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INFORMATION ON TIPPED AND SERVICE EMPLOYEES

On a regular basis, the Vermont Department of Labor (VDOL) receives questions or encounters situations regarding "service or tipped" employees. The following information will provide employers and employees guidance regarding the rules related to "service or tipped" employees.

DEFINITION OF A "SERVICE OR TIPPED" EMPLOYEE: As of July 1, 2017, a "service or tipped employee" means an employee of a hotel, motel, tourist place, or restaurant who customarily and regularly receives more than **\$120.00** per month in tips for direct and personal customer service. If an employee does **not** regularly receive more than \$120.00 per month in tips, the employee shall be paid an hourly wage equal to or exceeding the minimum wage rate.

BASIC WAGE RATE: Effective January 1, 2019 and each subsequent January thereafter, the basic wage rate will increase the same percentage amount as the minimum wage rate, using the Consumer Price Index (CPI), not seasonally adjusted, city average, or 5%, whichever is smaller. The current basic wage rate for "service or tipped" employees is indicated on the VDOL's minimum wage poster.

TIP CREDIT: Service or tipped employees who regularly receive more than \$120.00 per month in tips can be paid at a rate lower than the minimum wage, but under no circumstances can they be paid at less than the basic wage rate. Employers may use a "tip credit" towards meeting the minimum wage rate for tipped employees. All employers utilizing tip credits must provide the following information to the tipped employee **before** the employer may use the tip credit:

- 1) The amount of cash wages the employer is paying the tipped employee, which must be at least ~~\$5.39~~ ^{6.91} per hour;
- 2) the additional amount claimed by the employer as a tip credit, which cannot exceed ~~\$5.39~~ ^{6.59};
- 3) that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;
- 4) that all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily receive tips; and
- 5) that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

If a service or tipped employee does not earn enough tips in a workweek to make up the full tip credit, the employer **is required** to make up the difference. Below is an example of where an employer has paid the minimum basic wage rate and the difference the employer would be required to make up if the tips received did not result in the hourly wage equal or exceeding the current minimum wage. **PLEASE NOTE: As of 1/1/19, the basic wage rate is ~~\$5.39~~ ^{6.59} and the minimum wage rate is ~~\$10.78~~ ^{13.18}. The basic wage rate and the minimum wage rate will change January 1st of each year subsequent. VDOL posts any changes in the basic wage rate and minimum wage rate on its website at www.vermont.labor.gov.**



| | Total Wages |
|--|-------------------------------------|
| Employee works 20 hours at \$ 5.39 ^{6.59} per hour | 107.80 ^{131.80} |
| Employee earns tips of \$50.00 | \$50.00 |
| Total paid thus far to employee..... | \$157.80 |
| | 181.80 |
| Minimum wage is \$ 10.78 ^{13.18} for 20 hours worked | 215.60 ^{263.60} |
| Employer would subtract out amount already paid | \$157.80 |
| Employer would be required to pay | \$57.80 ** |
| | 81.80 |

**This ensures the employee has received the minimum wage amount for ALL hours worked.

RECORD KEEPING: A service or tipped employee shall submit a signed report to the employer on a weekly basis, indicating the total amount of tips received and retained by the employee during the previous seven-day period.

The employer shall preserve all such reports submitted by the employee for a period of three years. These records include, but are not limited to, the actual days and hours worked each day and payroll records detailing when the payments were made. A complete list of records an employer shall maintain is detailed in the Minimum Wage Rules, along with the Vermont Employment Security Board Rules, both of which can be found at the VDOL website, www.labor.vermont.gov.

Pursuant to Section 3(m) of the Fair Labor Standards Act (FLSA) the employee shall retain all tips received, except to the extent that there is a valid tip pooling arrangement. Additionally, Section 3(m) **prohibits** any agreement between the employer and the employee reallocating any part of the employee's tips to the employer.

TIP POOLING: Tip pooling or sharing arrangements are permissible under certain circumstances. The FLSA does not impose a maximum contribution amount or percentage on valid mandatory tip pools. To be valid, a tip pooling arrangement **must:**

- 1) Notify tipped employees of any required tip pool contribution amount;
- 2) only take a tip credit for the amount of tips each tipped employee ultimately receives;
- 3) **not** require an employee who receives tips to contribute more than is customary and reasonable; and
- 4) only permit sharing or pooling of tips amongst employees who customarily and regularly receive tips, unless full minimum wage is paid and no tip credit is taken.

The FLSA has specific guidelines around who may or may not participate in a valid tip pool if a tip credit is taken. Occupations recognized as eligible for tip pooling when a tip credit is taken include wait staff, bellhops, counter personnel who serve customers, bussers, server helpers, and service bartenders. The following occupations may only participate in a tip pool if full minimum wage is paid and no tip credit is taken: janitors, dishwashers, chefs or cooks, and laundry room attendants. Managers and supervisors are **prohibited** from participating in tip pools, regardless of whether minimum wage is paid or tip credits are taken.

TIPS CHARGED ON CREDIT CARDS: Federal rules permit a deduction of the processing fee from an employee's tips when a customer pays the tip with a credit card. The employee must still be paid at least the minimum wage after the processing fee is deducted. When used, it is advisable to notify employees of this practice, either through an employee handbook or written memo.

TIME SPENT IN NON-TIPPED DUTIES: 29 C.F.R. § 531.56(e) allows employers to take the tip credit for time spent in duties related to the tipped occupation, even though the duties are not directly producing tips. For example, a waiter/waitress who spends time cleaning and setting tables, making coffee, or occasionally washing dishes or glasses may be considered to be engaged in the tipped occupation even though the duties are not producing tips. However, if the tipped employee is spending a substantial amount of time (in excess of 20%) performing non-tipped duties, no tip credit may be taken.

TIPS MUST BE INCLUDED AS WAGES PAID: 21 V.S.A. §1301 (12) includes tips as "wages" reportable on the C-101 Quarterly Wage and Contribution Report. This means all tips paid by the employer or reported to the employer as received shall be included in the total of wages paid.

If you have questions about tips as it relates to payment, record keeping, or pooling, please contact the Wage and Hour Program at VDOL at (802) 951-4083 or via e-mail sent to Labor.WageHour@vermont.gov. If you have questions about quarterly reporting of tips, please contact Employer Services at 802-828-4344 or via email sent to Labor.UlandWages@vermont.gov.