

Publications

More Considerations for Restaurant and Bar Reopenings in Ohio

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On May 14, 2020, the Ohio Department of Health released its Dine Safe Ohio Order, formalizing the rules for restaurant and bar reopenings that it announced in a press conference on May 7, 2020 (summarized [here](#)). The Order reiterated most of the material set forth in that press conference and the informational releases issued in connection with that press conference, while expanding on and providing additional context. Of note:

- The Order makes is clear that all dining (eating and drinking) must be done while seated. As such, customers cannot stand at tables or other areas of a bar/restaurant while consuming food or alcohol.
- The Order requires employers to proactively ensure customers remain socially distanced. The Order does not explain how to do this, nor does the guidance provide any recommendations. There were widely-reported issues with customers mingling between tables at bars that opened their patios over the past weekend, and we expect that this will continue to be a compliance issue.
- The Order will be enforced by state and local health departments and local police departments. In his regular press conference on May 18, Governor DeWine indicated that there will be spot checks in bars and restaurants over the next few weeks. Where they find violations of Ohio's social distancing requirements, authorities may issue citations that could result in the revocation of an establishment's liquor license. They may also refer violations to the local prosecutor as a criminal case. Such violations would be pursued as a second degree misdemeanor, which is punishable by a fine of \$750, 90 days' imprisonment, or both.

As states and industries reopen, Vorys has been publishing return-to-work guidance on a regular basis, including guidance on whether employers must pay employees for time spent doing temperature checks ([read that alert here](#)). There are several wage-hour issues specific to the food service industry we wanted to highlight here.

First, most state laws allow employers to pay tipped employees (such as servers and bartenders) at a rate less than the regular minimum wage to account for the tips employees earn as part of their regular duties. This “tip credit” is only available to employers if the tips earned by those employees, when added to their wages, meet or exceed the regular minimum wage. If not, the employer must pay the difference. With most reopening orders limiting restaurant capacity in some way (and with potentially lower guest traffic initially), employers should pay close attention to the tips their employees earn to ensure that they are correctly paying their tipped employees.

Second, some states also prohibit tipped employees from performing certain duties (typically non-tip generating duties unrelated to their tipped work) while being paid less than the minimum wage and/or limit how much time a tipped employee can spend on duties related to their tip generating duties (typically no more than 20%). Some courts have held that the federal Fair Labor Standards Act also requires this. Many restaurants may be opening with fewer staff than normal, and these staff may have increased and/or different non-tip generating duties, such as ensuring compliance with social distancing and other reopening requirements. Restaurants need to carefully monitor the work of tipped employees and ensure they are being paid properly. For example, if tipped employees have new responsibilities, especially before the restaurant opens and after finishing serving customers, they may need to be paid at or above the regular minimum wage for that time. If tipped employees are expected to perform non-tip generating duties concurrently with their tipped duties (like additional cleaning, sanitizing, and enforcing social distancing), their time needs to be monitored carefully and potentially paid at or above the regular minimum wage.

Third, a layoff or a furlough may constitute a “separation” of employment, and so returning employees may technically be new hires. Employers should consider updating and re-issuing tip credit notices to all tipped employees. This is also a good opportunity to ensure that the notices are current. Those notices should state:

- the amount of cash wage the employer is paying the tipped employee;
- the additional amount claimed by the employer as a tip credit, which cannot exceed the difference between the minimum required cash wage and the current minimum wage;
- the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
- all tips received by the tipped employee are to be retained by the employee, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
- the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

Finally, as the pandemic forces companies to innovate, some restaurants and bars have begun delivering food or drinks directly to customers’ homes using restaurant/bar employees (instead of third-party delivery services). There are a number of legal issues that delivery raises, but a major wage-hour issue is expense reimbursement. Several states (California, for example) require employers to reimburse employees for expenses (including mileage). While federal law does not specifically require mileage reimbursement, if an employee’s wages would fall below the minimum wage because of mileage expenses, the employer must reimburse her for those expenses. Since many delivery drivers are minimum wage earners, it is important

to ensure that they are properly reimbursed for their mileage. The current best practice – and one required by some courts – is to follow the IRS standard mileage rate of \$0.575 per mile (as of 2020).

Vorys continues to monitor developments for the hospitality industry on a nationwide basis. If you have any questions, contact your Vorys lawyer.

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VORYS COVID-19 TASK FORCE

Outside of this new law, employers continue to face myriad issues as COVID-19 continues to spread and impact communities and workplaces (some of these issues are addressed in our prior alerts [located here](#)). We will continue to keep you posted on any important developments.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.