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One Minute Memo®

Massachusetts Appeals Court Limits Definition of "Service Charge" Under Old Tip Statute

During the last five years, almost 30 purported class action lawsuits have been brought against Massachusetts businesses arising from their practices in distributing tips and services charges collected from customers. Most of these cases have occurred in the hospitality industry and involve claims by service employees under Massachusetts General Laws c. 149, § 152A (the "Tip Statute"), which governs the distributions of tips and service charges. Last week, the Massachusetts Appeals Court issued the first appellate decision to consider the definition of "service charge" under the statute that was in effect prior to September 2004 (the "old Tip Statute").

In *Cooney v. Compass Group Foodservice*, 2007 Mass. App. LEXIS 852, the Appeals Court held that if a business charges a fee that is called a "service charge" on a customer's invoice, at least under the old Tip Statute, the proceeds from that fee must be paid to wait staff employees as a tip. This is so, the Court said, regardless of whether the fee was intended to be a gratuity. As it existed prior to September 2004, the Tip Statute applied only to the distribution of tips and service charges to food and beverage servers. Effective September 2004, the statute was substantially rewritten. The "new Tip Statute" applies not only in the food and beverage industry, but also to service charges and tips in other businesses in which employees "customarily" receive tips or gratuities. Further, the new Tip Statute specifically defines the types of employees eligible to receive tips and service charges. The *Cooney* case, brought under the old Tip Statute, does not directly involve the new Tip Statute, but plaintiffs are likely to argue that it has a bearing on it.

The ten *Cooney* plaintiffs, servers employed by Chartwells at Northeastern University's Henderson House, sued their employer and the University, which had contracted with Chartwells to provide food and beverage services at the conference center. The plaintiffs claimed they were entitled to the service charges that Northeastern charged its Henderson House customers. Northeastern first included a 5 percent "service charge" on its invoices in 1994, but by 2001, the rate had increased to 18 percent. Northeastern intended this charge to be a "facilities fee" and used the proceeds exclusively for the upkeep of Henderson House. If asked, the University informed its customers that the charge was not a gratuity. Chartwells also paid the servers on a "non-tipped" wage scale, intended for employees who did not receive substantial gratuities.

Relying on the old Tip Statute then in effect, which provided that "if an employer or other person submits a bill or invoice indicating a service charge, the total proceeds of such charge shall be remitted to the employees in proportion to the service provided by them," the plaintiffs sought to recover the service charges. Northeastern argued that the term "service charge" as used in the old statute was ambiguous in the absence of a statutory definition of the term, and that liability should not be imposed on "invoicing-entities" that innocently misnamed a fee intended for a purpose other than a tip by calling it a "service charge."

The Appeals Court rejected the University's arguments, ruling that "where the language of the statute is clear, it is the function of the judiciary to apply it, not amend it." The Court found the statute clear and unambiguous as to the meaning of "service charge" and the requirement that all proceeds of any "service charge" be remitted to wait staff regardless of the University's intent.

The Appeals Court's ruling highlights the risks that businesses face when they misuse the term "service charge." While the decision could be read to suggest that under the old Tip Statute, any fee imposed by a food and beverage business that is called a "service charge" without further explanation of its purpose must be turned over to its food and beverage servers, businesses should be aware that employees are likely to argue that it has broader application beyond its narrow facts. For that reason, it behooves all businesses that impose charges that are not intended to be gratuities and employ individuals who customarily receive tips to review their policies, customer-related documents, and invoices. Any fee not intended to be and not actually paid to wait staff as a tip or gratuity should not be labeled as a "service charge" and should only be labeled as such for "service employees" with extreme caution. Under Massachusetts law, this issue has very important and potentially costly implications if not handled correctly. Hospitality and other service business are, therefore, well advised to consult with their employment counsel experienced in addressing this legal issue.

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