OCTOBER 31, 2019 | STATE & LOCAL TRENDS

# Potential and Pending Requirements for D.C. Employers of Tipped Employees

In October 2018, the District of Columbia ("D.C.") Council passed a law called the "Tipped Wage Workers Fairness Amendment Act of 2018" (the "Act"), which had the immediate impact of repealing legislation ("Ballot Initiative 77") that eliminated the use of a tip credit in D.C. Because the D.C. Council repealed Ballot Initiative 77 through passage of the Act, employers with tipped employees are still permitted to take a tip credit toward meeting minimum hourly wage requirements. However, the Act also imposes certain training, reporting, and notice requirements for all employers of tipped employees. Some of these requirements have already gone into effect, while others require budgetary approval before they will kick in. We review some of the more significant requirements below.

Under the Act, all employers of tipped employees will have to provide sexual harassment prevention training to employees, as well as managers, owners, and operators of the business. Specifically, the D.C. Office of Human Rights ("OHR") will make available a sexual harassment training course, or will certify a list of providers to give the training, that covers how to respond to and prevent sexual harassment by co-workers, management, or patrons/guests. The Act mandates that employers provide the training to new hires within 90 days of hire unless they received the training within the last two years. All other workers already employed must receive training within two years. Managers, owners, and operators must then receive training every 2 years and all training should be given in-person or online. If the training is given by a certified provider, the employer must submit a certification to the OHR that the training has been completed. Certification is required within 30 business days after completion.

In addition to sexual harassment training, employers of tipped employees also must maintain a policy that describes how employees can report instances of sexual harassment to management and the OHR. Employers will have to file the policy with the OHR, distribute it to all employees, and post it in a conspicuous location in the workplace accessible to employees. All instances of sexual harassment reported are to be documented – including denoting whether the harasser was a non-managerial employee, managerial employee, owner, or operator – and employers will be required to report the number of instances and the number of each type of harasser identified to OHR.

The deadline to implement sexual harassment training, provide the policy, and report instances of sexual harassment is not yet determined, as this is one of the Act's requirements subject to budgetary funding approval. Indeed, the "Applicability" section of the Act states that "Sections 3, 4, 5, 6(d)(2) and (e), and

amendatory section 6a(d) within Sec. 7" of the Act apply only "upon the date of inclusion of their fiscal effect in an approved budget and financial plan." In other words, much of the Act is still waiting on budgetary approval.

The only provisions of the Act that are currently in effect, in addition to repeal of Ballot Initiative 77, are related to employee and manager training on D.C.'s Minimum Wage Act Revision Act of 1992 ("MWARA"), certain notices to employees regarding their tips, and the third-party payroll and wage reporting requirements. For training on the MWARA, employers of tipped employees must provide in-person or online training on its requirements on a yearly basis to employees, managers, and owners or operators. Subject to budgetary approval, employers will also have to submit certification of this training to the D.C. Department of Employment Services ("DOES").

As to required notices, employers must notify tipped employees of the minimum hourly tipped wage, the percentage by which tips paid with credit card will be reduced to account for credit card fees and, if tips are not shared, that the tipped employees shall retain all tips he or she receives. If tips are shared, the employer must inform its tipped employees of the tip sharing policy and post the tip sharing policy in the workplace.

In addition, beginning January 1, 2020, all employers of tipped workers, excluding hotels, must begin using a third-party payroll service to prepare its payroll. The Act also requires that employers submit a quarterly wage report to DOES within 30 days of the end of each quarter that certifies that each tipped worker was paid at least the required minimum wage, inclusive of gratuities. Employers should already be submitting these quarterly reports online or by hard copy only if it "creates a hardship" on the employer to submit its reports online. As of January 1, 2020, these reports must be submitted online directly by the third-party payroll provider or the hotel employer. Once budgetary approval is given, these quarterly reports will be required to include an itemized list of designated information beyond what it currently mandated.

The Act also includes requirements for the D.C. Mayor and D.C. government, such as (1) creating and maintaining a website that provides information about employee rights under anti-discrimination and other labor laws; (2) generating written materials on the rights of tipped workers to be used by employers; (3) developing a system to report violations of certain D.C. laws; and (4) creating a Tipped Workers Coordinating Council to, among other things, improve coordination of wage policies for tipped workers and review wage theft cases involving tipped workers. These requirements generally fall within the sections of the Act that are pending budgetary funding approval and, thus, do not currently have set deadlines.

Although the Act creates a number of significant obligations for employers of tipped employees, the most important mandates at this point are those that have already taken effect or have imminent deadlines. Specifically, D.C. employers of tipped employees should ensure that they are providing training on the requirements of the MWARA and have notified tipped employees of the necessary information related to their wages. Notably, if the employer has a tip sharing policy, tipped employees should not only be instructed on that policy, but the policy should be posted. In addition, employers or tipped employees must file their quarterly reports and be prepared to transition to a third-party payroll provider as of January 1, 2020, unless this transition has already occurred, or the employer is a hotel.