



Wage and Hour Law Update

Posted at 3:32 PM on February 6, 2013 by Noel Tripp

New York Judge: Deduction of Full "Seamless Web" Fees from Gratuities Potentially Violates of FLSA, New York Law

In a decision sure to attract attention within the [New York hospitality industry](#), Judge Alison J. Nathan of the United States District Court for the Southern District of New York ruled in a case of first impression that deducting the full amount of service fees charged by internet food delivery sites (including popular web portal SeamlessWeb) from employee gratuities very likely violated federal and state law. *Allende, et al. v. PS Brother Gourmet, Inc., et al.*, S.D.N.Y., No. 11-cv-5427, 02/01/13.

In *Allende*, the Defendant, an Indian restaurant on Manhattan's Upper West Side, argued that deduction of the fees in question was authorized by the Sixth Circuit's decision in *Myers v. The Copper Cellar Corp.*, 192 F.3d 546 (6th Cir. 1999) and New York authority adopting *Myers*, which permitted deduction from gratuities for the pro-rata share of processing fees charged by credit card companies. Rejecting this argument on summary judgment, Judge Nathan held that ratification of the deductions in *Myers* was "expressly premised on the understanding that the fees were incurred as the result of liquidating gratuities so that they could be paid to employees in cash" And "[t]he liquidation of the restaurant patron's paper debt to the table server required the predicate payment of a handling fee to the credit card issuer." The nature of the fees at issue in the instant case – including a "Processing Fee," "Commissions" and "Advertisement Fees" – the Court held, "undermine [d] Defendants' argument that the *Myers* rationale should apply, because the agreements with the food delivery sites "suggest that [Defendant] deducted from gratuities costs beyond those incurred as the result of converting credit card gratuities to cash." Thus, summary judgment for Defendant was not appropriate, and a finding at trial that the fees exceeded those costs would result in a violation. The Court indicated that a portion of the fee related to processing costs may be a permissible deduction.

The Court however issued pro-employer ruling related to individual liability and uniform issues. In finding an employee was not individually liable for any monies owed, the Court specifically noted that in the absence of authority to hire, fire, set schedules, set rates of pay or maintain employment records, there is "no authority for the proposition that assignment of daily tasks, when unrelated to hours worked or wages received, is relevant." As to the uniform issue, the Court held that the required black shirt, black pants and cap were ordinary street clothing and not a uniform under federal or state law. The Court pointed to the lack of any requirement that the clothing be of a certain style or cut.

While the employer in *Allende* doubtless believed that the fees in question were expenses necessary to the generation of the tips the employees received (and thus permissible as akin to credit card fees), and a viable argument remains that such deductions should be permitted, employers should closely analyze their practices

in regard to such deductions in response to this new decision. Wage and hour law is constantly evolving and employers should regularly audit their practices.

Comments (0) Read through and enter the discussion with the form at the end

Jackson Lewis LLP

|

One North Broadway, 15th Floor

| White Plains, NY 10601 |

Phone:

914-328-0404

| Fax:

914-328-1882