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LEGAL ALERT

Hospitality Industry Legal Alert: The Trouble with Tips Continues: Two Recent Court Actions Illustrate Ongoing Challenges Facing Hospitality Employers

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Executive Summary: The United States Supreme Court recently denied review of an Eighth Circuit decision holding that employers must pay the federal minimum wage to tipped employees during those times when the employees performed related non-tipped "preparation and maintenance work," as long as the time spent performing related non-tipped work exceeded 20% of their workday. The Supreme Court's decision to decline certiorari could have a significant impact on the hospitality industry.

In another ongoing case to watch, a federal district court in Tennessee granted conditional class certification to a class of bartenders, barbacks, and waitresses who claim they were required to share tips with security guards. This case again raises the issue of which classes of employees are "tipped employees" who can lawfully share in tips.

The Eighth Circuit Decision: Fast v. Applebee's International

In *Fast v. Applebee's International*, over 5,000 waiters and bartenders joined in a wage and hour lawsuit against Applebee's, claiming the restaurant chain failed to pay the federal minimum wage for work that did not generate tips. Importantly, the Fair Labor Standards Act (FLSA) permits employers to pay a minimum wage of $2.13 per hour to "tipped employees" (defined as employees who customarily receive at least $30.00 a month in tips), as long as the employee's tips make up the difference between the $2.13 hourly wage and the federal minimum wage, currently set at $7.25 an hour. However, the plaintiffs argued that Applebee's could not apply this $2.13 "tip credit" to work that was not directed toward producing tips, such as cleaning bathrooms, stocking service areas, rolling silverware, and "general preparation and maintenance both before and after the restaurant was open." Specifically, the plaintiffs in the *Applebee's* litigation relied on the Department of Labor's (DOL's) 1988 Handbook, which provides that if a tipped employee spends a substantial amount of time (defined as more than 20%) performing related but non-tipped work, then the employer may not take the tip credit for the time spent performing those duties.

Applebee's defended its pay practices by arguing that the plain language of the DOL regulations permits employers to apply the tip credit to duties that are "related" or "incidental" to a tipped occupation. However, the Eighth

Circuit (which encompasses the federal district courts of Arkansas, Iowa, Minnesota, Missouri, Nebraska, and the Dakotas) held the interpretation contained in the 1988 Handbook was entitled to deference, and that the DOL's "20% rule" therefore governed the case. Significantly, however, the Court of Appeals declined to address which duties fell within the "20% rule," but instructed the lower court to determine which job duties constituted "general preparation and maintenance work," for which employers could not apply the tip credit.

Are Restaurant/Bar Security Guards "Tipped Employees"? Stewart v. Coyote Ugly

In another interesting hospitality case involving the definition of "tipped employees," last week a federal trial court in Tennessee denied the employer's motion to dismiss and subsequently granted conditional class certification. The issue in *Stewart v. CUS Nashville, LLC* is whether security guards at Coyote Ugly are "tipped employees" who can lawfully participate in a tip pool. Stewart was a Coyote Ugly bartender, a non-salaried tipped employee. She claims that Coyote Ugly violated the FLSA by requiring employees in her category to contribute their tips to a tip pool so the tips could be shared with, among others, security guards. Stewart argues that the security guards are akin to dishwashers or prep cooks and thus do not meet the definition of "tipped employees" who "customarily and regularly receive tips" under 29 U.S.C. § 203(m), (t).

Coyote Ugly argues that, based on their level of customer interaction, including "hollering" to encourage people to enter, checking identification of those who do enter, being stationed in the front of the house with patrons, assisting female patrons onto and off of the bar to dance, picking up glasses and bottles, and otherwise ensuring a safe customer experience, security guards are more akin to bus boys, maître d's, silverware rollers, sushi chefs, and other front of the house employees who courts have held may properly share in tips. Although premature to address the merits, the court granted conditional certification to a class of bartenders, barbacks, or waitresses at company-owned Coyote Ugly saloons who were required to share tips with security guards.

Employers' Bottom Line:

Careful attention must be paid to ensure tipped employees are being properly compensated.

Following the *Applebee's* case, employers should expect the DOL to enforce the "20% rule" in any future investigations and litigation. The failure to define precisely which duties fall within the "20% rule" means that, for now, no bright lines exist. Thus, employers who rely on the tip credit are advised to determine how much time each tipped employee spends on "non-tipped" activities, and if these "non-tipped" activities constitute more than 20% of the total working time for any shift, the employer must pay the employee the federal minimum wage ($7.25/hour) for all time spent on non-tipped tasks. Further, in order to defend its pay practices, employers should maintain records documenting the time each employee spends on tipped and non-tipped tasks.

Additionally, the *Coyote Ugly* case bears watching to see if the court will reach the merits and, if so, whether restaurant or bar employees such as

security guards and bouncers will be deemed "tipped employees" with whom tips may be shared.

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