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CLIENT ALERT: Massachusetts' Highest Court Holds That Wage Act Proscribes Remittance of Service Charges To Non-Employers

On August 4, 2009, the Massachusetts Supreme Judicial Court ("SJC") held that the Massachusetts Wage Act prohibits all persons and entities from requiring service employees to remit tips or service charges to them by contract or any other means.

In *DiFiore v. American Airlines, Inc.*, 454 Mass. 486 (2009), skycaps challenged American Airlines' imposition of a charge on customers using curbside luggage check-in. While some of the skycaps were directly employed by American Airlines, most were employed by G2 Secure Staff, LLC ("G2") – a company with which American Airlines contracted for the provision of skycap services. Upon the imposition of the curbside luggage fee, the skycaps were required to remit the full amount of the fee to their respective employers and were not allowed to retain any part of it. By agreement, G2 forwarded American Airlines a portion of the fees it collected from the skycaps.

The SJC held that this arrangement violated the Massachusetts Wage Act, G.L. c. 149, § 152A, because the curbside luggage fee constituted a service charge which the Wage Act proscribes from being taken away from service employees. Under the Wage Act, a service charge is defined as "a fee charged to a patron in lieu of a tip to any wait staff employee, service employee, or service bartender, including any fee designated as a service charge, tip, gratuity, or a fee that a patron would reasonably expect to be given to a wait staff in lieu of, or in addition to, a tip."

The Court's ruling clarified that a "service charge" is not limited to fees imposed by an employer, but rather they can include fees established by any person or entity. Thus, the SJC ruled that any persons or entities can be liable under the Wage Act for requiring an individual to remit service charges, regardless of whether they are the individual's employer. In holding American Airlines liable to the skycaps, the SJC noted:

> Here, we do not think that the Legislature intended to permit restaurants and airlines to avoid the mandates of the statute by outsourcing the services of wait staff and service employees, and contractually requiring the outsource employer to remit to the restaurant or airline all or part of the service charges.

In light of the SJC's decision in *DiFiore*, employers in the service industry must not require their employees to remit any service charges to the employer or any third party entity with whom it contracts.

For more information on the Massachusetts Wage Act, including the imposition of administrative fees in the service industry, please contact your MBJ attorney.

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This alert was prepared on August 18, 2009.