Massachusetts Supreme Judicial Court Rules Mislabeled Administrative Fee Must Be Paid to Service Employees under Tips Act

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August 25, 2021

On August 23, 2021, the Massachusetts Supreme Judicial Court ruled in *Hovagimian v. Concert Blue Hill, LLC*, that the Massachusetts Tips Act requires that an employer pay service employees any "service charge" listed on an invoice to customers, even if the employer and customer intended the charge to be an administrative fee employers are permitted to retain under the Tips Act. The ruling serves as an important reminder to employers in the hospitality industry to be diligent and accurate in invoicing customers to avoid violating the Tips Act.

The Tips Act provides that "[i]f an employer or person submits a bill, invoice or charge to a patron or other person that imposes a service charge or tip, the total proceeds of that service charge or tip shall be remitted only to the wait staff employees, service employees, or service bartenders in proportion to the service provided by those employees." However, it contains a "safe harbor" provision that permits an employer to impose a house or administrative fee on a patron in addition to, or instead of, a service charge or tip, provided that the employer "provides a designation or written description of that house or administrative fee, which informs the patron that the fee does not represent a tip or service charge for wait staff employees, service employees, or service bartenders."

In *Hovagimian*, the employer, a banquet venue, contracted with a customer for banquet services. The agreement provided that the employer would bill the customer a 10% gratuity charge and a 10% overhead charge on top of the customer's food and beverage purchases. The overhead charge provision of the contract specifically indicated those proceeds would not be going to service staff. However, when the employer invoiced the customer, the 10% overhead charge was labeled as a 10% "service" charge. The employer's service employees sued the employer, alleging that the employer's retention of the extra 10% "service" fee invoiced to the customer violated the Tips Act. The Superior Court ruled in favor of the employer, finding that the most reasonable interpretation of the Tips Act's safe harbor provision would be to consider the "gratuity" charge as the service charge, and the additional "service" charge to be the "house or administrative fee in addition to … [the gratuity] charge." The Appeals Court affirmed.

In a 5-1 decision written by Justice Georges, the SJC reversed the Appeals Court. Relying on canons of contract and statutory interpretation, the Court found that, regardless of the intent of the employer and customer, the language and intent of the Tips Act demanded that a charge associated with "service" on an invoice be paid to service employees. Although the contract between the employer and the customer intended for the "service charge" at issue to be a 10% "overhead" charge permitted to be retained by the employer under the statute, the employer's subsequent errors in drafting the invoices were fatal to the employer's case. The employer, the court noted, drafted both the contract and the invoices, and any ambiguities would be interpreted against it. While the charge as described in the contract ordinarily would not be a charge that must be remitted to service employees, because the employer labeled the overhead charge as a "service charge" on its invoices, the Tips Act required that the fee be paid to the employer's service employees. While the defense argued this would result in a windfall for the employees, the court was unpersuaded. "Even if an employer's carelessness in drafting were to result in its employees unintendedly acquiring proceeds that the employer planned to retain," Justice Georges wrote, "that result is mandated by a plain reading of the statute, consistent with the Legislature's intent."

Hovagimian serves as a reminder to all service-based employers about the pitfalls associated with complying with the Tips Act. Although the employer's contract with its customer followed the requirements of the Tips Act, the employer's invoicing error opened it up to Tips

Act liability. Employers must be diligent and mindful of the Tips Act not only in contracting with customers, but also when invoicing those customers. If an invoice has any fee labeled as a "service" fee, those proceeds must be distributed to the service staff, regardless of the intent of the contracting parties.

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