



# Paying Tipped Employees

BY SAMANTHA MARTINEZ

In hotels and restaurants, servers earn a substantial part of their wages via tips and commissions. This means that hotels and restaurants can also accrue substantial liability for paying servers incorrectly. This article provides a short primer on payments to tipped and commissioned employees. This article discusses federal law regarding minimum wage. Many states and regions have higher minimum wage standards and the calculation rules may differ.



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**WHAT IF  
ONE PERSON  
PERFORMS  
BOTH TYPES  
OF JOBS?**

## TIPPED EMPLOYEES

The Fair Labor Standards Act, or FLSA, mandates that all employees receive minimum wage and overtime pay for each hour worked over 40 hours per week. Under federal law, employers may pay less than minimum wage—not less than \$2.13 per hour—to employees who receive optional gratuities (i.e., tips) from customers, but ONLY IF they meet the following tests:

1. The employee must be in an occupation in which he customarily and regularly receives more than \$30 a month in tips, such as a waiter.
2. The tips received must be enough so that the employee's total wages exceed the minimum wage. (If not, the employer must make up the difference so that the employee does receive minimum wage for each hour worked.)
3. The employee must be informed that he is being paid through this "tip credit" method.
4. The employee must be permitted to keep all of the tips received, except if the employee participates in a valid tip pool. A valid tip pool only includes participants who are employees who customarily and regularly receive tips. For example, management employees are not permitted to share the tips in a tip pool.

In addition, tipped employees are entitled to overtime for every hour worked over 40, calculated by multiplying the current minimum wage (\$5.85 for 2007, and increasing to \$6.55 in July 2008 and \$7.25 in July 2009) by 1.5, then subtracting the amount of the "tip credit" that the employer has taken:

- Tip credit = Minimum wage - minimum hourly for tipped employees:  $\$5.85 - \$2.13 = \$3.72$  tip credit
- Overtime wage = (Minimum wage x 1.5) less tip credit:  $\$5.85 \times 1.5 = \$8.78 - \$3.72 = \$5.06$  per hour for each hour over 40 [plus tips]

(If you are subject to a higher state minimum wage law, then you must use the state numbers rather than the federal minimum wage of \$5.85.)

## COMMISSIONED EMPLOYEES

Under the FLSA, employees who are paid a mandatory gratuity, such as a commission to a banquet server, are not considered "tipped" employees as above. Thus, they must be paid under a system that results in at least minimum wage paid for every hour worked.

However, employers receive an extra benefit regarding "commissioned" employees: employers do not have to pay overtime for hours worked over 40 hours per week, if two rules are followed:

1. More than half of the employee's compensation must represent a commission on goods or services (as opposed to base pay). For banquet servers, this commission would be a percentage of the mandatory gratuity charged to customers.
2. The employee must earn at least one and one-half times the minimum wage for each hour worked in a workweek, or \$8.76 per hour. For any week in which the employees fail to earn at least this hourly rate, the exemption would be lost and they would be entitled to overtime. As an alternative to paying overtime if the commissions do not result in at least a payment of \$8.76/hour, the company can make up the difference. This approach should be used with caution, however, because this "makeup" pay is counted as base pay. If the company is often making up the difference, or if making up the difference means that less than half of the employee's pay is base pay instead of commission, then the company would not be able to fit the first rule, and a new pay scheme should be considered.



Occasionally, properties employ one person to perform the work of both a tipped and commissioned employee—for example, a hotel restaurant server who also works as a room service attendant and receives both optional gratuities as tips and mandatory gratuities as commissions. It is lawful for the employer to pay employees a base wage that is less than minimum wage, and then use the mandatory gratuities to pay the employees minimum wage and overtime. Overtime would have to be calculated taking

into account the commissions, and paying an extra .5 times the employees' regular pay rate for the week, including commissions, for all hours over 40. This same method would be used for banquet employees entitled to overtime for any given week.

**Had enough math?** Sometimes pay issues can feel like solving an algebraic equation. However, this is one test you do not want to fail.