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Educate yourself and your employees about best practices to help avoid wage-and-hour lawsuits

By SHERRIL M. COLOMBO, ESQ.

(Nov. 17, 2008) Increasing confusion surrounding rules for tipped employees under the Fair Labor Standards Act and similar state laws—mixed with a transient workforce of millions earning most of their income from tips versus wages—is sparking a steady stream of restaurant industry wage-and-hour lawsuits.

Case in point: A California Superior Court judge ordered **Starbucks** to pay \$105 million to a class of approximately 100,000 baristas for improperly requiring them to share tips with employees performing supervisory work. Likewise, a federal court held 88 Palace, a New York City Chinatown restaurant, liable for \$699,374 in damages under the FLSA. The restaurant did not qualify for the FLSA's tip credit because it kept 25 percent of some tips, and it also paid nontipped employees from the tip pool. The list of cases goes on.

To minimize your chances of ending up in court, it's critical to follow tip guidelines and adopt best practices for compliance. First, if you are trying to determine whether you have a "tipped employee," you will need, according to the FLSA, to decide if that individual "customarily and regularly receives more than \$30 a month in tips." Under the FLSA, employers of tipped workers may consider such tips as part of their wages and seek a tip credit to satisfy federal minimum-wage laws, as long as the workers are paid a direct wage of at least \$2.13 per hour.

If so, employers can claim a "tip credit" for the remaining amount up to the minimum wage. If your workers receive less than the minimum wage when the tip credit is combined with the minimum wage, it is your obligation to provide the difference by paying the additional monies. Some states have a higher minimum wage than the federal minimum wage, which is currently \$6.55 per hour. In those states, therefore, a restaurant must ensure that tipped employees receive at least the state minimum wage combined with tips.

In order to satisfy the "tip credit": (1) the tip credit must be claimed for qualified tipped employees; (2) the employees must receive proper notice; and (3) all tips received by the employees must be retained by them. For the second prong, current regulations do not specify what constitutes sufficient notice. Explaining how the tip credit works to employees—including posting the standard Department of Labor poster containing the customary statement of tipped workers' rights and pay stubs showing the reduced wages and reported tips—will avoid confusion and curb possible wage claims. Of course, the better practice is also to provide written notice to the tipped employees of the tip credit.

Regarding the last prong, employees must be allowed to retain all tips they get, except where pooling of tips is used among employees who customarily and regularly receive tips. Disputes often arise in the tip-pooling situation when the employer requires tipped workers to share gratuities with those employees who do not normally qualify as tipped employees. To determine whether workers engaged in an occupation that "customarily and regularly" receives tips, you should establish whether they perform important customer service functions, i.e. interact with customers. For example, waiters, hosts, senior food servers, and bus-boys are considered eligible to participate in a tip pool, while salad mixers and kitchen helpers are not.

The practice, however, of forced tip sharing with management is an illegal one, regardless of whether management members also are engaged in services that could be subject to tipping. Workers, such as general managers and supervisors, who exercise substantial management authority over employer operations really are considered the equivalent of employers and not employees who often get tips.

Importantly, violating any of the FLSA's tipping rules will destroy the tip pool and subject a restaurant to liability for all employees who participated in the subject tip pool. Similarly, if an employer improperly classifies tipped workers, liability exists for all those affected in the tip pool. This can lead to a collective action and expose a restaurant to substantial damages. If the employer is found liable, liquidated damages—equal to the amount of back pay—are awarded, and attorney's fees normally are assessed against the employer.

Proposed DOL regulations—poised to eliminate maximum-contribution percentages and change notification procedures in tip pools, and modify eligibility requirements for tip credits, including revised notice standards—could provide some guidance in the near future. Besides following the steps above, the best defense against getting served with a substantial claim is to conduct regular audits to ensure your employees are getting the proper pay.

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This article does not necessarily reflect the opinions of the editors and management at Nation's Restaurant News.

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