

**RECENT AMENDMENT CLARIFIES  
MASSACHUSETTS "TIP STATUTE"**

On June 10, 2004, the Governor signed into law an amendment to the Massachusetts law governing service charges and tips. This amendment will help to clarify an area of the law which has confused many employers. The changes will require most employers in the restaurant, country club and food service industries to make some alterations to their pay practices. The amendment goes into effect on September 8, 2004.

**SERVICE CHARGES**

Recent class action lawsuits have targeted a number of Massachusetts employers who imposed "service charges" which were not distributed in their entirety to the waitstaff who provided the service. The "tip statute," M.G.L. c. 149, s. 152A, has now been amended to specifically permit a practice which many employers have already adopted: employers use the term "administrative fee" or "house fee" to retain discretion over how to use/distribute the amount collected (for example, to compensate non-waitstaff personnel such as assistant managers, or to offset the cost of another service). Such a fee may be used in addition to, or instead of, a service charge or tip. However, the amended statute *requires* that an administrative or house fee may only be used in this manner "if the employer provides a designation or written description of that house or administrative fee, which informs the patron that the fee does not represent a tip or service charge for wait staff employees, service employees, or service bartenders."

If this practice is not followed, employers *must*

distribute the entirety of any service charge to the wait staff employees, service employees, and service bartenders in proportion to the service provided by those employees. "Wait staff employees" are specifically defined by the amended statute to include only employees who serve food or beverages directly to patrons, and who have no managerial responsibility.

The requirement of the Massachusetts tip statute regarding service charges stands in contrast to that of federal law, which gives employers discretion over the use and distribution of service charges without the need for any special language or notice to customers.

**TIP POOLING**

Tip pooling has also been the subject of much recent litigation. Under the amended statute, employers may implement and administer a tip pool, provided that only wait staff employees, service employees, and service bartenders participate. As with service charges, the new definition of wait staff employees excludes those with managerial responsibilities, thus managers and assistant managers may not participate in tip pools, or receive a portion of a service charge.

**CONCLUSION**

Employers in the service and hospitality industries should review their practices and policies to bring them into compliance with the amended tip statute. As of September 8, 2004, it will no longer be enough to designate a fee as an administrative or house fee in order to avoid violation of the statute; instead, as noted above, specific language must be used to inform the patron that the fee is not a tip. Further, no one with managerial responsibility may receive a portion of a service charge or be included in a tip pool.

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