



Restaurant Workers

An Overview of the Fair Labor Standards Act (FLSA)



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

dol.gov/agencies/whd
1-866-4-US-WAGE

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Essential Workers

Essential Protections

Presentation Outline

- I. Misclassification and Coverage
- II. Minimum Wage
- III. Overtime
- IV. Tip Pools
- V. Recordkeeping
- VI. Collection and Redistribution of Tips
- VII. Family and Medical Leave Act
- VIII. How to File a Complaint
- IX. Retaliation

Employment Relationship



In order for the FLSA to apply, there must be an employment relationship between the “employer” and the “employee”.

[Fact Sheet 13: Employment Relationship](#)

Misclassification (cont..)

Misclassified employees are often denied:

- Minimum wage
- Overtime pay
- Health insurance
- Workers' compensation
- Unemployment insurance

Misclassification (cont.)

We generally consider the following factors when determining if a worker is an employee or independent contractor:

1. Is the work an integral part of the employer's business?
2. Does the worker's managerial skill affect his or her opportunity for profit and loss?
3. Relative investments of the worker and the employer
4. The worker's skill and initiative
5. The permanency of the worker's relationship with the employer
6. Employer control of work relationship
7. Independent business organization and operation

Misclassification

Misclassified workers may really be an employee even if the worker:

- Agrees to be paid by cash or by check, on the books or off the books
- Receives a 1099 tax form
- Signs an independent contractor agreement
- Engages in work away from company property
- Is registered as an independent contractor or other business entity under state law

Joint Employment

An employee may have two or more employers who are both responsible for paying the minimum wage and overtime for all hours the employee works.

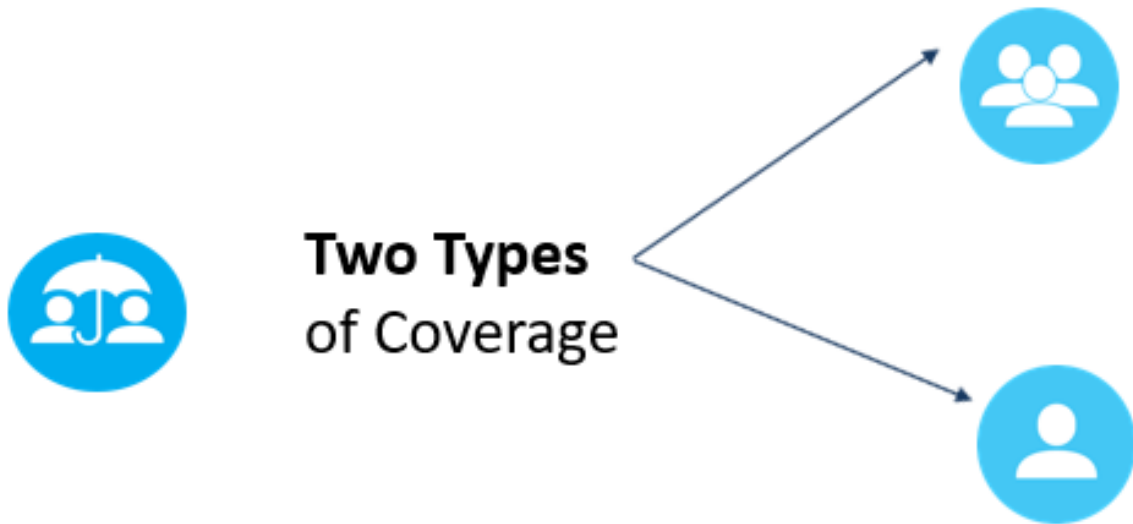
Coverage

Over 148 million workers in more than 10 million workplaces are protected or covered by the FLSA, which is enforced by the Wage and Hour Division of the U.S. Department of Labor.

[View Fact Sheet #14: FLSA Coverage](#)



Two Types of FLSA Coverage



Enterprise Coverage

Enterprise, as a whole, is covered and all employees are entitled to FLSA protections

Individual Coverage

Enterprise, as a whole, is NOT covered; however individual employees are covered and entitled to FLSA protections

Minimum Wage (cont.)

FLSA covered employers generally must pay employees at least the **federal minimum wage of \$7.25 per hour**. This may be higher in some states.



Minimum Wage

May include:

- Wages (salary, hourly, and piece rates)
- Commissions
- Certain bonuses
- Tips (for certain employees)
- Reasonable cost or fair value of room, board, other “facilities” provided by employer for employee’s benefit

Minimum Wage: Tipped Employees (cont.)

Who is a tipped employee?

An employee who works in an occupation where the employee customarily and regularly receives more than \$30 per month in tips.

- Examples include: servers, bartenders, counter personnel who serve customers, and bell hops, to name a few.
- Each employee is considered on a case-by-case basis.

Minimum Wage: Tipped Employees

Employers are required by law to ensure that tipped employees earn at least \$7.25 per hour.



Tipped Employees and Minimum Wage (cont..)



“Cash wage” = The amount paid directly by the employer to the tipped employee before taking into account tips received by the employee.

Tipped Employees and Minimum Wage (cont.)

The employer has two options for ensuring that tipped employees earn \$7.25 per hour:

Option 1. The employer may directly pay the tipped employee the full federal minimum wage of \$7.25 per hour without counting any tips earned; OR

Tipped Employees and Minimum Wage

Option 2. An employer may pay a tipped employee a cash wage of not less than \$2.13 per hour, if the employer notifies the employee beforehand and the employer ensures the tipped employee receives enough tips to make up the difference between the cash wage paid and the federal minimum wage.

Minimum Wage: Notice Requirements (cont.)

Before the employer may pay a cash wage of not less than \$2.13 per hour to a tipped employee, the employer must notify the tipped employee of the following:

Cash Wage

The amount of the cash wage the employer is paying (the wage paid directly by the employer before counting tips received by the employee), which must be at least \$2.13 per hour.

Tips

The amount of tips that the employer must ensure the employee receives to make up the difference between the federal minimum wage and the cash wage paid.

Minimum Wage: Notice Requirements

- Employees must receive at least enough tips to bring the total wage to the minimum wage (\$7.25 per hour);
- Employees are entitled to keep all their tips, except for lawful tip pools; and
- **If the employer fails to provide notice of the requirements above to the tipped employee, the employer must pay the full federal minimum wage of \$7.25 per hour.**

Tip Minimum Wage Examples (cont.)

During a non-overtime workweek, an employer that pays not less than \$2.13 per hour in cash wage must ensure that the employee receives enough tips to make up the difference between the federal minimum wage and cash wage paid.

The amount of the cash wage paid will determine how much the tipped employee must receive in tips to cover the federal minimum wage.

Tip Minimum Wage Examples

CASH WAGE + TIPS = \$7.25 per hour

- \$7.25 - \$2.13 from the employer → Employee must receive \$5.12 per hour in tips
- \$7.25 - \$3.13 from the employer → Employee must receive \$4.12 per hour in tips
- If an employee's tips earned in the workweek combined with the employer's cash wages paid of at least \$2.13 per hour do not equal the minimum wage of \$7.25 per hour, the employer must make up the difference and pay more in cash wage.

Calculations

Gross Weekly Straight Time Pay = Total cash wage + Total tips

The minimum wage is calculated on a weekly basis:

Hourly Rate =
$$\frac{\text{Gross Weekly Straight Time Pay}}{\text{Total Hours Worked Weekly in tipped occupation}}$$

Hourly rate must be at least \$7.25 per hour.

Hours Worked



An employee must be paid for all of the time considered to be “hours worked” under the FLSA. This may include time spent engaged to wait, on-call, in training, or traveling. Work not requested but “suffered or permitted” is work time.

[View Fact Sheet# 22: Hours Worked](#)

Waiting Time

Hours Worked

- Employee unable to use “waiting time” effectively for own purposes
- “Waiting time” controlled by employer

NOT Hours Worked

- Employee completely relieved from duty
- Time period long enough for employee to use for own purposes

On-Call Time

Hours Worked

- Employee must stay on employer premises
- Or, must be so close to the employer's premises that the time cannot be used effectively for employee's own purposes

NOT Hours Worked

- Employee must provide contact information
- Can use time effectively for own purposes

Rest and Meal Periods



- **Short rest breaks** (20 min or less) are compensable.
- **Bona fide meal periods** (typically 30 minutes or more) need not be paid as hours worked.
- Worker must be completely relieved of duty for meal period not to be paid time.

Break Time & Space for Nursing Mothers

The FLSA provides nursing employees, for up to 1 year after the child's birth, with:

- Reasonable break time to express breast milk
- A place, other than a bathroom, that may be used to express milk



Minimum Wage and COVID-19



If my employer requires COVID-19 testing during the workday, do I need to be paid for the time spent undergoing the testing?

Illegal Deductions

Deductions from pay are illegal if:

- Items are primarily for the benefit or convenience of employer, and
- Deduction reduces employee earnings below required minimum wage

Examples of illegal deductions may include deductions for tools or damages to property

Overtime (cont.)

Regular Rate

- Determined by dividing total earnings in workweek (except for statutory exclusions) by total number of hours worked in workweek

$$\text{Gross Weekly Straight Time Pay} \div \text{Total Hours Worked} = \text{RR}$$

- Regular Rate may not be less than the applicable minimum wage
- Total earnings include commissions, certain bonuses, and cost of room, board, and other facilities provided primarily for the employee's benefit

Key Takeaways for Tipped Workers (cont.)

- If an employee's tips earned in the workweek combined with the employer's cash wages paid of at least \$2.13 per hour do not equal the minimum wage of \$7.25 per hour, the employer must make up the difference and pay more in cash wage.
- Employers can only count a limited amount of tips received by the employee towards the employee's minimum wage requirement.

Key Takeaways for Tipped Workers

- The employee's regular rate is calculated based on the cash wage paid plus tips counted towards the minimum wage *not* just the cash wage paid.
- Employers cannot keep tips.



Overtime

For purposes of the following exercises, assume that:

1. The FLSA MW rate is \$7.25;
2. All hours worked by the tipped employee were in a tipped occupation;
3. The employer complied with the notice requirements; and
4. The payroll records are accurate.

Computing Overtime

1. Regular Rate:

Cash Wage + Tips Counted
as Part of the Minimum Wage

2. Half-Time Rate:

Regular Rate x .5

3. Overtime Pay (OT) Due:

Half-Time Rate x OT Hours
Worked

4. Straight Time Pay (ST) Due:

Regular Rate x All Hours Worked

5. Total Wages:

ST Due + OT Due (*Add #3 + #4*)

6. Tip Amount Due:

FLSA 3(m) Tips x All Hours
Worked

7. Total Wages Due:

Total Wages – Tip Amount Due
(*Subtract #6 from #5*)

Example #1 (cont.)

- Tipped employee earns \$256 in tips in the workweek.
- Tipped employee works 50 hours in a workweek.
- Employer pays a cash wage of \$2.13 per hour.
- Employer counts \$5.12 per hour in tips as part of the minimum wage requirement.

Example #1

1. Regular Rate:

$\$2.13$ (Cash Wage) + $\$5.12$ (Tips Counted as Part of Minimum Wage) = $\$7.25$

2. Half-Time Rate:

$\$7.25$ (Regular Rate) x $.5$ = $\$3.63$

3. Overtime Pay Due:

$\$3.63$ (half-time rate) x 10 hours of overtime = $\$36.30$

4. Straight Time Pay Due:

$\$7.25$ x 50 hours = $\$362.50$

5. Total FLSA Wages:

$\$362.50$ (straight time pay) + $\$36.30$ (overtime pay) = $\$398.80$

6. Tip Amount Due:

$\$5.12$ (tips counted as part of minimum wage) x 50 hours = $\$256.00$

7. Total Wages Due:

$\$398.80$ (total FLSA wages) - $\$256.00$ (tip amount due) = $\$142.80$

Note

The employee keeps $\$256$ in tips (except for any contributed to a tip pool).

Steps for Computing Overtime Full Minimum Wage Paid by the Employer

1. Regular Rate:

Gross Weekly Straight Time Pay \div Total Hours Worked

2. Half-Time Rate:

Regular Rate \times .5

3. Overtime Pay (OT) Due:

Half-Time Rate \times Overtime Hours Worked

4. Straight Time Pay Due:

Regular Rate \times All Hours Worked

5. Total Wages:

OT Due + ST Due
(Add #3 + #4)

Example #2: Full MW is paid by Employer

- Employer pays the employee \$15 per hour.
- Tipped employee earns \$500 in tips in the workweek.
- Tipped employee works 50 hours in the workweek.

Example #2

1. Regular Rate:

\$15 per hour

2. Half-Time Rate:

$\$15 \times .50 = \7.50

3. Overtime Pay (OT) Due:

$\$7.50 \times 10 \text{ OT hours} = \75

4. Straight Time Pay Due:

$\$15 \times 50 \text{ hours} = \750

5. Total Wages:

$\$750 + \$75 = \$825.00$

Note

This tipped employee is paid the hourly wage of \$15 and receives all tips earned of \$500 (except for any tips contributed to a tip pool).

Tip Pools (cont....)

1. Tip pool where the employer pays not less than \$2.13 per hour in cash wage and counts tips as part of the minimum wage.
2. Tip pool where the employer pays the full federal minimum wage of \$7.25 per hour.



Tip Pools (cont...)

Tip pool where the employer pays not less than \$2.13 per hour in cash wage and counts tips as part of the minimum wage

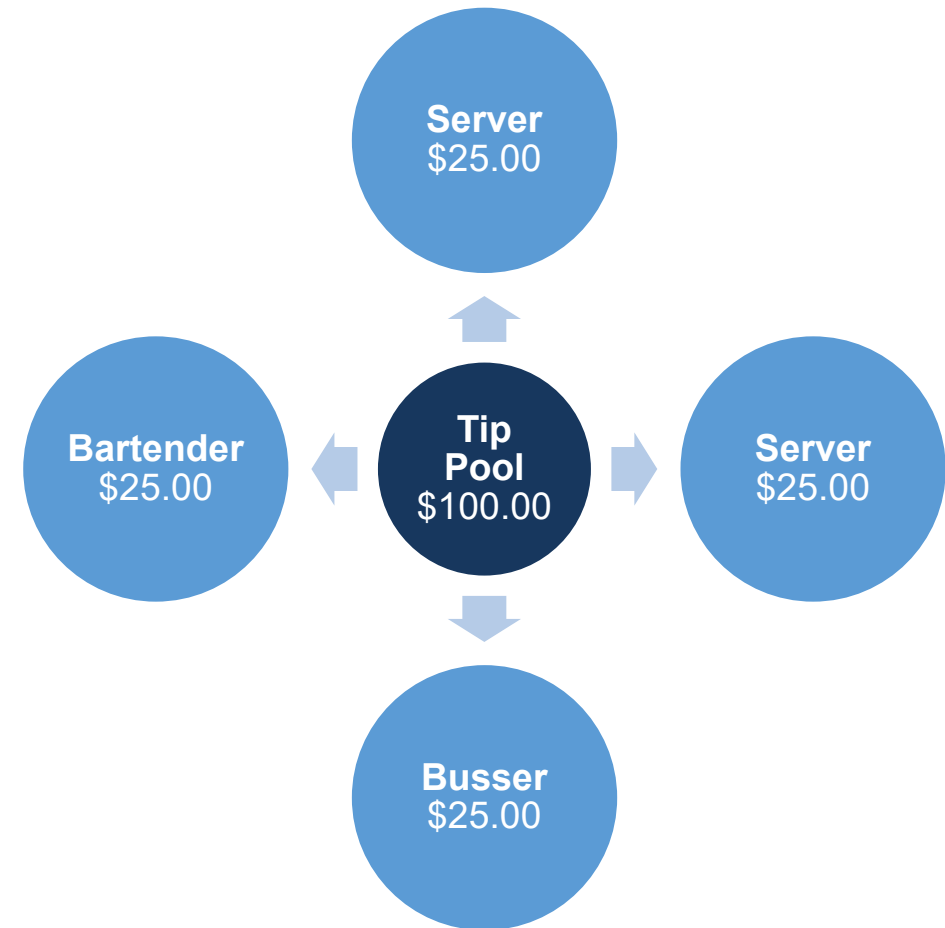
- Only tipped employees in occupations that “customarily and regularly receive tips”
- No back of the house or other non-tipped employees
- No managers or supervisors (or owners or employers) in the tip pool

Employers, managers, and supervisors may not keep employees’ tips

Tip Pools (cont..)

Who may participate in this tip pool?

- Only employees who customarily and regularly receive tips
- Non-tipped employees cannot be part of a mandatory tip pool where the employer pays not less than \$2.13 per hour in cash wage and counts tips as part of the tipped employee's minimum wage.



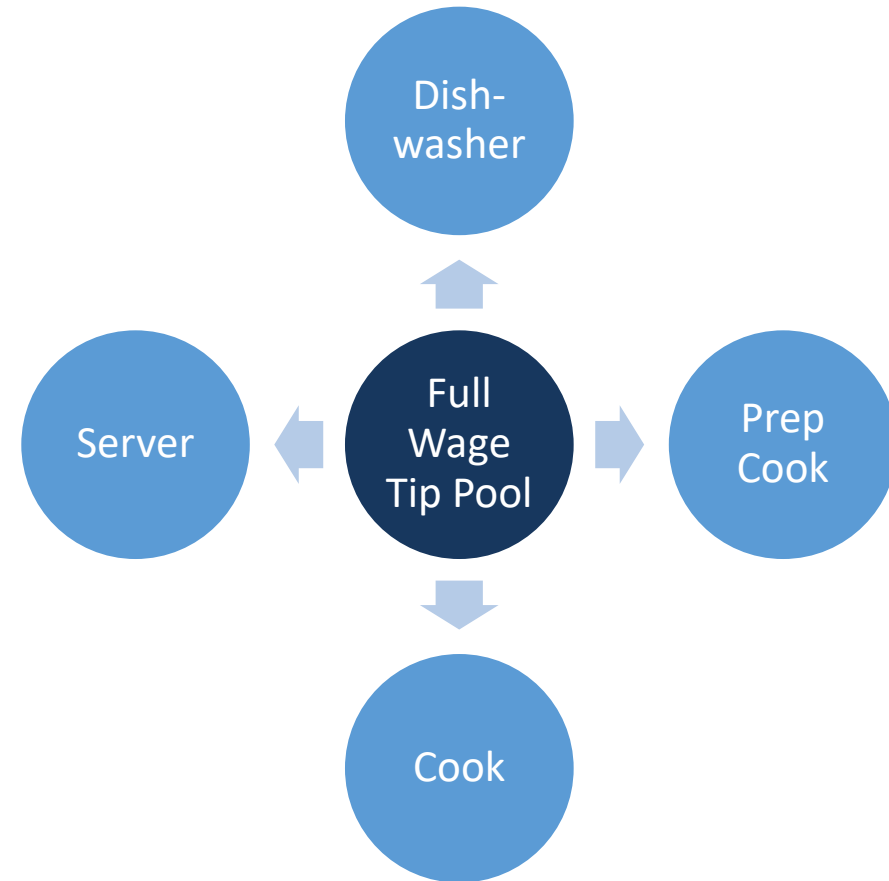
Tip Pools (cont.)

Tip pool where the employer pays the full federal minimum wage of \$7.25 per hour

- May include employees who are not tipped employees (for example, cooks and dishwashers) in the tip pool
- No managers or supervisors (or owners or employers) in the tip pool

Tip Pools

Tip pool where the employer pays the full federal minimum wage of \$7.25 per hour in cash wage.



Dual Jobs

Dual Jobs – an employee works for the same employer in a tipped occupation and non-tipped occupation.

An employer may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation.

Work that is part of tipped occupation is either:

- **Tip-producing work** – any work performed by a tipped employee who receives tips by providing service to customers; or
- **Directly supporting work** – work performed by a tipped employee to prepare or to assist in tip-producing customer service work, if the directly supporting work is not performed for a substantial amount of time.

Dual Jobs: When an Employer Can Take a Tip Credit

An employer can take a tip credit for a tipped employee only when the employee is performing tip-producing work or when the employee is performing directly supporting work, so long as that work is not performed for a substantial amount of time.

An employee has performed directly supporting work for a substantial amount of time if:

- The directly supporting work is more than 20 percent of the hours worked in the employee's tipped workweek; or
- The directly supporting work is performed for any continuous period of time of more than 30 minutes.

Example 1: Dual Jobs

- A Server is paid not less than \$2.13 per hour in cash wages.
- The Server works 30 hrs this workweek (5 hrs, 6 days/week).

Tip-Producing Work

Take orders, serves food and drink, attends to customer spills, processes credit card and cash payment.

Directly Supporting Work

Refills salt and pepper shakers and condiment bottles, rolls silverware, folds napkins, and vacuums under tables.

Total Tasks Time: 30 minutes before/after each shift and additional periods of no more than 30 minutes during lulls, totaling 9 hours per week.

Example 1: Dual Jobs Continued

Question: When can the Server's employer take a tip credit and when must the employer pay a direct cash wage at least equal to the minimum wage?

Example 2: Dual Jobs

- A Bartender is paid ~~\$~~4.25 per hour in cash wages.
- The Bartender works 40 hours this workweek (8 hours, 5 days/week)

Tip-Producing Work

Makes and serves drinks, talks and serves food to customers at the bar, and wipes down the surface of the bar where customers are sitting.

Directly Supporting Work

Slices and pits fruit for drinks for the next day's service, wipes down the bar and tables in the bar area, cleans bar glasses, retrieves liquor and supplies, cleans ice coolers and bar mats, and vacuums under the tables in the bar area.

Total Tasks Time: 90 minutes after each shift. 7.5 hours per week.

Example 2: Dual Jobs Continued

Question: When can the Bartender's employer take a tip credit and when must the employer pay a direct cash wage at least equal to the minimum wage?

Collection and Redistribution of Tips

An employer that collects tips for tip pools must fully distribute tips no later than the regular payday for the workweek or pay period in which the tips were collected.

Recordkeeping

Your employer must keep records of all wages paid to you and all hours you worked, no matter where the work is done.

[View Fact Sheet #21: Recordkeeping Requirements](#)

Child Labor: Nonagricultural (cont....)

Child labor provisions under FLSA are designed to protect the educational opportunities of youth and prohibit their employment in jobs that are detrimental to their health and safety.

Child Labor rules restrict the hours that youth under 16 years of age can work and lists hazardous occupations too dangerous for young workers to perform.

[View Fact Sheet #43: Child Labor Provisions for Nonagricultural Occupations](#)

Child Labor: Nonagricultural (cont...)

- **16 and 17 year olds**

Unlimited hours; may work in any occupation other than those declared hazardous by Secretary of Labor

- **14 and 15 year olds**

May work outside school hours and for limited periods of time; only specific non-manufacturing, non-hazardous jobs, and specific conditions apply

- **Children under 14**

With limited exceptions, no employment permitted in covered, non-agricultural occupations

Child Labor: Nonagricultural (cont..)

HO 2. DRIVING A MOTOR VEHICLE OR WORK AS AN OUTSIDE HELPER ON MOTOR VEHICLES



Minors under age 17 may not drive on public roads as part of their job.

Child Labor: Nonagricultural (cont.)

HO 11. POWER-DRIVEN BAKERY MACHINES



Bans the operation of power-driven bakery machines such as dough mixers, batter mixers (including most countertop models), dough rollers, and dough sheeters

Child Labor: Nonagricultural

HO 12. POWER-DRIVEN PAPER-PRODUCTS MACHINES, SCRAP PAPER BALERS, AND PAPER BOX COMPACTORS



Bans the operation of power-driven paper-products machines, including scrap paper balers and paper box compactors

Family and Medical Leave Act

Essential Protections:

- Twelve workweeks of unpaid leave per leave year for qualifying reasons
- Job protection
- Protection of benefits and status while on leave
- Return to the same or an equivalent position



Common Violations found in the Restaurant Industry

- Failure to pay minimum wage
- Failure to pay proper overtime
- Improper keeping of employees tips
- Failure to pay for competing pre- and post-shift work
- Improper deductions: for meal/rest breaks not taken, cash register shortages, and/or required uniforms
- Minors operating motor vehicles, bakery machines, and box compactors

FLSA Compliance Assistance

- Call WHD toll free and confidential information and helpline: 1-866-4US-WAGE (1-866-487-9243) or visit dol.gov/agencies/whd
- Visit the nearest Wage and Hour Division Office (WHD Offices): dol.gov/agencies/whd/contact/local-offices
- Employment Laws Assistance for Workers and Small Businesses (ELAWS): dol.gov/agencies/whd/compliance-assistance/elaws-advisors

How to File a Complaint

- Complaints can be submitted by phone.
- Complaints can come from third parties.
- Complaints are confidential.
- WHD does not ask workers about their immigration status.
- No fee to file a complaint.

Who May File a Complaint

- Employees – Former and Present
- Parent/Guardian
- School Officials
- Other Employers
- Advocacy Groups
- Other Agencies



Complaint Intake Information

Employee's name

- Contact information
- Address and phone number
- Employee's duties/work
- Circumstances or actions that caused potential violation of the law
- Copies of pay stubs or personal hours worked records if available

Employer's name

- Point of contact
- Address and phone number

This information is not required, but helps develop the case.

Retaliation

Employers cannot retaliate or discriminate against someone who files a complaint or participates in an investigation.

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