



New York State Department of Labor
David A. Paterson, Governor
M. Patricia Smith, Commissioner

February 27, 2009

[REDACTED]

Re: Request for Opinion
Tips/Service Charges
RO-08-054

Dear [REDACTED]:

This letter is written in response to yours of May 9, 2008 and August 6, 2008 in which you provide a copy of proposed guidelines for your client, [REDACTED], and ask the Department of Labor's Counsel's Office for its "review, comments and approval of these guidelines to ensure that there is no violation of Labor Law §196-d, or any other Labor Law provisions and/or regulations." A copy of the proposed guidelines provided with your August 6, 2008 letter are attached and made a part of this opinion letter. Please be advised that no part of this letter is intended to be or should be interpreted as an approval of these guidelines. The Department of Labor's Counsel's Office can only offer a legal opinion, if possible, as to whether a given policy or practice conforms to the Labor Law of the State of New York.

This opinion is based, for the most part, in reliance on the Court of Appeals' decision in *Samiento v. World Yacht, Inc.*, 10 NY3d 70 (2008) in which the Court held, among other things, that interpretation of the term "charge purported to be a gratuity" used in Labor Law §196-d requires the application of a "reasonable patron" standard, to wit:

[i]f the employer's agents lead the patron who purchases a banquet or other special function to believe that the contract price includes a fixed percentage as a gratuity, then that percentage of the contract price must be paid in its entirety to the waiters, busboys and 'similar employees' who work at that function, even if the contract makes no reference to such a gratuity. (10 NY3d at 79-80).

In this light, the proposed guidelines, most particularly the recommendations that employers should "make it clear on the invoice that this charge is not a tip or a gratuity" and "you may want to make it a policy to include a line on the bill or invoice for a gratuity to be added by the customer, to further distinguish this charge from a gratuity" would, in some measure and if appropriately followed, provide grounds for a reasonable patron to believe that the contract price does not include gratuities to the waitstaff. However, the notice should also make it clear that the charge is being retained entirely by the employer as an additional part of the contract price. Also, all notices to customers would, of course, have to be made in writing

Tel: (518) 457-6526, Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

and of sufficient phrasing, font size, and prominence as to make clear to any reasonable person that no part of the contract price is intended to be or will be given to the waitstaff as a gratuity.

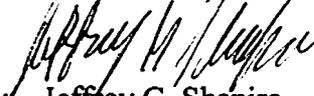
Please note, however, that neither the adoption of these guidelines nor compliance with them by an employer will fully insulate that employer from a finding that the employer withheld from the waitstaff charges purported to be a gratuity in violation of Labor Law §196-d since the ultimate determination in this regard will be determined by whether the employer fully *complied* with the representations made in this notification. Given the *Samiento* Court's holding that "the statutory language of Labor Law §196-d can include mandatory charges when it is shown that employers represented or allowed their customers to believe that the charges were in fact gratuities for their employees" (10 NY3d at 81), it is clear that the Department of Labor must look to the totality of the circumstances in determining whether a charged fee, whether characterized as "service charge," "management fee," "administrative fee," "set-up fee," or any other designation is, in fact, a charge purported to be a gratuity. No contract provision or other writing could prevent a finding that the employer led the patron, in some other way, to believe that the charges were gratuities for the employees. To chose but one possible example: even if an employer drafted and used a contract form which met all the requirements set forth above, the charge could still be found to be "purported to be a gratuity" if the employer or any of its representatives verbally stated to a customer words to the effect that "that's just something the law says we have to put in the contract - you don't have to worry about paying tips - everything's covered in the contract price - the waiters will be taken care of." Under such circumstances, the Department could find, contract language notwithstanding, that a reasonable patron would believe that the charge was intended as a gratuity for the waitstaff, thereby making the charge one "purported to be a gratuity" that must be distributed to employees.

Enclosed for your consideration please find a copy of an opinion letter issued by the Commissioner of Labor on December 1, 2008 stating, among other things, that she will be appointing a Wage Board pursuant to Labor Law §653 that will be charged with examining minimum wage issues relating to food service workers and which may, among other things, be asked to make a recommendation with regard to the promulgation of regulations codifying the holdings in *Samiento*. These regulations, if adopted, may provide further guidance for your clients.

If you have any further questions in this matter, please feel free to contact me.

Very truly yours,

Maria L. Colavito, Counsel


By: Jeffrey G. Shapiro
Associate Attorney

JGS:jc

cc: Carmine Ruberto

DRAFT

Guidelines for adding what was formerly known as a “service charge”

- Do not use the phrase “service charge” or the word “service”, because it leaves the impression with the customer that it is going to be given to the service staff.
- Possible alternatives include management fee, administrative fee, set-up fee, catering fee or banquet fee.
- Make it clear on the invoice or contract that this charge is not a tip or a gratuity.
- You may want to make it a policy to include a line on the bill or invoice for a gratuity to be added by the customer, to further distinguish this charge from a gratuity.
- You may want to show a breakdown on the contract or invoice of how this charge is being used and/or distributed so there is no confusion.
- A notice should also be posted or distributed to waitstaff notifying them that this fee is not a tip or gratuity.