



Employment Law Unit  
199 Water Street  
New York, NY 10038  
T (212) 577-3300  
www.legal-aid.org  
Direct Dial: (212) 577-3465  
Fax: (646) 616-4465  
E-mail: hvpfitsch@legal-aid.org

Blaine (Fin) V. Fogg  
*President*

Seymour W. James, Jr.  
*Attorney-in-Charge*

Adriene L. Holder  
*Attorney-in-Charge  
Civil Practice*

Karen Cacace  
*Supervising Attorney  
Employment Law Unit*

**December 14, 2014**

**Testimony of The Legal Aid Society, Employment Law Unit**

Dear Members of the New York State Department of Labor Wage Board:

Thank you for the opportunity to present this written testimony.

The Legal Aid Society is the oldest and largest provider of legal assistance to low-income families and individuals in the United States. Since 1876, the Society has provided free legal services to clients who are unable to afford private counsel in New York City. The Society's Employment Law Unit represents low-wage workers in employment-related matters such as claims for unpaid wages, claims of discrimination, and unemployment insurance hearings. The Unit conducts litigation, outreach and advocacy projects designed to assist the most vulnerable workers in New York City. We have extensive experience representing the lowest-wage workers in the hospitality industry and this experience informs our comments here today.

The Wage Board has been charged with the following question: 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 industries?

**Background**

In examining potential changes to the Wage Order, the Board should first consider the current status of the industry's compliance with the wage-and-hour law. Numerous studies have reported that wage theft is the industry standard.<sup>1</sup> Lack of enforcement of basic wage-and-hour protections means that there is little incentive for employers to follow the law.

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<sup>1</sup> See *The Social and Economic Effects of Wage Violations: Estimates for California and New York*, U.S. Department of Labor (December 2014); Annette Bernhardt, Diana Polson and James DeFilippis, *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City*, National Employment Law Project (2010); Annette Bernhardt, Ruth Milkman, Nik Theodore, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (September 2009); New York Restaurant Industry Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry* (2005).

Instead, there is a profit-driven incentive to skim from workers' wages since employers who do so are rarely caught and required to pay full penalties.

Given this context, the Wage Board should consider changes that will make enforcement easier and more effective.

**The Wage Board should eliminate the tip credit.**

The tip credit structure leaves workers vulnerable to exploitation. Many low-wage workers ultimately receive less than the minimum wage because their employers fail to comply with the requirements of the law in a variety of ways.

First, employers must monitor the level of tips received and make up the difference if a worker makes less than the minimum wage after tips. In our experience litigating wage-and-hour cases on behalf of restaurant workers, even well-resourced employers with extensive computerized record keeping systems fail to ensure that workers receive enough tips to make up the minimum wage.

Second, employers regularly take advantage of tipped workers and violate the "80/20" rule by assigning non-tipped duties to tipped employees for more than two hours or 20% of a shift and still pay only the tipped wage for the day. Again, as our litigation experience has shown, these violations take place even in franchise locations of well-resourced chain restaurants that have sufficient computerized recordkeeping capability to easily monitor the amount of non-tipped work an employee performs each day. The Wage Order's bright line rule – that the employer must pay the minimum wage for the entire day if too much non-tipped work is assigned – is a useful penalty but oversight and enforcement is difficult and the system leaves workers open to abuse.

Elimination of the tip credit would ensure that all hospitality industry workers at least receive the statutory minimum wage. This change would simplify enforcement of the wage-and-hour law and keep exploitative employers from undercutting their law-abiding competitors who provide living wages to their employees.

Employers have argued that elimination of the tip credit will hurt the industry and could require elimination of jobs. However, as reported by the National Employment Law Project, in the seven states which do not allow a tip credit, this has not happened, and instead, according to projections by the National Restaurant Association, all those states are expected to have greater restaurant job growth than New York in the next decade.<sup>2</sup>

Employers have also objected to the elimination of the tip credit by arguing that restaurant industry jobs are held primarily by young people who do not need a living wage. The statistics simply do not support this argument – particularly in New York. According to a

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<sup>2</sup> *Policy Brief: An Order of Fair Pay: How a "Wage Order" Eliminating New York's Sub-Minimum Wage for Tipped Workers Will Deliver Fair Pay for Workers, Women, and the State's Economy.* National Employment Law Project (July 2014).

study by the Community Service Society, seventy-five percent of tipped workers in New York City are 25 or older; 44 percent are either the head of household or a spouse; and 78 percent work full-time.<sup>3</sup> The same study found that tipped workers in New York State are more than twice as likely to live in poverty as workers in non-tipped occupations.<sup>4</sup> Notably, the National Employment Law Project reports that the poverty rates of tipped workers are lower in states without a tip credit.<sup>5</sup> These statistics show that elimination of the tip credit could significantly raise living standards for restaurant workers, who depend on their wages to support themselves and their families.

**At a minimum, the required cash wage should be raised and the credits available for meals and lodging should be kept at a minimum.**

If a tip credit is allowed, it should be kept to a minimum, as should credits for meals and lodging. Hospitality industry workers, like workers in other industries, should have a dependable income. Raising the credits will only invite exploitative employers to further abuse vulnerable workers.

**The Wage Board should add a requirement that employers clearly inform customers that a delivery charge is not a tip.**

We have represented many delivery workers whose employers have violated the Wage Order in several ways. One persistent problem is that employers of delivery workers often charge customers a delivery charge and customers assume that charge replaces the worker's tip. The Wage Order should require employers to clearly notify customers that a delivery charge is not a tip.

**The Wage Board should add notice requirements to strengthen enforcement of existing provisions of the Wage Order.**

The current Wage Order requires that, in order to take the tip credit for a day of work, an employer must limit a tipped employee's work in a non-tipped occupation to two hours or 20% of the shift, whichever is less. The Wage Order also requires that employers pay the higher required wage if a hospitality industry employee works outside the hospitality industry in work covered by another Wage Order. However, few employees in the industry know of these requirements, and neither provision is currently included in the notice provisions of the Wage Order. We have seen rampant abuse of these rules, even after the new Wage Order clarified these provisions.

If the tip credit is not entirely eliminated, the Wage Board should add the following provisions to the Wage Order:

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<sup>3</sup> *Policy Brief: New York's Tipped Workers and the Sub-Minimum Wage*, Community Service Society (2014).

<sup>4</sup> *Id.*

<sup>5</sup> *Supra* note 2.

**Require notice to employees of the 80/20 rule and the provision governing work under another wage order.**

*Include the following language in the notice to employees required by § 146-2.2.*

*“Written notice of pay rates, tip credit and pay day.”:*

If you work for this same employer at an occupation outside the hospitality industry (for example, if you work in a store owned by the same employer) for two hours or more during any one day, or for 12 hours or more in any week, you must be paid for all your working hours on that day or in that week according to the highest minimum wage rate required.

*Under “FOR TIPPED EMPLOYEES ONLY”*

If you work in a non-tipped occupation (such as cleaning or food preparation) for two hours or more, or for more than 20 percent of your shift, whichever is less, you must be paid the full minimum wage for the day.

**Require that the Department of Labor produce postings including the language above in the § 146-2.4. “Posting requirements.”**

Please contact us if there are any questions about this submission. Thank you for considering this written testimony.

Sincerely,

Hollis V. Pfitsch, Staff Attorney  
Karen Cacace, Supervising Attorney  
The Legal Aid Society  
Employment Law Unit  
199 Water Street, 3<sup>rd</sup> Floor  
New York, NY 10038  
Phone: 212-577-3465  
Fax: 646-616-4465  
hvpfitsch@legal-aid.org