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New York City Restaurants May Add a COVID-19 Recovery Charge to Patrons' Bills

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On September 16, 2020, the New York City Council passed a law that would allow New York City restaurants to charge customers a 10% COVID-19 Recovery Charge to help businesses recover as they begin to reopen. The measure will take effect as soon as the Mayor signs it into law.

Under the new law, food service establishments in New York City can add a surcharge of up to 10% of a consumer's total bill for on-premises dining, including indoor or outdoor dining. The surcharge cannot be added to takeout or delivery orders. The surcharge may only be added to the stated price of individual listed items, and cannot be added on top of taxes, gratuities, tips or charges for administration of a banquet, special function or package deal as allowed under the New York Hospitality Industry Wage Order.

Restaurants electing to add a COVID-19 Recovery Charge to customers' bills must conspicuously disclose the surcharge to consumers before any items are ordered by placing a disclosure at the bottom of each menu page. If menus are not used, the disclosure must be placed wherever food and beverage choices are listed. At a minimum, the disclosure must be:

1. Written;
2. Explicit that the COVID-19 recovery charge is a surcharge, not a gratuity for employees;

3. Clear and conspicuous;
4. Included on each page of any document, whether in paper or electronic format, that lists prices for the consumer, including but not limited to any paper or electronic menu;
5. In English, as well as in any other language used in the document upon which the surcharge is disclosed, unless such language is used solely in the names of items;

AND

6. In a font size similar to surrounding text.

The customer's final bill and receipt, if a receipt is provided, also must disclose the COVID-19 Recovery Charge and the total amount attributable to such surcharge. Restaurants may not refer to this surcharge by any other name — it must be called the "COVID-19 Recovery Charge" on all required disclosures, except that it may be referred to as the "COVID Charge" on a final bill or receipt.

There are additional circumstances when the COVID-19 Recovery Charge may not be imposed. The surcharge cannot be imposed by any food service establishment that is part of a chain with 15 or more locations nationally that do business under the same name and offer substantially the same menu items. Pushcarts, food stands and vehicles also may not add a COVID-19 Recovery Charge to their prices. A

COVID-19 Recovery Charge may not be added in addition to any charge for the administration of a banquet, special function or package deal as allowed under the New York Hospitality Industry Wage Order.

The law will remain in effect as long as all food service establishments in New York City are prohibited from operating at maximum indoor occupancy, and for a period of 90 days after those restrictions are lifted. The New York City Department of Consumer and Worker Protection may issue additional rules concerning the COVID-19 Recovery Charge, including rules related to the form and manner of any required disclosure. Violation of the law, or any rules promulgated by the Department of Consumer and Worker Protection, will be punishable by a civil penalty of between \$50 and \$350.

Restaurants that look to take advantage of this law must be diligent to ensure that the required disclaimer contains all necessary language and is listed everywhere a consumer could view the restaurant's prices. If the disclaimer does not contain all of the required information, in particular the required disclosure that the surcharge is not a gratuity that will be distributed to the restaurant's employees, a restaurant risks a claim that the surcharge should be considered a mandatory gratuity that would need to be distributed to food service employees. In addition to menus, restaurants should display the required disclaimer anywhere prices are listed, including physical locations such as menu boards and on the restaurant's website, to mitigate against any arguments that a consumer did not see the disclaimer when reviewing the prices before selecting what food or drinks to order. Finally, the revenue generated by the surcharge is, of course, subject to applicable sales tax.

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