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CONFIDENTIAL ATTORNEY-CLIENT
PRIVILEGED MEMORANDUM

DATE: December 12, 2013

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Controllers and Human Resources Directors

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: Mandatory Gratuities / Administrative Charges

In 2008 when the New York Court of Appeals decided Samiento v. World Yacht and again in late 2010 shortly before the effective date of the new New York State Hospitality Wage Order, we reiterated to our clients the importance of specifying on all food and beverage contracts, menus and other documents the percentage of any mandatory charges that are distributable to the service staff as gratuities and the percentage that is retained as an administrative fee. As we noted, based on court decisions and New York State regulations, the burden is on the employer to prove that a reasonable consumer would know how much of the mandatory charge is a gratuity and how much, if any, is an administrative fee.

Recently, The United States District Court for the Southern District of New York issued a decision that causes us concern about the language included in many banquet contracts and menus regarding mandatory charges. Essentially, the Court held that for all events held after January 1, 2011 (the effective date of the New York State Hospitality Wage Order), the employer must prove by clear and convincing evidence that a charge other than for food, beverage or specified items or services is NOT A GRATUITY. If there is no language making it convincingly clear that a charge is not a gratuity, it will be presumed to be so. In that case, the employer included an 11% "surcharge" without explaining what the surcharge was for, but included a separate line on the bill for a voluntary gratuity. Approximately 75% of the patrons left a voluntary gratuity of at least 11%. The Court found that under the pre-Hospitality Wage Order standards, the employer could establish that a reasonable consumer would be adequately informed about gratuities, but that the employer had not complied with the more specific requirements of the Hospitality Wage Order, which specifies that each charge must clearly indicate that it is NOT a gratuity.

We are therefore suggesting that every hotel and restaurant review its banquet contracts, menus and other documentation to insure that they clearly denote that charges other than those for food, beverage or specified items or services (such as audio-visual, flowers, etc.) are NOT gratuities. We suggest that you avoid using the term "service charge" altogether and that you include language similar to the following:

"A mandatory charge equal to _____% of the cost of food, beverage and room rental will be added to your bill and will be distributed to the service staff (waiters, bussers, captains, and bartenders) as a gratuity. NO OTHER CHARGES ON THIS CONTRACT ARE PURPORTED OR INTENDED TO BE A GRATUITY FOR THE SERVICE STAFF AND NO OTHER CHARGES WILL BE DISTRIBUTED TO THE SERVICE STAFF AS A GRATUITY. A separate charge of _____% will be added to your bill as an administrative fee which will be retained by the Hotel to defray its administrative costs. The administrative charge is NOT a gratuity."

In addition, if you have any other mandatory charges on any of your menus – for example, a delivery for room service meals on your room service menus – it would be advisable to add: "This charge is not a gratuity."

This language should be printed conspicuously on the contract or menu in at least 12-point type and in bold.

If you have any questions or would like us to review the language in your contracts and menus, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Robert Sacks, Lois M. Traub, Niki J. Franzitta or Alex Soric.

cc: Joseph E. Spinnato, Esq.
Geoffrey A. Mills, Chairman