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ALERTS

Second Circuit Refuses to Endorse Longstanding New York Rule That Service Employees With Minor Supervisory Authority Can Share in Tips

By Carolyn D. Richmond, Esq., Eli Z. Freedberg, Esq. and Glenn S. Grindlinger, Esq.

In a case of paramount importance to the hospitality industry, the Second Circuit Court of Appeals (Second Circuit) has asked New York's Court of Appeals to clarify, among other key issues, which type of employees are considered "agents" of an employer for purposes of sharing in tip pools. This decision concerned two cases, *Barenboim v. Starbucks Corp*. and *Winans v. Starbucks Corp*., which were combined for appeal, and now cast doubt on the enforceability of the 2011 Hospitality Wage Order. The Second Circuit also refused to confirm a number of federal court decisions finding that the mere fact that an employee has some supervisory responsibilities does not render that employee an"agent of the employer" and therefore, ineligible to retain gratuities. Instead, the Second Circuit asked the New York Court of Appeals, New York's highest court, to provide a definitive answer concerning whether the New York Labor Law permits employees who hold some supervisory responsibilities but are primarily engaged in guest service to receive tips. A negative answer from the New York Court of Appeals would invalidate provisions in the Hospitality Wage Order and a multitude of cases and opinion letters, which have held that employees such as captains, maitre d's, and others are eligible to receive tips. The outcome of the Court of Appeal's decision could significantly change the landscape of tipping in New York as well as other portions of the Wage Order.

In the first case, *Barenboim v. Starbucks Corp*., a class of New York baristas sued Starbucks for maintaining a policy requiring baristas to share tips with shift supervisors, employees with limited supervisory responsibilities, but who the baristas nevertheless claimed were "agents" of the company and therefore precluded from participating in a tip pool. It was undisputed that the shift supervisors were primarily responsible for serving customers, were paid hourly, assigned baristas to their positions, administered breaks, directed the flow of customers, and provided feedback to baristas regarding their performance. However, the shift supervisors did not have the authority to hire or fire employees, set employee compensation rates, or discipline employees. At each store, shift supervisors reported to assistant store managers (ASMs) and store managers — neither of whom participated in the tip pools.

In support of their position, the baristas argue that the New York Labor Law provides that "employers" and "agents" of employers are prohibited from receiving tips. They note that the New York Labor Law defines the term "agents" as "a manager, superintendent, foreman, ***supervisor*** or any other person employed acting in such capacity" (emphasis added). Because shift supervisors at Starbucks engage in some limited supervisory activities, the baristas contend that they are "agents" of Starbucks. As such, the baristas assert that the shift supervisors are prohibited from receiving tips. Furthermore, the baristas

argue that New York Labor Law § 196-d (Section 196-d) only permits employees to share tips with other employees who are at the same "level" or at a "lower level." They based this argument on the language of Section 196-d, which states that a waiter may share tips "with a busboy or similar employee." The lower court rejected the baristas' argument and held that shift supervisors were primarily engaged in guest service and lacked any fundamental managerial responsibilities. As a result, the district court granted summary judgment in favor of Starbucks and dismissed the baristas' claims.

Upon review of the district court's decision, the Second Circuit expressed skepticism about the baristas' arguments noting that there were numerous cases holding that the New York Labor Law only prohibited tipped employees from sharing tips with those employees who do not perform direct customer service. Nevertheless, the Second Circuit refused to reject the baristas' argument outright. Instead, the Second Circuit certified the issue to the New York Court of Appeals asking the court to issue an interpretation of the New York Labor Law. Specifically, the Second Circuit requested that the New York Court of Appeals answer the following question: "what factors determine whether an employee is an 'agent' of his employer for purposes of New York Labor Law § 196-d and, thus, ineligible to receive distribution from an employer-mandated tip pool?" In the event that the New York Court of Appeals holds that employees with limited supervisory responsibilities are "agents of the employer" and therefore forbidden from receiving tips, the Second Circuit also inquired whether portions of the Hospitality Wage Order that permit maitre d's and captains to participate in tip pools with lower level service employees would be rendered invalid.

In *Winans* case, ASMs, who have more authority than shift supervisors, sued Starbucks because of the Company's policy that prohibited them from receiving a share of the tips. The parties agreed that the ASMs were classified as non-exempt from overtime and that the ASMs spent a large portion of their shifts serving customers. The parties also agreed that the ASMs wore the same uniforms as the baristas and shift supervisors thereby making them indistinguishable from the viewpoint of Starbucks' customers. However, the Company demonstrated that as part of their job duties, ASMs conducted preliminary job interviews of applicants, prepared work schedules and payroll for management's approval, advised management about promotions and employee work performance, and recommended discipline.

The ASMs claim that Starbucks improperly excluded them from the tip pool even though their primary duty was customer service. The ASMs also claim that by prohibiting ASMs from participating in the tip pool even if they are the direct recipient of the gratuity, Starbucks improperly divests them of the tips.

In support of their position, the ASMs argue that the ultimate managerial power rests exclusively with store managers and ASMs do little more than assist the store managers. Therefore, the ASMs assert, they were "food service workers" as the term is used in the Hospitality Wage Order. Furthermore, they contend that as "food service workers," Starbucks could not exclude them from participating in the tip pool with other food service workers. In fact, the ASMs argue that Section 196-d and the Hospitality Wage Order compels an employer that establishes a tip pool to include in the tip pool all food service workers who directly receive tips, even if they have some managerial responsibility.

In response to these arguments, Starbucks asserts that, based on their job duties, the ASMs' principal function was to participate in the management of the store. Therefore, they are agents of Starbucks and if they participated in the tip pool, Starbucks would be in violation of Section 196-d. Further, the Company argues that while Section 196-d and the Hospitality Wage Order permit service employees to share tips with other service employees, it does not mandate the inclusion of any particular employee in such pools. In fact, Starbucks argues that the Hospitality Wage Order gives employers discretion to create tip pools, and to decide the formula for tip distribution from those pools; thus, Starbucks could exclude individuals from the tip pool if it chose to do so. Although the lower court did not definitively hold that ASMs are managerial employees, it did nevertheless grant summary judgment in favor of Starbucks and held that 196-d did not afford the ASMs with a statutory right to receive distributions from Starbucks' tip pools.

Instead of determining the merits of the parties' contentions, the Second Circuit certified the matter to the New York Court of Appeals to issue an opinion. Specifically, the Second Circuit asked the New York Court of Appeals to answer the following question: "does the New York Labor law permit an employer to exclude an otherwise eligible tip-earning employee under § 196-d from receiving distributions from an employer-mandated tip pool?"

By certifying the issues raised in both cases to the New York Court of Appeals and not rendering a conclusive

decision on these issues, the Second Circuit has highlighted the uncertainty that exists concerning the inclusion of key positions such as captains, sommeliers and maître d's in tip pools. The uncertainty exists despite the plain language of the Hospitality Wage Order and a multitude of lower court decisions permitting their inclusion. It is also no longer certain that employers can dictate which classification of food service employees can participate in an employer-mandated tip pool. For example, until clarified by the Court of Appeals it is unclear whether an employer can unilaterally decide to exclude all sommeliers from the tip pool if it so chose or whether it would simply have to decide to do away with all tipping.

Ultimately, the Second Circuit has asked the Court of Appeals to answer the following questions:

1. What factors determine whether an employee is an "agent" of his employer for purposes of N.Y. Lab. Law § 196-d and, thus, ineligible to receive distributions from an employer-mandated tip pool? In resolving this question for purposes of this case, the Court of Appeals may also consider the following subsidiary questions:

   a. Is the degree of supervisory or managerial authority exercised by an employee relevant to determining whether the employee is a "manager [or] supervisor" under N.Y. Lab. Law § 2(8-a) and, thus, an employer's "agent" under § 196-d?

   b. If an employee with supervisory or managerial authority renders services that generate gratuities contributed to a common tip pool, does § 196-d preclude that employee from sharing in the tip pool?

   c. To the extent that the meaning of "employer or his agent" in § 196-d is ambiguous, does the Department of Labor's New York State Hospitality Wage Order constitute a reasonable interpretation of the statute that should govern disposition of these cases?

   d. If so, does the Hospitality Wage Order apply retroactively?

2. Does New York Labor law permit an employer to exclude an otherwise eligible tip-earning employee under § 196-d from receiving distributions from an employer-mandated tip pool?

For more information about this Alert, please contact Carolyn D. Richmond, co-chair of Fox Rothschild's Hospitality Practice, at 212.878.7983 or crichmond@foxrothschild.com, Eli Z. Freedberg at 212.878.7970 or efreedberg@foxrothschild.com, Glenn S. Grindlinger at 212.905.2305 or ggrindlinger@foxrothschild.com, or or any member of Fox Rothschild's Hospitality Practice.

For more information about the New York City Hospitality Alliance, please go to: www.theNYCalliance.org.

CHECK YOUR PAY STUBS, BECAUSE THE PLAINTIFF'S BAR IS TOO

By Carolyn D. Richmond, Esq. and Eli Z. Freedberg, Esq.

As we discussed in detail in our Client Alert from April 2011, the Wage Theft Prevention Act (WTPA) significantly increased the record keeping burdens on New York State employers. While the annual rate of pay notice forms received a lot of attention, one of the lesser known elements of the WTPA required employers to include additional information on employees' pay stubs. Specifically, the WTPA provided that all pay stubs must identify the:

- Employer's name, address, and phone number;
- Employee name;
- Dates covered by payment (pay period);
- Basis of payment (hourly, salary, commission, etc.);
- Rates paid (regular and overtime);
- Hours worked (regular and overtime)
- Allowances or credits applied against wages;
- Gross wages;
- Any deductions from wages; and,
- Net wages

The New York State Department of Labor even posted a "sample" paystub on its website to provide an example of what it was contemplating when the WTPA was enacted. The sample can be found here.

Unfortunately, it did not take long for the plaintiffs' bar to begin capitalizing on the technical requirements of the WTPA. Indeed, we have seen a number of plaintiffs' lawyers file claims against restaurants where one of their primary claims is that the pay stubs that the employer provided to employees neglected to identify the allowances (primarily the tip credit allowance) taken. In addition, these plaintiffs are arguing that the penalty for neglecting to identify the tip credit allowance on the pay stub is that the employer forfeits the right to take advantage of the tip credit for each employee, for each week in which the pay stub was deficient. According to the plaintiffs' bar, this would be true even if the employer previously notified their employees of their intent to apply the tip credit allowance towards the minimum wages (e.g. through the Rate of Pay form and/or other means), and operated a lawful tip pool. In fact, some courts in New York have accepted this argument. See Copantitla v. Fiskardo Estiatorio, Inc., 788 F.Supp.2d 253, 290 (S.D.N.Y. 2011) (holding that an employer is only allowed to apply the tip credit if the wage statements it provides to employees show the allowances claimed as part of the minimum wage).

It goes without saying that this penalty can be significant. Please have your human resources personnel or payroll provider review your pay stubs to ensure that you are in compliance with the WTPA's technical requirements.

In addition, as the end of the year is quickly approaching ensure further compliance with the WTPA and make sure your company is on target to comply with the annual requirement to send all employees the rate of pay form no later than February 1st. Sample rate of pay forms can be found on the New York State Department of Labor's website as well as forms in a number of different languages.

If you require any assistance in evaluating your pay stub please contact Carolyn D. Richmond at crichmond@foxrothschild.com or Eli Z. Freedberg at efreedberg@foxrothschild.com or another member of the Fox Rothschild LLP's New York Labor & Employment Department.

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