



TIPPED OVER
EMPLOYER LIABILITY
IN A TWO-TIERED WAGE STATE



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EXECUTIVE SUMMARY

As the country moves toward establishing a minimum wage of \$15 per hour, two paths have emerged: that followed by California, in which all workers are on a single track to earn a basic minimum wage of \$15 per hour;¹ and a second path exemplified by New York, which passed \$15 minimum wage legislation, but reaffirmed a two-tiered wage system in which tipped workers continue to be left behind.² While signifying a monumental step forward for low-wage workers, New York State's recent minimum wage increase left out almost 400,000 tipped workers, and almost half of these work in the restaurant industry.³

New York's two-tiered wage system creates multiple challenges for employers and workers alike in the restaurant industry.⁴ First, maintaining the two-tiered wage system requires significant monitoring and documentation by employers, leading to a great amount of potential liability in order to ensure compliance with the necessary regulations associated with paying a subminimum wage.⁵ Second, in New York State, the increasing gap between the rising regular minimum wage and decreasing subminimum wage for tipped workers creates incentives for employers to increase the workload of tipped workers by shifting non-tipped work to tipped workers.⁶

For many employers, tipped workers are now the considerably 'cheaper' workers whose wages did not increase. As a result, the number of lawsuits filed by workers with regard to violations of regulations associated with the subminimum wage will continue to grow.⁷ This report documents restaurant employers' experiences of costly liability arising from the complicated rules surrounding paying tipped workers a lower minimum wage. Notably, by requiring all employers to simply pay the same minimum wage, California does not impose such costly liability on the restaurant industry.⁸

KEY FINDINGS

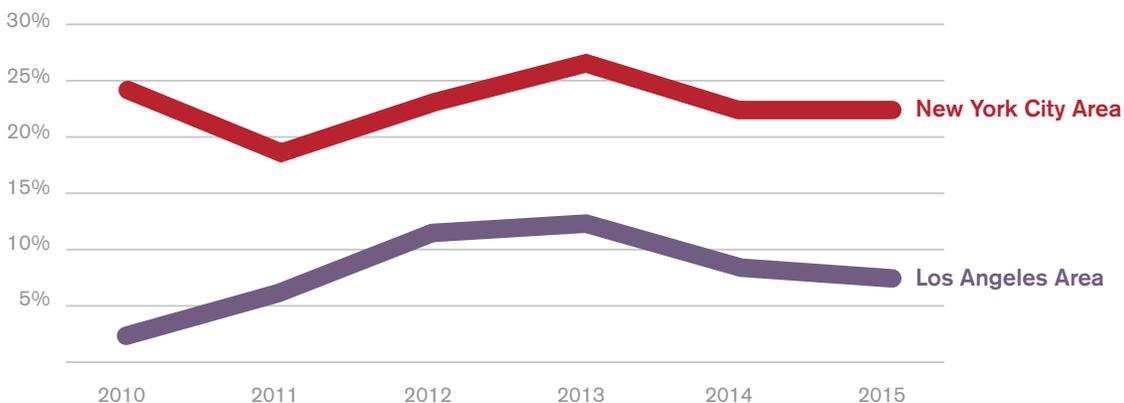
- › Employers in New York face liability from the multiple requirements associated with the subminimum wage system for tipped employees, including documenting and maintaining records for six years to show that the restaurant has complied with: (1) strict notification requirements of tip sharing procedures ("tip pools") that must be signed by each tipped

employee;⁹ (2) strict prohibitions on including non-tipped employees in a tip pool;¹⁰ (3) strict requirements that tips actually make up the difference between the minimum and subminimum wage each week;¹¹ and (4) strict requirements that not more than two hours, or 20 percent, of any shift, whichever is less, is spent in performing non-tipped work, or work that is not related to direct service (the ‘80-20 Rule’).¹²

- According to employers we interviewed, time and money spent monitoring compliance with the above regulations tied to paying the subminimum wage, such as the ‘80-20 Rule’, prevents employers from spending time training and even hiring new staff. Employers face a tradeoff when concentrating on lawsuits or on hiring: while small employers are better equipped to handle ‘80-20’ by limiting the number of service staff, liability prevents them from growing. Large employers are particularly concerned with the burden of liability, at times dissuading them from making additional hires.
- A survey of federal lawsuits filed in the Southern District of New York, covering the New York City (NYC) area, and in the Central District of California, covering the Los Angeles (LA) area, show that restaurant lawsuits made up approximately 23 percent of the total in the NYC area in a state with a two-tiered wage system, while making up only 8 percent of the total in the LA area in a state with no two-tiered wage system (see Figure 1).¹³
- Tipped workers in New York live in poverty at higher rates than the rest of the workforce, and this disparity increases for women who are the majority of tipped workers.¹⁴ Women in tipped occupations live in poverty at over twice the rate of the rest of the population, and earn only 68 percent of what men earn in the same occupations; disproportionately bearing the impact of the subminimum wage.¹⁵
- A ‘one fair wage’ system, in which employers pay all workers, including tipped workers, a full fair minimum wage, is necessary to ensure workers are properly paid, and employers are not placed at risk of unnecessary liability.



FIGURE 1
Restaurant Wage Cases in
New York City and Los Angeles Areas



GLOSSARY OF TERMS

TIPPED WORKERS

This report considers the following occupations, as tracked by the Bureau of Labor Statistics,¹⁶ “customarily tipped occupations”: Massage Therapists; Bartenders; Counter Attendants, Cafeteria, Food Concession, and Coffee Shop workers; Waiters and Waitresses; Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop; Food servers, Nonrestaurant; Dining Room and Cafeteria Attendants and Bartender Helpers; Gaming Service Workers; Barbers; Hairdressers, Hairstylists, and Cosmetologists; Miscellaneous Personal Appearance Workers (including Manicurists and Pedicurists; Shampoos; Makeup Artists, Theatrical and Performance; and Skincare Specialists); Baggage Porters and Bellhops; Concierges; Taxi Drivers and Chauffeurs; and Parking Lot Attendants.

SUBMINIMUM WAGE

A two-tiered wage system that allows for the employment of tipped workers at rates below the minimum wage. The Fair Labor Standards Act sets the federal minimum wage (currently \$7.25 per hour), as well as the subminimum wage for tipped workers (currently \$2.13 per hour). Twenty-six states (and the District of Columbia) have a subminimum wage higher than \$2.13 but lower than the state’s minimum wage.

ONE FAIR WAGE

Seven states disallow a separate, lower minimum wage for tipped workers – California, Nevada, Oregon, Washington, Minnesota, Montana, and Alaska. Tipped workers in those states receive the full minimum wage, and their tips function as a gratuity over and above their wages.

‘80-20 RULE’

Employers paying the subminimum wage must ensure that the amount of non-tipped tasks assigned to tipped employees does not exceed 20 percent or more of a tipped worker’s work time. Eighty percent of a tipped employee’s time must be spent performing tipped work. If over 20 percent of an employee’s time is spent executing non-tipped work the employer cannot pay the tipped minimum wage and must pay the full minimum wage for time spent working on those duties. Employers must track the amount of non-tipped tasks their tipped workers perform in order to ensure compliance with this rule. New York regulations specify that the entire shift must be compensated at the full minimum wage if the 20 percent or a two hour threshold is crossed, whichever is less.

NOTICE REQUIREMENT TO ALLOW FOR A SUBMINIMUM WAGE

Under the Fair Labor Standards Act, when an employer pays the subminimum wage, the employer must provide notice to the employee communicating the subminimum wage that the employer is paying the employee, the additional amount claimed by the employer bridging the gap between the subminimum and the full minimum wage, and that the amount between the subminimum wage and the full minimum wage cannot be greater than the amount of tips received by the employee. Federal regulations permit this notice to be written or oral, while in New York employers must provide written notice to each employee at the start of employment and whenever their wage changes (for example, whenever the minimum wage increases such that the amount between the minimum wage and subminimum wage changes, or if they receive a raise.)



INTRODUCTION

By passing \$15 per hour minimum wage legislation, New York State took an enormous step towards lifting up working standards for low-wage workers.¹⁷ However, by excluding nearly 400,000 tipped workers, nearly 200,000 of which are servers and bartenders, from a pathway to a living wage state policymakers have reaffirmed a two-tiered wage system that creates incentives for employers to shift non-tipped work to workers paid a subminimum wage.¹⁸ In the process of widening the gap between tipped and non-tipped workers, state policymakers have created a challenging enforcement environment and left behind the very workers that living wage legislation was meant to lift up.

Tipped workers in New York State saw their most recent raise in 2016, up to \$7.50 from \$5.00, but are now set to watch their wages decline as a percentage of the minimum wage, dropping from 83 percent to 66 percent of the new minimum wage.¹⁹ Left behind by state policymakers, tipped restaurant workers currently earn a median income of just \$16,481 a year, relying on tips that fluctuate based on season, shift, and scheduling practices.²⁰

Tipped restaurant workers in New York are primarily women (54 percent), and suffer from poverty at over twice the rate of other New Yorkers; women servers live in poverty at three times the rate of men in the general workforce (see Figure 2).²¹ Since women constitute the majority of restaurant workers living off tips in New York, it is primarily these low-income women — 26 percent of whom are mothers — who get left out when tipped workers

FIGURE 2
Women Servers Live in Poverty at Three Times
the Rate of Men in the Overall Workforce

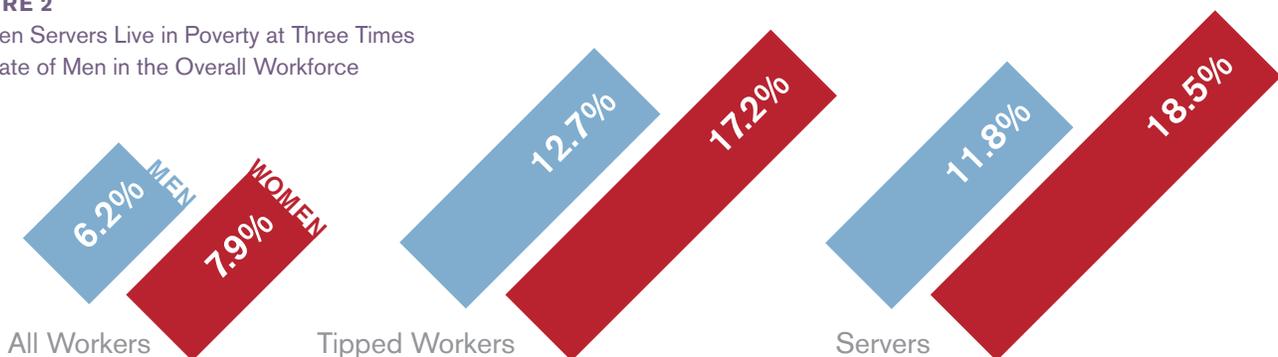


FIGURE 3

Potential Liability for Restaurant Employers in New York today and in 2019 with the full \$15 Minimum Wage

Potential Liability Calculations for NY Restaurant with 50 Tipped Employees with current \$9 minimum wage <i>Even assuming no overtime</i>
40 hours/week × \$1.50/hour = \$60.00/week <i>Difference between regular and subminimum wage</i>
OR
\$60.00 × 312 weeks (6 years) = \$18,720 <i>Total back wages per tipped worker</i>
\$18,720 × 50 tipped employees = \$936,000 <i>Total back wages for all employees in class</i>
\$936,000 × 2 = \$1,872,000 <i>Double damages under federal and NY law</i>
PLUS
\$500,000 in attorneys' fees and costs <i>Typical cost workers' and employer legal costs if litigated to trial</i>
POSSIBLE TOTAL LIABILITY \$2,372,000
Potential Liability Calculations for NY Restaurant with 50 Tipped Employees at \$15 per hour minimum wage rate in 2019 <i>Assuming no overtime</i>
40 hours/week × \$5.00/hour = \$200.00/week <i>Difference between regular and subminimum wage</i>
OR
\$200.00 × 312 weeks (6 years) = \$62,400 <i>Total back wages per tipped worker</i>
\$93,600 × 50 tipped employees = \$3,120,000 <i>Total back wages for all employees in class</i>
\$3,120,000 × 2 = \$6,240,000 <i>Double damages under federal and NY law</i>
PLUS
\$500,000 in attorneys' fees and costs <i>Typical cost workers' and employer legal costs if litigated to trial</i>
POSSIBLE TOTAL LIABILITY \$6,740,000

are excluded from a minimum wage increase.²² Moreover, these women face the worst sexual harassment of any industry. Because they are dependent on customer tips as their primary source of income, this primarily female workforce is encouraged by management to tolerate inappropriate customer behavior and objectification in order to earn their income. Recent research shows that women in two-tiered wage states like New York are twice as likely to experience sexual harassment as women in states like California, where women do not have to rely on tips as a portion of their base wage.²³ Further, gender pay inequity in this industry is greater in states like New York, where tipped workers are majority female and where women earn close to two thirds of what most men in tipped occupations earn.²⁴

New York's two-tiered wage system presents challenges for employers as well as workers. Unlike many other laws, wage and hour laws put the onus on employers to maintain accurate records related to time and pay. In New York, these records must be maintained for a minimum of six years, and the record-keeping requirements are particularly burdensome on restaurant employers because a restaurant owner who pays the subminimum wage rate has the burden to document *and be able to show*:

- 1) that only workers who customarily provide direct customer service and earn at least \$30 per month in tips are included in the subminimum wage system;²⁵
- 2) that only those same workers participate in a tip pool, if utilized;²⁶
- 3) that each tipped employee has been provided with a written notice, signed by the employee, of the subminimum wage at the beginning of employment and at the time of any changes in tipped employees' wages or the tip pool;²⁷
- 4) that each tipped employee has, in fact, earned the full minimum wage each week with tips or, if not, that the employer has paid the difference between the subminimum wage and the regular wage rate;²⁸ and
- 5) that all workers who earn a subminimum wage spend no more than 20 percent of their time, or two hours per day, whichever is less, engaging in activities not directly related to customer service.²⁹

Without such records, under the *Mt. Clemens* burden-shifting standard first announced by the U.S. Supreme Court in 1946, a court can rely only on the testimony of the complaining employees and *the employer bears the burden of disproving the testimony*. Further, a tipped employee subjected to any violation of these rules could bring a claim individually or for all tipped employees in a single lawsuit, even if no longer employed.

A restaurant operator that fails to comply with these highly technical and strict requirements can face devastating consequences as the restaurant may be required to make up the difference between the subminimum tipped wage and the regular minimum wage for all tipped employees going back for six years, plus penalties, and the tipped employees' attorneys' fees and costs, as well as its own legal fees. For a restaurant with 50 tipped employees, this could easily amount to nearly \$2.6 million in back pay, damages and

attorneys' fees, and court costs if the case were litigated to trial (see Figure 3).

A survey of 20 randomly selected class action lawsuits which involved tipped employees and settled between 2010 and 2015 showed a total of over \$100,000,000 paid out by restaurant owners, or on average over \$5 million per class action lawsuit, a stunning amount in pay outs even considering that settlements are often discounted when a trial is avoided. Further, as the gap between the regular and subminimum wage grows a restaurant's liability for subminimum wage violations will simultaneously skyrocket as the regular minimum wage rate rises to \$15 per hour; in the restaurant example in Figure 3, the restaurant operator's total liability could rise from \$2.3 million to almost \$7 million.

'80-20 RULE' CHALLENGES FOR EMPLOYERS AND EMPLOYEES

Although all of the rules associated with paying the subminimum wage can be challenging, the '80-20 Rule' can be the most daunting for employers to comply with because, in litigation, the employer will have to demonstrate that it kept track of time each tipped worker spent engaged in activities directly or not directly related to customer service. There is no mechanism to effectively catalog all time, a designation that is itself ambiguous and open to interpretation. In order to comply with this rule, employers must institute inefficient time-management practices that become increasingly burdensome as a business grows. These practices act as a retardant to growth, leading to lost employment opportunities.

"It really discourages employers from training people, because, any time spent training goes towards the 20 percent or the two hour threshold so unfortunately, it dissuades employers from investing in their people." —ERIN MORAN, Chief Culture Officer, Union Square Hospitality Group

However, the body of legal regulations that hold employers accountable, while complicated, is necessary to protect employees from abuses of a two-tiered wage system. These regulations were developed to protect workers from fraudulent misuse of the subminimum wage by employers, such as an employer simply paying all their workers the lower subminimum wage without a legal basis. Recent case law indicates that, given the difficulties in enforcing and complying with these rules, even these regulations are not effectively preventing abuses of tipped employees. To make matters worse, the Wage and Hour Division of the United States Department of Labor (DOL) conducted approximately 9,000 investigations in the full service restaurant industry from 2010-2012 and found an 84 percent non-compliance rate.³⁰ The only effective guard against such widespread non-compliance is to eliminate the two-tiered wage system altogether.

In order to fully understand the liabilities faced by employers due to the two-tiered wage system, we interviewed 20 New York restaurant employers on their experiences in complying with the regulations associated with the two-tiered wage system, combined these with 20 interviews previously conducted with employers from around the country, and spoke

Mt. Clemens Burden-Shifting Standard

"The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of...the [Fair Labor Standards] Act."



with several attorneys and workers who cite increased liability, complications, and challenges arising from the widening gap created between tipped and non-tipped workers as a result of New York State's two-tiered wage law. We also examined case law and patterns of claims arising out of the subminimum wage system.

Seven states, including California, which also recently increased its statewide minimum wage to \$15 an hour, do not have a lower wage for tipped workers.³¹ When California recently raised its minimum wage to \$15 an hour, the wage increased for all workers, tipped and non-tipped, and thus no liability was imposed on restaurant employers, and no extra burden was imposed on tipped workers.³²

The '80-20 Rule' and other rules necessary to regulate the subminimum wage create tremendous liabilities for employers and employees. The subminimum wage system is difficult to enforce and properly comply with, and effectively puts employers in New York at a competitive disadvantage. In contrast, California employers do not have this burden, since these liabilities simply do not exist there. New York can follow California's path and simply eliminate the costly liability experienced by employers by getting rid of the subminimum wage system.

METHODOLOGY

In order to ascertain the extent of legal liability faced by employers in New York due to the two-tiered wage system, we first reviewed Department of Labor regulations for tipped employees both at the federal and state levels. After this review, we crafted an employer interview guide focusing on knowledge and application of the various regulations related to the two-tiered wage system, and in particular the '80-20 Rule', due to the ambiguity and risk associated with this rule overall and in particular in New York. We then recruited restaurant owners across the state of New York to participate in the interview.

In total we interviewed representatives of 40 restaurant establishments, 20 from New York specifically for this study, combined with an additional 20 that participated in open-ended interviews focusing on 'high road' operations including liability associated with the subminimum wage. New York employers ranged from Limited Liability Companies (LLC), both sole proprietorship LLCs and LLCs with multiple members, to corporations with over a dozen locations. Interviewees ranged from business owners employing fewer than ten to those with thousands of employees, and represented a wide range of industry segments, from pizzerias and burger restaurants to farm-to-table fine dining establishments. The majority of employers reported that their tipped employees in these restaurants start at the subminimum wage of \$7.50 per hour, but range from \$9-\$60 per hour with tips. The majority of respondents paid servers \$7.50 per hour, except for establishments using a tipless model and one restaurant that started all workers at \$9 per hour plus tips. The restaurants interviewed had a range of policies with regard to tips and the tipped minimum wage. Two of the smaller establishments (20-25 employees) were tipless, while one of the corporations was testing a tipless model in one of its establishments. One of the restaurants with 15 employees was a *tipped house* that did not pay tipped workers the subminimum wage, but instead paid the full minimum wage in addition to tips. The newest establishment had been in operation for

one year, and the oldest for over 70 years.

The interview guide began with a set of questions on the interviewee's personal history, the history of the restaurant, the ownership structure, policy setting, and internal communication of policy, followed by a survey of number of staff, gender, race, wages, and benefits, and finally presented a set of questions on employer liability associated with the subminimum wage system, zeroing in on knowledge of and compliance with the '80-20 Rule' (including an explanation of the rule if necessary, planning and tracking systems and tools for compliance with the '80-20 Rule', concerns and complaints associated with the Rule, concerns about liability associated with the Rule, and scheduling and staffing decisions based on the Rule).

We also examined and contrasted cases filed in the Southern District of New York, which covers New York City, and the Central District of California, which covers Los Angeles. We analyzed these two large urban areas with comparable amounts of restaurant activity in terms of the number of restaurants and variation in types of restaurants, but with one area located in a state with a two-tiered wage rate (New York) and the other in a state with a single-tiered wage rate (California) to understand the real and practical liability consequences of a subminimum wage system for restaurant employers.³³

Finally, we examined the characteristics of tipped workers in New York using a four-year merged sample of the American Community Survey (2011-2014) to ensure adequate sample size and allow a granular review of the impact of the subminimum wage in New York.³⁴

KEY REGULATIONS FOR EMPLOYERS PAYING THE SUBMINIMUM WAGE TO TIPPED EMPLOYEES

The main regulations for employers who pay the subminimum wage:

1. The Fair Labor Standards Act (FLSA) defines tipped employees as “any employee engaged in an occupation in which he or she customarily and regularly receives not less than \$30 a month in tips.”³⁵
 - › The FLSA definition of tipped employee does not require the use of a calendar month in determining whether more than \$30 per month is received as tips.³⁶
 - › In situations in which an employee has a dual role, such as a retail employee who also serves as a waiter, the employee is only a tipped worker with respect to their employment as a waiter, as long as they customarily and regularly receive at least \$30 per month in tips through that role.³⁷
2. Under the FLSA, when an employer pays the subminimum wage, the employer may only require that employees pool tips with other employees who customarily and regularly receive tips. This requirement prohibits ‘Back-of-the-House’ (kitchen) employees and other workers who do not regularly and customarily receive \$30 in tips each month from participating in a tip pool if their employer pays the subminimum wage.³⁸
 - › A recent ruling from the 9th Circuit Court of Appeals, which covers California, upheld the U.S. Department of Labor’s ban on sharing tips with ‘Back-of-the-House’ employees even in states in which tipped employees receive the full state minimum wage.³⁹

- › Tip pooling may not be used to compensate the owner(s), manager(s), or supervisor(s) of a business.⁴⁰
3. The FLSA states that an employer may not pay the subminimum wage to tipped employees without first providing notice to them. Federal regulations state that the notice can be written or oral and must communicate the subminimum wage the employer is paying the tipped employee, the additional amount claimed by the employer bridging the gap from the subminimum to the full minimum wage, that the amount between the subminimum and full minimum wage cannot be greater than the amount of tips received by the employee, and that all tips received by the employee are to be retained by that employee except in the case of a valid tip pooling arrangement.⁴¹
 - › In New York, employers are required to provide written notice to each tipped employee prior to the start of employment and when their wage changes (for example if the minimum wage changes thereby affecting the gap between the subminimum and the minimum wage, or if they receive a raise) which sets out the employee's regular hourly pay rate, overtime pay rate, amount covered by tips between the subminimum and full minimum wage, regular payday, and indicates that employers are responsible for extra pay should tips be insufficient to bring employees up to the minimum wage.⁴²
 - › Additionally, employers in New York must retain for six years an acknowledgement of receipt of the subminimum wage notice signed by each tipped employee.⁴³
 4. Employers of tipped workers who earn a subminimum wage must be able to demonstrate that their tipped employees receive at least the minimum wage when tips and the subminimum wage are combined. If an employee's tips combined with their wages do not equal the federal minimum wage, the employer must make up the difference.⁴⁴
 - › If the employer has not kept records of tips received, the employees cannot be considered "tipped employees."⁴⁵
 5. For employers who pay the subminimum wage, the U.S. Department of Labor has developed complex regulations to account for any time not spent directly engaging with customers, including a "dual jobs" classification, and the '80-20 Rule'.⁴⁶
 - › A "dual jobs" classification exists for employees who have responsibilities "some of which may meet the subminimum wage requirements and some of which may not..." For dual jobs, "the [subminimum wage] may only be applied with respect to the time spent in the tipped job," meaning that the employee must be paid the full minimum wage for all time spent not directly engaging with customers.⁴⁷
 - › Additionally, the Department of Labor and courts have recognized that "some occupations require both tip-generating and non-tip-generating duties [such as maintenance and opening and closing], but do not constitute a dual job..."⁴⁸ In these instances, the non-tip generating duties must not exceed 20 percent of the employee's time. If non-tip generating duties exceed 20 percent of the employee's time, the employee is not

eligible to be paid the subminimum wage for that portion of time. This is known as the ‘80-20 Rule’.⁴⁹

➤ *In New York, the ‘80-20 Rule’ is more strict. The employer may not pay the subminimum wage on any day that a tipped employee works at a non-tipped occupation for two hours or more, or over 20 percent of the shift, whichever is less; instead the employee must earn the full minimum wage for the entire shift.*⁵⁰

These regulations are vital to protect tipped employees from abuses of the two-tiered wage system. Without these protections, tipped workers would have little recourse should their employer take advantage of their second-tier pay status by assigning them heavy non-tipped workloads. Nevertheless, for workers as well as employers, these regulations can be inaccessible and confusing. Moreover, in New York, these regulations fall short in their goal of protecting tipped workers, as demonstrated by the increasing number of lawsuits filed by tipped workers in the wake of the recent minimum wage increase.

In the New York City area, of a total of 2,791 cases filed under the Fair Labor Standards Act, 634 involved wage claims against restaurants (23 percent — see Figure 4), the vast majority of which involved claims relating to the subminimum wage rate for tipped employees, while in the Los Angeles area, such cases made up only 68 out of 937 total (8 percent — see Figure 5).

FIGURE 4
Federal Wage Lawsuits
in New York City Area

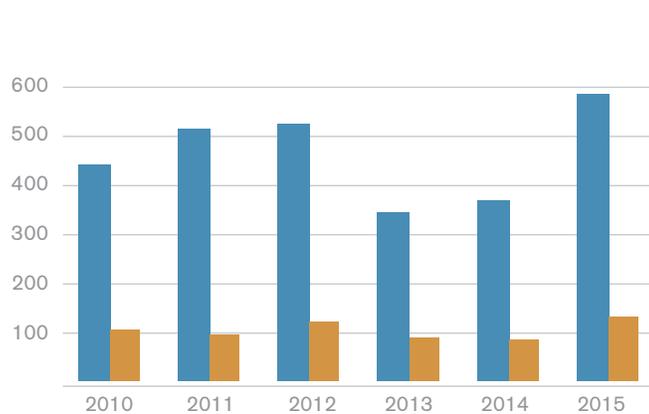
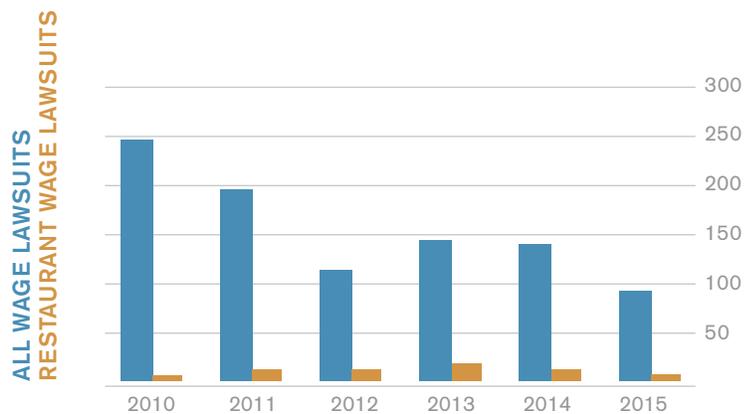


FIGURE 5
Federal Wage Lawsuits
in Los Angeles Area



Celebrity chef Tom Colicchio, a leader on food justice issues, favors eliminating the two-tiered wage system not only for social justice reasons, but also because of the tremendous liability the subminimum wage creates for employers. In New York State, there are additional burdens that require employers to inform every new employee that they are being paid the lower tipped minimum wage, and that tips will make up the difference, and even a requirement to officially notify workers when they are receiving a raise. As a result, several employment attorneys have developed whole practices suing employers like Tom for violating these complicated tipping laws. “There’s a whole cottage industry of attorneys who are making their living off this two-tiered system. Some of the cases are merited; many are not. They can get someone on a technicality as to whether they sent out a notice of a raise. It’s absolutely wrong. Do I think someone taking tips from servers to pay managers should be punished? Absolutely. But some of these attorneys are acting in their own self-interest. If we got rid of the lower minimum wage for tipped workers that would go away.”

EMPLOYER LIABILITY: THE EXAMPLE OF THE SUBMINIMUM WAGE NOTICE REQUIREMENT

Notification requirements associated with the two-tiered wage system create space for liabilities for restaurant employers. New York State requires that employers provide written notice to their employees that they are being paid the subminimum wage and that the employer will ensure that tips bring them up to the full minimum wage; this requirement helps protect employees from abuse, but can also be a source of confusion for employers:

“When a new hire comes in it’s pretty easy because it’s just one of the forms you add to your other forms for new hires. It’s when the wage goes up that you forget to notify people. Because wages usually go up [during] the busiest month of the year which is December, and no one has time to start chasing employees and let them know that their rate has changed.”
—GENERAL MANAGER at a fine dining establishment with 55 employees

New York requires that notice regarding the subminimum wage must be written and signed by tipped employees, while federal regulations allow for an oral notice.⁵¹ This is a source of confusion and widespread non-compliance for many restaurant employers. We interviewed Jeffrey H. Ruzal, Senior Counsel for the law firm of Epstein, Becker and Green, for a more detailed picture of how pervasive this liability issue is for restaurant employers in New York:

“I’ve found in my practice, in both providing advice and counsel to employers as well as defending restaurant employers in lawsuits where there is a [subminimum wage] claim,

very often there is a notice deficiency somewhere, or a record-keeping deficiency somewhere, and to the extent that there is, the result or the remedy would be to recover the difference between the subminimum tipped wage and the actual prevailing wage. On top of that are liquidated damages, which are automatic under federal law which provides for the time value or interest component of the amount which was wrongfully withheld, which is basically doubling it. Then certain state wage laws including New York will also provide for their own liquidated damages penalty, which is different. It is not interest based, but it is rather punitive, so it winds up being treble (or triple) damages. So, it can be incredibly costly simply by making a notice requirement mistake and often it is mere oversight.”

EMPLOYER LIABILITY: THE EXAMPLE OF THE ‘80-20 RULE’

Employers face significant liability associated with the two-tiered wage system. The Wage and Hour Division of the United States Department of Labor (DOL) conducted approximately 9,000 investigations in the full service restaurant industry from 2010-2012 and found an 84 percent non-compliance rate. These violations involved 82,000 workers and included 1,170 incidents of improperly calculated wages for tipped workers, resulting in fines of approximately \$5.5 million in back pay, and \$2.5 million in civil penalties.⁵²

“We worry about [‘80-20’] all of the time because the law is somewhat ambiguous, and the provision of time... would require that we are measuring time, and we are not . . . And so, in a litigious society, it does concern us. We do the very best we can, but without clarity or without measuring every minute, it is tough for us to know if we are 100 percent compliant.” —OFFICER at a large restaurant corporation

Although employers face liability in all of the areas noted above, the greatest liability is associated with the ‘80-20 Rule’, due to the legal ambiguity with regard to what qualifies for work that meets the customer-service requirement, as well as the added burden in the state of New York.

“For us... there is the FLSA requirement, but also New York law. The New York ‘80-20 Rule’ for us, is even more expansive, but also a little bit less clear than the FLSA ‘80-20 Rule’. Essentially what it says is that... for anyone who is working two hours or more or 20 percent of his or her shift, whichever is less, if they are doing that then they cannot be eligible for tips. So we have to think through that in terms of all of our operations, because we can’t really go around looking at exactly how our people are spending time. And there is ambiguity even around what work counts for the regular job duties for the 20 percent. So, an example, [does] side work count towards 20 percent, or not? Those are the challenges that we have.” —OFFICER at a large restaurant corporation

Although the sample size is small, a full quarter of employers explicitly expressed concerns with employer liability due to the ‘80-20 Rule’, highlighting the extent of employer liability. Even more troubling is the extent of ignorance and misunderstanding of liability due to the subminimum wage system, exemplified by ignorance of the ‘80-20 Rule’ in the

Jeffrey H. Ruzal

Senior Counsel for the law firm
of Epstein, Becker and Green



"It [the '80-20 Rule'] is the source of a lot of litigation; it is very opaque because it is hard to necessarily account for what is considered non-tipped work. And quite frankly, most Front-of-the-House employees, for some amount of time during their shift will perform non-service related duties, or duties that are arguably service related but will still be challenged. For example, does a bartender who spends part of his time cutting fruit, or stacking glasses, or doing barback related activities, is that considered service related? Many if not most restaurants will say, absolutely, it's a critical part of the job and the service cannot be accomplished without performing those ancillary duties, but of course the plaintiffs' bar and the Department of Labor would take a different view and say those are exactly the type of ancillary duties that if, in a given shift, go beyond 20 percent of the workers time or two hours, then the [subminimum wage] cannot be used.

It is even worse in New York than federal [law], because federal [law] says you can't [pay the subminimum wage] for non-tipped work using the 20 percent rule for that time that that work is not actually being done, service oriented work, whereas in New York you actually [lose the ability to pay a subminimum wage] for the entire shift so it is much more punitive in that regard... '80-20' is a hot topic of litigation at the moment, and the reason for that is that it draws more settlements. It is a very difficult claim to defend against, because... it's very amorphous, so it is hard to put forth documentary evidence or direct proof that the '80-20' hasn't been violated. You know, in a lot of cases, employers, knowing or understanding the litigation risk of going to trial and taking their chances, would rather try to settle early and hopefully strike some sort of a favorable or reasonable deal for themselves. And plaintiffs attorneys know this, and that is why they try to assert [this]."

Some of the interviewed employers asserted that their employees are generally well-compensated through tips, and thus wouldn't have an interest in pursuing litigation related to their tipped pay. Jeffrey Ruzal offered a cautionary note for employers on that point:

"It is typically those employees who will file a claim even if they are well compensated by tips, because frankly they have nothing to lose. And the types of lawsuits that are being filed are class and collective action, which means they are brought pursuant to the Fair Labor Standards Act, the Federal Law, as well as the State Wage and Hour laws, for example in New York it is the New York Labor Law. And what happens, it can be brought by one employee, and there is usually an overzealous plaintiffs lawyer, very hungry but well fed, who will bring it on behalf of a putative class and collective, even if there is one disgruntled employee who claims the tip credit was not implemented properly. All you need is one. And these cases typically will go through discovery, and more often than not there are at least conditionally certified early on, which means that the courts will allow the plaintiffs to disseminate notice of an action which will give all of the employees of the restaurants, and perhaps to those employers who maintain restaurant chains or franchises or various stores or various locations even in different states, the opportunity to opt in to the federal claim to the action, which creates not only employee relations concerns, it is certainly bad PR. It is certainly not good for investor relations, and can very much hurt the bottom line because the notice is already out and the chances that others will join is quite high."

restaurant industry among smaller employers. Of the employers we interviewed, a full one-quarter was unaware of the '80-20 Rule' prior to the interview. Of the group that was not concerned, a third confused the '80-20 Rule' with the two-tiered subminimum wage system itself, or the question of which workers could be included in the tip pool, and another third had no system in place to track the '80-20 Rule'. Of these eight individuals, two had over 30 years experience, one had 20 years experience, and two others had over 15 years experience working in the industry.

"I actually wasn't [aware of the rule], not even when I was at a restaurant tipped house both as a manager and tipped worker." —DIRECTOR at a tipless establishment with 15 years experience

Employers are at significant risk of engaging in wage and hour law violations. The New York statute of limitations is six years, meaning, "someone who worked six years ago could initiate... a claim on behalf of the class. Not only [could you] get money based on an error for current employees, but for a class of... former and current employees and get double damages."⁵³ The National Restaurant Association's most recent figures find a 72 percent average turnover rate in restaurant employment,⁵⁴ meaning the average restaurant employer in New York faces a liability for errors of omission or commission in worker wages based on improper use of the subminimum wage under the '80-20 Rule', based on a six year cumulative total of staff, not solely current staff. At an average restaurant with a 70 percent turnover rate, the pool of potential members of a suit is 461% higher than the current labor pool.⁵⁵

However, in practice, many of the employers we interviewed do not take steps to guard against this tremendous liability. Several employers admitted they do not take action to guard against liability, either because they did not know about the regulation or felt, as one owner of a small casual restaurant did, that: "*It is not trackable and there's no way to verify.*" The manager at one of the tipless restaurants noted that when they paid the subminimum wage, they only had one server, implying that they limited their liability by limiting the number of tipped employees. Several other employers noted they were small, explaining why they did not take steps to guard against the liability. A few employers attempted to comply with the '80-20 Rule' by setting a delimited period of time at the beginning and/or end of the shift for 'side work', or preparatory work that is not considered 'customer-facing' work:

"I don't have the tipped workers come in until a half hour before the shift... they are coming in when the restaurant is opening... whatever side work they're doing is pretty minimal... and at night they fold like 20 napkins, and that takes like 10 minutes... whatever they are doing at the end of the night, as far as routine cleaning, resetting stuff, I'm fairly confident either is within the ['80-]20' rule or would be defensible within the ['80-]20' rule."
—MANAGING PARTNER at a farm-to-table restaurant with 40 employees

One of the employers at an ethnic fine dining establishment attempted to comply with the rule by treating tipped occupations as dual occupations: "I have a dedicated person who does all our cleaning... the next day the only thing left to do for the tipped staff is to set up the tables which takes a half hour, they get paid the minimum wage for that and then they are on the floor."

However, this employer and others also pull certain workers out of the tip pool for

specified days or events: “one day a week it’ll happen where I’ll have two floor waiters come in but only one will work the floor and the other will stock the bar or help out, that person that is not on the floor, not getting tips... will get the full minimum wage for that time.”

Another employer dealt with liability by taking expeditors (workers who serve as a liaison between servers and the kitchen) out of the tip pool, since it is not always feasible to limit non-tipped work to a delimited period of time.

“We were concerned about lawsuits from our employees so we immediately pulled the expeditor out of the tip pool, calculated how much he made per hour with his tips which was \$35, added that to his \$5, and started paying our expeditor \$40 dollars an hour and spread that tip across our remaining employees. The ‘80-20 Rule’ [is] just not something that really [can] be calculated. On a Friday or Saturday, busy night, holiday or whatever, no problem, we are following the ‘80-20 Rule’. But on a slow night your service might only be three and a half hours and you are setting up for an hour and a half and you are tearing down for at least a half an hour, so there is no way you are doing that. And there is no practical way to enforce it.” —GENERAL MANAGER at a fine dining establishment with 55 employees

This same employer pointed out that the two-tiered wage system limited flexibility for both employers and workers, as employers lose their ability to re-assign tasks freely, and workers lose their ability to cross-train and advance in the industry:

“We had an expeditor who also ran food. How am I going to determine what portion of their work is in what? That’s the problem in a restaurant. People are doing different things. We try to work as a team but the [subminimum wage] forces people into roles. It limits the employee as well as the employer. Sometimes there are guys in the Front-of-the-House who want to learn about the Back-of-the-House, and want to spend more time in the kitchen doing prep and learning that kind of thing, but they can’t. We have to say they can’t do that.”

One of the employers noted they had ignored the ‘80-20 Rule’ on the assumption that employees would not be likely to jeopardize their jobs by reporting the violation. The assumption that employees might not complain about ‘80-20’ violations, although risky, is based on the experience of employees complaining after being removed from the tip pool. According to another employer, “Guys who worked on a Friday night and had to set up for Saturday... started complaining a lot more, ‘I’m not getting the tip for this so why am I setting up this party?’ So it became a lot harder to manage them. There were times when I’d have to call in a crew in the daytime and say, I’ll pay you guys \$100 each to set up the room because no one would want to do it if they weren’t part of the tip pool.”

One of the larger employers interviewed plans by constant vigilance, auditing operations for how positions, such as baristas, are spending their time and making changes to the schedule accordingly.

Apart from removing individuals from the tip pool for a shift or a percentage of their time, none of the employers were able to explicitly track how employees spent their time. As a result, employers created “bright line” items to avoid based on attorney advice or presentations at conferences. An employer at a farm-to-table restaurant with 40 employees explained,

“We took polishing out of the equation; we took out setting the dining room; we don’t have them clean the bathrooms... The only thing they do at the end of the night is sweep the dining room which takes five minutes, 10 at most.” However, employers did not concur on what they treated as non-tipped work:

“I would say that polishing glasses and polishing silver and folding napkins are a direct part of service. You can’t provide the service without doing those things. So we assume that in the calculation, that is part of the 80 percent. But we’ve heard attorneys... saying if you’re not facing the customer, you’re not serving the customer, so folding napkins is not part of [it]... The things that would push you over the 20 percent of your time technically are supposed to be paid at the regular minimum wage and not the tipped employer minimum wage... You can see that you shouldn’t ask servers to come in and paint the restaurant and pay them the tipped minimum wage for that time because they are not getting tipped and it’s not service. So that is obviously something that shouldn’t be considered part of the 80 percent... but there is a whole lot of stuff that’s grey area, that to me doesn’t seem grey, but to attorneys for plaintiffs who are suing their employers, they claim that they are grey. They say you should clock in at one rate when you are folding napkins and then clock out and then clock back in at the lower rate when you are walking to the table. That’s not feasible; that’s ridiculous.” —OWNER of a small wine bar



One of the managers at an organic farm-to-table establishment with 100 employees had not previously heard about the rule, but noted that workers had adopted a sort of “Front-of-the-House” privilege associated with their tipped status, effectively reducing liability: “They wouldn’t bother doing anything else. If they see something on the floor, they don’t pick it up. That is the system.”

Although most employers were not concerned about their adherence to the rule, several expressed explicit concerns about the lack of clarity surrounding the rule, such as the managing partner at an ethnic farm-to-table restaurant with 40 employees: “I am concerned... in the sense that I find it to be an ill-defined rule. It is both difficult to prove but also difficult to disprove.” Other employers, such as this owner of a small plate establishment, were concerned about the opportunity for lawsuits: “Yeah, my concern is that we’re in the same boat as every other employer who pays their employees the tipped minimum wage, which is one employee gets one lawyer and we’re screwed.” One of the officers at a large restaurant corporation noted, “We do the very best we can, but without the clarity or without measuring every minute, it is tough for us to know we are 100 percent compliant.”

As a rule, employers noted that workers had not complained about the ‘80-20 Rule’, or violations to the rule. In part this was due to ignorance, as one noted: “my bet is most of them don’t know what it is,” but workers’ responses to steps employers had taken due to the ‘80-20 Rule’ varied. Some employees were pleased to earn a higher wage during set up. As a Controller for an ethnic fine dining restaurant group with 150 employees noted, “Now they are happy to do set up because they are being paid higher to do it.” However, others were displeased that they were pulled out of the tip pool, as another General Manager noted:



Union Square Hospitality Group (USHG),

a concept started in 1985 by restaurateur Danny Meyer who was looking for “a place that would be his own favorite restaurant,” has grown to 13 restaurants primarily based in New York City.⁵⁶ Union Square Hospitality Group has received a lot of attention due to its recent decision to go tipless as part of a

project to raise wages for workers across the restaurant and recognize staff as service professionals. The Modern was the first restaurant in the group to adopt a policy of what it calls, Hospitality Included, and the results were so favorable that USHG has now implemented Hospitality Included at Maialino and North End Grill. Erin Moran, Chief Culture Officer, ultimately responsible for strengthening and growing USHG’s culture of Enlightened Hospitality, and overseeing all aspects of the employee experience at USHG restaurants, explains why moving all the concepts to the Hospitality Included model is a smart business decision: “Honestly,... one of the benefits associated with eliminating tipping is we don’t have to worry about the ‘80-20 Rule’. With predatory law firms the liability is really huge for the hospitality industry, particularly here in New York.” Erin notes that USHG tends to hire “hospitality industry professionals,” who view their work as “a career, not just a job.” Erin finds that the ‘80-20 Rule’, “really discourages employers from training people, because, any time spent training goes towards the 20 percent or the two hour threshold so unfortunately, it dissuades employers from investing in their people.”

“If there wasn’t a tip involved it was very difficult to get them to work.” According to an officer at a large restaurant corporation in business for over 30 years, workers do not tend to complain about the ‘80-20 Rule’, “unless they are part of a position then that we pull out of the tip pool because we are concerned in terms about being compliant. If they are in that position they typically do not like that.”

Only the larger employers had experience with employees filing charges on the rule, and attributed it to disgruntled employees learning about the rule from attorneys. However, one of these employers has found these complaints, “are typically full of inaccuracies. And it is challenging for us because we still have to spend money with our response to these meritless claims.” Other employers simply felt that their employees were compensated too well to be concerned about violations to the rule, such as the owner of an American cuisine fine dining establishment with 13 employees: “In the case of my restaurant, where Front-of-the-House staff make between \$22 and \$29 an hour, on average, no one is concerned whether or not folding napkins is covered under this rule, or whether they do it for two hours or 2.5 hours per shift.” But this employer was quick to add that, “We don’t ask them to do anything they’re uncomfortable with, or that isn’t widely accepted as Front-of-the-House side work; no mopping, bathroom cleaning, etc.”

However, as Jeffrey Ruzal noted, “it is a big gamble to assume because an employee is well compensated with tips, that he or she wouldn’t be interested in pursuing some sort of a litigation... That may very well be the case for a... well-positioned employee who wants to remain with the company, but that is certainly not going to be the case for disgruntled employees, or employees who are looking to leave the job for one reason or another, or are even terminated.”

Although several of the employers were not concerned with liability associated with ‘80-20’, one of these tied their lack of concern specifically to their rigorous dual employee system. Several employers expressed concern, and one, the owner of a wine bar with 12 employees, in particular noted the ambiguity in the regulation: “It’s a vague law. The definition of customer facing or customer service, whatever it says in the law, is not defined so it’s open to a lot of interpretation, which opens us up to a lot of liability. Because somebody might sue us claiming that something that we think is customer service is not customer service, and that pushed them over 20 percent of their time on a given day, or every day, or whatever. And we don’t have a way to officially control that, and I don’t know how we could.”

One of the larger employers expressed the largest concern with liability, and tied it to a corporate decision to move all of their restaurants to a tipless system. “We won’t be worried shortly, when we eliminate tipping in all of our restaurants. But honestly that is one of the reasons why we are eliminating tipping is so that we don’t have to worry about the 80-20 people and we can pay our people what we want to pay them. The liability is really, really huge. Particularly here in New York.”

One employer at a casual dining restaurant with 15 employees had no concerns, because they simply did not pay the subminimum wage; another employer at a casual restaurant with 8 employees was in active conversations with a labor attorney to examine the options of not using the subminimum wage, and a third, the owner of a small plate concept, was considering it:

“Yes I’ve very strongly considered [not using the subminimum wage] and avoiding that liability. And the down side of that is just economic; it’s giving a raise to my highest paid employees which either has to come from our bottom line, or we raise our prices, and our customers pay for it. And I would rather give raises to the guys making \$12 an hour than those making \$40 an hour . . . I don’t think it’s a big deal for us, we don’t ask our servers to do much that isn’t service related . . . except in the extreme, where a vengeful ex-server hires an aggressive lawyer, and it doesn’t matter whether we are right or wrong and they are after us to get what they can get. I don’t think there is any way to avoid that, but . . . I don’t think we are doing anything wrong.”

The largest employer readily acknowledged scheduling staff with the ‘80-20 Rule’ in mind:

“It really reduces the efficiency of our operations because we have to keep that in mind as we are asking people to do specific work during the day. And it really ties our hands. If you think about how a manager—the manager’s ability to direct work regardless of the industry is critical, because the manager sees opportunities and can prioritize tasks and people accordingly. However, with the ‘80-20 Rule’ our hands are tied in management, which I think decreases our operational efficiency pretty significantly.”

However, smaller employers also noted losses of efficiency due to scheduling concerns. The owner of an ethnic fine dining establishment stated: “I will say that we’ve staggered people coming in. I don’t love the idea all the time of the staggering. Sometimes it prevents us from having a real line-up meeting for service with all those people there.”

The majority of employers acknowledged cutting staff early, but only to control labor



When New York made history by becoming the first state on the east coast to adopt a \$15 per hour minimum wage it also created a pathway towards becoming the state with the widest gap between the subminimum wage for tipped workers and the minimum wage that protects the rest of the workforce. By the time the minimum wage in parts of the state reaches \$15.00 in 2018, tipped workers will be receiving \$7.50 less from their employers as wages than non-tipped employees. A robust enforcement strategy is needed to check employers who may find an incentive in that gap to shift non-tipped work to workers paid the tipped minimum wage.

Justine Daniels⁵⁷

Server, 40

23 years in the industry

Justine is a 40 year old server who works in Long Island, and has firsthand experience of both discrimination in the restaurant industry and the extra challenges that a two-tiered minimum wage brings to low-wage workers. She began serving food at the age of 17 to support herself through college. The first restaurant she went to, she applied for a server job and was turned down for lack of experience. They hired her as a dishwasher instead. They did hire a white woman for the server position, who also had no experience.

Challenges aside, Justine has enjoyed her time in the industry. She loves interacting with the customers as a server and feels that “everybody should have the experience of waiting tables. It’s the ultimate personality study.”

Justine worked at a well-known seafood restaurant for over five years where she was the only female and the only person of color working as a server. Recently, she was asked to work a private party for a famous political family, which went well and she made good money. Shortly after the party, she was called by the manager and told that there was not enough work for her, so they would have to let her go. She was surprised and although she asked if there was another reason, none was forthcoming. She heard “through the grapevine” that the owner was unhappy that she had worked that party. She had been putting on weight due to personal stress factors and she attributed the owner’s displeasure with the fact that she did not have the “look” of someone who should have been serving a celebrity – whether that was due to weight gain, gender, or skin color.

Discrimination based on her ethnicity and appearance wasn’t the only challenge she faced at her restaurant. Since tipped workers were left out of New York’s recent minimum wage increase to \$15, Justine’s restaurant has eliminated busser and barista positions, pushing that work to servers who are paid the subminimum wage of \$7.50 per hour. As a result of this increased workload, Justine experienced higher blood pressure and general exhaustion:

“I was paid \$7.50... most of the time my check is “zero”... Recently [since the minimum wage was raised] the busser [position] was eliminated. As a result [servers] need to do all the work, which was previously done by the bussers... I would say about 40 percent of my time is spent doing side work... closing shifts are always very draining, cleaning the place and glassware, sometimes it is 3:00 A.M. by the time all the work is done... There is no way they are going to pay me according to the ‘80-20 Rule’, \$15 for 40 percent of the work I do, no way... I would like a One Fair Wage system.”

costs and manage the tip pool, not as a response to the '80-20 Rule', and only one addressed a potential liability:

"We cut staff early to control labor costs not to comply with the '80-20 Rule'. I guess some evil lawyer could claim that if there are no customers in the restaurant, and the waiters are just standing around waiting for guests, then that time is not customer service because there are no customers. I would hope that no court would agree with that, but I'm absolutely sure there are lawyers that would make that argument. I guess we could calculate that, but we don't." —OWNER at a wine bar with 12 employees

INEFFICIENCIES AND SOLUTIONS

The '80-20 Rule' and other similar regulations necessary to monitor the subminimum wage create a burden that impacts the growth potential of the industry. Employers shared a recurring theme that the regulations to monitor the subminimum wage led to significant inefficiencies, such as one owner at an American fine dining establishment with 13 employees: "We're too small to be able to afford even a part-time HR person. [The regulatory burdens] are overwhelming. It's the worst part of owning a small business. While I agree with the spirit of the '80-20 Rule', I am in no way able to commit resources to tracking it."

There was disagreement about both the cause and solution to these problems. At least one employer of a casual restaurant in operation for 80 years, placed blame on employees and the raising minimum wage, "These kids don't want to work. You can barely get them to do their job as it is. Rolling silverware and cleaning tables is part of their job. Now they are trying to raise the minimum wage and it's killing us." However, several employers espoused the need to do away with the subminimum wage system altogether in order to limit liability.

"Because of the subminimum wage for tipped workers . . . these predatory attorneys do come through the door and accuse anyone of violating these laws, and even if you are completely innocent of it, its going to cost you a lot of money just to settle it. And if you're going to go on principle, you're going to go out of business because you can't afford to litigate . . . The '80-20 Rule', a lot of restaurants are going to fail on that count because if it's a slow night, your staff comes in at 3:30, your service starts at 5:30, and maybe they are out of there by 10:00, and the last customer leaves at 9:15. So, really, you've only had customers in there for three and three quarter hours, and your staff has been there for six. Whereas on a busy night, where the staff comes in at 3:30, and leaves at one in the morning, most of that time has been spent in service, so you're okay . . . but it's very hard on a slow night. It's beyond your control; there is no way to plan for everybody going home early tonight . . . As long as you are paying the minimum wage for everyone, then the '80-20 Rule' shouldn't apply . . . I think having a subminimum wage for tipped workers exposes the employer to unreasonable litigation. And we are in the restaurant business. Some restaurants have human resource departments that are huge, but some don't . . . Having the two standards does not benefit the employer. It causes resentment from the employee, because you are not paying them what they are worth . . . We wouldn't need an '80-20 Rule' if a tip was just extra on what someone should be making." —GENERAL MANAGER at a fine dining establishment with 55 employees

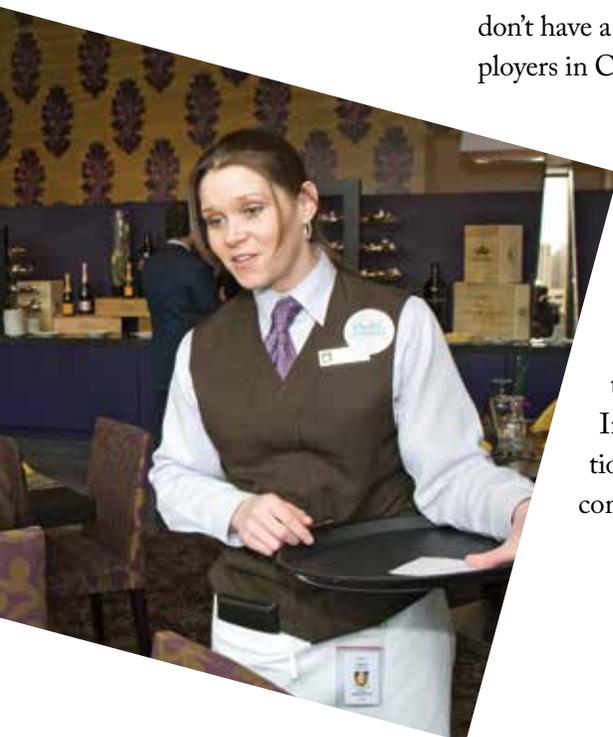
At least one employer of a casual fine dining restaurant found fault in the tip-pool system, stating, “*The real problem is with the inability to apply tips to the Back-of-the-House. The industry is moving towards eliminating tipping because of that problem.*” Another, director of a tipless establishment with 14 serving staff, touted the benefit of a tipless system: “working in a non-tipped house the way that I do now, it definitely takes a lot of the pressure off of wanting to know that my team is compensated fairly, not just fairly but well. One night it might be slow. One night it might be — this just makes it that much more of a democratic system that I actually like very much.”

TWO PATHS TWO COASTS

There are two paths currently being followed to a \$15 Minimum Wage; California and New York. In New York, the subminimum wage system is becoming entrenched as the amount between the subminimum wage and the minimum wage that must be covered by tips grows both as a percentage of the minimum wage and in absolute terms as the difference between the minimum and subminimum wage. This only increases the already high liability in New York both due to the stringent requirements to be eligible to pay the subminimum wage, and due to the specifics of state law that breaks down the ‘80-20 Rule’ by shift instead of by percentage of shift, since an employee who works the less of either two hours, or more than 20 percent in a non-tipped role has to be paid the minimum wage for the entire shift and not simply the portion of the shift engaged in non-tipped activities. As the minimum wage grows to \$15 per hour, employer liability will only grow due to the statute of limitations and compensatory double damages. New York, in addition, requires that employers notify tipped workers every time the tip pool changes, whenever a worker gets a raise, or any of their wage conditions change, otherwise the employer can be held liable for damages.

In California, in contrast, employers are not impacted by the ‘80-20 Rule’ because they don’t have a subminimum wage. The system is unambiguous and straight-forward; since employers in California can’t use the subminimum wage, they can’t violate it for time worked in a non-tipped occupation. None of the obligations that come from the subminimum wage and the liability that comes from not meeting those obligations apply to employers in California, or in any of the seven states that don’t allow a subminimum wage for tipped workers.

Use of the subminimum wage puts the onus on employers to ensure compliance with minimum wage regulations. There is an obligation to pay the full minimum wage in every state, but restaurant owners can apply a percentage of that obligation if they meet the regulatory requirements outlined in this report. In California, since employers are not applying any of the tip towards the obligation, they carry no risk of subminimum wage violations. The liability discussed here comes from employers having to pay that difference back.



CONCLUSION

As employers noted in interviews, technical violations related to what percent of time workers are working as tipped workers are a grey area ripe for technical violations. Together with a long statute of limitations, and strict record keeping requirements on what percentage of time workers are spending doing work eligible for the subminimum wage, employers face severe liabilities associated with using the subminimum wage. The employer bears the burden of keeping track of workers' time for purposes of '80-20 Rule' analysis, and carries the burden of showing that tips make up the difference. If employers don't have the records to rebut what workers attest, they can be liable.

Moreover, despite the fact that the intended purpose of these legal regulations is to hold employers accountable and curb abuses encouraged by a two-tiered wage system, due to the complicated nature of these regulations and difficulties in enforcing and complying with them they are not effective in protecting the rights of tipped employees. This is evident both from the pervasive violations of subminimum wage provisions recorded by Department of Labor investigators, and the amount of litigation related to the two-tiered minimum wage system in the New York area compared to an equivalent location, such as Los Angeles, without the two-tiered wage system.

This regulatory climate is required to ensure workers are made whole when they earn the subminimum wage. The only way to effectively remove this liability is by adopting a system with one fair wage — the elimination of the two-tiered wage system — that does not place workers at risk of being improperly paid, and does not place employers at risk of improperly using the subminimum wage.

NOTES

- 1 California Labor Code § 245.5, available at https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201520160SB3.
- 2 New York Labor Law Article 19, §652, available through <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>.
- 3 Bureau of Labor Statistics (BLS), May 2015 State Occupational Employment and Wage Estimates, New York, available at http://www.bls.gov/oes/current/oes_ny.htm. This report considers the following occupations, based on the Office of Management and Budget's 2010 Standard Occupational Classification system, "customarily tipped occupations": Massage Therapists; Bartenders; Counter Attendants, Cafeteria, Food Concession, and Coffee Shop workers; Waiters and Waitresses; Food servers, Nonrestaurant (including food delivery); Dining Room and Cafeteria Attendants and Bartender Helpers; Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop; Gaming Service Workers; Barbers; Hairdressers, Hairstylists, and Cosmetologists; Miscellaneous Personal Appearance Workers (Manicurists and Pedicurists; Shampooers; and Skincare Specialists); Baggage Porters and Bellhops; Concierges; Parking Lot Attendants; and Taxi Drivers and Chauffeurs. According to the BLS, there are 389,260 tipped workers, 295,740 tipped restaurant workers, and 198,440 servers and bartenders in the state of New York.
- 4 Jeffrey H. Ruzal, "Tip-related claims will continue to be served up as the lawsuit du Jour Against the Hospitality Industry in 2015," December 17, 2014, Epstein Becker Green, available at <http://www.ebglaw.com/news/tip-related-claims-will-continue-to-be-served-up-as-the-lawsuit-du-jour-against-the-hospitality-industry-in-2015/>.
- 5 New York Labor Law § 652 and New York State Department of Labor Regulations § 146. See also, *supra*, note 4.
- 6 See *supra* note 2.
- 7 Based on a review of FLSA cases filed in the Southern District of New York, wage cases brought against restaurants between 2010 and 2015 make up nearly 23 percent of all such wage and hour cases. See *infra* note 33.
- 8 State of California Department of Industrial Relations, "Minimum Wage," available at http://www.dir.ca.gov/dlse/faq_minimumwage.htm.
- 9 29 C.F.R. § 531, Subpart D; United States Department of Labor, Wage and Hour Division, Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA), available at <https://www.dol.gov/whd/regs/compliance/whdfs15.htm>; New York State Department of Labor Regulations § 146, available at www.labor.ny.gov/formsdocs/wp/CR146.pdf.
- 10 *Ibid.*
- 11 *Ibid.*
- 12 *Ibid.*
- 13 See *infra* note 33, *infra*, for a description of the methodology used.
- 14 American Community Survey, 2011–2014 merged-four year sample. Calculations by the Restaurant Opportunities Centers United (ROC United), examining data for individuals employed in customarily tipped occupations (see note 3 for a list of "customarily tipped occupations"), or other occupations, as noted, working in New York State, based on Ruggles et al., Integrated Public Use Microdata Series: Version 5.0 [Machine-readable database]. Minneapolis: Minnesota Population Center, 2010.
- 15 *Ibid.*
- 16 See *supra* note 3.
- 17 See *supra* note 2.
- 18 See *supra* note 3.
- 19 See *supra* note 2.
- 20 Median income is the result of a merged figure combining surveys from employers and employees as calculated by ROC United. Median hourly wage data for tipped workers is reported by employers and is contained in Bureau of Labor Statistics (BLS), May 2015 State Occupational Employment and Wage Estimates, New York (see *supra* note 3), while employee hourly wage data is extrapolated from the American Community Survey (ACS) 2014 (see *supra* note 14) by calculating an hourly wage through an analysis of employee reported median wage and salary income, median weeks, and median hours per week worked. Median income is based on the merged median hourly wage from the BLS and ACS, multiplied by median weeks and median hours worked as reported in ACS 2014.
- 21 See *supra* note 14.
- 22 See *supra* note 14.
- 23 Restaurant Opportunities Center United, Forward Together, et al., The Glass Floor: Sexual Harassment in the Restaurant Industry, (New York, NY: ROC United, October 7th, 2014).
- 24 See *supra* note 14.
- 25 See *supra* note 9.
- 26 *Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1090, (9th Cir. Or. 2016); also available at <http://cases.justia.com/federal/appellate-courts/ca9/13-35765/13-35765-2016-02-23.pdf?ts=1456250580>.
- 27 See *supra* note 9.
- 28 *Ibid.*
- 29 *Ibid.*
- 30 International Human Rights Law Clinic, Food Labor Research Center, and Restaurant Opportunities Centers United, Working Below the Line: How the Subminimum Wage for Tipped Restaurant Workers Violates International Human Rights Standards, (University of California, Berkeley, School of Law: December 2015), available at http://food.berkeley.edu/wp-content/uploads/2015/07/WorkingBelowTheLine_F2.pdf.
- 31 *Ibid.*
- 32 See *supra* note 1.
- 33 For purposes of an analysis of the effect of a two-tiered wage system on restaurant employers' exposure to liability in this report, unless otherwise specified, the statistics cited refer to an analysis of wage and hour lawsuits filed in federal courts in the Southern District of New York, which covers New York City, and the Central District of California, which covers Los Angeles, but which reflect the differences in a two-tiered wage state (New York) and a single wage state (California). In addition to lawsuits filed in federal court, many lawsuits are brought in state courts and the U.S. Department of Labor likewise brings many enforcement actions. However, similar statistics on these actions are not publicly available.
- 34 See *supra* note 14.
- 35 See *supra* note 9.
- 36 Code of Federal Regulations § 531.56, available at <https://www.law.cornell.edu/cfr/text/29/531.56>; also see *supra* note 9.
- 37 *Ibid.*
- 38 See *supra* note 4.
- 39 See *supra* note 26.
- 40 Dorinada D. DeScherer, Wage Hour Compliance Handbook 2016 Edition, December 7, 2015.
- 41 See *supra* note 9.
- 42 New York State Department of Labor Regulations § 146, available at www.labor.ny.gov/formsdocs/wp/CR146.pdf.
- 43 *Ibid.*
- 44 See *supra* note 9.
- 45 *Ibid.*
- 46 29 C.F.R. § 531.56.
- 47 Wage and Hour Opinion Letter FLSA2009-23.
- 48 See *supra* note 46.
- 49 See *supra* note 9.
- 50 See *supra* note 42.
- 51 *Ibid.*
- 52 See *supra* note 30.
- 53 ROC United interview with wage and hour attorney, Chris Williams.
- 54 National Restaurant Association, "Employee turnover rate tops 70% in 2015," March 22, 2016, available at: <http://www.restaurant.org/News-Research/News/Employee-turnover-rate-tops-70-in-2015>.
- 55 Five years times 0.721 turnover rate = 360.5%; 360.5% plus 100% current staff = 460.5%.
- 56 ROC United interview with Erin Moran, Chief Culture Officer, Union Square Hospitality Group.
- 57 Pseudonym used to protect worker's identity.

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TIPPED OVER
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