



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

September 2, 2008

[REDACTED]

Re: Request for Opinion
Tips/Meals
RO-08-0106

Dear [REDACTED]

This letter is written in response to your request for an opinion dated August 15, 2008 in which you ask several questions related to tips, meal periods, and employer provided meals. Please accept the enclosed materials and the following discussion in response to your request.

Your letter asks whether sushi/robata chefs serving food right in front of the customers are eligible for tips, and if it is legal for such chefs to share tips with the kitchen employees if management is not involved in the sharing. Please be advised that such sharing is legal under the New York Labor Law.

Section 196-d of the New York State Labor Law states, in full, 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.

It is important to note that "tip pooling" and "tip-sharing" are two entirely different concepts. Tip-pooling occurs when tips are pooled and redistributed by an employer. Tip-

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

pooling may not be mandated, but may only take place on a completely voluntary basis. Tip-sharing occurs when an employee who provides service shares a portion of his or her tip with another employee who also provides customer services but receives no tip, i.e. as when waiters share tips with busboys. Tip-sharing by wait staff with other employees providing customer services may be mandated by an employer. A scheme whereby employees who do not provide direct customer service are recipients of a portion of wait staff tips would be considered a tip-pooling arrangement which cannot be mandated by an employer. However, employees who do not render direct service, or merely do so on an incidental basis, such as dishwashers and managers, are not eligible to be included in mandatory tip-sharing.

Sushi/robata chefs serving food right in front of the customers are eligible to receive tips since they provide service to customers. While the employer may require such chefs to "share" their tips with other direct service employees, sharing with non-service employees may not be mandated. However, it is entirely legal for employees to share their tips with any other person that they see fit on an entirely voluntary basis. "Voluntary" means that it must be the employee who decides whether or not he/she shares tips, and that there must be no negative consequences of any kind as a result of a decision not to share tips. Please see the enclosed guidelines issued by the Department of Labor in 1972 and decision in Tandoor Restaurant, Inc., PR-82-85 (Industrial Board of Appeals 1985) for further discussion of tips and gratuities.

Your letter also asks whether management may decide when meals periods are provided to employees. Section 162 of the Labor Law states, in relevant part, as follows:

(2) Every person employed in or in connection with a mercantile or other establishment or occupation coming under the provisions of this chapter shall be allowed at least thirty minutes for the noon day meal, except as in this chapter otherwise provided. The noon day meal period is recognized as extending from eleven o'clock in the morning to two o'clock in the afternoon. An employee who works a shift of more than six hours which extends over the noon day meal period is entitled to at least thirty minutes off within that period for the meal period. (3) Every person employed for a period or shift starting before eleven o'clock in the morning and continuing later than seven o'clock in the evening shall be allowed an additional meal period of at least twenty minutes between five and seven o'clock in the evening. (4) Every person employed for a period or shift of more than six hours starting between the hours of one o'clock in the afternoon and six o'clock in the morning, shall be allowed at least sixty minutes for a meal period when employed in or in connection with a factory, and forty-five minutes for a meal period when employed in or in connection with a mercantile or other establishment or occupation coming under the provisions of this chapter, at a time midway between the beginning and end of such employment.

I trust that the statutory language contained above and the Guidelines for Meal Periods issued by the Department of Labor, enclosed, adequately answers your question regarding the time at which meal periods must be provided to employees within New York State.

Your letter further asks how much, if any, of the value of the meal provided to the employee may be deducted from the employee's wages. 12 NYCRR §137-1.9(a) provides, in relevant part, as follows:

(1) Meals furnished by an employer to an employee shall be valued at no more than...(iv) \$ 2.10 per meal on and after January 1, 2007, for food service workers receiving a cash wage of at least \$ 4.60 per hour; and \$ 2.45 per meal on and after January 1, 2007, for all other workers. (2) An allowance for more than one meal shall not be permitted for any employee working less than 5 hours on any day. (3) An allowance for more than two meals shall not be permitted for any other employee on any day, except that an allowance of one meal per shift may be permitted for such an employee working on a split shift.

As provided in the regulation above, a maximum of 2 meals per day at a rate of \$2.10 per meal for food service workers receiving at least \$4.60 per hour, and \$2.45 per meal for all other workers may be credited towards an employee's wages. In short, all employees must be paid at least the minimum wage, but a maximum of \$4.20-\$4.95 per day for meals provided by the employer may be counted toward such a wage. Please be advised that such an amount is not a "deduction," but rather a credit that may be applied toward an employee's wages to meet the minimum wage required by the New York Labor Law. Deductions from wages for the value of meals provided are prohibited by Labor Law §193.

This opinion is based on the information provided in your letter of August 15, 2008 and telephone communications on August 22, 2008. A different opinion might result if the circumstances outlined in your letter changed, 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:jc
cc: Carmine Ruberto