



LABOR & EMPLOYMENT DEPARTMENT

# ALERT

## NEW YORK STATE DEPARTMENT OF LABOR RETRACTS PREVIOUS OPINION AND NOW PERMITS EMPLOYERS TO PAY OUT CREDIT CARD AND CASH TIPS BY PAYROLL

By Carolyn D. Richmond and Eli Z. Freedberg

At long last, employers in the hospitality industry have some positive news from the New York State Department of Labor (DOL). On June 16, 2011, the DOL posted an update on its web site stating that it was rescinding the policy reflected in opinion letter RO-08-0032, which provided that employers must cash out and disburse the proceeds of credit card tips to food service workers on a nightly basis (or no later than the employee's next shift). The DOL also previously opined that the payment of credit cards tips through payroll violated the New York Labor Law. **The DOL has retracted these opinions.**

Pursuant to its new policy, the DOL will allow employers to cash out employees' credit card tips "no later than the next regularly scheduled pay day," which allows employers to pay out credit card tips through an employee's payroll check. The DOL has also relaxed its rules with respect to cash tips and will now allow employers, as a service to their employees, to hold an employee's cash tips that he or she earned over the course of a pay period and pay out those tips through payroll as well.

The DOL has, however, cautioned that "a request by an employee for the employer to provide this service must be voluntary, and the agreement cannot be a pre-condition of employment or a condition of continued employment." The DOL further cautioned that employers must keep a daily record of the tips earned by each employee and allow employees to inspect those records. Finally, the DOL implored employers to provide wage statement to each food service worker that contains a breakdown of tips and wages, and meets all other requirements for wage statements. The DOL's new opinion can be found at: <http://www.labor.ny.gov/workerprotection/laborstandards/workprot/payment-of-tips.shtm>. Employers should work closely with counsel to develop appropriate cash-tip agreements before commencing any changes to payroll practices.

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