IADC COMMITTEE NEWSLETTER

EMPLOYMENT LAW

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IN THIS ISSUE

Glenn Duhl explains a hotly-litigated wage and hour compliance issue in the restaurant and hospitality industry: the minimum wage and tip credit.

Gratuities in the Restaurant Industry—What's Going On?

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Tipping one's server seems like a simple process (aside from the difficulty of calculating how much to tip, of course). From an employment law perspective, however, the common practice of tipping in certain occupations combined with minimum wage laws presents a unique conundrum for employers. Must they pay the full minimum wage, knowing that their employees are receiving tips on top of it? Or, can they pay less, taking the chance that the employee will not make the minimum wage? Can they pool tips? Can they take a portion of tips?

"A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity." 29 C.F.R. § 531.52

Tips were traditionally paid in cash, which caused difficulties for both employers and taxing authorities. Tips were clearly income on which a tax should be paid. In addition, employers required to pay a minimum wage asserted that their employees' tips should be considered part of that wage. The tip credit solves both of these problems. It allows employers to take tips into account when calculating the wages due to tipped employees. Because employers are incentivized to keep track of employees' tips for their own purposes, the taxing authorities can also then require the employers to report employees' tips for tax purposes.

Pursuant to 29 U.S.C.S. § 203(m)(2)(A), the wages of tipped workers, defined as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips," may be determined as follows:

> In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to--(i) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on the date of the enactment of this paragraph [enacted August 20, 1996]; and (ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in clause (i) and the wage in effect under section 6(a)(1) [29 USCS § 206(a)(1)]."

The employer must pay $2.13 an hour minimum under section (i), but then the employee's tips can make up the difference between that and the minimum wage. That difference is the "tip credit". If the employee does not make enough in tips, then the employer must pay the employee sufficient wages to bring the employee up to the full minimum wage.

The employer must notify the employee that it is going to apply a tip credit. The necessary notice differs by circuit, and state. In some, a poster describing the tip credit is sufficient while in other more detailed notice is required. *See*, *e.g*., *Hernandez v. JRPAC Inc.*, 2016 U.S. Dist. LEXIS 75430, at *80 (S.D.N.Y. June 9, 2016).

While the federal government defines tipped workers by the definition above, many states only permit a tip credit as to certain classes of employees. For example, Connecticut originally authorized the tip credit for only servers serving customers at tables and booths; bartenders were ineligible. More recently, the definition of tipped employees in Connecticut was expanded to include bartenders.

The DOL recognizes the following as commonly tipped employees: waiters and waitresses, counter personnel who serve customers, bellhops, bussers, and service bartenders. DOL Field Operations Handbook § 30d04, *available at* https://www.dol.gov/whd/foh/foh_ch30.pdf. It also recognizes "sushi chefs or teppanyaki chefs, who are similar to counter personnel because they have direct contact and interact with customers and prepare and serve meals to customers in the bar area or customer tables"; "Bartender assistants or barbacks, who are similar to bussers because they learn bartending under the tutelage of a bartender, have the primary duty of supporting the bartender, and receive their tips from the bartender. Barbacks work primarily in the bar area and have the opportunity to occasionally interact with customers."; and "[s]ommeliers who explain the wine list, bring the selected bottle of wine to the table, and serve the wine to the customers." Courts have determined that employees in other occupations qualify as tipped occupations by comparison to the occupations identified in the regulations and Field Operations Handbook. See *Pellon v. Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1313 (S.D. Fla. 2007).

One frequent issue encountered is employers applying a tip credit to individuals who may not be tipped employees. The DOL also provides that the following are not tipped employees, should not be treated as such, and should not be included in tip pools: janitors; chefs or cooks (other than performance chefs); dishwashers; laundry room attendants; salad preparers; and prep cooks.

It is plain to most restaurant-goers that servers do not exclusively perform work for which they are tipped. A server may be required to get something for a table that he or she is not serving. Or, the employer may require servers to stock a service station with ice or clean silverware. In such a situation, employees have claimed that they are not receiving tips for helping a table that is not theirs or maintaining a clean supply of silverware.

The concept of "related duties" clarifies this situation. The Code of Federal Regulations distinguishes between dual jobs, such as a hotel worker who does maintenance work and waits tables, and a waitress who "spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses." 29 C.F.R. § 531.56. "Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips." 29 C.F.R. § 531.56. An employer may therefore require a server to perform related duties and maintain a tip credit as to the entirety of their wages.

In many cases the related duties of tipped employees are also the main duties of non-tipped employees. The DOL had previously interpreted § 531.56 as allowing a tipped employee to perform non-tipped duties provided they did not exceed 20 percent of the employee's work time. That interpretation led to significant issues. See *Pellon v. Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1313 (S.D. Fla. 2007) ("a determination whether 20% (or any other amount) of [an employee's] time is spent on non-tipped duties is infeasible"). The DOL has now rescinded that interpretation, dispensing with the 20% rule, and instead looking holistically at whether the duties are related to the tipped occupation. *See* DOL Wage and Hour Division Field Assistance Bulletin No. 2019-2, *available at* https://www.dol.gov/whd/FieldBulletins/fab2019_2.pdf ; DOL Wage and Hour Division Opinion Letter FLSA2018-27, *available at* https://www.dol.gov/whd/opinion/FLSA/2018/2018_11_08_27_FLSA.pdf. Related duties for a server would include cleaning and setting tables, making coffee, and even occasionally washing dishes. This is a sensible approach in that a server's ability to provide quality service may also be dependent on the cleanliness of the tables, the freshness of the coffee, and the availability of clean dishes.

Service charges differ from tips, but may be used in a similar way. A service charge is a "compulsory charge for service . . . imposed on a customer by an employer's establishment." 29 C.F.R. § 531.55(a). Such "service charges and other similar sums which become part of the employer's gross receipts are not tips for the purposes of the Act. Where such sums are distributed by the employer to its employees, however, they may be used in their entirety to satisfy the monetary requirements of the Act. 29 C.F.R. § 531.55(b). That is, they may be used to offset the employer's minimum wage obligations.

Lastly, tip pooling is permitted provided that only tipped employees are part of the tip pool, and employers may not take their employees' tips. Tip jars count as tip pools. When a tip is placed on a credit card, employers may deduct the transaction fee charged by the credit card company, but no more. The employer cannot pass on any of its costs, such as the cost of the credit card terminal or a dedicated credit card phone line to employees. If a tip placed on a credit card proves to be non-collectible, the employer need not pay the employee the tip, and if the employer already did so, it can recover the tip from the employee. The amount recovered cannot, however, exceed the amount of the tip.

A trend is arising away from tipping and toward servers being paid a full wage. This may provide for simpler pay arrangements, but American service culture is built on tips. It remains to be seen whether employers who do away with tips will be able to maintain quality of service.

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