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**THE EMPLOYMENT LAWYERS ASSOCIATION**

**RESPONSE TO GOVERNMENT CONSULTATION ON TIPPING, GRATUITIES, COVER AND  
SERVICE CHARGES**

**27 JUNE 2016**

## **RESPONSE TO GOVERNMENT CONSULTATION ON TIPPING, GRATUITIES, COVER AND SERVICE CHARGES**

### **INTRODUCTION**

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. Accordingly in this consultation we do not address such issues. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

The Legislative and Policy Committee of ELA set up a sub-committee under the chairmanship of Laura Farnsworth of Lewis Silkin LLP and James Warren of Fieldfisher LLP to consider and comment on the Government consultation on tipping, gratuities, cover and service charges. Its response to the various queries set out in the consultation paper is set out below.

A list of the members of the sub-committee is at the end of this paper.

### **Question 7: Which option (or group of options) do you think best meets the Government's objective to ensure all discretionary payments for service are clearly seen as voluntary for the consumer? Please provide reasoning to support your response. (Max 500 words)**

7. This is a question that is more appropriate for consumer groups to answer. However, our experience dealing with clients involved in sectors in which tipping is customary indicates that Option 1A (*any suggestion of a discretionary payment for service must emphasise that this is discretionary for the consumer*) is currently the most common approach utilised by service providers, and likely that which is preferred by both employers and employees in such sectors.

Option 1B (*Prevent businesses from suggesting any specific amount of discretionary payment for service*) could have an unintended consequence: impacting on workers' earnings (at least initially, prior to any re-setting of the balance between contractual and discretionary charges, and between contractual and discretionary pay). It may deny consumers the benefit of having an appropriate service charge calculated and set out for them, which could result in consumers "under-tipping". By way of example, one multi-site restaurant operator told us that it estimated that, on average, tips totalled just 9% of the food and drink bill, when left completely to the consumer to determine, which is substantially below the usual suggested tipping percentage.

### **Question 8: Do you expect the ability of consumers to make payments for goods and services by card would be affected by any of the proposals set out within Option 1? Please provide reasoning to support your response.**

8. This is a question that is more appropriate for other groups to answer.

### **Question 9: Can you suggest any other options to ensure transparency to consumers that voluntary payments are discretionary? (Max 500 words)**

9. In order to address the potential negative consequence of option 1B (workers receiving a reduction in discretionary payments) one alternative approach, seen in the USA, is for the discretionary service charge to be excluded from the bill, but for various suggested amounts (calculated by reference to specific percentages e.g. 10%, 15%, 17%, etc) to be

set out at the bottom of the bill. This gives consumers the option to “opt in” rather than placing the onus on them to “opt out” of paying a suggested service charge, whilst still giving them the benefit of a calculated amount as guidance.

**Question 10: Do you consider the current regulatory frameworks (Annex B) appropriate to enforce proposals to ensure that any suggestion of a discretionary payment for service emphasises that this is discretionary for the consumer?**

10. This is a question that is more appropriate for other groups to answer.

**Question 11: If no, what additional enforcement measures would you suggest? Please reference your suggestions to specific consultation options where possible (max 500 words)**

11. N/A

**Question 12: Which option (or group of options) do you prefer to meet the Government’s objective to ensure workers receive a fair share from discretionary payments for services? Please explain your reasoning. (Max 500 words).**

12. *Option 2A*

In theory this ensures both transparency and fairness. However, it may have unintended consequences if it results in employers either seeking to recoup those costs by reducing employment costs, or not allowing employees to determine how tips are shared and instead handling them centrally.

*Option 2B*

This would go some way to enhancing transparency and fairness. However, ELA is unsure of how the Government would go about setting the appropriate limit on deductions. It would be difficult to set a limit at a fixed sum if the administrative costs of processing payments vary between businesses. If the limit is set too low, this may have the same unintended consequences as described above in respect of Option 2A. Similarly, if the limit is set too high, this will not ensure that the employer is unable to profit from deductions.

There are similar problems in respect of transparency and fairness in limiting deductions to a fixed percentage. ELA queries whether there is evidence that legitimate administrative costs on employers of processing discretionary payments vary according to the value of payments. For example, ELA doubts that, where an employer imposes a 10% deduction, it can be the case that a tip of £100 costs £10 to process, whereas a tip of £10 costs £1.

Consequently, the only way of ensuring fairness and transparency in Option 2B would be for employers to set their own limits on deductions from discretionary payments having regard to their own administrative costs, to ensure that they do not profit. However, there is an obvious difficulty with enforcing this unless employees have access to information about business costs provided by the employer. ELA would suggest consideration is given to an obligation on employers to provide information to employees regarding their administrative/processing costs in order to justify the level of any deduction.

*Option 2C*

This ELA sub-committee has no direct experience of the practices identified in Option 2C. However, based on the description in the consultation document, ELA is concerned that the practice appears unfair and arbitrary. ELA is concerned by workers being required to make up the difference between tips received and charges levied “*out of their own pocket or future earnings*” as this could potentially result in workers being *de facto* paid less than the NMW. ELA is also concerned that requiring workers to pay a charge to go towards other employer costs such as “*team activities and rewards*” could disproportionately benefit particular groups and thus be potentially discriminatory.

#### *Option 2D*

ELA agrees with the proposals for an updated tronc guide, though queries whether the E24 guidance produced by HMRC, largely aimed at taxation, is the appropriate place for guidance concerned with work-place practices. BIS guidance specifically designed to address tronc management may be more effective.

ELA is unsure of the government’s proposals in relation to ‘*placing tronc requirements on a statutory footing*’. Primary legislation will be too heavy handed and may result in employers not supporting tronc systems owing to additional ‘red tape’. Statutory guidance may therefore be more appropriate.

ELA is unaware of specific instances of troncmasters experiencing victimisation by employers, though could well imagine such instances. Troncmasters would likely benefit from protection in fulfilling their role, akin to protection afforded to employee representatives. For example, protection against dismissal and the right not to suffer any detriment on the grounds of their status as troncmaster, or any activities undertaken in that role, and the right to paid time off work to carry out their functions as troncmaster.

#### **Question 13: Can you suggest any other options to ensure workers receive a fair share from discretionary payments for service (Max 500 words).**

13. The options above do not address the practice of deductions being made from tips to cover, for example, walk outs and breakages. It is important that any guidance comprehensively deals with such deductions, as well as the specific practices identified in Option 2.

#### **Question 14: Can you provide evidence to explain whether current handling deductions vary depending on the amount of discretionary payment for service, or a percentage charge? Please provide an explanation to explain why the current approach is adopted. (Max 500 words).**

14. Our experience indicates that where handling deductions are applied, it is more common for there to be a flat percentage charge. However, this is a question that is more appropriate for employer groups to answer directly.

#### **Question 15:**

15. N/A

#### **Question 16: Do you agree with the proposed E24 tronc guidance updates? Please provide reasoning or further additions to support your response (max 500 words).**

16. Further guidance on the practical operation of a tronc scheme would be welcome in particular since the current E24 (2015) guide predominantly addresses the tax and NIC treatment of tips including tips paid via a tronc.

Based on the stated finding that worker bodies largely believe that tronc are predominantly management controlled or manipulated, the further additional areas to be addressed by the E24 guide, as set out in paragraph 65(a) of the consultation paper, would assist in giving workers clarity and guidance on their involvement and input into the allocation of tips through a tronc scheme.

As regards the role and appointment of the troncmaster:

- a) Further guidance to clarify whether it is the troncmaster or the workers who participate in the tronc scheme who have the right to determine the allocation of tronc would be welcome.

The E24 guidance refers to the "troncmaster" as a "person, other than the employer, responsible for arrangements to share tips amongst employees." This could suggest that it is the troncmaster who also has the right to determine the allocation of tronc.

The 2009 Government Code of Best Practice describes the troncmaster as the person who distributes monies from the tronc and who has responsibility for operating PAYE or payment distributed through the tronc. It also states that "for a tronc to comply with HMRC regulations, it is an essential requirement that workers decide who participates in the tronc and how distributions are made, *not* the employer." This suggests that it is the workers who participate in the tronc scheme, rather than an appointed troncmaster, who have the right to determine the allocation of tronc.

Clarity and consistency within these two key reference documents would be welcome.

- b) Since employers should not be involved in the allocation of tronc, where a senior manager of the business is also appointed troncmaster, further guidance to clarify the scope of an individual's two different roles would be helpful. It is understood that the duties of a troncmaster are done on behalf of the workers, whereas the duties of the manager are done on behalf of the employer.

To further achieve the objective of increasing the prevalence of well managed tronc systems:

- c) if the Government agrees that workers within tronc systems should benefit from additional accountability and protection rights, any updating of the E24 guidance would also benefit from covering general guidance on the remedies available for workers if they are unhappy with the operation of the tronc and/or allocation of any tips through the tronc scheme.
- d) if there is to be greater accountability for troncmasters, additional guidance clarifying the extent to which the employer can or cannot interfere to put right any wrongs arising from the operation of the tronc would also be welcome. For example if there is a discriminatory allocation of tips amongst workers, the extent to which the employer can at that stage become involved and the potential impact, if any, on the tax/NI treatment of any tips re-allocated in those circumstances.

**Question 17: Which options for tronc (guidance or rules) do you think is most suitable to achieve the Government's stated objectives?**

- 17. Based on our experience working with retail/hospitality employers and employees we anticipate that further non-statutory guidance would be more welcome than additional regulation. The consultation paper's proposal at paragraph 65(b) of placing tronc requirements on a statutory footing to ensure the desired treatment of discretionary payments for service by those employers using such a system, does not provide any

detail as to which specific tronc requirements it is proposed would impose statutory rights and/or obligations. Further details and consultation with key stakeholders would be recommended before any new statutory rights and/or obligations are introduced to fully understand their scope and potential impact for both workers and employers.

**Question 18: Do you consider the current regulatory frameworks (Annex B) appropriate to enforce proposals to ensure that workers receive a fair share from discretionary payments for service?**

18. The legislation referred to within Annex B focuses upon tax, minimum wage and consumer protection. We note that there is considerable complexity involved in the tax treatment of tips which increases the administrative burden and uncertainty for employers and employees. A simpler tax regime could remove much of the current incentive for employers to charge administrative fees. In any event, the annexed legislation does not provide any direct enforcement mechanism. The separate key enforcement option available to employees is the right to bring a claim for unlawful deductions in the Employment Tribunal.

Case law confirms that employees can seek redress for inappropriate deductions from their tips made by employers. Deductions in breach of new legislation which prevents or limits administration or other charges could therefore be the subject of a claim.

Given the present Employment Tribunal fees regime and the relatively low value of tips there may be significant practical barriers to employees raising such claims. The administrative and tax complexity in this area also makes it difficult for employees to identify inappropriate conduct. Increased transparency may go some way to addressing the latter issue, and there may be scope for collective claims to overcome the costs barrier in circumstances in which a group of employees suffer inappropriate deductions. However, ELA considers that this type of potential claim should be a specific focus in any further general Tribunal fees review, together with other potential low value claims. It is noted that tipping related claims at present seem exceedingly rare, despite the range of concerns in this respect presently under consideration.

ELA therefore also suggests that relevant guidance on tipping should identify the scope for unlawful deduction from wages claims (including the potential obstacles for workers with such claims where a non-employer managed tronc scheme is operated), and the potential for collective or representative claims. Guidance might also advocate the election of independent employee representatives when employers manage the allocation of tips, to include a specific remit to examine the lawfulness of any proposed deductions.

**Question 19: If no, what additional enforcement measure would you suggest? Please reference your suggestions to specific consultation options where possible. (Max 500 words)**

19. N/A

**Question 20: Do you agree with the suggested updates (within Annex C) to the current voluntary Code of Practice? Please provide reasoning or further additions to support your response (Max 500 words).**

20. The updates outlined in Annex C are all important and helpful additions to any Code of Practice. In particular, the requirement for employers to provide annual and ad-hoc statements as described in Annex C will go some way to improving transparency for workers and will be vital for effective enforcement. If Option 2B is pursued it will also be necessary to ensure that reporting by employers also includes breakdowns of their own administrative costs of handling payments. However, there is a risk that any additional administrative costs/burdens might have adverse repercussions on employees if, for

example, employers seek to recoup those costs by reducing other benefits (e.g. free meals).

**Question 21: Which option(s) outlined in this section (3A and 3B) do you consider would best support the proposals under Options 1 and 2 to achieve the Government's stated objectives? Please provide an explanation to support your answer (Max 500 words).**

21. In ELA's experience, the current voluntary Code of Practice does not seem to be well-known and little attention is likely to be paid to a voluntary Code. For that reason, Option 3B is preferred. A statutory Code, modelled for example on the ACAS Code of Practice which employment tribunals must have regard to, including in making uplifts/deductions to tribunal awards, would certainly have far greater impact. Although in reality few stand-alone claims are likely to be brought in which such a statutory code might apply (though it may be of relevance to wages claims), it would nevertheless likely raise the profile of the Code amongst both employers and employees more successfully than a voluntary code.

**Question 22: Do you have any evidence of the costs of complying with the current voluntary Code of Practice?**

22. N/A

**Question 23: As an employer, do you estimate any additional costs in adhering to the suggested additions to the voluntary Code of Practice?**

23. N/A

**ELA Sub-committee**

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