

JULY 11, 1951.

MR. J. L. BROWN, *Deputy Commissioner,*  
*Department of Labor and Industry,*  
State House,  
Trenton 7, New Jersey.

## FORMAL OPINION—1951. No. 23.

DEAR MR. BROWN :

*Re Minimum Fair Wage Standards Order No. 6 Governing Employment  
of Women and Minors in Restaurant Occupations.*

Receipt is acknowledged of your request for a formal opinion relative to the collection of moneys paid to the Wage and Hour Bureau of the Department of Labor and Industry, by employers pursuant to direction by the aforesaid bureau.

Under date of March 1, 1951, we sent the following letter to Labor Commissioner Miller :

"Our attention has recently been directed to a situation involving the administration of Minimum Wage Order No. 6 by the Minimum Wage Division of your Department. The problem relates to the classification of so-called car hops or curb service employees as *non-service employees*.

As you know, there is a differential of about 12½ cents in the hourly rate between the service employee who receives 26½ cents an hour, and the non-service employee who receives 39 cents an hour. The differential presumably is based upon the contingency of gratuities.

Minimum Wage Order No. 6 defines *Service Employees* and *Non-Service Employees* as follows:

*Service Employee.* The term *Service Employee* as used in this Order shall mean any employee whose duties relate solely to the serving of food to patrons seated at tables, or to the serving of food to patrons seated both at tables and counters in establishments where all food served is prepared in a kitchen separate from the room in which food is served *and to the performance of duties incidental thereto* and who customarily receive gratuities from such patrons. (Italics ours.)

*Non-Service Employee.* The term *Non-Service Employee* as used in this Order shall mean any employee, except service employees.

The duties of car hops are to receive the food prepared within the restaurant building and serve it to patrons seated in their cars. The food is served on portable trays attached to the car doors. The incidence of gratuities is, if anything, greater than that attendant table waitresses.

Attached hereto is a copy of our file indicating that the precise question now under discussion was considered in 1947 when, pursuant to inquiry from White Castle System, Inc., the Minimum Wage Bureau was advised by this office that curb service employees should be classified as *Service Employees*.

After careful reconsideration of the duties of car hops and curb service employees we fail to discern any distinction and it is, therefore, our opinion that they must be classified as service employees.

This letter is being directed to you in an effort to rectify a misconception of the intent of the law, and to assist you in the administration of it."

Answering your questions as set forth in your inquiry:

1. What action should be taken with respect to the moneys that heretofore have been collected and dispersed by our Wage and Hour Bureau by reason of the differences in interpretation as to the definition of *service* and *non-service* employees?

As to the moneys that have heretofore been collected and dispensed by the administrator, it would seem to be virtually impossible for him to reacquire the funds because of the transient proclivities of those engaged in the type of work here involved.

2. What action should be taken with respect to the funds already collected as partial payment on pending claims? Should these funds be dispersed on a partial basis to the claimants or should they be returned to the employer?

The funds already collected as partial payment on pending claims should not be dispersed by the administrator, but should be returned to the employers, together with an explanation of the reason therefor.

3. If the funds referred to in question No. 2 are dispersed on a partial basis to the claimants, what action should be taken with respect to the uncollected portion of these same claims?

Every attempt must be made by the Wage and Hour Bureau to reacquire the funds partially dispersed, such moneys to be returned to the employers. (In such instances the Bureau has knowledge of the whereabouts of, and a modicum of control over the claimants.) As to the uncollected portion, the employers as well as the claimants must be advised of their correct and legal status.

4. What action should be taken with respect to the claims that have already been filed, or may hereafter be filed, by attorneys or individuals with respect to the differences in classification of *service* and *non-service* employees under this Order?

Each claim must be decided on its merits by the administrator, the latter keeping in mind the distinction between *service employee* and *non-service employee* as delineated by the Attorney General.

Very truly yours,

THEODORE D. PARSONS,  
*Attorney General.*

By: GRACE J. FORD,  
*Assistant Deputy Attorney General.*