Duff on Hospitality Law

U.S. Department of Labor Now Restricts an Employer's Mandatory Tip Pooling Arrangement Even When Employer Does Not Take Tip Credit

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A recent Field Assistance Bulletin issued by the U.S. Department of Labor (DOL) on February 29, 2012, announced a substantial change of the DOL's enforcement position regarding mandatory tip pooling with back-of-the-house employees.

As we have discussed in this blog previously tip pooling is the practice by which the tips of regularly tipped employees are pooled together and then redistributed among employees, including, on occasion, employees who do not customarily receive tips. Employees may voluntarily participate, or they can be required to participate by the employer.

In 2010, the U.S. Court of Appeals for the Ninth Circuit issued a decision, *Cumbie v. Woody Woo, Inc.* (596 F.3d 577 (9th Cir. 2010), which held that DOL limitations on an employer's use of the employee's tips did *not* apply when the employer does *not* take a tip credit. In states like Oregon and Washington, where the employer must pay a tipped employee the full minimum wage and is prohibited by state law from taking a tip credit, the employer is permitted to impose a mandatory tip-pooling arrangement and insist that tipped employees share their tips with back-of-the-house employees, not just with employees who customarily receive tips. The court's ruling was a significant win for employers in the Ninth Circuit; the employer was represented by Garvey Schubert Barer, amicus briefs were filed by Oregon Restaurant and Lodging Association and others, and the DOL even submitted a brief and argued part of the case for the employee — and lost.

In May 2011, and no doubt in response to the Ninth Circuit's ruling, the DOL rolled out new tip credit regulations stating that a tip is the sole property of the tipped employee *regardless of whether that employee takes a tip credit*, and that the employer is prohibited from using an employee's tips, *whether or not it has taken a tip credit*, except as a credit against its minimum wage obligations to the employee or in furtherance of a valid tip pool.

In its 2012 bulletin, the DOL issued the directive to its field investigators to enforce this new rule prospectively in the Ninth Circuit, a jurisdictional area that covers the states of Washington, Oregon,

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California, Nevada, Idaho, Montana, Hawaii and Alaska. The directive flies in the face of the agency's earlier assurances to the National Restaurant Association, which met with the DOL on several occasions last year to discuss the regulations when they were a work-in-progress and was told that the agency would *not* be enforcing their new rules in the Ninth Circuit because of the court's decision in *Cumbie v. Woody Woo, Inc*. The 2012 Field Assistance Bulletin flatly reverses those assurances and rejects the court's ruling outright.

Critics have questioned whether the DOL's 2011 rule exceeds the agency's regulatory authority over an employer that does not take a tip credit (and thus, the employee's actual wage is unaffected by tip pooling). The National Restaurant Association, Oregon Restaurant and Lodging Association and Washington Restaurant Association are weighing their options to challenge the DOL's new enforcement position. In the meantime, any employers in the Ninth Circuit should consider reviewing and revising their tip-pooling policies to eliminate mandatory tip pooling arrangements with chefs, cooks, dishwashers, managers, or any other back-of-the-house employees who do not "customarily and regularly receive tips." While employers with tip-pooling policies that comply with the DOL's new enforcement expectations may be at a competitive disadvantage with employers who don't follow the new guidelines, employers that distribute tips in a manner inconsistent with the recent regulations may face substantial liability under the Fair Labor Standards Act. Employers affected by the DOL's regulation and guidance should feel free to contact Joy Ellis is in the Portland office or Mike Brunet in the Seattle office to discuss their particular situation.

See the following links provided by the U.S. Department of Labor – Wage & Hour Division:

- Field Assistance Bulletin on the Wage and Hour Division's Enforcement of 2011 Tip Credit Regulations
- Wage and Hour Division Fact Sheet on Tipped Employees

Posted in Employment Law

Tagged as DOL, National Restaurant Association, ORLA, Tip pooling, Washington Restaurant Association, Woody Woo

Authored by

Joy Ellis

Principal|Portland

503.553.3121 joy.ellis@foster.com

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