



New York State Department of Labor
Eliot Spitzer, Governor
M. Patricia Smith, Commissioner

February 20, 2008

[REDACTED]

Re: Request For Opinion
Labor Law Section 196-d
File No.: RO 07-0128

Dear [REDACTED]:

This letter is written in response to your request for an opinion dated November 6, 2007. Please accept my apologies for this late response to your request. You ask whether sommeliers may be included in a tip pool. You describe such persons as "going around the dining room making suggestions on food and wine pairings, open(ing) bottles, pouring and decanting. Before service they often draw up the wine list (based on the season and food menu) and make suggestions to the owner on what bottles to add to the restaurant's cellar and how to price the wine depending on the 'market.' 80-90 percent of their job is spent on the dining room floor."

The question of whether such an employee may be included in a "tip pool" seems to confuse the concept of "tip-pooling" with "tip-sharing." "Tip-sharing" and "tip-pooling" are two entirely different concepts. Tip-pooling occurs when tips are pooled and redistributed among the tipped employees. Tip-sharing occurs when tipped employees share a portion of their tips with employees who also provide customer service but who receive no tips, i.e. as when waiters share tips with busboys. Tip-sharing may be mandated by an employer. Tip-pooling may not be mandated, but may only take place on a completely voluntary basis.

As tip-pooling is undertaken by employees on a purely voluntary basis, the employees may include any service employee they wish in the tip pool. As described below, sommeliers whose duties are those of a service employee may be included in a tip-pool, as long as their inclusion is purely voluntary on the part of the employees creating the tip-pool.

On the assumption that you are also asking whether sommeliers are "similar employees" whom employers may require to be included in a tip-sharing arrangement, please note that the Department's "Tip Appropriation Law Policy Guidelines" dated September 5, 1972, state that the Department will consider a "similar employee" to be one who participates with the waiter in rendering personal service to a patron.

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You have described sommeliers as rendering numerous personal services to patrons - explaining wine menus, making suggestions on choice of wine, opening bottles, pouring and decanting. You have also apparently stated that the sommeliers spend the majority of their time performing these duties. If these facts are accurate, then this Department would consider sommeliers to be "similar employees" who may be included in a mandatory tip-sharing arrangement created by an employer.

This opinion is based upon the information provided in your e-mail of November 6, 2007. A different opinion might result if any facts provided have been inaccurately stated, or if there are other relevant facts which have not been disclosed.

Very truly yours,

Jeffrey G. Shapiro
Senior Attorney

JGS:jc