

WHITE PAPER

Updated Wage & Labor Information

May 2015

- **Minimum Wage - \$8.25 per hour effective June 1st 2015**
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MINIMUM WAGE

Governor Markell signed Senate Bill 6 into law on January 30th 2014, raising the state's minimum hourly wage for all employees to **\$8.25 per hour**. The first step of the increase went into effect on June 1st 2014, raising the wage from \$7.25 to \$7.75 per hour.

**The second step of the increase, effective June 1st 2015
raises the Delaware Minimum Wage to \$8.25 per hour**

Tipped employees in Delaware must also make the same \$8.25 per hour minimum wage, but their wage is a combination of an hourly tip wage (\$2.23) paid by their employer, plus any tips collected from customers. If a tipped employee does not make enough tips during a shift, the employer must raise their hourly wage to accommodate the difference, until an hourly rate of \$8.25 is reached.

DELAWARE TIP WAGE (ALSO KNOWN AS "CASH WAGE")

No changes were made to Delaware's tip wage - the minimum wage payable to employees who receive tips remains at \$2.23 per hour. The employer must be able to prove that the employee received the balance of the full minimum wage (**\$2.23 an hour plus any tips collected *must* equal at least \$8.25 per hour**). If the employee does not earn enough additional tips to meet the \$8.25 minimum wage, the employer must make up the difference.

*For example, if an employee works a six-hour day and makes only \$30 in tips, an employer **must** still pay minimum wage. In this case, since the tips only equaled \$5 per hour, an employer must increase its wage contribution from \$2.23 to \$3.25 per hour to make sure that the employee makes the required \$8.25 per hour minimum wage.*

The Fair Labor Standards Act (FLSA) does permit an employer to take a tip credit toward its minimum wage obligation for tipped employees, equal to the difference between the minimum wage (Delaware \$8.25) and the required cash wage (Delaware \$2.23). Thus, the maximum tip credit that an employer can currently claim is \$6.02 per hour (the minimum wage of \$8.25 minus the minimum required cash wage of \$2.23). The Department of Labor also notes the following about employees that perform multiple duties while at work:

“When an employee is employed by one employer in both a tipped and a non-tipped occupation, such as an employee employed both as a maintenance person and a waitperson, the tip credit is available only for the hours spent by the employee in the tipped occupation. The FLSA permits an employer to take the tip credit for some time that the tipped employee spends in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips. For example, a waitperson who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing related duties, no tip credit may be taken for the time spent in such duties

TIP POOLING

Delaware does allow employers to adopt tip-pooling arrangements. According to the Federal Department of Labor and Delaware law, only employees who customarily receive tips can be part of the pool, and employees cannot be required to share their tips with other employees like dishwashers or cooks. Tips from a tip pool cannot go to the employer. According to Delaware’s Department of Labor:

- *Employees may establish a system for the sharing or pooling of 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.*
- *The Department may require the employer to pay restitution if the employer diverts any 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 gratuities diverted based on available evidence.

The Delaware Restaurant Association recommends that employers clearly define tip pooling procedures during employee orientation and ask all employees to sign their Tip Pooling Policy.

IRS RULING ON AUTOMATIC GRATUITIES

Beginning in 2014, the I.R.S. began enforcing a rule that changes the tax treatment of mandatory service charges, such as automatic gratuities for large parties and mandatory tips for catering or banquets. These are no longer tips, but classified as service charges, and must be treated (and taxed) as direct employee wages. Employers must withhold and pay Social Security and Medicare (FICA) tax on these amounts, may not claim a tip credit against its tax obligations for these amounts (as it can for tips), and must include them as part of the employee's hourly wage when determining overtime payments. For an amount paid directly to an employee (as with regular table service tips added to a final bill) to count as a tip rather than a service charge, all of the following must be true:

- The payment must be entirely voluntary
- The customer must have the unrestricted right to determine the amount
- The amount cannot be set by employer policy or subject to negotiation with the employer.
- The customer must have the right to determine who receives the payment.

OVERTIME PAY

In regards to overtime pay for both regular and tipped employees, the United States Department of Labor offers the following guidelines:

“For covered, nonexempt employees, the Fair Labor Standards Act (FLSA) requires overtime pay to be at least one and one-half times an employee's regular rate of pay after 40 hours of work in a workweek. In cases where an employee is subject to both the state and federal overtime laws, the employee is entitled to overtime according to the higher standard (i.e., the standard that will provide the higher overtime pay).” Note - Delaware's current minimum wage, \$8.25, is higher than the Federal minimum wage of \$7.25; therefore overtime calculations should use Delaware wages, as they will provide the higher overtime pay.

All hours worked in excess of 40 hours in one work week by a tipped employee must also be compensated at an overtime pay rate, similar to a non-tipped employee. The minimum amount an employee must make for overtime hours must not be less than \$12.38 (1.5 times the current \$8.25

Delaware minimum wage). **Once an employee is in overtime (starting the first hour after 40 hours in given work week), you are required to pay more than the \$2.23 per hour, even if an employee already makes more than \$12.38 in tips. The overtime hourly rate paid to a tipped employee is determined by subtracting the tip credit (\$6.02 in Delaware) from the overtime minimum wage (\$12.38), resulting in a \$6.36 hourly overtime rate.**

*For example, if a tipped employee worked a total of 60 hours in one week, the employer must make sure that the employee is paid at least \$2.23 an hour for the first hour worked, and that the employee made a minimum of \$8.25 for those 40 hours (from tips + \$2.23 paid by employer). The employer must then make sure for the additional hours (40-60), that the employee made no less than \$12.38 an hour (from tips + hourly cash wage paid by the employer), and that the cash wage paid per hour is no less than \$6.36). **This \$6.35 hour overtime wage is not 1.5 x the normal \$2.23 an hour, but rather \$12.38 (minimum overtime rate) - \$6.02 (the maximum Delaware tip credit).***

For more information about overtime wages, please contact the Delaware Division of Labor, or refer to the Fair Labor Standards Act (FLSA) Overtime Calculator Advisor

(<http://www.dol.gov/elaws/otcalculator.htm>). Please note that calculations are done based on the Federal minimum wage (\$7.25), but that Delaware's prevailing wage of \$8.25 an hour and \$2.23 for tipped employees should be used in your calculations. Delaware sets its own wage laws, but defers back to Federal FLSA regulations regarding payments of overtime hours.

Please also note that Delaware uses a \$6.02 tip credit, which is larger than the \$5.12 federal tip credit. According to the FLSA, "the employee is entitled to overtime according to the higher standard (i.e., the standard that will provide the higher overtime pay)."

To calculate overtime for tipped employees:

Min Wage (\$8.25) x 1.5 overtime rate = \$12.38 per hour. Employees must make at least this amount, when hourly wage is added to any tips collected.

\$12.38 - \$6.02 (DE tip credit) = **\$6.36 per hour**

CHILD LABOR LAW

The Delaware Department of Labor sets standards and regulations for workers under 18. Work Permits are required for minors 14 to 17 years old. The law restricts also hours of work and prohibits employment in hazardous occupations.

- The minimum age for employment is 14.

- Work Permits are required for all employed minors under the age of 18.
- Employers are required to keep work permits on file for each employed minor.
- A new work permit is required when a minor changes employers.

Specific Provisions for Individuals 14 and 15 Years of Age

Minors 14-15 years of age shall not work:

- Before 7:00 a.m. or after 7:00 p.m.- except from June 1st through Labor Day when the evening hour shall be extended to 9:00 p.m.
- More than four (4) hours per day on school days
- More than eight (8) hours per day on non-school days
- More than eighteen (18) hours in any week when school is in session for 5 days
- More than six (6) days in any week
- More than forty (40) hours per week when school is not in session, or
- More than five (5) hours continuously without a non-work period of at least 30 consecutive minutes.

Specific Provisions for individuals 16 and 17 Years of Age

Minors 16-17 years of age:

- May not work more than twelve (12) hours in a combination of school and work hours per day
- Must have at least eight (8) consecutive hours of non-work, non-school time in each 24-hour period
- May not work more than five (5) hours continuously without a non-work period of at least 30 consecutive minutes

Specific Provisions regarding Alcoholic Beverages

- 16, 17 & 18 year-olds must obtain a work permit from the Offices of the Alcoholic Beverage Control Commissioner. They may only handle alcohol when they buy it from a table. **They may not solicit drink orders**
- **19 and 20 year-olds may solicit orders for alcohol and serve it, but they may never, open, mix or pour alcoholic beverages**
- 18 year-olds may work in a liquor store, as long as they do not serve or sell alcoholic beverages. They may stock shelves and work in the stockroom

Delaware's Child Labor law also prohibits minors from working in certain hazardous occupations. The law also incorporates by reference those hazardous/prohibited occupations set forth under the federal

Fair Labor Standards Act. Anyone under the age of 18 shall not be employed or permitted to work in, near or in connection with:

- Meat slicers
- Demolition projects
- Transportation of persons or properties

Minors under the age of 16 shall not be permitted to work in, near or in connection with:

- Power-driven machinery or tools
- Deep fat fryers
- Grinders, food choppers, cutters, pressure cookers or steamers
- Loading or unloading trucks
- Warehousing and storage
- All work requiring scaffolding and ladders
- Freezers and meat coolers (call Department of Labor for Exceptions)
- Cooking (call Department of Labor for Exceptions)

FOR MORE INFORMATION ON THESE TOPICS

- **Delaware Restaurant Association**
Research & Reports
<http://www.delawarerestaurant.org/research-reports>
- **State of Delaware, Department of Labor**
Minimum Wage
<http://dia.delawareworks.com/labor-law/minimum-wage.php>
- **Internal Revenue Service**
Tips vs. Service Charges
<http://www.irs.gov/uac/Newsroom/Tips-Versus-Service-Charges-How-to-Report>
- **Department of Labor**
Wage and Hour Division
<http://www.dol.gov/whd/regs/compliance/whdfs15.htm>
- **State of Delaware, Department of Labor**
Child Labor Laws
<http://dia.delawareworks.com/labor-law/child-labor.php#16-17years>
- **Division of Alcohol & Tobacco Enforcement**
Alcoholic Beverage Server Program
<http://date.delaware.gov/ATE/pdf/tabsp.pdf>

The Delaware Restaurant Association has assembled this information as a service to our members. Before making any changes in your establishment, please consider consulting a tax advisor, attorney, or payroll specialist to ensure state and federal compliance to all tax, wage and labor regulations and requirements.