



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

September 22, 2009



Re: Request for Opinion  
Labor Law §196-d Violation  
RO-09-0063

Dear [Redacted]:

I have been asked to respond to your letters of April 22, 2008 and April 24, 2008 in which you request an opinion regarding the remedies for violations of New York Labor Law Section 196-d. Your letter poses a scenario in which a restaurant employs servers who receive \$10.00 per hour in tips and the food service worker minimum wage rate of \$4.60 per hour. In this scenario, the employer retained, admittedly in violation of Section 196-d, ten percent of the servers tips. Your letter asks what the appropriate remedies are for such a violation under such circumstances and whether the employer, in the scenario you pose, is required to pay the difference between the regular minimum wage and the food service worker minimum wage rate per hour for its violation of Section 196-d.<sup>1</sup>

Section 196-d of the Labor Law states in relevant part: "nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities." Accordingly, a violation of Section 196-d does not prevent an employer from paying a restaurant server the food service worker minimum wage. Therefore, in the scenario posed, the employer would not be required, under the New York State Labor Law, to reimburse an employee for the difference between the minimum wage and the food service worker minimum wage provided that the employer otherwise meets the requirements for payments under the food service worker minimum wage.

Please take notice, however, that there are remedies available under state law for the violations you have described in your letter. The New York State Labor Law authorizes the Commissioner of Labor to issue an order directing compliance to an employer found to be in violation of the provisions of the Labor Law. (See, NY Labor Law §§ 21(1); 196; 198; 218(1);

<sup>1</sup> Please be advised that as of July 24, 2009, the regular minimum wage is \$7.25 per hour and the food service minimum wage is \$4.65 per hour.

219(1).) Such an order may require that the employer pay employees all monies due with interest at the rate specified by Section 14-a of the banking law, currently set at 16 percent annually, that will be calculated from the date of the illegal retention of tips. (See, NY Labor Law §219(1).) The order may also assess a civil penalty in situations where an employer had been previously found in violation or where the violation is willful and egregious, in an amount equal to double the total amount found to be due. (See, NY Labor Law §218(1).)

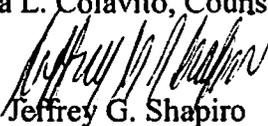
Applying this to the example provided in your letter of April 24, 2009, the employer would be required to pay the employees the ten percent of the server's tips retained, i.e. \$1.00 per hour, plus 16 percent annual interest from the date of the retention of the tips. While your letter does not specify whether the employer has been previously found in violation of Section 196-d, the retention described in your letter may, nevertheless, justify a civil penalty in an amount equal to double the amount found to be due if such a violation is found to be willful and egregious.

Please be further advised that New York State's laws are not the only laws applicable to this scenario. Under the Fair Labor Standards Act [29 USC §203(m)], an employer may only take advantage of a tip credit for the purposes of satisfying the minimum wage if the employee has been informed of the provisions of Section 203(m), and all tips received by such employee have been retained by that employee, with the exception of the permissible pooling of tips. While it would be inappropriate for this Department to render an interpretation of Federal law, please be advised that 29 USC §218(a) clearly establishes that no state law may reduce the protections provided to employees under the Fair Labor Standards Act; rather, the states may only supplement and increase the provisions of the Fair Labor Standards Act to the greater benefit of employees. Therefore, the fact that the New York State Labor Law does not require an employer to pay the difference between the minimum wage and the food service worker minimum wage does not relieve the employer of the requirements placed on it by federal law. If you wish to obtain a formal opinion with regard to the interpretation of the Fair Labor Standards Act, you should direct your request to the United States Department of Labor, Wage and Hour Division. You can consult your local phonebook to find the office of the USDOL nearest your home or office or you may go to the USDOL website, [www.dol.gov](http://www.dol.gov) for further information in this regard.

This opinion is based on the information provided in your letters of April 22, 2008 and April 24, 2008. A different opinion might result if the circumstances outlined therein changed, 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.

Very truly yours,

Maria L. Colavito, Counsel

By:   
Jeffrey G. Shapiro  
Associate Attorney

cc: Carmine Ruberto