52 N.J.R. 1562(a)

VOLUME 52, ISSUE 15, AUGUST 3, 2020

RULE ADOPTIONS

Reporter
52 N.J.R. 1562(a)

Agency

LABOR AND WORKFORCE DEVELOPMENT > DIVISION OF WAGE AND HOUR COMPLIANCE

Administrative Code Citation

Adopted Amendments: N.J.A.C. 12:56-2.1, 3.1, and 3.2

Adopted New Rules: N.J.A.C. 12:56-3.2, 3.3, 3.4, and 3.5

Text

Minimum Wage

Proposed: February 3, 2020, at 52 N.J.R. 125(a).

Adopted: July 14, 2020, by Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

Filed: July 14, 2020, as R.2020 d.075, **without change**.

Authority: N.J.S.A. 34:11-56a5 and P.L. 2019, c. 32.

Effective Date: August 3, 2020.

Expiration Date: June 29, 2025.

Summary of Hearing Officer's Recommendations and Agency's Response:

A public hearing regarding the proposed amendments and new rules was held on February 21, 2020, at the Department of Labor and Workforce Development (Department). David Fish, Executive Director, Legal and Regulatory Services, was available to preside at the public hearing and to receive testimony. No one testified at the public hearing. Written comments were submitted directly to the Office of Legal and Regulatory Services. After

reviewing the written comments, the hearing officer recommended that the Department proceed with adoption of the amendments and new rules without change.

Summary of Public Comments and Agency Responses:

Written comments were submitted by James M. McDonnell, Esq., Jackson Lewis, P.C., Berkeley Heights, NJ, on behalf of the New Jersey Restaurant Association. The submitted comments and the Department's responses are summarized below.

COMMENT: The commenter objects to proposed new N.J.A.C. 12:56-3.5(g), which prohibits an employer from using an employee's tips, whether or not the employer has taken a tip credit, for any reason other than as wages or in furtherance of a valid tip pool, and expressly prohibits the employer from using an employee's tips to pay any portion, however small, of the fee charged to the employer by a credit card company or other financial institution for the use of credit or debit cards in its business, including the processing of such credit or debit card transactions. The commenter notes that within proposed new N.J.A.C. 12:56-3.5(f), the Department characterizes tips as the property of the employee, and the commenter takes issue with the Department "requir[ing] restaurants to wholly bear the costs associated with collecting the employee's property." The commenter asserts that proposed new N.J.A.C. 12:56-3.5(g) conflicts with the position of the United States Department of Labor (USDOL) with respect to "the recoupment of the transaction costs associated with credit card tips." In support of this assertion, the commenter cites the USDOL Field Operations Handbook, which indicates that in its enforcement of the Federal Fair Labor Standards Act (FLSA), the USDOL permits an employer to reduce the amount of tips paid to the employee by the percentage charged by the credit card company (that is, transactional fee). The commenter states that restaurants prefer "uniformity in the application of laws and regulations with respect to the proper processing of gratuities."

RESPONSE: 29 U.S.C. § 218(a) expressly states that no provision of the FLSA shall excuse noncompliance with any state law establishing a minimum wage higher than the minimum wage established under the FLSA. This is commonly referred to as the "savings clause" of the FLSA and is understood to mean that states may pass laws and promulgate rules regarding the payment of minimum wage that are more generous to employees than the FLSA. Consequently, the commenter's preference notwithstanding, the Department's adoption of new N.J.A.C. 12:56-3.5(g) is both within the Department's statutory authority under the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq., and permitted under the "savings clause" of the FLSA.

As to the commenter's assertion that employers should not be required to pay credit card transaction fees "associated with collecting the employee's property (tips)," the Department disagrees. The payment of credit card transaction fees is a cost of doing business, like rent or utilities. Tipped employees are not independent contractors. They are not in business. They are employees and, as such, should not be required to suffer any diminution in their earnings, whether wages or tips, for the payment of credit card transaction fees.

COMMENT: The commenter objects to proposed new N.J.A.C. 12:56-3.5(n), which states, in pertinent part, that where a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing related duties, such as cleaning, setting tables, toasting bread, making coffee, or occasionally washing dishes or glasses, no tip credit may be taken for the time spent in such duties. The commenter asserts that new N.J.A.C. 12:56-3.5(n) would "implement the so called '80/20 Rule,'" which had been used for years by the USDOL in its enforcement of the FLSA, but was recently "abandoned" by the USDOL under the Trump Administration. The commenter takes issue with use of the "80/20 Rule" on the basis that it is "difficult for employers to administer" and leads to "confusion," citing in support of this position, the USDOL's October 2019 rule proposal, which includes a justification for the Trump Administration's abandonment of the 80/20 Rule for the purpose of enforcing the FLSA. The commenter maintains that adoption by the Department of the 80/20 Rule will interfere with restaurants' ability to "effectively utilize the tip-credit against the minimum wage," which he asserts will "result in a decrease in the overall number of restaurants, bars and dining establishments."

RESPONSE: Nineteen state attorneys general, including the Attorney General for the State of New Jersey, submitted formal comments in opposition to the USDOL proposal referred to and relied upon by the commenter in

support of his assertions. In short, the state attorneys general maintained that the 80/20 Rule places reasonable limitations on tip-crediting when workers are engaged in non-tip generating tasks and that the USDOL's rationale for the "drastic reversal of its interpretation [of the FLSA] is devoid of adequate justification." The state attorneys general also took issue with the USDOL's contention, echoed by the commenter, that the 80/20 rule has engendered confusion among courts, providing evidence that this statement is simply untrue. Suffice it to say, the Department agrees with the 19 state attorneys general in their assessment of the importance of the 80/20 Rule in protecting the rights of workers under minimum wage laws that permit tip-crediting, such as the New Jersey Wage and Hour Law, amended by P.L. 2019, c. 32. With the adoption of N.J.A.C. 12:56-3.5(n), the Department will, as is its prerogative under both State and Federal law, codify the 80/20 Rule in New Jersey for the purpose of enforcing the State Wage and Hour Law's minimum wage requirement, specifically relative to tip-crediting.

Federal Standards Statement

Section 6 of the Federal "Fair Labor Standards Act of 1938" (29 U.S.C. § 206), contains a minimum hourly wage rate of $ 7.25 per hour, effective July 24, 2009, with no scheduled adjustments, annual or otherwise; whereas N.J.A.C. 12:56-3, as adopted with amendments and new rules, would contain a minimum hourly wage rate for the State of New Jersey, effective January 1, 2020, of $ 11.00 per hour, with annual increases of $ 1.00 per hour until January 1, 2024, when the State minimum wage would be at least $ 15.00 per hour. The existence of a minimum hourly wage rate in New Jersey, which exceeds the Federal minimum hourly wage rate will most certainly have an economic impact on all of the citizens of this State, whether those citizens are minimum wage earners who will receive a pay raise, business owners who will be required to pay the increased State minimum hourly wage to their employees, or citizens of the State who are neither minimum wage earners, nor business owners, who will be impacted in one way or another (whether positively or negatively) by the existence of a State minimum hourly wage that exceeds the Federal minimum hourly wage rate. However, as explained in the Summary, Social Impact, and Economic Impact statements in the notice of proposal, the Department has no discretion to deviate from P.L. 2019, c. 32, which, effective July 1, 2019, increased the State minimum hourly [page=1563] wage rate to $ 10.00 per hour and requires that the rate be increased again on January 1, 2020, to $ 11.00 per hour, and again on January 1 of each year for four years thereafter, when the State minimum wage will reach a rate of, at minimum, $ 15.00 per hour.

Full text of the adoption follows:

SUBCHAPTER 2. DEFINITIONS

12:56-2.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

...

"Employer" includes any individual, partnership, association, corporation, and the State and any county, municipality, or school district in the State, or any agency, authority, department, bureau, or instrumentality thereof, or any person, or group of persons, acting directly or indirectly in the interest of an employer in relation to an employee.

"Established employer on-the-job or other training program" means an existing on-the-job or other training program that, when completed by the employee, either results in the employee earning an industry-valued credential or results in the employee being awarded credit that may be directly applied toward the earning of an industry-valued credential.

...

"Seasonal employment" means employment during a year by an employer that is a seasonal employer, or employment by a non-profit or government entity of an individual who is not employed by that employer outside of

the period of that year commencing on May 1 and ending September 30, or employment by a governmental entity in a recreational program or service during the period commencing on May 1 and ending September 30, except that "seasonal employment" does not include employment of employees engaged to labor on a farm on either a piece-rate or regular hourly rate basis.

"Seasonal employer" means an employer who exclusively provides its services in a continuous period of not more than 10 weeks during the months of June, July, August, and September, or an employer for which, during the immediately previous calendar year, not less than two-thirds of the employer's gross receipts were received in a continuous period of not more than 16 weeks or for which not less than 75 percent of the wages paid by the employer during the immediately preceding year were paid for work performed during a single calendar quarter.

"Small employer" means any employer who employed less than six employees for every working day during each of a majority of the calendar workweeks in the current calendar year and less than six employees for every working day during not less than 48 calendar workweeks in the preceding calendar year, except that, if the employer was newly established during the preceding calendar year, the employer shall be regarded as a "small employer" if the employer employed less than six employees for every working day during all of the weeks of that year, and during a majority of the calendar workweeks in the current calendar year, and, if the employer is newly established during the current calendar year, the employer shall be regarded as a "small employer" if the employer employed less than six employees for every working day during a majority of the calendar workweeks in the current calendar year.

"Tipped employee" means any employee engaged in an occupation in which he or she customarily and regularly receives more than $ 30.00 a month in tips. The definition of tipped employee does not require that the calendar month be used in determining whether more than $ 30.00 a month is customarily and regularly received as tips. Any appropriate recurring monthly period beginning on the same day of the calendar month may be used.

...

"Wages" means any monies due an employee from an employer for services rendered or made available by the employee to the employer as a result of their employment relationship including commissions, bonus, and piecework compensation and including the fair value of any food or lodgings supplied by an employer to an employee.

...

SUBCHAPTER 3. MINIMUM WAGE RATES

12:56-3.1 Statutory minimum wage rates for specific years; general

(a) Except as provided at N.J.A.C. 12:56-3.2, 3.3, 3.4, and 3.5, every employee shall, effective January 1, 2020, be paid not less than $ 11.00 per hour or the minimum wage rate set by section 6(a)(1) of the Federal "Fair Labor Standards Act of 1938" (29 U.S.C. § 206(a)(1), whichever is greater.

(b) For the period from January 1, 2020 through January 1, 2024, on an annual basis, on or about September 30, the Department shall, through a public notice published in the New Jersey Register, revise the minimum hourly wage set forth in (a) above, so as to be the greater of either an amount based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics, or the following:

1. For January 1, 2020, $ 11.00;

2. For January 1, 2021, $ 12.00;

3. For January 1, 2022, $ 13.00;

4. For January 1, 2023, $ 14.00; and

5. For January 1, 2024, $ 15.00.

(c) Beginning January 1, 2025, on an annual basis, on or about September 30, the Department shall revise the minimum hourly wage set forth in (a) above based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics. Annually, the Department shall, through a public notice published in the New Jersey Register, provide the new CPI-W, U.S. City Average, adjusted minimum hourly wage.

(d) The Department shall, no later than September 30 of each year, publish a notice, as set forth in (b) and (c) above, on the Department's website, http://www.nj.gov/labor/.

12:56-3.2 Statutory minimum wage rate for specific years; small and seasonal employees

(a) Except as provided at N.J.A.C. 12:56-3.3 and 3.4, every employee of a small employer and every employee who is engaged in seasonal employment shall, effective January 1, 2020, be paid not less than $ 10.30 per hour or the minimum wage rate set by section 6(a)(1) of the Federal Fair Labor Standards Act of 1938, 29 U.S.C. §206(a)(1), whichever is greater.

(b) For the period from January 1, 2020 through January 1, 2026, on an annual basis, on or about September 30, the Department shall, through a public notice published in the New Jersey Register, revise the minimum hourly wage set forth in (a) above, so as to be the greater of either an amount based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics, or the following:

1. For January 1, 2020, $ 10.30;

2. For January 1, 2021, $ 11.10;

3. For January 1, 2022, $ 11.90;

4. For January 1, 2023, $ 12.70;

5. For January 1, 2024, $ 13.50;

6. For January 1, 2025, $ 14.30; and

7. For January 1, 2026; $ 15.00.

(c) For January 1, 2027, on or about September 30, 2026, the Department shall, through a public notice published in the New Jersey Register, revise the minimum hourly wage set forth in (a) above by the same amount (not percentage) as the increase in the minimum hourly wage from January 1, 2026 to January 1, 2027, for employees covered under N.J.A.C. 12:56-3.1, plus one half of the difference between $ 15.00 per hour and the minimum hourly wage in effect on January 1, 2026, for employees covered under N.J.A.C. 12:56-3.1.

(d) For January 1, 2028, on or about September 30, 2027, the Department shall, through a public notice published in the New Jersey Register, revise the minimum hourly wage set forth in (a) above by the [page=1564] same amount (not percentage) as the increase in the minimum hourly wage from January 1, 2027 to January 1, 2028, for employees covered under N.J.A.C. 12:56-3.1, plus one half of the difference between $ 15.00 per hour and the minimum hourly wage in effect on January 1, 2026, for employees covered under N.J.A.C. 12:56-3.1.

(e) Beginning January 1, 2029, on an annual basis, on or about September 30, the Department shall revise the minimum hourly wage set forth in (a) above based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor,

Bureau of Labor Statistics. Annually, the Department shall, through a public notice published in the New Jersey Register, provide the new CPI-W, U.S. City Average, adjusted minimum hourly wage.

(f) The Department shall, no later than September 30 of each year, publish a notice, as set forth in (b), (c), (d), and (e) above, on the Department's website, http://www.nj.gov/labor/.

12:56-3.3 Statutory minimum wage rate for specific years; labor on a farm

(a) Every employee engaged on a piece-rate or regular hourly rate basis to labor on a farm shall, effective January 1, 2020, be paid not less than $ 10.30 per hour or the minimum wage rate set by section 6(a)(1) of the Federal Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1), whichever is greater.

(b) For the period from January 1, 2020 through January 1, 2024, on an annual basis, on or about September 30, the Department shall, through a public notice published in the New Jersey Register, revise the minimum hourly wage set forth in (a) above, so as to be the greater of either an amount based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics, or the following:

1. For January 1, 2020, $ 10.30;

2. For January 1, 2021, $ 10.30;

3. For January 1, 2022, $ 10.90;

4. For January 1, 2023, $ 11.70; and

5. For January 1, 2024, $ 12.50.

(c) For the period from January 1, 2025 through January 1, 2027, on an annual basis, on or about September 30, the Department shall, through a public notice published in the New Jersey Register, revise the minimum hourly wage set forth in (a) above, so as to be the greater of either an amount based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics, or the following:

1. For January 1, 2025, $ 13.40;

2. For January 1, 2026, $ 14.20; and

3. For January 1, 2027, $ 15.00.

(d) For January 1, 2028, on or about September 30, 2027, the Department shall, through a public notice published in the New Jersey Register, revise the minimum hourly wage set forth in (a) above by the same amount (not percentage) as the increase in the minimum hourly wage from January 1, 2027 to January 1, 2028, for employees covered under N.J.A.C. 12:56-3.1, plus one-third of the difference between $ 15.00 per hour and the minimum hourly wage in effect on January 1, 2027, for employees covered under N.J.A.C. 12:56-3.1.

(e) For January 1, 2029, on or about September 30, 2028, the Department shall, through a public notice published in the New Jersey Register, revise the minimum hourly wage set forth in (a) above by the same amount (not percentage) as the increase in the minimum hourly wage from January 1, 2028 to January 1, 2029, for employees covered under N.J.A.C. 12:56-3.1, plus one-third of the difference between $ 15.00 per hour and the minimum hourly wage in effect on January 1, 2027, for employees covered under N.J.A.C. 12:56-3.1.

(f) For January 1, 2030, on or about September 30, 2029, the Department shall, through a public notice in the New Jersey Register, revise the minimum hourly wage set forth in (a) above by the same amount (not percentage) as

the increase in the minimum hourly wage from January 1, 2029 to January 1, 2030, for employees covered under N.J.A.C. 12:56-3.1, plus one-third of the difference between $ 15.00 per hour and the minimum hourly wage in effect on January 1, 2027, for employees covered under N.J.A.C. 12:56-3.1.

(g) Beginning January 1, 2031, on an annual basis, on or about September 30, the Department shall revise the minimum hourly wage set forth in (a) above based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics. Annually, the Department shall, through a public notice published in the New Jersey Register, provide the new CPI-W, U.S. City Average, adjusted minimum hourly wage.

(h) The Department shall, no later than September 30 of each year, publish a notice, as set forth in (b), (c), (d), and (e) above, on the Department's website, http://www.nj.gov/labor/.

(i) The method for determining the minimum hourly wage rates set forth in (c), (d), (e), and (f) above may be subject to change pursuant to N.J.S.A. 34:11-56a4(d)(3), which directs the Commissioner of the Department and the Secretary of Agriculture not later than March 31, 2024, to issue a recommendation either approving the method for determining increases set forth in (c), (d), (e), and (f) above, disapproving the method for determining increases set forth in (c), (d), (e), and (f) above, or suggesting an alternative to the method for determining increases set forth in (c), (d), (e), and (f) above; and which states that the method for determining the minimum hourly wage rates set forth in (c), (d), (e), and (f) above shall take effect unless the Commissioner of the Department and the Secretary of Agriculture issue a recommendation either disapproving the method for determining increases set forth in (c), (d), (e), and (f) above or suggesting an alternative to the method for determining increases set forth in (c), (d), (e), and (f) above, and the Legislature, not later than June 30, 2024, enacts a concurrent resolution approving the implementation of the recommendation of the Commissioner and the Secretary of Agriculture.

12:56-3.4 Statutory minimum wage rate; training wage

(a) Commencing on January 1, 2020, an employee enrolled in an established on-the-job or other training program may, for the first 120 hours of work after having been hired, be paid a training wage of not less than 90 percent of the minimum hourly wage specified at N.J.A.C. 12:56-3.1, provided the following conditions are met:

1. The employee has been hired in, and is receiving training for, an occupation in which the employee has no previous similar or related experience;

2. The employer is not utilizing the employee being paid the training wage in a manner that causes, induces, encourages, or assists any displacement or partial displacement of any currently employed worker, including any previous recipient of the training wage, by reducing hours of a currently employed worker, replacing a current or laid off employee with a trainee, or by relocating operations resulting in a loss of employment at a previous workplace, or in a manner that replaces, supplants, competes with, or duplicates any approved apprenticeship program;

3. The employer makes a good faith effort to continue to employ the employee after the period of the training wage expires; and

4. The employer shall not hire the employee at the training wage unless there is a reasonable expectation that there will be regular employment, paying at or above the effective minimum wage, for the trainee upon the successful completion of the period of the training wage.

(b) As an alternative to, or in addition to, sanctions provided at N.J.A.C. 12:56-1.3 for any violation of N.J.S.A. 34:11-56a et seq., the New Jersey Wage and Hour Law, and/or this chapter, if an employer has made repeated, knowing violations of the provisions of this section regarding the payment of a training wage, the Department shall suspend the employer's right to pay a training wage.

(c) The employer's right to pay a training wage shall not be suspended for a period beyond three years. However, in determining the length of [page=1565] time for which an employer's right to pay a training wage shall be suspended, the following criteria shall be considered:

1. The seriousness of the violation;

2. The past history of previous violations by the employer;

3. The good faith of the employer; and

4. Any other factors that the Commissioner deems appropriate in determining the length of the suspension of the employer's right to pay a training wage.

(d) Whenever the Department shall find cause to suspend the right of an employer to pay a training wage, it shall notify the employer of the reason therefor, in writing, and provide the opportunity for a hearing in accordance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(e) All requests for hearings shall be filed within 10 business days from the date of receipt of the notice.

(f) In the absence of a timely request for a hearing, pursuant to (e) above, the determination of the Department shall be deemed the final administrative action in the matter.

(g) All requests for hearings shall be reviewed by the Division of Wage and Hour Compliance in order to determine whether the dispute can be resolved at an informal settlement conference. If the review indicates that an informal settlement conference is warranted, such conference shall be scheduled. If a settlement cannot be reached, the case shall be forwarded to the Office of Administrative Law as a contested case.

12:56-3.5 Tipped employees

(a) With respect to tipped employees, in determining the minimum hourly wage an employer is required to pay such an employee, only the employer who is paying its employee the minimum hourly wage set forth at N.J.A.C. 12:56-3.1 may take a credit for tips received by the employee against that minimum hourly wage (set forth at N.J.A.C. 12:56-3.1) in the following amounts:

1. For January 1, 2019 through June 30, 2019, $ 6.72 per hour;

2. For July 1, 2019 through December 31, 2019, $ 7.37 per hour;

3. For calendar year 2020, $ 7.87 per hour;

4. For calendar year 2021, $ 7.87 per hour;

5. For calendar year 2022, $ 7.87 per hour;

6. For calendar year 2023, $ 8.87 per hour; and

7. Commencing January 1, 2024, $ 9.87 per hour.

(b) The employer who takes a tip credit under (a) above, shall pay to each employee against whom such tip credit has been applied, a cash wage equal to the difference between the minimum hourly wage set forth at N.J.A.C. 12:56-3.1 and the tip credit taken under (a) above.

(c) With respect to tipped employees for whom the employer does not take the tip credit set forth in (a) above, the employer must pay the employee a cash wage equal to the full amount of the minimum hourly wage to which the employee is entitled under either N.J.A.C. 12:56-3.1 (employees, generally), 3.2 (employees of a small employer

and employees who are engaged in seasonal employment), 3.3 (employees engaged on a piece-rate or regular hourly rate basis to labor on a farm), or 3.4 (training wage).

(d) The tip credit permitted under (a) above may be taken only with respect to those employees whose occupations in the workweeks for which such payments are made are those of tipped employees.

(e) A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him or her. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity.

(f) Tips are the property of the employee whether or not the employer has taken a tip credit under (a) above.

(g) The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than as wages or in furtherance of a valid tip pool; this includes, a prohibition against the employer using an employee's tips to pay any portion, however small, of the fee charged to the employer by a credit card company or other financial institution for the use of credit or debit cards in its business, including the processing of such credit or debit card transactions.

(h) Only tips actually received by the employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee."

(i) In addition to cash sums presented by customers that an employee keeps as his or her own, tips received by an employee include amounts paid by bank check or other negotiable instrument payable at par and amounts transferred by the employer to the employee pursuant to directions from credit customers who designate amounts to be added to their bills as tips. Special gifts in forms other than money, or its equivalent, as described in this section, such as theater tickets, passes, or merchandise, are not counted as tips received by the employee for purposes of this section.

(j) Where employees practice tip splitting, such as where waiters give a portion of their tips to busboys, both the amounts retained by the waiters and those given to the busboys are considered tips of the individuals who retain them. Similarly, where an accounting is made to an employer for his or her information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his or her own are counted as his or her tips.

(k) An employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

(l) A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its employees, cannot be counted as a tip received in applying the provisions of this section. Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received.

(m) An employee must himself or herself customarily and regularly receive more than $ 30.00 per month in tips in order to qualify as a tipped employee. The fact that he or she is part of a group that has a record of receiving more than $ 30.00 per month in tips will not qualify him or her.

(n) Where an employee is employed in a dual job, for example, where a maintenance person in a hotel also serves as a waiter or waitress, if he or she customarily and regularly receives at least $ 30.00 per month in tips for his or her work as a waiter or waitress, he or she is a tipped employee only with respect to his or her employment as a waiter or waitress. He or she is employed in two occupations, and no tip credit may be taken for his or her hours of employment in his or her occupation of maintenance person. Such a situation is distinguishable from that of a waiter

or waitress who spends part of his or her time cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses. It is likewise distinguishable from the counterperson who also prepares his or her own short orders or who, as part of a group of counterpeople, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips. However, where a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing related duties, no tip credit may be taken for the time spent in such duties.

(o) The employee must receive more than $ 30.00 per month in tips "customarily and regularly" in the occupation in which he or she is engaged in order to qualify as a tipped employee. If it is known that he or she always receives more than the stipulated amount each month, as may be the case with many employees in occupations, such as those of waiters, bellhops, taxicab drivers, barbers, or beauty operators, the employees will qualify and the tip credit may be applied. On the other hand, an employee who only occasionally or sporadically receives tips totaling more than $ 30.00 per month, such as at Christmas or New Years' when customers may be more generous than usual, will not be deemed a tipped employee. The phrase "customary and regularly" signifies a frequency which must be greater than occasional, but which may be less than constant. If an employee is in an occupation in which he or she normally and recurrently receives more than $ 30.00 per month in tips, he or she will be considered a tipped employee even though occasionally because of sickness, [page=1566] vacation, seasonal fluctuations, or the like, he or she fails to receive more than $ 30.00 in tips in a particular month.

(p) An exception to the requirement that an employee will qualify as a tipped employee under (o) above is made in the case of initial and terminal months of employment. In such months, the purpose of the provision for tipped employees would be fulfilled if qualification as a tipped employee is based on his or her receipt of tips in the particular week or weeks of such month at a rate in excess of $ 30.00 per month, where the employee has worked less than a month because he or she started or terminated employment during the month.

(q) An employer is not eligible to take the tip credit set forth in (a) above, unless it has informed its tipped employees in advance of the employer's use of the tip credit of the following:

1. The amount of the cash wage that is to be paid to the tipped employee by the employer;

2. The amount of the tip credit, which will be claimed by the employer, which amount may not exceed the value of the tips actually received by the employee;

3. That all tips received by the tipped employee must be retained by the employee, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

4. That the tip credit shall not apply to any employee who has not been informed of the requirements of this section.

(r) The credit allowed on account of tips may be less than that permitted under (a) above; it cannot be more.

(s) In order for the employer to claim the maximum tip credit set forth in (a) above, the employer must demonstrate that the employee received at least that amount in actual tips. If the employee received less than the maximum tip credit amount in tips, the employer is required to pay the balance, so that the employee receives at least the minimum hourly wage under N.J.A.C. 12:56-3.1 with the defined combination of wages and tips.

12:56-3.6 Exemptions from the statutory minimum wage rates

(a) Employees in the following occupations shall be exempt from the statutory minimum wage rates:

1. Full-time students employed by the college or university at which they are enrolled at not less than 85 percent of the effective applicable minimum wage rate;

2.-4. (No change.)

5. Minors under 18 years of age except as provided at N.J.A.C. 12:56-11, 13, and 14, and 12:57, Wage Orders for Minors; and

6. At summer camps, conferences, and retreats operated by any nonprofit or religious corporation or association during the months of June, July, August, and September.

NEW JERSEY REGISTER
Copyright © 2020 by the New Jersey Office of Administrative Law

End of Document