

Tips and Gratuities Frequently Asked Questions

Section 196-d of the Labor Law and the New York State Minimum Wage Orders govern the handling of tips.

Labor Law Section 196-d applies to all private sector employees in all industries, and prohibits an employer or their agent from demanding or accepting, directly or indirectly, any tip left for an employee, or retaining any part of a charge purported to be a tip.

The vast majority of issues regarding tips arise out of the Hospitality Industry Wage Order, which applies to restaurants and hotels.

The Miscellaneous Industries Wage Order also addresses allowances and recordkeeping requirements for tips for employees who do not work in the hospitality industry. Some examples of tipped employees in Miscellaneous Industries include:

Car wash attendants
Hairdressers or aestheticians not employed by hotels
Golf or tennis instructors Valet parking attendants
Doorpersons

Who do the provisions governing tips cover?

All *private sector* employers and employees are subject to the provisions governing tips.

What is a tip?

A tip, or “gratuity,” is money given by a customer to an employee for service provided to the customer. A customer can give a tip in the form of:

Cash
Check
Credit
card
Any other form of payment

A charge made to the customer in addition to charges for food, drink, lodging, and other specified materials or services, is presumed to be a tip, and must be given to the employee who provides customer service.

What is a tip credit or tip allowance?

A tip credit/tip allowance is the amount of tips earned by an employee that the law allows his or her employer to take as a credit against the minimum wage requirements for that industry. Tip credits/allowances differ from industry to industry. They also differ from

occupation to occupation within the Hospitality Industry. Therefore, employers must give careful attention to review of the applicable wage order to ensure that they take the appropriate credit/allowance.

Under the Hospitality Wage Order:

Food Service Workers have a minimum hourly wage with a maximum hourly tip credit as follows:

(1) New York City for

(i) Large Employers of eleven or more employees

\$7.50 Cash Wage, \$3.50 Credit, \$11.00 Total on and after December 31, 2016;

\$8.65 Cash Wage, \$4.35 Credit, \$13.00 Total on and after December 31, 2017;

\$10.00 Cash Wage, \$5.00 Credit, \$15.00 Total on and after December 31, 2018;

(ii) Small Employers of ten or fewer employees

\$7.50 Cash Wage, \$3.00 Credit, \$10.50 Total on and after December 31, 2016;

\$8.00 Cash Wage, \$4.00 Credit, \$12.00 Total on and after December 31, 2017;

\$9.00 Cash Wage, \$4.50 Credit, \$13.50 Total on and after December 31, 2018;

\$10.00 Cash Wage, \$5.00 Credit, \$15.00 Total on and after December 31, 2019;

(2) Remainder of downstate (Nassau, Suffolk and Westchester counties)

\$7.50 Cash Wage, \$2.50 Credit, \$10.00 Total on and after December 31, 2016;

\$7.50 Cash Wage, \$3.50 Credit, \$11.00 Total on and after December 31, 2017;

\$8.00 Cash Wage, \$4.00 Credit, \$12.00 Total on and after December 31, 2018;

\$8.65 Cash Wage, \$4.35 Credit, \$13.00 Total on and after December 31, 2019;

\$9.35 Cash Wage, \$4.65 Credit, \$14.00 Total on and after December 31, 2020;

\$10.00 Cash Wage, \$5.00 Credit, \$15.00 Total on and after December 31, 2021;

(3) Remainder of state (outside of New York City and Nassau, Suffolk and Westchester counties)

\$7.50 Cash Wage, \$2.20 Credit, \$9.70 Total on and after December 31, 2016;

\$7.50 Cash Wage, \$2.90 Credit, \$10.40 Total on and after December 31, 2017;

\$7.50 Cash Wage, \$3.60 Credit, \$11.10 Total on and after December 31, 2018;

\$7.85 Cash Wage, \$3.95 Credit, \$11.80 Total on and after December 31, 2019;

\$8.35 Cash Wage, \$4.15 Credit, \$12.50 Total on and after December 31, 2020.

No tip credit is permitted for fast food employees.

Service Employees in Restaurants and All-Year Hotels have a minimum hourly wage with maximum hourly tip credit as follows:

(1) New York City by

(i) Large Employers of eleven or more employees

\$9.15 Cash Wage, \$1.85 Credit, \$2.40 Tip Threshold on and after December 31, 2016;
\$10.85 Cash Wage, \$2.15 Credit, \$2.80 Tip Threshold on and after December 31, 2017;
\$12.50 Cash Wage, \$2.50 Credit, \$3.25 Tip Threshold on and after December 31, 2018;

(ii) Small Employer of ten or fewer employees

\$8.75 Cash Wage, \$1.75 Credit, \$2.30 Tip Threshold on and after December 31, 2016;
\$10.00 Cash Wage, \$2.00 Credit, \$2.60 Tip Threshold on and after December 31, 2017;
\$11.25 Cash Wage, \$2.25 Credit, \$2.95 Tip Threshold on and after December 31, 2018;
\$12.50 Cash Wage, \$2.50 Credit, \$3.25 Tip Threshold on and after December 31, 2019;

(2) Remainder of downstate (Nassau, Suffolk and Westchester counties)

\$8.35 Cash Wage, \$1.65 Credit, \$2.15 Tip Threshold on and after December 31, 2016;
\$9.15 Cash Wage, \$1.85 Credit, \$2.40 Tip Threshold on and after December 31, 2017;
\$10.00 Cash Wage, \$2.00 Credit, \$2.60 Tip Threshold on and after December 31, 2018;
\$10.85 Cash Wage, \$2.15 Credit, \$2.80 Tip Threshold on and after December 31, 2019;
\$11.65 Cash Wage, \$2.35 Credit, \$3.05 Tip Threshold on and after December 31, 2020;
\$12.50 Cash Wage, \$2.50 Credit, \$3.25 Tip Threshold on and after December 31, 2021; 146-

4

(3) Remainder of state (outside of New York City and Nassau, Suffolk and Westchester counties) \$8.10 Cash Wage, \$1.60 Credit, \$2.10 Tip Threshold on and after December 31, 2016;

\$8.65 Cash Wage, \$1.75 Credit, \$2.25 Tip Threshold on and after December 31, 2017;
\$9.25 Cash Wage, \$1.85 Credit, \$2.40 Tip Threshold on and after December 31, 2018;
\$9.85 Cash Wage, \$1.95 Credit, \$2.55 Tip Threshold on and after December 31, 2019;
\$10.40 Cash Wage, \$2.10 Credit, \$2.70 Tip Threshold on and after December 31, 2020.

Service Employees in Resort Hotels have a minimum hourly wage with a hourly tip credit, and a tip threshold as follows:

(1) New York City by

(i) Large employers of eleven or more employees

\$9.15 Cash Wage, \$1.85 Credit, \$6.15 Tip Threshold on and after December 31, 2016;
\$10.85 Cash Wage, \$2.15 Credit, \$7.30 Tip Threshold on and after December 31, 2017;
\$12.50 Cash Wage, \$2.50 Credit, \$8.40 Tip Threshold on and after December 31, 2018;

(ii) Small Employer of ten or fewer employees

\$8.75 Cash Wage, \$1.75 Credit, \$5.90 Tip Threshold on and after December 31, 2016;
\$10.00 Cash Wage, \$2.00 Credit, \$6.75 Tip Threshold on and after December 31, 2017;
\$11.25 Cash Wage, \$2.25 Credit, \$7.60 Tip Threshold on and after December 31, 2018;
\$12.50 Cash Wage, \$2.50 Credit, \$8.40 Tip Threshold on and after December 31, 2019;

(2) Remainder of downstate (Nassau, Suffolk and Westchester counties) ‘\$8.35 Cash Wage,
\$1.65 Credit, \$5.60 Tip Threshold on and after December 31, 2016;
\$9.15 Cash Wage, \$1.85 Credit, \$6.15 Tip Threshold on and after December 31, 2017;
\$10.00 Cash Wage, \$2.00 Credit, \$6.75 Tip Threshold on and after December 31, 2018;
\$10.85 Cash Wage, \$2.15 Credit, \$7.30 Tip Threshold on and after December 31, 2019;
\$11.65 Cash Wage, \$2.35 Credit, \$7.85 Tip Threshold on and after December 31, 2020;
\$12.50 Cash Wage, \$2.50 Credit, \$8.40 Tip Threshold on and after December 31, 2021.

(3) Remainder of state (outside of New York City and Nassau, Suffolk and Westchester
counties) \$8.10 Cash Wage, \$1.60 Credit, \$5.45 Tip Threshold on and after December 31,
2016;
\$8.65 Cash Wage, \$1.75 Credit, \$5.85 Tip Threshold on and after December 31, 2017;
\$9.25 Cash Wage, \$1.85 Credit, \$6.25 Tip Threshold on and after December 31, 2018;
\$9.85 Cash Wage, \$1.95 Credit, \$6.60 Tip Threshold on and after December 31, 2019;
\$10.40 Cash Wage, \$2.10 Credit, \$7.00 Tip Threshold on and after December 31, 2020.

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For the employer to claim a tip credit/allowance (and pay a reduced hourly wage in conjunction with the tips received by the employee), the employer must prove that the employee actually received such tips. Employers must give employees, at or before the time of hiring, written notice that the employer will apply a tip credit or allowance toward their minimum wage.

What tip credit/allowance does the Labor Law permit for workers covered by more than one Wage Order?

An employee in the Hospitality Industry who works for the same employer at an occupation governed by another New York State Minimum Wage Order for two hours or more during any one day or for 12 hours or more in any week shall be paid for all hours of working time for that day or week in accordance with the standards contained in the Minimum Wage Order for the industry that will produce the higher level of protection/wages to the employee.

How does the Hospitality Wage Order define a food service worker, a service employee, and a non-service employee?

Under the Hospitality Wage Order:

A food service worker is any employee who is primarily engaged in the serving of food or beverages, who also regularly receives tips

- This includes employees such as:
 - Wait staff
 - Bartenders
 - Captains
 - Bussing personnel
- This does **not** include delivery persons

A service employee is an employee, other than a food service worker, who customarily receives tips.

A non-service employee is any employee other than a service employee or a food service worker

If a customer leaves a tip for an employee on a credit card slip, how can an employer give the tip to the employee?

When tips are given by customers via credit card, the employer must pay the employee the amount due no later than the next regularly scheduled pay day. The employer may subtract from the employee's tips the pro-rated share of the charge levied by the credit card company. An employer remitting tips to an employee must include a breakdown between the tips and the wages on the employee's wage statement, which must meet all other requirements for wage statements.

This position reflects a change in DOL policy as set forth in DOL opinion RO-08-0032 related to this issue. That opinion is hereby rescinded.

Additionally, tipped employees may provide their employer with a written authorization/assignment to use portions of their tips for wage deductions permitted under Section 193 of the Labor Law (e.g. health insurance, 401k contributions, union dues, etc.).

Can an employer withhold cash tips left for an employee, and provide them to employees when they receive their regular pay?

When customers pay tips in cash, employers may, as a service to their employees, allow employees to leave cash tips earned over the course of a pay period with the employer. The employer must issue a tip payment for the total amount of those cash tips along with any wage payment for the same pay period. A request by an employee for the employer to provide this service must be voluntary. The agreement cannot be a pre-condition of

employment or a condition of continued employment. The employer must still keep a daily record of the tips earned by each employee provided this service. The employer must have those records available for inspection by the employee and/or the Department of Labor. The wage statement provided with the tip payment must contain a breakdown of tips and wages. It must also meet all other requirements for wage statements.

Does the Labor Law consider service charges “tips?”

There is a rebuttable legal presumption that any charge which is not for food and drink is a tip. The Hospitality Wage Order includes provisions for notifying customers about service charges relating to:

- Banquets
- Special functions
- Package deals

To prove that a charge is not a tip, the employer must give the customer notice that matches the requirements of the Wage Order. The Wage Order requires that a charge for the administration of a banquet, special function, or package deal must be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip.

The employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity.

Adequate notification includes a statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the charge is for:

- Administration of the banquet, special function, or package deal
- Is not purported to be a gratuity
- Will not be distributed as gratuities to the employees who provided service to the guests

The statements shall use ordinary language readily understood and shall appear in a font size similar to surrounding text, but no smaller than a 12-point font.

A combination charge, part of which is for the administration of a banquet, special function or package deal and part of which is to be distributed as gratuities to the employees who provided service to the guests, must be broken down into specific percentages or portions, in writing to the customer.

Do employers have to notify delivery customers that a “delivery fee” is not a tip?

Yes. Employers must tell their customers who receive deliveries that the delivery fee identified on their bill, statement, receipt, or other document detailing the delivery is not a tip/gratuity. This applies only if the employer does not plan to give the entire delivery fee

to the employee making the delivery. A reasonable customer must be able to understand that the charge:

- Is kept by the employer as a delivery charge
- Is not a tip for the employee

Is tip pooling and tip sharing permissible?

Yes. The Hospitality Wage Order permits both tip sharing and tip pooling.

Tip sharing is when directly tipped employees share their tips with other workers who provided direct customer service.

When employers require tip sharing, the employer may set the percentages of tips shared among food service workers; employees must handle the transactions themselves.

When employees form a tip share on their own, the employees may set the percentages of the tips shared.

Tip pooling is when directly tipped employees pool their tips and redistribute them among directly and indirectly tipped employees.

When employers require tip pooling, the employer may set the percentages of tips shared among food service workers.

When employees form a tip pool on their own, the employees may set the percentages of the tips shared amongst the pool.

Are employers required to keep records of tips?

Yes. In workplaces covered by the Minimum Wage Order for the Hospitality Industry, employers must keep the following records:

- An accounting of all tips collected and distributed by a tip pool or share operated by that employer
- An accounting of any tip credit taken toward the minimum wage
- An accounting of any tip that is processed by the employer and given to the employee in a pay check
- The written notice of pay given to each employee about the employer's intention to take a tip credit

In industries **not** covered by the Hospitality Wage Order, employers seeking a tip allowance or credit must also keep records to prove that:

The tips covered by the tip allowance were actually received by the employee
Tips are customarily and usually given to employees by customers in that industry

Do employers have to keep records of tips that customers leave in a “tip jar”?

Yes. It does not matter how a tip is given or collected. An employer must still follow requirements regarding handling and payment of their employee tips, tip pooling or tip sharing, and required recordkeeping.

Do employers have to compensate participants in tip shares or pools for tips wrongfully withheld by participants?

No. Tips wrongfully withheld by an employee are tips that employees do not report or do not contribute toward a tip share or pool. The Labor Law does not require employers to compensate employees for monies wrongfully withheld by a participant.

Example: An employer is not responsible for a waiter concealing a particularly large tip received in cash.

May employees agree to waive their rights regarding tips?

No. No agreement between the employer and employee(s) can change or waive legal protections about the handling and payment of tips.

Can resort hotel employers take a tip credit for service employees who do not receive the required amount per hour in tips?

Employers of tipped service employees at resort hotels may take an hourly tip credit if that employee receives at least the required amount per hour in tips.

Employers must still treat service employees in resort hotels who earn less than the required amount per hour in average tips like any other service employee and a maximum hourly tip credit may be taken.

Can employers take a tip credit for employees who work in both a tipped and non-tipped capacity?

Employers of service employees and food service workers cannot take a tip credit for any day in which that employee works more than 20 percent OR two hours, whichever is less, of the workday in a non-tipped occupation.

Any work that is customarily and regularly performed in the industry by tipped employees will not be counted as non-tipped work. However, work that is, either in the industry or

for that particular employer, customarily and regularly performed by a non-tipped employee will be counted as non-tipped work.

Example: If a tipped waiter washes dishes because the non-tip credit eligible dishwasher is absent, then that is not work within the waiter's tipped occupation.

Example: An employee has a daily schedule as follows:

8 AM to 9:45 AM: food preparation

9:45 AM to 1:30 PM: serving food in the restaurant

1:30 PM to 2:00 PM meal period

2:00 PM to 4:30 PM serving food in the restaurant

That employee has worked 8 hours total, consisting of 6 hours, 15 minutes as a food service worker and 1 hour, 45 minutes in a non-tipped occupation preparing food.

20 percent of an 8 hour shift is 1 hour, 36 minutes.

Although the employee worked for less than two hours at the non-tipped occupation, he/she has worked for more than 20 percent of his/her shift at the non-tipped occupation.

Therefore, the employer may not take a tip credit/allowance for that employee on this day.