



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

December 14, 2009

[REDACTED]

Re: Request for Opinion
Tips/Service Charges
RO-09-0132

Dear [REDACTED]:

I have been asked to respond to your letter received by this office on September 21, 2009 in which you request an opinion as to the permissibility of reducing the amount distributed to a bartender from a service charge for banquet events. Your letter states that the [REDACTED] employs a full-time bartender earning a salary of \$400 per week plus tips which are not reported to or requested to be retained or accounted for by the [REDACTED]. When the [REDACTED] has banquets, a seventeen percent service charge is imposed on patrons. According to your letter, the service charge is not a tip or a gratuity, but a charge for servicing the banquet party. While the bartender previously received the full amount of the seventeen percent service charge as an incentive payment, the [REDACTED] is planning on reducing that amount to seven percent, and retaining the remaining ten percent. Your letter asks whether this reduction is permissible under the New York State Labor Law.

Section 196-d of the New York State Labor Law states, in full, as follows:

Gratuities. No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to the checking of hats, coats or other apparel. Nothing in this subdivision shall be construed as affecting the allowances from the

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minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter nor as affecting practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee.

Please be advised that if a "reasonable patron"¹ would believe that the service charge is a gratuity to be distributed to the service employees, the [REDACTED] may not reduce the amount of the charge distributed to the bartender as an incentive payment. However, should the [REDACTED] take adequate steps to inform the reasonable patron that the service charge is not exclusively a gratuity, the reduction in the amount of the service charge distributed to the bartender would be permissible under the Labor Law. Examples of such steps that may provide notice to the [REDACTED] patrons would include, but should not be limited to, providing a clear and understandable statement on the invoice that the bartender will only be receiving a portion of the service charge, placing an additional line on the bill for gratuity, conspicuously posting a notice informing employees and patrons that the fees imposed by the bill are only partially remitted to employees as a gratuity and the percent of such a breakdown, and including a breakdown on the invoice of how the service charge is distributed. You may also consider separating the charges added to the patron's bill by listing them separately as "service charge to be given to employees as a gratuity" and a "non-gratuity service charge," or similarly descriptive titles, so as to help ensure that the patrons understand what amount is being remitted to the bartender as a gratuity.

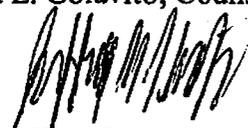
It is worth noting that the Department is currently in the process of revising the regulations relating to tips and service charges in the hotel and restaurant industries. Those regulations, which will clarify the means used to notify patrons that a service charge is not a gratuity, will be made available on the Department's website once they become effective.

This opinion is based on the information provided your letter dated September 14, 2009. A different opinion might result if the circumstances stated therein change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By:


Jeffrey G. Shapiro
Associate Attorney

JGS:mp
cc: Carmine Ruberto

¹ For more information as to the basis for the "reasonable patron" standard, kindly refer to decision of the Court of Appeals in *Samiento v. World Yacht Club, Inc.*, 10 NY3d 70, (2008).