

NOTES FROM CRA MINIMUM WAGE AND OVERTIME ROUNDTABLE - 11/30/16

Overview of Amendment 70 (Minimum Wage)

The CRA reviewed some of the questions members have had since the passage of Amendment 70.

Is there a chance that we can correct the flaws with Amendment 70 by altering the tipped wage or adding a learning wage?

- First, this cannot be changed at the state legislature. Since it was an amendment to the state constitution, the only way to change it again is through a vote of the people in an election. We believe that to be nearly impossible.
- Only one time in the last 100 years was something added to our constitution and later removed – prohibition.
- In order to change the constitution – as we saw with Amendment 70 – we would need to raise millions of dollars just to get it on the ballot – and another several million to educate the public.
- Meanwhile, the unions who initiated this have very deep pockets and would fight it heavily. They have stated to us that their intention is to increase minimum wage to \$15/hour and eliminate the tip credit altogether.

Are there opportunities to create off-ramps if the economy crashes?

Off-ramps are provisions that have existed in minimum wage amendments in other states. However, there were no off-ramp provisions in Amendment 70. This too would have to be done through another Constitutional amendment. Additionally, Amendment 70 changed language in Colorado's Constitution so that the minimum wage in Colorado can ONLY INCREASE in the future.

Roundtable Discussion – Minimum Wage

- Most people around the room have started looking at a price increase model, based on a show of hands.
- Several people also indicated that they were eliminating bussers and support staff.
 - One example mentioned was that they were employing split shifts and also breaker shifts where people would come in for 4 hours and help to break other staff for longer periods of time.
 - Others are moving to waitstaff bussing tables and increasing station size.
- Many people are struggling with how to solve the problem of front of house and back of house pay disparity.
- Some people simply don't think they can raise prices enough to fix the disparity between front of house and back of house, and they don't think the money exists in their current business model to accommodate the minimum and tipped wage increases.
- Suggestions were made about finding efficiencies – easier for some business models than others – and finding ways to retain employees and save costs on trainings and onboarding as a way to make up for the wage increase.
- Can you renegotiate any vendor contracts? Discussion was that this would help with some restaurant groups, but may be more difficult for smaller, independent restaurants.

Raising Prices – Examples/Thoughts

- Raising prices using a model that averaged-out based on number of server hours.
- Implementing gradual price increases over the next 4-5 years.
- Raising prices on menu items based on the average cover count – which in one example worked out to 25 cents per guest.
- Some that have the model to support it have looked at increased service charges on events that are hosted in the restaurant and on catering orders. Then the service charge can be spread among everyone. It is still taxable. *(Note: service charges always count as income to the business as they are mandatory and the property of the business.)*
- Talk of a hybrid service charge and tip model, i.e. charging everyone 10% service charge and leaving a line for additional tips. The risk is that the customer might not add the additional tipped amount.
- Some did across-the-board price increases and varied those by locations, and the sales/ number of employees at each location.
- Those who did or plan to increase prices did it by determining future labor costs and backing in the prices. *(Note: CRA has a worksheet to help determine increased labor costs and will send it out to the group for their individual use.)*

Tipped Wages vs. Service Charges

Tipped Wages:

- Currently, the law states that only employees that would customarily receive tips (servers, bussers, bartenders, hostesses) are allowed to participate in a tip pool – i.e. people that come into direct contact with the customer. The back of house staff and managers cannot participate under the current law.
- There is no telling when, but there may be relief in the future on the rule about sharing tips that would open it up to the back of house – depending on the outcome of some lawsuits that were filed and are still out for consideration.
- The National Restaurant Association is working to get the US Supreme Court to hear a case on the sharing of tips between the front and back of house when the restaurant pays all employees at least full minimum wage and doesn't take a tip credit. CRA will let members know as soon as there is movement on this. For now, the current law stands that you CANNOT share tips with back of house.

Service Charges:

- A service charge is a charge that is not optional for the customer. They don't get to choose how much it is or whether or not they pay it.
- It doesn't matter what you call it, any type of service charge (resort fee, hospitality fee) is taxable – i.e. income tax and sales tax.
- This fee is the discretion of management to distribute or not as they see fit.
- Some of the owners in the room felt that their business model/clientele could not accommodate a service fee or that their diners were not ready for it. This was especially true for restaurant groups that had businesses in different parts of the state, i.e. perhaps they could do a service charge in Denver but they know their clientele would not accept one at their Ft. Collins location.

Overtime Ruling Update

The December 1st overtime ruling has been postponed for now. It is not indefinite and no one really knows whether it will be ruled on soon, whether President Trump will eliminate the ruling altogether or whether a decision will come down back in favor of the rule, and businesses will need to comply immediately. This is being watched closely and as soon as we know more we will let our members know.

- On November 22, 2016, U.S. District Court Judge Amos Mazzant granted an Emergency Motion for Preliminary Injunction and thereby enjoined the Department of Labor (DOL) from implementing and enforcing the Overtime Final Rule on December 1, 2016.
- Then on December 1, 2016, the Department of Justice, on behalf of the DOL, filed a notice to appeal the preliminary injunction to the U.S. Circuit Court of Appeals for the Fifth Circuit. The Department has moved to expedite the appeal.

There is a possibility that if it does take effect at a later date, it will be retroactive to December 1. It is recommended that you speak with an attorney to determine what is right for your business.

Overtime Discussion

- Some restaurants have changed salaried positions that fall below the \$913/week or \$47,476/year threshold to hourly and/or have raised salaries for managers to fall above the threshold of \$913/week and don't plan to make any further changes at this point.
- Some restaurants have changed salaried positions that fall below the threshold to hourly – and are now planning to move them back to salary (perhaps with an incentive so they are not unhappy). (It is important to note that the duties test still applies for all salaried employees making more than \$455/week or \$23,660/year.)
- Some restaurants have postponed making any changes or a decision and don't plan to make changes until the overtime ruling is finalized.

Exempt vs. Non-Exempt Employees

Salary Test

Employees must meet two "salary tests" to be considered exempt from overtime in the FLSA.

- First, the exempt employee must earn a salary of at least \$455 per week (\$23,660 per year). 29 C.F.R. §541.602. The minimum salary level is absolute and applies even if the employee works less than full time.
- Second, the exempt employee must be paid on a "salary basis."

Duties Test

The employee must also meet one of the "duties tests" to be considered exempt from the FLSA.

The duties test that most often applies in the restaurant industry is the Executive/Managerial employee.

(Note: there are other exemptions that most often apply to other professions, but may apply here – check with the CRA or your labor attorney.)

In order to meet this test, the employee must:

- Manage the business or a recognized division, subdivision or department;
- Customarily and regularly supervise and direct the work of two or more full-time employees or their equivalent; and,
- Have authority to hire or fire other employees, or have their recommendations as to hiring, firing, job advancement, promotion or any other change of status of employees, be given particular weight.

If the employee meets all of the above requirements, then they can be exempted from overtime.

Non-Discretionary vs. Discretionary Bonuses

Non-Discretionary Bonuses

- Non-discretionary bonuses are bonuses that are paid to employees because the employee or the business hit a particular goal.
- They are spelled out in some kind of an agreement/ pay plan and once the employee or business hits the goal, the employer doesn't have the ability to change the amount of the bonus.
- Non-discretionary bonuses require the employer to go back and recalculate the employee's regular rate of pay for the period of the bonus in order to determine an overtime rate of pay for the employee.

Discretionary Bonuses

- For a bonus to be considered discretionary, it should be at the sole discretion of the employer to award it, not an expectation by the employees.
- This does not require the employer to go back and recalculate regular rate of pay for employees in order to determine an overtime rate of pay.

QUESTIONS ON ANYTHING ABOVE?

Please call the CRA and we are happy to help answer any questions or clarify any of the rules above.

Contact Nicholas Hoover, Government Affairs Coordinator
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