



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

June 7, 2010

[REDACTED]

Re: Request for Opinion
Service Charges - Labor Law §196-d
Gratuities
RO-10-0051

Dear [REDACTED]:

I have been asked to respond to your facsimile letter of March 30, 2010, in which you requested this Department's opinion as to the legality of the method by which you were compensated by your former employer, the operator of a Banquet House.

Based upon the minimal amount of information contained in your letter, it appears that your employer paid you a certain amount of the Service Charge that he received from his banquet patrons after deducting the amount of your regular wages from that amount. So, for example, if you had a base wage of \$200 per week and worked on several banquets during the week for which your share of tips was \$325, your employer would turn over only \$125 of your tip income to you.

The answer to the question you have posed depends on the nature of the Service Charge that is involved. If the Service Charge to which you refer is, in fact, a gratuity to be shared among the service staff at a banquet, then the practice you describe is a violation of the Labor Law which provides that no portion of a gratuity may be retained by your employer. Section 196-d of the New York State Labor Law provides, in relevant part, that employers cannot "demand or accept, directly or indirectly, any part of a gratuity or of any charge purported to be a gratuity for an employee." Under the arrangement you are describing, the employer is, in essence, retaining a portion of the gratuity to which you are entitled equal to the amount of base wages he is paying you. This could certainly be a violation of the Labor Law.

However, you should also be aware that if a "Service Charge" on a customer's banquet bill is clearly identified as something that is going to be retained by the employer (either in whole or in part), then a different conclusion could result. It is impossible for us to make a determination on this important factor based upon the information you provide in your letter.

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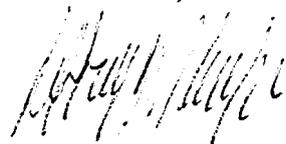
It is also unclear from your letter whether your employer provided you with notice as to what your rate of pay was going to be and how it was going to be calculated (e.g. whether it was going to include some straight pay and some portion of banquet charges). Section 195 of the Labor Law requires that persons hired after October 29, 2009, be provided with written notice of pay, and that employers provide employees with advance notice of any changes in their rate(s) of pay.¹ If you were hired after October 29, 2009, or if your employer changed your rate or method of compensation without providing you with advance notice, then the employer may have violated Section 195 of the Labor Law.

If you believe that your former employer violated the Labor Law either by not paying you properly or not providing you with notice to which you were entitled under the law, please do not hesitate to file the enclosed claim for unpaid wages form with the Department's Division of Labor Standards. The Department will then conduct an investigation of your former employer and will be able to determine the facts.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and 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: 

Jeffrey Shapiro
Associate Attorney

JGS:mp:lb

cc: Carmine Ruberto

¹ Prior to that date, the notice was not required to be written.