

General Scheme of Payment of Wages (Amendment) (Tips and Gratuities) Bill

Part 1: Preliminary and General

1. Short title, construction, collective citation and any necessary commencements

Part 2: Amendments to Payment of Wages Act 1991

2. Amendment to the definition of “wages”
3. Definitions of tips, gratuities and service charges
4. Prohibited deductions from wages
5. Obligation on employers to distribute certain tips and gratuities in a fair and equitable manner
6. Obligation on employers to prominently display notice on tips
7. Amendment of Terms of Employment (Information) Act 1994

Part 1: Preliminary and General

Head 1 provides for the short title, construction, collective citation and any necessary commencements.

Background

There is anecdotal evidence to suggest that some employers, in the restaurant and hospitality industry in particular, are using tips or gratuities, given by customers and intended for staff, for other purposes, including as a means of making up contracted wages and other overheads. The Tánaiste wishes to outlaw this practice via an amendment to the Payment of Wages Act 1991.

The Tánaiste's aim is to define and distinguish between wages, tips/gratuities and service charges in a clear and transparent manner and to prohibit the use of tips and gratuities as a contribution towards the payment of contracted wages.

He also wishes to ensure that employees have a right to a fair share of the tips and gratuities that are provided on a voluntary basis by satisfied customers.

The Tánaiste also intends to bring greater transparency to practices in this area by requiring employers to display a notice setting out how tips, gratuities, and service charges are distributed within their business.

Part 2: Amendments to Payment of Wages Act 1991

Head 2 – Amendment to the definition of “wages”

Amendment 1

In Section 1(1), in the definition of “wages”, in the list of payments that “shall not be regarded as wages for the purposes of this definition”, insert a new subparagraph (vi) along the lines of the following:

“(vi) any payment by way of tips or gratuities.”

Purpose

The purpose of Head 2 is to:

1. Provide that tips or gratuity cannot be used to form part or all of a person’s contractual wages/pay.
2. Maintain the position that service charges levied by a business (as distinct from tips and gratuities) are part of business revenues and as such can be applied to meet all business costs, including salaries.

Provisions

Amendment 1 provides that within the definition of “wages”, “any payment by way of tips or gratuities” shall also be an excluded item on the list of items that may not constitute a person’s wages within Section 1(1) of the Principal Act.

It should be noted that the concept of ‘tips and gratuities’ is not found anywhere except in the National Minimum Wage Act 2000. That Act excludes some types of tips and gratuities from the calculation of the minimum wage as follows:

-Section 19(2) of the National Minimum Wage Act states that any payments listed in Part 2 of the Schedule are not included as pay of an employee for the purposes of calculating the employee’s average hourly rate of pay.

-Section 19(4) of the National Minimum Wage Act states that “An employer shall not, for the purposes of the Act, change a payment or benefit in kind listed as a non-reckonable component of pay as set out in Part 2 of the Schedule so that its status becomes that of a reckonable component of pay as set out in Part 1 of the Schedule.”

-Part 2 of the Schedule sets out the non-reckonable components in calculating average hourly rate of pay and provides that “*any amount distributed to the employee of tips or gratuities paid into a central fund managed by the employer and paid through payroll*” shall not be a reckonable component in such calculations.

In that context, the policy intent of this Head is to ensure that tips and gratuities are excluded from all contractual wages, including those amounts that are above the Minimum Wage level. The aim is to achieve this without also amending the National Minimum Wage Act.

The National Minimum Wage Act excludes from the calculation of the minimum wage only those tips or gratuities that are “paid into a central fund managed by the employer and paid through payroll”. It does not expressly exclude tips or gratuities that are not fully under the control of the employer e.g., cash left on a dining table or in a tip jar by the till. It also does not expressly exclude tips or gratuities that are controlled by the employer, but not distributed through the payroll e.g., cash handouts to staff by the employer.

In that context, the policy intent in these Heads is not to limit “tips and gratuities” only to those monies “paid into a central fund managed by the employer and paid through payroll”. It is intended instead that any and all tips and gratuities should fall outside the calculation of a person’s contractual wages, whether those wages are at Minimum Wage level or above and whether those tips are controlled and accounted for or not.

Commencement

The provisions contained in this Head will come into operation by way of Commencement Order.

Head 3 – Definitions of tips, gratuities and service charges

Amendment 1

In Section 1(1) of the Principal Act, before the definition of “wages”, to insert a new definition of “tip or other gratuity” along the lines of the following:

“tip or other gratuity” means a payment voluntarily left for, made or gifted to an employee or an employer, whether in cash or by electronic or other means, by a customer of the employer, in such circumstances that it could reasonably be inferred that the customer intended or assumed that the payment would be kept by the employee or shared among the employees;

Amendment 2

In Section 1(1), before the definition of “strike”, to insert a new definition of “service charge” along the lines of the following:

“service charge” means a contractually imposed and receipted sum payable by a customer for services provided to them by or on behalf of a service provider, which sum is recorded in the general revenues of the service provider;

Purpose

The Tánaiste wishes to define and distinguish between wages, tips/gratuities and service charges in a clear and transparent manner.

This Head provides for some definitions that are currently absent from the Statute Book. The only place the terms “tips” or “gratuities” are currently mentioned is in Part 2 of the Schedule to the National Minimum Wage Act, where the terms are presented as being self-explanatory. Similarly, “service charge” is mentioned in Part 1 of the same Schedule, without definition. (There are Local Authority and housing “services charges” in legislation too, but their distinct context is clear.)

As explained under Head 1, it is intended to construe “tips and gratuities” in broad terms and not to limit the definition to that of the NMW Act Schedule.

As regards the definition of a “service charge”, Part 1 of the Schedule to the National Minimum Wage Act sets out the reckonable components that can be used in calculating the average hourly rate of pay and provides that “*the amount of any service charge distributed to the employee through the payroll*” can be included in the calculation. The NMW Act is silent on any services charges which are not distributed through the payroll. This suggests that the employer can legitimately include a service charge as a means of partly meeting his wage obligations to the employee, provided that service charge is distributed through the payroll.

It is not proposed to move away from that approach in this Bill. It is understood that service charges are indeed commonly used to cover a range of business expenses and the implications of prohibiting this practice and moving away from the current *status quo* would

need broad consultation and thorough consideration. It would likely require extensive legislative amendments across a range of Acts and would likely attract constitutional challenge.

Provisions

Amendment 1 inserts a new definition of “tip or other gratuity”.

Amendment 2 inserts a new definition of “service charge”.

Commencement

The provisions contained in this Head will come into operation by way of Commencement Order.

Head 4 – Prohibited deductions from wages

Amendment 1

Insert into subsection 5 a new subsection 2A, along the following lines:

“2A. An employer shall not make a deduction from the wages of an employee in respect of any tips or gratuities as defined under Section 1(1), other than authorised to be made by virtue of any statute or any instrument made under statute”

Purpose

The purpose of this Head is to clarify that deductions cannot be made from wages, and then supplemented by tips and gratuities.

The Payment of Wages Act 1991 already prohibits certain deductions from being made from employees’ wages. Section 5(2) currently reads:

“(2) An employer shall not make a deduction from the wages of an employee in respect of—

(a) any act or omission of the employee, or

(b) any goods or services supplied to or provided for the employee by the employer the supply or provision of which is necessary to the employment,...

It is proposed here to insert a new subsection to specifically prohibit employers from using tips to make up the contractual wage. This practice might be described as a deduction from wages, which deduction is then compensated by the tips and gratuities that customers intend to be additional or supplementary to the wage. The policy intent is to ensure tips and gratuities are additional to the wage and are not subsumed into the wage.

Provisions

Amendment 1 inserts into the Principal Act a new paragraph that tips or gratuities cannot be deducted from contractual wages.

Commencement

The provisions contained in this Head will come into operation by way of Commencement Order.

Head 5 – Obligation on employers to distribute certain tips and gratuities in a fair, transparent and equitable manner

Amendment 1

Insert into the Principal Act, after Section 5, a new Section 5A along the lines of the following –

“5A. (1) Supplementary to any wages paid in accordance with sections 1 and 2 of this Act, any tips or gratuities received by electronic means by an employer in a sector where the gifting of tips and gratuities [typically applies] [is typically a matter of practice] [is commonplace][regularly occurs] [exists] shall be fully distributed to employees in a manner that is fair, transparent and equitable, with no amount withheld other than authorised to be made by virtue of any statute or any instrument made under statute,.”

(2) In determining for the purposes of this section what is fair, transparent and equitable, an adjudication officer shall have regard to all of the factors or circumstances that it regards as relevant.

(3) The factors and circumstances referred to in subsection (2) may include:

- (a) the custom and practise within the establishment,
- (b) the seniority or experience of the employee,
- (c) the value of sales or income generated for the business by the employee,
- (d) the proportion or number of hours worked by the employee,
- (e) the role and influence of the employee in providing a personal customer service,
- (f) whether the employee is on a full-time or part-time contract of employment,
- (g) whether the employee was consulted in relation to the manner of distribution.

Amendment 2

Insert into Section 6, after “payment,” the term “or section 5A as respects the distribution of tips and gratuities”.

Purpose

The purpose of this Head is to provide a legal right for employees to receive tips and gratuities that are paid by electronic means (i.e. by credit and debit cards).

It is presumed that tips and gratuities in the Irish context are mostly intended by customers to be an additional or supplementary ‘bonus’ or ‘gift’ to a worker, separate to their wages, as

provided for under previous Heads. This Head provides that any tips or gratuities that are collected by the employer rather than directly given to the worker by the customer shall be distributed to staff by the employer. It has been suggested that a similar approach could be applied to tips and gratuities given in cash to the staff member. However, any such approach would be fraught with difficulty in terms of the inspection, compliance and adjudication aspects of any legislation. In order to fully regulate all tips and gratuities in all their forms would require an employer to fully collect, control, account for and document all cash tips and gratuities passing through their premises at all times. The employer would then have to distribute those monies in some manner, although no agreement or consensus as to how the monies should be distributed was found by the Low Pay Commission in its report. Even if a consensus around appropriate distribution could be found, the administrative burden on the employer and the inspection and compliance burden for the Workplace Relations Commission, would likely be disproportionate to the problem it seeks to solve.

For the above reasons, this Head proposes to cover only tips and gratuities that are captured in electronic form i.e. through a specific and entirely voluntary payment made by a customer by credit or debit card.

This Head then proposes that such tips and gratuities should be distributed “in a fair, transparent and equitable manner”. No definition of the term “in a fair, transparent and equitable manner” is proposed as it is considered that a one-size-fits-all approach would flounder. What is “fair, transparent and equitable” will depend on the circumstances of each business and its staffing and work arrangements. A non-exhaustive list of factors for consideration have been added to the Head, but these are not prescriptive. Reference is made to an ‘adjudication officer’ (i.e. a WRC adjudicator) because this is ultimately where the meaning of ‘fair, transparent and equitable’ will be settled.

Recourse to the WRC under Section 6 of the Principal Act is also provided for. Any adjudication on a complaint would likely consider matters such as the number of hours a staff member has worked, busy and quiet periods, and their role in the provision of services in the business.

Provisions

Amendment 1 inserts into the Principal Act a new Section that tips and gratuities paid by electronic means should be distributed to employees in a fair and equitable manner.

Amendment 2 provides recourse for workers to the Workplace Relations Commission in respect of complaints relating to the fair and equitable distribution of tips and gratuities paid by credit or debit card.

Commencement

The provisions contained in this Head will come into operation by way of Commencement Order.

Head 6 – Obligation on employers to prominently display notice on tips

Amendment 1

Insert a new Section 4A to provide along the lines of the following:

“4A (1) This section applies to every employer where the gifting of tips and gratuities [typically applies] [is typically a matter of practice] [is commonplace] [regularly occurs] [repeatedly/ frequently exists].

(2) Subject to subsection (1), every employer shall display,

(a) at a prominent location within the place of business, and

(b) at principal points of payment, and

(c) in such other position or positions that it may be easily read by employees and customers,

information on the manner in which tips, gratuities and service charges are distributed in that business.

(3) An employer who contravenes subsection (2) shall be guilty of an offence and shall be liable on summary conviction to a Class C fine.”

(4) (4) In determining whether this requirement applies an adjudication officer shall have regard to whether tips and gratuities are gifted to employees as a matter of practice in return for providing service to customers in a [direct][personal][face to face] manner.

Purpose

The purpose of this Head is to place an obligation on employers to display in a prominent and clear way their policy on how tips, gratuities and service charges are distributed in their business.

Subsection (2) anticipates where a customer of a business is most likely to see a displayed notice on tipping. It is considered that this is most likely to be at a prominent location on a business premises and at payment points.

Subsection (3) is a standard provision and places this offence within the Class C category of the Fines Act 2010, which currently means a fine not exceeding €2,500.

Subsection (4) has been added, in line with the new addition to subsection (1) to narrow down the businesses that are obliged to have and display a tipping policy. This is in line with observations made by the Office of the Attorney General on the draft Memo in Quarter 4 of 2019 that suggested “every person carrying on a business in the State” might be too broad. It also implies a distinction between businesses where ‘service charges’ are commonplace such as online ticket sales and businesses where tips and gratuities are commonplace because the customer receives a personal and face to face service from the staff.

It should be noted that the Low Pay Commission, in its July 2018 Report entitled ‘Recommendations for the National Minimum Wage’ has recommended the introduction of a requirement for employers to display basic entitlements in all places of employment where the minimum wage is in operation. This is a separate matter to what is provided under this Head.

This Head is somewhat similar to the requirement contained in Section 12 of the Protection of Young Persons (Employment) Act, 1996 which states:

“12.—(1) Every employer shall display at the principal entrances to the premises where any of his or her employees work, and in such other places as an inspector may require, in such a position that it may be easily read by employees so employed, the prescribed abstract of this Act.”

Provisions

Amendment 1 inserts into the Principal Act a new Section 4A to oblige employers in businesses that regularly receive tips to display clearly and prominently in the premises and at payment points and other positions where it may easily be read by employees and customers, e.g., websites/menus, their policy and practice as regards how tips, gratuities and service charges are distributed in their business. Subsection (4) provides that failure to do so is an offence, punishable by a fine up to €2,500.

Commencement

The provisions contained in this Head will come into operation by way of Commencement Order.

Head 7 – Amendment of Terms of Employment (Information) Act 1994

Amendment 1

Section 3(1A) of the Act of 1994 is amended by the insertion of the following paragraph after paragraph (e):

“(f) where applicable, the manner in which tips, gratuities and service charges are distributed.”

Purpose

The Tánaiste wishes to amend the *Terms of Employment (Information) Act 1994* to provide that an employer must inform employees in writing of the policy in relation to the distribution of tips and gratuities in that business. The information will be included in the written statement of terms of employment that must be provided to an employee not later than 5 days after the commencement of an employee’s employment.

As the practice of tipping and the imposition of service charges is limited to certain businesses and/or certain sectors, the words “where applicable” are suggested.

The *Employment (Miscellaneous Provisions) Act 2018* amended the *Terms of Employment (Information) Act 1994* to provide that five core terms of employment must be provided by the employer within five days of the commencement of employment. This would bring the core terms to six.