



New York State Department of Labor
David A. Paterson, Governor
Colleen Gardner, Commissioner

March 11, 2010

[REDACTED]

Re: Request for Opinion
Tips/Samiento
RO-09-0181

Dear [REDACTED]:

This letter is written in response to yours of December 16, 2009, in which you ask the Department to issue an opinion on how banquet contracts must be formatted and worded with respect to service charges in light of the decision of the Court of Appeals in *Samiento v. World Yacht Inc.*, 10 NY3d 70 (2008). Specifically, you ask (1) whether a banquet operator is required to distribute an 18% or 20% service charge to its service staff employees if the service charge is added to the banquet contract and nothing is stated about the purpose of the charge, and (2) whether a banquet operator may keep an 18% or 20% service charge if there is a statement at the bottom of the contract, in the same font size as the rest of the contract, which states "the service charge is kept as part of the banquet operator's general receipts and is not distributed to the service staff."

Section 196-d of the New York State Labor Law provides as follows:

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 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

Tel: (518) 457-4380, Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

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.

In *Samiento*, the Court of Appeals held that the language of Labor Law Section 196-d, "any charge purported to be a gratuity," "should be liberally construed in favor of the employees" and requires the application of a "reasonable patron" standard wherein it must be asked whether a reasonable patron would believe the charge is a gratuity. (*Id.* at 78.) The Court provided:

If 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. (*Id.* at 79-80)

In response to your first question, a banquet operator would not be permitted to retain but would be required to distribute an 18% or 20% service charge to the service staff if the banquet operator added the service charge to the banquet contract and said nothing about its purpose because a "reasonable patron" would believe an 18% or 20% service charge is for the service staff. An employer may retain a portion of a service charge so long as the retention of that portion of the service charge is sufficiently disclosed so that the "reasonable patron" would be aware that not all of the service charge will be going to the service staff. In such instances, the banquet operator should also inform the customer that any additional amount that it may elect to pay as a gratuity will be distributed in its entirety, as required by Section 196-d of the Labor Law.

In response to your second question, if a banquet operator adds a pre-printed statement to the bottom of a banquet contract which states, "the service charge is kept as part of the banquet operator's general receipts and is not distributed to the service staff" a banquet operator would not be allowed to retain the 18% or 20% charge unless it was determined from the totality of the circumstances that a reasonable patron would not believe the service charge was a gratuity. However, this statement is a positive step toward ensuring that the reasonable patron would not believe the charge to be a gratuity.

As you stated in your letter there is no set date by which the regulations codifying the holdings in *Samiento* are to be adopted. In the meantime banquet operators should provide customers with clear written notice that any charges appearing on the bill or in the contract in excess of the cost of the food and

beverages are not a gratuity. The following outlines a number¹ of considerations banquet operators should keep in mind in relation to such charges:

- The notice should be of sufficient font size and prominence such that a reasonable person is aware of the notice. The notice should be at least the same font size as the surrounding text and in some cases bigger or in bold type if the surrounding text is small.
- A charge which is for the purpose of offsetting the banquet operator's administration of an event should avoid labels that tend to confuse patrons, such as "service charge." For example, a patron will be less likely to believe a charge is for the service staff if it is labeled as an administrative fee.
- The purpose of the charge (e.g. to offset the administration of the event) and the manner in which the fee is calculated (e.g. the administrative fee is based on 18% or 20% of the total cost of the event) should be described in the contract and on any bill or menu listing prices for the event. Including a statement describing the purpose of and method of calculating the fee on those papers which concern pricing of the event will help ensure the patron is aware the administrative fee is a charge retained by the banquet operator.
- The notice should state that no portion of the administrative fee is being distributed to the service staff and patrons should leave an additional payment to be distributed to the following service staff (e.g. wait staff, busboys, bartenders, buffet line attendants) as a tip. Such a statement should help patrons distinguish the administrative fee from a gratuity, and make it clear that the listed members of the service staff are not receiving a tip from the administrative fee.
- The employer should consider including a separate line labeled gratuity or tip on the contract, bill or pricing menu which will give the patron further notice that the administrative fee is not a gratuity and serve to assure the service staff is compensated for their work.

Adopting the forgoing measures should help to ensure that a reasonable patron does not believe the administrative fee is a gratuity. However, please be advised that a banquet operator could still be found in violation of Labor Law 196-d should the customers be led to believe the charge is a gratuity. For example, the operator could lead customers to believe the charge is a gratuity despite the clear written notice by telling customers, "that is just something the

¹ This list is intended to be illustrative of the factors that banquet operators should consider, rather than an exhaustive list.

law requires us to put in the contract, you do not need to leave a tip, the service staff will be taken care of.”

This opinion has been provided on the basis of the facts set forth in your letter dated December 16, 2009. A different opinion might result if the circumstances outlined in your letter 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:ck:mp