Episode 64: “Order Up! Hot Tips for Employers in the Hospitality Industry, Part 1,” With Lee Jacobs

Speakers: **Ari Kwiatkowski** and **Lee Jacobs**, Barclay Damon

[Ari Kwiatkowski]: Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Ari: Hi, everyone. Welcome to episode 64. This is “Order Up! Hot Tips for Employers in the Hospitality Industry.” I am thrilled to welcome Lee Jacobs back to the podcast. Lee is a partner in our Labor & Employment Practice Area and our hospitality group, and he really is a go-to person in the hospitality industry when questions come up from our clients that really have to do with his practice. Lee, thanks so much for coming back. Welcome.

[Lee Jacobs]: It’s my pleasure to be here. I love these conversations and love educating people out there about the intricacies of the Hospitality Wage Order, which we’re going to be talking about shortly.

[Ari]: Yes, I was going to say, of which there are many intricacies to many, but we... our listeners know I always ask our guests to share something fun or interesting about their personal or professional lives. Last week you shared a fact. Would you mind indulging me and sharing another interesting fact about you?

[Lee]: Sure. It’s a combination of my professional and personal life. So hospitality/restaurant... being a restaurateur is in my blood. My... on my mother’s side, my grandfather, when he came back from World War II, he ended his first career as the head captain, the head maître d’ at the Pierre, which is a famous restaurant here in New York City. And on my father’s side, my father’s father owned what would be now considered a series of fast-casual hamburger restaurants in Lower Manhattan in the ’60s, ’70s, and ’80s. And my parents met in a restaurant. So literally, restaurant and hospitality is in my blood.

[Ari]: So you are the perfect person to practice in this area, and answer all of my questions.

[Lee]: Yeah, I think to a certain extent... I say to my mother, you know, if you had a lawyer like me all those years ago, maybe the restaurants would still be in business. But, you know, none of us have a time machine or something like that.

[Ari]: Right? Exactly. So I’m really glad you’re here because hospitality is not something that’s necessarily in my wheelhouse. And we haven’t actually talked to anything hospitality on the podcast before. So I’m really excited. I think this is great. And I just I guess I wanted to ask a really basic question, Lee, which is when we’re talking legal issues in the hospitality or service industry, who’s included like what businesses, what employees, can you kind of give us a rundown of that?

[Lee]: Sure. So the hospitality industry in New York State is governed by the Hospitality Wage Order. So depending upon what you do and if you’re an employee in the state of New York, you fall under a particular wage order that governs the rules of that area of work. So for the hospitality industry, you’re governed by the Hospitality Wage Order. And the Hospitality Wage Order defines hospitality industry as having two components. You’re either a restaurant or a hotel, and then when you double-click into restaurants, then you have places such as a traditional restaurant that we think of, and that also includes bars, cafeterias, catering halls, places that serve food and drink. And then when you double-click into hotels, there's two types of hotels, either a year-round hotel or a resort, where that hotel is open or part of the year or it's in a part of the state where it's a lower population. And when the resort opens, the population of that city doubles overnight, etc., etc.

[Ari]: Right.

[Lee]: And so if you fall into those two categories as an employee, you fall under the Hospitality Wage Order and the Hospitality Wage Order, as you were just saying, has so many intricacies that I found with my clients that and there's strict liability that if you don't follow these rules, you lose. Even if you are the best employer with the best intentions and you treat your employees like gold, if you literally do not dot your Is and cross your Ts, with these rules and you get into trouble, it's going to be a very tough uphill battle for you to succeed in winning that fight.

[Ari]: Great. So I think that's a good rundown. So we're really by and large part, were talking about people in the restaurant, employees in the restaurant industry, employees in the hotel industry. And then there's those specifics as it relates to resorts and things like that. And Lee, I know you mentioned the wage order. I think that's a good kind of a good place for us to start. Can you talk a little bit about that? And specifically, I think, given the name it, I would assume it would encompass some minimum wage requirements. Can you talk about that as it relates to downstate, upstate, and just tip credits and things like that? I think a good rundown would be good.

[Lee]: Sure. So I think we have to start with minimum wage. Minimum wage is federally, it's still the same. It's still the same amount that it's been when I was in high school. When I had an afterschool job. But New York State has come in and set a higher minimum wage. And we had just reached down here in New York City up to $15 an hour, and I include that in New York City being Long Island and Westchester County. And the remainder of New York State had just hit $14.20. So that was what minimum wage is. But... and stay tuned: an alert will be coming out from me, from Barclay Damon in the upcoming days: minimum wage is going up again. Minimum wage is set to go up to $17 an hour in downstate New York City, Long Island and Westchester by January 1, 2026. And it's to get to $16 an hour for the remainder of the state by January 1, 2026. And then, every year thereafter, minimum wage will increase based upon inflation. So this is something we have to pay attention to. So the minimum wage is set by the state. And what the wage order does is it allows employers to take certain credit against that hourly wage. So there are certain allowances that you can take, such as tip credits, meal credits, uniform credits, which means that...so we're going to use New York City because it's $15 an hour and math is just much easier at $15 an hour.

[Ari]: Right.

[Lee]: So, for example, in New York City, minimum wage is $15 an hour. But if you are a tipped employee, meaning you are a front-of-house, customer-facing employee and you receive tips from customers, the employer you're... as an employer, I only have to pay you $10 an hour. So long as you were receiving on average $5 an hour and tips. I don't mean that you need to get $5 an hour in tips, but let's just say you work an eight-hour shift. You're supposed to get $40 in tips and you get it all in that one last table right before you close up. We're good to go.

[Ari]: Right.

[Lee]: So right. But the distinction here is that we have to be correct with our terminology and what we're talking about and is a preview for our next episode, which is coming up. The Wage Theft Prevention Act, which is a New York rule, spells out that you have to give a pay stub to your employee every week that says how and why they were paid. And the math has to add up. So your... when you pay your employee with a tip credit, they're being paid $15 an hour with a $5 tip credit for an effective rate of $10 an hour. If you jump right to $10 an hour and your documents show that you're paying $10 an hour, even though that we all know that $10 an hour is the right amount with the tip credit being applied, you can lose in a Department of Labor audit or a wage and hour suit because it's unclear. Is that employee actually being paid $10 an hour with no tip credit? And what I actually also see with other clients is that where you have higher rates employees, someone who's making $17 an hour, $18 an hour and they have a tip credit. Is that tip credit, $5, $4, $3? If we're unclear on our documents and as to what we pay, you can get a cascading effect of damages, which we'll talk about in our second video excuse me, a second podcast coming up after this one.

[Ari]: Right. Okay. So that's a good, I think, introduction and summary. And as Lee said, we're going to really dive into the Wage Theft Protection Act, probably in our next episode. But good summary. I wanted to ask, Lee, about overtime because I think that we have a lot of questions on this from clients and I think there are some specific rules and rates as it relates to hospitality workers who are working overtime.

[Lee]: Sure. So overtime, absolutely. So overtime is in for the hospitality industry. It is when an employee works more than 40 hours in one work week. So, and you as the employer, have the ability to set your work week. It doesn't have to be Sunday to Saturday, it can be Tuesday to Wednesday, whatever it may be that's advantageous for your scheduling. But the moment an employee goes over 40 hours in one work week every hour worked over 40 is paid at time and a half. So down here in New York, in New York City, if the minimum wage to $15 an hour, that means their overtime rate is $22.50 an hour. And if they're a tip credit, if they're a tip credit employee, it's $22.50 minus $5 for an effective rate of $17.50. It is not—and a lot of my clients make a mistake in doing that because I'm paying you $10 an hour, $15 minus $5 for an effective rate of $10 with the tip credit. Oh! My overtime rate is $15 an hour because time and a half of $10. No, it's time and a half of $15. Which brings us to $22.50 minus $5, for an effective rate of $17.50. I hope that makes sense and ...

[Ari]: It does make sense...

[Lee]: And well, and the other thing to be to be clear about overtime is that it's... Sunday, holidays, religious holidays do not mean you get paid time and a half. It is only after 40 hours in one work week. So a lot of times, every year right around July 4th, Thanksgiving, Christmas, and New Year's, I get calls from my clients that say that their employees are demanding to be paid overtime, to work on Christmas, to work on New Year's, to work on Thanksgiving, whatever it may be. Just because it's a holiday does not mean that they get overtime. And if you need to pay an employee a higher hourly rate to convince them to work on a holiday, that's what you have to do. Someone does not automatically get overtime because it happens to be a holiday.

[Ari]: Yeah, that's a good point. And I think a lot of employees kind of confuse that point and think that "holiday" automatically equals "overtime." Which I understand.

[Lee]: It makes sense. And in other states that is allowed. But not here in New York. New York is very clear cut. Overtime is 40 hours... over 40 hours in one work week. Hard stop.

[Ari]: You got it. So we I've heard the term "spread of hours" come up a lot in the context of hospitality workers. And I'm wondering if you can kind of clarify that, because I don't know that I'm quite clear on what that means.

[Lee]: Spread of hours and is usually the hidden thing, the unknown skeleton in the closet that a lot of hospitality employers don't know that there is, that they are not following the rule. So "spread of hours" is two concepts, but they are overarching with the goal of when an employee is working for more than 10 hours in one day. So if you have an employee that is working more than 10 hours in one day straight through or they take a break in the middle of the day. So there is more than 10 hours from the first clock in to the last clock out, then spread of hours applies, or it also applies where someone has two shifts, a split shift during the day. Usually this works in the hospitality industry with back of house workers who usually with porters, cleaning staff, things of that nature. They'd come in in the morning, work 2 hours, clock out, go to their other job, come back at night, clock back in and work another 2 hours. But there's been more than 10 hours from that first clock-in in the morning and the last clock-in at night and then spread of hours applies. So what does that mean? When someone gets a spread of hour premium for that day? They get an additional hour at minimum wage for that day where spread of hours applies. So let's say we had that porter that porter's work is making $25 an hour because they come in in the middle of in early in the morning and they come back at the end of the night and they only actually work 4 hours—2 hours in the morning, 2 hours at night. They are eligible. They are to be paid $100 in wages for the 4 hours that they worked. And this is a New York City employee, plus $15 for spread of hour premium. So we're paying them $115 for that day. But when you pay—and again, our words matter as to what we say to our employees, again, that same thing with the $10 minus five, $15 minus $5 for an effective rate of $10, you don't say you get a spread of hours hour. I like to say the spread of hours premium because you're counting... when you're looking now for the week, counting for overtime, that spread of hours does not mean you worked 5 hours that day. You still worked 4 hours that day. And even getting ...

[Ari]: Right.

[Lee]: ...and even getting still specific to our language, we have to work with our payroll companies to make sure that there is another line item on the pay stub. So, say this employee was a minimum wage employee that was working $15 an hour. So I have some of my clients that just say, okay, it's part of hours. I'll just pay them for 5 hours for that day rather than 4. Easy-peasy, done. But now our piece of our paystubs are wrong. Our paystubs don't show that they worked ...that we paid them a spread of hours premium. And odds are, if you just lump this into your regular pay now, you're giving them an extra hour that's going to be calculating towards overtime, if they had overtime at the end of the week. So it's not just knowing and paying it, but it's actually paying it and documenting it correctly.

[Ari]: Yes. Which I feel like the documenting correctly piece is always the piece that we have to be really careful of.

[Lee]: Oh, yes. Oh, yes, indeed.

[Ari]: And I think we'll talk about that in the next episode, too. So, Lee, I wanted to ask you about frequency of pay as it relates to hospitality workers, because this is kind of a hot button issue, I think, in New York State, particularly frequency of pay of manual workers. So I kind of wanted to dive into this a little bit. How often must hospitality workers be paid under New York law?

[Lee]: So the... once a week. Hard stop. So the law is not hospitality workers must be paid once per week. The law is—which comes from the labor law that says if you are a manual worker, you must be paid once per week. And it defines a manual worker as someone who is as defined as a "mechanic, working man or laborer." It is and I'm reading from the Department of Labor FAQs here. I think you hear anyone who says the practice of law is not open book is lying to you. It has been the long-standing interpretation of this department that individuals who spend more than 25% of working time engaged in physical labor within the meaning of the term "manual worker." "Furthermore, the term physical labor has been interpreted broadly to include countless physical tasks performed by employees." So if you're on your feet, you're serving people, you're in the back of the house, you're a manual worker, and you're to be paid once a week. And—but then the double clicking a little bit further into that, what about my top of house? So for those of you that don't know hospitality industry, there is a distinction between the front of the house and the back of the house. Front of the house is where the servers, the hosts, the greeters, the bussers, the customer-facing things happen, back of the house is the kitchen staff, the cleaning staff, the people who don't see the customers. That's universally accepted terms. I've added over the course of my career something called the "top of the house." This is the people that are running your payroll, your HR team, your marketing team, your office staff. These people are clearly not manual laborers, right? They're not on their feet, they're sitting at a computer every day. Must they be paid once per week as well if they work for a hospitality company? The answer is no. They can be paid twice...they can be paid however you want to be paid, most likely every other week. But my advice is for administrative ease and do not add layers of complexity. Just pay everyone... if you're a hospitality business. Pay everybody, once per week, regardless of what they do for you. Because the damages.

[Ari]: Yes,

[Lee]: ...the penalties are quite shocking if you don't.

[Ari]: Right. So I'm glad you clarified. Like I said, I think this whole issue of who is a manual laborer, you know, under the labor law has kind of blown up over the last few months as it relates to other positions. But it seems pretty clear if you're doing those duties, you just you talked about, Lee, you are classified as a laborer under the labor law and you need to be paid every week...

[Lee]: Correct.

[Ari]: Not biweekly, because as you alluded to, there are some penalties. And can you give a rundown of what those penalties might be if you're failing to pay your hospitality employees?

[Lee]: So if you fail to pay your... not just your hospitality employees, but anybody, any employer, any employee in the state of New York, you failed to pay them on time, the penalty is 100% liquidated damages. So let's say you have an employee who makes $1,000 a week. Forget how they got to $1,000 per week. So at the end of two weeks, they're supposed to be making $2,000. You give them a check at the end of week two for $2,000. That pay for week one was late. The penalty for that week being late is 100% liquidated damages or an additional $1,000. And on top of that, you are in violation of the Wage Theft Prevention Act because the pay stub that you gave was incorrect, because the employee should have received the pay stub every week, for $1,000 per week, and they didn't get that. So then you are also exposed to a $250 per pay period penalty. So in this scenario just to two weeks being late so that the $500 civil penalty to the employee. But the big catch and we're going to talk about that more, so stay tuned, is: it opens you up to attorney's fees from plaintiff's law firms, which is the sword of Damocles that is hanging over all of these conversations. And we'll talk more about that in the next episode.

[Ari]: Great. So, Lee, I think for this episode. One last topic or topics I wanted to ask you about, which is on call pay and call in pay. I think there are some nuances as it relates to workers in the hospitality industry. So if you could run through that for our listeners, I think that'd be helpful.

[Lee]: Sure. So a hospitality... because most people don't know about the Hospitality Wage Order. And if you're thinking from the employee side, they've got someone who works in an office job and they fall under the miscellaneous employee wage order, there is this concept called "call in pay." Call in pay means you show up for work for a regularly scheduled shift and you get cut or sent home for whatever reason. You don't volunteer, your boss says "there isn't enough work. You go home." If you're an office worker and you fall under the miscellaneous wage order and you show up for work and you're sent home, you're owed 4 hours, 4 hours of your ...whatever your regular rate is. If you're a hospitality worker and you show up and you are cut and you are sent home, you're owed 3 hours. So a lot of times people will think, oh, in the hospitality industry, I'm I was cut, I was sent home. I only showed up for a half an hour. Boom, you owe me 4 hours. Where's my 60 bucks? Nope, hospitality industry. It's 3 hours, $45 here again in New York City. So this is where an employee has a regularly scheduled shift... reports to work and then they are sent home. And then the other topic that you asked about is "on call pay." On call pay is where an employee is literally sitting by the phone waiting to go to work. They are waiting for the call to be called in to work under strict construction of New York law, if you are telling an employee they have to be on call at a moment's notice to show up for work that time that they are on call. They are...that's the payable time. As a general rule in New York state, if you're an employee and you are asked by your employer to do something and you don't have the freedom to do whatever you want in your own regular life, that time is payable, is chargeable against the employer.

[Ari]: Got it. Yeah. I'm glad you explained it. I'm glad you made the distinction because I think even you know, in other industries you think, oh, call in pay, 4 hours. There you go. Done. But a little bit different in the hospitality industry. So I'm glad you pointed that out.

[Lee]: And to go even further into it about the misconceptions amongst employees. Right. This is assuming that is an employer knows everything, right? As an employee, when we go into New York City, there are specific rules for fast food workers as opposed to... so you can at a McDonald's next door to my parent's hamburger shop. But the rules for McDonald's are different than the rules for my parent's hamburger shop, even though they are next door to one another. Because in New York City there is something called the Fair Work Week law, which applies to retail shop owners and fast-food workers. And under those rules, there are scheduling rules and there are violations. If you don't give, don't give your employees sufficient notice that their schedules are changing and there's even per shift fines and penalties like $10, $100 per shift, per fine, per penalty. And there's even further rules and protections that fast food workers get, that you have to be put on a PIT, performance improvement plan, before you can even get fired as a fast-food worker in New York City as opposed to someone who works for regular hospitality, place can be fired for any reason or no reason at all, so long as it's not for discrimination or harassment. So there are even more specific rules where an employee thinks, hey, my roommate who works for McDonald's has all these rights. You don't because you don't work for a fast-food worker.

[Ari]: Right. Well, thank you so much, Lee. I think this was a great rundown of some of the most important things that employers in the hospitality industry need to know. And for our next episode, we're going to pick up where we left off and really kind of dig into the Wage Theft Protection Act. But before we break, any last words of advice or wisdom for our listeners?

[Lee]: Ari, so, one of my mantras is even if you pay your employees the right amount, they get paid above minimum wage, you pay them well, you treat them well. If you did not pay them in the right manner with the right documentation, you still lose. Stay tuned and we'll tell you how to protect yourself.

[Ari]: It's a good cliffhanger, Lee.

[Lee]: Absolutely.

[Ari]: Thanks so much again. And to our listeners, we will be back next in a couple of weeks. And we will talk about the Wage Theft Prevention Act. See you then.

[Lee]: Bye. Thank you.

[Ari]: Bye, Lee.

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Thanks for listening.