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Tip Pooling and Other Wage and Hour Issues in the Hospitality Industry: FLSA Amendments

Overtime Pay, Worker Classification, DOL Audits, and More

WEDNESDAY, SEPTEMBER 15, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Tip Pooling and Other Wage and Hour Issues in the Hospitality Industry

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September 15, 2021

Webinar Overview

- Overview of the current FLSA amendments, proposed regulatory changes, and their impact on tip pooling and tip credit employees.
- Discussion of potential employer liability in the hospitality industry.
- Defending employers in DOL audits and employee lawsuits.
- Effects of COVID-19 on employment in the hospitality industry.
- Best practices for hospitality industry employers.

DOL: Typical Problems Causing Non-Compliance in Hospitality Industry

- Employees placed on salary and classified as exempt without regard to the duties performed.
- Failure to maintain records of, or pay overtime to, non-exempt salaried employees.
- Failure to record and pay employees for all hours suffered or permitted to be worked.
- Illegal deductions from pay for items like cash register shortages, uniforms, errors, bad checks, etc.
- Failure to pay the correct overtime rate to tipped employees, or failure to pay the correct overtime rate that includes all service charges, commissions, bonuses and all other remuneration.
- For employees paid with the tip credit: Tips not sufficient to make up the difference between the employer's direct wage obligation and the minimum wage; employees receiving tips only; and sharing a portion of tipped employees' tips with employees who are not eligible because they do not normally receive tips such as dishwashers, cooks, chefs, and janitors.
- Paying straight time for hours worked beyond 40 per week instead of required overtime pay, or averaging the number of hours worked over two or more weeks to avoid overtime pay.
- Failure to pay minimum wage/overtime to temporary help or employee leasing firm workers who are jointly employed by the hotel.

Tipped Employees and the Tip Credit

- A "tipped employee" is defined as any employee engaged in an occupation in which he or she "customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t)
- The FLSA generally requires covered employers to pay employees at least the federal minimum wage, which is currently $7.25 per hour.
- Under section 3(m)(2)(A) of the FLSA, an employer is permitted to credit at least some of the tips that tipped employees receive toward its federal minimum wage obligations. Specifically, an employer can satisfy its obligation to pay those employees the federal minimum wage by paying a lower direct cash wage (currently no less than $2.13 per hour) and counting a limited amount of its employees' tips (no more than $5.12 per hour) as a partial credit to satisfy the difference between the direct cash wage paid and the federal minimum wage (known as a "tip credit").

Tipped Employees and the Tip Credit

- The following states do not permit a tip credit wage: Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington.
- The following have a minimum cash wage above the federal minimum wage: New York, Connecticut (bartenders), Colorado, Arizona, D.C., Hawaii.

FLSA Amendments

- On March 23, 2018, Congress amended section 3(m) of the FLSA in the Consolidated Appropriations Act of 2018. These amendments:
  - Prohibit employers from keeping tips received by their employees for any purpose, regardless of whether the employer takes a tip credit under the FLSA.
  - Prohibit managers and supervisors from receiving or keeping employees' tips, including from a tip pool.
  - Suspend the operation of the regulatory language that imposes restrictions on an employer's use of employees' tips when the employer does not take a tip credit. Employers that do not take a FLSA tip credit may now include a broader group of workers, such as cooks or dishwashers, in a mandatory tip pool.
  - Impose new civil money penalties not to exceed $1,100 when employers unlawfully keep tips.

2020 Tip Final Rule

- The 2020 Tip Final Rule Published on December 30, 2020 includes:
  - A prohibition on employers, including supervisors and managers, keeping tips received by workers, regardless of whether the employer takes a tip credit;
  - Recordkeeping requirements for employers that do not take a tip credit to include non-tipped workers, such as cooks and dishwashers, in nontraditional tip-sharing arrangements; and
  - Requirement for employers that collect tips for tip pools to fully distribute tips no later than the regular payday for the workweek or pay period in which tips were collected.

2020 Tip Final Rule- Recordkeeping

- If an employer takes a tip credit, records must include:
  - A symbol, letter or other notation placed on the pay records identifying each employee whose wage is determined in part by tips.
  - Weekly or monthly amount reported by the employee, to the employer, of tips received (this may consist of reports made by the employees to the employer on IRS Form 4070).
  - Amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable minimum wage specified in section 6(a)(1) of the Act). The amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.
  - Hours worked each workday in any occupation in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours.
  - Hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.

2020 Tip Final Rule

- Most of the rule became effective on April 30, 2021.
- However, DOL partially delayed effective date of certain provisions to December 31, 2021. These provisions were for assessment of civil money penalties and dual job regulations (80/20 Rule).

DOL's Proposed Rules

- 1988- DOL's Field Operation's Handbook included a requirement (80/20 rule) that when tipped employees spend more than 20% of their working time on tasks that do not generate tips, employer must pay full minimum wage. However, this was not regularly enforced or prosecuted.
- January 2009 Opinion Letter- rejected the 80/20 rule.
- March 2009 Opinion Letter- withdrew January 2009 Opinion Letter; reinstated 80/20 rule.
- November 2018 Opinion Letter- Rejects 80/20 rule
- February 2019 FOH Amendment- replaced strict 20% limit with a reasonable time standard- "An employer may take a tip credit for any amount of time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with, or within a reasonable time before or after, his tipped duties."

DOL's Proposed rules

- Reversing course yet again: on June 23, 2021, DOL issued its Notice of Proposed Rulemaking for Tipped Employees.
- The proposed rules dramatically change the regulations governing tipped employees who perform both tipped and non-tipped duties (i.e., side work).
- Under the proposed rules, employees can only be paid tip credit wages if they are performing work that produces tips or work that directly supports the tip producing work.

DOL's Proposed Rules

- Even if the employee is performing work that directly supports the tip producing work it cannot be for a substantial amount of time.
- A substantial amount of time is defined as:
  - More than 20% of their workweek on directly supporting work, or
  - more than 30 uninterrupted minutes at any time, on directly supporting work
- This proposed rule codifies the 80/20 rule PLUS adds a 30-minute block rule requiring employers to pay at least minimum wage for all 30-minute blocks or more that is not work producing tips.

DOL's Proposed Rules

- Work that directly supports the tip producing work is no longer governed by O*Net.
- The proposed rules define directly support as "work that assists a tipped employee to perform the work for which the employee receives tips."
- Examples provided include:
  - Servers: rolling silverware for their tables and cleaning their tables
  - Bartenders: cutting drink garnish, cleaning bar counter, getting a bottle of alcohol from storage

DOL's Proposed Rules

- Examples of excluded tasks include:
  - Servers: cleaning bathrooms and food preparation
  - Bartenders: cleaning dining areas and food preparation
- Public comments to the NPRM were due on August 23, 2021.
- There is no specific date when the DOL must provide the Final Rules or indication whether they will change the rules based on comments or industry feedback.

What to do now?

- Determine whether your tip pools contain employees who are not in positions that customarily receive tips.
  - If so, make sure all employees are paid minimum wage and no employees are paid using a tip credit.
- Ensure you are keeping records of tips received by all employees in the pool, not just those who are paid using a tip-credit wage.
- Make sure you are distributing tips promptly and in-full (no later than next regular pay day for the work week in which the tips were collected).
- Audit your current tip-credit employees to determine which tasks fit within the new definition and whether the fit within the proposed 80/20 rule and 30-minute block rule. If, and when, the DOL issues a final rule, you will have the data to make educated decisions.

California Law on Tips and Tip Pooling

- Labor Code Section 351 prohibits employers and their agents from sharing in or keeping any portion of a gratuity left for or given to one or more employees by a patron.
- "Gratuity" is defined in the Labor Code as a tip, gratuity, or money that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due for services rendered or for goods, food, drink, articles sold or served to patrons.
- Illegal for employers to make wage deductions from gratuities, or from using gratuities as direct or indirect credits against an employee's wages. The law further states that gratuities are the sole property of the employee or employees to whom they are given.
- Tip pooling: involuntary tip pooling permitted so long as the tip pooling policy is not used to compensate the owner, manager, or supervisor of the business, even if these individuals do provide direct table service to a patron or are in the chain of service to a patron.

California Law on Tips and Tip Pooling

- *Leighton v. Old Heidelberg*, *219* Cal. App. 3d 1062, 1071 (1990)- Employee challenged tip pooling as a violation of Sec. 351. Court found that employer-mandated tip pooling among waitresses, busboys, and bartenders, did not constitute "taking" by employer.
- *Chau v. Starbucks Corp.*, 174 Cal. App. 4th 688 (2009)- Even if shift supervisors for a restaurant chain could be considered "agents" under Sec. 351, Starbucks did not violate the statute by permitting shift supervisors to share in tip proceeds that were left in a collective tip box for baristas and shift supervisors, where baristas and shift supervisors worked as a team to serve each customer; shift supervisors generally spent more than 90 percent of their time performing the same service tasks as did baristas, and a customer would not be capable of distinguishing between baristas and shift supervisors.

Gratuities vs. Service Charges

- Service Charges:
  - Service charges are mandatory charges that may be imposed on customers; do not involve customer discretion
  - DOL January 15, 2021 (FLSA 2021-5): A compulsory service charge (e.g., 15 percent of the bill) is not a tip, and must be included in the regular rate of pay.
  - An employer or employee's characterization of a payment as a “service charge” vs. "tip" is not determinative.
  - IRS: service charges are reported as non-tip wages paid to the employee. Some employers keep a portion of the service charges. Only the amounts distributed to employees are non-tip wages.

Retail and Service Establishment Employees

- The FLSA 7(i) exemption from overtime for certain retail and service establishments is a common exemption used by the hospitality industry – particularly those that rely on service charges instead of gratuities.
- The conditions for the 7(i) exemption within such retail and service establishments are:
  - Employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek; and
  - More than half the employee's total earnings in a representative period must consist of commissions on goods or services.

Service Charges

- California Law- *O'Grady v. Merchant Exchange Productions, Inc.*
  - Mandatory 21% service charge was added to all banquet contracts for F&B.
  - Company did not pay service charge to servers; it distributed some money to managers and non-service personnel and retained the rest.
  - Court held that narrow definition of gratuities was not consistent with California law and rejected the employer's service charge vs. gratuity distinction.
  - The court held that "there is no categorical prohibition" that what "is called a service charge cannot also meet the statutory definition of a gratuity."
  - Case was remanded back to lower court for further proceedings (original decision was on demurrer).

Service Charges- Local Ordinances

- LA Hotel Service Charge Reform Ordinance (passed in 2014): for all Los Angeles City hotels, 100% of service charges for hotels, associated restaurants, and banquet facilities must go to the service employees.
  - "Service Charges shall not be retained by the Hotel Employer but shall be paid in the entirety by the Hotel Employer to the Hotel Worker(s) performing services for the customers from whom the Service Charges are collected. No part of these amounts may be paid to supervisory or managerial employees. The amounts shall be paid to the Hotel Worker(s) equitably and according to the services that are related to the description of the Service Charges given by the Hotel Employer to the customer."
- Similar ordinances are on the horizon in other cities.

DOL Audits for Hospitality Employers

- Respectfully assert the need to re-schedule to have the proper management employees present and sufficient staff to cover for employees participating in interviews, rather than immediately accept an unannounced visit or the auditor's demand for an immediate onsite visit.
- Take the time to contact counsel, check posters, educate management, and organize the documents requested by the DOL.
- Have the requested documents up to date, pulled, and ready for the DOL.
- Provide counsel for management interviews.
- Educate employees that they have a right to participate or refuse, but that the company encourages participation and will not retaliate against anyone who participates.

COVID-19 and Hospitality Employers

- Vaccine Policies
  - Vaccine Mandates vs. Incentives
  - Proof-of-Vaccination Requirement for Entry
    - Twenty states currently prohibit proof-of-vaccination requirements (Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Missouri, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming).
    - Four states (California, New York, Hawaii, Oregon) have moved to facilitate the proof-of-vaccination process through digital pass apps.
- Quarantine Requirements

California Right to Recall

- Labor Code Section 2810.8 applies to hotel and event center employers and is in effect until December 31, 2024.
- Within 5 business days of establishing an open position, an employer must offer its "laid-off workers" any open positions that are available for which the worker is qualified in writing.
- High administrative burden, but strong penalties ($500/employee/day until the violation is cured) for non-compliance.

Vaccine Mandates and Incentives

- EEOC guidance was updated in May 2021.
- Federal EEO laws allow employer to require that all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964.
- Vaccine incentives (both rewards and penalties) are permitted as long as they are "not so substantial as to be coercive."
- The act of administering the vaccine is not a "medical examination" under the ADA because it does not seek information about the employee's physical or mental health.

Local Proof-of-Vaccination Requirements

- **San Francisco**: as of August 20, proof of full vaccination required for indoor retail spaces where food and drink are being served and consumed inside. Proof is not required for outdoor dining. Full vaccination for staff of covered businesses is required by October 13.
- **NYC: "Key to NYC Pass"** program went into effect on August 17; enforcement began on September 13. Businesses are required to check the vaccination status of all staff and customers over 12 and may not permit entry to anyone who has not received at least one dose of the vaccine.
- **West Hollywood**: Executive order issued on September 10, 2021, with compliance date of October 11. Staff must be fully vaccinated by November 1.
- **Oahu:** Executive order went into effect on September 13, and will remain until mid-November 2021.

Biden Vaccine/Testing Announcement

- The Biden administration has tasked the Occupational Safety and Health Administration (OSHA) with developing an emergency temporary rule that will require employers with at least 100 employees to either mandate that their employees become fully vaccinated or require unvaccinated employees to submit to weekly COVID-19 testing.
- The administration has also tasked OSHA with developing a rule requiring these employers to provide their employees with paid time off (PTO) to get vaccinated (and to recover from any post-vaccination side effects or sickness).
- Violations could result in fines of up to $14,000 "per violation," but it is unclear what behavior will constitute a "violation" (e.g., a failure to implement a vaccine mandate generally or a failure to mandate that a specific individual become vaccinated).
- The vaccine mandates will not take effect until OSHA releases a rule specifically implementing the new requirements, and it is unclear when employers can expect this to happen.

Thank You

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