



New York State Department of Labor
Eliot Spitzer, *Governor*
M. Patricia Smith, *Commissioner*

October 26, 2007



Re: Request for Opinion
Tip Allowance - Food Service Worker
Our File No.: RO-07-0104

Dear [REDACTED]:

I have been asked to respond to your letter of October 1, 2007 in which you ask: "What is the minimum wage for employees who are delivering prepared food? Please note that these employees would be reporting tips in excess of \$2.55 per hour and making their deliveries off premises."

Employees are considered to be "food service workers" pursuant to regulation 12 NYCRR §137-3.4 if they are "primarily engaged in the serving of food or beverages to guests, patrons or customers in the hotel or restaurant industries ... and ... regularly receive tips from such guests, patrons or customers." If they are not "primarily engaged" in such duties, then they would be considered, from the facts provided, to be "service employees" pursuant to regulation 12 NYCRR §137-3.3(a)(4). It is this Department's interpretation of these regulations that the service of food described in 12 NYCRR §137-3.4 refers to service on the premises and not to delivery of prepared food off-premises. Therefore, the employees referred to in your letter will be considered "service employees."

According to Labor Law §652(1) all employees must be paid a minimum of \$7.15 per hour. Regulation 12 NYCRR §137-1.4(a)(4) states that employers of service employees may take a "tip allowance" of \$1.60 per hour for an employee whose average of tips received is between \$1.60 and \$2.30 per hour; and, \$2.30 per hour for an employee whose average of tips received is \$2.30 per hour or more.

Under the facts provided, the employer is entitled to take a tip allowance of \$2.30 per hour as the employees' average tips are greater than that amount. Therefore, these service employees must be paid a cash wage of at least \$4.85 per hour (\$7.15 minimum wage minus \$2.30 tip allowance).

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This opinion is based on the information provided in your letter of October 1, 2007. A different opinion might result if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel

By: Jeffrey G. Shapiro
Senior Attorney

JGS:jc
cc: Carmine Ruberto