

COMMISSIONER OF LABOR M. PATRICIA SMITH
OPENING STATEMENT AND CHARGE
TO THE 2009 RESTAURANT AND
HOTEL INDUSTRY WAGE BOARD
Tuesday, March 31, 2009
www.labor.ny.gov

Let me begin by thanking each of you for agreeing to perform this very important public service. I especially wish to thank Linda Donahue for agreeing to serve as Chair of this Minimum Wage Board. You each have a background that gives you special insight into the restaurant and hotel industries, albeit from different perspectives. As you conduct your deliberations, I am confident that you will respect and appreciate the perspective of your colleagues and work together to meet the goals set forth in this charge.

The Wage Orders you are being asked to review were originally promulgated in 1937 and many changes have ensued since then. We presently have five Wage Orders (restaurant, hotel, building service, farm and miscellaneous). The last thorough consideration of the Wage Orders in hospitality industries, by which I mean the restaurant and hotel industries, occurred in 2005. Since then, employer practices have changed. Decisions of the courts and of the Industrial Board of Appeals have had an impact on these orders. The last minimum wage law revision effective January 1, 2005, contained specific provisions regarding the hospitality industries. It is time to review the Wage Orders for updating and I have therefore convened this Wage Board by authority of Sections 653(2) and 659.1 of Article 19 of the NYS Labor Law.

The minimum Wage Orders protect the most vulnerable workers. Also, by setting common rules for all businesses in the affected industries, they also help to prevent unfair competition by a drive to the bottom in labor costs.

Among the functions of the Wage Orders are these: to ensure that workers receive the minimum wage and overtime compensation required by Article 19 of the NYS Labor Law, as well as the tips protected by Section 196-d, "free and clear." The Wage Orders protect the statutory minimum hourly rate from impingement by costs or duties imposed upon the employee by the employer. By limiting the share of the minimum hourly rate that may be paid in meals or lodging furnished rather than in cash, the Wage Orders help to preserve the right of the employee to receive and dispose of his/her own wages as he or she chooses. By limiting the share of the minimum hourly rate that may be counted as paid in tips, the Wage Orders help to preserve the right of the employee to his or her own tips and to ensure a reliable income to tipped employees, such that their entire household budget is not subject to the unpredictability of patrons' gratuities. There is much in the existing Wage Orders that should be preserved.

There are a number of matters which I ask that you address. They fall into several categories. You may also choose to consider other matters, in addition to those I will mention.

First, as an overarching issue, you should consider whether the hotel and restaurant Wage Orders should be combined into one wage order. Many provisions are common to both industries. Those provisions that are not held in common could continue to be addressed in specialized provisions, as they are currently. Please consider the advantages and disadvantages of combining the Wage Orders.

Second, there are a number of matters you should consider regarding gratuities, or tips. As you probably know, the Wage Orders allow employers to pay tipped employees a somewhat lesser rate based on their receipt of tips. You should consider the following questions regarding allowances for gratuities.

1. Should two-tiered tip allowances continue to exist or should we adopt a single tip allowance, in order to make tip allowances less confusing for workers and easier for employers to comply with? A related question is whether different occupational groups or business types should continue to have different tip credits.
2. Should the Wage Orders be amended to clarify how overtime rates are calculated for (a) tipped employees whose employers receive a tip allowance, and (b) employees subject to the lower statutory rate set by Labor Law Section 652(4)?
3. Under federal law, in order to receive a tip allowance, employers must inform tipped employees that they are getting a lower rate based on receipt of gratuities, and must also keep an accurate record of tips received by employees. Employers who do not do so may not receive a tip allowance. Should the Wage Orders be amended to conform with federal law in this respect?
4. Should the Wage Orders be amended to provide more specific guidance to employers regarding the permissibility and appropriate guidelines for tip sharing and tip pooling?
5. Should the Wage Orders be amended to provide more specific guidance to employers regarding the reasonable expectations of banquet customers in regard to gratuities, in light of the 2008 decision of the New York State Court of Appeals in *Samiento v. World Yacht Inc.*?

Third, when employers provide meals or lodging, the Wage Orders also allow the employers to claim a credit toward the minimum wage based on provision of such benefits – and, as a result, pay a lower rate to employees who receive such benefits. Several matters you should consider about these meals and lodging allowances are as follows:

1. Should the definition of a meal be updated?

2. Should the Wage Orders permit the meal and lodging allowances as part of the wages of employees who are paid *above* the minimum wage, as they are permitted to be part of the wages of minimum wage employees?
3. Existing Wage Orders require that payroll records show any credits claimed towards minimum wage. Should the wage order deny credits for meals or lodging received if the payroll records do not show the credits?

Fourth, you should consider several matters with regard to employee uniforms:

1. Should the definition of a uniform be changed? Is the blanket “ordinary wardrobe” exclusion adequate to protect workers from unreasonable expenses?
2. Should the Commissioner adopt a “wash and wear” exemption from uniform maintenance pay, as in the federal wage and hour regulations?

Fifth, as currently written, there are several provisions of the Wage Orders which apply only to “the applicable minimum wage rate” and thus phase out when an employee’s rate rises above a certain level. For example, the “spread of hours” provision requires an extra hour of pay in addition to the minimum hourly wage when there is a spread of hours, and thus, it phases out as the wage level rises. If the Wage Orders’ language were different, the spread of hours provision could be an additional payment owed to employees who work very long workdays, regardless of their hourly wage rate. Similarly, call-in pay and the uniform maintenance allowance are additional payments owed in addition to the minimum wage rate. Should these provisions be changed so that they explicitly apply to all employees, regardless of wage level? And if not, should the language of the Wage Orders be amended to clarify further and explain the phase-out process?

Sixth, regarding the “spread of hours” provision: should that regulation be amended or eliminated? Is it sufficiently well-known to achieve the desired effects of discouraging excessive shift length and of compensating the worker for the extra burden involved? If not, are there revisions to the Wage Order which could better achieve these goals?

Finally, many employers in these industries operate in violation of overtime requirements because they pay a flat weekly rate for a work schedule with regular or varying hours in excess of forty, with no evidence showing that they are paying a higher rate for hours worked beyond the first forty than they paid for the first forty hours. There is federal and state case law addressing this fact pattern. Are there any provisions which could be included in the Wage Orders which would more explicitly clarify for employers and employees the fact that the overtime requirement still applies and must be complied with when overtime eligible employees are paid weekly rates?

The regulations ultimately adopted regarding the hotel and restaurant industries will serve as templates for new regulations regarding other industries. Therefore I ask that you also consider the effects that your recommendations may have on other industries.

We at the Department of Labor will endeavor to provide you with the information you need to augment your thinking. Jean Lindholm, Supervising Investigator from the Division of Labor Standards, will serve as the Board's Secretary and will be your first line of communication with the Department. The Labor Standards Division is responsible for enforcing the provisions of the Wage Orders. Some of you already know Carmine Ruberto, Director of Labor Standards; Michael Burkard, Chief Investigator of Labor Standards; and Terri Gerstein, Deputy Commissioner for Wage Protection and Immigrant Services. Department Counsel, Maria Colavito and her staff will also be available in connection with legal issues. James Brown, Labor Market Analyst with our Research and Statistics Division, will provide you with available research material. In addition to these resources from within the Department, the Board may also consult with employers and employees in any of the occupations that are affected by the Wage Orders being reviewed, as well as their representatives. The Board may also consult with other persons who can share valuable information on the topics you will be discussing such as academics, economists, researchers, or others. Departmental Counsel will be able to advise you should you have questions regarding your authority to issue subpoenas, take depositions, or compel production of documents should that become necessary.

The time you have to do your work is short. The law requires that the Wage Board must hold its public hearing and submit its report and recommendations within 45 days after the members are appointed to the Wage Board. There is a provision, however, that will allow for an extension of an additional 45 days. I suggest you schedule public hearings in Albany, Buffalo and New York City to allow interested parties to express their opinions with regard to the various issues you will consider. These should be scheduled in April or May at the latest. At the conclusion of your fact-finding and deliberations, the Board will issue its Report and Recommendations on the various questions posed in this charge. This Report and Recommendations may be submitted only after a vote of not less than a majority of all the members in support of the Report and Recommendations.

Upon receipt of your Report and Recommendations, the Commissioner of Labor must file a copy with the Secretary of the Department and publish notices of the filing in ten newspapers around the state. Any objections to the Report and Recommendations must be filed with the Commissioner within 15 days after the publication. Within 45 days, however, of the filing of the Report and Recommendations with the Secretary of the Department, the Commissioner of Labor must by Order, adopt or reject your Report and Recommendations. That Order will become effective within thirty days after it is published.

I charge you to provide us with an understanding of what minimum wage means in today's hospitality industries. I hope you are inspired by the importance of your mission to the people of New York now and in the future. Thank you again for undertaking this critical and daunting task and be assured of the Department's commitment to provide you with whatever assistance you need to accomplish your purpose. Good luck.