



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

August 2, 2010



Re: Request for Opinion
Labor Law §196-d
RO-10-0038

Dear [REDACTED]

This letter is written in response to your facsimile dated April 14, 2010, in which you refined your prior request for opinion dated March 15, 2010 relating to Section 196-d of the Labor Law and the Department's interpretation of the recent holding of the Court of Appeals in *Samiento v. World Yacht, Inc.*, 10 NY3d 70 (2008). Your letter provides the following question as a refinement of your previous request:

Whether the holding in *Samiento v. World Yacht, Inc.* that "*An employer cannot be allowed to retain these monies*" is to be literally construed, and, if so, how such monies are to be disbursed if less than all of the wait staff employees participate in a civil or administrative action to recover these monies.

Unfortunately, read individually or in connection with the content of your previous letter, this question is still too ambiguous for the Department to provide a meaningful response. For instance, it is unclear as to whether you are asking about the timing of the proceedings or the non-participation of employees in an administrative or civil proceeding. It is also unclear if you are referring only to monies to be disbursed as part of a judgment and order in the civil law suit or whether you refer to monies that would be available based upon the holding of the suit. Moreover, since your letter indicates that the question relates to a non-class action, it is unclear to us how monies included in a judgment would be disbursed to anyone other than the named employees. Additionally, if the matter concerns a private civil action under Section 198 of the Labor Law, please be advised that it would be inappropriate for the Department of Labor to give an opinion since such proceedings are not brought by the Commissioner of Labor.

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However, a few points should be noted which may provide a resolution to your inquiry. First of all, the prohibition on an employer's retention of an employee's tips, as regulated and required by law, exists regardless of whether an employee (singularly or in concert with any percentage of the affected workforce) acts on an employer's failure to comply with the law since that failure to act does not operate as a waiver of the protections or rights afforded under the Labor Law.¹

Second, with regard to the disposition of any unlawfully retained monies, any court or administrative order regarding such funds is likely to provide for the appropriate dispensation of such funds and the parties who should benefit thereby, making it improper for the Department to render an opinion on this point. Furthermore, the different and varied facts and issues in this type of case makes it almost impossible to enunciate an accurate interpretation of the law.

Finally, with regard to administrative proceedings commenced by this Department, Section 196 of the Labor Law empowers the Department of Labor (on behalf of the Commissioner of Labor) to investigate and issue orders on her own authority to enforce the provisions of Article 6 of the Labor Law. That authority can be exercised by the Commissioner in her discretion and does not require that the employees make a complaint. Accordingly, the fact that certain employees did not file a complaint with the Department does not prevent the Department from investigating violations of Section 196-d and enforcing its provisions through administrative orders. Notably, the New York State Industrial Board of Appeals has held that the six year limitations period for "actions" within Article 6 of the Labor Law (Labor Law §198(3)) is inapplicable to administrative proceedings, and therefore does not operate as a time bar on the Department's enforcement of the provisions in Article 6. (*See, In re 238 Food Corp.*, PR-05-068 (Industrial Board of Appeals, April 23, 2008, also holding that the Department's practice of issuing citations for violations that occurred six years prior to the receipt of a complaint to be valid and reasonable.) Consequently, the answer to your question may differ with regard to a judicial order or an administrative order if one of the issues to be addressed is the length of time that has expired between the employer's retention of gratuities and the issuance of an order or determination.

As you have noted in your letter, the Department's opinion in regard to this matter is one that has never yet been addressed in either a court action or opinion and would, therefore, be of general interest to various parties with an interest in this topic. Consequently, we wish to be as precise as possible in providing the response you seek. If you still insist on an opinion after the above exposition, in order to provide a response specific to your inquiry, I suggest that you frame your question by providing specific facts in a hypothetical scenario setting forth the type and nature of the violations, the parties in the matter, whether an administrative or civil legal action is involved, the nature of the final judgment or determination, as well as a specific timeline related to the hypothetical.

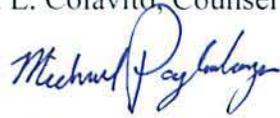
This opinion is based exclusively on the facts and circumstances described in your email requests dated April 14, 2010 and March 15, 2010 and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and

¹ Naturally, the Department recognizes that statutes of limitation can have the same effect as waivers under certain circumstances.

circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel

By:



Michael Paglialonga
Assistant Attorney

MC:MP:dz
cc: Carmine Ruberto