

## California Appellate Court Protects Employers Who Allow Tips for Dishwashers

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By:

[Matthew D. Marca](#)  
[Guissu N. Raafat](#)

On March 27, 2009, in *Brad Etheridge v. Reins International California, Inc.*, No. B205005, the Second Appellate District of the California Court of Appeal approved a mandatory tip-pooling policy that allows participation of kitchen staff. The court rejected all wage and hour claims by a class of waiters arguing that kitchen staff cannot participate in a tip pool. Given the ruling in *Etheridge*, California restaurant employers with mandatory tip pooling policies would be well advised to review, and if necessary, amend their policies.

### Background

California Labor Code section 351 provides that tips are the sole property of the employee to whom it was paid and not the employer or manager. The general rule of thumb for the restaurant industry is that tips are for waiters to be shared with bussers and bartenders. The waiters provide the service and hence share in the majority of the tips. At most restaurants, the waiters then tip-out the bussers and sometimes the bartenders.

Many times there were arguments among waiters, bussers, and bartenders as to how much was to be shared — with bussers and bartenders reacting to the cheap waiter. In order to resolve these issues, many employers implemented mandatory tip-pooling policies. Under the terms of these policies, all tips are pooled and then shared by a pre-determined percentage. Waiters have challenged this practice and alleged that mandatory tip pooling violates Labor Code section 351. In previous California Court of Appeal decisions, the waiters lost that battle.

In 1990, the California Court of Appeal in *Leighton v. Old Heidelberg, Ltd.*<sup>1</sup> upheld mandatory tip-pooling policies. The court in *Leighton* stated that a mandatory tip-pooling policy is one of common sense and fairness, and protects the public, the employees and the restaurant employer, and allows a restaurant employer to exercise control over his business to ensure an equitable sharing of gratuities in order to promote peace and harmony among employees and provide good service to the public.

Following the *Leighton* decision, the rule of thumb used by the restaurant industry was that only employees who provide "direct table service" can participate in the tip pool. This industry rule was also supported by several Labor Commissioner opinion letters relying upon *Leighton*. In fact, in a 1998 Department of Labor Standards Enforcement (DLSE) opinion letter, the chief counsel explicitly excluded dishwashers, cooks, and chefs from participating in any tip pool given that they did not provide "direct table service." In its most recent decision, the court in *Etheridge* disregarded this DLSE opinion and expanded the types of employees who are eligible to participate in a tip-sharing pool.

### Etheridge Allows Kitchen Staff to Participate in a Tip Pool

In *Etheridge*, the court considered whether a mandatory tip-pooling policy that shared tips with employees who did not provide "direct table service" violated Labor Code section 351. The employer in *Etheridge* had a mandatory tip-pooling policy stating that tips must be shared between waiters, bussers, kitchen staff, bartenders and dishwashers. The plaintiffs alleged that this was a violation of California Labor Code section 351 because they were required to share tips with employees who did not provide "direct table service." The plaintiffs relied on the language in *Leighton*, which stated that the standard industry practice is to distribute tips among employees "who directly provide table service to a patron."

The Second Appellate District rejected this argument and expanded upon the reasoning in *Leighton*. First, it found that *Leighton* did not rely solely on "direct table service" to allow participation in tip pooling. Rather, *Leighton* actually held that bartenders could participate in tip pools given that they "contributed to the service of that patron."

Next, the court expanded its reasoning in *Leighton* and found that limiting tips to those employees who provide "direct table service" would lead to strange results.

[A] 'direct table service' limitation would allow a busser to participate in a tip pool if the busser clears the plates while the patron is still seated at the table, but not to participate if the busser waits until after the patron has departed. The work is the same; the next patron still starts his dining experience with an equally clean table, but the busser who cleans between patrons would be barred from participating in the tip pool because he does not personally interact with any patrons.<sup>2</sup>

The *Etheridge* court found this result to be in its words "illogical."<sup>3</sup> The court further reasoned that it makes no sense to exclude kitchen staff from participation in tip pooling.

If the plates on which the food is served are not clean, the food received is not hot, or is not as ordered, the patron may be inclined to leave a smaller tip even when the services of the servers and bussers were satisfactory. Likewise, when the meal is delicious, the presentation on the plates beautiful, and special food requests have been satisfied, the patron may be inclined to leave a generous tip, even when the servers and bussers might not have delivered exceptional service. In short, a patron tips on all of the service received, not simply the service received by employees the patron can see.<sup>4</sup>

Based on this reasoning and on the premise of fairness, protecting the public and promoting peace and harmony among employees, the court held that waiters and bussers cannot maintain a cause of action against an employer with a mandatory tip-pooling policy that tips any employee who "contribute(s) to the patron's service, even if not providing direct table service," which includes kitchen staff.

## Practical Implications

This is actually the third time in March that the California Courts of Appeal have rejected the concept that only employees providing "direct table service" are entitled to share in the tip pool.<sup>5</sup> Restaurant employers with operations in California can now include kitchen staff in tip-pooling policies without fear of exposure to claims by angry waiters and bussers. Although there is language in *Etheridge* suggesting that each employee is an integral part of the service to the patron, employers are well advised to set policies that distribute tips by a percentage that has some rational relationship to the overall level of service given by that class of employees. The central theme throughout *Leighton*, and now *Etheridge*, is that the

tip-pooling policies are to promote peace and harmony among employees. Certainly distributing 90% of tips to the dishwasher is not reasonable and will not promote peace and harmony. This is a case-by-case analysis based on the division of duties at each restaurant and should be analyzed carefully.

Moreover, an unanswered question is whether kitchen staff and those employees "who provide the service a patron tips on, but cannot see," now have a *right* to share in the tips left by patrons. Labor Code section 351 provides that the tips are the "... sole property of the employee or employees to whom it was paid." *Etheridge* holds that a patron pays the tips to all the employees who provide service. Based upon *Etheridge*, the dishwashers might be able to prevail on a claim that they are entitled to participate in tip pooling and an employer's policy preventing them from doing so is unlawful. California restaurant employers also would be well advised to amend tip-pooling policies to allow kitchen staff and other employees who provide service to the patron to participate in the tip pool.

While the central theme appears to be peace and harmony, none is likely to exist for some time as tip-pooling policies change. Every conversation with current and past waiters elicits visceral responses to the concept that they must share tips with kitchen staff. Now kitchen staff might have been given a *right* to share in the tip pool. Unfortunately, the employer is stuck in the middle of a fight about money (that by California statute is not the employer's money) as it implements policies to fairly divide tips between its employees to promote harmony.

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<sup>1</sup> 219 Cal. App. 3d 1062 (1990).

<sup>2</sup> *Etheridge*, No. B205005, slip op. at 21 (Cal. Ct. App. Mar. 27, 2009).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 22.

<sup>5</sup> See also *Grodensky v. Artichoke Joe's Casino*, No. A119035, A119036, 2009 WL 607400, at \*\*30-31 (Cal. Ct. App. Mar. 11, 2009); *Budrow v. Dave & Buster's of Cal.*, 2009 WL 503359 (Cal. Ct. App. Mar. 2, 2009).

[Matthew D. Marca](#) is a Shareholder and [Guissu N. Raafat](#) is an Associate in Littler's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, [info@littler.com](mailto:info@littler.com), Mr. Marca at [mmarca@littler.com](mailto:mmarca@littler.com), or Ms. Raafat at [graafat@littler.com](mailto:graafat@littler.com).