

Filed December 23, 2019

LABOR AND WORKFORCE DEVELOPMENT

DIVISION OF WAGE AND HOUR COMPLIANCE

Minimum Wage

Proposed Amendments: N.J.A.C. 12:56-2.1, 3.1, and 3.2 (recodified as 3.6)

Proposed New Rules: N.J.A.C. 12:56-3.2, 3.3, 3.4 and 3.5

Authorized By: _____

Robert Asaro-Angelo, Commissioner

Department of Labor and Workforce Development

Authority: N.J.S.A. 34:11-56a5.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2019 - _____

A public hearing on the proposed amendment will be held on the following date at the following location:

Friday, February 21, 2020

10:00 A.M. to 12:00 Noon

New Jersey Department of Labor and Workforce Development

John Fitch Plaza

13th Floor Auditorium

Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 777-2960 if you wish to be included on the list of speakers.

Submit written comments by April 3, 2020 to:

David Fish, Executive Director

Legal and Regulatory Services

NJ Department of Labor and Workforce Development

P.O. Box 110 – 13th Floor

Trenton, New Jersey 08625-0110

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The agency proposal follows:

Summary

The Department is proposing amendments to N.J.A.C. 12:56-2.1, 3.1, and 3.2 (recodified as 3.6), and new rules at N.J.A.C. 12:56-3.2, 3.3, 3.4 and 3.5, in order to implement P.L.2019, c.32, which amends N.J.S.A. 34:11-56a et seq., the New Jersey Wage and Hour Law, increasing the state minimum hourly wage to \$15.00 incrementally over a span of years. The law sets forth separate methods for calculation of the incremental increase in the state minimum hourly wage as well as the time-frame for phase-in of the increase to \$15.00 for: (1) employees generally, (2) employees of a small employer and employees who are engaged in seasonal employment, and (3) employees engaged on a piece-rate or regular hourly basis to labor on a farm. The law also permits employers of tipped employees to take a tip credit up to a certain specified amount (which increases incrementally until 2024) against the state minimum hourly wage the employer would otherwise be required to pay in cash under the section of the law that applies to employees generally (the first category listed above). In addition, P.L. 2019, c. 32, allows employers to pay an employee who is enrolled in an

“established employer on-the-job or other training program” a training wage of not less than 90 percent of the state minimum hourly wage required to be paid to employees generally (the first category listed above). Finally, P.L. 2019, c. 32, (1) changes the definition of “wages” so as to exclude gratuities received by the employee for services rendered for an employer or customer of an employer, (2) changes the definition of “employer” so as to include the State and any county, municipality, or school district in the State, or any agency, authority, department, bureau, or instrumentality of any such entity, and (3) defines the following new terms: “seasonal employment,” “seasonal employer,” and “small employer.”

In order to implement these changes to the State Wage and Hour Law, the Department is proposing the following:

1. Amendments to N.J.A.C. 12:56-2.1, which would incorporate the above-referenced changes to the statutory definitions for the terms, “wages” and “employer,” and the above-referenced statutory definitions for the new terms, “seasonal employment,” “seasonal employer” and “small employer;” and which would define for the first time the following term and phrase, respectively, each of which is used within the body of the proposed new rules: “tipped employee” and “established employer on-the-job or other training program;”
2. Amendments to N.J.A.C. 12:56-3.1, which would address the incremental increase in the state minimum hourly wage for employees generally;
3. A new rule at N.J.A.C. 12:56-3.2, which would address the incremental increase in the state minimum hourly wage for employees of a small employer and employees who are engaged in seasonal employment;

4. A new rule at N.J.A.C. 12:56-3.3, which would address the incremental increase in the state minimum hourly wage for employees engaged on a piece-rate or regular hourly rate basis to labor on a farm;

5. A new rule at N.J.A.C. 12:56-3.4, which would address the payment by employers of a “training wage” to employees who are enrolled in an established on-the-job or other training program during the first 120 hours of work after having been hired;

6. A new rule at N.J.A.C. 12:56-3.5, which would address the minimum hourly wage requirement for tipped employees; and

7. The recodification of existing N.J.A.C. 12:56-3.2 to 12:56-3.6 (necessitated by new rules at N.J.A.C. 12:56-3.2 through 3.5) and an amendment to N.J.A.C. 12:56-3.6(a)1 to insert the word “applicable” between “effective” and “minimum wage rate,” and to remove the phrase “effective March 1, 1979.” The first of these amendments reflects a change to the State Wage and Hour Law and is intended to ensure consistency between the law and the rules. The second of the amendments is a technical change, since the 1979 date is no longer relevant.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements of N.J.A.C. 1:30-3.3(a)5.

Social Impact

The vast majority of what is contained within the proposed amendments and new rules is expressly mandated by P.L.2019, c.32. Therefore, whatever social impact

might be felt, positive or negative, by citizens of the State, including business owners throughout the State, would derive in the first instance from P.L.2019, c.32, and not from the proposed amendments or new rules. It is the Department's belief that the proposed amendments and new rules would have a positive social impact in that they would clarify exactly what the state minimum hourly wage is for any particular year or type of employee, and specify exactly how and when the state minimum hourly wage rates will change and by what amount. This will allow workers to adjust their expectations as to what they will receive in pay for the type of work they perform, and for employers to plan for increases in pay to workers. The well-being of workers will generally be advanced by increases in the state minimum hourly wage as workers will be better able to meet their financial needs and the financial needs of their families. Employee productivity may also increase in response to the higher state minimum hourly wage resulting in social benefits to employers as well.

Economic Impact

As indicated above, the vast majority of what is contained in the proposed amendments and new rules is necessitated by the enactment of P.L.2019, c.32. Therefore, whatever economic impact might be felt, positive or negative, by citizens of the State, including business owners throughout the State, would derive in the first instance from the enactment of P.L.2019, c.32, not from the proposed amendments or new rules. It is the Department's belief that the proposed amendments and new rules would have a positive economic impact in that they would provide clarity and certainty concerning what the state minimum hourly wage is and to whom it applies, allowing workers and businesses to adjust their expectations based on a specific set of rules

setting forth the state minimum hourly wage and the adjustments thereto in detail. It is the Department's hope that minimizing confusion as to these issues will avoid costs for employees and employers of unnecessary litigation, which might otherwise result.

Federal Standards Analysis

Section 6 of the Federal "Fair Labor Standards Act of 1938" (29 U.S.C. §206), contains a minimum hourly wage rate of \$7.25 per hour, effective July 24, 2009 with no scheduled adjustments, annual or otherwise; whereas N.J.A.C. 12:56-3.1 et seq., as amended, would contain a minimum hourly wage rate for the State of New Jersey, effective January 1, 2020, of \$11.00 per hour, with annual increases of \$1.00 per hour until January 1, 2024 when the State minimum wage would be at least \$15.00 per hour. The existence of a minimum hourly wage rate in New Jersey which exceeds the Federal minimum hourly wage rate will most certainly have an economic impact on all of the citizens of this State, whether those citizens are minimum wage earners who will receive a pay raise, business owners who will be required to pay the increased state minimum hourly wage to their employees, or citizens of the State who are neither minimum wage earners, nor business owners, who will be impacted in one way or another (whether positively or negatively) by the existence of a state minimum hourly wage which exceeds the Federal minimum hourly wage rate. However, as explained earlier, the Department has no discretion to deviate from P.L.2019, c.32, which, effective July 1, 2019 increased the State minimum hourly wage rate to \$10.00 per hour and requires that the rate be increased again on January 1, 2020 to \$11.00 per hour, and again on January 1 of each year for four years thereafter when the State minimum wage will reach a rate of, at minimum, \$15.00 per hour.

Jobs Impact

As explained in the social and economic impact statements above, to the degree that the proposed amendments would have an impact on the generation or loss of jobs within the State, a question much debated with an answer as of yet still unknown, such impact would result in the first instance from P.L.2019, c.32, which increases the State minimum hourly wage and requires an annual adjustment of that rate until the rate reaches a projected minimum of \$15.00 per hour. The Department has no discretion to deviate from the changes in N.J.S.A. 34:11-56a4 resulting from the enactment of P.L.2019, c.32.

Agriculture Industry Impact

As explained in the jobs impact statement above, to the degree that the proposed amendments might have an impact on the agriculture industry within the State, such impact would result in the first instance from the changes in N.J.S.A. 34:11-56a4 brought about by P.L.2019, c.32. The minimum hourly wage for seasonal and farm employees increases at a slower rate than the state minimum hourly wage for employees in New Jersey, generally. For example, although the minimum hourly wage increases to \$11.00 on January 1, 2020 for employees generally, the minimum hourly wage for seasonal and farm employees on January 1, 2020 is \$10.30; and when, on January 1, 2024, the minimum hourly wage for employees, generally, reaches \$15.00, the minimum hourly wage for seasonal employees will be \$13.50 and \$12.50 for farm employees. It is manifest that the legislature afforded relief to the agriculture industry in terms of lesser increases in the minimum wage over a longer time period, and those provisions are reflected in the proposed amendments and new rules.

Regulatory Flexibility Analysis

The proposed amendments would impose no reporting or recordkeeping requirements on small businesses, as that term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. As to compliance requirements, small employers are afforded relief in the increases in the state minimum hourly wage in that the minimum hourly wage is increased to \$10.30, as opposed to \$11.00, effective January 1, 2020, and the minimum hourly wage for those employed by small employers continues to increase at a slower rate than for employees generally, until both rates reach \$15.00. Thus, the proposed amendments and new rules reflect the relief that P.L.2019, c.32 affords small employers. As to the impact of the increases in the state minimum hourly wage on small employers, as indicated earlier in the social, economic, jobs, and agriculture industry impact statements, the requirement that employers pay covered employees no less than the state minimum hourly wage described within the proposed amendments and new rules is due in the first instance to changes to N.J.S.A. 34:11-56a4 resulting from P.L.2019, c.32, from which the Department has no discretion to deviate.

Housing Affordability Impact Analysis

As indicated in each of the earlier impact statements, to the degree that the proposed amendments might have an impact on the average costs associated with housing, such impact would result in the first instance from P.L.2019, c.32, which increases the state minimum hourly wage to \$11.00 and requires an annual adjustment of that rate according to a set schedule to at least \$15.00. The Department has no discretion to deviate from P.L.2019, c.32.

Smart Growth Development Impact Analysis

As indicated in each of the earlier impact statements, to the degree that the proposed amendments might evoke a change in the housing production within Planning Areas 1 and 2, or within designated centers, under the State Development and Redevelopment Plan, such impact would result in the first instance from P.L.2019, c.32, which increases the state minimum hourly wage according to a set schedule. The Department has no discretion to deviate from P.L.2019, c.32.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Commissioner has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the proposal follows (additions indicated with boldface **thus**; deletions indicated in brackets [thus]):

12:56-2.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

...

“Employer” includes any individual, partnership, association, corporation, **and the State and any county, municipality, or school district in the State, or any agency, authority, department, bureau, or instrumentality thereof**, or any person or group of

persons acting directly or indirectly in the interest of an employer in relation to an employee.

“Established employer on-the-job or other training program” means an existing on-the-job or other training program that when completed by the employee either results in the employee earning an industry-valued credential or results in the employee being awarded credit that may be directly applied toward the earning of an industry-valued credential.

. . .

“Seasonal employment” means employment during a year by an employer that is a seasonal employer, or employment by a non-profit or government entity of an individual who is not employed by that employer outside of the period of that year commencing on May 1 and ending September 30, or employment by a governmental entity in a recreational program or service during the period commencing on May 1 and ending September 30, except that “seasonal employment” does not include employment of employees engaged to labor on a farm on either a piece-rate or regular hourly rate basis

“Seasonal employer” means an employer who exclusively provides its services in a continuous period of not more than ten weeks during the months of June, July, August, and September, or an employer for which, during the immediately previous calendar year, not less than two thirds of the employer’s gross receipts were received in a continuous period of not more than sixteen weeks or for which not less than 75 percent of the wages paid by the employer

during the immediately preceding year were paid for work performed during a single calendar quarter.

“Small employer” means any employer who employed less than six employees for every working day during each of a majority of the calendar workweeks in the current calendar year and less than six employees for every working day during not less than 48 calendar workweeks in the preceding calendar year, except that, if the employer was newly established during the preceding calendar year, the employer shall be regarded as a “small employer” if the employer employed less than six employees for every working day during all of the weeks of that year, and during a majority of the calendar workweeks in the current calendar year, and, if the employer is newly established during the current calendar year, the employer shall be regarded as a “small employer” if the employer employed less than six employees for every working day during a majority of the calendar workweeks in the current calendar year.

“Tipped employee” means any employee engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips.

. . .

“Wages” means any monies due an employee from an employer for services rendered or made available by the employee to the employer as a result of their employment relationship including commissions, bonus and piecework compensation and including [any gratuities received by an employer to an employee] the fair value of any food or lodgings supplied by an employer to an employee.

12:56-3.1 Statutory minimum wage rate for specific years; general

(a) Except as provided in N.J.A.C. 12:56-3.2, **12:56-3.3, 12:56-3.4, and 12:56-3.5**, every employee shall, effective January 1, [2019] **2020**, be paid not less than \$ [8.85] **11.00** per hour [,] **or** the minimum wage rate set by section 6(a)(1) of the Federal “Fair Labor Standards Act of 1938” (29 U.S.C. §206(a)(1), [or the rate provided under N.J.S.A. 34:11-56a4,] whichever is [greatest] **greater**.

(b) For the period from January 1, 2020 through January 1, 2024, on an annual basis, on or about September 30, the Department shall, through a public notice published in the New Jersey Register, revise the minimum hourly wage set forth in (a) above so as to be the greater of either an amount based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics, or the following:

- 1. For January 1, 2020, \$11.00;**
- 2. For January 1, 2021, \$12.00;**
- 3. For January 1, 2022, \$13.00;**
- 4. For January 1, 2023, \$14.00; and**
- 5. For January 1, 2024, \$15.00.**

[(b)] (c) Beginning January 1, 2025, [O]on an annual basis, on or about September 30, the Department shall revise the minimum hourly wage set forth in (a) above based on any percentage increase during the one-year period of August of the

prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics. Annually, the Department shall, through a public notice published in the New Jersey Register, provide the new CPI-W, U.S. City Average, adjusted minimum hourly wage.

[(c)] (d) The Department shall, no later than September 30 of each year, publish a notice, as set forth in (b) **and (c)** above, on the Department's website, [http://lwd.dol.state.nj.us/labor] <https://www.nj.gov/labor/>.

12:56-3.2 Statutory minimum wage rate for specific years; small and seasonal employees

(a) Except as provided in N.J.A.C. 12:56-3.3 and 12:56-3.4, every employee of a small employer and every employee who is engaged in seasonal employment shall, effective January 1, 2020, be paid not less than \$10.30 per hour or the minimum wage rate set by section 6(a)(1) of the Federal "Fair Labor Standards Act of 1938" (29 U.S.C. §206(a)(1), whichever is greater.

(b) For the period from January 1, 2020 through January 1, 2026, on an annual basis, on or about September 30, the Department shall, through a public notice in the New Jersey Register, revise the minimum hourly wage set forth in (a) above so as to be the greater of either an amount based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and

clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics, or the following:

- 1. For January 1, 2020, \$10.30;**
- 2. For January 1, 2021, \$11.10;**
- 3. For January 1, 2022, \$11.90;**
- 4. For January 1, 2023, \$12.70;**
- 5. For January 1, 2024, \$13.50;**
- 6. For January 1, 2025, \$14.30; and**
- 7. For January 1, 2026; \$15.00.**

(c) For January 1, 2027, on or about September 30, 2026, the Department shall, through a public notice in the New Jersey Register, revise the minimum hourly wage set forth in (a) above by the same amount (not percentage) as the increase in the minimum hourly wage from January 1, 2026 to January 1, 2027 for employees covered under N.J.A.C. 12:56-3.1, plus one half of the difference between \$15.00 per hour and the minimum hourly wage in effect on January 1, 2026 for employees covered under N.J.A.C. 12:56-3.1.

(d) For January 1, 2028, on or about September 30, 2027, the Department shall, through a public notice in the New Jersey Register, revise the minimum hourly wage set forth in (a) above by the same amount (not percentage) as the increase in the minimum hourly wage from January 1, 2027 to January 1, 2028 for employees covered under N.J.A.C. 12:56-3.1, plus one half of the difference between \$15.00 per hour and the minimum hourly wage in effect on January 1, 2026 for employees covered under N.J.A.C. 12:56-3.1.

(e) Beginning January 1, 2029, on an annual basis, on or about September 30, the Department shall revise the minimum hourly wage set forth in (a) above based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics. Annually, the Department shall, through a public notice published in the New Jersey Register, provide the new CPI-W, U.S. City Average, adjusted minimum hourly wage.

(f) The Department shall, no later than September 30 of each year, publish a notice, as set forth in (b) through (e) above, on the Department’s website, [http://lwd.dol.state.nj.us/labor] <https://www.nj.gov/labor/>.

12:56-3.3 Statutory minimum wage rate for specific years; labor on a farm

(a) Every employee engaged on a piece-rate or regular hourly rate basis to labor on a farm shall, effective January 1, 2020, be paid not less than \$10.30 per hour or the minimum wage rate set by section 6(a)(1) of the Federal “Fair Labor Standards Act of 1938” (29 U.S.C. §206(a)(1), whichever is greater.

(b) For the period from January 1, 2020 through January 1, 2024, on an annual basis, on or about September 30, the Department shall, through a public notice in the New Jersey Register, revise the minimum hourly wage set forth in (a) above so as to be the greater of either an amount based on any percentage increase during the one-year period of August of the prior year through August of

the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics, or the following:

- 1. For January 1, 2020, \$10.30;**
- 2. For January 1, 2021, \$10.30;**
- 3. For January 1, 2022, \$10.90;**
- 4. For January 1, 2023, \$11.70; and**
- 5. For January 1, 2024, \$12.50;**

(c) For the period from January 1, 2025 through January 1, 2027, on an annual basis, on or about September 30, the Department shall, through a public notice in the New Jersey Register, revise the minimum hourly wage set forth in (a) above so as to be the greater of either an amount based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics, or the following:

- 1. For January 1, 2025, \$13.40;**
- 2. For January 1, 2026, \$14.20; and**
- 3. For January 1, 2027, \$15.00.**

(d) For January 1, 2028, on or about September 30, 2027, the Department shall, through a public notice in the New Jersey Register, revise the minimum hourly wage set forth in (a) above by the same amount (not percentage) as the increase in the minimum hourly wage from January 1, 2027 to January 1, 2028 for

employees covered under N.J.A.C. 12:56-3.1, plus one third of the difference between \$15.00 per hour and the minimum hourly wage in effect on January 1, 2027 for employees covered under N.J.A.C. 12:56-3.1.

(e) For January 1, 2029, on or about September 30, 2028, the Department shall, through a public notice in the New Jersey Register, revise the minimum hourly wage set forth in (a) above by the same amount (not percentage) as the increase in the minimum hourly wage from January 1, 2028 to January 1, 2029 for employees covered under N.J.A.C. 12:56-3.1, plus one third of the difference between \$15.00 per hour and the minimum hourly wage in effect on January 1, 2027 for employees covered under N.J.A.C. 12:56-3.1.

(f) For January 1, 2030, on or about September 30, 2029, the Department shall, through a public notice in the New Jersey Register, revise the minimum hourly wage set forth in (a) above by the same amount (not percentage) as the increase in the minimum hourly wage from January 1, 2029 to January 1, 2030 for employees covered under N.J.A.C. 12:56-3.1, plus one third of the difference between \$15.00 per hour and the minimum hourly wage in effect on January 1, 2027 for employees covered under N.J.A.C. 12:56-3.1.

(g) Beginning January 1, 2031, on an annual basis, on or about September 30, the Department shall revise the minimum hourly wage set forth in (a) above based on any percentage increase during the one-year period of August of the prior year through August of the current year of the consumer price index (CPI) for all urban wage earners and clerical workers (CPI-W, U.S. City Average), as released by the United States Department of Labor, Bureau of Labor Statistics.

Annually, the Department shall, through a public notice published in the New Jersey Register, provide the new CPI-W, U.S. City Average, adjusted minimum hourly wage.

(h) The Department shall, no later than September 30 of each year, publish a notice, as set forth in (b) through (e) above, on the Department's website, [<http://lwd.dol.state.nj.us/labor>] <https://www.nj.gov/labor/>.

(i) The method for determining the minimum hourly wage rates set forth in (c) through (f) above may be subject to change pursuant to N.J.S.A. 34:11-56a4(d)(3), which directs the Commissioner and the Secretary of Agriculture not later than March 31, 2024 to issue a recommendation either approving the method for determining increases set forth in (c) through (f) above, disapproving the method for determining increases set forth in (c) through (f) above, or suggesting an alternative to the method for determining increases set forth in (c) through (f) above; and which states that the method for determining the minimum hourly wage rates set forth in (c) through (f) above shall take effect unless the Commissioner and the Secretary of Agriculture issue a recommendation either disapproving the method for determining increases set forth in (c) through (f) above or suggesting an alternative to the method for determining increases set forth in (c) through (f) above, and the Legislature, not later than June 30, 2024, enacts a concurrent resolution approving the implementation of the recommendation of the Commissioner and the Secretary of Agriculture.

12:56-3.4 Statutory minimum wage rate; training wage

(a) Commencing on January 1, 2020, an employee enrolled in an established on-the-job or other training program may, for the first 120 hours of work after having been hired, be paid a training wage of not less than 90 percent of the minimum hourly wage specified at N.J.A.C. 12:56-3.1, provided the following conditions are met:

1. The employee has been hired in and is receiving training for an occupation in which the employee has no previous similar or related experience;

2. The employer is not utilizing the employee being paid the training wage in a manner that causes, induces, encourages or assists any displacement or partial displacement of any currently employed worker, including any previous recipient of the training wage, by reducing hours of a currently employed worker, replacing a current or laid off employee with a trainee, or by relocating operations resulting in a loss of employment at a previous workplace, or in a manner which replaces, supplants, competes with or duplicates any approved apprenticeship program;

3. The employer makes a good faith effort to continue to employ the employee after the period of the training wage expires; and

4. The employer shall not hire the employee at the training wage unless there is a reasonable expectation that there will be regular employment, paying at or above the effective minimum wage, for the trainee upon the successful completion of the period of the training wage.

(b) As an alternative to or in addition to sanctions provided in N.J.A.C. 12:56-1.3 for any violation of N.J.S.A. 34:11-56a et seq., the New Jersey Wage and Hour Law and/or N.J.A.C. 12:56, if an employer has made repeated, knowing violations of the provisions of this section regarding the payment of a training wage, the Department shall suspend the employer's right to pay a training wage.

(c) The employer's right to pay a training wage shall not be suspended for a period beyond three years. However, in determining the length of time for which an employer's right to pay a training wage shall be suspended, the following criteria shall be considered:

- 1. The seriousness of the violation;**
- 2. The past history of previous violations by the employer;**
- 3. The good faith of the employer; and**
- 4. Any other factors which the Commissioner deems appropriate in determining the length of the suspension of the employer's right to pay a training wage.**

(d) Whenever the Department shall find cause to suspend the right of an employer to pay a training wage, it shall notify the employer of the reason therefor, in writing, and provide the opportunity for a hearing in accordance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(e) All requests for hearing shall be filed within 10 business days from the date of receipt of the notice.

(f) In the absence of a timely request for a hearing, pursuant to (e) above, the determination of the Department shall be deemed the final administrative action in the matter.

(g) All request for hearing shall be reviewed by the Division of Wage and Hour Compliance in order to determine whether the dispute can be resolved at an informal settlement conference. If the review indicates that an informal settlement conference is warranted, such conference shall be scheduled. If a settlement cannot be reached, the case shall be forwarded to the Office of Administrative Law for a formal hearing.

12:56-3.5 Tipped employees

(a) With respect to tipped employees, in determining the minimum hourly wage an employer is required to pay such an employee, only the employer who is paying its employee the minimum hourly wage set forth in N.J.A.C. 12:56-3.1 may take a credit for tips received by the employee against that minimum hourly wage (set forth at N.J.A.C. 12:56-3.1) in the following amounts:

- 1. For January 1, 2019 through June 30, 2019, \$6.72 per hour,**
- 2. For July 1, 2019 through December 31, 2019, \$7.37 per hour,**
- 3. For calendar year 2020, \$7.87 per hour,**
- 4. For calendar year 2021, \$7.87 per hour,**
- 5. For calendar year 2022, \$7.87 per hour,**
- 6. For calendar year 2023, \$8.87 per hour, and**
- 7. Commencing January 1, 2024, \$9.87 per hour.**

(b) The employer who takes a tip credit under (a) above, shall pay to each employee against whom such tip credit has been applied a cash wage equal to the difference between the minimum hourly wage set forth in N.J.A.C. 12:56-3.1 and the tip credit taken under (a) above.

(c) With respect to tipped employees for whom the employer does not take the tip credit set forth in (a) above, the employer must pay the employee a cash wage equal to the full amount of the minimum hourly wage to which the employee is entitled under either N.J.A.C. 12:56-3.1 (employees, generally), N.J.A.C. 12:56-3.2 (employees of a small employer and employees who are engaged in seasonal employment), N.J.A.C. 12:56-3.3 (employees engaged on a piece-rate or regular hourly rate basis to labor on a farm), or N.J.A.C. 12:56-3.4 (training wage).

(d) The tip credit permitted under (a) above may be taken only with respect to those employees whose occupations in the workweeks for which such payments are made are those of “tipped employees” as defined in N.J.A.C. 12:56-2.1. Under N.J.A.C. 12:56-2.1, the occupation of the employee must be one “in which he or she customarily and regularly receives more than \$30 a month in tips.” To determine whether a tip credit may be taken in paying wages to a particular employee it is necessary to know what constitutes “tips,” whether the employee receives “more than \$30 a month” in such payments in the occupation in which he or she is engaged, and whether in such occupation he or she receives these payments in such amount “customarily and regularly.” The principles applicable to a resolution of these questions are discussed in the following sections.

(e) A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him or her. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity.

(f) Tips are the property of the employee whether or not the employer has taken a tip credit under (a) above.

(g) The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than as wages or in furtherance of a valid tip pool; this includes, a prohibition against the employer using an employee's tips to pay any portion, however small, of the fee charged to the employer by a credit card company or other financial institution for the use of credit or debit cards in its business, including the processing of such credit or debit card transactions.

(h) Only tips actually received by the employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee" within the meaning of N.J.A.C. 12:56-2.1.

(i) In addition to cash sums presented by customers which an employee keeps as his own, tips received by an employee include amounts paid by bank check or other negotiable instrument payable at par and amounts transferred by the employer to the employee pursuant to directions from credit customers who designate amounts to be added to their bills as tips. Special gifts in forms other than money or its equivalent as above described, such as theater tickets, passes,

or merchandise, are not counted as tips received by the employee for purposes of this section.

(j) Where employees practice tip splitting, as where waiters give a portion of their tips to busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them. Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his or her tips.

(k) An employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

(l) A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its employees, cannot be counted as a tip received in applying the provisions of this section. Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received.

(m) The definition of tipped employee does not require that the calendar month be used in determining whether more than \$30 a month is customarily and

regularly received as tips. Any appropriate recurring monthly period beginning on the same day of the calendar month may be used.

(n) An employee must himself or herself customarily and regularly receive more than \$30 a month in tips in order to qualify as a tipped employee. The fact that he or she is part of a group which has a record of receiving more than \$30 a month in tips will not qualify him or her.

(o) Where an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter, if he customarily and regularly receives at least \$30 a month in tips for his work as a waiter, he is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit may be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waiter who spends part of his time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips. 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.

(p) The employee must receive more than \$30 a month in tips “customarily and regularly” in the occupation in which he or she is engaged in order to qualify

as a tipped employee. If it is known that he or she always receives more than the stipulated amount each month, as may be the case with many employees in occupations such as those of waiters, bellhops, taxicab drivers, barbers or beauty operators, the employees will qualify and the tip credit may be applied. On the other hand, an employee who only occasionally or sporadically receives tips totaling more than \$30 a month, such as at Christmas or New Years' when customers may be more generous than usual, will not be deemed a tipped employee. The phrase "customary and regularly" signifies a frequency which must be greater than occasional, but which may be less than constant. If an employee is in an occupation in which he or she normally and recurrently receives more than \$30 a month in tips, he or she will be considered a tipped employee even though occasionally because of sickness, vacation, seasonal fluctuations or the like, he or she fails to receive more than \$30 in tips in a particular month.

(q) An exception to the requirement that an employee will qualify as a tipped employee only if he customarily and regularly receives more than \$30 a month in tips is made in the case of initial and terminal months of employment. In such months the purpose of the provision for tipped employees would be fulfilled if qualification as a tipped employee is based on his or her receipt of tips in the particular week or weeks of such month at a rate in excess of \$30 a month, where the employee has worked less than a month because he or she started or terminated employment during the month.

(r) An employer is not eligible to take the tip credit set forth in (a) above, unless it has informed its tipped employees in advance of the employer's use of the tip credit of the following:

1. The amount of the cash wage that is to be paid to the tipped employee by the employer,

2. The amount of the tip credit, which will be claimed by the employer, which amount may not exceed the value of the tips actually received by the employee,

3. That all tips received by the tipped employee must be retained by the employee, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips, and

4. That the tip credit shall not apply to any employee who has not been informed of the requirements of this section.

(s) The credit allowed on account of tips may be less than that permitted under (a) above; it cannot be more.

(t) In order for the employer to claim the maximum tip credit set forth in (a) above, the employer must demonstrate that the employee received at least that amount in actual tips. If the employee received less than the maximum tip credit amount in tips, the employer is required to pay the balance so that the employee receives at least the minimum hourly wage under N.J.A.C. 12:56-3.1 with the defined combination of wages and tips.

12:56-[3.2]3.6 Exemptions from the statutory minimum wage rates

(a) Employees in the following occupations shall be exempt from the statutory minimum wage rates:

1. Full-time students employed by the college or university at which they are enrolled at not less than 85 percent of the effective **applicable** minimum wage rate [, effective March 1, 1979];
2. through 5. (no change.)