Duff on Hospitality Law

Tip Pooling – UPDATE

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As many of you are aware, the 9th Circuit Court of Appeals gave Northwest restaurant owners much to cheer about early last year when it authorized Northwest restaurants to initiate mandatory tip pools including back-of-house employees who traditionally do not receive tips. A complete description of the Court's decision in Woody Woo and its immediate effects can be found in my blog post from last November .

Unfortunately, recently issued regulations by the Department of Labor, which took effect earlier this month on May 5, 2011, call the Court's decision into question. While the regulations simply re-state the position taken by the Department of Labor (and rejected by the Court) in Woody Woo, the new regulations significantly amend the DOL tip regulation that the Woody Woo Court considered in coming to its ruling.

So what does this mean for restaurant owners in states covered by the 9th Circuit Court of Appeals (Washington, Oregon, California, Idaho, Montana, Nevada, and Arizona)? Owners who relied on Woody Woo to initiate mandatory tip pools over the past year now face the risk that an employee or the DOL could use the new regulation to bring suit (or issue an assessment, in the case of the DOL) against the employer because of the tip pool.

The Washington Restaurant Association has been working closely with the National Restaurant Association to gain a better understanding as to whether and how DOL intends to enforce these new regulations against restaurant owners who had previously benefitted from Woody Woo. Although DOL has recently stated that it would not enforce the newly promulgated regulations against restaurant owners in states covered by the 9th Circuit Court of Appeals, the DOL hasn't yet put that commitment in writing. Until then, we recommend proceeding with caution. If you have recently initiated a mandatory tip pool benefitting both front of house and back of house employees, you may want to suspend the pool until the DOL provides further definitive guidance. If you are contemplating initiating a mandatory tip pool in the near future, you may want to hold off – at least for now.

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Authored by

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Greg Duff

Principal|Seattle

206.816.1470 greg.duff@foster.com

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