



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

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February 27, 2009

Re: Request for Opinion  
Tips  
RO-08-0057

Dear [REDACTED]:

I have been asked to respond to your letter of May 16, 2008. Your letter states that you were a server at a restaurant that required you to turn over your tips every night, and to have a portion of your tips redistributed to the floor manager and the wine steward or "sake manager." Your letter states that the floor managers interact with only about 15-20% of the customers (e.g. running a salad or a drink if there are not enough wait staff employees on duty) and even then only briefly, and the wine steward or "sake manager" only interacts with about 20% of the customers (when customers sought information about which wine to purchase). Please be advised that in the situation you describe, the employer is in violation of Labor Law §196-d.

Section 196-d of the Labor Law provides 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 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.

In responding to your letter, it is important to note that "tip-sharing" and "tip-pooling" are two entirely different concepts, with tip pooling occurring when tips are pooled and redistributed among the tipped employees, and tip sharing occurring when tipped employees share a portion of their tips with employees who also provide customer service but receive no tips, i.e. as when waiters share tips with busboys. Tip pooling must be undertaken by employees on a completely voluntary basis and may not be mandated by an employer. Tip sharing, on the other hand, occurs when tipped employees share a portion of their tips with employees who also provide customer service based upon a tip sharing practice or program that may be, but is not necessarily, mandated and established by the employer. Any requirement that the employer

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handle the tips e.g. for distribution, is a violation of Labor Law §196-d. An employer may merely require that an employee share a portion of his/her tips with other service employees or "similar employees."

While restaurant managers may occasionally perform direct service tasks for restaurant patrons, they generally do so only on an as-needed basis and their primary responsibility is the supervision of the restaurant operation. (*see, In the Matter of the Petition of Tandoor Restaurant, Inc.*, Industrial Board of Appeals Docket No. PR-82-85 (July 19, 1985).) Your letter provides that the floor managers in the establishment where you work only provide service to customers on an as-needed basis, and that their interaction with the customer is rather limited. Accordingly, it is a violation of Labor Law §196-d for your employer to require that you share your tips with the floor managers.

On the other hand, sommeliers have been considered to be "similar [to service] employees" by this Department as they render numerous personal services to patrons. The wine steward or "sake manager" you describe is performing a service similar to that of a sommelier, as he/she renders personal service to patrons. Accordingly, the employer may mandate tip sharing with the wine steward or "sake manager" you describe.

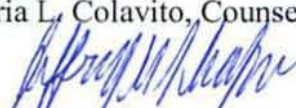
Finally, your employer may not require that you turn over all of your tips so that they may be pooled and shared. Insofar as your employer requires that you turn over all of your tips every night so that they may be redistributed, your employer is in violation of Labor Law §196-d. The only exception to this prohibition established by the Department relates to tips included in bills paid with credit cards. In those situations, the employer has no choice but to collect the tip and then redistribute it to the appropriate employees.

I suggest that you contact this Department's Division of Labor Standards to make a complaint so that a full investigation may be conducted.

This opinion is based on the information provided in your letter of May 16, 2008. A different opinion might result if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel

  
By: Jeffrey Shapiro  
Associate Attorney

cc: Carmine Ruberto