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CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

DATE: May 18, 2016

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
Labor and Employment Law Practice Group

RE: Night Shift Differential May 12, 2016 Meeting

I. Background

As reported at our meeting on May 12th, the Union is calculating monies claimed due using a more expansive approach than is required under the Fair Labor Standards Act (“FLSA”). While the FLSA only requires that night shift differential (and other extra pays such as cots and extra rooms)¹ be calculated in overtime occurring after forty (40) hours in a work week, the Union is including night shift differential in overtime calculations between 35 and 40 hours, daily overtime and 6th/7th day overtime. In addition, the Union is not taking into account credits against overtime which the FLSA permits.²

¹ Cot pay, combination pay, extra rooms and portage fees all constitute extra pay. Under New York State law, spread of hours pay should not be included in any overtime calculation.

² Credits against any FLSA liability can be taken for premium pay for (i) hours worked in excess of 7 or 8 hours in a day (ii) premium pay for hours worked between 36 to 40 in a workweek, and (iii) premium pay for work on Saturday, Sunday, holidays, and/or 6th and 7th days of the week (when such pay is not less than 1.5 times the rate established for like work on other days/non overtime hours).

A. Calculation: Examples from Meeting

35 Hour Employee Scenarios (who receives OT pay for hours over 35)

Employee 1 **CBA Rate of pay:** **\$23.50**
 CBA Night Shift Differential: **\$1.28**

Row 1 Hours Worked: 7 hours / per day / 6 days = 42 hours (3 of which are night shift)

Row 2 Total Earnings: $23.50 \times 42 \text{ hours} =$ \$987 Straight pay for all hours worked

Row 3 $1.28 \times 3 \text{ hours} =$ \$3.84 Night Shift Differential Pay

Row 4 $(\$23.5 \times .5) \times 7 \text{ hours} =$ \$82.25 CBA OT compensation (hours 36-42)
\$1,073.09

Total Earnings for purposes of calculating FLSA OT: $987 + 3.84 =$ **\$990.84** (excludes CBA OT pay per the Statutory Exceptions noted above)

Regular Rate for FLSA OT: $990.84 / 42 \text{ hours} =$ **\$23.59**

Half-time FLSA Premium Rate: $23.59 \times .5 =$ \$11.795

FLSA OT Amount Due $11.795 \times 2 \text{ (all hours over 40)} =$ \$23.59

Total Compensation Calculation

Hours 1- 42 are paid at the contractual rate: $23.50 \times 42 \text{ hours} =$ \$987
 $1.28 \times 3 \text{ hours} =$ \$3.84

 \$990.84

Hours 41-42 are paid at the FLSA OT Premium Rate: $11.795 \times 2 \text{ hours} =$ \$23.59

Total Compensation Due Under FLSA: $990.84 + \$23.59 =$ \$1,014.43

Actually paid under the contract: \$1073.09 = No FLSA Liability

II. Union’s Position

The Union is calculating back pay for two years utilizing a simplified method that does not take into account the crediting provisions of the FLSA and that includes all overtime hours, not just hours worked over 40 in a week. The following is an example of the Union’s approach:

Employee 1 **CBA Rate of pay:** **\$23.50**
 CBA Night Shift Differential: **\$1.28**

Hours Worked: 7 hours / per day / 6 days = 42 hours (3 of which are night shift)

Earnings: \$23.50 x 42 hours = \$987 Straight pay for all hours worked
 \$1.28 x 3 hours = \$3.84 Night Shift Differential Pay
 (\$23.5 x .5) x 7 hours = \$82.25 CBA OT compensation (hours 36-42)
 \$1,073.09

Union’s Calculation 1.28 x .5 = .64 Overtime premium
 .64 x 7 hours = \$4.48 Premium applied to all overtime hours

Total Compensation

Total Earnings: \$1,073.09
FLSA Liability \$4.48
 Total Compensation \$1,077.57

In the Union’s scenario, back pay is owed regardless of what contractual overtime has already been paid.

III. Conclusion and Recommendations

The Union continues to distribute agreements together with their night shift differential / OT calculations. As reported, it is the position of the Association that, with the exception of Hotels that have a practice of calculating OT as the Union does, Hotels should follow the FLSA methodology.

However, in some cases, there are amounts calculated by the Union that are not significant. On Friday, we were copied on the Union’s calculation for several hotels. Those amounts – all covering two years – are: \$74; \$85; \$91; \$112; \$136; \$733; \$797; \$814; \$1,395; \$1,584; \$3,532; \$5,497. On the other hand, on May 17, we were copied on an Agreement for one Hotel seeking \$59,000.

Accordingly, Hotels have several options:

- (1) Refrain from signing the Agreement, but pay the back pay amounts calculated by the Union:

If you choose to do so, we have been advised by the DOL that Hotels should pay each employee directly, in a separate check from regular payroll, and obtain a copy of the canceled check with the employee's signature on it. This is the evidence the DOL will need in order to issue what the DOL calls a Form WH56, which closes out the FLSA dispute. The DOL will provide us with the form, which we will forward along to you. We understand that the form will reflect each employee's name, the amount of back pay and the time frame covered. Going forward in order to come into compliance with the FLSA, you should utilize the FLSA calculation.

- (2) Refrain from both signing the Agreement and paying back pay based upon the Union's calculations:

This will certainly require Hotels (or their payroll company) to perform the correct FLSA calculations and present them to the Union, which may result in a Union grievance.

- (3) Of course, Hotels are permitted to sign the Agreement sent by the Union and pay employees in accordance with the Union's calculations, but Hotels that do so must recognize that they are committing to include in the future night shift differential in overtime pay for all purposes under the IWA or Division A CBA, notwithstanding the FLSA methodology which could result in lesser amounts or no FLSA liability at all.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Lois M. Traub, Alexander Soric, Jennifer Schmalz, Jaclyn Ruocco, Robert L. Sacks, or Michael C. Lydakis. We apologize for the delay in issuing this Memo, but we were awaiting information from the DOL.

cc: Joseph E. Spinnato, Esq.
Vijay Dandapani, Chairman