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Department of Labor Regulations Concerning Allowances for Tip Credit Gratuities Permitted or Applied as part of the Minimum Fair Wage
Response to Public Comment

RESPONSE TO PUBLIC COMMENTS

On April 15, 2020, the Connecticut Department of Labor (CTDOL) published on the Secretary of the State's website its Notice of Intent to adopt regulations concerning employees who perform both service and non-service duties and allowances for gratuities permitted or applied as part of the minimum fair wage pursuant to section 31-60 of the Connecticut General Statutes. A thirty-day public comment period commenced on that date and the comment period closed on May 15, 2020. Written comments to the proposed regulations within the thirty-day public comment period were provided by the following parties:

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CTDOL has considered the comments received and has made the following modifications to the proposed regulations. A copy of the final draft of the regulations is attached. The following is a summary of the comments received and the action taken in response to those comments. The Agency response to each comment appears in bold immediately following the comment.

(1) Section One. § 31-60-2. Gratuities as part of the minimum fair wage:

A. Subsection (a)(2) Comments:

David Golder, Esq. ("Golder") and the Connecticut Restaurant Association ("CRA") recommend that the "weekly" record-keeping requirement stated in § 31-60-2(a)(2) is not absolutely required by statute or regulation, and that the requirement may reasonably be modified to include that such record may be kept on a daily, weekly or bi-weekly basis. The CRA suggests that the required record can be more easily implemented by restaurants if it is scheduled consistent with the actual work schedule of the employee, which may fluctuate on a daily, weekly or bi-weekly basis. Additionally, Golder suggested deleting the phrase claimed "as credit for part of the minimum wage" for the reason that it is unnecessary and redundant. Golder further recommends that the phrase "in the wage record" be modified to "in a wage record" to clarify that the restaurant-employer may monitor the amount of gratuities in any internal record. Golder and the CRA suggest that subdivision (2) be modified as follows:

> "The amount received in gratuities claimed shall be recorded on a daily, weekly, or bi-weekly basis [as a separate item] in a wage record, even though payment is made more frequently…"

The Agency has reviewed the suggested revisions and will modify § 31-60-2(a)(2) in accordance with the suggestions with the exception that the agency will retain the language "as credit for part of the minimum wage" as it is internally consistent with similar language used in subdivision (3) of subsection (a).

B. Subsection (a)(3) Comments:

Regarding subdivision (3) of § 31-60-2(a), Golder recommended that the phrase "not less than" be inserted before the words "the amount claimed" to signify that the regulation does not require the exact amount of all tips provided to an individual employee to be recorded in a wage record but rather only the tip portion necessary to ensure that the employee received a payment of not less than the minimum fair wage. Golder suggested that subdivision (3) be modified as follows:

> "each employer claiming credit for gratuities as part of the minimum fair wage paid to any employee shall provide substantial evidence that not less than the amount claimed, which shall not exceed the allowance hereinafter provided, was received by the employee…"

The Agency has reviewed the suggested revisions and will modify § 31-60-2(a)(3) in accordance with the suggestion.

C. Comment Addressing Both Subdivisions (a)(2) and (a)(3):

To ensure that each subdivision is subject to the same standard of proof, Attorney Golder suggested that a new sentence be added as a final sentence to subsection (a) to the effect:

> "To clarify, such attestation, statement, or 'substantial evidence' will satisfy subsections (2) and (3) of this section."

The Agency has reviewed the suggested revisions and will modify subsection (a) in accordance with the suggestion.

(2) Section 2. 31-62-E2. Definitions:

A. Subsection (c) Comments:

The National Women's Law Center through its Senior Counsel Julie Vogtman ("NWLC") suggested that the definition of "service employee" be revised as follows:

> (c) "Service employee" means any employee whose duties consist of service duties related solely to the serving of food and/or beverages to patrons seated at tables or booths, and ~~to the performance of~~ duties incidental to such service, and who customarily receives gratuities.

The Agency has reviewed the suggested revision, and declines to adopt the proposed language because the change does not substantively alter the existing meaning of the definition.

B. Subsection (d) Comments:

Several commenters recommended changes to this subsection concerning duties which are incidental to service employee duties. The Agency addresses each comment separately as follows:

(i) Attorney Golder suggested that the list should not be exhaustive, and that the first sentence of subsection (d) should include the words "and similar" as noted below:

> (d) "Duties incidental to such service" means, for purpose of subsection (c) of this section, performance of the following and similar tasks:"

The Agency has reviewed the suggestion, and concludes that the list provided is intended to be exhaustive in an effort to afford predictability and reduce the need for interpretation of duties not so included.

(ii) The CRA through Attorney O'Donnell suggests that the Agency consider adding a subdivision (24) to the list of "duties incidental to such service" to include:

(24) Restocking beer, liquor and wine.

The Agency has reviewed the suggested revision, and declines to adopt the proposed language because the suggested revision is not viewed by the Agency as a duty incidental to a service duty.

(iii) The AFL-CIO through its President Sal Luciano suggested that subdivisions (18) and (19) be eliminated from the list of "duties incidental to such service" as provided in § 31-62-E2(d)[1] because they concern duties that by their nature are not incidental to a service duty within a service employee's immediate service area and are more appropriately characterized as a non-service duties.

The Agency has reviewed the suggested revisions, and declines to eliminate subdivisions (18) and (19) because the Agency considers such activities to be incidental to the duties of service employees.

(iv) The NWLC recommends bifurcating subdivision (d) into two subdivisions: a subdivision (d) pertaining to a listing of specific "service duties;" and a subdivision (e) pertaining to a listing of "duties incidental to such service."

The Agency has reviewed the suggested revisions, and declines to further complicate existing regulations by attempting to list and distinguish between "service duties" and "duties incidental to such service" duties.

(v) Legal Assistance Attorney James Bhandary-Alexander recommends that rolling silverware, setting up food stations, or setting up dining areas to prepare for the next shift or for large parties (subdivision 18), and stocking service areas with supplies such as coffee, food, table ware, and linens (subdivision 19), should not be characterized as "duties incidental to service," and should be removed from subsection (d).

The Agency has reviewed the suggested revisions, and declines to remove subdivisions (18) and (19) from subsection (d) because the Agency considers such activities as "duties incidental to such service" within the meaning of subsection (d).

[1] In its comment, the AFL-CIO seeks to eliminate subdivisions (18) and (19) from "Section 31-60-2(d)." On information and belief, the Agency submits that the comment was intended to apply to § 31-62-E2(d), the only such proposed regulation with such an extensive numerical listing of duties.

(vi) Anthony Advincula of Restaurant Opportunities Centers United suggests without specific language to a particular proposed regulation that service workers are essential workers; that they should not have to rely on fluctuating tips; and should be afforded guaranteed protections like hazard pay, PPE and complete wages as conditions of employment.

The Agency has reviewed the remarks, and declines to modify any proposed regulation.

C. Subsection (e) Comments:

(i) The AFL-CIO through its President Sal Luciano, Legal Assistance Attorney James Bhandary-Alexander and the NWLC through its Senior Counsel Julie Vogtman suggested that the definition of non-service employee should be amended to specifically include hostesses, hosts and staff working at take-out stations. They also suggest that duties concerning the performance of general maintenance of the restaurant facility, i.e., cleaning bathrooms, shoveling snow, sweeping sidewalks, removing trash, washing windows, etc., should be expressly included in the definition of a "non-service employee."

The Agency has reviewed the suggested revisions, and declines to incorporate the requested change concerning hostesses and hosts into the definition of "non-service employee" because the equivalent task of "escorting customers to their tables" is viewed by the Agency as a duty incidental to service within the meaning of subdivision (13) of subsection (d). The Agency further declines to expressly include the duty of waiting on take-out customers in the "non-service employee" definition because: (1) there is no need to itemize non-service duties when the essence of the 80/20 rule is that any duty not expressly defined as one performed by a "service" employee within the meaning of § 31-62-E2(c) or as "incidental to service" within the meaning of § 31-62-E2(d) is non-service by default; and (2) the Agency intends to maintain its current interpretation that waiting on take-out customers is a duty of a non-service employee. Moreover, in regard to the general maintenance of the restaurant facility, to the extent that any duty exceeds the cleaning duties required of a service employee in subdivisions (14) and (15) of subsection (d), it is already considered to be a non-service duty.

(3) Section 3. 31-62-E2a. Service Employees:

Attorney Golder advocates for the elimination of this proposed regulation as a "litigation trap" because under the 80/20 rule, any duty deemed to be non-service by definition – including duties performed while the restaurant is closed – can be performed for 20% or less of the day at the tip credit rate. In the alternative, Golder suggests that a carve-out of 30 minutes be proposed to cover any work performed while the establishment is closed.

The agency declines to adopt the requested revisions. This proposed regulation creates the unambiguous policy position that no "service" or "incidental to service" duty can be performed while the restaurant is not open to the public.

(4) Section 4. Section 31-62-E3Gatuities as Part of the Minimum Fair Wage:

(A) Subsection (b) Agency Comments:

The Agency notes that it failed to submit proposed revisions to subsection (b) of Conn. State Agencies Regs. § 31-62-E3 to the Office of the Secretary of State for publication and review. The proposed revisions to Subsection (b) are below and the intent of the revisions is to make this subsection internally consistent with the proposed changes provided above for Conn. State Agencies Regs. § 31-60-2.

> (b) the amount received in gratuities claimed as credit for part of the minimum fair wage shall be recorded on a daily, weekly, or bi-weekly basis [as a separate item] in [the] a wage record even though the payment is made more frequently, and

The agency incorporates herein all of the comments and Agency responses to comments contained in Section One above to proposed revisions of Conn. State Agencies Regs. § 31-60-2(a)(2).

(B) Subsection (c) Comments:

Attorney Golder notes that § 31-62-E3 serves a similar purpose as § 31-60-2, and thus, the proposed revisions to § 31-60-2 should be made to 31-62-E3 for purposes of internal consistency. Similar to comments made above in Section 1(A),(B) and (C), Attorney Golder suggests: the word "weekly" be complemented by the insertion of the words "daily" and "bi-weekly;" modifying "in the wage record" to "in a wage record;" and inserting the phrase "not less than" before the words "the amount claimed" so that the proposed wording is internally consistent with § 31-60-2.

The agency incorporates herein all of the comments and Agency responses to the comments contained in Section One above to proposed revisions of Conn. State Agencies Regs. § 31-60-2(a)(2) and § 31-60-2(a)(3).

(C) Comment Addressing Both Subsections (b) and (c):

Attorney Golder further recommends that the substantial evidence standard of proof applies to both subsections (b) and (c) as it does in § 31-60-2(a)(2) and (a)(3) above.

The Agency has reviewed the suggested revisions and will modify subsections (b) and (c) in accordance with the suggestion.

(5) Section 31-62-E3a. Service and non-service duties within the restaurant industry:

(A) Section 31-62-E3a Comments:

Several commenters recommended changes to this section. The Agency addresses each comment separately as follows:

(i) Attorney Golder recommends the deletion of the last sentence of this proposed regulation because, as an independent sentence, it suggests that an employer must segregate "service" and non-service duties whenever an employee performs *any* amount of non-service work in the course of a day or shift. That interpretation would be in direct conflict with the 80/20 rule mandated by the legislature, and contrary to the language in the two subsections that immediately precede the sentence. Alternatively, Golder suggests that the last sentence be modified to incorporate subsections (a) and (b) of this section so as to mandate the segregation of non-service work only when such work equals or exceeds the lesser of two hours in a day or 20% of an employee's shift. The modified last sentence of the regulation would provide:

> "If a service employee performs non-service duties during the course of a day's work in excess of the lesser of subsections (a) or (b) of this section, an employer must segregate and record time spent on non-service duties to claim a credit for gratuities as part of the minimum fair wage for that day."

The Agency has reviewed the suggested revisions and will modify § 31-62-E3a in accordance with the suggestion.

(ii) Mr. Luciano of the AFL-CIO suggests that the proposed regulation requires employers to segregate service and non-service duties, which should be fairly straightforward, especially with modern point-of-sale systems.

The Agency has reviewed the comment, and notes that the proposed regulation does not require the segregation of service from non-service duties in every instance when non-service work is performed by an employee, but rather, only when the amount of non-service duties exceeds the lesser of the time restrictions stated in subsections (a) or (b) of the regulation.

(iii) The NWLC through its Senior Counsel Julie Vogtman submits that the proposed regulation incorrectly implements the 80/20 rule by allowing an employer to take a tip credit for unlimited time spent on tasks incidental to service duties.

The Agency has reviewed the comment, and disagrees that the proposed regulation is an incorrect implementation of the 80/20 rule because said rule is triggered not by the performance of tasks incidental to service duties, but solely by the performance of non-service duties in excess of the lesser of the time restrictions stated in subsections (a) or (b) of the regulation.