



National Employment
Law Project

Delivering Economic Opportunity

June 3, 2009

Ms. Linda Donahue, Chair
Chair, Restaurant and Hotel Industry Wage Board
Senior Policy Analyst, Cornell University School of Industrial and Labor Relations

Attention: Jean Lindholm
Division of Labor Standards
New York State Department of Labor
Building 12, Room 185B, State Office Campus
Albany, NY 12240

VIA EMAIL: jean.lindholm@labor.state.ny.us

Dear Chairperson Donahue and Members of the Wage Board:

Thank you for this opportunity to submit our written testimony to the Restaurant and Hotel Industry Wage Board on behalf of the National Employment Law Project and each of the undersigned organizations including the Asian-American Legal Defense and Education Fund, Brandworkers International, Chinese Staff and Workers' Association, the Legal Aid Society, MFY Legal Services, the Restaurant Opportunities Center of New York (ROC-NY), the Tompkins County Workers' Center, the Community Development Project of the Urban Justice Center, the Workers' Rights Law Center, the Workplace Project, and YKASEC – Empowering the Korean American Community. As many of us testified at public hearings, each of our organizations represents clients or has members who will be substantially impacted by your decisions. We sincerely appreciate the time and deliberation that you are putting into this process.

In this letter, we first lay out a few general principles that we urge you to keep in mind as you are preparing the new Wage Order. Then we address each of the specific issues in the Commissioner's Charge individually.

General Principles

As you deliberate over the questions raised in the Commissioner's Charge, we urge you to consider four general principles:

1. The Restaurant and Hotel Industry Wage Orders Substantially Affect Low-Wage Workers

There is a perception – promoted by some industry representatives at the public hearings – that New York’s tipped workers are students and aspiring actors who are earning substantial amounts of money after tips are included, upwards of \$20 per hour. While there are certainly some waitresses, waiters, and bartenders at high-end restaurants who make substantial tips and fit this demographic profile, this is simply not the reality for the vast majority of the industry’s workers, including many other front-of-the-house workers (like table bussers and runners) in the same high-end restaurants. And for waitresses and waiters in less exclusive restaurants, kitchen staff across the industry, and tipped workers in other industries, working for tips is far less lucrative.

NELP has conducted a thorough demographic analysis of tipped workers around the country for our forthcoming report, *Restoring the Minimum Wage for America’s Tipped Workers*. (A working paper version is attached.) We based our analysis on three years of national data (2005-07) and five years of New York State-specific data (2003-07) from the Current Population Survey, a large annual survey conducted by the Census Bureau for the United States Bureau of Labor Statistics.

Strikingly, we found that the family poverty rate for waitresses and waiters is nearly three times the poverty rate for all workers. While 5.7% of all workers live in families that earn less than the federal poverty level (itself an inadequate measure of poverty), 14.9% of all waitresses and waiters live in families below the poverty line. This problem is even worse for Hispanic waitresses and waiters (18% live in family poverty) and African-Americans (22.3%).

Focusing on New York specifically, we also found that the median hourly wage for waitresses and waiters was only \$9.60 *including tips* (in 2007 dollars). Only the top 10% of waitresses and waiters earned in the high teens each hour. The vast majority only earn a few dollars more than the minimum wage even after tips are included.

As explained further in the report, we found that tipped workers are disproportionately women, and many are struggling to get by and care for their families. Nationwide:

- 72% of waitresses and waiters – the largest group of tipped workers – and 62% of all tipped workers are women;
- More than two-thirds of tipped workers are adults 21 and older, and 71.5% of waitresses and waiters are over 21.
- While 15% of waitresses and waiters identify as Hispanic and 6.5% as African-American, the largest portion – nearly 71% – are white. Among all tipped workers, nearly 21% are Hispanic, 11% are African-American, and still nearly 61% are white.

A clear pattern emerges from these statistics: policies that disadvantage tipped workers disproportionately hurt women.

Moreover, these aggregate statistics belie the rosy depictions of actors working for tips on the side, and much more closely reflect the experiences of our clients and members. And while most waitresses and waiters are struggling, the economic picture is even worse for their front-of-the-house colleagues like bussers and runners, as well as kitchen staff who do not receive tips. Tipped workers outside of food service, including delivery people, car wash workers, and personal services workers, like nail salon workers, generally earn even less.

As you deliberate over the new Wage Orders, we urge you to keep in mind the real effects they will have on low-wage workers throughout the restaurant and hotel industries – cornerstone service industries where more than a hundred thousand of New Yorkers today spend their careers. Strengthening protections for tipped workers can bring tipped jobs closer to living wage jobs, something that our economy badly needs more of today.

2. New York’s Regulations Should Be No Less Protective than Federal Law

The federal Fair Labor Standards Act (FLSA) establishes a floor beneath which wages may not fall. This means that compliance with less stringent state laws can be in violation of federal standards. See 29 U.S.C. § 206(a). As a result, it is important that New York State’s regulations are at least as protective as federal law. Otherwise, employers may mistakenly violate federal law, believing that complying with the weaker New York standard is sufficient. To provide the strongest protection for workers and reduce this confusion, the wage board should consistently ensure that New York’s minimum wage rules and protections are in all cases at least as strong as corresponding federal standards. In our responses to the Commissioner’s Charge below, we provide detail on those areas where improvements should therefore be made.

3. New York Should Be a Leader in Worker Protections

But it isn’t enough to ensure that New York’s minimum wage protections are no weaker than federal standards. In fact, New York should be at the forefront of the states in protecting workers, both to set an example for the nation and because New York’s exceptionally high costs of living and housing mean that workers here need stronger protections to make ends meet. Historically, New York did just that. But in recent decades, New York has failed to update its protections, with the result that it is no longer one of the leading states in many areas relating to wage protections. The wage board and the legislature should therefore update those protections to restore New York’s leadership role and provide the state’s workers the protections they need.

For tipped workers, many states currently establish a minimum wage that is substantially higher than New York’s food service worker wage of \$4.60, an amount that is 64% of the full state minimum wage. The corresponding tipped worker minimum wages elsewhere are as high as \$9.79 (San Francisco), \$8.55 (Washington state), and \$8.40 (Oregon). In fact, seven states now require employers to pay tipped workers 100% of the minimum wage, including Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington. An eighth state, Hawaii, provides only a nominal 25-cent tip allowance, and in turn requires workers to make at least 75-cents per hour in tips (for a total of 50 cents more than the minimum wage). And many other states have tipped

worker minimum wages higher than New York’s, such as Connecticut (\$5.52), Illinois (\$4.80), and even North Dakota (\$4.86) and West Virginia (\$5.80).

But while our tipped worker minimum wage is lower than in these other states, New York’s cost of living is among the highest in the nation, and includes four of the top ten most expensive urban areas nationwide (Manhattan, Brooklyn, Queens, and Nassau County) according to the Council for Community and Economic Research (C2ER). See ACCRA Cost of Living Index, <http://www.coli.org/pdf/MediaRelease2009Q1.pdf> (2009). By contrast all six of the other urban areas on that top ten list are in states with significantly higher tipped worker minimum wages than New York, including four urban areas in California, one in Connecticut, and one in Hawaii. *Id.*

Likewise, the National Low Income Housing Coalition has found that only two states – Hawaii and California – and the District of Columbia have housing costs higher than New York, where the monthly Fair Market Rent for a two-bedroom apartment is \$1207. See 29 U.S.C. § 218(a). See NLIHC, OUT OF REACH 2009 at 124 (Apr. 2009), <http://www.nlihc.org/oor/oor2009/oor2009pub.pdf>.

The Economic Policy Institute’s “basic family budget” calculations also provide a useful breakdown of living costs both by category and by region within the state, based largely on the United States Department of Housing and Urban Development’s measured fair market rents and other region-specific data.

Chart 1. Cost of Living in New York

HUD FMR Area	Housing	Food	Child Care	Transportation	Health	Other	Taxes	Monthly Total	Annual Total
Albany-Schenectady-Troy	\$851	\$643	\$1372	\$482	\$547	\$359	\$533	\$4788	\$57,457
Binghamton	\$674	\$643	\$1372	\$468	\$547	\$317	\$413	\$4434	\$53,210
Buffalo-Niagara Falls	\$704	\$643	\$1372	\$447	\$547	\$324	\$420	\$4457	\$53,479
Elmira	\$739	\$643	\$1372	\$468	\$547	\$332	\$445	\$4547	\$54,562
Glens Falls	\$776	\$643	\$1372	\$468	\$547	\$341	\$490	\$4637	\$55,645
Ithaca	\$893	\$643	\$1372	\$468	\$547	\$369	\$549	\$4841	\$58,096
Kingston	\$933	\$643	\$1372	\$468	\$547	\$379	\$594	\$4937	\$59,240
Nassau-Suffolk	\$1529	\$649	\$1372	\$447	\$547	\$522	\$932	\$5993	\$71,913
New York	\$1318	\$643	\$1372	\$401	\$547	\$471	\$977	\$5730	\$68,758
Poughkeepsie-Newburgh-Middletown	\$1103	\$643	\$1372	\$482	\$547	\$420	\$713	\$5281	\$63,373
Rochester	\$773	\$643	\$1372	\$447	\$547	\$340	\$454	\$4576	\$54,915
Rural NYS	\$703	\$643	\$980	\$524	\$570	\$324	\$278	\$4022	\$48,266
Syracuse	\$713	\$643	\$1372	\$482	\$547	\$326	\$438	\$4522	\$54,266
Utica-Roma	\$699	\$643	\$1372	\$404	\$547	\$323	\$400	\$4388	\$52,652
Westchester County	\$1519	\$643	\$1372	\$482	\$547	\$520	\$942	\$6026	\$72,310

Source: Economic Policy Institute’s Basic Family Budget Calculations, 2-parent, 2-child family, in 2008 dollars.

Given this context, it is clear that New York’s tipped worker minimum wage for food service workers of \$4.60 per hour (\$9,568 per year) is hardly enough for a family to get by. Even waitresses and waiters earning the median \$9.60 per hour, including tips, are still paid just under \$20,000 per year – less than half of what it takes to make ends meet in any region of the state, let alone in our highest cost-of-living urban areas.

4. Tipped Workers Need Strong Protections to Offset Great Uncertainty

Working for tips creates great uncertainty for low-wage workers. Not only are tips notoriously erratic by their very nature, but they are also susceptible to misappropriation. Consequently, tipped workers need a strong minimum wage paid directly by their employers to cushion them against wide swings in their paychecks.

Tips vary depending on broader economic trends, from season to season and from shift to shift. Tipped workers are hit especially hard by economic downturns, and the current recession underscores why it is so important to raise the tipped worker minimum wage. Families have less money to spend on dinners out, leaving tipped workers fewer customers and less pay. Compounding the problem, tipped workers report that customers who are feeling squeezed by the economy are leaving smaller tips.

But even when the economy is stronger, seasonal swings are the norm. For every holiday boom, there is a mid-summer slowdown. Tips can also vary significantly from shift-to-shift during a normal week. In practice, few employers actually do the active monitoring necessary to make sure workers always receive enough tips to bring them up to the level of the full minimum wage. (The Internal Revenue Service allows employers to estimate tips based on receipts for tax purposes. While this is not sufficient recordkeeping for minimum wage purposes, it does remove another incentive for employers to closely track tips received.)

Meanwhile, tips are also especially vulnerable to being misappropriated. Tip-pooling arrangements create opportunities for unethical employers to illegally skim off a portion of tips to keep for themselves or to use to pay other employees. Some such abuses are direct, with managers or owners simply pocketing a portion of the tips. *See, e.g.*, Steven Greenhouse, “Judge Approves Deal to Settle Suit Over Wage Violations,” *New York Times*, June 19, 2008, at http://www.nytimes.com/2008/06/19/nyregion/19wage.html?_r=1&ref=nyregion&oref=slogin. Other unscrupulous employers use less direct methods, for example, by illegally including non-tipped workers in the tip pool so that they can be paid the lower minimum wage for tipped workers.

As workers testified at the public hearings, these practices are decidedly common in New York City, and it is documented by numerous studies. *See* Restaurant Opportunities Center of New York, *Behind the Kitchen Door* 14 (2005), <http://www.urbanjustice.org/pdf/publications/BKDFinalReport.pdf> (finding that 19% of restaurant workers who were surveyed reported having their tips stolen by managers or owners) (attached). *See also* ANNETTE BERNHARDT, ET AL, *UNREGULATED WORK IN THE GLOBAL CITY* (2007), <http://www.nelp.org/globalcity> (documenting a wide range of pervasive employment law violations in New York City’s restaurant industry, including tip appropriation) (attached). Both ROC-NY and the Justice Will Be Served coalition have helped members file lawsuits to recover stolen tips, winning substantial sums. *See, e.g.*, Steven Greenhouse, *Suits Alleging Pay Violations at Restaurants*, *N.Y. TIMES*, May 12, 2007, at <http://www.nytimes.com/2007/05/12/nyregion/12workers.html?pagewanted=all>.

Nor are these problems limited to New York City. The Tompkins County Worker Center (in Ithaca), the Workers' Rights Law Center (in the Hudson Valley), and the Workplace Project (on Long Island) have all worked with members or clients to file lawsuits or complain to the state Department of Labor because of tip misappropriation. And for every worker who pursues these claims, many more fail to uncover the problem.

This reality underscores the importance of a strong tipped worker minimum wage to guarantee tipped workers a basic income that is less vulnerable to seasonal swings, not to mention manipulation and other abuse.

* * *

In summary, tipped workers are disproportionately women, and have high poverty rates even after tips are included. New York's tipped workers need a higher tipped minimum wage to provide a stable source of income as they struggle to live in one of the nation's most expensive states. And other workers in these industries who do not receive tips likewise need strong protections to ensure that they can stretch their wages to make ends meet.

Commissioner's Charge

With these general principles in mind, we take up the issues in sequence as they arise in the Commissioner's Charge. Please do not hesitate to call upon us if you would like any more detailed information or research on any of these issues.

1. Combine the Hotel and Restaurant Industry Wage Orders

We support combining these two Wage Orders into one in order to provide substantially uniform regulations across these two closely related industries. This step will minimize confusion among workers and employers alike in determining which Wage Order applies to particular workers.

2. Streamline the Tip Allowance by Giving All Workers the Full Minimum Wage

At present, New York provides a confusing patchwork of tip allowances that vary depending on the industry, the worker's occupation, and even the amount of tips a worker received. As ROC-NY testified at the public hearing, this disjointed system creates opportunities for tipped workers to be underpaid due to their improper classification. We support standardizing the tip allowance across industries and occupations as much as possible in order to eliminate any confusion as to which minimum wage rate applies to tipped workers.

More specifically, given New York's high cost of living and the great uncertainty that tipped workers face, both discussed in the General Principles section above, we urge the Wage Board to follow the lead of seven states ranging from California and Washington to Montana and Minnesota and eliminate the tip allowance altogether. Despite warnings to the contrary, the actual experiences of states and cities that have preserved or adopted higher minimum wages for

tipped workers show that it is an effective tool for improving living standards and bolstering economic security without costing jobs or slowing business growth.

Raising the tipped worker minimum wage can have a substantial impact on workers' income. For example, if New York guaranteed all workers the full minimum wage of \$7.25 (as of July 24, 2009), it would put an extra \$2.65 per hour into the pockets of tipped workers (or up to \$5512 per year for a full-time worker).

And given that many are struggling to get by, tipped workers who earn more money are likely to spend it to make ends meet – which will also have a stimulus effect on their communities. In a forthcoming paper based on a Federal Reserve Bank of Chicago study, the Economic Policy Institute projects that the three-step federal minimum wage increase passed in 2007 will result in a total of \$10.4 billion in additional consumer spending by mid-2010. See Kai Filion, *Increases in Minimum Wage Boost Consumer Spending* (May 27, 2009), at http://www.epi.org/economic_snapshots/entry/snapshot_20090527/. See also Eileen Appelbaum & Tsedeye Gebreselassie, *Minimum Wage Boost Produces Bang for the Buck*, N.J. STAR-LEDGER (Jan. 16, 2009), http://www.nelp.org/page/-/EJP/Bang_for_the_Buck.pdf; Jon Shure, *Economic Stimulus 101*, N.J. VOICES (Sep. 23, 2008), at http://blog.nj.com/njv_jon_shure/2008/09/economic_stimulus_101.html. State and local governments benefit from increased income and sales tax revenues, too.

Organized trade groups like the National Restaurant Association typically argue that raising the minimum wage – either in general or for tipped workers, in good times or bad times – will cost jobs. They claim that businesses will be forced to lay off low-wage workers or even close their doors if the minimum wage is increased. However, studies of states and cities that have raised their tipped worker minimum wages have consistently found no evidence that doing so leads to job losses or slows business growth in industries that employ tipped workers including restaurants. These results are consistent with the trend in research on the minimum wage in general, which has shown that recent minimum wage increases have neither led to job losses nor been a major factor, one way or the other, in the overall economic health of industries that employ low-wage workers. See LIANA FOX, *MINIMUM WAGE TRENDS: UNDERSTANDING PAST AND CONTEMPORARY RESEARCH* (2006), <http://www.epi.org/content.cfm/bp178> (explaining recent research on the economic effects of raising the minimum wage). See also ECONOMIC POLICY INSTITUTE, *HUNDREDS OF ECONOMISTS SAY: RAISE THE MINIMUM WAGE* (2006), http://www.epi.org/minwage/epi_minimum_wage_2006.pdf (“We believe that a modest increase in the minimum wage would improve the well-being of low-wage workers and would not have the adverse effects that critics have claimed.”)

For example, a 2006 study by the Fiscal Policy Institute examined job growth between 1998 and 2003 in the 10 states and the District of Columbia that had minimum wages higher than the federal rate at that time – Alaska, California, Connecticut, Delaware, Hawaii, Massachusetts, Oregon, Rhode Island, Vermont and Washington. The study compared job growth in those states with the 40 states that did not have higher minimum wages. All 10 of the high minimum wage states analyzed in the study also had tipped worker minimum wages higher than the federal \$2.13 rate – including 4 that guarantee tipped workers the full state minimum wage and Hawaii with its nominal 25-cent tip credit. The study found that these 10 states actually had faster job growth

among small businesses than the other 40. This experience highlights how job growth is driven overwhelmingly by other factors in a state's economy – not by how high or low the state's minimum wage is. FISCAL POLICY INSTITUTE, STATES WITH MINIMUM WAGES ABOVE THE FEDERAL LEVEL HAVE HAD FASTER SMALL BUSINESS AND RETAIL JOB GROWTH (March 30, 2006), <http://fiscalpolicy.org/FPISmallBusinessMinWage.pdf>.

Similarly, in 2006, economist Paul Wolfson at Dartmouth's Tuck Business School conducted a study using Current Population Survey data focusing in particular on the restaurant industry – one of the largest tipped industries. Wolfson's study examined the 17 states and the District of Columbia that had raised their minimum wages above the federal level as of 2005. Again, 16 of those jurisdictions – California, Connecticut, Delaware, D.C., Florida, Hawaii, Illinois, Maine, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont, Washington and Wisconsin – had tipped worker minimum wages that exceeded the federal \$2.13 rate. The study found that raising the minimum wage in those states raised workers' incomes in the restaurant industry, but found no evidence that it adversely affected restaurant employment. See PAUL WOLFSON, STATE MINIMUM WAGE: A POLICY THAT WORKS (2006), <http://www.epi.org/content.cfm/bp176> (documenting the benefits for workers when states raised their minimum wages).

Additional evidence is provided by the experiences of the restaurant industry in San Francisco, which raised the city minimum wage from \$6.75 to \$8.50 in 2004 and requires employers to pay their tipped workers the full minimum wage. When that city's minimum wage law took effect, tipped workers received a raise of \$1.75 per hour – a substantial increase. A University of California study of the city's restaurant industry found that the increase did not result in restaurant closures, job loss, or even substantial price increases. In fact, the study found that the increase may have helped stabilize the restaurant industry, since job tenure and employment of full-time employees actually increased at fast food restaurants, and employment of tipped workers increased at table-service restaurants. ARINDRAJIT DUBE, ET AL, THE ECONOMIC IMPACT OF A CITYWIDE MINIMUM WAGE (3d Rev. 2007), <http://repositories.cdlib.org/iir/iirwps/iirwps-111-05/> (analyzing the effects of San Francisco's citywide minimum wage with a particular focus on the restaurant industry).

In fact, even the National Restaurant Association's own analysis of industry trends projects that the four leading states in restaurant job growth over the next decade will all be states that mandate high minimum wages for tipped workers, including two that require tipped workers to be paid the full minimum wage, Alaska (\$7.15) and Nevada (\$6.85, with automatic annual cost-of-living increases). California (\$8.00) is also projected to lead in nationwide restaurant sales volume. National Restaurant Association, "Restaurant Industry in All 50 States to Grow Sales, Add Jobs in 2008 and Beyond," Dec. 12, 2007, at <http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1536>. See also Press Release, *Darden Sees Little Impact from Minimum Wage Hike*, Dec. 20, 2006 (on file with NELP).

All of this evidence underscores that the minimum wage in general – and the minimum wage for tipped workers in particular – is simply not a major factor in the economic health of the restaurant industry or other low-wage industries. These industries are influenced far more by broader trends in the economy – not by whether they must pay somewhat more to their lowest-wage staff. And

those broader trends – including the price of supplies and fuel – do not justify lower wage standards for workers.

Finally, please note that raising the minimum wage for tipped workers does not necessarily increase restaurant employers' social security payroll tax liability. At present, restaurant workers and employers alike pay payroll taxes on the entire amount of a worker's wages plus tips. But Congress has given restaurant employers a rather unique federal income tax credit to offset the social security payroll taxes that they pay on any tips in excess of the federal minimum wage. 26 U.S.C. § 45(b). In effect, restaurant employers' social security payroll tax liability for tipped workers is therefore limited to the full federal minimum wage. Even if New York raises the minimum wage for tipped workers to \$7.25, and even if the result is that tipped workers will earn an extra \$2.65 per hour, this change will not in itself create any additional social security tax burden for restaurant employers thanks to this offsetting federal income tax credit. *See also* National Restaurant Association, *How to Claim a Federal Income Tax Credit for FICA Taxes You Pay on Employees' Tips*, available at http://www.restaurant.org/legal/law_fica.cfm.

3. Tipped Worker Overtime Rates Should Be Calculated Consistent with Federal Law

The Wage Order should clarify that overtime is calculated for all tipped workers in the same manner that it is calculated under federal law: 1.5 times the overall minimum wage minus the tip allowance, if any. *See* 29 C.F.R. § 531.60; United States Department of Labor Field Operations Handbook § 30d07(a).

New York Labor Law establishes a “wage for . . . food service worker[s]” that does not use the words “tip allowance” or “tip credit.” *See* N.Y. Labor Law § 652(4). But in doing so, New York law effectively establishes a tip allowance because it nonetheless conditions the lower “food service worker” wage upon the worker earning the full minimum wage after tips are included. *Id.* (“ . . . provided that the tips of such an employee, when added to such cash wage, are equal to or exceed the minimum wage in effect pursuant to subdivision one of this section . . . ”). In fact, this is functionally equivalent to the mechanism used currently by the federal minimum wage law, which itself does not use the term “tip allowance” or “tip credit” in the statute either. Instead, as in New York, federal law simply establishes a minimum wage for tipped workers of \$2.13 – or “the cash wage required to be paid such an employee on the date of the enactment of this paragraph [in 1996]” – conditioned upon the reality that a worker “actually received” the remainder in tips. 29 U.S.C. § 203(m)(1).

The Wage Order should therefore expressly provide that overtime is calculated just as under federal law. For example, at present the minimum wage is \$7.15 and the minimum wage for food service workers is \$4.60. The difference of \$2.55 is therefore effectively a “tip allowance.” The proper overtime rate for tipped workers is thus \$8.18:

$$\begin{aligned} & (1.5 \times \text{Minimum Wage}) - \text{Tip Allowance} \\ & 1.5 \times \$7.15 - \$2.55 = \$8.175 \end{aligned}$$

Of course, if New York establishes the minimum wage for tipped workers at the full minimum wage, the tip allowance will be \$0, and the overtime rate for tipped workers will simply be 1.5 times the minimum wage. For example, if the minimum wage is \$7.25, then the overtime rate will be \$10.88.

4. Employers Should Be Required to Keep Accurate and Transparent Records of Tips Received and Inform Employees of the Same

Federal law requires employers both to keep records of the tips their employees receive and to inform employees of their intent to take any credits based on those tips. New York should build upon these requirements to more adequately protect tipped workers and guide employers toward best practices to avoid potential litigation.

Under the federal law, employers are already required to keep accurate records of the “[w]eekly or monthly amount reported by the employee, to the employer, of tips receive [which may consist of tax reporting forms].” 29 C.F.R. § 516.28(a)(2). *See also* 29 U.S.C. § 211(c) (authorizing the Wage and Hour Administrator to promulgate recordkeeping regulations). Federal law also requires employers to “inform[]” employees of their intent to take the tip credit. 29 U.S.C. § 203(m). Both the legislative history of this section and the weight of the case law on the issue strongly suggest that employers are required to not merely *notify* workers but also “*explain* the tip provision of the Act to the employee.” S. Rep. 93-690 at 43 (emphasis added). *See also Marshall v. Gerwill*, 495 F.Supp. 744, 753 (D. Md. 1980) (“Defendants cannot invoke these provisions without satisfying the clear requirements of prior notice to the employees”); *Bonham v. Copper Celler Corp.*, 476 F.Supp. 98, 101 (E.D. Tenn. 1979) (disallowing the tip credit because employer had not adequately informed plaintiffs of the tip credit provisions); *Cuevas v. Bill Tsagalis*, 149 Ill. App. 3d 977, 500 N.E.2d 1047 (2d Dist. 1986). Employers must also notify their employees in writing each time they change the amount of the tip credit from one week to the next. 29 C.F.R. § 516.28(a)(3). Even New York’s own Clerical and Miscellaneous Employees Wage Order contains basic recordkeeping requirements that are preconditions for taking any tip allowance at all. *See Wage Order for Clerical and Miscellaneous Employees* § 142-2.5.

The Wage Order should build upon these existing federal and state regulations by requiring employers to keep records of any tip pooling arrangement that they permit – which will benefit both tipped workers and law-abiding employers alike. As described in detail above, tip pooling creates substantial opportunities for abuse by unscrupulous employers. Transparency in the process is important to ensure that tipped workers actually receive the tips to which they are entitled.

In particular, the Wage Order should allow tip pooling only if employers implement the following recordkeeping practices – with tipped workers contributing information as needed:

- (1) Maintain an up-to-date, transaction-by-transaction log of the tips and charges purported to be gratuities left by each table, whether in cash or by credit card, that is regularly accessible to all workers for review.

- (2) Post a summary of daily sales and total tips (including cash and credit card) for each of the last seven days in an area accessible to all workers, such as the kitchen or break room.
- (3) Keep accurate records – accessible to all workers – regarding the distribution of tips via the tip pool, including:
 - the “share” of tips that each tipped occupation is scheduled to receive, as determined by a majority vote of tipped workers;
 - a list of all workers who are classified in an occupation that is allowed to take part in the tip pool;
 - the actual amount in tips that each tipped worker receives via the tip pool, by date;
 - a full accounting of all other policies and procedures related to the operation of the tip pool.

These requirements build upon current provisions of the Wage Orders that require recordkeeping, statements to employees, and posting – all common concepts in minimum wage laws. *See* Wage Order for the Hotel Industry at §§ 138-3.1-3.3; Wage Order for the Restaurant Industry at §§ 137-2.1-2.3. And by adopting these uniform recordkeeping requirements, the Wage Order would protect workers and law-abiding employers alike. Transparency in recordkeeping will deter unscrupulous employers from illegally appropriating a portion of workers’ tips. The state Department of Labor could investigate claims of tip misappropriation much more quickly as well.

Meanwhile, these recordkeeping requirements will help law-abiding employers in two ways. First, this reform would level the playing field for employers who are paying their workers the wages they are owed without resorting to the illegal tip pooling practices described above – but who currently have higher labor costs than their competitors simply because they are playing by the rules. Second, keeping these detailed records will guide employers toward best practices that will also protect them from allegations of improper tip pooling and shield them from costly litigation and stiff penalties in the future.

5. The Wage Order Should Strengthen Protections Against Improper Tip Pooling

Strengthening the recordkeeping requirements is a key first step toward protecting workers in tip pools. But the Wage Order should also provide that tip pools must be properly administered to be considered valid.

Once again, federal law provides a solid base upon which to build. For example, the federal minimum wage law makes clear that the tip pooling is only allowed for employees who “customarily and regularly receive tips.” 29 U.S.C. § 203(m). United States Department of Labor (USDOL) guidance clarifies that these workers include, but are not limited to, waitresses and waiters, bellhops, counter personnel who serve customers, table bussers and servers’ helpers, and

service bartenders – regardless of who actually receives the tips from customers. Field Operations Handbook at § 30d04(a).

But the guidance makes clear that other occupations are ineligible to participate in tip pools: janitors, dishwashers, chefs or cooks, and laundry room attendants. *Id.* at § 30d04(c). And hosts or hostesses may only be included on a case-by-case basis, depending on the particular worker’s duties, given the wide variation in such a job classification. *Id.* at § 30d05(d); *Kilgore v. Outback Steakhouse of Florida*, 160 F.3d 294, 301-02 (finding that employees called “hosts” qualified as tipped employees because they interacted with customers, seating them and delivering food and drinks).

Furthermore, federal regulations clearly provide that tipped workers may only be treated as such during the hours that he or she works as a tipped employee. 29 C.F.R. § 531.59. In other words, an employee who has “dual jobs” – one tipped and one non-tipped – may only be treated as a tipped worker during “hours spent in the tipped occupation,” and even then only if the workers “customarily and regularly” receive tips. Field Operations Handbook at § 30d00(d).

But under no circumstances – regardless of job title – may any employer or agent of an employer share in the tip pool. *See* 29 C.F.R. § 531.35. The federal minimum wage law defines “employer” broadly to include “any person acting directly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d). Courts utilize an “economic reality” test to determine whether an individual is an employer or agent for these purposes, considering: “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.” *See Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984). None of these factors is dispositive, and a worker may be an employer or agent even if her “control” is only periodic. *Herman v. RSR Sec. Servs., Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). As David Borgen and James Kan wrote in *Dipping Into the Tip Pool: Restaurant Workers and the FLSA* (2007):

Several courts have utilized this analysis to conclude that the involvement of various managers or owners in server tip pools was illegal. In *Ayres v. 127 Restaurant Corp.*, 12 F.Supp.2d 305 (S.D.N.Y. 1998), the court found that an individual upon being promoted to general manager of the restaurant became an agent of his employer and thus, an improper participant of the contested tip pool because he had full authority to suspend, terminate, and hire, assumed greater responsibility of the restaurant’s budget, and received a weekly salary irrespective of his hours worked. *Id.* at 307-308. Similarly, in *Chung v. New Silver Palace Restaurant, Inc.*, 246 F.Supp.2d 220 (S.D.N.Y. 2002), the court found the tip pool tainted where it included the participation of “black jackets.” Because these “black jackets” included major shareholders and board members of the restaurant, exercised hiring and firing powers, and had direct supervisory power over the waiter, the court concluded that they were employers under the FLSA and thus could not share in the waiter tip pool. *Id.* at 228-29. *See also Chan v. Sung Yue*

Tung, Corp., 2007 WL 313483 at *12-13 (finding that owners, officers, and managers of the restaurant improperly participated in the server tip pool).

The Wage Order should build upon these federal protections and provide the clear, concrete guidance that employers and workers alike requested at the public hearings. Specifically, the Wage Order should clarify that a tip pool will be considered to be valid *only* if it meets each of the following criteria:

- (1) Only workers who “customarily and regularly receive tips” may take part in a tip pool. The Wage Order should clearly delineate which workers may or may not take part. In particular, the Wage Order should clarify that:
 - Managers – those workers with hiring, firing, scheduling, supervisory, and/or disciplinary power – may *never* participate in the tip pool – even during shifts that he or she is not acting as a manager, due to his or her “periodic” control over other workers;
 - There should be a presumption that hosts, hostesses, and maître d’s may not participate in the tip pool unless the employer meets the burden of proving that such workers are never managers and are functionally performing the duties of servers, bussers, or runners regardless of their titles;
 - Back-of-the-house workers like pastry chefs, non-service workers like silverware polishers, and sommeliers may not participate in the tip pool for the shifts and/or hours during which they perform these duties – although these workers may fill “dual jobs” and may participate in the tip pool for any hours that they are employed as tipped employees – so long as they do not also act periodically as managers.
- (2) Workers should be empowered to determine whether to pool their tips (as is the current New York State policy) and what “share” of tips that each tipped worker occupation or classification should receive from the tip pool, if necessary, by a majority vote – although workers may collectively decide to reassess these decisions whether temporarily or permanently at any time.
- (3) Workers must be primarily responsible for administering the tip pool – including handling any cash tips and directing the redistribution of tips left on credit cards – but management may designate one or more trusted representative to watch over this process.
- (4) The employer must meet all of the recordkeeping requirements described in Recommendation 4, above.

A tip pool that fails to meet *all* of these requirements should be declared invalid, resulting in a violation of N.Y. Labor Law § 196-d. When an employer fails to maintain or produce accurate records, the burden of proof should shift to the employer once the employee “produces sufficient

evidence to show the amount and extent of that work as a matter of just and reasonable interference.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1940).

Furthermore, we urge the Wage Board to add language to the Wage Order that bars employers from deducting credit card fees from workers’ tips. Some New York employers deduct the transaction fees charged by credit card companies – up to 5% or more – from workers’ tips.

While the USDOL does not prohibit this practice under federal law, New York Labor Law has more concrete prohibitions against tip appropriation. Federal law simply provides that in order to take the tip credit, an employer must ensure that “all tips received by [a tipped employee] have been retained by the employee.” 29 U.S.C. § 203(m). New York Labor Law further provides that an employer may not “demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee.” N.Y. Labor Law § 196-d (emphasis added). The plain text of the statute forbids employers from retaining “any part of a gratuity” left by a customer, even if it is to pay for credit card processing fees.

This protection is especially important since tipped workers have no opportunity to decide whether or not the establishment accepts credit cards, which credit cards are accepted, and how credit cards are processed – all important question given that fees vary significantly across cards and providers. See, e.g., Maureen Farrell, *Saving on Credit Card Processing Fees*, FORBES, Feb. 20, 2007, available at http://www.forbes.com/2007/02/20/visa-americanexpress-globalpayment-ent-fin-cx_mf_0220creditcard.html.

Other states like California and Colorado already outlaw this practice. See Cal. Labor Code § 351; Colorado Minimum Wage Order Number 25, 2 Colo. Code of Regs. 1103-1. In fact, Colorado has done so using the Wage Order mechanism itself. *Id.*

Even some prominent employers have publicly decided to take the high road and voluntarily refrain from deducting these credit card fees. OSI Restaurant Partners – whose brands include Outback Steakhouse – publicly ended this practice because they determined it is “inconsistent with [OSI’s] principles and beliefs,” including “tak[ing] care of our people and our customers.” See Dina Berta, *Garnishing of Tips to Pay Charge Card Fees Sparks Controversy*, NATION’S RESTAURANT NEWS, Feb. 18, 2008, available at http://findarticles.com/p/articles/mi_m3190/is_7_42/ai_n24321216/. This move was applauded by Outback waitresses and waiters, one of whom estimated that the charges could add up to nearly \$800 per year. *Id.*

6. The Wage Order Should Provide a Presumption that Service Charges and Other Add-On Charges Are Tips

In a recent decision, the Court of Appeals held that mandatory charges or fees like “service charges” may be treated as tips if that is consistent with “the expectation of the reasonable customer,” or as the New York State Department of Labor has put it, if a “patron would understand that a service charge was being collected in lieu of a gratuity.” See *Samiento v. World*

Yacht, Inc., 10 N.Y. 3d 70 (2008). The Wage Order should adopt language that reflects this decision.

Drawing upon *Samiento*, the Wage Order should provide that:

Section 196-d of New York Labor Law prohibits employers from demanding, accepting, or retaining any part of an employee's gratuity or "any charge purported to be a gratuity." Any charge for service in the restaurant industry or involving food service in the hotel industry is presumed to be a charge purported to be a gratuity.

7. Meal and Lodging Credits Should Only Be Taken Consistent With Federal Minimum Wage and Should Count As Income for All Workers

In terms of meal and lodging credits, the Wage Order should maintain the maximum meal and lodging allowances that are provided in the current Wage Orders. In addition, the Wage Order should reflect three key protections that already exist under the federal minimum wage:

- (1) Meal and lodging credits must be "voluntary and uncoerced" and not "primarily for the benefit of the employer."

The Wage Order should create a process whereby workers can opt out of unwanted, unnecessary, or otherwise impractical meals or lodging arrangements – which is consistent with the USDOL's interpretation of federal law. USDOL regulations provide that employers may take meal and lodging credits toward wages only if the worker's acceptance of the meal or lodging is "voluntary and uncoerced." 29 C.F.R. § 531.31. Further, an employer may not take credit for what it provides "primarily for the benefit of the employee." *Id.* at § 531.32(c).

For example, workers should not be required to pay for meals that they simply cannot eat. Some workers have dietary or religious restrictions that keep them from eating the food that is served to them by employers. Employers should therefore create a process whereby workers may opt into and/or out of meal and lodging with reasonable notice.

In practice, some restaurant employers conduct meetings over "family meal" before a shift. Of course, workers who opt out of the "meal" itself may still be required to attend these pre-shift meetings even though they are not eating, as long as they are paid for their hours worked (something that should happen regardless of whether a worker is eating a meal during a required meeting).

- (2) Meal and lodging allowances should be considered wages for overtime purposes.

The Wage Order should conform to federal law in requiring meal and lodging allowances to be counted toward an employee's wages for purposes of calculating his or her regular rate of pay for overtime purposes, regardless of whether the employee makes minimum wage or more than minimum wage:

Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made. Where board, lodging, or other facilities are customarily furnished in addition to a cash wage, the reasonable cost of the facilities to the employer must be considered as part of the employee's regular rate of pay.

29 C.F.R. § 531.37(b). *See also* Field Operations Handbook § 30c01(c).

(3) Meal and lodging credits should be denied if payroll records do not track them.

Finally, the Wage Order should deny employers the opportunity to credit the cost of meals and lodging (up to the maximum allowance) toward wages if they fail to keep adequate records of these credits. Federal law already requires employers to keep these records. *See* 29 C.F.R. § 516.27. And adequate recordkeeping is vital to ensuring that unscrupulous employers do not misuse these credits.

8. The Uniform Maintenance Allowance Should Be Preserved and Extended

The Wage Order should preserve and extend the uniform maintenance allowance and ensure that all workers are compensated for purchasing and cleaning required uniforms. Required uniforms are a costly expense, especially for workers who are making minimum wage, and employers should not be encouraged to hand off overhead expenses to their workers. Doing so would also be inconsistent with federal law, which does not allow an employer to impose the cost of doing business upon its employees – including the cost of “uniforms and of their laundering” or “rental.” *See* 29 C.F.R. §§ 531.3(d)(2), 531.32(c).

The Wage Order should clarify that the “ordinary wardrobe” exception to the uniform allowance should match the applicable definition in federal law. ROC-NY reports that employers routinely misuse the ordinary wardrobe exclusion to require workers to purchase specialty items that are not reasonably ordinary wardrobe – for example, one member reports being asked to purchase a blue sequined coat. The Wage Order should define “ordinary wardrobe” consistent with federal guidance, which outlines the following principles for determining what counts as a uniform (versus “ordinary wardrobe”):

- a. If an employer merely prescribes a general type of ordinary basic street clothing to be worn while working and permits variations in details of dress, the garments chosen by the employees would not be considered to be uniforms.
- b. On the other hand, where the employer does prescribe a specific type and style of clothing to be worn at work, e.g. where a restaurant or hotel requires a tuxedo or a skirt and blouse or jacket of a specific or distinctive style, color, or quality, such clothing would be considered uniforms.

- c. Other examples would include uniforms required to be worn by guards, cleaning and culinary personnel, and hospital and nursing home personnel.

Field Operations Handbook at § 30c12(f)(1). The Wage Order would be most clear if it provided the same principles.

Finally, any “wash and wear” exemption that is adopted should mirror federal guidance, which both narrowly defines “wash and wear” and requires employers to provide uniforms in sufficient numbers so that they can be washed on a regular laundry schedule (i.e. not requiring unreasonably frequent washing):

However, in those instances where uniforms are (a) made of “wash and wear” materials, (b) may be routinely washed and dried with other personal garments, and (c) do not require ironing or any other special treatment such as drycleaning, daily washing, or commercial laundering, [federal authorities] will not require that employees be reimbursed for uniform maintenance costs. This position is not applicable where daily washing is required and the employer furnishes or reimburses the employee for a single uniform.

Field Operations Handbook § 30c12(b) (emphasis in original).

9. Spread of Hours

The Wage Order should continue to provide a right to premium pay for work over a “spread of hours.” As workers testified at the public hearings, working in service industries – like restaurants and hotels – is physically and mentally exhausting. And workers who are working a split shift often have trouble filling the break time between shifts productively. The intent of spread of hours regulations is to discourage employers from scheduling these extremely long shifts – whether or not punctuated by breaks within a shift – without adequate compensation.

To be sure, spread of hours regulations are confusing, especially since courts have differed on the application of spread of hours to workers who earn more than minimum wage. *Compare Yang v. ACBL Corp.*, 2005 U.S. Dist. LEXIS 31567, at *11 n.10 (S.D.N.Y. 2005) and *Espinosa v. Delgado Travel Agency*, 2007 U.S. Dist. LEXIS 44844 (E.D.N.Y. 2007). But it is enormously confusing to calculate how a spread of hours requirement would “phase out” for workers who make more than minimum wage, and it is difficult to understand why the intent behind this regulation would be inapplicable to those workers. The Wage Order should clarify spread of hours for all involved by reiterating that all workers are entitled to spread of hours pay.

Finally, the Wage Board should consider taking additional steps to protect workers from unreasonably long shifts to supplement the existing spread of hours regulation, for example, the daily overtime requirements that Make the Road New York has proposed and the protection against being forced to work unreasonably long shifts that Chinese Staff and Workers’ Association has proposed.

10. In addition to Spread of Hours, Call-In Pay and the Uniform Maintenance Allowance Should Apply to All Employees Regardless of Wage Level

As with spread of hours, both call-in pay and the uniform maintenance allowance should apply to all employees, regardless of wage level. First, the rationales behind both the call-in pay requirement and the uniform maintenance allowance apply regardless of how much a worker is paid. The call-in pay requirement deters employers from poor scheduling that requires workers to arrive for work only to be sent home for lack of work – something that can happen to minimum wage workers and others alike. The uniform maintenance allowance ensures that a worker’s agreed-upon wage rate is clear and transparent – whether she is paid the minimum wage or more – and ensures that an employer cannot use such allowances and credits to lower a worker’s agreed-upon rate of pay and offset overhead costs.

Second, extending these protections to all workers makes these requirements easier to understand and calculate for workers and employers alike. As with spread of hours, discussed above, employers and workers both have trouble calculating the proper call-in pay and uniform maintenance allowances when they are “phased out” for workers who make slightly more than the minimum wage. Extending these protections will make them easier to understand and implement.

Granted, there may be some highly compensated workers for whom these sorts of regulations should not apply, for example, managers who themselves determine schedules and establish rates of pay. Rather than implementing a complicated phase-out as in current law, regulations like spread-and-hours, call-in pay, and uniform maintenance allowances could simply exempt any employees who are exempt from the existing overtime provisions of the Wage Order. These longstanding overtime exemptions are readily understood throughout these industries, and this sort of exemption is much simpler than a mathematically complicated phase-out.

11. Employees Paid a Flat Weekly Rate Should Have Their Regular Rates for Overtime Purposes Calculated on the Basis of a Forty-Hour Workweek

The Wage Order should create a rebuttable presumption that salaried workers are compensated on the basis of a forty-hour workweek. At present, the Wage Orders and federal case law provide conflicting guidance on this point.

As Make the Road New York discussed in its written testimony, existing statutes and case law diverge in terms of determining how a salaried worker’s regular rate should be calculated. The current Wage Orders both provide that a salaried worker’s regular rate of pay should be calculated by dividing the worker’s weekly salary by the total number of hours worked in a week. *See* Wage Order for the Restaurant Industry at § 137-3.5; Wage Order for the Hotel Industry at § 138-4.16. *See also* *In re Cayuga Lumber*, Docket PR05-009 (N.Y. Industrial Board of Appeals, Sep. 27, 2007).

But federal courts in New York interpreting federal overtime requirements have recognized a presumption that a weekly salary covers only the first 40 hours of employment, so the regular rate should be calculated by dividing the worker’s weekly salary by the total number of hours worked

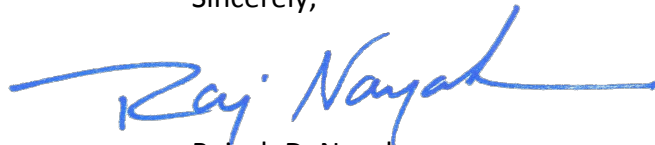
in a week *up to 40*. See *Giles v. City of New York*, 41 F. Supp. 2d 308, 317 (S.D.N.Y. 1999) ("There is a rebuttable presumption that a weekly salary covers 40 hours; the employer can rebut the presumption by showing an employer-employee agreement that the salary cover a different number of hours"); *Jacobsen v. Stop & Shop Supermarket Co.*, No. 02 Civ. 5915, 2003 WL 21136308, at *3 (S.D.N.Y. May 15, 2003); *Rosso v. PI Management Associates, L.L.C.*, 2005 WL 3535060 (S.D.N.Y. 2005). This is also the position taken by states like California. See, e.g., Cal. Misc. Industries Wage Order 17-2001 § 4 (2001).

The Wage Order should therefore incorporate the same protection as under federal law and recognize a presumption that a weekly salary only covers the first 40 hours of employment. A salaried worker's regular rate should be calculated by dividing the worker's weekly salary by the total number of hours worked in a week *up to 40*. This not only protects workers, but it ensure that employers who follow New York's Wage Order are not exposed from liability under federal law, which incorporates the state minimum wage in establishing its overtime requirements. See *Field Operations Handbook* §§ 32b00a(b), 32j02. See also *Chan v. Sung Yue Tung Corp*, 2007 WL 313483 at *25 (S.D.N.Y.) (relying on 29 U.S.C. 218(a)).

* * *

Thank you again for taking the time to consider our testimony. Again, we are happy to discuss any of the ideas, suggestions, and models that we have raised within at your convenience.

Sincerely,



Rajesh D. Nayak
Staff Attorney
National Employment Law Project (New York, NY)

On behalf of:

- **Asian-American Legal Defense and Education Fund (New York, NY)**
- **Brandworkers International (Queens, NY)**
- **Chinese Staff and Workers' Association (New York, NY)**
- **The Legal Aid Society (New York, NY)**
- **MFY Legal Services, Inc. (New York, NY)**
- **Restaurant Opportunities Center of New York (New York, NY)**
- **Tompkins County Workers' Center (Ithaca, NY)**
- **Community Development Project of the Urban Justice Center**
- **Workers' Rights Law Center (Kingston, NY)**
- **The Workplace Project (Hempstead, NY)**
- **YKASEC – Empowering the Korean American Community (Queens, NY)**

Cc: Neil Kwatra, Director of Political and Strategic Affairs, NYHMTC
Daniel C. Murphy, President, NYS Hospitality & Tourism Association
Rick J. Sampson, President & CEO, NYS Restaurant Association
James W. Versocki, Esq., Archer, Byington, Glennon & Levine LLP
Peter Ward, International Vice President & Business Manager, UNITE HERE Local 6