



New York State Department of Labor
David A. Paterson, Governor
M. Patricia Smith, Commissioner

VIA FAX AND MAIL
[REDACTED]

February 19, 2009

[REDACTED]

Re: Request for Opinion
Minimum Wage/Tip Allowance
File No. RO-09-0014

Dear [REDACTED]:

This letter is in response to yours of February 2, 2009, in which you describe a situation in which a restaurant owner pays waiters and waitresses \$25.00 for a twelve-hour shift; with a half-hour meal break.¹ During the course of this meal break, the restaurant owner provides the employees with a free meal. You also state that the employees are allowed to keep all tips². You ask if this practice is legal. Please be advised that the facts you describe constitute multiple violations of the minimum wage, overtime, and spread of hours provisions of the New York State Labor Law.

New York State regulations classify waiters and waitresses as "food service workers," (see 12 NYCRR §137-3.4). Although such food service workers must receive at least the minimum wage, (see 12 NYCRR §137-1.2), their employers may pay a specified minimum cash wage less than the amount of the minimum wage, provided that the amount of tips received, when added to the cash wage paid by the employer, are equal to or exceed the minimum wage (see 12 NYCRR §137-1.5). In other words, the employer of a food service worker is permitted a "tip allowance" of the difference between the cash wage paid to the worker and the minimum

¹ Please note that providing this half-hour meal break constitutes nothing more than the employer's compliance with Labor Law §162(2). Please also note that employees working as you describe might be entitled to additional meal breaks pursuant to paragraphs 3 and 4 of that statute.

² Please also note that "allowing" waiters and waitresses to keep their tips constitutes nothing more than the employer's compliance with Labor Law §196-d, which forbids employers, with certain defined exceptions, from demanding, accepting or retaining any part of a gratuity or charge purported to be a gratuity.

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wage, provided that the worker receives tips that equal or exceed such difference (*see also* Labor Law §652(4)).

As of January 1, 2007, the current minimum cash wage that must be paid to a food service worker was and remains \$4.60 per hour, provided that the tips of such worker, when added to such wage, is equal to or greater than \$7.15 per hour. Therefore, no matter how much a food service worker's tips exceed the "tip allowance," the employer of that worker must still pay him/her at least \$4.60 per hour for all hours worked.

Furthermore, a food service worker must be paid overtime for all hours over forty worked in a week at a rate of one and one-half times that worker's regular rate of pay (*see* 12 NYCRR §137-1.3). The Department of Labor considers the overtime rate for a food service worker paid the minimum cash wage to be one and one-half times the minimum wage (\$10.725) minus the "tip allowance" (\$2.55), to wit, \$8.175 per hour, provided that the tips of such worker, when added to such wage, is equal to or greater than \$10.725 per hour. Please note that New York State statutes and regulations require payment of overtime only if an employee works more than forty hours in a single week. An employee who worked, as in your example, twelve hours in a single day would not be entitled to overtime pay provided that the employee worked no more than forty hours in that week.

Please be further advised that 12 NYCRR §137-1.7 provides that all employees in the restaurant industry, including but not limited to food service workers, must be paid on each day in which the "spread of hours" (*see* 12 NYCRR §137-3.11) exceeds ten, one hour's pay at the minimum wage in addition to all other wages required to be paid.

Please note that although employers who provide their employees with a "meal" (as that term is defined in 12 NYCRR §137-3.8) may take a "meal allowance" in the form of a reduction against the total amount of wages paid, such allowance can be no more than \$2.10 per meal (12 NYCRR §137-1.9(a)(1)(iv)). Accordingly, a waiter or waitress who worked a twelve hour shift with a half-hour meal break and a free meal, and who did not work more than forty hours in that week, would have to receive at least \$57.95 from his/her employer for that day's work (\$4.60 per hour times 11.5 hours plus \$7.15 for "spread of hours" minus \$2.10 meal allowance) on the condition that the tips received by that employee on that day brought his/her total earnings to equal or greater than \$7.15 per hour. If such an employee worked that same twelve hour shift, with a half-hour meal break and a free meal, each day for five days in a single week, he/she would have to be paid by his/her employer at least \$352.31 for that week's work (40 hours at a rate not less than \$4.60 [provided the tips, when added to such wage are greater than \$7.15], plus 17.5 hours at a rate not less than \$8.175 [provided the tips, when added to such wage, are greater than \$10.725 per hour], plus 5 "spread of hours" at a rate not less than \$7.15, minus 5 "meal allowance" credits at \$2.10 per meal).

Therefore, the answer to your question is a decisive "no," it is not legal for a restaurant owner to pay waiters and waitresses \$25.00 for a twelve-hour shift, even if such employer provides the half-hour meal break required by law and a free meal and "allows" the employees to keep all their tips, again as required by law. As described above, such an employer would be committing numerous violations of the New York State Labor Law and its attendant regulations by grossly underpaying its workers. Please be advised that the Commissioner of Labor would be

very anxious to obtain the name and address of such an employer, together with any employee complaints or statements or other documentation you might have regarding such an employer's wage practices, so that this Department could perform a full investigation, enforce the Labor Law as necessary, and obtain for any employees of that employer all wages that should have been paid to them by operation of law, with interest and attendant civil penalties.

This opinion is based on the information provided in your letter of February 2, 2009. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me. Should you wish to file a complaint on behalf of the workers involved with the Division of Labor Standards which investigates and enforces violations of wage and hour laws, you may reach them at the local Department of Labor NYC district office at 75 Varick Street, New York, NY 10019 or via email at LSAsk@labor.state.ny.us

Very truly yours,

Maria L. Colavito, Counsel



By: Jeffrey G. Shapiro
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JGS:da

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