June 2006 | Incorporating California Personnel Law Update | www.counciloned.com

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An exert from Council's June 2006 edition

Wage and Hour Class Actions Challenge Legality of Mandatory Tip-Pooling Practices in the California Restaurant Industry

Written by:
John Nadolenco, *Partner*
&
Jerome M. Jauffret, *Associate*
MAYER, BROWN, ROWE & MAW LLP
Los Angeles, California

Published by:
COUNCIL
ON EDUCATION IN MANAGEMENT

Wage and Hour Class Actions Challenge Legality of Mandatory Tip-Pooling Practices in the California Restaurant Industry

A significant number of class actions have recently been filed in California state courts challenging the legality of mandatory tip-pooling policies at a number of restaurants and restaurant chains. The plaintiffs, who work as restaurant "servers," allege that they have been wrongfully compelled to share their tips with "bartenders" and "expediters" in violation of California law.

In California, the courts have upheld various types of mandatory tip-pooling policies if they "allow for a fair distribution of the gratuity to all those who earned it by contributing to the service afforded to the patron." *Leighton v. Old Heidelberg* (Cal. App. 1990). However, mandatory tip-pooling policies that require the sharing of any gratuity with an owner, manager, or supervisory employee are prohibited by statute. California Labor Code § 351.

California's Department of Labor Standards Enforcement (DLSE) also has issued opinion letters giving employers guidance on mandatory tip-pooling policies. Tip-pooling policies are allowed if "(1) [t]ip pooling participants are limited to those employees who contribute in the chain of service bargained for by the patron, pursuant to industry custom, and (2) [n]o employer or agent with the authority to hire or discharge any employee or supervise, direct, or control the acts of employees may collect, take, or receive any part of the gratuities intended for the employee(s) as his or her own." DLSE Opinion Letter 2005.09.08. (The employer may, however, collect any mandatory service charges added to patrons' bills since the charges are considered to be part of the price of service rather than gratuities. DLSE Opinion letters 1994.01.07 and 2000.11.02.) The DLSE also has opined that tip-pooling policies must provide some "reasonable relationship" between the degree to which employees provide service to the patron and the distribution of the pooled tips, and that it would determine on a case-by-case basis whether a particular tip-pooling policy was "unfair or unreasonable," taking into account circumstances that may be unique to a particular establishment. Giving an extreme example, the DLSE has stated that it would find unlawful a policy that required restaurant servers to give 90 percent of their tips to hostesses, whose duties consisted only of initially directing the patron to the table. DLSE Opinion Letter 1998.12-28-1.

The courts and the DLSE have issued guidance as to the types of employees who may be lawfully included in mandatory tip-pooling. In the restaurant industry, mandatory tip-pooling may include only employees who provide "direct" table service. *Leighton v. Old Heidelberg*; see also DLSE Opinion Letters 2005.09.08 and 1998.12-28-1. In addition to table servers, such employees might include, depending on their duties in the particular establishment, buspersons, bartenders, hostesses, wine stewards, chefs who cook at the patron's table, expediters if part of their duties includes serving food to the patron's table, and maitre d's if they do not have supervisory or managerial responsibilities. But such employees would not include backroom employees like dishwashers, cooks, and chefs who work only in the restaurant's kitchens. And they may never include any restaurant owners, managers, or any employee with supervisory duties.

The DLSE also has issued some guidance for other industries that may impose mandatory tip-pooling, emphasizing that these examples are not meant to be all inclusive. In the car wash industry, the employer might include employees such as those who vacuum, wash, polish, and/or dry cars, but not cashiers who collect the payments. In the salon or spa industry, the employer might include towel or locker attendants, hair washers, stylists, manicurists, and masseuses. In the car parking industry, parking attendants, valets, or shuttle drivers might be included. And in the gaming industry, employers might include porters, dealers, and runners.

Employer Notes: The outcome of the recently filed class actions against the restaurant industry will be determined on a case-by-case basis, depending on the particular duties of the bartenders and expediters at each of the restaurants where they are employed. In light of this current round of court challenges, California employers in the restaurant and other industries that impose mandatory tip-pooling policies should confirm that the duties of the employees receiving a share of the tips, and the percentage of the tips received by those employees, comply with the requirements and policies of California law.

John Nadolenco, Partner, and Jerome M. Jauffret, Associate, Mayer, Brown, Rowe & Maw LLP, Los Angeles, California. You can contact Mr. Nadolenco at jnadolenco@mayerbrownrowe.com and Mr. Jauffret at jjauffret@mayerbrownrowe.com. ■