Seattle Minimum Wage Ordinance Legal Review and Guide

This guide is being provided by the Washington Restaurant Association and Washington Lodging Association as a service to members to help you understand the Seattle Minimum Wage Ordinance and how to comply with it. It has been prepared by an attorney and takes into account the Ordinance, as well as the Rules and FAQs concerning the Ordinance as posted by the City of Seattle.

Also included in this guide is a discussion of the new Administrative Wage Theft Ordinance, as well as the state disclosure law concerning service charges. However, a number of issues within the Ordinance remain unclear, and it will take further government action (legislation, clarifying rules, court decisions, etc.) to clarify them.

The guide is not meant to be legal advice and is no substitute for legal advice. If you have any questions about the information provided, or if you have any concerns or confusion about how the information below applies to your workplace, we strongly encourage you to seek the advice of a knowledgeable wage and hour attorney. Per our legal advocates, the WRA and WLA urge you to seek the assistance of an accountant in determining what options might be best for your business to comply with the new law. Should you need legal advice and would like attorney names, please contact WRA at (360) 956-7279 or WLA at (206) 306-1001.

I. Overview

A. How do I determine if I am a Schedule 1 or Schedule 2 Employer?

1. By the number of your employees.

   Schedule 1 Employers (Large Employers) employ 501 or more employees in the U.S. (regardless of where they work in the U.S.)

   Schedule 2 Employers (Small Employers) employ 500 or fewer employees in the U.S. (regardless of where they work in the U.S.)

   See below rules concerning franchisees, integrated enterprises and joint employers, as these can impact your Schedule size.

2. Method for counting employees to determine your Schedule size for the current calendar year if you had employees in the last calendar year:

   Calculate the average number of employees employed (i.e. paid) during each calendar week during the prior year. Include any week during which at least one employee worked, and do not include any weeks where no employees worked.

   Include all employees in the U.S., including: full-time, part-time, temporary, seasonal, jointly-employed employees, and all employees of the franchise or a network of franchises in the U.S (per the below).

3. Method for counting employees to determine your Schedule size for the current calendar year if you had no employees in the last calendar year:

   If you did not have employees during the previous calendar year, count the average number of employees employed per calendar week during the first 90 calendar days of the current year in which the employer engaged in business.

4. Rule for Franchisees

   In determining their schedule size, franchisees must include all employees who work for other franchisees of the franchisor. Those franchisees associated with a franchisor or a network of franchises

with franchisees that employ more than 500 employees in aggregate in the U.S. are deemed Schedule 1 employers (even, for example, if the local Seattle franchisee only employs well under 500 employees).

The Ordinance provides the following relevant definitions:

"Franchise" means a written agreement by which:

1. A person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliate;

2. The operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol; designating, owned by, or licensed by the grantor or its affiliate; and

3. The person pays, agrees to pay, or is required to pay, directly or indirectly, a franchise fee;

"Franchisee" means a person to whom a franchise is offered or granted

"Franchisor" means a person who grants a franchise to another person

5. The "Integrated Enterprise," and it's Impact on your Schedule Size

For purposes of determining whether a non-franchisee employer is a Schedule 1 or Schedule 2 employer, separate entities that form an "integrated enterprise" are considered a single employer under the Ordinance, which may impact their schedule size.

Separate entities will be considered an integrated enterprise where a separate entity controls the operation of another entity. Factors considered in making this assessment include, but are not limited to:

1. Degree of interrelation between the operations of the entities;
2. Degree to which the entities share common management;
3. Centralized control of labor relations; and
4. Degree of common ownership or financial control over the entities.

Per the Ordinance, notwithstanding the above, there will be a presumption that separate legal entities, which may share some degree of interrelated operations and common management with one another, will be considered separate employers as long as (1) the separate legal entities operate substantially in separate physical locations from one another, and (2) each separate legal entity has partially different ultimate ownership.[1]

6. The "Joint Employer" Rule and its Impact

Per SOCR Rule SHRR 90-100, separate entities may be treated as a joint employer under the Ordinance. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. An individual may also be a joint employer. Also per that Rule:

Schedule Size: Employees who are jointly employed must be counted by all joint employers in determining each of their Schedule size, regardless of whether the employee is maintained on only one of the employers' payrolls.

Pay Rate: The Schedule size of the joint employer with the most employees determines the hourly rate for the employee who is jointly employed.

Joint and Several Liability: If the facts establish that the employee is jointly employed by two or more employers, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Ordinance with respect to the entire employment for the particular pay period.

Determining whether joint employment exists: In our opinion, the applicable SOCR Rule is confusing, including its analysis of how joint

[1] Note that the Ordinance, Rules nor FAQs clarify what is meant by "partially different ultimate ownership." It is reasonable to interpret this to mean that the entities have ownership that is not exactly the same (e.g., 3 individuals co-own one of the entities, but only 2 of the individuals co-own the other entity).

employment will be determined. The FAQs provide further guidance on this issue. FAQ C(10) explains:

> While a joint employment relationship generally exists when an employee preforms work that benefits two or more employers, the final determination depends on a number of nonexclusive factors that are part of an "economic realities test." The five primary factors are: (1) The nature and degree of control of the worker; (2) The degree of supervision (direct or indirect) of the work; (3) The power to determine the pay rates of the methods of payment of the workers; (4) The right (directly and indirectly) to hire, fire, or modify the employment conditions of the workers; and (5) Preparation of payroll and the payment of wages.

FAQ C (10) provides additional factors that will be considered as well.

EXAMPLES OF POTENTIAL JOINT EMPLOYMENT

Joint employment might be found by SOCR (or a court) in situations such as:

(1) Your business obtains a temporary worker through a staffing agency;

(2) Your business contracts with a janitorial service to clean your establishment;

(3) Your business contracts with a landscaping / gardening service to come to your premises and tend to your landscaping.

In situations such as these, you will need to apply the factors listed in FAQ C (10) to assess the likelihood that the joint employment test is met. For example, if the janitorial employees come to your establishment after it is closed, nobody from your business is there to supervise them, you do not schedule the hours of the janitors (other than they must come when the business is closed), you do not determine the pay of the janitors or who works for the janitorial company, there is less risk of a finding of joint employment than, for example, if one of your managers is present when the janitors are, your manager looks over their work to ensure it is performed to your satisfaction, or other of the factors are met.

B. **Which employees are covered by the Minimum Wage Ordinance?**

1. The Ordinance applies to all employees who perform work within the geographic boundaries of Seattle (including full-time, part-time, temporary and seasonal employees), subject to certain exceptions per the below.

2. The Ordinance applies to all hours worked by covered employees within Seattle city limits. It does not apply to hours worked outside of Seattle.

3. Occupations **Not** Covered By the Ordinance:

    a. The 14 occupations listed under Seattle Municipal Code 12A.28.200(B). For our members, the most likely applicable positions listed are for those who meet the state law overtime exemption for executive, administrative, professional or outside sales positions.

    b. Individuals performing services under a work study agreement.

        The Rules define a "work study" as "a job placement program that provides students in secondary and/or post-secondary educational institutions with employment opportunities for financial aid and/or vocational training."

        The FAQs further state: "However, the Washington Student Achievement Council requires all State Work Study (SWS) student employees to be paid a wage that is comparable to what a non-student would earn in the same position. As of April 1, 2015, the SWS program requires all Seattle-based SWS funded positions to follow Seattle minimum wage requirements. For more information, contact Jeffrey Powell, Program Administrator at Washington Student Achievement Council, by phone (360-753-7621)."

    c. Independent Contractors.

        Per the FAQs, independent contractors are not covered by the Ordinance, as they are not employees.

        Also per the FAQs, to determine whether an individual is an employee or independent contractor, the City will apply the "Economic Realities Test" that is used in the Fair Labor Standards

Act and the Washington State Minimum Wage Act (MWA). The FAQs further state that "factors distinguishing an independent contractor from an employee include: (1) Degree of control that the business have over the worker; (2) Worker's opportunity for profit or loss depending on the work's managerial skill; (3) Worker's investment in equipment or material; (4) Degree of skill required for the job; (5) Degree of permanence of the working relationship; and (6) Degree to which the services rendered by the worker are an integral part of the business." Finally, the FAQs reference a State L&I Independent Contractor Guide to further assist in this analysis.

d. Employees who are simply traveling through Seattle (from a starting point outside Seattle to a destination outside of Seattle).

   Also, for such employees, stops to refuel, eat a meal or run a personal errand are not considered employment related stops.

C. **Which employees have special rules for their coverage and pay rates?**

1. Employees who perform work on an "Occasional Basis"

An employee who performs work in Seattle on an occasional basis is covered by the Ordinance in a two-week period only if the employee performs more than two hours of work for an employer within Seattle during that two-week period.

Per the Rules, employees who perform work in Seattle on an irregular basis (i.e. not regularly scheduled) are considered to work in Seattle on an occasional basis.

The employer must track time worked in Seattle by such employees, to determine whether they perform more than two hours of work within Seattle within a two-week period. When the "occasional basis" employee meets that threshold, payment for all time worked in Seattle by that employee during the applicable two-week period must comply with the ordinance.

Per the Rules, to track time worked by occasional basis employees (to conduct the above analysis) employers must consistently apply a consecutive two-week period. Moreover:

Employers have the discretion to determine the two-week period, including a calendar period, pay period, or rolling period measured forward or backward from the first hour worked in Seattle.

Employers may delegate tracking of time worked in Seattle to employees, if the employer meets the Ordinance requirements for notice and posting, and provides the employee with a reasonable system for tracking time they work in Seattle.

Employers are not required to track time worked in Seattle if the employer complies with all Seattle requirements for payment of minimum wage and minimum compensation to an employee regardless of where that employee's work is performed.

EXAMPLE: A restaurateur has two restaurants – one in Bellevue and one in Seattle. Sally typically works at the Bellevue location. However, one week she goes to the Seattle location for a one-hour mandatory meeting. She otherwise does not work at the Seattle location during the relevant two-week period. Sally's pay for the one-hour meeting in Seattle does not need to comply with the Seattle Minimum Wage Ordinance. However, if the meeting was more than two hours, or if Sally performed additional work at the Seattle location within that two-week period that, combined with the meeting, totaled over two hours, Sally's pay for work at the Seattle location during that two-week period would need to comply with the Ordinance.

2. <u>"Minors"</u>

The Ordinance states that "the Director shall have the authority to issue a rule for the minimum wage for employees under the age of 18 (within certain parameters set forth in the Ordinance).

Per the Rules, **employees less than 16 years old** must be paid an hourly rate of at least 85% of the hourly rate required for employees ages 16 and older by the Ordinance.

Per the FAQs, **employees who are 16 or 17 years old** must be paid the full Seattle minimum wage.

3. <u>Learners, Apprentices, Messengers and Workers with a Disability</u>

Per the Ordinance, the Director has the authority to issue a Special Certificate authorizing an employer to pay a wage less than the Seattle wage but above the State minimum wage for learners, apprentices, messengers, and people with disabilities (as defined in RCW 49.46.060).

Process for applying for a Special Certificate (Per the Rules and FAQs):

Applications for a Special Certificate must be submitted in writing to the Director of the City's Office of Labor Standards. Applications will be considered on a case-by-case basis.

An applicant for such a Certificate must secure a letter of recommendation from the State L&I stating that the applicant has a demonstrated necessity pursuant to WAC 296-128, before the Certificate will be issued. (a copy of an approved special certificate from the State L&I shall serve as a letter of recommendation).

If an application is approved, the Certificate will have the same limitations for time, number, proportion and length of service as prescribed by the State L&I, provided the hourly rate is above the Washington State minimum wage.

The Director shall send written notice of the decision to the employer, and when applicable, to the employee as prescribed by WAC 296-128.

D. What are my notice and posting requirements?

1. The Minimum Wage Ordinance's requirements

Employers are required to give notice to their employees about their rights and protections under the ordinance in English, Spanish and any other language commonly spoken by employees at the particular workplace.[2]

The Notice must include that: (a) Employees are entitled to minimum wage and/or minimum compensation; (b) Retaliation is illegal; and (3) Employees have the right to file a complaint with the Office of Labor

[2] If an employee is jointly employed, both/all employers are required to give this notice.

Standards in their employer does not pay them minimum wage and/or minimum compensation or if they employees are retaliated against for exercising their rights under the ordinance.

Employers may comply with this requirement by posting in a conspicuous place at any workplace or job site where any covered employee works a notice published each year by the Department informing employees of this information in the appropriate language.

The City has created a poster to meet this requirement.[3] English and Spanish versions are available on SOCR's website http://www.seattle.gov/civilrights/labor-standards/minimum-wage (these also meet one of the Wage Theft Ordinance notice requirements).

2. The Administrative Wage Theft Ordinance requirements[4]

Overview of **the requirements under this law:**

- Pay employees wages **and** tips.
- Provide written notice to employees of pay rate and tip policies and other information at time of hire or change of employment.
- Provide written notice of certain specific information each pay day.
- Provide written notice to employees of their rights to wage and tip compensation.

Please see Section II below for detailed information on each of the notice requirements.

[3] Attached as Exhibit 1 is a copy of the English version of the poster.

[4] This law also became effective on April 1, 2015. Under this law, Seattle's Office of Labor Standards (OLS) can now investigate workers' complaints of nonpayment of wages and tips. The ordinance creates new requirements for employers, and an administrative process for addressing wage theft complaints. It does not, however, replace criminal investigations. It remains a crime to withhold payment of wages and tips owed to employees under Seattle Municipal Code (SMC) 12A.08.060.

E. How long must I keep payroll records under this law?

Under both the City Minimum Wage Ordinance and the Wage Theft Ordinance, employers must retain payroll records for three years documenting minimum wages and minimum compensation paid to covered employees. Payroll records also shall contain information regarding medical benefits and tips that demonstrate the payment of minimum wages and minimum compensation to each employee.

II. Schedule 1 Employers

A. What is the minimum wage I must pay?

Please see attached Exhibit 4 for an overview of Schedule 1 annual requirements.

B. What types of payments apply towards the minimum wage?

1. The Ordinance defines "minimum wage" as all wages, commissions, piece-rate and bonuses actually received by the employee and reported to the IRS.

2. For years 2016, 2017 and 2018, Schedule 1 employers receive a credit towards their City minimum wage requirements for payments they make towards an employee's qualifying medical benefits plan (per Exhibit 4).

C. How do I apply the credit for health plans?

1. What health plans qualify for the credit?

   Per the Ordinance, to qualify for the credit, the medical benefits plan must be "a silver or higher level essential health benefits package, as defined in [the Affordable Care Act], or an equivalent plan that is designed to provide benefits that are actuarially equivalent to 70 percent of the full actuarial value of the benefits provided under the plan, whichever is greater."

2. For which employees can I apply the credit?

   Only those employees for whom you pay towards their qualifying medical benefits plan, and only for the period during which you make such contributions.

   Therefore, you cannot take the credit for an employee who declines coverage.

Similarly, if an employer has a policy of delaying medical benefits for a new employee until the employee has completed an eligibility period (e.g. 90 days), the employer must pay the new employee the higher minimum wage rate until the employee completes the eligibility period and enrolls in the employer-offered medical benefits plan.

The same applies if, for example, an existing employee loses eligibility under the qualifying medical plan for a period of time.

3. What is the annual schedule of the health insurance credit, and when does it expire?

   Please see Exhibit 4, referenced in Section II A above.

D. What are commissions and how can I apply them towards the minimum wage?

1. Definition: The Ordinance defines a "commission" as "a sum of money paid to an employee upon completion of a task, usually selling a certain amount of goods or services."

2. Application of commissions towards Minimum Wage: Per the Ordinance:

   Where an employee is paid on a commission or piece-rate basis, wholly or partially, the amount earned on such basis in each work-week period may be credited as a part of the total wage for that period, and the total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.

3. Interpretation of the above quote: This part of the Ordinance means that, for employees paid commissions, the commissions paid to the employee may meet 100% of the employee's minimum wage in a workweek (including the state minimum wage), if the commissions earned divided by hours worked in that workweek total at least the full minimum wage.

   This interpretation of the Ordinance is consistent with State and Federal law, which also allow for commissions paid to employees to meet the state minimum wage requirements, provided the commissions earned and paid to the employee total at least full minimum wage.

4. Limitation on the use of service charges as commissions.

The Rules acknowledge that service charges paid to employees may meet the definition of "commission" under the Ordinance, but place limitations on the use of service charges in this manner.

Please see the discussion of service charges under for analysis of the use of service charges.

E. What are bonuses and how can I apply them towards the minimum wage?

1. Definition: The Ordinance defines a "bonus " as ""non-discretionary payments in addition to hourly, salary, commission, or piece-rate payments paid under an agreement between the employer and employee."

   Note that federal and state law provide guidance on when bonuses are discretionary versus non-discretionary. Please consult State L&I or a knowledgeable wage / hour attorney if you have any questions.

   Also note that, while the Ordinance does not explicitly require that the agreement between the employer and employee concerning the payment of bonuses be in writing, it is recommended to have the agreement be in writing (to, among other things, ensure compliance with the notice provisions under the Wage Theft Act).

2. Application of bonuses towards Minimum Wage: The Ordinance states:

   > Where an employee is paid a bonus, the amount of the bonus in each work-week period may be credited as a part of the total wage for that period, and the total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.

3. Our interpretation of the above quote and the "bonus" definition: Neither the Rules nor the FAQs provide further guidance about bonuses. Given that "bonus" is "in addition to hourly, salary, commission or piece-rate payments", it is appropriate to set an employee's guaranteed hourly rate at a certain level (e.g., at or above the state minimum wage) and have non-discretionary bonuses make up the difference between the hourly rate and the Seattle minimum wage.

4. Potential limitation on this analysis for service charges.

   The Rules do not explicitly recognize that non-discretionary bonuses paid to employees may meet the Ordinance's definition of a bonus.

Please see the discussion of service charges under Section V below for analysis of the use of service charges.

F. Can I take a credit for tips earned by my employees?

NO. Schedule 1 employers are not able to apply tips towards their City (or State) minimum wage payment obligations.

G. Since I cannot apply tips toward the City's wage obligations, are there any other tip issues I should be aware of?

YES. Please see discussion at Section IV (II) below for more information.

H. Can I apply service charges towards my minimum wage obligations?

YES, <u>if</u> they meet certain requirements. Please see Section V below for more information.

I. How does the Ordinance impact overtime calculations?

1. <u>Basic overview of overtime</u>: Under Federal and State laws, the rate at which an employee must be paid overtime is 1.5 times their "regular rate" of pay. The "regular rate" includes the employee's base hourly rate, plus commissions, service charges, non-discretionary bonuses and certain other forms of remuneration from the employer to the employee. Certain forms of employee income (such as tips) are not included in the employee's "regular rate."[5]

2. <u>The Ordinance's Impact on the "Regular Rate" for Schedule 1 Employers</u>: The FAQs state that, "Under Seattle's minimum wage, **one and one-half times the regular rate applies to the minimum wage or flat rate paid to the employee, but does not include tips and/or payments toward medical benefits.**"

   EXAMPLE: You are a Schedule 1 employer, and pay towards a qualifying health care plan for your employees. Linda has worked for you since 2010, and is on your health care plan. In 2015 you give Linda a raise to $11.00 per hour to comply with the Seattle minimum wage.

[5] This is intended to only be a very basic overview of overtime. The laws concerning overtime can be confusing. If you have any questions about overtime consult L&I or a knowledgeable wage/hour attorney.

In 2016, you give Linda a raise to $12.50 to comply with that year's minimum wage, as you are able to apply the health care credit to $13.00 per hour. In one workweek in February 2016, Linda works 45 hours. Her regular rate for that workweek is $12.50, and her overtime rate for that workweek is $18.75 per hour.

In March 2016, Linda cancels her health insurance coverage (she joins her new husband's plan instead). You therefore increase her hourly rate of pay to $13.00, since you no longer can take the health care credit towards her pay. Two weeks later, she again works 45 hours. Now, her regular rate of pay for that workweek is $13.00 per hour, and her overtime rate for that workweek is $19.50.

J. How does the Minimum Wage Ordinance impact my obligations under Seattle Paid Sick and Safe Time Ordinance?

1. Under the PSST Ordinance, an employee must be compensated at the same hourly rate for a PSST absence as the employee would have earned during the time the paid leave is taken.

2. The FAQs provide guidance to Schedule 2 employers concerning the appropriate rate of pay when an employee covered by the Minimum Wage Ordinance is out on PSST leave, but do not provide guidance to Schedule 1 employers on this issue.

   As discussed below, the guidance provided to Schedule 2 employers is instructive, and the same logic should apply to Schedule 1 employers. Nonetheless, if you are in doubt you should contact the SOCR.

   Guidance to Schedule 2 employers: Per FAQ D(11)(d), Schedule 2 employers who are using tips (or payments towards qualifying medical benefits plans) to make up the difference between minimum wage and minimum compensation, may also apply tips (or the medical benefit credit) to the rate of pay for time the employee is out on PSST, provided that doing so results in the employee making at least minimum compensation for all hours worked and while out on PSST leave in that pay period.[6]

[6] While the FAQ references the "pay period", apply this analysis on a workweek basis, instead of a pay period basis, to ensure compliance with federal and state overtime laws, and to reduce confusion.

Application of this guidance to a Schedule 1 Employer: Assuming SOCR agrees that this analysis would apply to a Schedule 1 employer who is applying the health care credit towards an employee's pay, the Schedule 1 employer would be able to take that credit towards the employee's pay when the employee is out on PSST leave (assuming the employer continues to pay towards the employee's health care plan during that time).

III. Schedule 2 Employers

A. What is the minimum wage I must pay, and how is this different than minimum compensation?

Schedule 2 employers must consider both the Minimum Wage and the Minimum Compensation rates that apply to them. Exhibit 5 is a chart providing an overview of the annual amounts of these two rates for Schedule 2 employers.

Consider the minimum wage as the total minimum wage the Schedule 2 employer must pay each of its Seattle employees for work performed in Seattle, without consideration of tips or contributions towards a qualifying medical benefits plan.

Consider the minimum compensation as the total minimum amount the Schedule 2 employee must receive by virtue of being employed by you, allowing you to take into account tips and/or contributions towards a qualifying medical benefits plan to make up the difference between the minimum wage and minimum compensation.

EXAMPLE: You are a Schedule 2 employer. Jeff works for you as a server. In 2015, in any given workweek, he averages about $10.00 per hour just in tips. You still must pay Jeff a minimum wage of $10.00 per hour. You can, however, apply his tips towards the $1.00 additional amount required to meet the minimum compensation rate (assuming all of the conditions for using tips have been met, discussed below in Section IV below.

EXAMPLE: You are the same Schedule 2 employer as discussed in the previous example. Tim works for you, as the dishwasher. You choose to not include him in the tip pool, and he opted out of your qualifying medical benefits plan. You must pay Tim $11.00 per hour in wages, since he cannot apply tips or qualifying medical benefits contributions to the delta between minimum wage and minimum compensation.

B. What types of payments apply towards the minimum wage?

The Ordinance defines "minimum wage" as all wages, commissions, piece-rate and bonuses actually received by the employee and reported to the IRS.

1. What are commissions and how can I apply them towards the minimum wage?

   a. Definition: The Ordinance defines a "commission" as "a sum of money paid to an employee upon completion of a task, usually selling a certain amount of goods or services."

   b. Application of Commission towards Minimum Wage:

      Please see Section II (D) above (under the section for Schedule 1 employers) for a discussion of how Commissions may be applied towards the minimum wage.

      Note, however, that the language from the Ordinance discussed in Section II (D) (2) and (3) above (seeming to allow commissions paid to the employee to apply towards meeting 100% of the employee's minimum wage in a workweek - including the state minimum wage) is in the portion of the Ordinance expressly dealing with Schedule 1 employers (Section 14.19.030). The section of the Ordinance expressly dealing with Schedule 2 employers (Section 14.19.040) does not have similar language. This is likely simply an oversight and that Schedule 2 employers may apply commissions towards their minimum wage obligations in the same manner intended for Schedule 1 employers (e.g., the definition of minimum wage for both Schedules is the same), please obtain clarification on this point from SOCR if this applies to/impacts your business model.

   c. Limitation on applying services charges as commissions.

      The Rules acknowledge that service charges paid to employees may meet the definition of "commission" under the Ordinance, but place limitations on the use of service charges in this manner.

      Please see the discussion of service charges under Section V below for analysis of the use of service charges.

2. What are bonuses and how can I apply them towards the minimum wage?

   Please see discussion of bonuses under Section II (E) above.

As with the discussion concerning commissions, however, please note that the language from the Ordinance discussed in Section II (E) (2) and (3) above is in the portion of the Ordinance expressly dealing with Schedule 1 employers (Section 14.19.030). The section of the Ordinance expressly dealing with Schedule 2 employers (Section 14.19.040) does not have similar language. This is likely simply an oversight and that Schedule 2 employers may apply bonuses towards their minimum wage obligations in the same manner intended for Schedule 1 employers (e.g., the definition of minimum wage for both Schedules is the same).

Potential limitation on use of service charges as bonuses:

The Rules do not explicitly recognize that non-discretionary bonuses paid to employees may meet the Ordinance's definition of a bonus.

Please see the discussion of service charges under Section V below for analysis of the use of service charges.

3. Can I apply service charges towards meeting my minimum wage obligations?

YES, if they meet certain requirements. Please see Section V below for more information.

C. What payments apply towards minimum compensation?

Employers can meet the hourly minimum compensation requirement through wages (including applicable commissions, piece-rate, and bonuses), tips and money paid by an employer towards an individual employee's medical benefits plan.

1. What are the rules concerning applying tips towards minimum compensation?

Please see the detailed discussion below in Section IV for a detailed analysis of issues concerning tips, tip pooling, and the use of tips towards minimum compensation requirements.

2. What are the rules concerning applying a qualifying health plan towards minimum compensation?

a. What health plans qualify?

Per the Ordinance, to qualify for the credit, the medical benefits plan must be "a silver or higher level essential health benefits package, as

defined in [the Affordable Care Act], or an equivalent plan that is designed to provide benefits that are actuarially equivalent to 70 percent of the full actuarial value of the benefits provided under the plan, whichever is greater."

b. For which employees can I apply the qualifying health plan?

Only those employees for whom you pay towards their qualifying medical benefits plan, and only for the period during which you make such contributions.

Therefore, you cannot apply the qualifying health plan for an employee who declines coverage.

Similarly, if an employer has a policy of delaying medical benefits for a new employee until the employee has completed an eligibility period (e.g. 90 days), the employer cannot apply the health plan towards meeting new employee's minimum compensation until the employee completes the eligibility period and enrolls in the employer-offered medical benefits plan.

The same applies if, for example, an existing employee loses eligibility under the qualifying medical plan for a period of time.

D. How do I calculate overtime in light of the Ordinance?

1. Basic overview of overtime: Under Federal and State laws, the rate at which an employee must be paid overtime is 1.5 times their "regular rate" of pay. The "regular rate" includes the employee's base hourly rate, plus commissions, service charges, non-discretionary bonuses and certain other forms of remuneration from the employer to the employee. Certain forms of employee income (such as tips) are not included in the employee's "regular rate."[7]

2. The Ordinance's Impact on the "Regular Rate" for Schedule 2 Employers: The FAQs state that, "Under Seattle's minimum wage, **one and one-half times the regular rate applies to the minimum wage or flat rate paid to the employee, but does not include tips and/or payments toward medical benefits.**"

[7] This is intended to only be a very basic overview of overtime. The laws concerning overtime can be confusing. If you have any questions about overtime consult L&I or a knowledgeable wage / hour attorney.

EXAMPLE: You are a Schedule 2 employer, and pay towards a qualifying health plan for your employees. Linda has worked for you since 2010, and is on your health care plan.

In 2015, your contributions towards the health plan are in excess of $1.00 per hour per employee. You give Linda a raise to $10.00 per hour to comply with the Seattle minimum wage, and make up the difference towards her minimum compensation with the health plan payments. In one workweek in July, Linda works 45 hours. Her regular rate for that workweek is $10.00 per hour, and her overtime rate is $15.00 per hour. In September 2015, Linda cancels her health insurance coverage (she joins her new husband's plan instead). You therefore increase her hourly rate of pay to $11.00, since you no longer can take the health care credit towards her minimum compensation. Two weeks later, she again works 45 hours. Now, her regular rate of pay for that workweek is $11.00 per hour, and her overtime rate for that workweek is $16.50.

Potential overtime complications when applying tips towards minimum compensation:

The SOCR rules concerning use of tips towards meeting the minimum compensation can create complications when determining the regular rate of pay and overtime due to a tipped employee. This is explained in Section IV I (C) below. Please review that section and the example therein if you intend to use tips towards meeting the minimum compensation rate.

E. **How does the Minimum Wage Ordinance impact my obligations under the Seattle Paid Sick and Safe Time Ordinance?**

1. Under the PSST Ordinance, an employee must be compensated at the same hourly rate for a PSST absence as the employee would have earned during the time the paid leave is taken.

2. The FAQs provide guidance to Schedule 2 employers concerning the appropriate rate of pay when an employee covered by the Minimum Wage Ordinance is out on PSST leave.

   Per FAQ D(11)(d), Schedule 2 employers who are using tips (or payments towards qualifying medical benefits plans) to make up the difference between minimum wage and minimum compensation, may also apply

tips (or the medical benefit credit) to the rate of pay for time the employee is out on PSST, provided that doing so results in the employee making at least minimum compensation for all hours worked and while out on PSST leave in that pay period.[8]

IV. Overview of Tips (What both Schedule 1 and Schedule 2 Employers Need to Know)

I. Use of Tips Towards Minimum Wage / Minimum Compensation

A. **Schedule 1** employers cannot use tips towards minimum wage (but see below rules at Section II that apply to notice and tip pools, regardless of employer size).

B. **Schedule 2** employers cannot use tips towards minimum wage, but can use tips towards meeting the difference between minimum wage and minimum compensation.

1. For example, in 2015, Schedule 2 employers can use tips and/or money paid towards the employee's qualifying medical benefits plan ONLY towards the $1.00 difference per hour between that year's minimum wage and minimum compensation requirements.

C. Rules for Schedule 2 employers to follow in applying tips towards minimum compensation:

1. An employer can only apply those tips towards an employee's minimum compensation that are (1) retained by the employee and (2) reported to the IRS.

    a. **NOTE:** This reinforces the importance of (1) having a policy and system in place for employees to report their tips at the end of each shift, (2) enforcing that policy, and (3) retaining records of those reported tips for the period required by the Ordinance (3 years).

2. For employees who work more than one job for your establishment, you can only use the City's "tip credit" towards time spent by the employee working in a tipped position.

[8] While the FAQ references the "pay period", it is recommend that you apply this analysis on a workweek basis, instead of a pay period basis, to ensure compliance with federal and state overtime laws, and to reduce confusion.

a. SOCR has stated that any duties of a tipped employee may be paid at the tipped rate (e.g., opening, running and closing side work).

    i. For example, per FAQ D(9)(d), an employer can apply an employee's tips towards time in mandatory meetings, if the employee is attending the meeting as a tipped employee.

b. Per FAQ D(9)(g), tipped positions are those that contribute towards the "chain of service provided to the customer, including servers, counter personnel, bussers, service bartenders and kitchen staff." That FAQ also states that shift supervisors may be considered tipped employees if their duties primarily consist of customer service tasks rather than managerial duties, and if they lack the authority to hire and fire.[9]

3. Per the FAQ D(9)(c), an employee's tips can be averaged over a pay period in applying them towards the difference between minimum wage and minimum compensation (again, for employees who work in both tipped and non-tipped positions, this is only for time spent working in a tipped position).

    a. **NOTE**: While the FAQs allow averaging of tips over a pay period, it's recommended to average tips over the workweek instead. Minimum wage and overtime laws are typically applied on the workweek basis. Therefore, averaging tips over the workweek will be more consistent with other wage and hour laws, will be less confusing, and will be less likely to be viewed as a violation of other laws (e.g., state / federal overtime laws).

    b. **EXAMPLE**: Whether someone is entitled to overtime is determined on a workweek basis (i.e., if they work over 40 hours in a workweek). Their overtime rate of pay is 1.5 times their "regular rate" of pay. Per the FAQs, a Schedule 2 employee's "regular rate" must be at least the City's minimum compensation rate, unless the difference between the City's minimum wage and minimum compensation is made up with tips or payments

[9] You may have other employees who may fall within the "chain of service" (e.g., expediters and food runners). Confirm with the SOCR that any positions you believe fall within the "chain of service" that are not included in the FAQs are tipped for purposes of the Ordinance.

towards qualifying medical benefits. If averaging tips over the pay period (allowed by the City) results in an employee's overtime rate being lower than it would have been if the employee's tips were averaged over a workweek, then the employee may argue that averaging tips over the pay period violates their overtime rights under state or federal law. That argument may or may not be valid but, at the very least, defending against such a claim would likely be substantially more expensive than erring on the side of caution and averaging tips over a workweek.

4. Overtime pay rate considerations for Schedule 2 tipped employees

    a. Overtime must be paid at 1.5 times the employee's regular rate of pay.

    b. Per FAQ 11(f), the "regular rate" for tipped employees of Schedule 2 employers will typically be that year's applicable minimum wage rate (or higher if you pay more), as opposed to the minimum compensation rate.

    c. This assumes, however, that the employee's tips make up the difference between the minimum wage and minimum compensation. If the employee's tips do not make up this difference in a workweek, you will need to make up the difference with wages, which will increase that employee's regular rate of pay for that workweek.

    d. Also, remember that for employees who work for you in both a tipped position and a non-tipped position (e.g., a server who also works for you as an office administrative assistant), you cannot take the tip credit for time spent by that employee working in the non-tipped position. This may create the situation where the employee works at two different pay rates in the same workweek (e.g, the tipped position's minimum wage rate, and the office position's pay rate of at least the minimum compensation). If that occurs in a week in which the employee works overtime, you will

need to follow state and federal rules concerning determining the appropriate "regular rate" in such instances.[10]

5. Impact of tips on Seattle Paid Sick and Safe Time Requirements:

    a. Under the PSST Ordinance, an employee must be compensated at the same hourly rate for a PSST absence as the employee would have earned during the time the paid leave is taken.

    b. Per FAQ D(11)(d), Schedule 2 employers who are using tips (or payments towards qualifying medical benefits plans) to make up the difference between minimum wage and minimum compensation, may also apply tips for time the tipped employee is out on PSST, provided that doing so results in the employee making at least minimum compensation for all hours worked and while out on PSST leave in that pay period.[11]

D. **EXAMPLE of using tips towards minimum wage and overtime**:

Sally works for your Schedule 2 restaurant. She typically works 25 hours per week as a server, and 10 hours per week as an administrative assistant (admin), helping out with office paperwork (paying invoices, working with vendors, ordering cleaning supplies, etc.). In 2015, her pay rate as a server is $10.00 per hour plus tips and, as an admin, her pay rate is $13.00 per hour. Your pay period is biweekly. During the first week in one pay period in July 2015, Sally picked up a couple of extra server shifts, working 35 hours as a server that week. She also worked 10 hours as an admin that week – resulting in her working 45 hours that workweek. In the second workweek of that pay period, Sally worked her usual schedule of 25 hours as a server and 10 hours as an admin. In that workweek, she also attended a one-hour mandatory meeting for all servers, and spent 5 hours attending mandatory server training on a new service model – resulting in her working 41 hours that workweek. It is now time to run payroll.

ANALYSIS: You first need to determine for which hours you can apply tips towards the difference between minimum wage and minimum compensation. You then need to apply the tips she earned to those hours, to determine

[10] This typically involves taking the "weighted average" of the pay rates. Please see L&I's "How to Compute Overtime" guide - and/or speak with a wage/hour attorney if you have questions.

[11] It's recommended that you apply the tips in this manner on a workweek basis, instead of a pay period basis, to ensure compliance with federal and state overtime laws, and to reduce confusion.

whether the tips make up the difference so that, if the tips fall short, you can make up the difference with wages. Then you will be able to determine her appropriate hourly pay rate for each hour worked per workweek, which will then allow you to determine her "regular rate" of pay for calculating her overtime.

In **workweek 1**, you can apply the tips she earned towards the 35 hours she worked as a server. Assume you average the tips she earned for that workweek, and that this easily reaches the $1.00 per hour difference between the minimum wage and minimum compensation for each of those hours. Based on this, in applying the "weighted average" method of determining the appropriate overtime rate, her earnings for that workweek would be as follows:

- 35 hours X $10.00 per hour = $350.00
- 10 hours X $13.00 per hour = $130.00.
- Her straight time pay, therefore, is $480 ($350 + $130).
- Her regular rate of pay is $10.67 ($480.00 divided by 45 hours worked).
- Her additional pay owed for overtime is $26.67 (1/2 of the regular rate times 5 overtime hours).
    - Because she already is credited with straight time pay for all 45 hours, her additional overtime owed is just ½ of the regular rate for each overtime hour.

In **workweek 2**, it is appropriate to apply the tips she earned that week towards (a) the 25 hours she worked as a server, (b) the one hour mandatory server meeting, and (c) the 5 hours of mandatory server training.[12] Again assume that you average the tips she earned for that workweek, and that this easily reaches the $1.00 per hour difference between the minimum wage and minimum compensation for each of those hours. You would then follow the same methodology outlined for workweek 1 in determining the amount she is owed for this workweek.

[12] The same logic of applying an employee's tips towards time spent in mandatory meetings for tipped employees (allowed by the City per FAQ D(9)(d)) applies equally to time spent in mandatory training for tipped employees.

II. Rules that Apply to Both Schedule 1 and Schedule 2 Employers

A. Notices must be provided under Seattle's Wage Theft Ordinance (SMC 14.20)[13]

Under this new law (effective 4/1/15), employers must provide employees with the following information at the following times:

1. At the time of hire, and within one pay period prior to any change in employment, employers shall provide written notice to employees of:

    a. The employer's name and any trade names ("doing business as") used by the employer;

    b. Physical address of the employer's main office or principal place of business and, if different, a mailing address;

    c. Employer's telephone number;

    d. Employee's rate or rates of pay;

    e. Employee's tip policy, including any tip sharing, pooling, or allocation policies, if applicable;

    f. Pay basis (e.g. hour, shift, day, week, commission); and

    g. Employee's established payday for earned wage and tip compensation.

    NOTE: It is unclear what the City means by "any change in employment". According to the SOCR, at this time, their intent is for this to mean if there is a change to any of the 7 items required in the notice at the time employment begins.

2. Each time wages and tips are paid, employers shall provide written notice to the employee that contains the following information:

    a. The employee's rate or rates of pay;

    b. The employee's tip compensation;

[13] Note that these notices must be provided to all employees, not just tipped employees. Also, aspects of this new law are unclear. SOCR stated they will be developing Rules and FAQs for this Ordinance over the next few months, and changes to their current position may result from that process.

c. The employee's pay basis (e.g. hour, shift, day, week, commission);

d. The employee's gross wages; and

e. All deductions from the employee's pay for that pay period.

NOTE: Per SOCR, their intent at this time is that the employee's pay stub may meet this requirement if it contains all of the information listed.

3. Employers shall provide written notice to employees that they are entitled to the wage and tip compensation rights defined in Chapter 14.20; that retaliation against persons for their exercise of rights defined in Chapter 14.20 is prohibited; and that each employee has the right to file an administrative charge under Chapter 14.20 if the employer fails to comply with the wage and tip compensation rights defined in Chapter 14.20 or if the employer takes adverse action against a person in retaliation for engaging in activity protected under Chapter 14.20.

    a. Employers may meet this notice requirement by:

        1. displaying the City's poster in each establishment where such employees are employed;

        2. including the poster in employee handbooks or other written guidance to employees;

        3. distributing a copy of the poster to each new employee upon hiring; or

        4. duplicating all of the poster's text for use in another format (e.g. employee letter or employee-accessible online system).

NOTE: Per SOCR, at this time their intent is that an employer does not need to use the Poster as a means of communicating this information to employees (i.e., you can create your own writing), so long as your notice provides all of the required information.

B. Limits on Mandatory Tip Pools / Sharing Policies

1. Per the FAQ D(9)(e), employers may establish a mandatory tip pooling or sharing arrangement among employees.

2. Per that same FAQ, such employees "include servers, counter personnel, bussers, service bartenders, and kitchen staff." Moreover, shift supervisors may share in tip pools if their duties primarily consist of customer service tasks rather than managerial duties, and if they do not have the authority to hire and fire.

    a. Therefore, if you have salaried managers who you have determined are exempt from overtime, they likely are exempt by meeting the "executive" exemption – which requires them to be primarily engaged in management duties and involved in hiring and firing decisions. These exempt managers, therefore, should not be in a mandatory tip pool or sharing arrangement per this FAQ.

3. **NOTE:** The City's position concerning who can be in a mandatory tip pool or tip sharing arrangement is broader than federal law. Federal law limits tip pools to "customarily and regularly tipped employees" – which federal DOL has determined typically are only those who have direct customer contact (typically excluding those who work in the kithen).

    a. WRA joined in a lawsuit challenging application of these federal limitations when the employer does not take a tip credit against the federal minimum wage. The District Court agreed with WRA, and struck those portions of the regulations.

    b. DOL appealed to the Ninth Circuit Court of Appeals. That court may disagree with the District Court, and allow those federal regulations to apply in states such as Washington.

    c. You should take this into consideration when deciding whether to change your tip pool to require sharing with kitchen staff. While doing so would be legal currently, if the Ninth Circuit overturns the District Court, you will need to change the tip pool back to exclude kitchen staff.

V. Service Charges[14]

I. Can service charges count towards meeting the City's minimum wage obligations?

A. Yes, for both Schedule 1 and Schedule 2 Employers, per the below:

1. Per the Ordinance, Commissions and Bonuses can be applied towards meeting the Seattle Minimum Wage (Ordinance sections 14.19.010 (Q) and (W)).

2. Per Rule SHRR 90-070, service charges will be considered a "Commission" under the Ordinance, if the payment of the service charge to the employee meets the Ordinance's definition of a commission.

    a. The Ordinance defines Commission as: "a sum of money paid to an employee upon completion of a task, usually selling a certain amount of goods or services (Ordinance section 14.19.010 (C)).

3. The Rules do not state that service charges paid to employees can also meet the Ordinance's definition of a bonus, but nor do the Rules expressly state that service charges cannot meet the Ordinance's definition of a bonus.

    a. In communications with SOCR, it appears they recognize that, notwithstanding the Rules not addressing this issue, there are circumstances where service charges paid to employees would meet the definition of a bonus for purposes of the Ordinance.

    b. The Ordinance defines Bonus as: "non-discretionary payments in addition to hourly, salary, commission, or piece-rate payments paid under an agreement between the employer and employee."

    c. Before applying service charges as a bonus, you should discuss the situation with SOCR to determine how they would view your particular situation, and or obtaining advice of counsel from an attorney who is experienced in wage and hour laws.

[14] As stated in the introduction, you are urged to seek the assistance of an accountant in determining what options might be best for your business to comply with these new laws.

II. How can I apply service charges towards meeting the City's minimum wage?

A. By ensuring that the payment of the service charge to the employee is done in a manner that meets the Ordinance's definition of a "Commission."

1. For example, make the payment of the service charge to the employee contingent upon the employee completing some task – such as working the event that results in the payment of the service charge.

B. Also per the above, while payments of service charges to employees also would seem to meet the Ordinance's definition of "Bonus" in certain circumstances, and SOCR seems to agree with this. Obtain advice of counsel and input from SOCR before applying a service charge as a bonus under the Ordinance.

III. What does the Ordinance mean, in saying that the payment needs to be made "upon completion of a task" for it to be a Commission?

A. What types of tasks qualify?

1. The Ordinance, Rules and FAQs are not clear on this point.

2. As the Ordinance suggests, such tasks usually involve the selling of goods or services.

    a. For example, paying your private dining / banquet salesperson a portion of the service charges for the events they book would appear to meet this definition. (note, however, that paying some of the service charges to the salesperson implicates the "service charge disclosure law" discussed beginning in section VI below).

3. By saying "usually," the Ordinance is not limiting the tasks exclusively to selling goods or services.

4. Moreover (as discussed further below), in discussing an overtime exemption for certain commissioned employees, State L&I has stated:

> "Hotels, motels and restaurants may levy mandatory service charges . . . for services. If part or all of the service charges are paid to service employees, that payment may be considered commission . . ." (Admin Policy ES.A.10.1)

5. Based on the language of the Ordinance and the State Admin Policy, it is reasonable to treat as a commission payments of service charges to service

employees after completing a task – though there are different levels of risk in applying this.

6. Specifically, in our opinion, the more closely related the task is to the event / service that resulted in the service charge, the lower the risk is to treat as a commission the payment of that service charge to the employee. The less directly the employee's job (or task) is related to the event / service, the more risk of a finding that the payment of the service charge is not a commission. Examples of this are provided below.

    a. Least risk: Treating as a commission the payment of service charges to employees who worked the event that resulted in the service charge (e.g., receipt of a portion of the service charge is contingent upon the employee completing a task related to the event).

        EXAMPLE: Sharing service charge from an event with the banquet servers, bartenders, cooks, dishwashers, bussers and housemen who participated in the event.

    b. More risk: Treating as a commission the payment of service charges received from an event to service employees who were not involved in that event.

        EXAMPLE: Your establishment has 10 events in a workweek. You combine all service charges from those events into one weekly service charge pool. All banquet servers, cooks, dishwashers, housemen and booking agents who participated in any of the events that week receive a portion of that service charge pool, based on the number of hours they worked for one or more of the events. None of the employees worked all 10 of the events.

            i. In our opinion, you can certainly argue that this would still meet the Ordinance's definition of Commission. The payment is contingent upon the completion of a task: the employee must have contributed to at least one event in that workweek. By pooling the service charges for the week and paying the employees a share of the entire pool, you are simply defining the scope of the commission they receive for completing their task.

ii. In discussing this scenario with SOCR, their initial reaction is that a payment of this nature would not be a commission. However, SOCR did state that they likely would view this payment as a bonus (even though the Rules do not expressly recognize service charges as bonuses).[15]

c. Most risk: Treating as a commission the payment of service charges received from an event to non-service employees, or to employees who provide services wholly unrelated to the event.

EXAMPLE: You share the service charge received from a banquet luncheon with such employees as the gardening / landscaping employees, as well as with the housekeeping employees who clean guest hotel rooms, and treat the payments to these employees as a commission.

i. While you could argue that such payments to these employees meet the technical definition of a commission found in the Ordinance (e.g., you condition the payment on the their completion of a task – performing their job that week in a satisfactory manner), it is likely SOCR would see this as beyond the scope of the intent of a Commission.

ii. However, as with the prior example, it is possible SOCR would view such payments to the gardening / housekeeping employees as a "bonus", and therefore still permissible to apply against the City's wage requirements.

7. Given the lack of clarity on this issue, if you are contemplating paying your employees in a manner other than outlined in 6(a) above and having such payments apply towards the Seattle minimum wage as a bonus or commission, seek the advice of counsel experienced in wage and hour laws, or discuss it with SOCR to confirm their view of the matter.[16]

[15] SOCR is considering this issue further, and may provide further clarification in the near future.

[16] In addition to raising the issue of whether the payments can be either a commission or a bonus, you will need to consider the wording of the service charge disclosure in such a situation (e.g., sharing the service charge with people who did not work the event).

B. Does the payment need to be made to the employee directly after completing the task (e.g., pay the employee the service charge directly after the event)?

1. The Ordinance, Rules and FAQs are not clear on this point.

2. However, such a requirement is not in keeping with customs and practices of paying commissioned employees - they typically receive their commissions in a paycheck on scheduled paydays, just like any other employee.

3. Per communications with SOCR, they agree this is not necessary. Per SOCR, allocating the service charges to employees on a workweek basis and paying in accordance with the scheduled payday is appropriate.

    a. Paying service charges in this manner is also consistent with FAQ D(9)(f), which states that employers may pay employees tips left on credit cards on the employees' regular pay day. Presumably this would also apply to service charges left on credit cards.[17]

IV. What amount of the minimum wage can be paid for with service charges?

A. Per the FAQ D(9)(h), service charges can only be applied towards paying the difference between the State minimum wage and the City Ordinance requirements (i.e., minimum wage or minimum compensation).

B. **NOTE**: The City's position stated in the FAQ appears to be inconsistent with the Ordinance itself, which states:

> Where an employee is paid on a commission or piece-rate basis, wholly or partially, the amount earned on such basis in each work-week period may be credited as a part of the total wage for that period, and the total wages paid for such period shall be computed on the hours worked in that period resulting in no less than the applicable minimum wage rate.

K. We interpret this part of the Ordinance to mean that, for employees paid commissions, the commissions paid to the employee may meet 100% of the employee's minimum wage in a workweek (including the state minimum wage), if the commissions earned divided by hours worked in that workweek total at least the full minimum wage.

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[17] Note that this FAQ also allows employers to deduct from the tips paid to the employee the credit card company's fee required to convert the tip (or, presumably service charge) into cash.

L. This interpretation of the Ordinance is consistent with State and Federal law, which also allow for commissions paid to employees to meet the state minimum wage requirements, provided the commissions earned and paid to the employee total at least full minimum wage.[18]

C. The City FAQ's limitation on the use of commissions when they are paid through service charges (only allowing them to be applied towards the delta between the State and City minimum wage) is due to some ambiguity concerning the State law's treatment of service charges. This ambiguity is caused by the following:

1. Generally, state law allows commissions to be paid towards minimum wage requirements, wholly or partially.

2. State law recognizes service charges paid to employees of hotels, motels and restaurants as commissions – at least with respect to an exemption from overtime for commissioned employees of retail or service establishments.[19] It is unclear, however, whether the state would recognize service charges as commissions beyond application of this overtime exemption.

3. The state disclosure law concerning service charges (discussed below beginning at Section VI) states: "Service charges are in addition to hourly wages paid or payable to the employee or employees serving the customer."

    a. Some interpret this to mean that service charges cannot be applied towards meeting the state minimum wage (or agreed upon wage) of the employees receiving the service charge.

    b. This sentence is actually clarifying what the disclosure to guests must state – essentially, meaning that the employer cannot take "credit" for service charges paid to an employee to meet their wage requirements. Instead, the employer can only take "credit" in the disclosure for those service charges paid to employees above their agreed-upon wages.

    c. It is not clear which interpretation of this sentence is correct. It will require the state legislature, L&I or a court to clarify this.

[18] *See, e.g.,* WAC 296-126-021, as well as State L&I website discussing commissions; federal DOL discussion of commissions (http://www.dol.gov/compliance/topics/wages-commissions.htm).

[19] *See, e.g.*, L&I Administrative Policy ES.A.10.1.

4. Adding to this confusion is a L&I Administrative Policy, which states "Gratuities, tips, or service fees are not considered when computing the minimum wage and may not be credited as part [of] the minimum wage."

    a. While this language clearly excludes service charges from being applied towards the state minimum wage, it is unclear whether a court would follow this provision of the Administrative Policy, as it appears to be an incorrect application of the law.[20]

D. Until this issue is clarified under State law and the City has the opportunity to re-address this issue under the Ordinance, we recommend following the FAQ and applying service charges only towards the delta between the State minimum wage and the City's minimum wage and minimum compensation requirements.[21]

V. Do service charges paid to employees impact their overtime rate?

i. Yes.

ii. Service charges paid to employees are considered wages (subject to the limitations discussed above).

iii. If service charges paid to employees only bring them from the state minimum wage to the City minimum wage, their overtime rate would not change.

1. **Example**: You are a Schedule 1 employer. In 2015, you pay service employees the state minimum wage of $9.47 per hour, plus service charges up to the City's $11.00 per hour minimum wage. All other service charges go to "the house." You pay non-service employees the full city minimum wage of $11.00 per hour through direct wages, irrespective of service charges.

    a. Here, both service and non-service employees' "regular rate" is $11.00 per hour. Their overtime rate, therefore, is $16.50.

2. **Example:** You are a Schedule 2 employer. In 2015 you pay tipped employees the state minimum wage of $9.47 per hour, plus service charges

[20] For example, L&I cites WAC 296-126-022 as authority for this position. That provision of the Code, however, states only that "gratuities received by employees shall not be considered a part of the minimum wage." It does not include service charges.

[21] Applying service charges towards the state minimum wage is NOT unlawful. However, that such an approach risks inviting litigation or challenges by the City or State, resulting in legal defense costs and a risk of a finding of liability.

up to the City's $10.00 per hour minimum wage. All other service charges go to "the house." The tipped employees' tips then bring them to the $11.00 minimum compensation rate. Non-tipped employees are paid $11.00 per hour through direct wages.

a. Here, the tipped employees' "regular rate" is $10.00 per hour, and their overtime rate is $15.00 per hour. The non-tipped employees' "regular rate" is $11.00 per hour, and their overtime rate is $16.50.[22]

D. If service charges paid to employees exceed the City minimum wage, however, their overtime rate and relevant calculation would change.

1. **Example**: You are a Schedule 1 employer. In 2015, you pay service employees the state minimum wage of $9.47 per hour, plus a share of the service charges received from events they work. In one workweek, a server works 45 hours, and receives $300 in service charges.

a. The server's straight time earnings that week are $726.15 ($9.47 x 45 hours = $426.15, + $300 service charges). The server's regular rate of pay for that week is $16.14 per hour (straight time earnings of $726.15 divided by 45 hours worked). Because the $726.15 is the total straight time pay for all 45 hours, all that is owed for overtime is the half-time rate of $8.07 ($16.14 divided by 2) multiplied by 5 hours, or $40.35. The total wages (including overtime) for that workweek are $766.50.[23]

E. Note that federal and state laws recognize an exemption from overtime for commissioned employees of service or retail establishments.

1. The general requirements for this exemption are as follows:

a. the employee must be employed by a retail or service establishment (which includes restaurants, hotels and motels); and

b. the employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and

[22] FAQ 11(f) provides similar, and additional, examples.

[23] This follows the second example provided in Exhibit 6 – L&I's "How to Compute Overtime" guide.

c. more than half the employee's total earnings in a representative period (at least a month and not more than a year) must consist of commissions.[24]

2. L&I recognizes service charges paid to employees of hotels, motels and restaurants as commissions for purposes of meeting this exemption. Therefore, you may be able to apply this exemption from overtime for certain of your employees who receive service charges as commissions.

VI. What is the disclosure law concerning service charges?

A. State law requires that, when an employer "imposes an **automatic service charge** related to food, beverages, entertainment, or porterage provided to a customer", the employer "**must disclose in an itemized receipt and in any menu provided to the customer the percentage of the automatic service charge** that is **paid or is payable directly to the employee or employees serving the customer**." RCW 49.46.160(1).

B. SOCR incorporated this into the Rules concerning the Ordinance (SHRR 90-070).

VII. What is the impact of failing to comply with the disclosure law?

A. Failing to comply with the disclosure law may result in expensive litigation.

1. There have been a number of lawsuits filed under this law in recent years. These are typically filed as class actions on behalf of employees. These lawsuits are expensive to defend against, and typically have resulted in expensive settlements (to avoid further defense costs).

B. In addition to the risk of litigation, the City has stated in FAQ (D(9)(i)) that "if employers do not comply with this disclosure requirement, OLS will automatically presume that the service charge was not paid to the employee and will not credit the amount toward Seattle's minimum wage requirements."

VIII. What is considered a service charge?

A. The state service charge disclosure law (and SOCR's Rule SHRR 90-070) defines "service charge" as:

> a separately designated, automatic amount collected by employers from customers **that is for services provided by**

[24] This is just a basic overview of this exemption. Meeting it is more complicated than this indicates.

> **employees**, **or** **is described in such a way** **that customers might reasonably believe that the amounts are for such services**.

B. We interpret this to mean that a service charge is a separately designated, automatic amount . . . that is EITHER

1. for services provided by employees OR

2. described in such a way that customers might reasonably believe the amount is for services provided by employees.

C. The state service charge disclosure law provides examples of what would constitute a service charge under that law, stating that:

> Service charges include but are not limited to charges designated on receipts as a "service charge," "gratuity," "delivery charge," or "porterage charge."

1. Therefore, for example, an "automatic gratuity" added to a bill (e.g., for parties of 8 or more) would be deemed a service charge under this law, requiring compliance with the disclosure provision.

IX. What if I call the charge something else, such as a "surcharge"?

A. This is a gray area, as explained below.

1. In FAQ D(9)(j), SOCR states that, at least for the City's purposes, it will depend on how the "surcharge" is described to the guest. If the surcharge is described in a manner that implies to guests that it is for services provided by employees, the disclosure requirements must be followed. If, however, the surcharge "does not suggest that the amount is being collected for services, and that the amount will not be paid to the employee" then the disclosure requirements do not need to be followed.[25]

2. SOCR's position that it depends on how the "surcharge" is defined to the guests does not appear to take into account the first part of the State and City disclosure provisions' definition of a service charge. Per Section VIII above, those both define a service charge as charges "for services provided by employees" OR described in a way that indicates it is for such services.

[25] The quoted language from the FAQ is unclear to whether the quoted language means that the description of the "surcharge" must state that it will not be paid to the employee or, rather, that the description must simply not imply that it will be paid to the employee.

B. Because of the definition of a service charge, we recommend that, if your intent is for some or all of the "surcharge" to be paid to employees serving the guests, you err on the side of caution and follow the disclosure requirements, irrespective of how the charge is otherwise described to guests.

1. Similarly, if your intent is to use the proceeds from the service charge in some other manner (e.g., to pay kitchen employees to increase their wages), we recommend disclosing this as well.[26] Again, this is to err on the side of caution and ensure compliance with the disclosure law.

EXAMPLE: We include a ____ % surcharge to every bill. None of this surcharge is paid to your server. All of the proceeds from this surcharge are paid to kitchen personnel to recognize their contributions to our guests' experience.

X. Examples of issues under the disclosure law

A. Failing to disclose that you subtract the credit card processing fee from the service charges.

1. **Example:** You institute an "automatic gratuity" of 18% of the bill for parties of 8 or more. You pay 100% of these service charges to servers, minus the credit card fee paid to convert the service charge into cash. Those credit card fees are typically 3% of the charge. Your disclosure on the menu and itemized receipt state that 100% of the service charge is paid to the servers.

2. You run the risk of a lawsuit, challenging your disclosure as being inaccurate. The plaintiff lawyer may allege that you incorrectly stated that 100% of the service charge is paid to the servers, when in fact 97% is paid to the servers (due to the reduction for the credit card fee).

3. If you are going to subtract the credit card processing fee, we recommend including this in the disclosure. An example of this might be "Servers receive 100% of the service charges, minus amounts charged by the applicable credit card company to convert the service charge into cash."

B. Failing to disclose that part of the service charge is paid to back-of-house employees, managers, or "booking agents."

[26] The reason we recommend distinguishing between service staff and kitchen employees, for example, is discussed in greater detail at section X (B) below. Additional examples are also provided.

1. The state service charge disclosure law defines "employee" as: "nonmanagerial, nonsupervisory workers, including but not limited to servers, busers, banquet attendant, banquet captains, bartenders, barbacks, and porters."

2. Note, however, that the disclosure law requires disclosure of the percentage of the service charge that is paid **to the employee or employees <u>serving the customer.</u>**

3. It is therefore unclear whether this means that businesses must disclose what percentage is paid only to the employees who directly serve the customer, or whether including any employee in the list of the definition of "employee" within the disclosure is appropriate.

4. **<u>Example</u>:** You apply a 20% service charge to private parties. This is distributed as follows: 50% of the service charge goes to banquet servers who worked the event; 30% goes to the bartenders, barbacks, and bussers who worked the event; 10% goes to the kitchen staff who worked the event, and 10% goes to the private dining event coordinator who booked the event. Your disclosure to the customer says that 100% of the service charge goes to the employees who contributed to the event.

    a. In this scenario, you risk a lawsuit alleging improper disclosure.

    b. Since the law says you must disclose what percentage is paid to the employees <u>serving the customer</u>, the most conservative approach is to state that 50% of the service charge goes to the servers who worked the event.

        ii. From a customer relations perspective, you might also want to disclose that the rest of the service charge is going to other employees, so guests understand that the rest is not going to the "house."

        iii. In that case, you might want the disclosure to say precisely how the service charge is being broken out, to ensure full compliance with the disclosure law, and to have full transparency with the guests. For example, you may want the disclosure to say: 50% of the service charge is paid to the to the servers who worked the event, 30% is paid to the bartenders, barbacks, and bussers who worked the event; 10% is paid to the kitchen staff who worked the event, and 10% is paid to the private dining event coordinator who booked the event."

VI. Enforcement and Investigations

SOCR (and its Office of Labor Standards) is authorized to investigate any violations of the Ordinance.

A Charge must be filed within 3 years from the date of the alleged violation.

During an investigation, OLS gathers evidence by conducting interviews, obtaining witness statements, and reviewing written information. Throughout the investigation, OLS can help the parties reach a settlement agreement for early resolution.

In the event the SOCR determines a violation has occurred, appropriate remedies will include full payment of unpaid wages, interest, an agreement to future compliance, monitored compliance for 12 months and, potentially, civil penalties.

Successor Liability: if an employer sells or transfers a business, any person who becomes a successor to that business becomes liable for the full amount of the remedy for a minimum wage violation.

The Rules and FAQs provide additional information concerning these issues as well.