

**Minimum Wage Order for the Hotel Industry**

Part 138 of Title 12 of the Official Compilation of Codes, Rules, and Regulations of the state of New York (Cited as 12 NYCRR 138)

Promulgated by the Commissioner of Labor Pursuant to the Minimum Wage Act  
(Article 19 of the New York State Labor Law)

Statutory authority: Labor Law, Article 2, § 21 (11) and Article 19, § 652



As amended  
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**Part 138**  
**Hotel Industry**

- Subpart 138-1 Coverage
- Subpart 138-2 Minimum Wage and Allowances
- Subpart 138-3 Regulations
- Subpart 138-4 Definitions
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**Subpart 138-1**  
**Coverage**

**§ 138-1.1 Coverage of Part.**

Every employer in the hotel industry shall pay to each employee, as defined in this Part, not less than the minimum wage rates provided in this Part.

**Subpart 138-2**  
**Minimum Wage and Allowances**

Section

- 138-2.1 Basic minimum hourly wage rate and type allowances – all-year and resort hotels
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**§ 138-2.1 Basic minimum hourly wage rate and tip allowances--all-year and resort hotels.**

(a) Basic minimum hourly wage rate.

- (1) \$5.15 per hour on and after March 31, 2000;
- (2) \$6.00 per hour on and after January 1, 2005;
- (3) \$6.75 per hour on and after January 1, 2006;
- (4) \$7.15 per hour on and after January 1, 2007;
- (5) \$7.25 per hour on and after July 24, 2009; or, if greater, such other wage as may be established by Federal law pursuant to 29 U.S.C. section 206 or any successor provisions.

(b) *Tip allowance for service employees.*

- (1) On and after March 31, 2000, allowance for tips shall not exceed \$1.15 an hour for an employee whose weekly average of tips received is between \$1.15 and \$1.65 per hour and shall not exceed \$1.65 per hour for an employee whose weekly average of tips received is \$1.65 per hour or more. FOR RESORT HOTELS ONLY, the allowance for

tips shall not exceed \$2.05 per hour for an employee whose weekly average of tips received exceeds \$2.90 per hour.

(2) On and after January 1, 2005, allowance for tips shall not exceed \$1.35 an hour for an employee whose weekly average of tips received is between \$1.35 and \$1.90 per hour and shall not exceed \$1.90 per hour for an employee whose weekly average of tips received is \$1.90 per hour or more. FOR RESORT HOTELS ONLY, the allowance for tips shall not exceed \$2.40 per hour for an employee whose weekly average of tips received exceeds \$3.40 per hour.

(3) On and after January 1, 2006, allowance for tips shall not exceed \$1.50 an hour for an employee whose weekly average of tips received is between \$1.50 and \$2.15 per hour and shall not exceed \$2.15 per hour for an employee whose weekly average of tips received is \$2.15 per hour or more. FOR RESORT HOTELS ONLY, the allowance for tips shall not exceed \$2.70 per hour for an employee whose weekly average of tips received exceeds \$3.80 per hour.

(4) On and after January 1, 2007 allowance for tips shall not exceed \$1.60 an hour for an employee whose weekly average of tips received is between \$1.60 and \$2.30 per hour and shall not exceed \$2.30 per hour for an employee whose weekly average of tips received is \$2.30 per hour or more. FOR RESORT HOTELS ONLY, the allowance for tips shall not exceed \$2.85 per hour for an employee whose weekly average of tips received exceeds \$4.05 per hour.

(5) On and after July 24, 2009, allowance for tips shall not exceed \$1.60 per hour for an employee whose weekly average of tips received is between \$1.60 and \$2.35 per hour and shall not exceed \$2.35 per hour for an employee whose weekly average of tips received is \$2.35 per hour or more. FOR RESORT HOTELS ONLY, the allowance for tips shall not exceed \$2.90 per hour for an employee whose weekly average of tips exceeds \$4.10 per hour.

(c) *Tip allowance for food service worker.*

(1) On and after March 31, 2000, a food service worker shall receive a cash wage of at least \$3.30 per hour, provided that the tips received when added to such cash wage are equal to or exceed \$5.15 per hour;

(2) On and after January 1, 2005, a food service worker shall receive a cash wage of at least \$3.85 per hour, provided that the tips received when added to such cash wage are equal to or exceed \$6.00 per hour;

(3) On and after January 1, 2006, a food service worker shall receive a cash wage of at least \$4.35 per hour, provided that the tips received when added to such cash wage are equal to or exceed \$6.75 per hour;

(4) On and after January 1, 2007, a food service worker shall receive a cash wage of at least \$4.60 per hour, provided that the tips received when added to such cash wage are equal to or exceed \$7.15 per hour;

(5) On and after July 24, 2009, a food service worker shall receive a cash wage of at least \$4.65 per hour, provided that the tips received when added to such cash wage are equal to or exceed \$7.25 per hour.

(d) *Tip allowance for chambermaids in resort hotels.*

(1) On and after March 31, 2000, allowance for tips shall not exceed 80 cents per hour for an employee whose weekly average of tips received is between 80 cents and \$2.90 per hour and shall not exceed \$1.65 per hour for an employee whose weekly average of tips received is more than \$2.90 per hour;

(2) On and after January 1, 2005, allowance for tips shall not exceed 95 cents per hour for an employee whose weekly average of tips received is between 95 cents and \$3.40 per hour and shall not exceed \$1.90 per hour for an employee whose weekly average of tips received is more than \$3.40 per hour;

(3) On and after January 1, 2006, allowance for tips shall not exceed \$1.05 per hour for an employee whose weekly average of tips received is between \$1.05 and \$3.80 per hour and shall not exceed \$2.15 per hour for an employee whose weekly average of tips received is more than \$3.80 per hour;

(4) On and after January 1, 2007, allowance for tips shall not exceed \$1.10 per hour for an employee whose weekly average of tips received is between \$1.10 and \$4.05 per hour and shall not exceed \$2.30 per hour for an employee whose weekly average of tips received is more than \$4.05 per hour;

(5) On and after July 24, 2009, allowance for tips shall not exceed \$1.10 per hour for an employee whose weekly average of tips received is between \$1.10 and \$4.10 per hour and shall not exceed \$2.35 per hour for an employee whose weekly average of tips received is more than \$4.10 per hour.

**§ 138-2.2 Overtime hourly rates.**

An employer shall pay an employee for overtime at a wage rate of 1 1/2 times the employee's regular rate for hours worked in excess of maximum hours as listed below.

	<i>Nonresidential Employees</i>	<i>Residential employees</i>
For working time over	40 hours	44 hours

To all employees of resort hotels on the seventh consecutive day in any week, for the hours worked on such seventh consecutive day.

**§ 138-2.3 Call-in pay.**

(a) Where a nonresidential employee by request or permission of the employer reports for duty on any day, whether or not assigned to actual work, the employer shall pay:

(1) for at least three hours for one shift, or the number of hours in the regularly scheduled shift, whichever is less;

(2) for at least six hours for two shifts totalling six hours or less, or the number of hours in the regularly scheduled shift, whichever is less;

(3) for at least eight hours for three shifts totalling eight hours or less, or the number of hours in the regularly scheduled shifts, whichever is less.

(b) Payment shall be at the applicable minimum wage rate after allowance for tips for the time actually worked and without allowance for tips for the balance of the period.

**§ 138-2.4 Rate for working time, waiting time and travel time.**

(a) *All-year hotels.*

(1) *Working time* means actual service or time of permitted attendance at the establishment, and time spent in traveling at the request of the employer from one of the employer's establishments to another.

(2) *Waiting time*, other than time off duty for a split shift, during which an employee is required or permitted to wait during the workday while no work is provided by the employer, shall be counted as working time. Such waiting time shall be paid for at not less than the minimum rate before taking into account any allowances for tips, and after taking into account any allowance for meals and the total number of hours of working time for that week.

(3) An employee required or permitted to travel from one establishment to another of the same employer after the beginning or before the close of the working day shall be compensated for *travel time* at the minimum rate before taking into account any allowances for tips and shall be reimbursed for fare.

(b) *Resort hotels.* *Working time* means that an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee.

(c) *All hotels.* A residential employee shall not be deemed to be permitted to work or required to be available for work:

(1) during such employee's normal sleeping hours solely because such employee is required to be on call during such hours; or

(2) at any other time when such employee is free to leave the place of employment.

**§ 138-2.5 Required uniforms.**

No allowance for the supply, maintenance, or laundering of required uniforms shall be permitted as part of the minimum wage. Where an employee purchases a required uniform, he shall be reimbursed by the employer for the cost thereof not later than the time of the next payment of wages. Where the employer fails to launder or maintain required uniforms for any employee, he shall pay such employee in addition to the minimum wage prescribed herein:

(a) On and after March 31, 2000, \$6.40 per week if the employee works more than 30 hours weekly; \$5.05 per week if the employee works more than 20 but not more than 30 hours weekly; and \$3.05 per week if the employee works 20 hours or less weekly;

(b) On and after January 1, 2005, \$7.45 per week if the employee works more than 30 hours weekly; \$5.90 per week if the employee works more than 20 but not more than 30 hours weekly; and \$3.55 per week if the employee works 20 hours or less weekly;

(c) On and after January 1, 2006, \$8.40 per week if the employee works more than 30 hours weekly; \$6.60 per week if the employee works more than 20 but not more than 30 hours weekly; and \$4.00 per week if the employee works 20 hours or less weekly;

(d) On and after January 1, 2007, \$8.90 per week if the employee works more than 30 hours weekly; \$7.00 per week if the employee works more than 20 but not more than 30 hours weekly; and \$4.25 per week if the employee works 20 hours or less weekly;

(e) On and after July 24, 2009, \$9.00 per week if the employee works more than 30 hours weekly; \$7.10 per week if the employee works more than 20 but not more than 30 hours weekly; and \$4.30 per week if the employee works 20 hours or less weekly.

**§ 138-2.6 Additional rate for spread of hours – all-year hotels only.**

A nonresidential employee in an all-year hotel shall receive one hour's pay at the basic minimum hourly wage rate before allowances, in addition to the minimum wages otherwise required in this Part, for any day in which the spread of hours exceeds 10.

**§ 138-2.7 Allowances for meals and lodging.**

(a) *Allowance for meals – all year hotels.*

(1) Meals furnished by an employer to an employee may be considered part of the minimum wage, but shall be valued at not more than:

(i) On and after March 31, 2000, \$1.65 per meal for food service workers earning at least \$3.30 per hour; and \$1.75 per meal for all other workers;

(ii) On and after January 1, 2005, \$1.85 per meal for food service workers earning at least \$3.85 per hour; and \$2.05 per meal for all other workers;

(iii) On and after January 1, 2006, \$2.00 per meal for food service workers earning at least \$4.35 per hour; and \$2.30 per meal for all other workers;

(iv) On and after January 1, 2007, \$2.10 per meal for food service workers earning at least \$4.60 per hour; and \$2.45 per meal for all other workers;

(v) On and after July 24, 2009, \$2.10 per meal for food service workers earning at least \$4.65 per hour; and \$2.50 per meal for all other workers.

(2) For an employee working less than 5 hours on any day, the allowance for meals shall not exceed that for one meal.

(b) *Allowance for lodging--all-year hotels.*

Lodging furnished by an employer to an employee in an all-year hotel may be considered a part of the minimum wage, but shall be valued at not more than 25 cents per hour on and after March 31, 2000; not more than 30 cents per hour on and after January 1, 2005; and not more than 35 cents per hour on and after January 1, 2006.

(c) *Allowances for meals and lodging--resort hotels.*

Meals and lodging furnished by an employer to an employee in a resort hotel may be considered a part of the minimum wage, but shall be valued at not more than:

(1) Lodging and three meals per day:

(i) On and after March 31, 2000, \$10.90 per day for a food service worker earning at least \$3.30 per hour; and \$11.55 per day for each day worked by all other workers;

(ii) On and after January 1, 2005, \$12.10 per day for a food service worker earning at least \$3.85 per hour; and \$13.45 per day for each day worked by all other workers;

(iii) On and after January 1, 2006, \$13.10 per day for a food service worker earning at least \$4.35 per hour; and \$15.15 per day for each day worked by all other workers;

(iv) On and after January 1, 2007, \$13.60 per day for a food service worker earning at least \$4.60 per hour; and \$16.05 per day for each day worked by all other workers;

(v) On and after July 24, 2009, \$13.75 per day for a food service worker earning at least \$4.65 per hour; and \$16.25 per day for each day worked by all other workers.

(2) Meals furnished by an employer to a non-residential employee:

(i) On and after March 31, 2000, \$2.15 per meal on workdays for a food service worker earning at least \$3.30 per hour; and \$2.30 per meal on workdays for all other workers;

(ii) On and after January 1, 2005, \$2.40 per meal on workdays for a food service worker earning at least \$3.85 per hour; and \$2.70 per meal on workdays for all other workers;

(iii) On and after January 1, 2006, \$2.60 per meal on workdays for a food service worker earning at least \$4.35 per hour; and \$3.00 per meal on workdays for all other workers;

(iv) On and after January 1, 2007, \$2.70 per meal on workdays for a food service worker earning at least \$4.60 per hour; and \$3.20 per meal on workdays for all other workers;

(v) On and after July 24, 2009, \$2.75 per meal on workdays for a food service worker earning at least \$4.65 per hour; and \$3.25 per meal on workdays for all other workers.

(3) Lodging furnished without meals:

(i) 25 cents an hour on and after March 31, 2000;

(ii) 30 cents an hour on and after January 1, 2005; and

(iii) 35 cents an hour on and after January 1, 2006.

### **Subpart 138-3**

#### **Regulations**

#### Section

138-3.1 Employer records

138-3.2 Statement to employee

138-3.3 Posting

138-3.4 Lodging and meals

- 138-3.5 Basis of wage payment
- 138-3.6 Deductions and expenses
- 138-3.7 Diversified employment
- 138-3.8 Employment covered by more than one wage order
- 138-3.9 Learner or apprentice
- 138-3.10 Rehabilitation programs
- 138-3.11 Student obtaining vocational experience

**§ 138-3.1 Employer records.**

(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:

- (1) name and address;
- (2) social security number;
- (3) the number of hours worked daily and weekly, including the time of arrival and departure of each *nonresidential* employee working on a split shift, and of each *nonresidential* employee in an all-year hotel with a spread of hours exceeding 10;
- (4) the amount of gross wages, job classification and wage rate;
- (5) deductions from gross wages;
- (6) allowances, if any, claimed as part of the minimum wage;
- (7) money paid in cash; and
- (8) student classification.

(b) In addition, for each individual permitted to work as a staff counselor in a children's camp, or in an executive, administrative or professional capacity, an employer's records shall show:

- (1) name and address;
- (2) social security number;
- (3) description of occupation; and
- (4) for individuals working in an executive or administrative capacity, total wages, and the value of allowances, if any, for each payroll period.

(c) For each individual for whom student status is claimed, a statement from the school indicating whether or not such individual:

- (1) is a student and his course of instruction is one leading to a degree, diploma or certificate; or
- (2) is completing residence requirements for a degree;
- (3) is required to obtain supervised and directed vocational experience to fulfill curriculum requirements.

(d) Employers, including those who maintain their records containing the information required by this section at a place outside of New York State, shall make such records or sworn certified copies thereof available upon request of the commissioner at the place of employment.

**§ 138-3.2 Statement to employee.**

Every employer covered by this Part shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions, and net wages.

**§ 138-3.3 Posting.**

Every employer covered by this Part shall post in a conspicuous place in his or her establishment a notice issued by the Department of Labor summarizing minimum wage provisions.

**§ 138-3.4 Lodging and meals.**

(a) No charge shall be made by an employer for lodging or for any meal furnished by the employer to an employee whose compensation is predicated on the inclusion of lodging or meals. A residential employee in a resort hotel whose compensation is predicated on the inclusion of meals shall receive three meals per day.

(b) Nothing herein contained shall prevent an employee purchasing from the employer, or the employer selling to the employee:

- (1) in an all-year hotel, meals at other times or places than those provided as part of his compensation;
- (2) in a resort hotel, food in addition to meals provided as part of his compensation.

**§ 138-3.5 Basis of wage payment.**

The minimum wage provided by this Part shall be required for each week of work, regardless of the frequency of payment, whether the wage is on a commission, bonus, piece rate, or any other basis.

**§ 138-3.6 Deductions and expenses.**

(a) Wages shall be subject to no deductions, except for allowances authorized in this Part, and except for deductions authorized or required by law, such as for social security and income tax. Some examples of prohibited deductions are:

- (1) deductions for spoilage or breakage;
- (2) deductions for cash shortages or losses;
- (3) fines or penalties for lateness, misconduct, or quitting by an employee without notice.

(b) The minimum wage shall not be reduced by expenses incurred by an employee in carrying out duties assigned by his employer.

**§ 138-3.7 Diversified employment.**

The wages of an employee who works at diversified employment on any day shall be subject to no allowance for gratuities for that day, provided he works for two hours or more as a nonservice employee. The wages of a service employee or a food service worker in a resort hotel who works for two hours or more on any day as a chambermaid shall be subject to the allowance for chambermaid for that day.

**§ 138-3.8 Employment covered by more than one wage order.**

An employee in the hotel industry who works for the same employer at an occupation governed by another New York State minimum wage order:

- (a) for two or more hours during any one day, or
- (b) for 12 or more hours in any week

shall be paid for all his hours of working time for that day or week in accordance with the minimum wage standards contained in the minimum wage order for such other industry or the hotel industry, whichever is higher.

**§ 138-3.9 Learner or apprentice.**

No learner or apprentice shall be paid less than the minimum rate prescribed in this Part.

**§ 138-3.10 Rehabilitation programs.**

For an individual employed as part of a rehabilitation program approved by the commissioner, the payment of compensation under such a program shall be deemed to meet the requirements of this Part.

**§ 138-3.11 Student obtaining vocational experience.**

A student is not deemed to be working or to be permitted to work if, in order to fulfill the curriculum requirements of the educational institution which the student attends, such student is required to obtain supervised and directed vocational experience in another establishment.

**Subpart 138-4**

**Definitions**

Section

- 138-4.1 Hotel industry
- 138-4.2 Resort hotel
- 138-4.3 All-year hotel
- 138-4.4 Employee
- 138-4.5 Service employee
- 138-4.6 Nonservice employee
- 138-4.7 Food service worker
- 138-4.8 Chambermaid
- 139-4.9 Voluntary absence
- 138-4.10 Meals
- 138-4.11 Lodging
- 138-4.12 Split shift
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- 138-4.14 Interval off duty
- 138-4.15 Required uniforms
- 138-4.16 Regular rate
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### **§ 138-4.1 Hotel industry.**

(a) The term *hotel industry* includes any establishment which as a whole or part of its business activities offers lodging accommodations for hire to the public, to employees, or to members or guests of members, and services in connection therewith or incidental thereto. The industry includes but is not limited to commercial hotels, apartment hotels, resort hotels, lodging houses, boarding houses, furnished room houses, children's camps, adult camps, tourist camps, tourist homes, auto camps, motels, residence clubs, membership clubs, dude ranches, Turkish baths and Russian baths.

(b) The term hotel industry excludes:

(1) eating and drinking places (i) customarily offering lodging accommodations only to their own employees; (ii) customarily offering lodging accommodations of less than five rooms to the public, or to members or guests of members whether or not lodging accommodations are offered to their own employees;

(2) establishments in which lodging accommodation is not available to the public, or to members or to guests of members, but is incidental to instruction, medical care, religious observance, or to the care of handicapped or destitute persons or other public charges;

(3) establishments in which lodging accommodations are offered by any corporation, unincorporated association, community chest, fund or foundation organized exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

These exclusions shall not be deemed to exclude such establishments from coverage under another minimum wage order which covers them.

### **§ 138-4.2 Resort hotel.**

A *resort hotel* is one which offers lodging accommodations of a vacational nature to the public or to members or guests of members, and which:

(a) operates for not more than seven months in any calendar year; or

(b) being located in a rural community or in a city or village of less than 15,000 population, increased its number of employee workdays during any consecutive four-week period by at least 100 percent over the number of employee workdays in any other consecutive four-week period within the preceding calendar year; or

(c) being located in a rural community or in a city or village of less than 15,000 population, increased its number of guest days during any consecutive four-week period at least 100 percent over the number of guest days in any other consecutive four-week period in a preceding calendar year.

### **§ 138-4.3 All-year hotel.**

An *all-year hotel* is one that does not qualify as a resort hotel under the foregoing definition. Motor courts, motels, cabins, tourist homes, and other establishments serving similar purposes shall be classified as all-year hotels unless they specifically qualify as a resort hotel in accordance with the foregoing definition thereof.

**§ 138-4.4 Employee.**

(a) *Employee* means any individual permitted to work in the hotel industry by the operator of the establishment or by any other employer, except as provided below.

(1) Golf caddies shall be excluded from this definition. This exclusion shall not be deemed to exclude caddies from another minimum wage order which covers such employees.

(2) A camper who works no more than four hours a day for a children's camp and at all other times enjoys the same privileges, facilities and accommodations as a regular camper in such camp shall be known as a camper worker and shall not be an employee within the meaning of this Part.

(3) Turkish bath workers employed by concessionaires in hotels or by Turkish baths operated independently of hotels are excluded from this definition, except that such workers are employees under this Part if they are employed in connection with the lodging facilities of the establishment. Turkish bath workers employed by hotels are employees under this Part.

(b) Employee also does not include any individual employed by a Federal, State or municipal government or political subdivision thereof.

(c) Employee also does not include an individual employed in, or as:

(1) Executive, administrative or professional capacity.

(i) Executive. Work in a *bona fide executive capacity* means work by an individual:

(a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof; and

(b) who customarily and regularly directs the work or two or more other employees therein; and

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) who customarily and regularly exercises discretionary powers; and

(e) who is paid for his services a salary of not less than:

(1) \$386.25 per week on and after March 31, 2000, inclusive of board, lodging, other allowances and facilities;

(2) \$450.00 per week on and after January 1, 2005, inclusive of board, lodging, other allowances and facilities;

(3) \$506.25 per week on and after January 1, 2006, inclusive of board, lodging, other allowances and facilities;

(4) \$536.10 per week on and after January 1, 2007, inclusive of board, lodging, other allowances and facilities;

(5) \$543.75 per week on and after July 24, 2009, inclusive of board, lodging, other allowances and facilities.

(ii) Administrative. Work in a *bona fide administrative capacity* means work by an individual:

(a) whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general operations of his employer; and

(b) who customarily and regularly exercises discretion and independent judgment; and

(c) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (*e.g.*, employment as an administrative assistant); or who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge; and

(d) who is paid for his services a salary of not less than:

(1) \$386.25 per week on and after March 31, 2000 inclusive of board, lodging, other allowances and facilities;

(2) \$450.00 per week on and after January 1, 2005, inclusive of board, lodging , other allowances and facilities;

(3) \$506.25 per week on and after January 1, 2006, inclusive of board, lodging , other allowances and facilities;

(4) \$536.10 per week on and after January 1, 2007, inclusive of board, lodging , other allowances and facilities;

(5) \$543.75 per week on and after July 24, 2009, inclusive of board, lodging, other allowances and facilities.

(iii) Professional. Work in a *bona fide professional capacity* means work by an individual:

(a) whose primary duty consists of the performance of work:

requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical process; or

original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and

(b) whose work requires the consistent exercise of discretion and judgment in its performance; or

(c) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work), and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(2) Outside salesperson. The term *outside salesperson* means an individual who is customarily and predominantly engaged away from the premises of the employer and not at any fixed site and location for the purpose of:

(i) making sales; or

(ii) selling and delivering articles or goods; or

(iii) obtaining orders or contracts for service or for the use of facilities.

(3) Staff counselor in children's camps.

(i) A *staff counselor* is a person whose duties primarily relate to the guidance, instruction, supervision and care of campers in children's camps, whether such work involves direct charge of, or responsibility for, such activities, or merely assistance to persons in charge. The term *staff counselor* includes, but is not limited to: head counselor, assistant head counselor, specialists counselor or instructor (such as swimming counselor, arts and crafts counselor, etc.), group or division leader, camp mother, supervising counselor, senior counselor, counselor, general counselor, bunk counselor, assistant counselor, co-counselor, junior counselor, and counselor aide.

(ii) *Children's camp* means any establishment which, as a whole or part of its business activities, is engaged in offering for children, on a resident or nonresident basis, recreational programs of supervised play or organized activity in such fields as sports, nature lore, and arts and crafts, whether known as camps, play groups, play schools, or by any other name. The term children's camp does not include an establishment which is open for a period exceeding 17 consecutive weeks during the year.

#### **§ 138-4.5 Service employee.**

(a) A *service employee* is an employee, other than a food service worker, who customarily receives tips of at least:

(1) \$1.15 per hour on and after March 31, 2000;

(2) \$1.35 per hour on and after January 1, 2005;

(3) \$1.50 per hour on and after January 1, 2006; and

(4) \$1.60 per hour on and after January 1, 2007.

(b) It shall be presumed that employees whose duties relate solely to any of the following services are *service employees*:

(1) table waiters, prior to March 31, 2000;

- (2) bellmen;
- (3) baggage porters;
- (4) package-room messengers or delivery boys;
- (5) doormen and footmen;
- (6) busboys in resort hotels, and
- (7) page boys.

(c) It shall be presumed that all employees other than those mentioned in subdivisions (a) and (b) of this section are nonservice employees or food service workers (except for resort hotel chambermaid). Substantial proof must be presented to the Department of Labor to rebut these presumptions.

**§ 138-4.6 Nonservice employee.**

(a) A *nonservice employee* is any employee other than a service employee, a food service worker or a resort hotel chambermaid.

(b) In resort hotels a chambermaid shall be deemed a nonservice employee if she fails to receive tips of at least:

- (1) 80 cents per hour on and after March 31, 2000;
- (2) 95 cents per hour on and after January 1, 2005;
- (3) \$1.05 per hour on and after January 1, 2006; and
- (4) \$1.10 per hour on and after January 1, 2007.

**§ 138-4.7 Food service worker.**

A *food service worker* is one who on and after March 31, 2000, is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hotel or restaurant industries, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers.

**§ 138-4.8 Chambermaid.**

A *chambermaid* means any employee in a resort hotel whose duties relate solely to the cleaning and servicing of guest rooms and who customarily receives tips of at least:

- (1) 80 cents per hour on and after March 31, 2000;
- (2) 95 cents per hour on and after January 1, 2005;
- (3) \$1.05 per hour on and after January 1, 2006; and
- (4) \$1.10 per hour on and after January 1, 2007.

**§ 138-4.9 Voluntary absence.**

*Voluntary absence* means an absence which is not designed or planned by the employee or the employer to evade minimum wage standards. Recurrent or periodic absence is not voluntary absence except for medical treatment under a doctor's care.

**§ 138-4.10 Meals.**

(a) A *meal* shall provide adequate portions of a variety of wholesome, nutritious foods. As a standard it should include at least one of the types of food from all four of the following groups:

- (1) fruits or vegetables;
- (2) cereals, bread or potatoes;
- (3) eggs, meat, fish or poultry; and
- (4) milk, tea or coffee;

except that for breakfast, group (3) may be omitted if both cereal and bread are offered in group (2).

(b) Meals shall be deemed to be furnished by an employer to an employee when made available to the employee during reasonable meal periods and customarily eaten by the employee.

**§ 138-4.11 Lodging.**

*Lodging* means living accommodations which meet the standards prescribed in Subpart 138-5 of this Part, standards for lodging of employees in the hotel industry for the purpose of permitting an allowance for lodging, and are used by the employee.

**§ 138-4.12 Split shift.**

A *split shift* is a schedule of daily hours in which the hours of work required or permitted are not consecutive. Interruption of working hours for any meal period of one hour or less does not constitute a split shift.

**§ 138-4.13 Spread of hours.**

The *spread of hours* is the interval between the beginning and end of the workday. The spread of hours for any day shall include working time plus time off for meals plus time off duty.

**§ 138-4.14 Interval off duty.**

An *interval off duty* is the time during the workday, other than working time, waiting time, travel time and time off duty, for any meal period of one hour or less.

**§ 138-4.15 Required uniforms.**

A *required uniform* shall be that clothing worn by an employee, at the request of an employer, while performing job-related duties or to comply with any State, city or local law, rule or regulation. It does not, however, include clothing that may be worn as part of an employee's ordinary wardrobe.

**§ 138-4.16 Regular rate.**

The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece rate, salary, or any other basis than hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings.

### **§ 138-4.17 Diversified employment.**

The term *diversified employment* means employment in an all-year hotel of any employee who is required or permitted to perform either the duties of a service employee or food service worker as well as those of a nonservice employee, and the employment in a resort hotel of an employee who is required or permitted to perform either the duties of a service employee or food service worker as well as those of a chambermaid, or the duties of a chambermaid as well as those of a nonservice employee, or the duties of a service employee or food service worker as well as those of a nonservice employee.

## **Subpart 138-5**

### **Standards for Lodging of Employees in the Hotel Industry for the Purpose of Permitting an Allowance for Lodging**

#### Section

138-5.1 Structural standards

138-5.2 Water, waterclosets, washing facilities

138-5.3 Site of room and area per person

138-5.4 Light and heat

138-5.5 Furniture, beds, storage space, etc.

138-5.6 Cleanliness

#### **§ 138-5.1 Structural standards.**

- (a) The building in which hotel employees are lodged should be in good repair, have a satisfactory floor, and watertight roof and sides.
- (b) The premises in which hotel employees are lodged should be in compliance with standards for protection against fire, and with all structural, sanitation and similar standards in State and local laws, codes, regulations and ordinances applicable to the premises.
- (c) *Windows and ventilation.* For sleeping quarters, natural light through clear glass should be provided by windows having a total area within the casements of at least 10 percent of the floor area of the room. Natural ventilation should be furnished in sleeping quarters by an openable window area of at least five percent of the floor area of the room. Doors opening from sleeping quarters directly to the outside of the structure should not be considered a part of the area required to be openable for ventilation. Adequate light and natural or mechanical ventilation should be provided in toilet rooms and bathrooms.
- (d) *Screens.* Effective screening against mosquitoes and house flies should be provided between May 1st and October 15th for all windows and exterior openings of living quarters.

#### **§ 138-5.2 Water, waterclosets, washing facilities.**

- (a) *Water.* Drinking water acceptable to the local health authority should be readily available and easily accessible.
- (b) *Toilets.*
  - (1) Adequate toilet facilities should be provided. These facilities should provide for privacy, and should be so constructed and maintained that they will not be offensive.

Privies shall be considered inadequate toilet facilities. Toilet facilities should be separate for each sex, except when used by less than seven persons, and except where building is occupied by one sex.

(2) Except when used by less than seven persons, there should be at least the following: one toilet for each 10 persons or less of each sex. Urinals may be substituted for not more than one half of the required toilets for men.

(3) The required toilet facilities should be easily accessible, should be located in the same building as the sleeping facilities or adjacent thereto, and should be no more than one floor above or below the sleeping room, and be within 200 feet, by walking distance, of a door of each sleeping room. They shall be so located as to be accessible without any person passing through any sleeping room other than his own.

(c) *Washing facilities.* At least one shower head or bathtub should be provided for each 20 persons or less of each sex. Bathing facilities should be separate for each sex, except when used by less than seven persons. Hot and cold running water should be provided for every shower head or bathtub. Adequate handwashing facilities with hot and cold running water should be provided in sleeping rooms or adjacent to toilet or sleeping facilities.

#### **§ 138-5.3 Size of room and area per person.**

A room used as sleeping quarters should contain for single occupancy at least 60 square feet; for multiple occupancy at least 40 square feet of floor area for each person; provided, however, that if a double-deck unit is substituted for a single-level bed, bunk or cot, there should be at least 35 square feet of floor area for each person using the double-deck unit. The required floor area in a room in a building should consist only of that part of the floor area which has a clear height above it of at least five feet, and at least 80 percent of the required floor area should have a continuously clear height above it of at least six feet six inches. Sleeping quarters should be separate for each sex, except for married couples.

#### **§ 138-5.4 Light and heat.**

(a) *Heat.* All rooms occupied between October 1st and May 1st should have heating facilities which are properly vented and shielded and capable of maintaining a minimum temperature of 68°F in each room, and such temperature should be maintained at least between 6 a.m. and 10 p.m. whenever the outdoor temperature falls below 50°F.

(b) *Light.* Adequate light should be provided for sleeping quarters, toilet rooms, public halls, and stairs. If electric current is available, at least one electric light outlet with fixtures in proper working condition should be provided in each sleeping room, toilet room, bathroom, public hall, and on stairs.

#### **§ 138-5.5 Furniture, beds, storage space, etc.**

(a) *Beds, etc.* The employer should supply every employee with an individual bed or bunk or cot, bed or bunk spring, mattress, pillow, blanket or other cover all of which shall be clean and in good condition. Every bed, bunk or cot should be raised at least one foot from the floor, be located at least two feet from the side of any other bed, bunk or cot located in the same room, and have at least 27 inches of air space above it.

(b) *Storage space.* Every person should be supplied, in the sleeping quarters, with adequate space for storage of his or her clothes and other possessions.

(c) *Linens.* Clean sheets, towels and pillowcases should be supplied weekly by the employer.

**§ 138-5.6 Cleanliness.**

The building should be maintained in a clean and sanitary condition free of vermin, rodents, garbage, or other matter dangerous to life or health. The grounds of the building should be maintained in a clean and reasonably dry condition.