Carmine

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

December 1, 2008

[redacted]

Re: Request for Opinion
Labor Law §196-d
Tips/Service Charges
RO-08-0107
RO-08-0111
RO-08-0129

Dear Sirs:

This letter is written in response to correspondence received from each of you in which you ask for an opinion as to whether the decision by the New York State Court of Appeals in *Samiento v. World Yacht, Inc.*, 10 NY3d 70 (2008), will cause this Department to modify its policy regarding enforcement of Labor Law §196-d in regard to the collection and distribution of banquet and event service charges. In particular, you ask whether the *Samiento* decision will have any effect upon the position expressed in a memorandum from [redacted] then Director of the Division of Labor Standards, dated June 1, 1995 (hereinafter referred to as "the 1995 memo") and whether the Department will be promulgating regulations to implement the Court of Appeal's decision in that case.

By way of background, it should be noted that an Opinion issued by the Department dated March 26, 1999, effectively superceded the 1995 memo when it

stated that, "[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 waiter, busboys and 'similar employees' who work at that function, even if the contract makes no reference to such a gratuity." Any misconception as to the meaning and import of this Opinion was erased, moreover, when it was quoted and relied upon by the Court of Appeals in the *Samiento* decision which correctly and clearly sets forth the proper interpretation of Labor Law §196-d.

Labor Law §196-d states, in relevant part:

> 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. ... Nothing in this subdivision shall be construed 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 ...

The first sentence of this statute clearly states, in summary, that an employee may keep all gratuities received by him/her and that no employer may, in any way, take possession of any such gratuity or charge purported to be a gratuity. The final sentence of the statute exempts from this prohibition the common practice of employers collecting gratuities by adding fixed "service charges" to the price of banquets and other special functions for distribution to employees. It was this final sentence upon which the employers in *Samiento* relied in asserting that banquet service charges were not contemplated within the meaning of "charges purported to be a gratuity" as set forth in Labor Law §196-d. Contrary to this assertion, the *Samiento* court examined the legislative history of this final sentence and held that its intent was:

> ... to ensure the industry could continue its common practice of applying a fixed percentage, or lump sum payment, to a banquet patron's bill as a gratuity which then was distributed to all personnel engaged in the function, wait staff, bartenders, busboys and all other similar employees. It was feared that without this language the practice of pooling for later distribution of tips to all involved employees would be prohibited because upon receiving payment, a person could

> believe they were entitled to retain the entire amount and not share with the rest of the personnel who worked the banquet, (10 NY3d at 80). (Citation omitted).

In light of this legislative intent, the Court held that the employers' contention that banquet "service charges" did not fall within the meaning of the term "any charge purported to be a gratuity" was incorrect.

In *Samiento*, the Court also considered the practice of employers who, among other things, "told inquiring customers that the 20% service charge is remitted to defendants' waitstaff as the gratuity, but then failed to distribute any amount of the service charge to their waitstaff," and "presented banquet patrons with bills which segregated and excluded the banquet service charge from other banquet charges, thereby treating the banquet service charge like a gratuity for sales tax purposes, and presumably for income tax purposes as well," and "represent[ed] to the customer that the gratuity was included in the ticket price but then only remitt[ed] to its employees a gratuity of between 4% to 7%," (10 NY3d at 75-76).

Under the "reasonable patron" standard of review used by the Court (10 NY3d at 79), such practices lead patrons to understand that the gratuity was already included in the cost of their meal and consequently, required the distribution of such gratuity to employees. In arriving at such decision, the Court cited with approval the 1999 opinion issued by this Department which is referenced above. (*Id.* at 79-80)

Therefore, as described and affirmed by *Samiento*, it is clear that if an employer causes a reasonable patron to believe that a service charge is a gratuity to be received by a service employee(s), then it is "a charge purported to be a gratuity for an employee" under Labor Law §196-d and must be distributed to such employee(s). This decision affirms the position taken by the Department in the March 26, 1999 Opinion and clearly lays to rest any doubt with regard to the validity of the 1995 memo.

Please be further advised that since there has been no modification of the Department's enforcement policies since the 1999 Opinion letter affirmed by the *Samiento* Court, and since no modification of such policies is contemplated, your request that any "modification" be applied prospectively has no basis in fact or law. Such enforcement policy will be applied to all current and future matters, as it has been in the past.

Finally, the Commissioner will be appointing a Wage Board pursuant to Labor Law §653, which 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.* We will await such recommendation before making a final decision with regard to the matter.

Sincerely,

M. Patricia Smith

M. Patricia Smith

cc: Carmine Ruberto