

TIPPING THE SCALES IN FAVOUR OF HOSPITALITY SECTOR EMPLOYEES

Many employers in the hospitality sector are still struggling to recruit enough high-quality staff in the wake of Covid and Brexit. Other countries such as Australia are seeking to attract British staff with hospitality experience with the lure of more sunshine and higher pay. Whilst we sadly cannot compete with Australia in the sunshine stakes, we are raising our game in the UK in relation to overall remuneration.

Whilst most hospitality sector staff are on zero hours contracts and/or the national minimum wage, steps are being taken by the Government to ensure that they receive a fairer deal in respect of their overall pay. In 2024, new legislation will come into force requiring employers in any business where customers pay tips, gratuities or service charges to allocate these payments to workers in full.

The Employment (Allocation of Tips) Act 2023 (known as the "Tipping Act") will additionally require employers to allocate tips between workers fairly and to have a written policy, accessible to all workers, on how tips are allocated. Employers will also be required to keep records for three years on how tips were dealt with.

Employers in the hospitality sector should review their policies and procedures on tipping and any existing *tronc* arrangements now, ahead of these new requirements coming into force, to ensure compliance, to help attract and retain good staff and to avoid potentially time consuming and costly complaints and claims from workers. Getting this wrong could also cause reputational and brand damage. Restaurant chains including Pizza Express, Turtle Bay and TGI Fridays have all found themselves the subject of bad press and even boycott campaigns for their tipping policies in recent years.

Key requirements

Key elements of the Tipping Act include the following:

- The **total amount** of tips, gratuities and service charges (less any required deductions for tax and national insurance) paid by the customer must be allocated fairly between the workers at each place of business of the employer.
- Tips, gratuities and service charges must be allocated and paid to workers no later than the end of the month following the month in which the tip, gratuity or service charge was paid by the customer.
- Where tips are paid by customers more often than on an occasional or exceptional basis (which is likely in almost all hospitality businesses) employers must have a written policy on dealing with tips, accessible to all workers.
- The written policy must cover:
 - whether the employer requires or encourages customers to pay tips, gratuities and service charges; and
 - how the employer ensures that all tips, gratuities and service charges are dealt with in compliance with the Tipping Act.
- Employers will be required to keep a written record (which a worker can request sight of) for three years from the date a customer paid a tip, gratuity or service charge stating how the tip was dealt with.
- The Tipping Act specifically includes agency workers within its scope.

Preparation

A number of currently common practices will not be permissible under the Tipping Act so it is crucial that employers review current tipping and *tronc* arrangements, and any existing written policies in good time ahead of the new rules.

It is not unusual for hospitality businesses to make deductions from tips paid by card to account for processing fees. Some businesses may even retain a percentage of tips paid to cover breakages, till shortages and walk-outs. Both arrangements are currently permitted but will be prohibited under the Tipping Act. Employers should cease any such practices ahead of the Tipping Act becoming operational.

Tips administered by way of an independent tronc will be permissible under the Tipping Act so long as the total amount of the tips, gratuities and service charges paid by the customer are allocated to workers without any unlawful deductions. The existing law on the operation and taxation of troncs remains unchanged.

Ahead of the new legislation becoming operational, there will be a consultation process and the publication of a mandatory Code of Practice to replace the existing voluntary Code of Best Practice on Service Charges, Tips, Gratuities and Cover Charges. It will be interesting to see what the main differences will be between the new mandatory Code and the existing voluntary Code, and we will update clients on this at the relevant time.

The Code will set out how to ensure fairness and transparency in the distribution of tips between workers. Once this has been published, written policies should be formulated or updated setting out how the business is compliant.

Penalties

Non-compliance could be costly for businesses as workers will be able to bring a specific claim in the Employment Tribunal for non-payment of tips. Workers will have a period of 12 months beginning with the date of failure to comply to bring a claim. Where there has been a series of failures, then the 12-month period will begin to run from the last failure in the series. This is a much longer time limit within which to bring an Employment Tribunal claim than the current 3-month time limit which applies to most other employment claims. We anticipate seeing group action claims being lodged against employers who fail to comply with the new legislation.

If the Tribunal finds the claim well founded, employers could be ordered to pay the tips owed and additionally up to £5,000 as compensation for financial loss suffered by the claimant (or each claimant in the case of a group action) as a result of the employer's failure to comply. The new legislation does not expand on the meaning of "financial loss" so it will be interesting to see how this concept develops beyond any financial loss suffered as a result of being out of work for a specific period, if and when such claims come before the Employment Tribunal.

Workers will also be able to bring a claim against their employer for failure to have a written policy and to keep records. However, the worker will only have three months from the date of the employer's failure to comply to bring this claim in the Employment Tribunal. Again, employers could be ordered to pay up to £5,000 per claimant as compensation for a breach.

For both claims, the worker would also need to notify ACAS of their potential claim[s] pursuant to the Early Conciliation process before they can submit their claim to the Employment Tribunal.

The definition of wages under existing employment legislation will be expanded to include tips, gratuities and service charges meaning that these payments could also form part of a claim for unlawful deduction from wages. To bring an unlawful deduction from wages claim, the employee would need to show that they had a contractual entitlement to receive the tips, gratuities or service charge in dispute. It is likely that standard employment and/or zero hours contracts for hospitality staff will be updated to include express reference to their entitlement to receive a fair proportion of the tips, gratuities and/or service charge received for the hours/shifts they work, calculated in accordance with the employer's written policy on tips, service charge and gratuities.

The exact date that the new legislation will come into force has not yet been confirmed as it will follow the consultation period and publication of the Code of Practice, so watch this space for further guidance.

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