New York State Department of Labor
David A. Paterson, *Governor*
Colleen C. Gardner, *Commissioner*

September 27, 2010

[redacted]

Re: Request for Opinion
Labor Law §196-d – Gratuities
RO-10-0015

Dear [redacted]:

I have been asked to respond to your email of January 25, 2010 in which you ask whether an employer may withhold amounts from tipped employees until the next pay period in order for the employees to have sufficient weekly wages to pay for their health and dental insurance premiums and 401k contributions. Your letter states that a large restaurant operating in New York City offers health and dental insurance as well as a 401k program to its employees, many of whom are tipped employees. Currently, the restaurant deducts the employees' contributions from their wages and, in cases in which an employee's wages are insufficient to make the payment, the restaurant makes the payment on behalf of the employee and subsequently asks the employee for a check or cash to pay for these contributions. Evidently, the employer has incurred many thousands of dollars of unreimbursed payments utilizing this method. Your letter inquires as to whether the restaurant may withhold a portion of the employees' credit card tips to cover any insufficiency in order for employees to have sufficient earnings to cover the employees' premiums and contributions.

New York Labor Law §196-d states, in relevant part that "[n]o employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." As you note in your letter, the plain language Section 196-d prohibits any retention or withholding of gratuities by the employer. Such retention or withholding is prohibited regardless of any permission or consent given by the employee by virtue of the prohibition on employer's "accepting" any part of the gratuities. No exception to this plain language may be crafted since the Court of Appeals recently held that "the remedial nature of Labor Law § 196-d, such [statutory] language should be liberally construed in favor of the employees." (*Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 78 (2008).)

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Accordingly, please be advised that it is the opinion of this Department that Section 196-d of the Labor Law prohibits employers from withholding or retaining employees' gratuities for the payment of insurance premiums or for 401k program contributions.

It is important to note, however, that nothing in the Labor Law restricts an employee's ability to assign gratuities to the employee's insurance carrier or 401k account. Such an assignment may be made out of that employee's gratuities left via credit card. While an assignment of such gratuities to his or her *employer* would be in violation of Section 196-d, nothing in that Section prevents an employee from requesting that its employer remit such monies on the employee's behalf to another. The assignment must be given to the employer in writing, must be in language clearly understandable to the employee, must be limited to the exact amount needed during that payment period to satisfy insurance and 401k obligations only, and must be revocable at any time, also in writing. A copy of the executed assignment must be provided to the employee and must be maintained by the employer for the same period as required for payroll records under the law. In short, a properly drafted and executed assignment of gratuities may be made by employees for the payment of insurance payments and 401k contributions (both of which are statutorily-permitted categories of deductions) so long as the employer, his agent or affiliate, does not retain any amount of that gratuity.

This determination is based exclusively on the facts and circumstances described in your letter dated January 25, 2010, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel

Michael Paglialonga

By:
Michael Paglialonga
Assistant Attorney I

MP
cc: Carmine Ruberto

[illegible], please be advised that it is the opinion of this Department that Section [illegible] of the Labor Law prohibits an employer from withholding or retaining employees' gratuities for the payment of [illegible] fees or for any other purpose.

It is important to note, however, that nothing in the Labor Law restricts an employee's ability to assign gratuities to the employee's insurance carrier or 401k account. [illegible] and purchases may be made out of that employee's gratuities [illegible] via credit card. While the assignment of such gratuities to the aforementioned payee would not be in violation of Section [illegible], [illegible] in that Section prohibits an employer from receiving [illegible] the employee's [illegible] funds of the employee [illegible]. The assignment [illegible] must be in [illegible] only and voluntary to the employee [illegible] that [illegible] period to satisfy insurance and 401k obligations [illegible] be revocable at any time, also in writing. A copy of the executed assignment must be provided to the employee and must be maintained by the employer for the same period as required for payroll records under the law. In short, a properly drafted and executed assignment of gratuities [illegible] by employees for the payment of insurance premiums and 401k contributions [illegible] permitted categories of [illegible] the [illegible] does not retain any amount of the [illegible].

This determination is based exclusively on the facts and circumstances described in your letter dated January 23, [illegible] and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that are relevant to the consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending [illegible] litigation concerning the issue addressed herein. If you have any further questions, please feel free to contact me.

Very truly yours,
Maria L. Colavito, Counsel

By: Michael Paglialonga
Michael Paglialonga
Assistant Attorney

MP:
cc: [illegible] Ruberto