

New York State Subminimum Wage Hearings

Report and Recommendations to Governor Andrew M. Cuomo

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Executive Summary

- As part of the 2018 State of the State, Governor Andrew M. Cuomo directed the New York State Labor Commissioner to examine the impact of minimum wage tip credits. This report concerns workers in miscellaneous industries covered by the Minimum Wage Order for Miscellaneous Industries and Occupations, including, among others car wash attendants, nail salon workers, tow truck drivers, dog groomers, wedding planners, tour guides, valet parking attendants, hairdressers, aestheticians, golf and tennis instructors, and door-persons (the “miscellaneous industries”).
- The Department held seven hearings across the State, capturing 40 hours of testimony from more than 700 individuals. The Department also received comments from more than 3,000 individuals through emails, letters and postcards. Some of this testimony and these comments concerned industries other than the miscellaneous industries.
- The Department has also monitored trends in potentially affected industries and reviewed scholarly research on these issues.
- An analysis of demographic data shows there are more than 70,000 miscellaneous industry workers in New York State who are likely to be tipped.
- Miscellaneous industry workers have widespread confusion about whether or not they are entitled to earn minimum wage. This has led to rampant wage theft in particular industries, and a real concern that tip credits are simply not appropriate in others, due to cultural norms that do not favor tipping.
- Miscellaneous industry workers testified overwhelmingly in support of ending the tipped wage credit.

RECOMMENDED ACTION

- The New York State Department of Labor recommends eliminating the tip credit for all miscellaneous industry workers.
- The elimination of the tip wage for miscellaneous industries should be phased in over a one-year period, an aggressive timetable that will provide employees relief while also giving businesses time to adjust to these changes as to not inadvertently incur job loss.

Background

New York State law allows employers in certain industries to pay tipped employees below the state minimum wage only if the cash wage they are paid by the employer (referred to in this report as the “subminimum wage” or “cash wage”) when combined with the average of tips received by employees calculated as an hourly rate equals or exceeds the state minimum wage. Different rules or formulas determine the subminimum or cash wage that employers must pay in various industries. In miscellaneous industries, the system for determining the cash wage is exceedingly complex.

An analysis of demographic data¹ shows that more than 70,000 miscellaneous industry workers in New York State who are likely to be tipped.

About This Report

One of the Department’s roles is to continuously evaluate minimum wages and take affirmative steps to issue orders and regulations to effectuate the purposes of the law and to safeguard the minimum wage. The minimum wage is necessarily an issue that requires balance between what the workers need to receive as a livable wage, and whether or not it will affect the overarching availability of jobs. Recently, the Division of Budget has conducted an analysis of the impact of the minimum wage reaching \$15 per hour in areas outside of New York City and has concluded that due to the unemployment level remaining low, even upstate, the impact was not harmful to jobs. Fundamentally this dialogue is about whether or not workers are receiving the appropriate legal wages, at minimum. The essence of a tip is that it is not intended to provide the base wage, but rather that tips are so common that total compensation far exceeds the minimum wage, therefore some offset of the minimum wage may be warranted in some industries.

This report summarizes the collective voices of thousands of workers past and present who have worked for tips and aims to balance that with the economic realities of running a successful business and the role of these businesses as employers in our society.

Statistics related to this debate are often skewed, or include strategic omissions, to benefit the perspective of the provider. It should be noted that several hospitality businesses submitted copies of their pay records as part of their written comments and others further offered to open their books to Department representatives.

The reality is that there is little representative data on exactly how many workers receive tips, how much and how frequently they are tipped and how much of what they earn is actually reported. There is anecdotal evidence supporting many arguments, but limited information available with statistical accuracy.

About the Subminimum Wage Hearings

On Dec. 17, 2017, Governor Cuomo announced that the New York State Commissioner of Labor would hold public hearings to examine industries and evaluate the possibility of ending minimum wage tip credits in New York State.

The Department of Labor held seven hearings across the state, which lasted approximately 40 hours, included more than 700 speakers and were attended by an estimated 3,100 individuals.

¹ 2018 American Community Survey 1-Year Estimates for Selected Occupations and Industries

The hearings focused on how the subminimum wage affects workers' ability to earn a fair wage as it relates to tips and raising a family and how it affects business operations and managers' interactions with workers.

Specific attention was paid to ensure attendees were afforded a reasonable opportunity to speak and an opportunity to hear from those testifying. This included hiring dozens of interpreters throughout the hearing process and providing real-time translation in all languages requested, including Spanish, Korean, Chinese and Nepalese.

Summary of Hearing Participants

Date	Location	Total Testifiers	Total Attendees	Hearing Length (hours)
4/20	Farmingdale	106	500	6:45
4/25	Watertown	33	100	1:50
4/30	Syracuse	93	450	4:50
5/8	Buffalo	106	400	5:15
5/18	Albany	114	450	6:40
6/19	NYC (miscellaneous only)	118	500	6:00
6/27	NYC (hospitality only)	155	700	8:15
TOTAL:		725	3,100	39:35

Counts include repeat testifiers and attendees

Overview of Hearings

- The Department of Labor received written comments from more than 3,000 individuals through emails, letters and postcards and petitions.
- More than a third of the comments were generated from NYC followed by the Capital Region, and Western NY respectively.
- Car wash attendants and nail salon workers provided the overwhelming majority of comments for the miscellaneous industries.

CONSIDERATIONS RELATED TO THE POTENTIAL ELIMINATION OF THE TIP CREDIT IN THE MISCELLANEOUS INDUSTRIES

When weighing the potential elimination of the tip credit, either immediately or over time, in the miscellaneous industries, the specific factors noted in the following pages, among many others, were considered, along with various studies, comments, news articles and petitions.

Income Predictability

Eliminating the tip credit system would provide a more predictable wage floor for tipped workers and would help offset known wage fluctuations due to customer preference, weather², the economy and seasonality.³

“With a minimum wage I will be very, very calm and I will be staying without anxiety because I won’t be worried if some clients come or some clients don’t come,” said nail salon worker Crescenciana Mercado.

Increasing Costs

Businesses and business groups across the miscellaneous industries cited rising costs and slim profit margins as considerations in moving forward with any decision on the subminimum wage. Specifically, an already increasing minimum wage⁴, rent, insurance, utilities, property taxes, Paid Family Leave and potential scheduling regulations.

Nail salon owners specifically cited additional expenses related to past regulations. Esther Chang, a nail salon owner, said: “I want the government to support the small business owners but they made us buy bonds, insurance and ventilation systems so this is guaranteed to make the business owners suffer even more going forward.”

Additionally, businesses⁵ cited a reduction in customers due to increased prices and predicted a further decline if prices were again increased.

“Our members know their customers well,” wrote Steve Rotlevi, President of the Association of Car Wash Owners. “They will only pay so much for what is considered a non-essential or discretionary expense such as a car wash and will wash their car less as prices go up. This loss of business will have a direct impact on businesses and employees.”

Minimum Wage Rate Simplification Needed

In the miscellaneous industries, there is no single “cash wage” (or pre-tip wage) that employers are required to pay. Rather, each individual employer may calculate the amount of tips typically given to that employer’s employees, and compare that amount to the “low” and “high” numbers in the below table. The employer then determines the required cash wage based on whether the tips are below the “low” threshold, between the “low” and “high” thresholds, or above the “high” threshold.

² Josselyn Paniagua, Long Island restaurant worker

³ <https://www.nelp.org/wp-content/uploads/Basics-Tipped-Minimum-Wage.pdf>

⁴ Erie County restaurant owner Tricia Browne

⁵ Hyung Ju Kim, nail salon owner

Minimum Wage Increase Schedule for Miscellaneous Industry Workers

(MW=minimum wage | Cash=cash wage)

	NYC					LI & Westchester					Remainder of NY				
	MW	Low	High	Cash (L)	Cash (H)	MW	Low	High	Cash (L)	Cash (H)	MW	Low	High	Cash (L)	Cash (H)
12/31/19	\$15	\$2.25	\$3.65	\$12.75	\$11.35	\$13	\$1.95	\$3.20	\$11.05	\$9.80	\$11.80	\$1.75	\$2.90	\$10.05	\$8.90
12/31/20						\$14	\$2.10	\$3.40	\$11.90	\$10.60	\$12.50	\$1.90	\$3.05	\$10.60	\$9.45
2021*						\$15	\$2.25	\$3.65	\$12.75	\$11.35	TBD	TBD	TBD	TBD	TBD

Testimony demonstrated that this system is inordinately difficult to understand.

“Carwash workers in New York City should not have to depend on having to ask the community lawyers to know their hourly wage,” said Juan Goris of Make the Road New York.

“When workers come in asking for help, they always ask what they should be making. What is the minimum wage,” said Kathy Amiliategui, a Make the Road New York organizer. “It’s a simple question and yet for tipped workers, one with an unnecessarily complicated answer. It’s nearly impossible for workers to enforce their labor rights when the minimum wage is so convoluted. Frequently workers go through the process of meeting with advocates and lawyers to understand what their legal minimum wage should be only to find out that their wages are being stolen anyways.”

Wage Theft

Workers in miscellaneous industries face a significant risk of underpayment -- both by intentional wage theft and inadvertently due to the complex nature of how the tip credit is calculated. Additional factors like overtime, call-in pay, uniform maintenance and costs, meal credits or lodging can affect and further complicate how much workers take home.

In a past assessment of wage theft cases investigated by the Department of Labor, nearly two-thirds of all minimum wage-related cases were in the miscellaneous industries covering miscellaneous industry workers. In 80% of cases, underpayments were found.

In the hearings, numerous workers⁶ in the miscellaneous industries reported having their wages stolen.

The New York State Department of Labor has repeatedly taken action⁷ against the car wash industry for wage theft violations⁸, as has the New York State Attorney General’s Office.⁹

A Feb. 2019 New York Times article¹⁰ described how other car wash workers “had no notion of what their base wage might be, and whether the tips were actually coming to them. The managers would simply collect the money from the tip boxes at the end of each shift, take it into the office, and then hand the workers their wages in cash.”

⁶ Luzmila Yagioa, manicurist

⁷ <https://labor.ny.gov/pressreleases/2015/september-16-2015.shtm>

⁸ https://www.labor.ny.gov/pressreleases/2010/oct12_2010.shtm

⁹ <https://ag.ny.gov/press-release/2018/ag-schneiderman-sues-tropical-breeze-car-wash-allegedly-cheating-over-150-minimum>

¹⁰ <https://www.nytimes.com/2019/02/22/nyregion/car-wash-wage-dispute.html>

Cristobal Guterrez, a Legal Advocate for Make the Road, said, “Many of our clients, particularly immigrant women working in nail salons, many of whom are in this room, report that they are told to sign a sheet where the tip amount is left blank to be completed by the employer later in case of an investigation of the Department of Labor or a lawsuit.”

Confusion over Which Occupations are Tipped

Tipping is not an established custom in most of the miscellaneous industries. Many, if not most, customers do not know that workers in the miscellaneous industries typically depend on tipping to earn a minimum wage.

Hearing testimony revealed some industries face a substantially lower rate of tipping due to this confusion.

“The two-tiered wage system ... is not well known or understood by the general public, nor are the unique aspects and challenges faced by those workers who rely on tips to make a living wage,” states economist Sylvia Allegretto, chair of the Center on Wage and Employment Dynamics at the Institute for Research on Labor and Employment, University of California, Berkeley.¹¹

“As I have followed this process, I’ve learned many new things,” testified Stephen Brakell, a hospitality industry business owner. “For instance, I was not aware that nail salon workers and car washer workers were paid on a tip credit. I feel for many of these people and I think the industry business models are significantly different from that of full-service hospitality.”

“It’s not fair that I get to earn less by the hour because I get tips,” said nail salon worker Yendi Peralta. “The customers do not know that they are paying my salary. I deserve a salary plus tips that I receive for my good service.”

Simon Salvador, a unionized car wash worker in Brooklyn, said: “I make minimum wage plus tips. The tips are divided between the workers. Making a full minimum wage allowed me to depend on a stable income and not depend on the generosity of the customers to earn a fair salary.”

¹¹ <https://irle.berkeley.edu/files/2018/04/Should-New-York-State-Eliminate-its-Subminimum-Wage.pdf>

RECOMMENDATION

At Governor Cuomo's request, the Department of Labor has spent a considerable amount of time examining tipped industries in New York State and if the tip credit system should be modified or eliminated.

The New York State Department of Labor **recommends eliminating the tip credit for all miscellaneous industry workers** (those covered by the Minimum Wage Order for Miscellaneous Industries and Occupations).

The elimination of the tip wage for miscellaneous industries should be phased in over a one-year period, an aggressive timetable that will provide employees relief while also giving businesses time to adjust to these changes as to not inadvertently incur job loss.

On June 30, 2020 New York State should reduce the low and high tip credit for all industries covered by the miscellaneous wage order by 50%. The tip credit should be completely eliminated on December 31, 2020.

PROGRESS TO DATE ON ISSUES AFFECTING TIPPED INDUSTRIES

\$15 Minimum Wage: Under the 2016 Budget, New York State is moving toward the nation's first statewide \$15 minimum wage with all workers in New York City making at least \$15 per hour beginning on Dec. 31, 2019. The increase in minimum wage will affect an estimated 2.3 million New Yorkers -- about a quarter of the total workforce -- by the time it's fully phased in. These workers will experience higher pay, increasing their collective spending power by more than \$15.7 billion each year. This builds upon the Governor's prior minimum wage increase from \$7.25 to \$8 per hour in 2013, \$8.75 in 2014 and \$9.00 in 2015.

Hospitality Wage Board: In September 2014, the Labor Commissioner convened a Wage Board to investigate modifications to the required cash wage rates and the allowable credits for tips, meals and lodging for employees in the hospitality industry. In February 2015, based on the Wage Board's recommendations, the Department of Labor established uniform tip amounts and criteria for all tipped workers in the hospitality industry. This includes food service workers, service employees and service employees in resort hotels. Additionally, the tipped cash wage was increased to \$7.50 per hour as of Dec. 31, 2015.

In its report and recommendations, the Wage Board noted that a subminimum wage affects "especially low-paid employees, women and minorities" and that "a complete elimination and raise to a single minimum wage would simplify a complicated system."

Fast Food Wage Board: In May 2015, the Labor Commissioner empaneled a Wage Board to investigate and make recommendations on an increase in the minimum wage in the fast food industry. The Commissioner signed a wage order in September 2015 approving the board's recommendations and raising the wage to \$15 for employees of fast food chains. It is phasing in incrementally, with all fast food workers in New York City earning \$15 per hour as of Dec. 31, 2018 and fast food workers in the rest of the state rising annually until it reaches \$15 on July 1, 2021.

Combating Worker Exploitation: Under Governor Cuomo, New York State has elevated the status of all workers, especially immigrants and those who work off the books, have hazardous jobs, are isolated and fear coming forward. In 2015, the Governor launched the Nail Salon Enforcement Task

Force to strengthen laws and regulations and provide education and outreach to owners, employees and consumers to ensure compliance with New York State laws. This led to a series of reforms including the Nail Salon Workers' Bill of Rights, new bond and insurance requirements for all nail salons and a new Nail Trainee License Program to provide new opportunities for unlicensed nail practitioners to register and to continue to work while studying for their licensing exam. Also in 2015, Governor Cuomo launched a first-of-its-kind statewide Exploited Workers Task Force to root out worker exploitation issues by identifying and halting illegal practices in multiple industries across New York State. In 2016, he issued Executive Order 159, combining the missions, powers and duties of the Nail Salon, Joint Enforcement and Exploited Workers' task forces into the Joint Task Force on Employee Misclassification and Worker Exploitation.

To date, the Joint Task Force has launched nearly 23,000 wage theft and misclassification cases affecting nearly 174,000 workers and has directed businesses to pay nearly \$20.4 million in back wages and nearly \$6.4 million in damages. The Task Force's Anti-Retaliation Unit has opened hundreds of retaliation cases and assessed hundreds of thousands of dollars in damages and penalties against employers who retaliated against workers seeking to file claims. Additionally, the Task Force has resolved thousands of cases through its Mediation Unit and other administrative mechanisms.

Equal Pay for Women: Under Governor Cuomo, no state in the nation has done more than New York to protect and advance the rights of women. In 2015, Governor Cuomo eliminated a loophole that allowed employers to prohibit employees from discussing their salaries. In 2017, he issued Executive Order #161, which prohibits state entities from evaluating prospective candidates based on prior wage history, and Executive Order #162, which requires state contractors to disclose gender, race, ethnicity and salary of all employees to drive transparency and progress toward wage equity.

At his direction, the Labor Department undertook and issued a gender wage gap study, following hearings and stakeholder discussions with academic experts, workers, business owners and the public across the state. One recommendation was that "New York State should explore potentially eliminating the subminimum wage for tipped workers, thereby ensuring that women who make the least are paid a predictable wage and that businesses' books are not balanced on the backs of workers, closing the door on centuries-old practices inequitably afforded to only a handful of industries."

In 2018, Governor Cuomo assembled the Child Care Availability Task Force, a group of experts focused on developing innovative solutions that will improve access to quality, affordable child care in New York. The task force is specifically examining access to affordable child care, the availability of child care for parents with non-traditional work hours, statutory and regulatory changes that could promote or enhance access to child care, business incentives to increase child care access, and the impact on tax credits and deductions relating to child care.

In 2019, Governor Cuomo signed into law legislation that expands equal pay laws to prohibit unequal pay on the basis of a protected class for all substantially similar work and forbids employers from asking prospective employees about their salary history. In 2020, a complementary law will go into effect that will forbid all employers -- public and private -- who do business in New York State from asking prospective employees about their salary history and compensation.

Wage Enforcement and Recovery: New York State is the national leader in returning money to workers who were not paid the proper minimum wage, overtime pay or fringe benefits. Under Governor Cuomo, the state has seen a dramatic increase in the amount of money returned to

workers who were cheated by their employers. In 2018, the Department of Labor collected nearly \$35 million and returned that money to approximately 35,000 workers victimized by wage theft and public work violations. Since 2011, the Department of Labor has recovered more than \$310 million in stolen wages and returned it to more than 275,000 workers victimized by wage theft and public work violations.

Combatting Harassment: New York is a national leader in the fight against sexual harassment and Governor Cuomo signed into law the nation's most comprehensive sexual harassment package as part of the 2019 budget. That package expanded workplace harassment protections in the State's Human Rights Law to include contractors, subcontractors, vendors, consultants or others providing services in the workplace; required employers to adopt a sexual harassment prevention policy and training and mandated that all state contractors submit an affirmation that they have a sexual harassment policy and that they provide annual training to all of their employees. All employers in New York State are now required to either implement the state's model policy and training or to use the models as a basis to establish their own policy and training. All employees working in New York State must receive annual sexual harassment training. Materials, including videos, FAQs, posters, editable model documents and toolkits for employers, are available in English and the seven most common other languages. In addition, the Department of Labor has done direct outreach and specifically engaged industries with the highest rates of tipped workers.

In August 2019, Governor Cuomo signed legislation that enacted additional workplace harassment protections as part of his 2019 Women's Justice Agenda. This legislation strengthens New York's anti-discrimination laws to ensure employees can seek justice and perpetrators will be held accountable by eliminating the restriction that harassment be "severe or pervasive" in order to be legally actionable; mandating that all non-disclosure agreements allow employees to file a complaint of harassment or discrimination and extending the statute of limitations for employment sexual harassment claims filed from one year to three.