

**MEMORANDUM**

June 19, 2015

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Action:** Expedited Bill 24-15, Human Rights – Minimum Wage – Tipped Employee – Amendments

**Health and Human Services Committee recommendation (3-0): enact the Bill with an amendment.**

Expedited Bill 24-15, Human Rights – Minimum Wage – Tipped Employee – Amendments, sponsored by Lead Sponsors Councilmembers Berliner, Katz, Council Vice President Floreen, and Councilmember Rice was introduced on May 21, 2015. A public hearing was held on June 9 and a Health and Human Services Committee worksession was held on June 16.

Bill 24-15 would:

- (1) modify the amount of the tip credit an employer can use to calculate the minimum wage for a tipped employee working in the County;
- (2) require an employer of a tipped employee to submit quarterly wage reports;
- (3) require the Executive to establish an online reporting system for quarterly wage reports; and
- (4) generally amend the law governing the minimum wage for a tipped employee working in the County.

**Background**

In November 2013, the County enacted Bill 27-13, Human Rights and Civil Liberties – County Minimum Wage – Dollar Amount, establishing the County minimum wage with phased increases on October 1 of each year through 2017. Earlier this year the Council modified some of the effective dates for the phased increases by enacting Bill 59-14, Human Rights and Civil Liberties – County Minimum Wage – Effective Dates.

A tipped employee under Bill 27-13 must be paid the County minimum wage, but the employer may subtract from the hourly wage paid a tip credit. The maximum tip credit is the County minimum wage less 50% of the State minimum wage. For example, the County minimum

wage is \$8.40 per hour. The State minimum wage is currently \$8.00 per hour. Therefore, the maximum tip credit is \$8.40 less \$4.00 (50% of \$8.00) or \$4.40. Therefore, an employer must pay a tipped employee working in the County a base pay of \$4.00 per hour. If the employee does not earn enough in tips to cover the tip credit, the employer must make up the difference. However, the maximum tip credit will change as the County minimum wage and the State minimum wage change over time. A chart showing the different wage rates and the tip credit over time is at ©5. The County minimum wage less the tip credit (the County base pay for a tipped employee) is always 50% of the State minimum wage, but it would change over time as the State minimum wage rises. However, the State minimum wage less the State tip credit (the State base pay for a tipped employee) remains at the current \$3.63 per hour. Bill 24-15 would keep the County base pay for a tipped employee at its current \$4.00 per hour as the State minimum wage rises. An employer would still have to ensure that a tipped employee working in the County receives enough tips to cover the tip credit.

The Bill would also require the Executive to establish an online reporting system and an employer would have to file a quarterly report certifying that each tipped employee received the minimum wage through the base pay plus tips.

### **Public Hearing**

Shelley Moskowitz, representing Jews United for Justice (©6) opposed the Bill because it would freeze the base pay for tipped employees. Ashlie Bagwell, Harris Jones & Malone, representing a coalition of County Restaurants, Dan Simons, owner of Founding Farmers Restaurants, Lynn Martins, Seibel's Restaurant, and Omar Martinez, Silver Diner Restaurant each supported the Bill. The restaurant representatives argued that forcing a restaurant to increase the base pay for their servers, who earn significantly more than the County minimum wage in tips, would give them less money to pay their non-tipped employees working in the kitchen. We also received similar written testimony from the Restaurant Association of Maryland (©7-9) and Clyde's Restaurant Group (©10-11).

### **HHS Worksession**

The Committee reviewed the Bill and discussed the reporting requirement. The Committee amended the Bill to clarify that the online system that the Executive must establish for employers to report would be an optional method of complying. With this amendment, the Committee (3-0) recommended approval of the Bill.

### **Issues**

#### **1. What is the fiscal and economic impact of the Bill?**

OMB estimated that there are 35,592 tipped employees working in the County. See ©14. Based upon this estimate, OMB estimated that the Office of Human Rights would need to add 2 Investigator II positions at an annual recurring cost of \$270,000 to review, verify, or investigate each employer report. However, the Bill does not require the Office of Human Rights to step up enforcement of the application of the minimum wage to tipped employees. In fact, the Office

currently has only 4 investigators to cover enforcement of all of the various discrimination laws and other laws recently added by the Council. To increase the enforcement staff by 50% just to review reports on tipped employees is inefficient and unnecessary. OMB also estimated that the online reporting system would have a one-time cost of \$100,000 to develop and implement and a recurring \$10,000 cost to maintain.

Finance was unable to find reliable information about employment, wages, and income for the restaurant industry in Montgomery County. Looking at national data, Finance concluded that the Bill would not have a negative impact on employment and could have a positive impact on wages for non-tipped employees who work with tipped employees.

## **2. Should the base pay for tipped employees be set at \$4.00 per hour?**

Tipped employees must be paid the County minimum wage for all hours worked in the County. If the sum of the base pay plus the tips received does not equal the County minimum wage, the employer must pay the employee the difference. The current base pay for tipped employees will keep rising as the State minimum wage rises. See the chart at (C5). The restaurant industry representatives argued that tipped employees in their restaurants already earn more than the minimum wage in tips alone. For example, the general manager for Seibel's Restaurant in Burtonsville, Lynn Martins, testified that the servers in her restaurant average \$22 per hour in tips. Therefore, raising the base pay for a server working at Seibel's would increase the pay for a server and reduce the amount of revenue available for the restaurant to pay non-tipped employees working in the kitchen. In addition, the rising base pay for tipped employees is complicated for businesses to keep up with and difficult to enforce. **Committee recommendation (3-0):** approve the provision setting base pay for tipped employees at \$4.00 per hour.

## **3. Should the Bill require quarterly payroll reports?**

The Bill would require each employer in the County to send a quarterly payroll report to the Director of the Office of Human Rights within 30 days after the end of the quarter. The report must include a certification from the employer that each tipped employee was paid the County minimum wage. The Bill would also require the Executive to establish an internet based reporting system for an employer of a tipped employee to complete these reports. The Committee discussed whether the online reporting system that the Executive must establish would be the exclusive method of complying. The Committee decided that it should not be the only way to comply and amended the Bill to clarify that issue. See lines 28-31 at C3.

By law, the Maryland Department of Labor Licensing and Regulation (DLLR) has authority to investigate complaints about the County's minimum wage law and take action to enforce it. The County Office of Human Rights has concurrent authority to do so, but due to staffing limitations, routinely refers complaints to DLLR. However, according to Jenny Baker, Assistant Attorney General and counsel for the DLLR, the State would not accept a request to investigate an employer from the County resulting from a review of a payroll report required by Bill 24-15. (See C12) DLLR only accepts complaints from an employee. Therefore, if a review of the payroll record indicates a violation, the County would have to either investigate the employer itself or ask an affected employee to file a complaint with the State directly.

None of the restaurant representatives objected to the proposed quarterly payroll reporting requirement. Although, it may not lead to greater enforcement by the State, it could encourage employers to comply with the law. **Committee recommendation (3-0):** approve the new reporting requirement.

This packet contains:	<u>Circle #</u>
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Expedited Bill No. 24-15  
Concerning: Human Rights – Minimum  
Wage – Tipped Employee –  
Amendments  
Revised: June 16, 2015 Draft No. 3  
Introduced: May 21, 2015  
Expires: November 21, 2016  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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Lead Sponsors: Councilmembers Berliner, Katz, Council Vice President Floreen, and  
Councilmember Rice

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**AN EXPEDITED ACT** to:

- (1) modify the amount of the tip credit an employer can use to calculate the minimum wage for a tipped employee working in the County;
- (2) require an employer of a tipped employee to submit quarterly wage reports;
- (3) require the Executive to establish an online reporting system for quarterly wage reports; and
- (4) generally amend the law governing the minimum wage for a tipped employee working in the County.

By amending

Montgomery County Code  
Chapter 27, Human Rights and Civil Liberties  
Section 27-69

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

*The County Council for Montgomery County, Maryland approves the following Act:*

1           **Sec. 1. Section 27-69 is amended as follows:**

2   **27-69.       Tipped Employees.**

3           (a) *Definition.* As used in this Section, *tipped employee* means:

4               (1) an employee who:

5                       (A) is engaged in an occupation in which the employee  
6                               customarily and regularly receives more than \$30 each  
7                               month in tips;

8                       (B) has been informed by the employer about the provisions of  
9                               this Section; and

10                      (C) has kept all of the tips that the employee received.

11               (2) Notwithstanding paragraph (1)(C), this Section does not prohibit  
12                       the pooling of tips.

13           (b) *Computation of wage.* Except as provided in subsection (c), an  
14                       employer may include, as part of the wage of a tipped employee:

15                      (1) an amount that the employer sets to represent the tips of the  
16                               employee; or

17                      (2) if the employee or representative of the employee satisfies the  
18                               Director that the employee received a lesser amount in tips, the  
19                               lesser amount.

20           (c) *Limit.* The tip credit amount that the employer may include under  
21                       subsection (b) must not exceed the County minimum wage less [50% of  
22                       the minimum wage required for that employee under the State Act]  
23                       \$4.00 per hour.

24           (d) *Reports.* An employer who employs a tipped employee in the County  
25                       must submit a quarterly wage report within 30 days after the end of each  
26                       quarter to the Director certifying that each tipped employee was paid the  
27                       minimum wage required by this Section.

28 (e) Online reporting system. The Executive must establish an internet  
29 based reporting system as an optional method for an employer of a  
30 tipped employee to submit the quarterly wage report required by  
31 subsection (d).

32 **Sec. 2. Expedited Effective Date.**

33 The Council declares that this legislation is necessary for the immediate  
34 protection of the public interest. This Act takes effect on July 1, 2015.

35 *Approved:*

36

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George Leventhal, President, County Council

Date

37 *Approved:*

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Isiah Leggett, County Executive

Date

39 *This is a correct copy of Council action.*

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Linda M. Lauer, Clerk of the Council

Date

## LEGISLATIVE REQUEST REPORT

Expedited Bill 24-15

*Human Rights – Minimum Wage – Tipped Employee – Amendments*

- DESCRIPTION:** Bill 24-15 would:
- (1) modify the amount of the tip credit an employer can use to calculate the minimum wage for a tipped employee working in the County;
  - (2) require an employer of a tipped employee to submit quarterly wage reports; and
  - (3) require the Executive to establish an online reporting system for quarterly wage reports.
- PROBLEM:** The changing base pay for a tipped employee has caused some confusion among employers in the County.
- GOALS AND OBJECTIVES:** Reduce confusion over the amount of base pay for a tipped employee.
- COORDINATION:** Human Rights, County Attorney
- FISCAL IMPACT:** To be determined.
- ECONOMIC IMPACT:**
- EVALUATION:** N/A
- EXPERIENCE ELSEWHERE:** Federal, State, and County minimum wages are different.
- SOURCE OF INFORMATION:** Robert H. Drummer, Senior Legislative Attorney
- APPLICATION WITHIN MUNICIPALITIES:** No change.
- PENALTIES:** No change.

**County and State Minimum Wage for Tipped Employees**

**County** minimum wage for tipped employees = County minimum wage minus County "tip credit."

**County** tip credit must not exceed the County minimum wage minus 50% of the State minimum wage.

**State** minimum wage for tipped employees = State minimum wage minus State "tip credit."

**State** tip credit must not exceed State minimum wage minus \$3.63.

<b>Date</b>	<b>County minimum wage</b>	<b>Maximum County tip credit</b>	<b>County min. wage for tipped employees less max. tip credit</b>	<b>State minimum wage</b>	<b>Maximum State tip credit</b>	<b>State min. wage for tipped employees less max. tip credit</b>
October 1, 2014	\$8.40	\$4.77	\$3.63	\$7.25	\$3.62	\$3.63
January 1, 2015	\$8.40	\$4.40	\$4.00	\$8.00	\$4.37	\$3.63
July 1, 2015	\$8.40	\$4.27	\$4.13	\$8.25	\$4.62	\$3.63
October 1, 2015	\$9.55	\$5.42	\$4.13	\$8.25	\$4.62	\$3.63
July 1, 2016	\$10.75	\$6.37	\$4.38	\$8.75	\$5.12	\$3.63
July 1, 2017	\$11.50	\$6.87	\$4.63	\$9.25	\$5.62	\$3.63
July 1, 2018	\$11.50	\$6.45	\$5.05	\$10.10	\$6.47	\$3.63

Testimony of Shelley Moskowitz  
on behalf of Jews United for Justice  
to  
Montgomery County Council  
Hearing on Expedited Bill 24-15,  
Human Rights - Minimum Wage - Tipped Employee Amendments

June 9, 2015

Good afternoon. My name is Shelley Moskowitz. I am here today on behalf of Jews United for Justice (JUFJ) which has an active and growing membership base in Montgomery County, Maryland. I have lived in the metro-DC region for over 25 years and I am a past President of JUFJ's Board of Directors. I want to thank the Council for holding this hearing today and giving me an opportunity to speak.

Bill 24-15 would modify the amount of the tip credit an employer can use to calculate the minimum wage for a tipped employee working in the County. It would require an employer of a tipped employee to submit quarterly wage reports and it would require the Executive to establish an online reporting system for those reports; and it generally amends the law governing the minimum wage for a tipped employee working in the County.

JUFJ and hundreds of our members were strong supporters of efforts to raise the minimum wage in Montgomery County and the state of Maryland. While the bill that went to the Governor's desk gradually raises the state minimum wage to \$10.10, it also included amendments favored by restaurant industry lobbyists that froze the wages of tipped workers at a sub-minimum rate of \$3.63 per hour. Montgomery County's minimum wage gradually increases to \$11.50 in 2018 with tipped workers' wages slated to be set at half of the rising state minimum wage. The bill under consideration today would lock Montgomery County's tipped workers' wages at \$4.00 per hour rather than allowing it to grow to \$5.05. Why? This may eliminate some confusion among County employers when they calculate the tip credit as the base state wage rises, but more than anything, it does a disservice to low-wage tipped workers. They must make up the gap by relying on tips that by their very nature are unpredictable – they can go up or down depending on the weather or the shift they are given. While some tipped workers at white tablecloth restaurants may earn a good living with tips, the average worker earns less than \$10 per hour. Since customers are unlikely to change their tipping behavior, it means that more tipped workers will be in danger of making less than minimum wage.

In theory, employers are supposed to pay their workers the amount needed to bring them up to minimum wage if their tips are too low. Unfortunately, few managers make it easy for workers to make up the difference and many employees are either unaware of this regulation or fear for their jobs if they speak up. Bill 24-15 may improve reporting, but it does not guarantee compliance.

Jewish tradition teaches that we have a duty to "speak up, judge righteously, champion the poor and the needy (Proverbs 31:9)." That is why I am here today. Seven states, including California and Minnesota already provide the same minimum wage for restaurant workers as for everyone else. We will continue to stand with tipped workers and we want to work with you to close the wage gap. Thank you.



## **Council Bill 24-15 Position and Issue Background**

The *Restaurant Association of Maryland* strongly supports Council Bill 24-15, which would freeze Montgomery County's tip wage at the current \$4.00/hour. Keeping Montgomery's tip wage at \$4.00 will help eliminate the confusion associated with annual tip wage increases and avoid putting Montgomery County's full-service restaurants at an even greater competitive disadvantage with regard to regional tip wages. At \$4.00/hour, Montgomery County's tip wage will still be higher than the frozen tip wages in the rest of Maryland and surrounding jurisdictions (MD & Prince George's County - \$3.63; D.C. - \$2.77; VA - \$2.13).

Given that tips are considered as wages, tipped employees are generally the highest hourly wage earners in a full-service restaurant, often making significantly more than minimum wage. Keeping the tip wage at \$4.00/hour also makes it easier for full-service restaurant operators to give raises to their non-tipped employees, which helps to reduce the hourly wage disparity between dining room staff and kitchen staff.

To address concerns about ensuring that tipped employees make at least the full hourly County minimum wage in combined tip wage plus tips, we also support this legislation's quarterly wage and hour reporting requirement for employers of tipped employees to ensure compliance. This information can be easily obtained from payroll reports.

### **BACKGROUND: UNDERSTANDING TIPPED EMPLOYEES' WAGES**

#### **THE TIP CREDIT: WHY IT EXISTS**

Congress has for decades defined "wages" under Section 203(m) of the Fair Labor Standards Act (FLSA) to include not just cash, but certain other credits and benefits that employees receive as a result of their employment, including tips.

Tip income is an important part of the wages and benefits employees receive due to employment. In fact, tip-earning employees are among the industry's highest-earning employees, earning a median of \$12 to \$17 an hour in tips, according to recent National Restaurant Association research. Employees and employers pay taxes on tipped wages.

For these reasons, section 203(m) of the FLSA allows employers to apply a portion of the tip earnings employees receive because of their employment toward the employer's obligation to pay tipped employees the minimum wage. This is called taking a "tip credit." Employers may take a tip credit only under strict conditions.

## **TIPS AS WAGES**

Federal and state tax laws classify tips as wages and tax employees and employers accordingly.

- Employees owe **income and FICA** (Social Security and Medicare) taxes on their tip income.
- The federal government considers all tips as wages for **Social Security** purposes. Employers pay Social Security taxes on the tips employees report, and tip income is included in the government's wage calculations for Social Security benefits.
- The federal government considers all tips as wages for **Medicare** purposes, and requires employers to pay Medicare taxes on all reported tip income.
- Tips are also considered as wages for **unemployment insurance** purposes, and employers are required to pay unemployment insurance taxes on reported tip income.

## **HOW THE TIP CREDIT WORKS**

If an employee meets the definition of a "tipped employee," tip-credit law allows an employer to credit toward the required minimum wage rate a portion of the tips received by the employee and reported to the employer.

Current Montgomery County law allows employers to pay a tipped employee a minimum cash tip wage of at least \$4.00 an hour and take a tip credit of up to \$4.40 an hour (i.e., the difference between the current \$8.40 County minimum wage and the \$4.00 tip wage).

If an employee's hourly tips fall below the tip credit (currently \$4.40 an hour) the employer is responsible for making up the difference by paying any additional wages needed to bring the employee up to the required County minimum wage. Thus, a tipped employee can never be paid below the minimum wage. In fact, paying a tipped employee below minimum wage is a violation of federal, state and local laws.

## **PROTECTING EMPLOYEES**

Federal, state and local wage laws provide strong protections to ensure that tipped employees never earn less than the applicable minimum wage. Employers must meet the following conditions in order to claim any tip credit:

1. A tip credit can be taken only against the wages of employees who customarily and regularly receive at least \$30 per month in tips.
2. In cases where an employee's tip earnings fall below the maximum permissible tip credit, the employer is responsible for making up the difference to bring the employee up to the applicable minimum wage.
3. The employer must notify the employee of the tip credit taken.
4. Employees must be allowed to retain all of their tips, except for valid tip pools.
5. Employers must have records documenting that employees earned tips in an amount at least equal to the tip credit claimed.

## **TIPPED EMPLOYEES' WAGES: MYTHS & FACTS**

### *MYTH #1: TIPPED EMPLOYEES ARE PAID BELOW MINIMUM WAGE.*

**FACT:** Tipped employees cannot be paid below minimum wage. The minimum wage for tipped employees is the exact same as the minimum wage for every other employee in Montgomery County (currently \$8.40). Employers must ensure that the tipped employee earns at least \$8.40 an hour (or the applicable County minimum wage) in tip wage plus tips or the employer is responsible for making up the difference. It is not legal for any employee in the County to earn less than the full minimum wage per hour.

### *MYTH #2: CUSTOMERS ARE SUBSIDIZING RESTAURANT EMPLOYEES' WAGES.*

**FACT:** Restaurant employers invest in their businesses to provide the conditions that enable employees to earn tips. Congress created the tip-credit system and its safeguards for employees decades ago because lawmakers recognized that tipped employees receive tips due to the jobs their employers provide for them. Tipped employees receive additional wages in the form of tips given to them by their employer's guests. This money is not given to other employees. That's why federal law treats tipped and non-tipped employees differently for wage purposes. The tip credit lets employers take tipped employees' special status into account for purposes of meeting the employer's obligation to pay these employees the minimum wage.

### *MYTH #3: TIPPED EMPLOYEES EARN POVERTY-LEVEL WAGES*

**FACT:** Most tipped employees are far from minimum-wage earners. Server positions in restaurants provide opportunity, flexibility and, often, very competitive pay. Recent *National Restaurant Association* research shows that on a national level, restaurant servers earn a median hourly wage of between \$16 and \$22, counting both tips and employer-paid tip wage. Looking at tip income alone, entry-level servers earn a median of \$12 an hour in tips, with more experienced servers earning a median of \$17 an hour in tips, according to the research. *NOTE: These figures represent overall averages; the hourly earnings of servers vary significantly based on the type of establishment and the average per-person check size.*

### *MYTH #4: EMPLOYERS ABUSE WAGE-AND-HOUR RULES WHEN THEY PAY TIPPED EMPLOYEES.*

**FACT:** There will always be a few who violate any law imposed on citizens or companies. However, employers risk costly wage-and-hour lawsuits, significant back-pay requirements and stiff penalties if they take a tip credit without meeting all the legal requirements for doing so. Restaurant employers are not willing to knowingly break the law or jeopardize their businesses by failing to take the required steps for claiming a tip credit. The vast majority of restaurant operators follow the rules, designed as safeguards for tipped employees. These requirements include ensuring that tipped employees earn and report tips in an amount equal to at least the amount of the tip credit claimed, and that the employer has records to prove it. In cases where an employee's earnings fall below the maximum permissible tip credit, the employer is responsible for making up the difference to meet the minimum wage.

# **CLYDE'S RESTAURANT™** **G · R · O · U · P**

3236 M Street, NW • Washington, DC 20007 • (202) 333-9180 • Fax: (202) 625-7429 • clydes.com

**Support the Tipped Wage Freeze**  
**Council Bill 24-15**  
**Jeff Owens**  
**Clyde's Restaurant Group**

I want to share some detailed data with you about our employees and customers to help you understand why it is appropriate to keep the Montgomery County tipped wage at \$4.00/hour.

Clyde's Restaurant Group owns and operates 14 restaurants in the Washington D.C. metropolitan area, two of which are located in Montgomery County.

## **Tipped Employees are the Highest Earners on Staff**

Today we have 339 employees in our two Montgomery County restaurant operations of which 285 are County residents and 178 earn gratuities. We always strive to staff enough servers to give them each a small section of tables and the opportunity to provide great service and earn a customary tip of nearly 20%. All tipped employees are required to report their tip income to us to be included in both the employer and employee payroll tax calculations.

These tipped employees are highly skilled and provide our restaurants' most significant interaction with our guests. When claimed tip income considered, they are the highest paid staff in the restaurant.

## **\$18.51 per hour**

During a recent pay period which includes the 14 days from May 13 to 26, our two locations staffed 157 tipped employees as servers, bartenders and bus staff. These employees worked 8,507 hours and earned \$157,477 which is comprised of the cash wages paid by Clyde's plus declared tip income from gratuities. This equates to \$18.51 per hour. All employees earned more than the minimum wage.

The non-tipped departments include the seating hosts and the kitchen staff for which we staffed 128 hourly employees during this pay period. These folks worked 7,559 hours and earned \$85,965 in wages which equates to \$11.37 per hour on average. Eight of the 128 non-tipped employees are being paid the minimum wage of \$8.40 per hour with the remaining 120 at higher rates.

The staff departments ranked from the highest to lowest hourly pay is as follows:

	<u>Earnings</u>	<u>Hours</u>	<u>Per Hour</u>
Bartender	\$32,902.59	1,517.19	\$21.69
Backwait	\$19,619.00	1,004.10	\$19.54
Frontwait	\$84,828.01	4,485.02	\$18.91
Bus	\$20,127.64	1,500.90	\$13.41
Total Tipped	\$157,477.24	8,507.21	\$18.51
Cook	\$42,620.87	3,418.27	\$12.47
Host	\$11,206.18	1,019.78	\$10.99
Prep	\$19,309.68	1,797.09	\$10.74
Dish	\$12,828.73	1,324.01	\$9.69
Total Non-tipped	\$85,965.46	7,559.15	\$11.37

“Just raise the prices to pay the higher wages.....”

Some might say just increase prices to cover higher wages because the dining guests will not mind paying more. I can tell you we are very fortunate that our guests are willing to pay \$15.50 for a grilled chicken salad or \$13.50 for a cheeseburger so that we are able to achieve a 2% profit margin. We work very hard to keep up with the price sensitivity of our guests.

For example, when the wholesale crabmeat market became volatile during the past year we have offered a crab cake platter priced at \$26.95 and \$19.95 at different points of time. For the same 26-day period in May 2014 and May 2015, nine of our restaurants in the Washington D.C. metropolitan area sold 14,556 platters when offered at \$19.95 but only sold 3,454 of the same platters when offered at \$26.95.

I urge you to support Council Bill 24-15 to keep the Montgomery County tipped wage at the current \$4.00/hour.

Thank you.



Jeff Owens  
Chief Financial Officer  
Clyde's Restaurant Group  
jowens@clydes.com

## **Drummer, Bob**

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**From:** Jenny Baker -DLLR- <jenny.baker@maryland.gov>  
**Sent:** Tuesday, June 09, 2015 1:08 PM  
**To:** Drummer, Bob  
**Cc:** Thomas J. Meighen -DLLR-; Kelly M. Schulz -DLLR-; Sarah Harlan -DLLR-  
**Subject:** Expedited Bill 24-15 - Tipped Employee Amendments

Bob-

This email follows up on our conversation yesterday regarding Expedited Bill 24-15 - Tipped Employee. As we discussed, enforcement of the minimum wage law by the Department's Employment Standards Service ("ESS") is complaint driven. ESS accepts complaints from employees not third parties. As drafted, if Montgomery County were to determine that there may be a violation of the Montgomery County tip credit, any complaint would have to be filed by the employee and not Montgomery County.

Let us know if you have any other questions. Jenny

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Jenny Baker  
Assistant Attorney General  
Department of Labor, Licensing and Regulation  
(410) 230-6135



ROCKVILLE, MARYLAND

**MEMORANDUM**

June 15, 2015

**TO:** George Leventhal, President, County Council

**FROM:** Jennifer A. Hughes, Director, Office of Management and Budget  
Joseph F. Beach, Director, Department of Finance

**SUBJECT:** FEIS for Council Bill 24-15, Minimum Wage – Tipped Employee – Amendments

Please find attached the fiscal and economic impact statements for the above-referenced legislation.

JAH:fz

**cc:** Bonnie Kirkland, Assistant Chief Administrative Officer  
Lisa Austin, Offices of the County Executive  
Joy Nurmi, Special Assistant to the County Executive  
Patrick Lacefield, Director, Public Information Office  
Joseph F. Beach, Director, Department of Finance  
James Stowe, Director, Office of Human Rights  
Loretta Garcia, Office of Human Rights  
Dieter Klinger, Department of Technology Services  
Philip Weeda, Office of Management and Budget  
Naeem Mia, Office of Management and Budget

**Fiscal Impact Statement**  
**Council Bill 24-15, Minimum Wage – Amendments**

1. Legislative Summary:

The proposed legislation would do the following:

- modify the amount of the tip credit an employer can use to calculate the minimum wage for a tipped employee working in the County;
- require an employer of a tipped employee to submit quarterly wage reports;
- require the Executive to establish an online reporting system for quarterly wage reports; and
- generally amends the law governing the minimum wage for a tipped employee working in the County.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

The new law requires the monitoring of quarterly reports that cover potentially 35,592 employees who are part of the "Tipped Employee" classification in Montgomery County according to the Maryland Department of Labor, Licensing and Regulation, Workforce Investment Area (WIA), Occupational Wage Estimates, April 2015. Categories of such workers include Message Therapists, Bartenders, Waiters and Waitresses, Hosts and Hostesses at restaurants, lounges and coffee shops, Gaming Service Workers, Barbers, Hairdressers, Hairstylists, and Cosmetologists, Miscellaneous Personal Appearance Workers, Personal Care and Service Worker, Taxis Drivers and Chauffeurs.

The Bill, as drafted, does not require specific action regarding the review or processing of the reports. If the Office of Human Rights is required to review, verify, or investigate the reports it is estimated that up to three additional staff may be required. The office estimates it will need two Investigator II positions and an Office Services Coordinator at a cost of approximately \$270,000.

In addition, the law would require the creation of an electronic reporting system to be developed by the Department of Technology Services (DTS). DTS estimates the department will need approximately \$100,000 to develop and implement an internet-based reporting system for employers to submit quarterly reports on tipped employees. This estimate is based on 800 hours of staff or contractor time at an hourly rate of \$125 per hour. In addition, there will be on-going costs to maintain the reporting system. DTS believes the online application will be available on various County web sites (via links) and will have the ability to generate reports to measure compliance.

It is unclear whether or not civil penalties for violations would apply; thus any revenue estimates cannot be determined at this time.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Total
Personnel	\$270,000	\$270,000	\$270,000	\$270,000	\$270,000	\$270,000	\$1,620,000
IT Report Development & Maintenance	\$100,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$150,000
TOTAL	\$370,000	\$280,000	\$280,000	\$280,000	\$280,000	\$280,000	\$1,770,000

It is unclear whether or not civil penalties for violations would apply; thus any revenue estimates cannot be determined at this time.

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

Not applicable.

5. An estimate of expenditures related to County's information technology (IT) systems, including Enterprise Resource Planning (ERP) systems.

See #2.

6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

If the volume of reports, level of review, or investigation increases over time, additional resources may be required.

7. An estimate of the staff time needed to implement the bill.

See answer #2.

8. An explanation of how the addition of new staff responsibilities would affect other duties.

Additional staff would require on-boarding and training.

9. An estimate of costs when an additional appropriation is needed.

Not applicable.

10. A description of any variable that could affect revenue and cost estimates.

Not applicable.

11. Ranges of revenue or expenditures that are uncertain or difficult to project.

The Bill, as drafted, does not require specific action regarding the review or processing of the reports and it is unclear whether or not civil penalties for violations would apply.

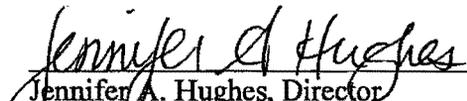
12. If a bill is likely to have no fiscal impact, why that is the case.

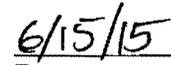
Not applicable.

13. Other fiscal impacts or comments.

None

14. The following contributed to and concurred with this analysis: James Stowe and Loretta Garcia, Office of Human Rights, Dieter Klinger, Department of Technology Services, and Naeem Mia and Philip Weeda, Office of Management and Budget.

  
Jennifer A. Hughes, Director  
Office of Management and Budget

  
Date

**Economic Impact Statement**  
**Bill 24-15, Human Rights – Minimum Wage – Tipped Employee - Amendments**

**Background:**

This legislation would:

- Modify the amount of the tip credit an employer can use to calculate the minimum wage for a tipped employee working in the County,
- Require an employer of a tipped employee to submit quarterly wage reports, and
- Require the County Executive to establish an online reporting system for quarterly wage reports.

The economic impact statement analyzes the economic effect attributed to the first bullet.

**1. The sources of information, assumptions, and methodologies used.**

Sources of information include:

- Bureau of Labor Statistics (BLS), U.S. Department of Labor
  - Occupational Employment Statistics (OES),
  - Quarterly Census of Employment and Wages (QCEW), and
  - *BLS Reports*, April 2015.
- Congressional Budget Office (CBO)
- Maryland Department of Labor, Licensing and Regulation (DLLR)
  - Montgomery County Workforce Investment Area (WIA), Occupational Wage Estimates, April 2015, and
  - Montgomery County WIA, Food Preparation and Serving Related Occupations, Projections 2010-2020.
- National Restaurant Association
- “Waiting for Change: Is it Time to Increase the \$2.13 Subminimum Wage?”, Sylvia A. Allegretto, Institute for Research on Labor and Employment, University of California, Berkeley, December 2013.
- “Legal regulation of tip pooling and tip sharing in the United States hospitality industry”, Rebecca Ahmed, *UNLV Theses/Dissertations/Professional Papers/Capstones*. Paper 593, Spring 2009.
- “The Effect of the Tipped Minimum Wage on Employees in the U.S. Restaurant Industry”, *Southern Economic Journal*, Vol. 80, Issue 3, pp. 633-655, January 2014.

In preparation of the economic impact statement for Bill 24-15, the Department of Finance (Finance) obtained data from BLS, CBO, DLLR, and the National Restaurant Association. Finance also conducted a review of the literature on the minimum wage and tipped employees. However, the literature on the minimum wage, subminimum wage, and data cited therein pertain to the United States and not to the State of Maryland or Montgomery County.

**Economic Impact Statement**  
**Bill 24-15, Human Rights – Minimum Wage – Tipped Employee - Amendments**

The first step in the preparation of the EIS is the definition of tipped employee. The U.S. Department of Labor defines a “tipped employee” as one that “engages in an occupation in which he or she customarily and regularly receives more than \$30.00 per month in tips” (Sources: Ahmed and 29 C.F.R. §531.56). According to Ahmed, employees who make more than \$30.00 in tips on certain holidays and events, but do not regularly receive tips, are not classified as “tipped employees”. According to DLLR, “employers are not allowed to pay tipped employees (earning more than \$30.00 per month in tips) less than \$3.63 per hour, provided each employee earns enough tips to bring their average hourly wage to at least the State minimum of \$7.25 per hour. Deficiencies must be supplemented by the employer to bring the wage up to the minimum wage level.” As of January 1, 2015, the basic combined cash and tip minimum wage rate in Maryland is \$8.00 of which \$3.63 is the minimum cash wage and \$4.37 is the maximum tip credit against the minimum wage. Since January 1, 2003, the three rates – minimum wage, maximum tip credit, and minimum cash wage - were raised four times – in 2007, 2008, 2009, and 2015.

The next step is to determine which occupational categories (or occupation codes) comprise tipped employees. Using data from the monthly Current Population Survey, CBO identifies 11 occupations as tipped employees. The categories include:

- Massage therapists
- Bartenders
- Waiters and waitresses
- Host and hostesses, restaurant, lounge, and coffee shop
- Gaming services workers
- Barbers
- Hairdressers, hairstylists, and cosmetologists
- Miscellaneous personal appearance workers
- Personal care and service workers
- Taxi drivers and chauffeurs
- Dining room and cafeteria attendants and bartender helpers

For purposes of this economic impact statement, Finance discusses the economic impact on the restaurant industry and workforce specifically for waiters and waitresses.

BLS states that “the industry with the highest percentage of workers earning hourly wages at or below the federal minimum wage was the leisure and hospitality (18 percent). Over half of all workers are paid at or below the federal minimum wage in this industry, the vast majority in restaurants and other food services. For many of these workers, tips may supplement the hourly wages received.”

A review of the economic literature by Finance on tipped employment and the minimum wage focused on the restaurant industry. According to the Allegretto study, growth in employment in the full-service restaurant industry grew by 72 percent between 1990 and 2012 compared to approximately 22 percent in private sector employment. Since 1996,

**Economic Impact Statement**  
**Bill 24-15, Human Rights – Minimum Wage – Tipped Employee - Amendments**

the gap between the federal minimum and subminimum wage for tipped workers increased from 50 percent to over 70 percent by 2012.

According to the article in the *Southern Economic Journal*, the U.S. restaurant industry employed nearly 9 million workers and accounted for nearly 50 percent of all hourly workers in the U.S. that were paid at or below the federal minimum wage. Therefore, according to the authors, “because of the sheer size of the industry and the number of its workers that are affected by the minimum wage laws, many studies of earnings and employment effects of minimum wages have focused on the restaurant industry.” Finally, the authors suggest that workers in limited-service restaurants are rarely eligible for tips and their study focused on the full-service, i.e., sit-down dining, restaurant industry.

Data on employment, income, and average wages for the restaurant industry in Montgomery County are either not available or very limited in scope. For example, data for NAICS code 722, food services and drinking places, from the QCEW database are not available for Montgomery County. However, DLLR provides employment by Workforce Investment Area for Montgomery County for waiters and waitresses for April 2015. DLLR estimates employment of 4,980 for waiters and waitresses with a mean wage of \$22,517 and a median wage of \$19,137. These data are limited because the wages do not identify full-time versus part-time workers and whether they are employed by full-service or limited-service restaurants. DLLR also provides a forecast of employment for waiters and waitresses in the County. According to the WIA Occupational Projections for 2010-2020, employment in that occupational category is estimated to increase from 4,681 in 2010 to 5,244 in 2020 or at an average annual rate of nearly 1.2 percent.

To assess the impact of the State of Maryland raising the average hourly rates for tipped employees, Finance analyzed total employment and total wages with NAICS Code of 722. Data with more detailed NAICS Codes for that industry are not available for the State of Maryland. Excluding the recession years of 2008 and 2009 but including 2007 (data for 2015 are not yet available), the impact on raising the minimum and subminimum hourly wages had no negative economic impact on employment but a positive economic impact on total wages from 2006 to 2007.

**2. A description of any variable that could affect the economic impact estimates.**

While the analysis presented in the last paragraph of section #1 suggests that raising the subminimum wage rate did not have a negative impact on employment and total wages in the food services and drinking places and in fact may have had a positive impact on both, such analysis and conclusion is limited based on the structure of the restaurant industry and the availability and the level of detail of economic data for that industry. The variables that could affect the economic impact estimates for employment and incomes are based on the theoretical and empirical effects on raising the subminimum wage pertaining to the restaurant industry.

## Economic Impact Statement

### Bill 24-15, Human Rights – Minimum Wage – Tipped Employee - Amendments

The theoretical effects of a higher subminimum wage on earnings and employment are based on whether the labor market in the restaurant industry is competitive or if the labor market is monopsonistic. Monopsonistic labor market refers to a market with just one employer who pays the same wage to all of his or her workers. Market power is the ability of a firm or business to raise the market price of a good over its marginal cost and has a loyal customer based through repeat visits. The market in this example is one in which the sole employer has market power and faces no competition within a specific market area. The theoretical underlying framework that would determine the economic impact estimates on raising the minimum wage for tipped employees in the restaurant industry is whether the restaurant is either competitive or monopsonistic.

According to the article in the *Southern Economic Journal*, “if the labor market is competitive, an increase in the minimum wage reduces employment of workers previously earning the minimum, but could increase or decrease aggregate earnings of the affected workers depending on the responsiveness of labor demand.” The authors further state that “if the labor market is monopsonistic, small increases in the minimum wage could increase both employment and earnings of affected workers, but sufficiently large increases in the minimum reduce employment.” Based on the authors empirical analysis, such analysis “provides convincing evidence that higher tipped minimum wages increase earnings but reduce employment.” However, the authors qualify their conclusion that their results are “confronted with the difficulties of separately identifying the true effect from a spurious relationship.”

The issue not analyzed by the authors is how the tip credits laws affect the composition of pay for restaurant workers and whether restaurant owners and managers respond by mandating more tip pooling. Such variables would have an economic impact on employment and income by tipped employees. For example, the authors suggest that if employers can offset the increased costs of a higher tipped minimum by requiring tip-pooling, such pooling reduces the tips to tipped employees and redistributes those tips to other workers. Such redistribution may reduce the wages of other workers and offsets the cost of the higher tipped minimum. However, if tips are shared with other workers, laws may limit the ability of an employer to reduce wages through tip-pooling. According to Ahmed, “the U.S. Department of Labor and state employment regulations establish boundaries within which employers can reliably evaluate tipping policies for legal compliance.”

### **3. The Bill’s positive or negative effect, if any on employment, spending, savings, investment, incomes, and property values in the County.**

Because of the lack of specific data on employment, wages, and income for the restaurant industry in Montgomery County, Finance reviewed both the literature on the effects of tipped minimum wage on employees and the effect of the State of Maryland raising the maximum tip credit under the State’s minimum wage. While the analysis of the effect on Maryland’s increase in the tip credit shows that it had no negative impact on employment but a positive impact on total wages, that analysis is limited as stated in section #2. Second, the literature presented conclusions based on a study using nationwide data.

**Economic Impact Statement**  
**Bill 24-15, Human Rights – Minimum Wage – Tipped Employee - Amendments**

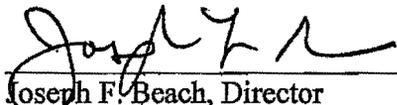
With the caveat of limited data specific to Montgomery County and a review of the literature and analysis using Maryland data for food services and drinking places, Finance assumes that Bill 24-15 could have no negative economic impact on employment but a positive economic impact on incomes for the affected population in the County. However, that caveat is based on the following:

- The restaurant industry is monopsonistic such that employers can increase prices to their customers to offset the cost of increasing the maximum County tip credit without a negative effect on employment and wages.

**4. If a Bill is likely to have no economic impact, why is that the case?**

Based on Finance's caveat present in section #3, Bill 24-14 could have a positive economic impact on income but no economic impact on employment.

**5. The following contributed to or concurred with this analysis: David Platt, Mary Casciotti, and Rob Hagedoorn, Finance;**

  
\_\_\_\_\_  
Joseph F. Beach, Director  
Department of Finance

6/4/15  
\_\_\_\_\_  
Date