

Hospitality Industry Wage Order

Part 146 of Title 12 of the Official Compilation of Codes, Rules, and Regulations

of the State of New York (Cited as NYCRR 146)

Promulgated by the Commissioner of Labor



Effective January 1, 2011

Statutory Authority: Labor Law Article 19, § 653 and § 656; Article 6, §199; and Article 2, § 21(11)

PART 146
HOSPITALITY INDUSTRY

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MINIMUM WAGE RATES

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146-1.1. Application.

- (a) Every employer in the hospitality industry must pay to each employee, as defined in this Part, at least the minimum wage rates provided in this Part.
- (b) The rates provided herein shall apply, unless otherwise stated, on and after January 1, 2011.

146-1.2. Basic minimum hourly rate.

The basic minimum hourly rate shall be \$7.25 per hour, or, if greater, such other wage as may be established by federal law pursuant to 29 U.S.C. section 206 or any successor provisions.

146-1.3. Tip credits.

An employer may take a credit towards the basic minimum hourly rate if a service employee or food service worker receives enough tips and if the employee has been notified of the tip credit as required in Section 146-2.2. Such employees shall be considered “tipped employees.”

- (a) *Tip credits for service employees.*

A service employee shall receive a wage of at least \$5.65 per hour, and credit for tips shall not exceed \$1.60 per hour, provided that the total of tips received plus wages equals or exceeds \$7.25 per hour. FOR RESORT HOTELS ONLY, a service employee shall receive a wage of at least \$4.90 per hour, and credit for tips

shall not exceed \$2.35 per hour, if the weekly average of tips is at least \$4.10 per hour.

(b) *Tip credits for food service workers.*

A food service worker shall receive a wage of at least \$5.00 per hour, and credit for tips shall not exceed \$2.25 per hour, provided that the total of tips received plus the wages equals or exceeds \$7.25 per hour.

146-1.4. Overtime hourly rates.

An employer shall pay an employee for overtime at a wage rate of 1½ times the employee's regular rate for hours worked in excess of 40 hours in one workweek.

When an employer is taking a credit toward the basic minimum hourly rate pursuant to Section 146-1.3 above, the overtime rate shall be the employee's regular rate of pay before subtracting any tip credit, multiplied by 1½, minus the tip credit. It is a violation of the overtime requirement for an employer to subtract the tip credit first and then multiply the reduced rate by one and one half.

Example #1: Non-tipped employee

An employee regularly paid \$10.00 per hour who works 50 hours in a workweek:

Regular rate:	\$10.00 per hour
Overtime rate:	\$10.00 x 1.5 = \$15.00 per hour
Wage for 40 hours:	\$10.00 x 40 = \$400.00
Wage for 10 hours:	\$15.00 x 10 = <u>\$150.00</u>
Total	\$550.00

Example #2: Tipped employee

A food service worker regularly paid \$7.25 per hour minus a tip credit of \$2.25 per hour, for a wage rate of \$5.00 per hour, who works 50 hours in a workweek:

Regular rate:	\$7.25 per hour
Overtime rate:	\$7.25 x 1.5 = \$10.875 per hour
Wage rate for 40 hours:	\$7.25 - \$2.25 = \$5.00 per hour
Wage rate for 10 hours:	\$10.875 - \$2.25 = \$8.625 per hour
Wages for the workweek:	\$5.00 x 40 hours = \$200.00
	\$8.625 x 10 hours = <u>\$ 86.25</u>
Total	\$286.25

Alternative calculation:

Wages for the work week:	\$7.25 x 40 hours = \$290.00
	\$10.875 x 10 hours = <u>\$108.75</u>
	Subtotal \$398.75
Minus tip credit	\$2.25 x 50 hours = <u>-112.50</u>

Total \$286.25

146-1.5. Call-in pay.

(a) An employee who by request or permission of the employer reports for duty on any day, whether or not assigned to actual work, shall be paid at the applicable wage rate:

(1) for at least three hours for one shift, or the number of hours in the regularly scheduled shift, whichever is less;

(2) for at least six hours for two shifts totaling six hours or less, or the number of hours in the regularly scheduled shift, whichever is less; and

(3) for at least eight hours for three shifts totaling eight hours or less, or the number of hours in the regularly scheduled shift, whichever is less.

(b) For purposes of this section, applicable wage rate shall mean:

(1) Payment for time of actual attendance calculated at the employee's regular or overtime rate of pay, whichever is applicable, minus any customary and usual tip credit;

(2) Payment for the balance of the period calculated at the basic minimum hourly rate with no tip credit subtracted. Payment for the balance of the period is not payment for time worked or work performed and need not be included in the regular rate for the purpose of calculating overtime pay.

(c) Call-in pay shall not be offset by any credits for meals or lodging provided to the employee.

(d) A *regularly scheduled shift* is a fixed, repeating shift that an employee normally works on the same day of each week. If an employee's total hours worked or scheduled to work on a given day of the week change from week to week, there is no regularly scheduled shift.

(e) This section shall apply to all employees, regardless of a given employee's regular rate of pay.

146-1.6. Spread of hours greater than 10 in restaurants and all-year hotels.

The *spread of hours* is the length of the interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals plus intervals off duty. Examples of a spread of hours greater than 10 are:

7 am – 10am, 7pm – 10pm = 6 hours worked but a 15 hour spread;

11:30am – 3pm, 4pm – 10:00pm = 9½ hours worked but a 10½ hour spread.

- (a) On each day on which the spread of hours exceeds 10, an employee shall receive one additional hour of pay at the basic minimum hourly rate.
- (b) The additional hour of pay shall not be offset by any credits for meals or lodging provided to the employee.
- (c) The additional hour of pay is not a payment for time worked or work performed and need not be included in the regular rate for the purpose of calculating overtime pay.
- (d) This section shall apply to all employees in restaurants and all-year hotels, regardless of a given employee's regular rate of pay.

146-1.7. Uniform maintenance pay.

(a) Where an employer does not maintain required uniforms for any employee, the employer shall pay the employee, in addition to the employee's agreed rate of pay, uniform maintenance pay of:

- \$9.00 per week for work weeks over 30 hours;
- \$7.10 per week for work weeks of more than 20 but not more than 30 hours; and
- \$4.30 per week for work weeks of 20 hours or less.

Maintaining required uniforms includes washing, ironing, dry cleaning, alterations, repair, or any other maintenance necessary.

(b) *Wash and wear exception to uniform maintenance pay.* An employer will not be required to pay the uniform maintenance pay, where required uniforms

- (1) are made of "wash and wear" materials,
- (2) may be routinely washed and dried with other personal garments,
- (3) do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment, and
- (4) are furnished to the employee in sufficient number, or the employee is reimbursed by the employer for the purchase of a sufficient number of uniforms, consistent with the average number of days per week worked by the employee.

(c) *Employee chooses not to use employer-provided laundry service.* The employer will not be required to pay uniform maintenance pay to any employee who chooses not to use the employer's service, where an employer

- (1) launders required uniforms free of charge and with reasonable frequency,
- (2) ensures the availability of an adequate supply of clean, properly-fitting uniforms, and
- (3) informs employees individually in writing of such service.

(d) Uniform maintenance pay shall not be offset by any credits for meals or lodging provided to the employee.

(e) This section shall apply to all employees, regardless of a given employee's regular rate of pay.

146-1.8 Costs of purchasing required uniforms.

(a) When an employee purchases a required uniform, he or she shall be reimbursed by the employer for the total cost of the uniform no later than the next payday. Employers may not avoid such costs by requiring employees to obtain uniforms before starting the job.

(b) Where the employer furnishes to the employees free of charge, or reimburses the employees for purchasing, enough uniforms for an average workweek, and an employee chooses to purchase additional uniforms in excess of the number needed, the employer will not be required to reimburse the employee for the cost of purchasing the additional uniforms.

(c) This section shall apply to all employees, regardless of a given employee's regular rate of pay.

146-1.9. Credits for meals and lodging.

Meals and/or lodging provided by an employer to an employee may be considered part of the wages paid to the employee but shall be valued at no more than the amounts given below.

(a) *Meal credits in restaurants and all-year hotels.*

(1) Meals furnished by an employer to an employee may be considered part of the wages but shall be valued at no more than \$2.50 per meal for all workers.

(2) A credit for more than one meal shall not be permitted for any employee working less than 5 hours on any day.

(3) A credit for more than two meals shall not be permitted for any other employee on any day, except that a credit of one meal per shift may be permitted for an employee working on a split shift.

(b) *Lodging credits in restaurants.*

Lodging furnished by an employer to an employee may be considered part of wages but shall be valued at no more than:

\$1.50 per day for food service workers and \$1.75 per day for all other workers; or
\$9.60 per week for food service workers and \$11.30 per week for all other workers.

(c) *Lodging credits in all-year hotels.*

Lodging furnished by an employer to an employee in an all-year hotel may be considered part of wages but shall be valued at no more than 35 cents per hour.

(d) *Meal and lodging credits in resort hotels.*

Meals and lodging furnished by an employer to an employee in a resort hotel may be considered part of wages but shall be valued at no more than:

(1) Lodging and 3 meals per day furnished to a residential employee:

\$13.75 for each day worked by a food service worker and \$16.25 per day for each day worked by all other workers.

(2) Meals furnished to a non-residential employee:

\$2.75 per meal on workdays for a food service worker and \$3.25 per meal on workdays for all other workers.

(3) Lodging furnished without meals:

35 cents per hour.

**SUBPART 146-2
REGULATIONS**

Section

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146-2.1. Employer records.

(a) Every employer shall establish, maintain and preserve for at least six years weekly payroll records which shall show for each employee:

- (1) name and address;
- (2) social security number or other employee identification number;
- (3) occupational classification;
- (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
- (5) regular and overtime hourly wage rates;
- (6) the amount of gross wages;
- (7) deductions from gross wages;
- (8) the amount of net wages;
- (9) tip credits, if any, claimed as part of the minimum wage;
- (10) meal and lodging credits, if any, claimed as part of wages;
- (11) money paid in cash; and
- (12) student classification.

(b) The records should also indicate whether the employee has uniforms maintained by the employer.

(c) In addition, for each individual working in an executive, administrative or professional capacity, or as a staff counselor in a children's camp, an employer's records shall also show:

- (1) name and address;
- (2) social security number or other employee identification number;
- (3) description of occupation; and
- (4) for individuals permitted or suffered to work in an executive or administrative capacity, total wages, and the value of meal and lodging credits, if any, for each payroll period.

(d) For each individual for whom student status is claimed, a statement from the school which such individual attends indicating whether or not such individual:

- (1) is a student whose course of instruction is one leading to a degree, diploma or certificate; or
- (2) is completing residence requirements for a degree; and
- (3) is required to obtain supervised and directed vocational experience to fulfill curriculum requirements.

(e) Employers, including those who maintain their records containing the information required by this section, Section 146-2.2, Section 146-2.17 and Section 146-2.18 at a place outside of New York State, shall make such records or sworn certified copies thereof available at the place of employment upon request of the commissioner.

146-2.2. Written notice of pay rates, tip credit and pay day.

(a) Prior to the start of employment, an employer shall give each employee written notice of the employee's regular hourly pay rate, overtime hourly pay rate, the amount of tip

credit, if any, to be taken from the basic minimum hourly rate, and the regular payday. The notice shall also state that extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate. The employer must provide notice in (1) English and (2) any other language spoken by the new employee as his/her primary language, so long as the Commissioner has made such notice available to employers in such language on the Department's website.

(b) Such notice shall also be required prior to any change in the employee's hourly rates of pay.

(c) An acknowledgment of receipt signed by the employee shall be kept on file for six years.

(d) The employer has the burden of proving compliance with the notification provisions of this section. As an example, the employer will have met this burden by providing the employee with the following notice, filled out and subject to revisions in the minimum rates, subject to the language requirements set forth in subdivision (a), and the employee signs a statement acknowledging that he or she received the notice.

Notice of Pay Rates and Pay Day

Company name and address _____

Preparer's name and title _____

Employee's name and address _____

Your regular rate of pay will be \$_____ per hour for the first 40 hours in a week.

Your overtime rate of pay will be \$_____ per hour for hours over 40.

Your designated pay day will be: _____

FOR TIPPED EMPLOYEES ONLY:

The tip credit taken will be \$_____ per hour.

If you do not receive enough tips over the course of a week to bring you up to the minimum hourly rates of \$7.25 per hour for the first 40 hours and \$10.875 per hour for hours over 40, you will be paid additional wages that week to make up the difference.

FOR SERVICE EMPLOYEES IN RESORT HOTELS ONLY (if different from rates given above): If your weekly average of tips received is at least \$4.10 per hour, your regular rate of pay will be \$_____ per hour and your overtime rate of pay will be \$_____ per hour. The tip credit taken will be \$_____ per hour.

Preparer's signature and date _____

I have been notified of my pay rate, overtime rate, tip credit if applicable, and designated pay day on the date given below.

Employee's signature and date _____

146-2.3. Statement to employee.

Every employer shall provide to each employee a statement, commonly referred to as a pay stub, with every payment of wages. The pay stub must list hours worked, rates paid, gross wages, credits claimed (for tips, meals and lodging) if any, deductions and net wages.

146-2.4. Posting requirements.

Every employer shall post, in a conspicuous place in his or her establishment, notices issued by the Department of Labor about wage and hour laws, tip appropriations, illegal deduction provisions and any other labor laws that the Commissioner shall deem appropriate.

146-2.5. Hourly rates are required.

Employees as defined in Section 146-3.2, other than commissioned salespersons, shall be paid hourly rates of pay. Employers may not pay employees on a daily, weekly, salary, piece rate or other non-hourly rate basis.

146-2.6. Weekly basis of minimum wage.

The minimum wage provided by this Part shall be required for each week of work, regardless of the frequency of payment.

146-2.7. Deductions and expenses.

(a) Employers may not make any deductions from wages, except for credits authorized in this Part and deductions authorized or required by law, such as for social security and income taxes. Some examples of prohibited deductions are:

- (1) deductions for spoilage or breakage;
- (2) deductions because of non-payment by a customer;
- (3) deductions for cash shortages or losses; and
- (4) fines or penalties for lateness, misconduct, or quitting by an employee without notice.

(b) Employers may not charge employees separately from wages for items prohibited as deductions from wages, except for optional meal purchases allowed by Section 146-2.8(d) of this Part.

(c) If an employee must spend money to carry out duties assigned by his or her employer, those expenses must not bring the employee's wage below the required minimum wage.

146-2.8. Meals and lodging.

(a) When an employer takes a meal and/or lodging credit toward the pay of an employee, the employer may not charge the employee any additional money for the meal(s) and/or lodging.

(b) A residential employee in a resort hotel whose compensation is based on the inclusion of meals shall be provided with three meals per day.

(c) An employee who works a shift requiring a meal period under Section 162 of the New York State Labor Law must either:

- (1) receive a meal furnished by the employer as part of his or her compensation, at no more than the meal credit allowed in this Part; or
- (2) be permitted to bring his or her own food and consume it on premises.

(d) Nothing in this Part shall prevent an employee from purchasing from the employer:

- (1) in a restaurant or an all-year hotel, meals at other times or places than those provided as part of his or her compensation;
- (2) in a resort hotel, food in addition to meals provided as part of his or her compensation.

Such purchases may not be paid for through deductions from the employee's wages.

146-2.9. Working at tipped and non-tipped occupations on the same day.

On any day that a service employee or food service worker works at a non-tipped occupation (a) for two hours or more, or (b) for more than twenty percent (20%) of his or her shift, whichever is less, the wages of the employee shall be subject to no tip credit for that day.

Example: An employee has a daily schedule as follows: 8 a.m. to 9:45 a.m., food preparation; 9:45 a.m. to 1:30 p.m., serving food in the restaurant; takes ½ hour meal period; 2:00 p.m. to 4:30 p.m. 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. Twenty percent (20%) 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% of his/her shift at the non-tipped occupation. Therefore, the employee is subject to no tip credit for that day.

146-2.10. Employment 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 (a) for two hours or more during any one day or (b) 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 minimum wage standards contained in the minimum wage order for such other industry or the hospitality industry, whichever is higher.

146-2.11. Learner, trainee, or apprentice rates.

Any employees whom an employer designates learners, trainees, or apprentices must nonetheless be paid at least the minimum rates prescribed in this Part.

146-2.12. Rehabilitation programs.

For an individual employed as part of a rehabilitation program approved by the commissioner, the payment of compensation under such program shall be deemed to meet the requirements of this Part.

146-2.13. Student obtaining vocational experience.

A student is not deemed to be permitted or suffered to work if, in order to fulfill the curriculum requirements of the educational institution which the student attends, the student is required to obtain supervised and directed vocational experience in another establishment.

146-2.14. Tip sharing and tip pooling.

(a) Tip sharing is the practice by which a directly tipped employee gives a portion of his or her tips to another service employee or food service worker who participated in providing service to customers and keeps the balance.

(b) Tip pooling is the practice by which the tip earnings of directly tipped employees are intermingled in a common pool and then redistributed among directly and indirectly tipped employees.

(c) Directly tipped employees are those who receive tips from patrons or customers without any intermediary between the patron or customer and the employee.

(d) Indirectly tipped employees are those employees who, without receiving direct tips, are eligible to receive shared tips or to receive distributions from a tip pool.

(e) Eligibility of employees to receive shared tips, or to receive distributions from a tip pool, shall be based upon duties and not titles. Eligible employees must perform, or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental. Examples of eligible occupations include:

- (1) wait staff;
- (2) counter personnel who serve food or beverages to customers;
- (3) bus persons;
- (4) bartenders;
- (5) service bartenders;
- (6) barbacks;
- (7) food runners;
- (8) captains who provide direct food service to customers; and
- (9) hosts who greet and seat guests.

(f) Employers may not require directly tipped employees to contribute a greater percentage of their tips to indirectly tipped employees through tip sharing or tip pooling than is customary and reasonable.

146-2.15. Tip sharing.

(a) Directly tipped employees may share their tips on a voluntary basis with other service employees or food service workers who participated in providing service to customers.

(b) An employer may require directly tipped food service workers to share their tips with other food service workers who participated in providing service to customers and may set the percentage to be given to each occupation. However, employees must handle the transactions themselves.

(c) Nothing in this section shall be interpreted as requiring an employer to compensate participants in tip sharing for tips wrongfully withheld from the tip sharing by any participant.

146-2.16. Tip pooling.

(a) Directly tipped employees may mutually agree to pool their tips on a voluntary basis and to redistribute the tips among directly tipped employees and indirectly tipped employees who participated in providing the service.

(b) An employer may require food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool. Only food service workers may receive distributions from the tip pool.

(c) Nothing in this section shall be interpreted as requiring an employer to compensate participants in tip pooling for tips wrongfully withheld from the tip pool by any participant.

146-2.17. Records of tip sharing or tip pooling.

(a) Employers who operate a tip sharing or tip pooling system must establish, maintain, and preserve for at least six years records which include:

- (1) A daily log of the tips collected by each employee on each shift, whether in cash or by credit card;
- (2) A list of occupations that the employer deems eligible to receive tips through a tip sharing or tip pool system;
- (3) The shares of tips that each occupation is scheduled to receive from tip sharing or tip pooling; and
- (4) The amount in tips that each employee receives from the tip share or tip pool, by date.

(b) Such records must be regularly made available for participants in the tip sharing or tip pooling systems to review. Nothing in this section shall be interpreted as granting any employee the right to review the payroll records of any other employee.

146-2.18. Charge purported to be a gratuity or tip.

Section 196-d of the New York State Labor Law prohibits employers from demanding, accepting, or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity.

(a) A charge purported to be a gratuity must be distributed in full as gratuities to the service employees or food service workers who provided the service.

(b) There shall be a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for "service" or "food service," is a charge purported to be a gratuity.

(c) Employers who make charges purported to be gratuities must establish, maintain and preserve for at least six years records of such charges and their dispositions.

(d) Such records must be regularly made available for participants in the tip sharing or tip pooling systems to review.

146-2.19 Administrative charge not purported to be a gratuity or tip.

(a) A charge for the administration of a banquet, special function, or package deal shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip.

(b) 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.

(c) Adequate notification shall include a statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and 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.

(d) 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, in accordance with the standards for adequate notification in subdivision (c) of this Section. The portion of the combination charge which will not be distributed as gratuities to the employees who provided service to the guests shall be covered by subdivisions (a), (b) and (c) of this Section.

146-2.20. Tips charged on credit cards.

When tips are charged on credit cards, an employer is not required to pay the employee's pro-rated share of the service charge taken by the credit card company for the processing of the tip. The employer must return to the employee the full amount of the tip charged on the credit card, minus the pro-rated portion of the tip taken by the credit card company.

Example: The bill totals \$100.00 exactly. The customer leaves, on their credit card, the \$100.00 payment of the bill, as well as a \$20.00 tip. Both the tip and the bill must be processed through a credit card company which charges a 5% fee on all transactions. The total charge levied by the credit card company on the \$120.00 charge is \$6.00. Of that \$6.00, \$5.00 is for the bill (5% of \$100) and \$1.00 is for the tip (5% of \$20). The employer must provide the employee \$19, which represents the \$20 tip minus \$1.00 pro-rated employee's portion of the surcharge).

SUBPART 146-3 DEFINITIONS

Section

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146-3.1. Hospitality industry.

- (a) The term *hospitality industry* includes any restaurant or hotel, as defined herein.
- (b) The term *restaurant* includes any eating or drinking place that prepares and offers food or beverage for human consumption either on any of its premises or by such service as catering, banquet, box lunch, curb service or counter service to the public, to employees, or to members or guests of members, and services in connection therewith or incidental thereto. The term restaurant includes but is not limited to restaurant operations of other types of establishments, restaurant concessions in any establishment and concessions in restaurants.
- (c) The term *hotel* includes:
 - (1) any establishment which as a whole or part of its business activities offers lodging accommodations for hire to the public, to employees, or to members or guests of members, and services in connection therewith or incidental thereto. The industry includes but is not limited to commercial hotels, apartment hotels, resort

hotels, lodging houses, boarding houses, all-year hotels, furnished room houses, children's camps, adult camps, tourist camps, tourist homes, auto camps, motels, residence clubs, membership clubs, dude ranches, and spas and baths that provide lodging.

(2) An *all-year hotel* is one that does not qualify as a resort hotel under the definition below. Motor courts, motels, cabins, tourist homes, and other establishments serving similar purposes shall be classified as all-year hotels unless they specifically qualify as resort hotels in accordance with the definition below.

(3) A *resort hotel* is one which offers lodging accommodations of a vacational nature to the public or to members or guests of members, and which:

(i) operates for not more than seven months in any calendar year; or

(ii) being located in a rural community or in a city or village of less than 15,000 population, increased its number of employee workdays during any consecutive four-week period by at least 100 percent over the number of employee workdays in any other consecutive four-week period within the preceding calendar year; or

(iii) being located in a rural community or in a city or village of less than 15,000 population, increased its number of guest days during any consecutive four-week period by at least 100 percent over the number of guest days in any other consecutive four-week period within the preceding calendar year.

(d) The hospitality industry excludes:

(1) establishments where the service of food or beverage or the provision of lodging is not available to the public or to members or guests of members, but is incidental to instruction, medical care, religious observance, or the care of persons with disabilities or those who are impoverished or other public charges; and

(2) establishments where the service of food or beverage or the provision of lodging is offered by any corporation, unincorporated association, community chest, fund or foundation organized exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

The exclusions set forth in paragraphs (d)(1) and (d)(2) of this section shall not be deemed to exempt such establishments from coverage under another minimum wage order which covers them.

146-3.2. Employee.

(a) *Employee* means any individual suffered or permitted to work in the hospitality industry by the operator of the establishment or by any other employer, except as provided below.

(b) Employee does not include any individual employed by a Federal, State or municipal government or political subdivision thereof.

(c) Employee also does not include any individual permitted to work in, or as:

(1) An executive, administrative or professional capacity.

(i) Executive. Work in a *bona fide executive capacity* means work by an individual:

(a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;

(b) who customarily and regularly directs the work of two or more other employees therein;

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;

(d) who customarily and regularly exercises discretionary powers; and

(e) who is paid for his services a salary of at least:

\$543.75 per week inclusive of board, lodging, or other allowances and facilities.

(ii) Administrative. Work in a *bona fide administrative capacity* means work by an individual:

(a) whose primary duty consists of the performance of office or non-manual field work directly related to management policies or general operations of such individual's employer;

(b) who customarily and regularly exercises discretion and independent judgment;

(c) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (e.g., employment as an administrative assistant); or who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge; and

(d) who is paid for his services a salary of at least:

\$543.75 per week inclusive of board, lodging, or other allowances and facilities.

(iii) Professional. Work in a *bona fide professional capacity* means work by an individual:

(a) whose primary duty consists of the performance of work:

requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes, or

original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and

(b) whose work requires the consistent exercise of discretion and judgment in its performance; or

(c) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work), and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(2) An outside salesperson. The term *outside salesperson* means an individual who is customarily and predominantly engaged away from the premises of the employer and not at any fixed site and location for the purpose of:

(i) making sales; or

(ii) selling and delivering articles or goods; or

(iii) obtaining orders or contracts for service or for the use of facilities.

(3) A golf caddy. This exclusion shall not be deemed to exclude caddies from another minimum wage order which covers such employees.

(4) A camper worker. A camper who works no more than four hours a day for a children's camp and at all other times enjoys the same privileges, facilities and accommodations as a regular camper in such camp shall be known as a *camper worker* and shall not be an employee within the meaning of this Part.

(5) Spa and bath workers employed by concessionaires in hotels or by spas and baths operated independently of hotels, who shall be covered under another

minimum wage order. Spa and bath workers employed by hotels are employees under this Part.

(6) Staff counselors in children's camps.

(i) A *staff counselor* is a person whose duties primarily relate to the guidance, instruction, supervision and care of campers in children's camps, whether such work involves direct charge of, or responsibility for, such activities, or merely assistance to persons in charge. The term *staff counselor* includes, but is not limited to: head counselor, assistant head counselor, specialist counselor or instructor (such as swimming counselor, arts and crafts counselor, etc.), group or division leader, camp mother or father, supervising counselor, senior counselor, counselor, general counselor, bunk counselor, assistant counselor, co-counselor, junior counselor, and counselor aide.

(ii) *Children's camp* means any establishment which, as a whole or part of its business activities, is engaged in offering for children, on a resident or nonresident basis, recreational programs of supervised play or organized activity in such fields as sports, nature lore, and arts and crafts, whether known as camps, play groups, play schools, or by any other name. The term children's camp does not include an establishment which is open for a period of more than 17 consecutive weeks during the year.

146-3.3. Service employee and non-service employee.

(a) A *service employee* is an employee, other than a food service worker, who customarily receives tips at the rate of \$1.60 or more per hour.

(b) A *non-service employee* is any employee other than a service employee or a food service worker.

(c) Classification as a *service employee* or as a *non-service employee* shall be on a weekly basis except that an employee may not be classified as a service employee on any day in which she or he has been assigned to work at an occupation in which tips are not customarily received for 2 hours or more or for more than 20% of her or his shift, whichever is less.

(d) The employer shall have the burden of proof that an employee receives sufficient tips to be classified as a service employee.

146-3.4. Food service worker.

(a) A *food service worker* is any employee who is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers. The term "food service worker" shall not include delivery workers.

(b) Classification as a *food service worker* shall be on a weekly basis except that an employee may not be classified as a food service worker on any day in such week in which she or he has been assigned to work in an occupation in which tips are not customarily received for 2 hours or more or for more than 20% of her or his shift, whichever is less.

146-3.5. Regular rate of pay.

(a) The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work, before subtracting a tip credit, if any.

(b) If an employer fails to pay an employee an hourly rate of pay, the employee's regular hourly rate of pay shall be calculated by dividing the employee's total weekly earnings, not including exclusions from the regular rate, by the lesser of 40 hours or the actual number of hours worked by that employee during the work week.

Exclusions from the regular rate are gifts and discretionary bonuses, fringe benefits pay, expense reimbursement, profit-sharing and savings-plan payments, employer contributions to benefit plans, premium pay for hours worked above 8 hours a day or 40 hours a week or above normal daily or weekly standards, premium pay for time and one half (or greater) rates paid for Saturday, Sunday, holiday, day of rest, sixth or seventh day worked, and premium pay for work outside of a contractual daily period not exceeding 8 hours or a contractual weekly period not exceeding 40 hours. The premium pay mentioned above shall be credited towards overtime pay due.

146-3.6. Working time.

Working time means time worked or time of permitted attendance, including waiting time, whether or not work duties are assigned, or time an employee is required to be available for work at a place or within a geographical area prescribed by the employer such that the employee is unable to use the time productively for his or her own purposes, and time spent in traveling as part of the duties of the employee.

146-3.7. Meal.

(a) A *meal* shall provide adequate portions of a variety of wholesome, nutritious foods and shall include at least one of the types of food from all four of the following groups:

- (1) fruits or vegetables;
- (2) grains or potatoes;
- (3) eggs, meat, fish, poultry, dairy, or legumes; and
- (4) tea, coffee, milk or juice.

(b) *Meals shall be deemed to be furnished* by an employer to an employee when made available to that employee during reasonable meal periods and customarily eaten by that employee.

146-3.8. Lodging.

Lodging means living accommodations used by the employee which meet generally accepted standards of adequacy and sanitation. All lodging provided by an employer to an employee must comply with all community standards for housing. For purposes of this Part, community standards shall mean all applicable state, county and local health or housing codes. The employer shall have the burden of proof that provided lodging complies with community standards.

146-3.9. Split shift.

A *split shift* is a schedule of daily hours in which the working hours required or permitted are not consecutive. Interruption of working hours for a meal period of one hour or less does not constitute a split shift.

146-3.10. Required uniform.

A *required uniform* is that clothing required to be worn while working at the request of an employer, or to comply with any federal, state, city or local law, rule, or regulation, *except* clothing that may be worn as part of an employee's ordinary wardrobe.

Ordinary wardrobe shall mean ordinary basic street clothing selected by the employee where the employer permits variations in details of dress.

146-3.11. Week of work.

A *week of work* is a fixed and regularly recurring period of 168 hours – seven consecutive twenty-four hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under this Part, a single workweek may be established for an establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him or her. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of this Part.