



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

May 21, 2009



Re: Request for Opinion
Mandatory Service Charges
RO-09-0053

Dear [REDACTED]:

I have been asked to respond to your letter dated March 31, 2009 in which you ask a question regarding mandatory service charges under Section 196-d of the Labor Law in light of the Court of Appeals' decision in *Samiento v. World Yacht Club, Inc.*, 10 NY 3d 70. Your letter asks what obligation, if any, an employer has to prevent customers from believing charges are gratuities when they are not. At the outset of this analysis, it is worth noting that this opinion relates only to banquets or special services, in line with the Court's decision in *Samiento*, and should not be interpreted as determining the permissibility of service charges in any other situation.

In *Samiento*, the Court of Appeals used the "reasonable patron" standard of review to determine whether patrons would reasonably believe that the gratuity was already included in the cost of their meal and consequently, required the distribution of such gratuities to employees. (*Id.* at 75-76.) Under this standard, if a reasonable patron would 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). Therefore, while an employer is obligated, under the decision in *Samiento*, to clearly inform customers that a service charge is not a gratuity to avoid it becoming a "charge purported to be a gratuity for an employee," when in fact it is not, the steps employers must take to meet this obligation depend on the factual circumstances of each particular case. Accordingly, this Department cannot give definitive direction as to what action an employer must take to ensure that its obligation is met since there is no one action or affirmative disclaimer that may be prescribed in every factual scenario.

Unfortunately your letter does not set forth any specific factual circumstances from which it may be determined that a "reasonable patron" would or would not believe that the charges are not gratuities. However, prudence would dictate that employers take sufficient steps necessary to ensure that a "reasonable patron" would believe that the charge was not a gratuity. Such steps may include, but should in no way be limited to, the conspicuous use of an affirmative disclaimer describing the nature and intended recipients of the charge, labeling the charge as a non-gratuity

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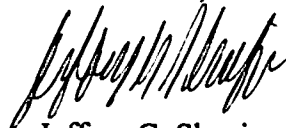
service charge, informing patrons that the amounts charged do not include gratuities and that they should feel free to tip service employees accordingly, and including an additional line on the bill for the customer to leave a gratuity.

Should you require a definitive opinion as to whether such an obligation has been met, you may respond to this letter with a detailed description of the means by which the employer would be intending to meet its obligation. Such correspondence should include a mock-up of any disclaimer on a billing invoice and any other information relevant toward making such a determination.

This opinion is based on the information provided your letter dated March 31, 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