

## Take This Tip: Class Actions Suits Under the Massachusetts Tip Act Are on the Rise

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Over the past few years, plaintiff-side class-action lawyers have filed numerous lawsuits under the Massachusetts “Tip Act.” That the lawsuits were filed is not surprising, considering the recent amendment to the Massachusetts Wage Act that mandates treble damages, plus recovery of attorneys’ fees and costs, for Tip Act violations.

The Tip Act has been “on the books” in some form or another since 1952. In its current iteration, the Tip Act prevents employers from reducing tips given to their service employees (e.g., wait staff, bartenders) or requiring service employees to participate in a “tip pool” where tips are given to non-service employees (e.g., cooks, managers). Also, if an employer imposes some service charge or automatic tip on a patron, or uses a valid tip pool, the full amount must be given to the service employees and the “giving” must be in proportion to the service provided by those employees if shared.

Nothing within the Tip Act, however, prevents an employer from taking advantage of a “Tip Credit.” For example, both state and federal law allow employers to pay tipped employees a lower minimum wage than the standard minimum wage paid to non-tipped employees. In Massachusetts, employees who earn at least \$20.00 per month in tips may be paid an hourly rate of \$2.63 per hour, provided that, with tips, the employee earns at least the minimum wage (currently \$8.00 per hour). If the hourly rate, including tips, does not equal the minimum wage, the employer must make up the difference. Employers who wish to take advantage of the Tip Credit should be mindful that, in recent years, plaintiffs have brought class-action complaints against restaurants arguing that the employer should not be allowed to take advantage of the Tip Credit rate for hours where the employee was not performing a service function, such as time spent cleaning the restaurant. If a plaintiff is able to prove that his or her employer violated the Tip Act (for example, by unlawfully sharing tips with non-service employees), the employer may be liable for damages in an amount equal to the difference between the minimum wage and tip credit wage. That amount would be automatically tripled under the Massachusetts Wage Act, even if the employer’s violation was accidental.

Nor does the Tip Act prevent an employer from imposing a house or administrative fee on a patron that is in addition to or instead of a service charge or tip, so long as the employer informs the patron, in writing, that the fee does not represent a tip or service charge for service employees. In addition, as the Tip Act covers any fee that a patron would “reasonably expect” to be given to a service

employee, in lieu of, or in addition to, a tip, employers may very well want to set their house or administrative fees or charges at a percentage that does not look like it is a standard tip or service charge, i.e., at some percent other than 15-20% so as to avoid any patron confusion.

The Tip Act, like the Massachusetts Wage Act, is not optional and employers may not contract with their employees to exempt themselves from coverage. The Tip Act imposes both civil and criminal penalties and remedies, including fines of up to \$50,000 for repeated willful violations and any person found to have violated the Tip Act must make “restitution” for any unlawful tip practices, along with 12% interest on that amount. Furthermore, a private party (such as an aggrieved former employee) may file a lawsuit under the enforcement provisions of the Wage Act and recover treble damages, attorneys’ fees and costs. Such actions may be brought as individual claims or claims seeking class-wide relief. The Tip Act also empowers the Massachusetts Attorney General to enforce its terms. Therefore, employers should be careful not to bite the hand that feeds their patrons.

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