

# STATE OF NEW YORK

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1101

2017-2018 Regular Sessions

## IN ASSEMBLY

January 10, 2017

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Introduced by M. of A. HUNTER -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to certain affirmative defenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Paragraph (b) of subdivision 1 of section 195 of the labor  
2 law, as added by chapter 564 of the laws of 2010, is amended to read as  
3 follows:

4 (b) The commissioner shall prepare templates that comply with the  
5 requirements of paragraph (a) of this subdivision. Each such template  
6 shall be dual-language, including English and one additional language.  
7 The commissioner shall determine, in his or her discretion, which  
8 languages to provide in addition to English, based on the size of the  
9 New York state population that speaks each language and any other factor  
10 that the commissioner shall deem relevant. All such templates shall be  
11 made available to employers in such manner as determined by the commis-  
12 sioner. Employers may rely upon these templates and shall not be liable  
13 for their good faith reliance upon the templates provided by the commis-  
14 sioner;

15 § 2. Section 196-d of the labor law, as added by chapter 1007 of the  
16 laws of 1968, is amended to read as follows:

17 § 196-d. Gratuities. No employer or his agent or an officer or agent  
18 of any corporation, or any other person shall demand or accept, directly  
19 or indirectly, any part of the gratuities, received by an employee, or  
20 retain any part of a gratuity or of any charge purported to be a gratui-  
21 ty for an employee. This provision shall not apply to the checking of  
22 hats, coats or other apparel. Nothing in this subdivision shall be  
23 construed as affecting the allowances from the minimum wage for gratui-  
24 ties in the amount determined in accordance with the provisions of arti-  
25 cle nineteen of this chapter nor as affecting any affirmative defenses

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 made available under this chapter, or any practices in connection with  
2 banquets and other special functions where a fixed percentage of the  
3 patron's bill is added for gratuities which are distributed to employ-  
4 ees, nor to the sharing of tips by a waiter with a busboy or similar  
5 employee.

6 § 3. Subdivision 1-a, the closing paragraph of subdivision 1-b and the  
7 closing paragraph of subdivision 1-d of section 198 of the labor law,  
8 subdivision 1-a as amended by chapter 362 of the laws of 2015, the clos-  
9 ing paragraph of subdivision 1-b and the closing paragraph of subdivi-  
10 sion 1-d as amended by chapter 537 of the laws of 2014, are amended to  
11 read as follows:

12 1-a. On behalf of any employee paid less than the wage to which he or  
13 she is entitled under the provisions of this article, the commissioner  
14 may bring any legal action necessary, including administrative action,  
15 to collect such claim and as part of such legal action, in addition to  
16 any other remedies and penalties otherwise available under this article,  
17 the commissioner shall assess against the employer the full amount of  
18 any such underpayment, and an additional amount as liquidated damages,  
19 unless the employer proves a good faith basis for believing that its  
20 underpayment of wages was in compliance with the law, which may include,  
21 but is not limited to, reliance by the employer on any template provided  
22 by the commissioner pursuant to paragraph (b) of subdivision one of  
23 section one hundred ninety-five of this article. Liquidated damages  
24 shall be calculated by the commissioner as no more than one hundred  
25 percent of the total amount of wages found to be due, except such liqui-  
26 dated damages may be up to three hundred percent of the total amount of  
27 the wages found to be due for a willful violation of section one hundred  
28 ninety-four of this article. In any action instituted in the courts upon  
29 a wage claim by an employee or the commissioner in which the employee  
30 prevails, the court shall allow such employee to recover the full amount  
31 of any underpayment, all reasonable attorney's fees, prejudgment inter-  
32 est as required under the civil practice law and rules, and, unless the  
33 employer proves a good faith basis to believe that its underpayment of  
34 wages was in compliance with the law, which may include, but is not  
35 limited to, reliance by employer on any template provided by the commis-  
36 sioner pursuant to paragraph (b) of subdivision one of section one  
37 hundred ninety-five of this article, an additional amount as liquidated  
38 damages equal to one hundred percent of the total amount of the wages  
39 found to be due, except such liquidated damages may be up to three  
40 hundred percent of the total amount of the wages found to be due for a  
41 willful violation of section one hundred ninety-four of this article.

42 On behalf of any employee not provided a notice as required by subdivi-  
43 sion one of section one hundred ninety-five of this article, the  
44 commissioner may bring any legal action necessary, including administra-  
45 tive action, to collect such claim, and as part of such legal action, in  
46 addition to any other remedies and penalties otherwise available under  
47 this article, the commissioner may assess against the employer damages  
48 of fifty dollars for each work day that the violations occurred or  
49 continue to occur, but not to exceed a total of five thousand dollars.  
50 In any action or administrative proceeding to recover damages for  
51 violation of paragraph (a) of subdivision one of section one hundred  
52 ninety-five of this article, it shall be an affirmative defense that (i)  
53 the employer made complete and timely payment of all wages due pursuant  
54 to this article or article nineteen or article nineteen-A of this chap-  
55 ter to the employee who was not provided notice as required by subdivi-  
56 sion one of section one hundred ninety-five of this article [ ~~or~~ ]; (ii)

1 the employer reasonably believed in good faith that it was not required  
2 to provide the employee with notice pursuant to subdivision one of  
3 section one hundred ninety-five of this article; (iii) the employer  
4 relied in good faith upon the templates provided by the commissioner  
5 pursuant to paragraph (b) of subdivision one of section one hundred  
6 ninety-five of this article; or (iv) the employee received sufficient  
7 tips to equal or exceed the amount of any allowances claimed by the  
8 employer as any part of the minimum wage, including any and all avail-  
9 able tip allowances. In such circumstances where the employer estab-  
10 lishes any of the affirmative defenses described in subparagraphs (i)  
11 through (iv) of this paragraph, the employer shall not forfeit any tip  
12 allowances available under law. These affirmative defenses shall be  
13 available to employers in defense of actions brought by the commissioner  
14 and/or by the employee.

15 On behalf of any employee not provided a statement as required by  
16 subdivision three of section one hundred ninety-five of this article,  
17 the commissioner may bring any legal action necessary, including admin-  
18 istrative action, to collect such claim, and as part of such legal  
19 action, in addition to any other remedies and penalties otherwise avail-  
20 able under this article, the commissioner may assess against the employ-  
21 er damages of two hundred fifty dollars for each work day that the  
22 violations occurred or continue to occur, but not to exceed a total of  
23 five thousand dollars. In any action or administrative proceeding to  
24 recover damages for violation of subdivision three of section one  
25 hundred ninety-five of this article, it shall be an affirmative defense  
26 that (i) the employer made complete and timely payment of all wages due  
27 pursuant to this article or articles nineteen or nineteen-A of this  
28 chapter to the employee who was not provided statements as required by  
29 subdivision three of section one hundred ninety-five of this article  
30 ~~[ex];~~ (ii) the employer reasonably believed in good faith that it was  
31 not required to provide the employee with statements pursuant to para-  
32 graph (e) of subdivision one of section one hundred ninety-five of this  
33 article; (iii) the employer relied in good faith upon the templates  
34 provided by the commissioner pursuant to paragraph (b) of subdivision  
35 one of section one hundred ninety-five of this article; or (iv) the  
36 employee received sufficient tips to equal or exceed the amount of any  
37 allowances claimed by the employer as any part of the minimum wage  
38 including any and all available tip allowances. In such circumstances  
39 where the employer establishes any of the affirmative defenses described  
40 in subparagraphs (i) through (iv) of this paragraph the employer shall  
41 not forfeit any tip allowances available under law. These affirmative  
42 defenses shall be available to employers in defense of actions brought  
43 by the commissioner and/or by the employee.

44 § 4. Section 199 of the labor law, as added by chapter 548 of the laws  
45 of 1966, is amended to read as follows:

46 § 199. Rules and regulations. The commissioner may issue such rules  
47 and regulations as he determines necessary for the purposes of carrying  
48 out the provisions of this article, which shall be consistent with and  
49 shall not alter the terms and conditions set forth in this article.

50 § 5. This act shall take effect immediately and shall apply to affir-  
51 mative defenses that became available before, on, or after such effec-  
52 tive date.