

To whom it may concern at The Washington Department of Labor & Industries,

Washington voters passed I-1433 which raised wages and provided paid sick leave to thousands of workers in the state. Additionally, I-1433 included language that supplemented current Washington law regarding tips and service charges. It couldn't be clearer: **"Tips and service charges paid to an employee are in addition to, and may not count towards, the employee's hourly minimum wage."** We have had to continually fight business interests attempting to implement a tip penalty for workers, and it appears as though these groups and employers have now turned their focus to manipulating service charges.

Employers are free to use service charges, including those meant to replace a tip system in restaurants, so long as the charges are clear for employees and consumers, and employees are compensated by the service charges *in addition to* their hourly wage. Although no businesses have instituted service charges for things like increased rent, they have decided to go after their own workers. The trend among many employers has been implementing intentionally misleading charges, or using service charges to supplement wages—a violation of I-1433. Failure to quickly provide strong guidance and enforcement of service charge guidelines will allow this trend to spread until it is nearly impossible to remedy. We aren't just talking about getting the wording right--in many cases, this is wage theft.

Working Washington members have collected numerous examples of problematic service charges from across the state including 1) unlabeled service charges, 2) service charges with "wage" or similar in the name of the charge, 3) charges for employees not directly servicing the customer, 4) municipal minimum wage related service charges, and 5) "mandate" service charges.

In order to prevent further violations and correct the numerous current violations, LNI must enact strong administrative rules regarding service charges that include the following components:

- Ensure workers are able to be made whole, with service charge violations equivalent to wage theft. Appropriate severity should be applied to any citations or other additional enforcement mechanism.
- In order to facilitate compliance by employers, and so employees are better able to unambiguously identify violations, LNI should include in administrative rules clear examples of prohibited service charge language and usage. For example, charges that include "wage" or similar should be invariably interpreted as being used toward employees' wages.
- LNI should ensure service charges are not obscured as taxes or fees, as employees and consumers are better able to identify when employers are using service charges illegally when the charge is clear.

We thank LNI for examining this issue and working to release guidelines for service charges. Below are detailed descriptions of the examples we have received with an explanation for why we believe these charges to be misleading or in violation of I-1433, and must be addressed in administrative rules.

1. **Unlabeled Service Charges: we request LNI explicitly state in rules that any charge that does not specify the charge is not payable to employees servicing the customer must be paid the employee, and include how LNI will enforce these charges are being paid to employees**

**servicing customers. Service charges that are not correctly paid to employees should be enforced as wage theft.**

Many charges are vague and frequently fail to state explicitly they are not payable to the employee servicing the customer, and according to I-1433 should therefore be paid to the employee servicing the customer, and not as a part of their wages. This is a clear requirement in RCW 49.46.160, however employers frequently disregard this. In many cases, this may be an establishment attempting to use a service charge toward employees' minimum wages. If additional information is not readily available on the receipt or the menu, the charge may present as a tax or fee based on the location of the charge on the bill. Omission of information that provides clarity to consumers and employees should not impede enforcement, and administrative rules should include guidelines to prevent this from occurring. Example: *Black Bottle, Seattle*



2. **“Wage” in Name Service Charges: We request LNI consider any service charge that states the charge will be applied toward wages be interpreted as contributing towards wages and in violation of I-1433. Examples of service charge language that is prohibited should be included in LNI’s administrative rules.**

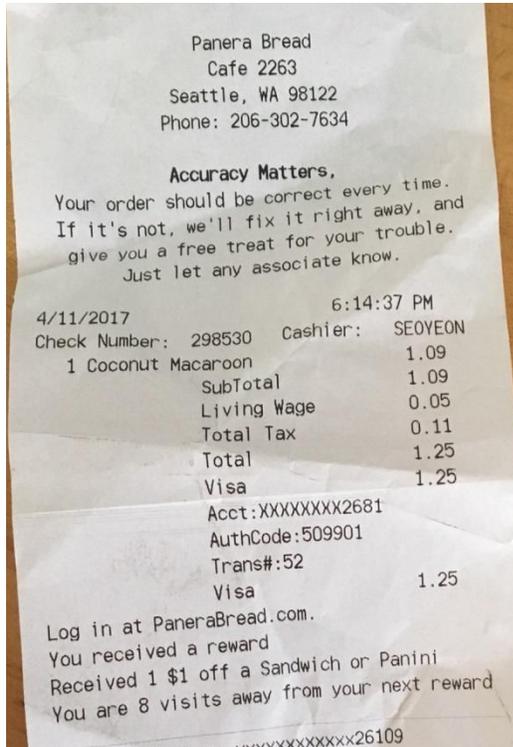
Many service charges reference “living wage” or other related terms, but do not explicitly state they are contributing to wages. It is clear from context the intended purpose is use the charge toward employees' minimum wage. Any charge that states it is being used toward an employee's minimum wage would be in violation of I-1433. In addition, these charges also frequently fail to state the charge is not payable to the service employees, so therefore these charges must be added on as an additional income item in addition to service employee's base pay.

Some charges are labeled with more detail about the purpose, sometimes even presented in a positive tone, e.g. *Bremerton Bar & Grill, Bremerton*:

“Attention valued guests: We support the recent initiative to amend the state minimum wage and benefits. A living wage surcharge of 2.9% will be added to all checks. Please ask your server if you have any questions. Thank you!”

Any service charges that reference wages, regardless of tone or level of detail, must all be inferred to be used to contribute toward employees’ wages.

Additional examples: *Panera Bread, Seattle; Doc’s Marina Grill, Bainbridge Is.; and Waddell’s Pub, Spokane.*

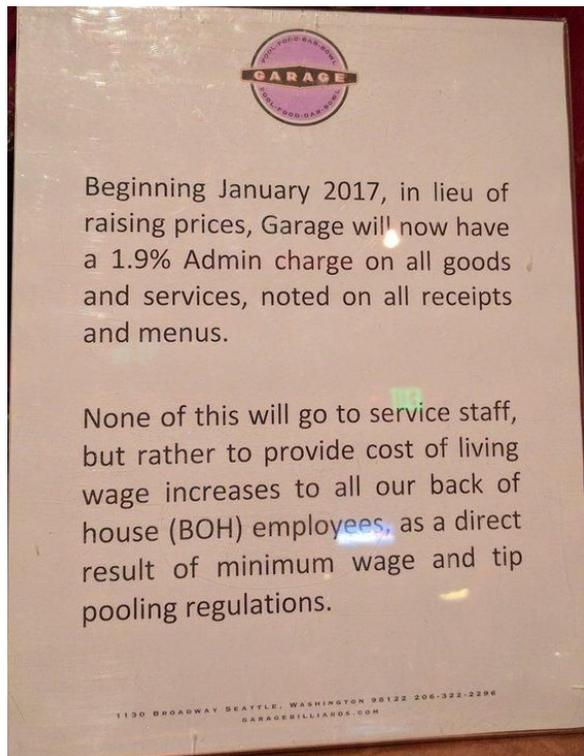




3. **Non-servicing Employees Service Charges:** We request LNI include language in administrative rules that explicitly states service charges itemized as not payable to service staff but used to pay the minimum wage of other workers is in violation of I-1433. Examples that distinguish between illegally using service charges toward minimum wage and acceptable commission-style tip replacement should be included in administrative rules.

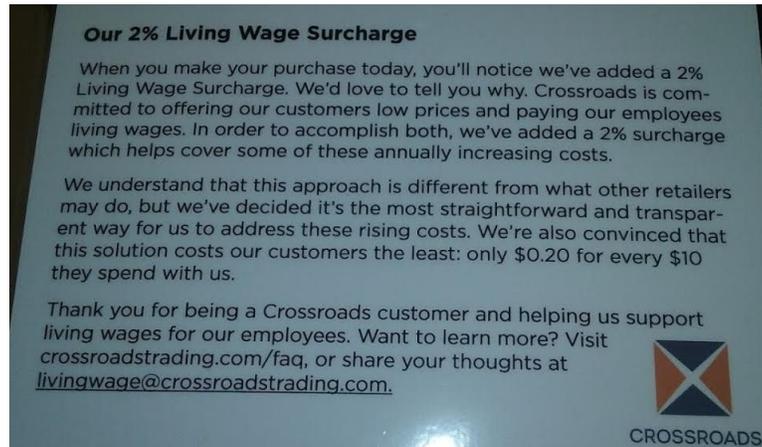
Some restaurants have opted to implement a service charge to increase wages for all staff using a system that replaces tips, similar to commission, with a portion used for non-servicing staff; such a policy when used to pay employees *above* the employee's minimum wage is in

accordance with I-1433. Some restaurants have charges that present similarly, and are worded similarly, however do not function as additional compensation above the employee's minimum wage and/or do not specify the percentage that is not payable directly to the employee servicing the customer. Service charges that are itemized as not being payable to the employee servicing the customer are intended to remove ambiguity for the consumer whether or not the charge contributes to a service employee's gratuity, and what percentage goes to the employer (if any). These charges cannot be used to offset the minimum wages of any other employee, and for the employee servicing the customer must be in addition to their hourly wage, even if that wage is above that employee's minimum wage as stipulated in RCW 49.46.160: "Service charges are in addition to hourly wages paid or payable to the employee or employees serving the customer"--with no minimum wage threshold for these employees. An employer may institute a service charge that is not payable to the servicing employee, but when using a service charge as compensation for additional staff, it must be *in addition* to the non-servicing staff's minimum wage. Example: *The Garage, Seattle* stipulates the charge is not paid directly to the servicing staff, which is permitted, however the charge is being used toward the minimum wage of non-servicing staff, which is not permitted.



Service charges are rare in retail establishments, although there is no reason to assume this will not propagate in a way similar to restaurants. Retail staff are not normally tipped, whether or not the charge is directly payable to the employee is not relevant as it would be in industries and for employees outlined in RCW 49.46.160. Example: *Crossroads Trading, Seattle*. The service charge cannot go toward employee's minimum wages, which is explicitly the use as outlined in their own notice. Although they use the term "living wage" in the notice, the website they direct

to states as the reason for the charge “besides supporting minimum wage increases for our employees, we’re committed to keeping our prices low”



4. **Municipal Minimum Wage and Service Charges Paid to Workers Above State Minimum Wage:** According to the language of I-1433, LNI’s rules regarding tips and service charges should also apply toward minimum wages mandated above the statewide minimum wage.

While LNI is tasked with enforcing only state wage laws, there are instances where there is some ambiguity. For instance, it is feasible a service charge in Seattle could be found to be used as compensation for a worker’s wages above the state minimum wage up to the Seattle Minimum Wage. If the service charge language in I-1433 is interpreted as only applying to wages up to the statewide minimum wage, such a service charge could be found to be in violation of Seattle’s ordinance, but outside the jurisdiction of LNI. The language in I-1433 has specific language regarding service charges being used for wages, “...may not count towards, the *employee’s* hourly minimum wage.” The employee’s minimum wage would therefore not necessarily be the statewide minimum wage, but whatever the minimum wage owed to the employee, including the higher wages of Seattle and SeaTac. This would mean LNI’s guidance of service charges *would* include service charges that might be construed as going towards wages over the statewide minimum wage and up to the *employee’s* minimum wage. The Seattle Office of Labor Standards has deferred action on service charges. Their tentative reasoning for allowing tips and service charges to count toward the Seattle minimum wage is based on an incorrect interpretation that service charges could be considered commission, and this could count toward a minimum wage according to 49.46.130; however, service charges can be considered commission *only in determining overtime exemption* and this is in narrowly defined circumstances which include an employee making over one-and-a-half times the state minimum wage. This becomes clear in the context of the section:

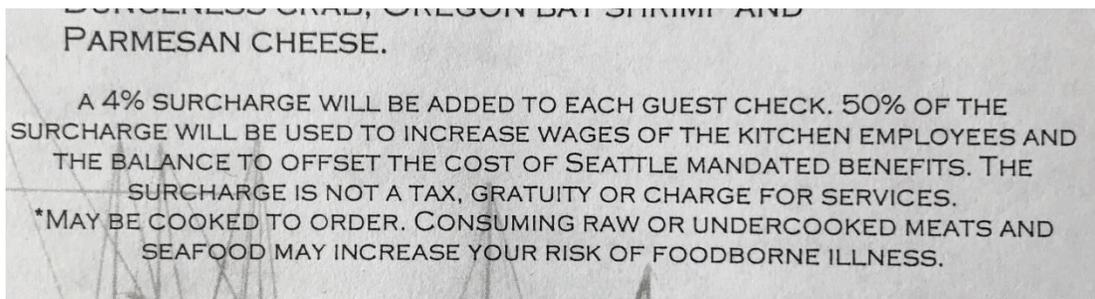
“Certain types of payments can or cannot be considered commissions for purposes of the exemption.”

“1. Service charges collected by the establishment and paid to employees. Hotels, motels and restaurants may levy mandatory service charges on customers, which represent a percentage of amounts charged to customers for ES.A.10.1 Page 4 of 5 7/15/2014 services. If part or all of the service charges are paid to service employees, that payment may be considered commission and, if other conditions are met, the service employees may be exempt from the payment of overtime premium pay.”

Automatic service charges are not commission, and this would mean they are must always be used as compensation above an employee’s minimum wage or in addition to whatever the hourly wage for employees directly servicing a customer. Service charges are imposed upon a customer, and commission is for services rendered. RCW 49.46.160 only offers an employer the ability to take a percentage of a service charge, if itemized as such, in certain industries for employees servicing a customer. It allows an employer to not pay an employee this service charge, but it does not grant the ability for the employer to use this charge toward an employee’s minimum wage, though it is frequently cited and described as a blanket exemption.

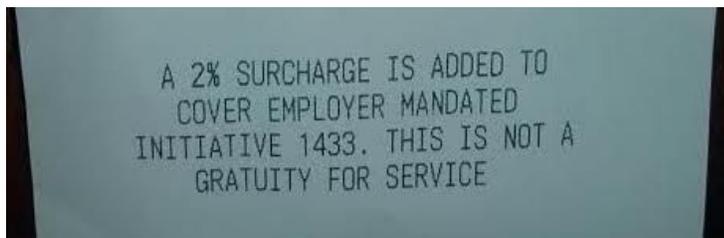
Seattle’s interpretation, whether accurate or not, would not be under the purview of LNI, except for 1) the very specific usage of “an employee’s minimum wage” in I-1433, which indicates that the tips and service charge language would be applicable to other minimum wages set by municipalities, or other instances where the employee’s minimum wage differs from the standard statewide minimum wage; and 2) RCW 49.46.160 makes no minimum wage distinction at all for employees directly servicing a customer, and all charges must be paid above whatever the employee’s hourly wage is. LNI providing clear guidance on this has the added benefit of simplifying an otherwise complicated exception that would make enforcement difficult in a segment of cases.

Example: *Chinook’s at Salmon Bay, Seattle*

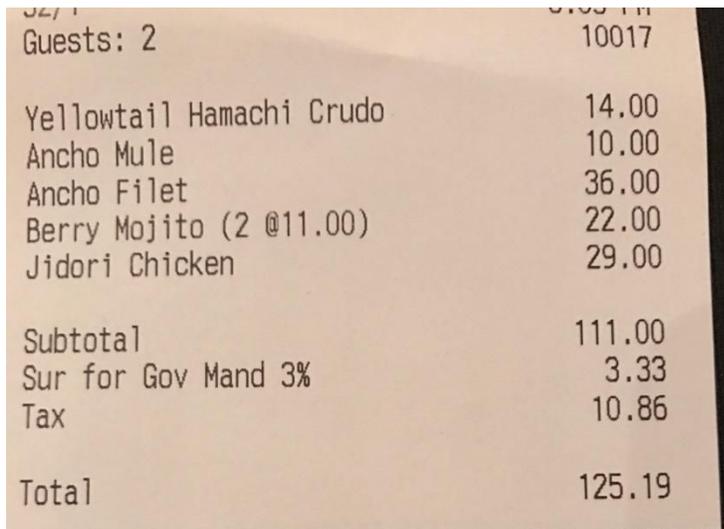


5. **Deceptive “Mandate” Service Charges and Appearance of Taxes or Fees:** We request LNI include language that explicitly prohibits deceptive service charges that appear as taxes or fees as they obscure how the fee should legally be distributed for both the employee and the consumer.

Clarity on service charges is a protection for workers and consumers. Service charges that are ambiguous or appear to be mandated make it more difficult to identify service charge violations, such as when the service charge is being used toward an employee's minimum wage. The charges are intentionally misleading, and there is no reason to assume the charges are going to employees as income above their minimum wage. There does not appear to be a simple way for LNI to verify a service charge is being used only for wages above the employee's minimum wage without creating requirements for how service charges are displayed on an employee's paycheck. The label for the charge may not refer to wages directly, rather mandates or specific legislation. We believe these service charges are deceptive and imply the charges are a mandatory tax or fee. Examples: *John Howie's Steakhouse, Bellevue; Sip at the Wine Bar & Restaurant, Issaquah; Wally Park, SeaTac; Buckley's, Seattle*



A 2% SURCHARGE IS ADDED TO  
COVER EMPLOYER MANDATED  
INITIATIVE 1433. THIS IS NOT A  
GRATUITY FOR SERVICE



Guests: 2	10017
Yellowtail Hamachi Crudo	14.00
Ancho Mule	10.00
Ancho Filet	36.00
Berry Mojito (2 @11.00)	22.00
Jidori Chicken	29.00
Subtotal	111.00
Sur for Gov Mand 3%	3.33
Tax	10.86
Total	125.19

PRICE SUMMARY			
Rate Type	PRICE	QTY	TOTAL
*Daily	\$17.95	1	\$17.95
*Daily	\$17.95	1	\$17.95
			\$35.90
*\$2.30 Port Flat Fee			\$2.30
*\$0.99 Living Wage		2	\$1.98
Surcharge			
Taxable Sub-Total			\$40.18
\$3.00 City Flat Fee			\$3.00
10% Sales Tax			\$4.02
<b>Total Amount</b>			<b>\$47.20</b>

\*Denotes taxable item



We appreciate LNI's commitment to enforcing our state's labor standards and for recognizing the urgency of this issue. We will continue to work with LNI through this process to ensure service charges are communicated appropriately for consumers and employees are properly compensated.

Signed,

Sage Wilson, Working Washington