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CLIENT ALERT: Massachusetts SJC Rules that Tip Law Permits No-Tipping Policies Provided Appropriate Notice is Given

The Massachusetts Supreme Judicial Court has ruled that employers, including restaurateurs, may institute policies barring employees from accepting tips under the state's tips law. In *Meshnick v. Scrivanos*, SJC-11618 (April 10, 2015), which affects a putative class action case against a large Dunkin Donuts franchisee, the SJC affirmed that the franchise-employer could prohibit its customers from leaving gratuities. The Court however, cautioned that where an employer fails to adequately notify its customers of a no-tipping policy, the employer is obligated to distribute money left by customers to wait staff and service employees.

Massachusetts' unique tipping regulations closely regulate distribution of gratuities; however, the tip law covers only a narrow category employees who fall within the ambit of the statute, including those employees who provide direct customer service and meet the definition of "service employee" or "wait staff employee." Service bartenders who do not provide direct service are also protected by the law. Generally, the tips law permits tip sharing among wait staff employees including counter staff who "serve[] beverages or prepared food directly to patrons," "work[] in a restaurant . . . or other place where prepared food or beverages are served," and have "no managerial responsibility." Employers and their management employees are barred from sharing or keeping tips. Employers who demand, retain, request or accept from any payment or deduction from a tip or service charge given to such wait staff employee, service employee, or service bartender face substantial civil penalties.

Scrivanos' Dunkin Donuts stores implemented a no-tipping policy, which included placing various kinds of "no tipping" signs in many of its locations. Employees were also directed to notify patrons of the no-tipping policy and they were instructed to refuse to accept tips. Those who accepted tips were subject to disciplinary action. Several employees filed a class action lawsuit, claiming that the tips law prohibited their employer from instituting the no tip policy. The employees also alleged that money left behind was placed in the cash register and retained by the employer in violation of the tip law.

The Court rejected the employee's claim, writing that "No language in G. L. c. 149, § 152A (b), or elsewhere in the Tips Act . . . prohibits an employer from imposing a no-tipping policy. The Tips Act addresses circumstances in which tipping [is] permitted and wait staff employees have been given tips, directly or indirectly; it prescribes what the employer is required to do with such tips."

Where an employer "has clearly communicated a no-tipping policy that effectively conveys that money left by a customer will not be received by any wait staff employee as a tip" the court found that any money that is nevertheless left by a customer is not a "tip given to the wait staff" employees because a customer cannot reasonably expect that this money has been given to the employees. Thus, in these circumstances, an employer may lawfully retain the money left behind.

Notice of No-Tipping Policy Required

The decision does not appear to be a complete victory for the employer. The Court left standing employee claims that in some instances their employer had not provided clear notice to customers of the no-tip policy, yet retained tips. An employer must "inform[] the patron that the fee does not represent a tip or service charge for [covered employees]" under a provision of the Tip Law. Thus, it will likely be left for a jury to decide whether customers who left money at some Scrivanos' Dunkin Donuts locations had "the reasonable expectation" that the money they left would be distributed to the counter staff.

Employers seeking to implement a no-tipping policy must provide clear notice of the policy to customers. If an employer is to retain money left intentionally or abandoned by customers, it "… must "inform [] the patron that the fee does not represent a tip or service charge." G. L. c. 149, § 152 (d). The Court suggests that "[a] clear communication of the no-tipping policy could be accomplished through the posting of signs such as those conveying that employees may not accept tips. In addition, employers could instruct wait staff employees to convey to customers orally the existence of a no-tipping policy, and could provide training regarding the content of the communication, as well as when during the various points of interaction with a customer the information should be conveyed."

Given the significant penalties for non-compliance under the tip law, employers are encouraged to proceed carefully with the assistance of counsel when considering and implementing a no-tipping policy.

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