

STATE OF NEW YORK DEPARTMENT OF LABOR



Minimum Wage Order for the Restaurant Industry

Part 137 of Title 12 of Official Compilation of Codes, Rules and Regulations

Effective July 24, 2009

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

PART 137
RESTAURANT INDUSTRY

Subpart 137-1 Minimum Wage and Allowances
Subpart 137-2 Regulations
Subpart 137-3 Definitions

SUBPART 137-1
MINIMUM WAGE AND ALLOWANCES

Section

- 137-1.1 Application
- 137-1.2 Basic minimum hourly wage rates
- 137-1.3 Overtime hourly rate
- 137-1.4 Tip allowance for service employees
- 137-1.5 Tip allowance for food service worker
- 137-1.6 Call-in pay rate
- 137-1.7 Additional rate for spread of hours
- 137-1.8 Rate for required uniforms
- 137-1.9 Allowances for meals and lodging

§ 137-1.1 Application.

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

§ 137-1.2 Basic minimum hourly wage rates.

The basic minimum hourly rate shall be:

- (a) \$5.15 per hour on and after March 31, 2000;
- (b) \$6.00 per hour on and after January 1, 2005;
- (c) \$6.75 per hour on or after January 1, 2006;
- (d) \$7.15 per hour on and after January 1, 2007;
- (e) \$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.

§ 137-1.3 Overtime hourly rate.

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 40 hours in one workweek.

§ 137-1.4 Tip allowance for service employees.

- (a) Allowance for tips shall not exceed:

(1) On and after March 31, 2000, \$1.15 an hour for an employee whose average of tips received is between \$1.15 and \$1.65 per hour; \$1.65 per hour for an employee whose average tips received is \$1.65 per hour or more;

(2) On and after January 1, 2005, \$1.35 an hour for an employee whose average of tips received is between \$1.35 and \$1.90 per hour; \$1.90 per hour for an employee whose average of tips received is \$1.90 per hour or more;

(3) On and after January 1, 2006, \$1.50 an hour for an employee whose average of tips received is between \$1.50 and \$2.15 per hour; \$2.15 per hour for an employee whose average of tips received is \$2.15 per hour or more;

(4) On and after January 1, 2007, \$1.60 an hour for an employee whose average of tips received is between \$1.60 and \$2.30 per hour; \$2.30 per hour for an employee whose average of tips received is \$2.30 per hour or more;

(5) On and after July 24, 2009, \$1.60 per hour for an employee whose average of tips received is between \$1.60 and \$2.35 per hour; \$2.35 per hour for an employee whose average of tips received is \$2.35 per hour or more.

(b) No allowance for tips or gratuities shall be permitted for an employee whose weekly average of tips is less than:

(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.

§ 137-1.5 Tip allowance for food service worker.

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

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

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

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

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

§ 137-1.6 Call-in pay rate.

(a) An employee who by request or permission of the employer reports for duty on any day, whether or not assigned to actual work, shall be paid at the applicable minimum wage rate:

(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; and

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

§ 137-1.7 Additional rate for spread of hours.

On each day in which the spread of hours exceeds 10, an employee 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.

§ 137-1.8 Rate for 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) \$6.40 per week on and after March 31, 2000, if the employee works more than 30 hours weekly; \$5.05 per week on and after March 31, 2000, if the employee works more than 20 but not more than 30 hours weekly; and \$3.05 per week on and after March 31, 2000, if the employee works 20 hours or less weekly.

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

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

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

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

§ 137-1.9 Allowances for meals and lodging.

(a) Allowances for meals.

(1) Meals furnished by an employer to an employee shall be valued at no more than:

(i) \$1.65 per meal on and after March 31, 2000, for food service workers receiving a cash wage of at least \$3.30 per hour; and \$1.75 per meal on and after March 31, 2000, for all other workers;

(ii) \$1.85 per meal on and after January 1, 2005, for food service workers receiving a cash wage of at least \$3.85 per hour; and \$2.05 per meal on and after January 1, 2005, for all other workers;

(iii) \$2.00 per meal on and after January 1, 2006, for food service workers receiving a cash wage of at least \$4.35 per hour; and \$2.30 per meal on and after January 1, 2006, for all other workers;

(iv) \$2.10 per meal on and after January 1, 2007, for food service workers receiving a cash wage of at least \$4.60 per hour; and \$2.45 per meal on and after January 1, 2007, for all other workers;

(v) \$2.10 per meal on and after July 24, 2009, for food service workers receiving a cash wage of at least \$4.65 per hour; and \$2.50 per meal on and after July 24, 2009, for all other workers.

(2) An allowance for more than one meal shall not be permitted for any employee working less than five hours on any day.

(3) An allowance for more than two meals shall not be permitted for any other employee on any day, except that an allowance of one meal per shift may be permitted for such an employee working on a split shift.

(b) Allowances for lodging. Lodging furnished by an employer to an employee may be considered as part of the minimum wage but shall be valued at not more than:

(1) \$1.20 per day on and after March 31, 2000, for food service workers receiving a cash wage of at least \$3.30 per hour; \$1.25 per day on and after March 31, 2000 for all other workers; \$7.60 per week on and after March 31, 2000, for food service workers receiving a cash wage of at least \$3.30 per hour; and \$8.05 per week on and after March 31, 2000, for all other workers;

(2) \$1.35 per day on and after January 1, 2005, for food service workers receiving a cash wage of at least \$3.85 per hour; \$1.45 per day on and after January 1, 2005, for all other workers; \$8.45 per week on and after January 1, 2005, for food service workers receiving a cash wage of at least \$3.85 per hour; and \$9.40 per week on and after January 1, 2005, for all other workers;

(3) \$1.45 per day on and after January 1, 2006, for food service workers receiving a cash wage of at least \$4.35 per hour; \$1.65 per day on and after January 1, 2006, for all other workers; \$9.15 per week on and after January 1, 2006, for food service workers receiving a cash wage of at least \$4.35 per hour; and \$10.55 per week on and after January 1, 2006, for all other workers;

(4) \$1.50 per day on and after January 1, 2007, for food service workers receiving a cash wage of at least \$4.60 per hour; \$1.75 per day on and after January 1, 2007, for all other workers; \$9.50 per week on and after January 1, 2007, for food service workers receiving a cash wage of at least \$4.60 per hour; and \$11.15 per week on and after January 1, 2007, for all other workers;

(5) \$1.50 per day on and after July 24, 2009, for food service workers receiving a cash wage of at least \$4.65 per hour; \$1.75 per day on and after July 24, 2009, for all other workers; \$9.60 per week on and after July 24, 2009, for food service workers receiving a cash wage of at least \$4.65 per hour; and \$11.30 per week on and after July 24, 2009, for all other workers.

SUBPART 137-2 REGULATIONS

Section

137-2.1 Employer records

137-2.2 Statement to employee

137-2.3 Posting

137-2.4 Basis of wage payment

137-2.5 Deductions and expenses

137-2.6 Employment covered by more than one wage order

137-2.7 Learner or apprentice rates

137-2.8 Rehabilitation programs

137-2.9 Student obtaining vocational experience

§ 137-2.1 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) occupational classification and wage rate;
- (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
- (5) the amount of gross wages;
- (6) deductions from gross wages;
- (7) allowances, if any, claimed as part of the minimum wage;
- (8) money paid in cash; and
- (9) student classification.

(b) The records should also indicate whether the employee has uniforms laundered, cleaned or maintained by the employer.

(c) In addition, for each individual permitted to work 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.

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

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

(e) 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.

§ 137-2.2 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.

§ 137-2.3 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.

§ 137-2.4 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.

§ 137-2.5 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.

§ 137-2.6 Employment covered by more than one wage order.

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

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

shall be paid for all 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 restaurant industry, whichever is higher.

§ 137-2.7 Learner or apprentice rates.

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

§ 137-2.8 Rehabilitation programs.

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

§ 137-2.9 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 137-3 DEFINITIONS

Section

- 137-3.1 Restaurant industry
- 137-3.2 Employee
- 137-3.3 Service employee and nonservice employee
- 137-3.4 Food service worker
- 137-3.5 Regular rate
- 137-3.6 Working time
- 137-3.7 Voluntary absence
- 137-3.8 Meals
- 137-3.9 Lodging
- 137-3.10 Split shift
- 137-3.11 Spread of hours
- 137-3.12 Interval off duty
- 137-3.13 Required uniforms

§ 137-3.1 Restaurant industry.

(a) The term *restaurant industry* includes any eating or drinking place that prepares and offers food or beverage for human consumption either on any of its premises or by such service as catering, banquet, box lunch, or curb service or counter service to the public, to employees, or to members or guests of members, and services in connection therewith or incidental thereto.

(b) The industry includes but is not limited to restaurant operations of other types of establishments, restaurant concessions in any establishment and concessions in restaurants.

(c) The term *restaurant industry* excludes:

(1) eating or drinking places operated by establishments customarily offering lodging accommodations of five or more rooms to the public, to employees or to members or guests of members, except that it does not exclude eating or drinking places offering lodging accommodation only to their own employees;

(2) eating or drinking places operated by establishments where the service of food or beverage is not available to the public but is incidental to instruction, medical care,

religious observance, or the care of handicapped or destitute persons or other charges;
and

(3) eating and drinking places operated 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 exempt such establishments from coverage under another minimum wage order which covers them.

§ 137-3.2 Employee.

(a) *Employee* means any individual permitted to work by an employer in the restaurant industry, except as provided below.

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

(c) Employee also does not include any individual permitted to work 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;

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

(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;

(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 such individual's employer;

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

(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 processes; 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.

§ 137-3.3 Service employee and nonservice employee.

(a) A *service employee* is an employee who customarily receives tips at the rate of:

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

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

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

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

(b) A *nonservice employee* is any employee other than a service employee.

(c) Classification as a service employee or as a nonservice employee shall be on a weekly basis except that an employee may not be classified as a service employee on any day in such week in which he has been assigned to work in an occupation in which tips are not customarily received.

(d) The employer shall have the burden of proof that an employee receives sufficient tips to entitle such employer to classify such employee as a service employee.

§ 137-3.4 Food service worker.

(a) A *food service worker* is any employee who, 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 receive tips from such guests, patrons or customers.

(b) Classification as a *food service worker* shall be on a weekly basis except that an employee may not be classified as a *food service worker* on any day in such week in which he has been assigned to work in an occupation in which tips are not customarily received.

(c) The employer shall have the burden of proof that an employee receives sufficient tips to entitle him to classify such employee as a food service worker.

§ 137-3.5 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.

§ 137-3.6 Working time.

Working time means time worked or time of permitted attendance, including waiting time, whether or not work is provided, and time spent in traveling as part of the duties of the employee.

§ 137-3.7 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.

§ 137-3.8 Meals.

(a) A meal shall provide adequate portions of a variety of wholesome, nutritious foods and shall 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.

§ 137-3.9 Lodging.

Lodging means living accommodations used by the employee which meet generally accepted standards of adequacy and sanitation.

§ 137-3.10 Split shift.

A *split shift* is a schedule of daily hours in which the working hours required or permitted are not consecutive. No meal period of one hour or less shall be considered an interruption of consecutive hours.

§ 137-3.11 Spread of hours.

The *spread of hours* is the interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals plus intervals off duty.

§ 137-3.12 Interval off duty.

An *interval off duty* is 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.

§ 137-3.13 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.