

## **Wage Theft & Legal Options for Restaurant & Food Service Workers**

### **If your employer isn't paying you for all hours worked, we can help**

Food service is hard work. Servers and kitchen staff are on their feet for long hours preparing food, assisting customers, cleaning up, setting tables, and more, all under heavy time pressure and constant scrutiny. Employers in this industry have both a moral and legal obligation to pay for all hours worked, including overtime.

Unfortunately, the food service industry has a massive problem with wage theft, and many of the most vulnerable workers in Ohio and across the country are victims. Many common pay practices in the restaurant industry are violations of the wage and hour laws. In fact, [U.S. Department of Labor investigations](#) of over 9,000 restaurants found that a stunning 84% were in violation of federal wage laws.

If your employer is violating the law – whether that's a [minimum wage violation](#), tip violation, [failure to pay overtime](#), unpaid break violation, or any other form of wage theft – then there is money coming right out of your paycheck. Employees need to know their rights – and where they can go for recourse if their employer is breaking the law.

### **Tipped minimum wage violations**

Probably the best-known wage law violations in restaurants are [tip credit violations](#). Under both federal and Ohio law, employers of workers who customarily receive tips are allowed to take a "tip credit" and pay less than the minimum wage. In Ohio, the tipped minimum wage is \$5.25 per hour, which is half the regular minimum wage of \$10.45 per hour (rounded up to the nearest five cents). It's typical for servers in restaurants to receive the tipped minimum wage.

The tradeoff at the heart of the tipped minimum wage is that the employee gets the benefit of tipping and *might* make more than the regular minimum wage on busy shifts. However, there are several ways that unscrupulous employers stretch the benefit of the tip credit by paying the tipped minimum wage for non-tipped work. For example:

#### **Opening and closing work**

It goes without saying that when there are no customers in the restaurant, there is no opportunity for servers to earn tips. So, if a server comes to work before opening to set up or stays after closing to clean up, there is clearly zero chance that they will earn any tips during that time.

Nevertheless, some employers pay the tipped minimum wage for this opening and closing work. This is against the law – all employees should be paid the full minimum wage for any time worked while the establishment is not open for business.

#### **Violations of the 80/20 rule**

The law does recognize that tipped workers may have incidental duties that support their tipped work, such as bussing tables, folding napkins, refilling condiments, or making coffee. Having a small amount of "side work" does not necessarily mean the employer can't take the tip credit. However, the side work must not be a mechanism for the employer to pay a lower wage for significant amounts of non-tipped work.

Both Ohio and federal minimum wage laws assess this situation as the 80/20 rule – that is, a tipped worker should spend no more than 20% of their shift performing tip-supporting side work, with at least 80% of the shift spent on actual tipped work (that is, serving customers). If you spend more than 20% of your shift on side work, then you should be paid the full minimum wage for that non-tipped work, even if you did receive tips during that shift.

### **Taking the tip credit for non-tipped work**

Beyond the 80/20 rule, some food service employers require tipped employees to perform work that has nothing to do with generating tips. We've already mentioned opening and closing, but other examples include preparing food, cleaning the kitchen, or even cleaning the bathrooms. If an employer pays the lower tip-credit wage for such work that has nothing to do with generating tips, then they are in violation of both state and federal wage and hour laws.

### **Other tip credit violations**

In addition to paying the tipped minimum wage for non-tipped work, restaurants may also violate the law by mishandling the tips. Some examples include:

- **Illegal tip pooling.** While tip pooling is allowed under Ohio and federal law, only tipped employees can be included in the tip pool. The employer is not allowed to keep any part of the tip pool, nor to require employees to share their tips with owners, managers, or other non-tipped employees.
- **Making unlawful deductions.** Employers are not permitted to take deductions from tips; that money belongs to the tipped employee. The only exception is taking a deduction for credit card processing, but the amount deducted must be no more than the actual credit card processing cost the employer pays.
- **Not paying the full minimum wage for each and every hour.** Employers can only take the tip credit if the tips earned actually bring the employee up to the full minimum wage, each and every hour of each and every shift. They must keep track of when tips are received, ensure that the hourly wage plus tips equals at least \$10.45 per hour, and pay the difference if not.
- **Not paying the correct overtime wage.** When tipped employees work more than 40 hours in a workweek, federal law requires that their overtime rate be based on the full federal minimum wage (\$7.25 per hour), not the lower minimum wage using the tip credit. The employer must calculate the overtime rate (time and a half) first, and *then* subtract the tip credit.

If you have any reason to believe that your employer's tip credit practices violate the law, contact our experienced [wage and hour attorneys](#) today. We can help.

## Misclassification and Unpaid Overtime

Another common wage law violation in the food service industry concerns sous chefs, service managers, and similar employees who are [misclassified as exempt](#).

Under federal law, most employees are considered non-exempt, which means they must be paid time and a half for all hours worked in excess of 40 in a given workweek. Only employees who meet specific criteria can be treated as "exempt" and thus do not have to be paid overtime. In the food service industry, this usually means claiming the "managerial exemption" or "executive exemption," which has the following criteria:

- The employee must manage the business or a customarily recognized department or subdivision of the business – such as the kitchen or dining room.
- The employee must have the power to hire, fire, and evaluate other employees, or comparable decision-making authority.
- The employee must spend most of their working hours on managerial tasks – directing employees, planning menus, handling complaints, addressing interpersonal issues, scheduling, budgeting, etc.
- The employee must direct the work of at least two full-time employees (or an equivalent number of part-time employees).

Notably, the exemption has nothing to do with your job *title* – it's based entirely on job *duties*. If you spend most of your time preparing food or assisting customers, then you should not be classified as exempt; the exemption only applies if you spend most of your time *managing*.

In most restaurants, this means only a few employees should be classified as exempt: the general manager, who oversees the whole restaurant; the chef, who manages the kitchen; and perhaps a few others in larger establishments. Simply having a job title that denotes a leadership role, such as sous chef, head waiter, or shift manager, does not automatically make you exempt from overtime. It's the employer's responsibility to prove that each and every element of the executive exemption is met.

Employers misclassify employees as exempt because they can save a lot of money on free overtime. Our [case results](#) include multiple million-dollar recoveries for classes of employers who were misclassified as exempt from overtime.

## Unpaid Break Violations

Neither federal law nor Ohio law requires employers to offer breaks. However, if a restaurant or other food service establishment offers breaks, then they must comply with the law. The laws that apply to breaks include:

- Short rest breaks of 20 minutes or less **must be paid**. Employers are not allowed to deduct those breaks from the employee's hours worked.
- Bona fide meal breaks of 30 minutes or more do not have to be paid, but it's the employer's responsibility to follow the law. In order to have an unpaid break, you must get **30 uninterrupted minutes** during which you are completely relieved of work duties. If your employer interrupts your meal break – for instance, to have you assist a customer – then they cannot deduct that break from your hours worked.

Unfortunately, in the hectic environment of a restaurant, it's far too common for these rules to be skirted. If your employer has deducted a break that was less than 20 minutes long, interrupted a meal break with work duties, or even deducted a break that you didn't actually take from your hours worked, then they can be held accountable for [unpaid wages](#) and perhaps unpaid overtime if the break would have pushed you above 40 hours worked in that workweek.

That time adds up, especially if an employer has an ongoing practice of skirting [the unpaid break laws](#) across many shifts. In one representative case, we recovered **\$4 million** for a class of workers who were not paid for their break time.

### **Talk to an experienced wage and hour lawyer about your rights**

The food and beverage service industry is notorious for taking advantage of workers, and often, their cost-saving practices run afoul of the state and federal wage and hour laws. If you are in this situation, you have recourse, but you need to fight for your rights. We can help.

If you suspect your employer is violating your rights, take two steps right away. First, document everything. Don't rely on your employer's record-keeping; keep track of your own hours worked, tips, breaks, and so on. Second, [contact Nilges Draher LLC](#) immediately. Our experienced attorneys know how to navigate complex wage and hour claims, and we can explain your rights and options.

Restaurant employees deserve to be paid for all hours worked. If your employer isn't paying you the wages you deserve, contact us online for a [free case evaluation](#). We can help.