

# Analyzing the Current Wage Structure of Tipped Employees:

## THE RESTAURANT INDUSTRY PERSPECTIVE

*On July 24, 2014, Governor Andrew Cuomo directed the Department of Labor to convene a wage board to review current regulations for tipped food service and service industry workers and to make recommendations for changes.*

*The Wage Board will make a recommendation to the Department of Labor (DOL) on what changes, if any, should be made to the cash wage for tipped employees. Melissa Autilio Fleischut for the New York State Restaurant Association submitted this document as written testimony at the Albany Wage Board Hearing on Tuesday, December 9, 2014.*



NEW YORK  
STATE  
RESTAURANT  
ASSOCIATION

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Good afternoon, my name is Melissa Autilio Fleischut and I am the President and CEO of the New York State Restaurant Association. The Association was founded in 1935 and represents thousands of restaurants across the state from Brooklyn to Buffalo and Montauk to Massena. Its mission is to help restaurateurs succeed and we believe the decision of this wage board could impact a restaurant's ability to succeed.

The restaurant industry is a vital part of the New York State economy. One in three Americans got their first job working in a restaurant. Nearly half of all Americans have worked in the restaurant industry. Eight out of ten restaurant owners got their start with an entry-level job in the restaurant industry. Restaurants are the place where business deals are made, where people can rise from the dishroom to the board room, and where organizations go for the philanthropic support that helps them do great work in local communities across the country. When towns and cities are looking to revitalize an area it is often the restaurant industry that steps up first providing jobs and investing capital in the community.

### THE SCOPE OF THE CHARGE

Department of Labor Commissioner Peter Rivera has asked members of the 2014 Hospitality Industry Wage Board to examine "what modifications, if any, should be made to the required cash wage rates and the allowable credits for tips, meals, and lodging for food service workers and service employees in the hospitality industry."

Commissioner Rivera also states in the Charge that "Any recommendations that you make on these issues should be consistent with the statutory scheme, which establishes a system that allows the minimum wage to be satisfied through a combination of minimum cash wage amounts paid by employers and maximum allowances for gratuities that employees receive from customers."

### THE NEW YORK STATE RESTAURANT ASSOCIATION'S POSITION ON THE CHARGE

The tip credit structure for tipped employee compensation does not need to change. All tipped workers earn at least minimum wage after tips and wages are combined. Under New York State law, if a tipped employee's wages combined with their tips does not meet the state minimum wage, the employer must make up the difference. Every single worker is covered under current law, but even so, it is rarely relied upon. Tipped employees are not minimum wage workers. Tipped workers are already taking home much more than minimum wage; they average \$11.00 per hour statewide.<sup>1</sup> Servers and bartenders have the opportunity to take home hundreds of dollars from a single good shift in most establishments.

Furthermore, tips are considered wages by both the IRS and the NYS Department of Tax and Finance, therefore they are included, in part, towards fulfilling minimum wage requirements.

The current system is working for both employees and employers. Employees are earning at least minimum wage (often much more), gaining valuable experience, and are given flexible schedules that allow them to further their education or care for their families. Employers are given a break on labor costs which allows them to employ and retain non-tipped workers like prep cooks and dishwashers.

Therefore, the New York State Restaurant Association respectfully recommends that the Wage Board make no changes to the current system.

## **THE EFFECTS OF LOWERING THE TIP CREDIT**

### ***Business owners will have less money to spend on non-tipped workers.***

Lowering or eliminating the tip credit will have an unintended impact on non-tipped workers. The hospitality industry is a very thin profit-margin industry, and the tip credit for servers gives the business owner the flexibility they need to compensate back of house workers at a higher than minimum wage. Eliminating this option would seriously tie their hands in their ability to promote and raise the wages of non-tipped workers in the future.

### ***Small businesses will be hit hardest.***

With an increase in labor costs, businesses will be forced to find ways to cut corners to make up for the cost of labor. Small businesses do not have the capacity to completely re-focus a business model, nor do they have the resources to absorb large increases in the cost of labor. That means cutting employee hours or layoffs, neither of which are good for the employer or employee.

### ***Chain restaurants will shift business models.***

To cope with an increase in labor costs, restaurant owners will change their business models to a digital interface. We can already see this happening in large chain restaurants. Chili's has already installed tablet like-devices at tables for customers to order food and pay for meals.<sup>ii</sup> Similar fast-casual outfits such as Applebee's, Olive Garden, Red Lobster, and TGI Fridays are planning similar installations. This digitization will cause the loss of tipped positions in thousands of restaurants. Of course, not all businesses will be able, or want to replace face-to-face service with a digital interface. Those that can't or won't will be forced to cut labor costs in other ways, such as cutting hours or layoffs.

### ***New York State will be less attractive to new and expanding businesses.***

The current tip credit for restaurants in New York State is one of the smallest in the Northeast. Most of our neighboring states have tip credits of \$4 or \$5 and some are more than double New York's tip credit. By dramatically decreasing or eliminating New York's tip credit, the Wage

Board will be making New York State less attractive to companies looking to build or expand in New York and sending those businesses to neighboring states.

## THE TRUTH ABOUT TIPPED EMPLOYEES

There have been many arguments made in favor of decreasing or, in most cases, completely eliminating the tip credit. The restaurant industry would like to clear the air on many of these claims and set the record straight.

### ***MYTH: Tips are gifts and should not be counted as wages***

A common belief is that a tip is a piece of extra income provided by a satisfied customer for a job well done, and that it should not be counted towards the service provider's wages. Whether or not that should be the case, the IRS is clear that tips are to be counted as part of an employee's wages, stating that "tips you receive while working on your job are considered part of your pay."<sup>iii</sup>

Tips must be tracked and reported on tax returns and both the employer and employee pay taxes on them, so they are counted as part of an employee's income and therefore satisfy a portion of the minimum wage requirements. If the IRS thinks tips are being under-reported, they will go after the employer to increase reporting.

### ***MYTH: Wage theft is rampant in the restaurant industry***

According to the New York State Office of Civil Rights, there have been less than 7,000 wage complaints opened since 2012.<sup>iv</sup> That's around 2,300 complaints per year over all industries. New York State restaurants alone employ over 770,000 people,<sup>v</sup> so even if you assume every wage complaint came from the restaurant industry and all the complaints were made this year, it would still be less than 1% of all employees.

If an employer is not making sure all employees take home at least minimum wage they are committing wage theft, a serious charge with serious consequences. If an employer is breaking the law, it is an issue of theft, not of cash wage adequacy or minimum wage requirements.

No one supports bad business practices, breaking the law, or cheating employees out of their hard earned money. Those committing these crimes represent an amazingly small portion of businesses, and their intolerable acts should not tarnish an entire industry. It is unfair to penalize law abiding business owners, who uphold the laws in place, because a small number of people break the law.

In the 2014 Legislative session the Senate and Assembly passed a New York State Restaurant Association backed bill that increased the penalties for wage theft. The NYS Wage Theft

Prevention Act increased penalties and strengthened enforcement of laws protecting workers from nonpayment and underpayment of wages.

***MYTH: Tipped workers were left behind when the minimum wage was raised***

In 2011, the Wage Board and the Commissioner of Labor approved an increase to the cash wage from \$4.65 to \$5.00 per hour. It took effect on January 1, 2011 and there was no similar increase to the minimum wage.

Since all tipped workers are entitled to at least the minimum wage in all cases, they too get a boost every time the mandatory minimum wage goes up.

Today the minimum wage in New York State is \$8.00 per hour, so all tipped employees are required to bring home at least \$8.00 per hour. When the minimum wage goes up to \$8.75 per hour on December 31, 2014, all tipped workers will be required to bring home at least \$8.75 per hour. No one is being left behind.

Thank you for the opportunity to present this testimony to the members of the Wage Board. We look forward to hearing your recommendation.

Respectfully submitted,

Melissa Autilio Fleischut  
CEO & President  
New York State Restaurant Association

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<sup>i</sup> [http://www.bls.gov/oes/current/oes\\_ny.htm#35-0000](http://www.bls.gov/oes/current/oes_ny.htm#35-0000)

<sup>ii</sup> <http://online.wsj.com/news/articles/SB10001424127887323342404579077453886739272>

<sup>iii</sup> [http://www.irs.gov/publications/p17/ch04.html#en\\_US\\_2013\\_publink100032364](http://www.irs.gov/publications/p17/ch04.html#en_US_2013_publink100032364)

<sup>iv</sup> <http://www.nydailynews.com/opinion/new-york-workers-shorter-1-billion-annually-article-1.2018530>

<sup>v</sup> <http://www.restaurant.org/Downloads/PDFs/State-Statistics/2014/new-york>