

THE NATIONAL LAW REVIEW

DC Repeals Tipped Worker Wage Law but Imposes New Requirements on Employers of Tipped Workers

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The District of Columbia Council recently repealed a law approved by voters in a June 2018 referendum that would have fundamentally changed the way tipped workers in the District are paid. Embedded in the repeal legislation, which passed in October 2018 and took effect on December 13, 2018, are provisions that place new and potentially substantial requirements on employers of tipped workers in the District. These new requirements are ostensibly designed to prevent abuse of tipped workers. Because the repeal and its new requirements are now in effect, employers of tipped workers such as restaurants, bars, and other service establishments should immediately take note and plan for compliance.

The repeal legislation, dubbed the “Tipped Wage Workers Fairness Amendment Act of 2018,” (the “Act”) institutes three new major requirements that impact employers and D.C. government: (1) employers of tipped workers must comply with new sexual harassment training requirements; (2) employers of tipped workers must begin to use – if they do not already -- a third-party payroll system that submits payroll data to the District’s Department of Employment Services (“DOES”); and (3) DOES must provide more information to the public on the various labor and anti-discrimination laws in the District and create an internet and phone-based reporting system for public reporting of potential violations.

Sexual Harassment Documentation, Reporting and Training Requirements

No later than July 1, 2019, employers of tipped workers must file with the Office of Human Rights (“OHR”) a policy that includes detail on how employees may report instances of sexual harassment to management and to OHR. By the same date, employers must also distribute the employer’s sexual harassment policy to employees and post the policy in a conspicuous place accessible to all employees in the workplace.

Importantly, employers should also take note that they will be required to document instances of sexual harassment reported to management, including whether the reported harasser was a non-managerial employee, manager, owner, or operator, and then report to OHR by July 1, 2019 (and annually thereafter) the number of instances of sexual harassment reported to management and the total number of reported harassers who were non-managerial employees, managers, owners, or operators.

In addition, no later than December 12, 2020, and regularly thereafter, owners, operators, managers, and employees of employers of tipped workers must attend sexual harassment prevention training. Except for managers, this requirement may be satisfied by attending either in-person or web-based training every two years. Managers must attend this biannual training in person. New employees must be trained within 90 days of hire unless the new employee has taken the required training within the preceding two years. While OHR is directed by the Act to design and provide a sexual harassment training course, employers may opt to use a course from a private sector provider that has been certified by OHR. If the employer opts to train using a non-



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OHR course, the employer must certify to OHR within 30 business days following completion of the training that the employee, manager, owner, or operator has completed the required training. Whether an individual takes the OHR-sponsored training course or a non-OHR course, OHR will maintain records of each individual's training for at least 5 years.

Third-Party Payroll and Wage Reporting Requirements

Additionally, beginning January 1, 2020, employers of tipped workers (except for hotel employers) must begin using a third-party payroll service. The payroll service (or hotel) must submit a quarterly wage report to DES within 30 days of the end of each quarter, which must certify that each tipped worker was paid at least the required minimum wage, inclusive of gratuities.

Until then, and as of December 13, 2018 (the effective date of the Act), the employer must submit quarterly reports to DOES that itemize the following information: (1) the name of each employee; (2) the number of hours each employee worked each week during the quarter for which the report is being provided; (3) the total pay, including gratuities, received by each employee each week during the quarter for which the report is being provided; (4) the average weekly wage for each employee during the quarter for which the report is being provided; and (5) the employer's current tip out policy that the employer supplied to the third-party payroll company for calculation of wages during the quarter.

The quarterly reports must be submitted electronically via the [DOES employer self-service portal](#). The Act requires that "before January 1, 2020," all employers of tipped workers must submit the reports through the portal unless doing so would create a hardship. The portal currently instructs employers as follows:

ATTENTION ALL QUARTERLY FILERS:

Pursuant to DC Code § 32-1009.01. Notice requirements for tipped wages; please be advised that restaurants and other employers having employees that are paid pursuant to § 32-1003(f)(1) (Tipped Employees), must submit a quarterly "Tipped Wage Report" to the Mayor via an Internet-based portal (ESSP) to ensure that employees receive a combined wage and gratuity (tip) income that is no less than the full minimum wage.

Employers and Agents can now upload an electronic file containing tipped wage information. [Click here to download](#) the file specification instructions.

Come January 1, 2020, quarterly reports due as of that date must thereafter be submitted via the portal by the third-party payroll services on behalf of the employers they serve, as well as by hotel employers.

The Act also requires that the portal be designed to accept anonymous and non-anonymous wage theft complaints by employees. In addition, DOES must establish a public reporting system that allows employees and other members of the public to report wage-related violations. The reporting system must be available by web and telephone 24 hours a day, 7 days a week each week for the entire calendar year. DOES may investigate reports submitted through this system.

At the time of wage payment, employers must also provide employees with an itemized statement showing the following: (1) the date of the wage payment; (2) gross wages paid; (3) deductions from and additions to wages, including a separate line for gratuities; (4) net wages paid; (5) hours worked during the pay period; (6) the employee's tip declaration form for the pay period, delineating cash tips and credit card tips; and (7) any other information as the Mayor may prescribe by regulation.

Other New Notices and Miscellaneous Requirements

The law also amends Section 4(g) of The Minimum Wage Act Revision Act of 1992 (the "Minimum Wage Act") in order to place additional notice requirements on employers of tipped workers. With this amendment, the minimum wage requirements applicable to non-tipped workers will not apply to employers of tipped workers as long as the employer has provided its tipped employees with notice of the following, which must be included in the notice furnished pursuant to section 9(c) of the Act: (1) the provisions of subsection (f) of Section 4 of the Minimum Wage Act; (2) if tips are not shared, that the tipped employee shall retain all tips received; (3) if tips are shared, the employer's tip-sharing policy; and (4) the percentage by which tips paid via credit card will be reduced by credit card fees. This amendment also requires employers that have a tip-sharing policy to post that policy. Likewise, employers will not be liable to pay the regular non-tipped minimum wage as long as all gratuities received by the employee have been retained by the employee, except that tip pooling is permissible.

Finally, the law establishes a Tipped Workers Coordinating Council, which is intended to be a partnership of tipped workers, employers, and public agencies that promotes a high-quality response to tipped-worker cases of wage theft and unfair labor practices.

What Should Employers of Tipped Workers Do Right Now?

Here's what employers of tipped workers should do right now to ensure compliance:

- File quarterly tipped wage reports on the [DOES ESSP portal](#).
- Take steps now to ensure that before July 1, 2019, you have a fully compliant sexual harassment policy that is ready to file with OHR and be distributed to employees and conspicuously posted.
- Non-hotel employers of tipped workers should begin looking for a third-party payroll service that can ensure compliance with the Act beginning on January 1, 2020.
- Prepare to explore the OHR-sponsored sexual harassment training once it is created, or look for an OHR-certified training course, once OHR has released this information. We will keep you abreast of developments in this area.
- For new hires required to be trained within 90 days of hire, provide them with a mandatory robust sexual harassment training and document that training, regardless of whether OHR has yet released its own course or certified any non-OHR courses.
- Reach out to local employment counsel to seek advice in areas where the law has failed to provide clarity.

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