

Tip-donation requirement charitable – but illegal

I work in the restaurant/bar industry. Once a month, my boss picks a day, and it's usually a Friday or Saturday, and tells us that all of our tips for that day will be donated to charity. We don't mind being charitable, but we aren't told ahead of time and none of us have ever been asked if this is OK. We rely on tips for gas, groceries, things our children need, etc. Even if it's once a month, can they legally force us to do this?

John J. Balitis

Fennemore Craig

The scenario you describe raises concerns under both state and federal law.

According to Arizona's wage payment statute, unless an employer disputes what it owes to a worker or has a legal obligation to withhold his or her compensation, an employer is not per-

mitted to divert an employee's wages without written authorization from the employee. Your employer's practice in this regard is unlawful.

Setting the state law issue aside, your employer's diversion of tips to charity may run afoul of minimum wage requirements under the Federal Fair Labor Standards Act. Making this determination will depend on whether your employer uses a tip credit system to compensate you.

If your employer pays you a sub-minimum base wage but uses your tip income to supplement your base wage to ensure you are paid minimum wage in the aggregate, the practice of withholding tips on any given day will result in you being paid less than minimum wage for the hours you work that day. Assuming you are an hourly, non-



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Amy Lieberman

exempt worker, this practice is unlawful. It is also noteworthy that tip credit arrangements should be in writing.

By contrast, if your base wage, exclusive of tips, is equal to or greater than the current minimum wage, diverting your tips on any given day will not result in a minimum wage violation. In considering this issue, it is important to keep in mind that Arizona law provides for a minimum wage that is higher than the minimum wage re-

quired under the FLSA.

Amy Lieberman

Insight Employment Mediation

No, your employer cannot require that your tips be donated to charity. Your tips belong to you.

Under the Fair Labor Standards Act, which is enforced by the Wage and Hour Division of the Department of Labor, an employee's tips are the sole property of the employee. This is the case, regardless of whether an employer pays the employee less than the required minimum wage of \$7.25 an hour and uses the employee's tips to make up the difference, referred to as taking a "tip credit."

The only thing an employer can legally use an employee's tips for is in furtherance of a valid tip pooling arrangement, where tips are shared by all em-

ployees who are providing service to customers, or in furtherance of a tip credit.

Even though your employer cannot require donations of tips to charity, it is not illegal for your employer to encourage voluntary donations, just as an employer can encourage donations of time or money to a charity such as United Way. As long as your job is not contingent upon donating your tips, it is permissible to encourage such giving.

In that circumstance, I would ask your employer for a record of the amount donated that is attributed to you, and seek tax advice about whether that amount can be taken as a deduction by you on your taxes.

— Compiled by Georgann Yara

Send your questions to asktheexperts1@gmail.com.