

## 4 Tips For Employers Taking Gratuities On Credit Cards

By **Jon Steingart**

Law360 (August 12, 2024, 2:30 PM EDT) -- Restaurants and other businesses where workers receive tips have to pay fees so they can accept credit card payments, leading a few states to ban passing the cost onto employees.



Since restaurants and other establishments that accept gratuities on goods and services have to pay fees when patrons tip workers, some states have put laws into place that prevent employees from shouldering the deductions themselves. (David Paul Morris/Bloomberg via Getty Images)

Minnesota recently joined the ranks of states that prohibit any deduction from tips for interchange fees when a new law, **Senate File 3852**, took effect Aug. 1. It says that an employer must give an employee "the full amount of gratuity" a customer leaves on a credit card or other electronic payment.

Michael Moberg, a Minneapolis-based Jackson Lewis PC principal who advises employers, told Law360 the law is meant to establish that interchange fees are a cost of doing business that workers shouldn't have to take on.

"That's trying to avoid a company or employer taking any sort of a minimal deduction for service charges that Visa, Mastercard, American Express or whoever will charge merchants who take their cards," he said. "If the gratuity for a restaurant order is \$20, and it's paid on a credit card, the way that we're reading this amendment is that \$20 has to go to the server."

The Motley Fool, a consumer finance advice company, estimates fees range between 1.15% and 3.15%.

Minnesota is aligned on prohibiting deductions to cover fees with California, Maine, New Jersey and Pennsylvania. On the other hand, Alaska, Colorado, Illinois, Maryland, New York, North Carolina, Rhode Island, Washington state and Washington, D.C., allow deductions to cover swipe fees.

In states that allow deductions, employers still have to be careful that the amount they withhold doesn't exceed their fees.

Here, Law360 offers four tips that can help employers comply with rules on fees for tips.

### **Have Employees Acknowledge When They're Paid**

Moberg said he recommends having employees sign an acknowledgment indicating the date and amount of the tips they receive, because many employers distribute tips in cash at the end of the shift during which they're earned, instead of waiting until the next paycheck.

"You'd have to make sure that you have really good recordkeeping of what's going on, and you've got to have somebody at the restaurant who is actually able to make sure that those payments to the wait staff at the end of the night are accurate," he said. "The employer's also got to have some kind of recordkeeping, receipt system [or] some kind of acknowledgment from the wait staff saying 'I acknowledge,' or 'I agree you gave me cash tonight to reflect my credit card tips.'"

Another option is distributing tips on paychecks, because it provides firm accounting, he said. But that generally isn't an appealing option for employers of tipped workers, many of whom are used to walking out at the end of the shift with cash in their pockets, he added.

"If you're serving customers and the bills are \$200 or \$300 or more, and you're getting 15%, 20%, or even more than 20% in tip, you'd really like to walk out at the end of your shift with that money, wouldn't you, instead of having to wait?" he said.

### **If You Take Credit Card Payments, Take Credit Card Tips**

One way to avoid any potential issues with passing electronic tips on to employees is to require tips in cash, but Moberg said he advises against that if a business is set up to take electronic payments.

"I would imagine that a lot of restaurant owners might be hesitant to try to implement a policy like that," he said. "You don't want to do anything to make it more difficult for patrons of the restaurant to come in and pay for meals or provide a tip."

Businesses taking credit card payments should let customers tip that way because it provides a seamless guest experience, he said.

### **Check Local Requirements**

Felice Ekelman, a Jackson Lewis partner who specializes in hospitality, told Law360 it's important to check local rules because some states permit fee deductions.

New York, where Ekelman is based, explicitly allows the practice in its **wage regulations** for the hospitality sector.

The straightforward regulation leads Ekelman to give straightforward advice to clients, she said.

"When we talk to employers, we're always advising them to make sure that they don't deduct more," she said. "Because that's tantamount to taking the tips."

She said she appreciates the clarity that the regulation provides so that it's easy to understand what's allowed.

"Ambiguity is always a disservice," she said. "Ambiguity breeds litigation."

### **Build Cushion Into the Deduction**

Amanda Fugazy, a New York-based partner at Ellenoff Grossman & Schole LLP, told Law360 that when the

practice is permitted, employers should take care that the amount they deduct doesn't exceed the fees they pay. She represents restaurants as head of the firm's labor and employment group and co-head of its hospitality practice group.

"Typically, if you err somewhere around 2.8%, 3%, you'll never take more and you'll get some level of reimbursement," she said.

Coming up with the amount isn't simple, because in reality there is no single figure that represents the fee a business pays to accept credit cards, she said.

"It's really very, very complex in real life to figure out what interchange fee is associated with any given gratuity," she said. "What employers do in practice is they try and look at an average and try to go with what the lowest fee would likely be."

Limiting the amount that an employer may deduct so that it's no more than the fee it's charged is a sensible way to make a business responsible for its receipts and workers responsible for their personal income, she said.

"Employers would say the tip is left for the employee as additional compensation by the customer, so why should the employer carry that burden?" she said.

--Editing by Amy Rowe.