

## Hold out your hand

Tips go hand in hand with the licensed retail sector and for many workers are synonymous with wages, like commission to a salesman. However, whether or not tips are treated as wages, and the implication of this for the employer, is all a question of "Who handles the money?"

Depending on the type of establishment you run a customer may:

- Pay a mandatory service charge
- Include a gratuity in their cheque or credit/debit card payment
- Leave a tip in cash (either put into a collection box or handed directly to a member of staff)

The system that it is operated is relevant for determining liability for tax and NIC contributions and for calculating the worker's rate of pay in respect of the entitlement to the National Minimum Wage.

A payment which an employee receives by way of his share of the service charge, gratuity or pooled tips is subject to income tax. The employer is liable for operating PAYE when they make the payment to the employee. However, if the employee retains for himself any cash tips handed to him directly from the customer or left on a table for him to collect then PAYE will not apply as the employer has not been involved in making the payment. Instead it is the responsibility of the individual employee to advise HM Revenue & Customs of the amount of money received through cash tips so that any outstanding tax can be calculated and recovered, normally through an adjustment to the employee's PAYE tax code.

An employer can distance themselves and cease to have responsibility for operating PAYE on the payment by setting up a tronc arrangement to distribute the fund collected by way of tips, gratuities or voluntary service charges. Under this arrangement a troncmaster is appointed to take over the responsibility for determining how the fund is distributed amongst staff and for operating PAYE on the payment. The troncmaster can be held personally liable for any failure to deduct tax from payments from the tronc.

Any payment which is made through the allocation of mandatory service charges is subject to payment of NIC. Payments made under an approved tronc arrangement, where the employer has no involvement in deciding the amount each employee receives, are exempt from NIC. If a tronc is not used, the payment will only be exempt if it has been given gratuitously by customers and satisfies at least one of the following conditions:

- It is not paid, directly or indirectly, to the employee by the employer and does not comprise or represent monies previously paid to the employer
- It is not allocated, directly or indirectly, to the employee by the employer.

Employees may be dependant on the tips they make to sustain their level of income. Employees are entitled to be paid a rate that is at least the National Minimum Wage (NMW). The NMW is reviewed annually. The current rates and the increased amounts that will apply from 1st October 2007 are:

- The adult rate is £5.35 rising to £5.52 per hour

- The 18-21 development rate is £4.45 rising to £4.60 per hour
- The 16 -17 development rate is £3.30 rising to £3.40 per hour

Although the employee may use tips to supplement their wages, the employer can only take tips into account when calculating the employee's rate of pay to satisfy the NMW if these are paid through the employer's payroll and appear on the employee's payslip. Cash tips given directly to the employee by a customer do not count towards the NMW. If a tronc is in operation and the employee is paid directly from the troncmaster this too will not count towards the NMW. However, if the troncmaster passes the money to the employer to make the payment to the employee via the employer's payroll and it is reflected in the payslip, this will count towards the NMW, even if the payment is made net and exempt from NIC.

Tips may also count as "wages" for the purposes of the employee's right not to be subjected to an unlawful deduction from wages. In one such case, **Saavedra v Aceground Ltd (1995)**, the employer operated a tronc system to distribute a service charge among the staff. The waiter, who had a contract which provided that he would be paid at a certain rate "plus service", brought a claim when the restaurant's management used part of the tronc fund to make up for a fall in turnover. The EAT held that the difference between what he actually received and what he would have received had the employer not taken money out of the pool was an unlawful deduction.

Unfortunately, as one licensee in Central London found out recently, employers can suffer an unlawful deduction too. A man who was just two hours into his first trial shift as a glass collector at the pub put his hand into the till and stole more than £1,000, being an act which is deserving of more than a slap on the wrist!