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Washington State Issues New Guidance on Tips, Tip Pools and Service Charges

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The Washington State Department of Labor and Industries (DLI) recently issued enforcement guidance concerning tips and services charges under the State's Minimum Wage Act. The guidance confirms existing law and clarifies the DLI's interpretation of the law on tips and gratuities, tip pools, service charge disclosures and deductions from tips. Employers in the State of Washington should review their tip pool and services charge policies to ensure compliance with the guidance.

Tips and Gratuities Belong to the Employee and May Not Offset the Minimum Wage

In the State of Washington, employers are not permitted to take a "tip credit" to pay tipped employees at a lower rate than the state's current minimum wage of \$12.00 per hour. Employers must pay employees all tips and gratuities left by a customer (subject to permissible deductions for credit card processing charges, discussed below). Therefore, if a customer leaves a tip with the employer, manager or supervisor for an employee who provided the service, that tip must be given to the employee responsible for the service. A manager or supervisor may not keep the tip unless the tip is specifically given to such individual for service he or she directly provides.

Employers may adopt a "no-tipping" policy, but if a customer leaves a tip anyway, then the employee who received the tip must be allowed to keep it; the employer cannot confiscate it or otherwise add it to their general receipts.

Tip Pools Are Permitted, With Some Restrictions

The DLI guidance discusses in detail the requirements and restrictions of using a tip pool. Under Washington law, mandatory tip pools are permitted and may include all employees—both back-of-house and front-of-house employees—*except* for individuals exempt from the definition of "employee" under the Minimum Wage Act, which includes individuals exempt from overtime, such as those employed in a bona fide executive, administrative or professional capacity (*i.e.*, managers and supervisors).

While Washington State does not mandate that tip pool policies be in writing, the DLI recommends employers adopt written policies. Further, while not required, employers may assist employees with the administration of employee tip share arrangements established by the employees themselves.

Service Charge Requirements and Disclosures

In contrast to a tip or gratuity, which is given voluntarily by a customer, a service charge is an automatic charge added to a customer's bill for services related to food, beverages, entertainment, or delivery. An automatic charge becomes a service charge when it is a separately designated amount that is described in such a way that customers would reasonably believe the charge is for the service provided and may lead the customer to believe that the service charge replaces a tip or gratuity. Examples of service charge designations include, but are not limited to: "service charge," "mandatory gratuity" or "delivery charge." In contrast, late fees, cancellation fees and parking fees are not considered "service charges" and are therefore not subject to the requirements discussed below.

Pursuant to Washington law, employers must provide specific written disclosures when including a service charge on a bill. Specifically, employers must disclose the percentage of the service charge that is retained by the employer (the "employer portion") and the percentage paid to the employee(s) serving the customer (the "employee portion"), if any, and this information must appear in an itemized receipt *and* in any menu provided to the customer. Employers should be especially cognizant of this requirement—if an employer fails to make this disclosure, the entire service charge must be paid to the employee(s) providing the service.

When distributing the employee portion of a service charge, if any, the employee portion must be paid only to the employee(s) who serve the customer (such as bartenders, servers, banquet attendants, captains, barbacks, bussers, etc.). Therefore, the employee portion of a service charge may not be distributed to managers, supervisors or back-of-house employees. The *employer portion* of a service charge may, however, be distributed as the employer sees fit, including to managers and supervisors.

The DLI guidance includes examples of appropriate service charge disclosure statements and disclosure statements that run afoul of the law, which would require an employer to distribute the entirety of a service charge to the employee(s) serving the customer. For example, a compliant disclosure that includes an employee portion of a service charge would read:

"A service charge of ___% / \$___ will be added to your bill. The ___% of this service charge is paid to the employee or employees who served you today."

In contrast, a compliant disclosure that does *not* include an employee portion of the service charge would read:

"A service charge of ___% / \$___ will be added to your bill. 100% of this service charge is retained by [Employer Name]."

For a complete list of the DLI's examples of appropriate and inappropriate service charge disclosure statements, see pages 4-5 of the DLI's [guidance](#).

Payment of Tips and Deductions

Tips and gratuities (or the share of tips due to employees from a tip pool) and the employee's portion of a service charge received in cash may be retained by the employees. If, however, the tips and/or service charge are received by the employer (whether in cash from the customer or via credit card), the employer must pay the tips and employee portion of the service charge to the employee no later than the end of the pay period in which they were earned. Employers must also keep records of all tips and service charges paid to employees.

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If tips and/or service charges are charged to a credit card, an employer is permitted to deduct a prorated amount of any transaction fee charged by the credit card company. However, employers are not permitted to deduct any more than the prorated transaction fee, which means employers may not deduct from an employee's tips or service charge any cash register shortages or other business expenses.

In light of the DLI's guidance, employers should contact counsel to review and revise their current tip pool and service charge policies to ensure compliance with the law and the DLI guidance document.

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