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What does your tip-out policy say about you?

The pooling and sharing of a portion of gratuities — "tipping out" — is a common practice among restaurants and bars.

Calculated either as a percentage of tips received by a server or of overall corporate sales for a period of time, pooled gratuities have traditionally been shared among servers, bussers, chefs and other restaurant staff.

Increasingly, however, the "house" (the restaurant or bar itself) has begun to take a piece of the action — ostensibly to recuperate breakage costs or monetary errors.

Though seemingly benign (What could be wrong with sharing among colleagues?), tipping out has already been banned in the provinces of New Brunswick and Prince Edward Island, and in New York.

In addition, for the third time, a member of the Ontario legislature has introduced a private member's bill (supported by the provincial Minister of Labour) that would amend Ontario's Employment Standards Act (ESA) making it illegal for an employer to take any portion of an employee's tips or other gratuities.

The criticism of tipping out is essentially twofold — perceived unfairness and the law.

Perceived unfairness

In an industry (restaurant and bar) where staff salaries are intentionally kept low on the assumption gratuities can and will make up the difference, asking staff to share pooled gratuities with the house has raised the ire of worker advocates across North America who see this protocol as unreasonable and an abuse of the employer-employee relationship.

Whether or not the perception is accurate, a "no dipping into tipping" movement is gaining ground across Canada and the United States, carrying with it the winds of additional legislative change.

GUEST COMMENTARY

SHANA FRENCH

The law

Most jurisdictions have some form of employment standards legislation. In Ontario, that legislation is the ESA which sets out the rights of employees and requirements applicable to employers in most Ontario workplaces.

One such requirement is a prohibition on an employer deducting wages as a means of recuperating breakage costs or monetary errors. The term "wages," however, does not include gratuities.

As a result, tipping out the house has been and remains an unregulated protocol that appears to allow employers to do indirectly what they are forbidden to do directly.

The ESA also stipulates minimum wage standards. If the process of tipping out (whether or not the house participates) results in an employee's wages dropping below minimum wage, this can result in liability for the employer — not to mention unfairness to the employee.

As well, if the house retains a portion of gratuities, there may be issues with the applicable revenue enforcement agency if the gratuities are not properly tracked and reported for tax purposes.

This is particularly true as gratuities are increasingly paid through credit and debit transactions and their collection can be readily tracked in the event of an audit.

Tips for employers

If tipping out is a workplace protocol your business has adopted or would like to adopt, there may be implications — both legal and in the court of public opinion.

At the very least, consider the following:

- Do the employment standards of your jurisdiction address tipping out — directly or indirectly — and, if so, what exactly is permitted and what is not?
- Does your organization's tipping-out protocol have the potential to violate applicable minimum wage standards? If so, consider ways to proactively correct this.
- Even if tipping out is permitted in your particular jurisdiction, consider the potential cost to your business of negative publicity should the tipping-out protocol become the focus of public scrutiny.
- If your organization participates in a share of tipping out, conduct an internal review of your gratuity tracking systems to ensure best practices for tax compliance.

Shana French is a lawyer at Sherrard Kuzz, a Toronto-based employment and labour law firm representing management. She can be reached at (416) 603-0700, sfrench@sherrardkuzz.com or visit www.sherrardkuzz.com for more information.