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## Second Circuit Rejects Employees' Attempts to Claim Delivery Fees

By Glenn S. Grindlinger

The United States Court of Appeals for the Second Circuit recently rejected an assertion by employees that they were entitled to the proceeds of the delivery fee charged by their grocery store employer. In its March 5 ruling for *Belizaire v. Ahold USA, Inc., et al.*, the Second Circuit narrowed what types of fees commonly assessed by business can be reasonably construed as charges that purport to be gratuities — the proceeds of which must be paid to the affected employees.

As a result, employers can continue to assess common charges that exist across industries, such as delivery fees, without fear that such charges will lead to costly litigation.

### Background

In 2008, the New York Court of Appeals, New York's highest court, issued its opinion in *Samiento v. World Yacht, Inc.*, 10 N.Y.3d 70, that radically changed the ballgame for mandatory charges assessed to customers by businesses. In *Samiento*, the Court of Appeals was asked to interpret New York Labor Law § 196-d, which in relevant part states that “no employer ... shall ... retain any part of a gratuity or of any charge purported to be a gratuity for an employee.” Prior to *Samiento*, the New York Department of Labor (DOL) and lower courts had long held that any mandatory charge assessed by a business, such as a mandatory service charge, by its very nature could not be a gratuity or purport to be a gratuity and

therefore could be retained by the business. The *Samiento* court rejected that viewpoint. Rather, the *Samiento* court held that if the reasonable customer would believe that the mandatory charge at issue, such as a service charge, was a gratuity, the proceeds of that charge could not be retained by the business and had to be paid to the employees who provided service to the customer who paid the charge.

In 2011, in its Hospitality Industry Wage Order, the DOL expanded upon *Samiento*. In that Wage Order, the DOL promulgated a rule stating that there is a presumption that “any charge in addition to charges for food, beverage, lodging and other specified materials or services ... is a charge purported to be a gratuity,” the proceeds of which must be paid to the employees who provided the services at issue. The Hospitality Industry Wage Order goes on to state that an employer can rebut the aforementioned presumption if the employer properly informs the customer that the charge at issue is not a gratuity and is not paid to the service staff.

### *Belizaire v. Ahold USA, Inc., et al.*

In *Belizaire*, a grocery store chain assessed a “delivery fee” on grocery deliveries. Plaintiffs claimed that the reasonable customer would believe that the “delivery fee” was a charge that purported to be a gratuity and therefore should be paid to the employees who delivered the

groceries to the customer. The District Court disagreed and granted the grocery store defendants' motion to dismiss. The Second Circuit upheld the District Court's decision to dismiss the complaint concluding that no reasonable person would believe that a charge called a "delivery fee" would be (or purport to be) a gratuity. Specifically, the Second Circuit held that there were three main reasons why no customer would believe that the "delivery fee" was a gratuity.

- First, Belizaire did not allege that defendants ever represented to customers that the delivery fee was a gratuity. The defendants' website had a section entitled "Service Fees and Tipping." In that section, the defendants clearly distinguished between mandatory service fees, such as the delivery fee, and tips. The website also stated that "tipping is optional. It is not expected but always appreciated." According to the Second Circuit, these statements and course of conduct would not permit any reasonable customer to conflate the delivery fee with a gratuity.
- Second, the Second Circuit noted that the delivery fee was a flat rate that actually decreased if the customer ordered more than \$100 of groceries. The defendants had a minimum order size of \$60 and charged a flat delivery fee of \$9.95. However, if the customer ordered more than \$100 worth of groceries, the delivery fee dropped to \$6.95. According to the Second Circuit, no reasonable customer would perceive a mandatory fee to be a gratuity when the fee decreases as the value of goods increases.
- Third, the Second Circuit held that the Hospitality Industry Wage Order's regulations were not applicable as the grocery store employer was not in the

hospitality industry. However, the Second Circuit noted that even if that wage order was applicable, it would not bolster Belizaire's claim. The Second Circuit stated that the rebuttable presumption that a mandatory charge is a gratuity if not properly explained does not apply to "charges for . . . specified materials or services." In the Second Circuit's opinion, a "delivery fee" is a specified service, easily understandable to the average consumer and therefore the presumption that a mandatory charge is a gratuity is not applicable. Thus, a "delivery fee" differs from a mandatory fee, such as a "service charge," that is vague and amorphous. Accordingly, the delivery fee at issue did not have to be paid to the delivery employees.

This decision is good news for employers. Since *Samiento*, plaintiff-employees, especially those in the hospitality industry, have challenged virtually every mandatory charge that customers are required to pay. This decision should narrow what mandatory charges will be challenged. Employers can continue to assess common charges that exist across industries, such as delivery fees, without fear that such charges will lead to litigation that could significantly impact an employer's bottom-line.

For more information about this alert, please contact Glenn S. Grindlinger at 212.905.2305 or [grindlinger@foxrothschild.com](mailto:grindlinger@foxrothschild.com), or any member of the firm's national Labor & Employment Department.

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