

# Don't Drown In the Tip Pool: An Overview of the Massachusetts Tip Pooling Statute

By Dave Robinson on July 26, 2022



Tip pooling is the practice of taking gratuities received from patrons and either pooling all or part of them to be distributed to other employees. It is the typical practice for restaurants, banquet facilities and other places where prepared food or beverages are served to implement some form of tip pooling as part of their employee compensation. However, failure to carefully implement a legal tip pooling policy can have disastrous results because all of your tipped employees have a claim if you fail to properly administer the tip pool. Along with treble damages (all wage claims are trebled under the Massachusetts Wage Act), an employee class verdict can easily add up to become a business-killing verdict for a small restaurant.

Under Massachusetts law, an employer may distribute pooled tips only to employees who are categorized as “wait staff,” “service bartenders” or “service employees.” Such employees are generally defined as those persons who (i) serve beverages or prepared food directly to patrons, (ii) clear patrons’ tables, (iii) prepare beverages for patrons to be served by another employee, or (iv) provide service directly to customers in a position in which one customarily receives tips (such as coat check employees), and who do not have managerial responsibilities.

Restaurants should be aware that if they choose to add a service charge to a customer’s bill (as opposed to permitting the customer to leave a discretionary gratuity), they must distribute all proceeds of that service charge to wait staff, service bartenders or service employees in proportion to the service provided by those employees. Restaurants may impose a “house” or other administrative fee in place of a service charge and retain or distribute that fee at its discretion. However, a restaurant must carefully identify the fee as administrative so that it is evident to customers that the fee is not a gratuity or tip that will be distributed to service employees. Fees that are ambiguously described – whether intentionally or innocently – will be treated as service charges that must be remitted by the employer. Mistakes in properly defining a charge to customers can be quite costly. For example, in 2008, Canyon Ranch, a luxury spa, agreed to pay \$14.75 million to settle a lawsuit alleging the service charge it collected from its patrons should have been distributed to its service employees.

The law applies to all tip pools, whether merely permitted or mandated, and can not be avoided by entering into a special agreement or contract with an employee. Moreover, managerial personnel must be aware that they cannot retaliate against or discipline employees for complaining about the tip pooling policies, even if there is no merit to the complaint. Otherwise, the employer could be subject to potential exposure for a retaliation claim, in addition to the original tip pool claim.

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Restaurant owners and managers should consider reviewing their tip pooling practices or instituting a written policy to be sure they are in compliance with the laws of their particular state, which vary significantly from state to state. An experienced attorney should be consulted before instituting or revising a tip pool policy.

If you have any questions or concerns regarding tip pooling, handling employee complaints, or any other personnel policy or matter, please contact the author at [dwr@riw.com](mailto:dwr@riw.com).

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