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An Update on Tip Pooling

By Joy Ellis on 5.17.13 | Posted in Food and Beverage

Those of you following the challenge to the Department of Labor ("DOL") tip pooling regulations interpreting the Fair Labor Standards Act ("FLSA") may recall the events below. You may also want to view our past updates and insights on the tip pooling topic in the following articles: DOL Restrictions, Tip Pooling Remains a Hot Topic, Tip Pooling - Update, Tip Pooling in Oregon and Washington.

- In 2010, in a case called Cumbie v. Woody Woo 596 F.3d 577 (9th Cir. 2010), the Ninth Circuit (with jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) ruled that the FLSA did not prohibit employer-mandated tip-pooling arrangements if the employer did not take a tip credit. This meant it was lawful for employers in the Ninth Circuit to require that their tipped employees share tips with non-tipped employees (bussers, dishwashers and cooks, for example), just so long as all employees got paid minimum wage and the restaurant did not take a tip credit. (Seven states – Alaska, California, Minnesota, Montana, Nevada, Oregon and Washington – do not allow a tip credit.)
- The DOL then issued regulations in April 2011 addressing ownership of employee tips, in conflict with the ruling of *Cumbie v. Woody Woo*. The regulations created legal uncertainty for any employers who were engaging in mandatory tip-pooling with back-of-the-house employees.
- In February 2012, the DOL issued a field assistance bulletin to its staff, declaring "the employer is prohibited from using an employee's tips, whether or not it has taken a tip credit …" and the DOL would "enforce nationwide the 2011 final rule explaining that a tip is the sole property of the tipped employee regardless of whether the employer takes a tip credit[.]" The field assistance made clear on no uncertain terms that that the DOL considered it a violation of the FLSA for an employer to institute a tip pool that required sharing tips with back-of-the-house employees, even if the employer did not take a tip credit.
- In July 2012, restaurant industry associations and others filed a lawsuit in Oregon federal court, contending that the DOL regulations unlawfully prohibit back-of-the-house kitchen workers from sharing in tips left by customers when the employer does not take a tip credit against minimum wage. See *Oregon Restaurant and Lodging Association v. Solis et al.*, Case No. 3:12-cv-01261 (D. Or.).

On May 16, 2013, the parties argued their case before the federal judge who will decide whether the DOL exceeded its authority in issuing its regulations and whether the DOL regulations are inconsistent with the plain language of the FLSA as well as the Ninth Circuit ruling in *Cumbie v. Woody Woo*. After hearing the arguments made by both sides, the judge took the matter under advisement and indicated that he would have a ruling out in the very near future.

We will keep you posted on further developments.

Tags: DOL, FLSA, Tip pooling