New York State Department of Labor
David A. Paterson, *Governor*
M. Patricia Smith, *Commissioner*

April 22, 2009

[redacted]

Re: Request for Opinion
Tips
RO-08-0060

Dear [redacted]:

I have been asked to respond to your letter of May 23, 2008 in which you request clarification of several prior opinion letters issued by this office which state that sushi chefs are "similar employees" eligible to participate in employer-mandated tip sharing arrangements pursuant to Labor Law §196-d. Please accept my apology for the late response to your request.

You state in your letter that over the last several decades, sushi chefs have become an integral part of Asian restaurant dining rooms. These chefs, you state, act much like a "flair bartender," putting on a show for guests by demonstrating their knife skills and agility with the product. You also state that in many circumstances, the chefs directly communicate with guests, taking sushi orders as well as describing the menu and its components in detail, as well as often being called upon to "instruct" a guest on how to eat a particular course. They also prepare the sushi in front of the guest. You also state that the amount of interaction between a sushi chef and a guest will often depend on how much interaction the guest wants. You state that this is no different than the interaction between a guest and a waiter – some guests wish to converse with a waiter and some do not. Based on these statements, you ask that the Department of Labor address four issues.

You first ask whether sushi chefs have to "speak" directly to the guest in order to be eligible for tip sharing. It is this Department's opinion that the relevant factor in determining whether an employee is eligible for tip sharing is the degree of personal service rendered to the customer, not any verbal interaction between the employee and customer. It should be noted that in the vast majority of situations, busboys, specifically named in the statute as being eligible for tip sharing, have almost no interaction with customers. Under the factual circumstances provided by you and set forth above, the personal services rendered by sushi chefs to customers are sufficient to classify them as "similar employees" eligible to participate in mandatory tip sharing. However, where a sushi chef provides direct service tasks only on an "as-needed" or incidental basis, similar to that of a restaurant manager or a kitchen chef, the employee may not be included in mandatory tip sharing. (See, In the Matter of Tandoor Restaurant, Inc., Industrial Board of Appeals, No. 82-85 [Dec. 23, 1987], a copy of which is enclosed.)

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You then ask whether the fact that sushi chefs at the sushi bar also prepare sushi for the dining room patrons seated at tables changes the Department's position that sushi chefs may be included in mandatory tip sharing. As stated above, the key factor is the degree of personal service rendered to patrons. Furthermore, as noted below, the amount required to be shared by and with the employee, must be reasonable in relation to the amount of direct service rendered by that employee.

Third, you ask that the Department confirm that the concepts of tip pool and tip sharing are not mutually exclusive. It is important to point out that under the New York Labor Law, "tip-sharing" and "tip-pooling" are two entirely different concepts, with tip pooling occurring when tips are pooled and redistributed among the tipped employees, and tip sharing occurring when tipped employees share a portion of their tips with employees who also provide customer service based on a tip sharing practice or program that may be, but is not necessarily, mandated and established by the employer. Tip pooling must be undertaken by employees on a completely voluntary basis and may not be mandated or initiated by employers. Tip sharing, on the other hand, may be mandated by employers, but at no time may an employer require an employee's tips be turned over to the employer for redistribution. Rather, such redistribution must be accomplished by the employees themselves. An employer may merely require that employees share a portion of their tips with other service employees or "similar employees." As you describe in your letter, it is possible both for an employer to require that tipped employees share a percentage of their tips with other eligible employees (tip-sharing) and for those tipped employees to agree, among themselves, to pool the remaining tip money and distribute it among themselves (a tip-pooling arrangement).

Fourth and finally, you state that federal and California laws provide that management may set tip-share percentages that are reasonable. You further state your belief that, in New York, neither statute, regulation nor Department interpretation of law sets a specific percentage for tip sharing. You give an example of a 4-star Manhattan restaurant in which, based on the fact that many employees provide personal service to patrons, the tip share is set at 50%[1], to be distributed as follows: 15% to the waiters, 10% to the back waiters, 6% to the bussers, 6% to the runners, 5% to the sommeliers, 3% to the hosts, and 5% to the sushi bar. You are correct in asserting that there is no New York statute, regulation or interpretation of law setting specific percentages for tip sharing. Based on the fact that management may require that tipped employees share their tips with other employees providing personal service, it is this Department's opinion that management may set the tip-sharing percentages provided such percentages are reasonable in relation to the amount of direct service rendered by that employee.

This opinion is based on the information provided in your letter of May 23, 2008. A different opinion might result if the circumstances outlined in your letter changed, if the facts

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[1] The Department assumes that this means that waiters and waitresses keep 50% of the tips at their tables, while the remaining 50% is distributed by them as described. Please be advised that if any part of the tips are retained in any manner by the employer, or are required to be distributed to employees who did not render personal service to the patrons, a violation of Labor Law §196-d will have occurred.

provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

Jeffrey Shapiro /da

By: Jeffrey G. Shapiro
Associate Attorney

cc: Carmine Ruberto
Enclosure