



## Episode 65: “Order Up! Hot Tips for Employers in the Hospitality Industry, Part 2,” 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]:** Hey, everyone. Welcome to episode 65. This is “Order Up! Hot Tips for Employers in the Hospitality Industry, Part 2.” I am very happy to welcome Lee Jacobs back to the podcast. Lee’s been on a couple times, and as I’ve mentioned before, he’s a partner in Barclay Damon’s New York City office, and he is well-versed in all things hospitality. So, Lee, thanks again for joining.

**[Lee Jacobs]:** My pleasure to be here. As I’m...hopefully everyone is hearing and I love talking about this stuff. I love educating people because, as we’re going to talk about today, these rules are strict liability. It doesn’t matter if you have the best intentions. So your best defense is literally to make sure you get it right. So I feel it’s my job to educate people, and I get really excited for it. So I’m super happy for this conversation we’re about to have.

**[Ari]:** Awesome. So, Lee, the last...a couple of weeks ago, we kind of did a pretty good rundown I think of everything that employers in the hospitality industry need to know that’s kind of specific to their employees. We talked about minimum wage, overtime, frequency of pay issues, on call pay, call in pay, spread of hours. We kind of hit everything. I think today what we want to focus on is the Wage Theft Protection Act. And we did mention it a little bit a couple weeks ago, but just... I think it’s such an important topic. And as you alluded to, the penalties and damages are so important that it’s kind of worth its own episode. So can you just remind us, Lee: Who is covered by the Wage Theft Protection Act?

**[Lee]:** Everybody, every employee in the state of New York...if you are an employee, you are covered by this law regardless of what you do or who you work for.

**[Ari]:** So not hospitality specific, just so everyone understands.

**[Lee]:** Everybody, there are hospitality-specific rules as it relates to the Wage Theft Prevention Act. But every employee, if you are an employee in the State of New York, if you are, an attorney who is an employee of the law firm, you are to get an LS59, which is an exempt employee form. If you are an hourly employee at a restaurant, you get an LS4, which is an hourly employee form. Every employee must receive these forms and there’s this law, you know, just don’t jump into it. It’s called the Wage Theft Prevention Act. It’s got two parts. The first part is the notice. So at the start of employment, or before a change in rate of pay, you’re to receive a form. And then with every payment, it’s the second part—you’re to receive a pay stub, and both the form and the pay stub must contain certain information. And if it doesn’t contain that information hard stop. Do not pass go. Go directly to fines and penalties. The failure to have the wage acknowledgment form which we’ll jumping into and in a moment is a \$50 per day penalty capping at \$5,000 per employee. So after 100 days of employment, if the form doesn’t exist, was never given, or more importantly, if the form is incorrect, there’s a mistake on it. It’s a \$50 per day penalty capping at \$5,000 per employee. On the pay stub side, the wage statement is what we colloquially call a pay stub. If you fail to give a pay stub to an employee, think your cash employee, your off the books employees or you do get a pay stub, and those pay stubs are incorrect,

linking back to our prior episode where I said it's about \$15 an hour for New York City tipped employees. Your \$15 an hour, \$5 tip credit for an effective rate of \$10 an hour. If my pay stub from a payroll company called BEF, I'm hopeful. I got my letters one off, if you know what I'm saying, cannot take care of the tip credit and it just shows \$10 an hour that pay stub is wrong. And it's a \$250 per pay period penalty. So in the hospitality industry, we're paying everyone once a week. It's \$250 per pay period and it caps after... at \$5,000. So just I believe by... and I have my calculator here because we're going to be doing some math, \$5,000 divided by \$250 is just after 20 weeks. You get to that penalty amount. So that's a penalty to the employee on top of whatever you didn't pay them improperly. But the big thing here—and this is the big problem with this law is it has... it's fee shifting. So we think in America, you see on TV, on ads, you get you get a lawyer and that says we don't get paid unless you get paid. And we think of my lawyers split 30%. They get one-third contingency. The failure to pay your employee correctly or the failure to follow these forms and fill the forms out properly is fee shifting. So that means if—and I had a case like this that went to federal trial, it was a four-day trial in federal court in Manhattan—it was over whether or not someone was paid properly. I was able to prove to the jury that he was paid properly. But my client did not give this sous chef, who should have had an LS 59, which is a wage acknowledgment form for an exempt employees, did not give him that form. The jury awarded the former employee \$5,000 as allowed, and by law. My client paid me ...my firm at that time about \$65,000, \$70,000 in legal fees. And then he had to pay his plaintiff's lawyer. His former employee's lawyer \$110,000. And that is completely... so the only one who won in this scenario was the plaintiff's lawyer. He got \$110,000, while his client got \$5,000.

**[Ari]:** Right, right. Yeah. I think that's a good real-life example of how it can play out and how even though that person was obviously paid everything they were entitled to, right? They weren't...they weren't owed any money because the employer didn't comply with the one portion of the law that required the proper form be given to the employee. It's a lot of money.

**[Lee]:** And this adds up. I had a class action lawsuit. So jumping into the form here, now, if you're unfamiliar with the form, they're called the wage acknowledgment form. There's a different forms for different types of employees. So there's the LS54, which is for an hourly employee and LS 55, which is for someone who has multiple hourly rates. And LS, sticking with hospitality LS 59 is for exempt employees sticking again top of the house, chefs, managers, things of that nature, right. So I had a I had a case that was sustained meaning it continued through to the end. It was a class of 1,100 employees over a six-year period because the law here is a six-year look-back period, 1,100 employees, because a checkbox was not checked on the LS 54. So there was a line that said minimum wage... your hourly rate, is \$15 an hour. And then when you went down to the next section, which talked about credit, tip credit, it wrote \$5 an hour, but the box was not checked. There have been some judges that have sustained that type of case and says that was strictly ability. You didn't follow the rule. The case must go forward. I have had other cases... seen of other cases where you're required to include a phone number on the LS 74, a phone number that works and will call and someone will pick up. That has been sustained because there was no phone number. And more importantly, and this is the... an unknown one that a lot of people don't know about is that you have to give this form, not only does it have to be correct, you have to give the form to your employees in their native language. If the Department of Labor makes these forms in your employee's native language. If that language is not available, then you can just give them the English form. I'm looking at the Department of Labor website right now, and I see again, just speaking of specific hospitality, LS54, the form is available in Burmese, Chinese, Haitian Creole, Italian, Korean, Polish, Russian, Spanish, Vietnamese, and Yiddish. For LS 55, which is people who have multiple hourly rates, you know, they do a shift as a server and they do a shift as a bartender. Different hourly rate. You've got to add Arabic and Urdu into the conversation as well. So if your employees speak those languages and that's their native language, you have to give them that form in that language and begs the question, as an employment practices lawyer, if... then what about your other forms and documents? Your employee handbook, how are you doing investigations? How are you communicating with your employees in their native languages? And then go even further into that: What happens when there's a racial discrimination or a sexual harassment complaint made from someone who doesn't speak the language you speak? You can't include their best friend who works on the line, who translates everything else for them, for that best friend now to

work as a translator. And it violates the rules of investigations, as we talked about two episodes ago, where... about the HR and confidentiality rules. Sorry, everything is just interconnected as it relates to employment practices. One thing triggers another. So if you don't...

**[Ari]:** Yes. So true.

**[Lee]:** So if you don't have this form or the form isn't filled out right or there's a mistake on the form strict liability, \$50 per day and you don't go any further than that. And then on the paystubs, as I said before, it's a \$250 per pay period penalty capping at \$5,000 per employee. So the floor, the floor when you add these two together is \$10,000 in civil penalties to an employee. And so if you are a good employer, it could be for one employee, and that's before you get to anything else. So I sat on a panel once where a plaintiff's lawyer said I had an intake and someone comes to me and says they were sexually assaulted or abused last night. I will treat them like a human being, offer to take them to the police, etc., etc. But then I'm going to ask somehow, was there an LS54 filled out? Because I know that regardless of what happens with the rape, the assault, I know I'm getting paid because I know that I'm going to get my attorney's fees paid for. This is in that case that I talked about, I wrote a memo of law to the judge asking to strike down those attorney's fees from \$110,000. I got them down to \$83,000 because the plaintiff's bar is perverting the law, in my opinion here, that these laws are here to protect employees. So you know how much you get paid when you start the job. And after you get your check, you can verify the two together and make sure it makes sense.

**[Ari]:** Right.

**[Lee]:** And so it has good intent. But the plaintiff's bar, because of the penalties, are taking it to its full extreme. And I will say the law has caught up and is recognized that when this rule first came into effect, it was not capped at \$5,000 per employee. It was more than that. It was the actual number. Excuse me, so it was \$5,000 per year, but multiple years could tack on to it. So it could be... if you did three years of not doing of the wage acknowledgment form, that was the \$15,000 penalty plus the paystubs, assuming we're also \$15,000 now, the law is limited to just \$5,000 per employee. So it has caught up, but the bar still perverts it. And I've got a good example, two good examples that explain how it goes to an illogical conclusion, even though you were treating your employees not only properly, but some may say too good, some lawyers would say "too good" because no good deed, goes unpunished, unfortunately.

**[Ari]:** For sure.

**[Lee]:** We have the story of back of house Bob and front of house Fran. Back of house Bob is your line cook. Line cook does not mean chef, does not mean supervisory roles in any way, and this is an hourly shift working employee. Front of house Fran, she's a server. Back of house Bob comes to you and says for whatever reason it could be immigration, child support, state benefits, running from a judgment, whatever it may be says pay me cash, I want to be paid cash. And by the way, I'm... doesn't matter how many hours per week I work. Just pay me \$2,000 per week and we'll call it even Steven. We're good. Okay. Fran, front of house worker is \$15 an hour. You're taking a \$5 tip credit for an effective rate of \$10 an hour. Fran works 40 hours a week. She never works overtime. So back of house Bob. Things are going great. You're working with Bob. He's pulling his hours. You really don't know how many hours he's working. You're not keeping track of it. By the way, the law requires you, as the employer, to keep all of the records clock in, clock out records, pay records everything. If you don't have the records, the law will say, we'll take the employee's story if it's true and reasonable. Otherwise, Mr. Employer, you're out of luck. So you haven't really been tracking Bob's hours. You've been paying him \$2,000 flat a week and you've been kicking him in the tip pool. You've been taking him \$500 a week in tips as well. So Bob is making \$2,500 a week, and Bob's worked for you for four years and things are great. Bob now find out because his cousin, who works for another restaurant somewhere else under similar arrangements, just got a nice big fat paycheck from the Department of Labor because of an audit. And so, Bob, now goes and looks for a lawyer and Bob.

**[Ari]:** Uh oh.

**[Lee]:** This is... yeah, and this is Bob's case against you. So you were paying Bob \$2,500 a week. You're paying well above minimum wage. You're paying well above the threshold exemption of what you would pay. And a manager or professional. But Bob didn't do that. He did rote work. So he's required to be paid for every hour that he works. The Hospitality Wage Order requires that hospitality workers must either be paid hourly or on a salary, and you're only paid a salary if you qualify for an exemption. So that means unless you're a manager or chef or something like that, you must be paid hourly. You can't be paid daily, you can't be paid weekly. So our agreement to pay Bob a flat weekly rate is illegal. So what the law does is it takes the total amount that Bob was paid for the week, the \$2,000 plus \$500, \$2,500, and it divides it by 40 because you can't enter into a legal agreement with Bob to you pay him for—you have to agree to pay minimum wage for 40 hours and then overtime thereafter. So Bob's hourly rate now becomes \$62.50. So I did \$2,500 divided by 40. His overtime rate becomes \$93.75. Bob says he works 70 hours per week for you. You can't prove it because you have no clock in clock out rate because you were doing Bob a favor by paying him cash under the table. So he never went into your clock in clock out system. But you're able to prove because you have good lawyers that the business isn't open for those many of hours and you've got proof that Bob did this and whatever it is and you're able to... the best you can show is 60 hours per week is what Bob was working for. Now, Bob's new wages are: 40 hours, \$62.50, for \$2,500, 20 hours at \$93.75 for overtime totaling to \$1,875. His new weekly wage that should have been paid was \$43.75 and you paid him \$2,500 for a differential of \$1,875. So according to the law, you underpaid Bob \$1,875 per week. And Bob, I said for you, worked for you for four years because he was a great employee and Bob took two weeks off a year getting my calculator out \$1,875 times, 50 weeks, times four years, \$375,000 is what you owe Bob.

**[Ari]:** Wow.

**[Lee]:** Yep. And that's... it's....

**[Ari]:** A lot of money for

**[Lee]:** In addition to...

**[Ari]:** For one employee...

**[Lee]:** For one employee and that's it. And this because you did a good favor to Bob. Because Bob had—again whatever the reason may be—asked to be off the books. Right. And this is in addition to his \$5,000 for the wage acknowledgment form, the \$5,000 for the paystubs, the attorney's fees that you have to pay to your attorney, to Bob's attorney, and add on top of that interest. Because the court is going to say the law says, well, Bob should have had all of these moneys from four years ago. And again, as you said Ari, that's just for one employee. So let's look at the other employees that we have a problem here because odds are a plaintiff's employee are not coming just for one, they're going to go look for everything. They're going to look under every stone. So Bob here, right was participating in the tip pool. Tip pool rules are strict construction in New York. Back of house employees cannot share in tips, period. Managers cannot share in tips. Only customer-facing employees can share in tips. So here, front of house Fran, who you...was on the books. You have every clock in clock out record. You paid Fran exactly right. You paid her 15 times 40 for \$600, and then five times 40 for \$200, minus \$200. So for \$400 is what you pay her each week. And she makes about \$1,000 in tips. She does very well for a server. But because Bob has now tainted the tip pool, you have to refund the tip credit because you are no longer have the legal ability to take the tip credit because the tip credit can only be used when it's shared amongst people who are allowed to take the tips, and you follow records and you have a tip sharing agreement, etc., etc. So now you owe back to Fran \$200 per week for all of the tip credits that were illegally taken. And it's not just Fran, it's everybody else who was...

**[Ari]:** Everyone else.

**[Lee]:** Exactly. And then everyone else who was in that tip pool, that wage acknowledgment form may be correct, right? That let's assume that's correct. 15 easy. But the pay stub was wrong. \$250 per pay stub period and plaintiff's attorney's fees. It's mind-boggling. So the only way you can win these fights is to prevent them and to avoid them.

**[Ari]:** Right.

**[Lee]:** You really have to have processes in place to do this right, correctly. And we have to acknowledge that we're human beings. And plugging my own webinar that's coming up soon, hopefully you'll get invitations in time for it. If not, you can you sure see it on the website, but it's what to do when the DOL comes knocking that... steps you need to do that... I recommend every six months because we're human. Being your sister who's doing onboarding for you, your payroll company, your HR manager, whomever can make a mistake, they could miss something. They could forget something. So you need to have processes built in to catch them, because if you don't, they can become catastrophic. As we just talked about with Bob and Fran.

**[Ari]:** Yes. Well, I think this episode has been great, Lee, because you've done such a good job giving us some real-life examples. Real life scenarios, and how these issues can really play out. And I think that just really has underscored the importance of being in compliance with all of the applicable laws, including the Wage Theft Prevention Act. So thank you so much, Lee. I really appreciate it. I know our listeners do. It's been a pleasure having you. I'm sure you'll come on again in the future. But as always, before we break, any final words of wisdom for our listeners?

**[Lee]:** Ask questions. Remember, we're human beings. We make mistakes. Reach out for help, because the... as much as it pain sometimes people calling a lawyer to ask for advice here, an ounce of prevention is absolutely worth it. Please don't be a stranger.

**[Ari]:** Again, good advice. Thanks so much. And to our listeners, as we mentioned a couple minutes ago, he is going to be doing a webinar which is a free one hour on September 17, basically tell you everything you need to know about what to do with your subject to a DOL audit and how to prevent any issues. So I definitely encourage you to tune in. You can shoot me an email or Lee an email if you need more information. And the information for the webinar will also be on the [barclaydamon.com](http://barclaydamon.com) website under the Labor & Employment page. So thanks so much, Lee. Really appreciate you.

**[Lee]:** My pleasure. Thanks, Ari.

**[Ari]:** The *Labor & Employment Podcast* is available on [barclaydamon.com](http://barclaydamon.com), YouTube, and all your favorite podcast streaming platforms. Like, follow, share, and continue to listen. Thanks.

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