



New York State Department of Labor

David A. Paterson, Governor

M. Patricia Smith, Commissioner

August 13, 2008

[REDACTED]

Re: Request for Opinion  
Tips (Labor Law §196-d)  
RO-08-0009

Dear [REDACTED]:

This letter is written in response to yours of January 14, 2008 to [REDACTED]. Please accept this Department's apologies for this late response. In your letter you point out that on July 24, 2009, the federal minimum wage will increase to \$7.25 per hour, while the federal cash wage for tipped employees will remain at \$2.13 per hour. You further point out that by the operation of New York State Labor Law §652(1), this increase in the federal minimum wage will automatically result in an identical increase in New York State's minimum wage. You then reference Labor Law §652(4) and ask whether you are correct in interpreting such statute as meaning that there will not be an increase in New York State's current cash wage for tipped employees as a result of the increase in the federal and State minimum wages.

Please be advised that your interpretation is only partially correct. While New York State's laws do not require an automatic increase in the cash wage for tipped employees as a result of an increase in the minimum wage, an increase in the minimum wage requires a review of the cash wage that may result in an increase.

You correctly point out both that Labor Law §652(4) sets the current cash wage for "food service worker[s] receiving tips" at \$4.60 per hour and that the only provision in that paragraph for automatic increases in such cash wage is if there is an increase in the cash wage required to be paid by 29 USC §203(m). As no such increase in the federal cash wage is currently scheduled, there will be no automatic increase in New York State's cash wage by operation of Labor Law §652(4) as a result of the July 24, 2009 increase in the minimum wage.

However, an automatic increase by operation of Labor Law §652(4) is not the only means by which the State's cash wage may increase. While Labor Law §652(4) sets a current cash wage of \$4.60, it does so "provided ... that no other cash wage is established pursuant to

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[Labor Law §653].” Labor Law §653(2) requires the Commissioner of Labor to appoint a wage board within six months after enactment of any change in the minimum wage “to inquire and report and recommend any changes to wage orders governing wages payable to food service workers.”

Based upon these provisions, it is the Commissioner of Labor’s opinion that the July 24, 2009 increase in the federal minimum wage which was enacted in May, 2007, and resulted in a concomitant increase in the state minimum wage pursuant to Labor Law §652(1), mandates the appointment of a wage board , which wage board will have the authority to recommend that the relevant wage orders be changed to require payment of a cash wage greater than that required by Labor Law §652(4).

This opinion is based upon the information provided in your letter of January 14, 2008. A different opinion might result if any facts provided have been inaccurately stated, or if there are other relevant facts that have not been disclosed. If you have any further questions, please feel free to contact me.

Very truly yours,

Maria L. Colavito, Counsel



By: Jeffrey G. Shapiro  
Associate Attorney

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cc: Carmine Ruberto ✓