

Duff on Hospitality Law

Is Your Tip Pool Policy a Recipe for Trouble?

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In a [recent](#) blog post, we highlighted the trend amongst hoteliers and restaurateurs toward adopting service charge models to meet the rise in state and local minimum wage requirements. Although “no-tip” and “service charge” policies are receiving their fair share of attention in the news, employers with improperly designed tip pools are garnering their own headlines—and lawsuits. For example, Red Robin recently agreed to a \$1.3 million settlement in response to class action claims against the company that it impermissibly included back of house kitchen staff in the servers’ tip pool. If your company requires employees to pool their tips, or is considering doing so, it will want to avoid some common and costly pitfalls that have beleaguered others. For starters:

Tips belong to employees and are never the employer’s property, even when the employer mandates that employees participate in a tip pool!

Tip pools are comprised of tips received by service staff. Those tips are voluntary contributions given by customers to employees who provides the service to the customers. The Fair Labor Standards Act (“FLSA”) dictates that those tips are the property of the employee, even when used in furtherance of a *valid* tip pool and or when applied as credit toward the federal minimum wage. [\[1\]](#)

The FLSA requires employers (who ask that employees participate in a tip pool) include in the pool only those employees who “customarily and regularly” receive tips, such as food or beverage servers, bell attendants, bartenders and bussers. [\[2\]](#) As a result, employers may not include back of house employees in a tip pool, as well as managers and supervisors. [\[3\]](#)

An employer also may not take money from a tip pool to cover guests’ unpaid checks, an employees’ breakage, or other of the business’ costs and losses. All of the tips contributed to a tip pool must be redistributed back to eligible employees.

A tip pool and a service charge system are not the same thing!

A tip pool is comprised of discretionary tips. A service charge is a nondiscretionary fee charged to the customer. In both cases, employers may pool all tips or charges and redistribute them to employees. However, where tips are always 100% the property of service employees, the employer may sometimes keep a percentage of service charges as gross receipts for the

business. Employers also have other responsibilities for communicating and accounting for service charges, but their primary responsibility when using tip pools is to redistribute 100% of the tips back to non-management service staff.

Why are employers getting sued?

Employers might confuse the standards regarding service charges with those regarding tip pools because in both cases, they are controlling the distribution of the funds. For example, an employer might impermissibly include prohibited employees in the tip pool who might otherwise be able to receive distributions of service charges. Or the employer might retain some portion of the tips to pay for costs, which is prohibited by law but may be allowed for a service charge.

Many employees who earn tips are paid the minimum wage, and unless prohibited by state or local law, may earn less than the minimum wage if employers are allowed to credit tips the employee received toward meeting the required minimum wage. As a result, employees often rely on tips to earn a livable wage, and they may be sensitive to non-tipped employees sharing in their tips or distrust that the employer is returning a fair share to the employees. Employers who keep a portion of the tip pool for the business or include in their tip pools managers and back of house staff who do not directly serve guests are those most likely to be singled out by employees for wage claims. [4]

The Bottom Line:

- Do not include back of house staff in your tip pool
- Do not include managers or supervisors with managerial responsibilities in your tip pool
- Do not retain any portion of the tip pool to cover costs or to address issues such as breakage or loss
- Do not require employees to contribute a percentage of their sales to the tip pool; tip pools should be comprised of the tips the employee actually receives

Issues surrounding tip pools are complex, and you are advised to explore your company's unique and specific needs with your legal counsel if you are considering implementing a tip pool for your staff.

[1] [Fact Sheet #15A: Ownership of Tips Under the Fair Labor Standards Act \(FLSA\)](#); See also 29 C.F.R. § 531.52

[2] [Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act \(FLSA\)](#)

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[3] Courts may determine that some supervisors do not meaningfully control the work terms and conditions of subordinates and may therefore be included in tip pools; however, to avoid legal claims and their associated costs, it is generally advised that employers exclude supervisors. See [New York Court Sides With Starbucks on Tip Rules](#)

[4] See these related articles on tip pooling lawsuits: [Red Robin franchisee settles tip-sharing lawsuit for \\$1.3M](#); [Mario Batali agrees to pay \\$5.25 million in tips lawsuit](#); [Tip-pooling lawsuit targets Union Square Hospitality Group](#); [Hayashi must pay \\$166K in 'tip pooling' lawsuit](#)

Tags: back of house kitchen staff, Fair Labor Standards Act, FLSA, hotel restaurant, hoteliers, minimum wage, restaurateurs, service charge system, Service Charges, service staff, tip pool, tip pool policy