

## FTR Now

# Ontario Passes New Legislation Governing Tips and Gratuities

**Date:** December 15, 2015

On December 7, 2015, the Ontario government passed Bill 12, *An Act to Amend the Employment Standards Act, 2000 With Respect to Tips and Other Gratuities* (“Bill 12”). Bill 12 which subsequently received Royal Assent on December 10, 2015, will come into force on June 10, 2016. It will prohibit employers from withholding, making deductions from, or collecting tips or other gratuities from employees unless authorized under the *Employment Standards Act, 2000* (“ESA”).

In this *FTR Now*, we discuss the significant potential impact of this legislation on employers.

## DEFINITION OF “TIPS OR OTHER GRATUITIES”

Effective June 10, 2016, Bill 12 will enact a new part in the ESA – Part V.1, Employee Tips and Other Gratuities. For the purposes of the new Part, the term “tip or other gratuity” is broadly defined to include the following:

- a voluntary payment made to or left for an employee by a customer in circumstances where a reasonable person would conclude that the customer intended that the payment would be kept by the employee or shared by the employee with other employees;
- a voluntary payment made to an employer by a customer in circumstances where a reasonable person would conclude that the customer intended that the payment be redistributed to an employee or employees;
- a payment of a service charge or similar charge imposed by an employer on a customer in circumstances where a reasonable person would conclude that the customer intended that the payment be redistributed to an employee or employees; and,
- such other payments as may be prescribed by regulation.

Put simply, if a customer makes a voluntary payment, and a reasonable person would conclude based on the circumstances that the customer intended that the payment be kept by or provided to an employee or employees, then the payment constitutes a “tip or other gratuity” for the purposes of the ESA. This is true regardless of whether the payment is made by the customer to the employee, to the employer, or as part of a service charge levied by the employer.

Bill 12 further states that a “tip or other gratuity” does not include the following:

- such payments as may be prescribed by Regulation; or,

- such charges as may be prescribed relating to the method of payment used, or a prescribed portion of those charges.

Based on the purpose of Bill 12 and the plain language chosen by the Legislature, it is likely that the method of payment chosen by a customer does **not** impact whether a payment constitutes a “tip or other gratuity.” In other words, a voluntary payment that is made by credit card instead of cash will still constitute a tip or other gratuity if a reasonable person would conclude that the payment was intended for employees. In our view, the exemption for charges relating to the method of payment will likely exempt only the credit card company charges associated with using such a card (e.g. a 2% service fee per transaction), and only if such charges are prescribed by regulation.

Accordingly, if a voluntary payment of 20% is left by a customer in cash, the entirety would be owed to the employee or employees. If a voluntary payment of 20% is paid by a customer on a credit card, the entirety would still be owed to the employee or employees unless a regulation made under the legislation allows the employer to deduct the credit card charge fee applicable to the transaction. In such circumstances the balance of the 20% voluntary payment would still be owed to the employee or employees.

## **PROHIBITION AGAINST WITHHOLDING, DEDUCTING OR COLLECTING TIPS OR OTHER GRATUITIES UNLESS AUTHORIZED**

Bill 12 prohibits an employer from withholding tips or other gratuities from employees, and further prohibits an employer from making any deductions from tips or other gratuities unless authorized under the ESA. Bill 12 also prohibits an employer from requiring an employee to return or give his or her tips or other gratuities to the employer unless authorized under the ESA.

The primary exemption to the foregoing prohibitions relates to “pooling.” In particular, the Bill 12 amendments allow an employer to withhold, make deductions from, or require the collection of tips or other gratuities if the employer redistributes such tips or other gratuities to some or all of its employees.

However, employers are precluded from sharing in tips or other gratuities unless the employer is a sole proprietor, partner, shareholder or director and regularly performs to a substantial degree the same work performed by some or all of its employees, or employees of a different employer in the same industry who commonly receive or share in tips or other gratuities.

## **COLLECTIVE AGREEMENTS**

If an employer is party to a collective agreement at the time the Bill 12 amendments come into force (i.e. June 10, 2016), and the collective agreement includes a provision addressing the

collection and payment of tips and other gratuities that conflicts with the legislation, the collective agreement provision will prevail until a renewal collective agreement comes into effect. If the parties do not negotiate the collective agreement provision in their next set of negotiations, the new rules in Part V.1 of the amended ESA will then prevail over the collective agreement.

## **ENFORCEMENT**

Bill 12 will not change the ESA's general rule that "tips and other gratuities" are not considered to be "wages" under the ESA. Thus, absent an agreement to the contrary, they would still not be considered to be wages for vacation or holiday pay purposes, for example.

However, Bill 12 does provide that if an employer improperly withholds, deducts from or causes an employee to return or give over tips or gratuities in violation of the new provisions in the ESA, these amounts will be deemed to be "debts" owing to the employees. These debts would be enforceable as if they were unpaid wages under the ESA. Thus, employees could file complaints with the Ministry of Labour or grievances under any applicable collective agreement if there is a dispute related to the payment or distribution of tips or gratuities.

## **COMING INTO FORCE**

Bill 12 will come into force on June 10, 2016, which is six (6) months after it received Royal Assent. At this time, no supporting regulations have been filed.

## **PLANNING FOR POTENTIAL EFFECTS OF THE ACT**

While the government has engaged with stakeholders during the development of Bill 12, the fact remains that the practical effects of Bill 12 may be significantly impacted by the regulatory framework yet to be determined. Indeed, even the scope of "tips or other gratuities" could change significantly through regulations.

In particular, many employers remain concerned that Bill 12 will preclude the practice of withholding group or banquet service charges, despite the fact that employer withholdings on such charges are commonly used for the purposes of subsidizing higher wage rates for non-gratuity earners (including cooks, cleaners, managers, etc.). While regulations may address some of these concerns, they remain outstanding at the time of publication. We will monitor and communicate further legislative developments in this area as they are known.

Accordingly, we strongly encourage employers to review their existing tips and gratuities policies, including any collective agreement language that may apply well in advance of June 10, 2016, which is when the reforms outlined above will become effective. Bill 12 may have a significant impact on your current practices and procedures, as well as your financial planning and future



collective bargaining strategies.

For more information on Bill 12, please contact [Donna M. D'Andrea](#) at 416.864.7275 or your regular [Hicks Morley lawyer](#).

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