



SPONSOR: Rep. K. Williams & Sen. Walsh  
Reps. Brady, Kowalko, Lambert, Lynn, Mitchell,  
Morrison, Osienski; Sen. Ennis

HOUSE OF REPRESENTATIVES  
151st GENERAL ASSEMBLY

HOUSE BILL NO. 266

AN ACT TO AMEND TITLE 19 OF THE DELAWARE CODE RELATING TO THE DELAWARE MINIMUM WAGE  
FOR EMPLOYEES THAT RECEIVE TIPS OR GRATUITIES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1           Section 1. Amend Chapter 9, Title 19 of the Delaware Code by making deletions as shown by strike through and  
2     insertions as shown by underline as follows and by redesignating accordingly:

3           § 901. Definition of terms.

4           As used in this chapter:

5           (1) "Department" means the Department of Labor or its authorized representatives.

6           (2) "Employ" means to suffer or permit to work.

7           (3) "Employee" includes any individual employed by an employer but shall not include:

8           a. Any individual employed in agriculture;

9           b. Any individual employed in domestic service in or about a private home;

10          c. Any individual employed in a bona fide executive, administrative or professional capacity, or as an  
11     outside commission paid salesperson, not route driver, who customarily performs services away from the  
12     individual's employer's premises taking orders for goods or services;

13          d. Any individual employed by the United States;

14          e. Any individual engaged in the activities of an educational, charitable, religious or nonprofit  
15     organization where the employment relationship does not in fact exist or where the services are rendered to such  
16     organization gratuitously;

17          f. Any individual employed in the catching, taking, propagating, harvesting, cultivating or farming of any  
18     kind of fish, shellfish, crustacea, sponges, seaweeds or other aquatic forms of animal and vegetable life, or in the  
19     first processing, canning or packing such marine products at sea as an incident to or in conjunction with such  
20     fishing operations, including the going to and returning from work and loading and unloading when performed by  
21     any such employee;

g. Any individual under the age of 18 participating in and employed as a junior counselor or counselor in training (CIT) by a nonprofit organization in a summer camp program.

h. Any inmate in the custody of the Department of Correction and any inmate on work release who participates in the Prison Industries programs or other programs sponsored for inmates by the Department of Correction pursuant to Chapter 65 of Title 11 or other applicable Delaware law, unless said inmate is employed by an employer other than the State or a political subdivision thereof.

(4) "Employer" includes any individual, partnership, association, corporation, statutory trust, business trust or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.

(5) "Gratuities" means ~~voluntary~~ monetary contributions received by an employee from a guest, patron or customer for services rendered. "Gratuities" includes tips.

(6) "Occupation" means any occupation, service, trade, business, industry or branch or group of industries or employment or class of employment in which employees are gainfully employed.

( ) "Primary direct service employee" is one who in a given situation performs the main direct service for a customer and is to be considered the recipient of the gratuity.

(7) "Wage" means compensation due to an employee by reason of the employee's employment, payable in legal tender of the United States or check or bank convertible into cash on demand at full face value, subject to such deductions, charges or allowances as may be permitted by the regulations of the Department under this chapter.

§ 902 Minimum wage rate (For current federal minimum wage, see 29 U.S.C. § 206(a)(1)(A))

(b) Gratuities received by employees engaged in occupations in which gratuities customarily constitute part of the remuneration may be considered wages for purposes of this chapter in an amount equal to the tip credit percentage, as set by the federal government as of June 15, 2006, of the minimum rate as set forth in subsection (a) of this section. In no event shall the minimum rate, under this subsection, be less than \$2.23 per hour.

~~(c) For purposes of this section:~~

~~(1)~~ (c) An employee engaged in an occupation in which gratuities customarily constitute part of the remuneration shall be any worker engaged in an occupation in which workers customarily and regularly receive more than \$30 50% of the employee's income from employment at the employer's place of business per month in tips or gratuities. The occupation in question must involve direct receipt of gratuities from a customer, not from a tip pool or other intervening mechanism distributing gratuities.

(2) ~~"Gratuities" means monetary contributions received directly or indirectly by an employee from a guest, patron or customer for services rendered where the customer is entirely free to determine whether to make any payment at all and, if so, the amount.~~

(3) ~~A "primary direct service employee" is one who in a given situation performs the main direct service for a customer and is to be considered the recipient of the gratuity.~~

(d)(1) ~~Any gratuity received by an employee, indicated on any receipt as a gratuity, or deposited in or about a place of business for direct services rendered by an employee is the sole property of the primary direct service employee and may not be taken or retained by the employer except as required by state or federal law. The gratuities received by a service employee become the property of the employee and may not be shared with the employer. Gratuities that are automatically included in the customer's bill or that are paid by a non-cash payment must be treated like gratuities given to the service employee. A gratuity that is paid by a non-cash payment must be paid by the employer to the employee by the next regular payday and may not be held while the employer is awaiting reimbursement from non-cash payment payor. The employer may not deduct any amount from employee tips or gratuities paid by a non-cash payment, including service fees assessed to the employer in connection with a non-cash transaction.~~

(2) ~~Employees may establish a system for the sharing or pooling of tips or gratuities among direct service employees, provided that the employer shall not in any fashion require or coerce employees to agree upon such a system. Where more than 1 direct service employee provides personal service to the same customer from whom gratuities are received, the employer may require that such employees establish a tip pooling or sharing system not to exceed 15% of the primary direct service employee's gratuities. The employer shall not, under any circumstances, receive any portion of the gratuities received by the employees.~~

(3) ~~The Department may require the employer to pay restitution if the employer diverts any tips or gratuities of its employees in the amount of the gratuities diverted. If the records maintained by the employer do not provide sufficient information to determine the exact amount of gratuities diverted, the Department may make a determination of tips or gratuities diverted based on available evidence.~~

( ) ~~Any employer who violates sections (d) of this act shall be liable for a civil penalty in an amount not to exceed \$1,000 for the first violation, \$2,000 for the second violation, and \$5,000 for each subsequent violation.~~

#### SYNOPSIS

This bill clarifies that the definition of employees who receive gratuities also includes employees that receive tips, that these employees earn more than 50% of their income from tips or gratuities. This bill clarifies that employers may continue to pay a tipped minimum wage to primary direct service employees under this bill. Employers cannot direct employees to engage in tip pooling in Delaware—tip pooling arrangements must be controlled by the employees themselves.

It also clarifies that tips automatically added to a bill or added to credit card charges are to be treated like tips or gratuity and must be paid by the employer directly to the employee at the next pay period as opposed to being held by the employer waiting to receive payment from the credit card company and that the employer may not deduct service fees from the employees tips or gratuities.