

## Navigating the Treacherous Waters of Tipped Employee Wages

As evening sets, many restaurants will find themselves bustling with customers and loyal patrons eager to put the day's work to rest. But while managers focus on reservations, inventory, food allergies, and table checks, obligations owed to employees are always present. The complex laws that govern wage and hour compliance are particularly challenging when the workforce includes service employees.

Most waiters and waitresses will earn a majority of their pay from customer tips. Under federal law, restaurants are only *required* to pay \$2.13 per hour to tipped employees who customarily and regularly make more than \$30.00 in tips a month, with tip money making up the difference between the paid hourly rate and the federal minimum wage (\$7.25 per hour). When an employee's hourly wage and tips do not add up to the minimum wage, then the employer must pay the difference.<sup>1</sup>

The statutory definition of a tipped employee does not require that a calendar month be used in determining whether more than \$30.00 a month is received in tips. Instead, any recurring monthly period beginning on the same day of each calendar month can be used.<sup>2</sup> Further, when an employee normally receives more than \$30.00 in tips a month, he or she is considered a tipped employee even though occasionally due to sickness, vacation, seasonal fluctuations or the like, he or she fails to receive more than the \$30.00 in tips in that particular month, or during the first and last months of employment.<sup>3</sup>

Employers may allow for employee tip pooling or sharing arrangements amongst employees who customarily and regularly receive tips, such as: waiters, waitresses, bellhops, counter personnel (who serve customers), bussers, and service bartenders. However, a tip pool should not include employees who do not customarily and regularly receive tips (i.e. dishwashers, cooks, chefs, and janitors).<sup>4</sup>

The ability to pay tipped employees a reduced hourly pay rate allows restaurant employers to control overhead costs. But, this compensation model relies on the assumption that employees are provided with notice that this tip credit process is the method by which the employer is satisfying its minimum wage requirements. Although an employer is not required to explain tip credits, it must inform employees of tip credits.<sup>5</sup>

In a 2009 case illustrating poor practices, a waitress brought suit against a country restaurant buffet in Covington, Georgia for alleged violations of the Fair Labor Standards Act ("FLSA"). An issue in the case was whether the waitress had received proper notice that tips would be used to satisfy the restaurant's minimum wage requirements. The case revealed that the employer never informed the employee about the tip credits nor collected or counted the waitress's tips. In addition, although the restaurant alleged that it had a written policy regarding employee minimum wage, it failed to show that it provided the policy to the waitress or that the policy was in place when she began working.<sup>6</sup>

To meet their notice obligation, many employers prominently display a wage and hour poster issued by the Wage and Hour Division of the United States Department of Labor which informs tipped employees of tip

credits.<sup>7</sup> But to defeat an employee's claim that notice was insufficient, employers must be careful to post the notice in areas accessible and visible to tipped employees. Further, while displaying the wage and hour poster may satisfy the minimum notice requirement, best practices includes implementation and maintenance of written policies in employee handbooks regarding minimum wage calculations.

Many employers routinely require employees to perform prep-work, side-work, or closing duties during a period of time when the employee is not earning tips. An employer can use tips made by an employee during their work time to satisfy periods of time spent on non-tipping activities connected to the employee's waiting duties. However, an employee's tips should not be used to satisfy minimum wage requirements for "substantial time" spent on non-tipping activities. Therefore, it is generally recommended that tipped employees spend no more than 20% of their work time on non-tip producing work.

Some employers attempt to avoid subsequent litigation by implementing "See You Tomorrow" policies in which they require that more than 80% of a tipped employees work time be spent on serving customers and no more than 20% of their time be spent doing non-tip related activities.<sup>8</sup> However, these policies are only as good as their implementation. Although an employer may have attractive policies in place, it is important to monitor for ongoing compliance.

Although courts will not allow an employer to rely on ignorance alone to avoid damages, employers who evidence a good faith attempt to comply with these requirements may be able to avoid liability for liquidated damages if subsequent litigation ensues. Thus, it is a best practice for employers to regularly review their employee handbooks for notice provisions to employees regarding wage and hour calculations and make appropriate revisions. Employers should also develop a system designed to ensure accurate and complete record creation and retention and to audit tipped employee duties and responsibilities.

Employers who are in the weeds with wage and hour issues or who need a professional to review and advise them on employee handbooks are encouraged to contact Burr & Forman.

If you have additional questions, please contact:  
[Michelli Rivera](#) in Atlanta at [mrivera@burr.com](mailto:mrivera@burr.com) or (404) 685-4246.

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<sup>1</sup> See The Fair Labor Standards Act, 29 U.S.C. § 201, et. seq.

<sup>2</sup> See 29 C.F.R. § 531.56.

<sup>3</sup> See 29 C.F.R. §§ 531.57, 531.58.

<sup>4</sup> See United States Department of Labor, Wages, <http://www.dol.gov/dol/topic/wages/wagestips.htm> (last visited July 17, 2015).

<sup>5</sup> See *Id. v. Neighborhood Rest. Partners, LLC*, 32 F. Supp. 3d 1285 (N.D. Ga. 2014).

<sup>6</sup> See *Holder v. MJDE Venture, LLC*, No. CIVA 1:08-CV-2218-TW, 2009 WL 4641757, at \*1 (N.D. Ga. Dec. 1, 2009).

<sup>7</sup> See *Id.*, 32 F. Supp. 3d at 1285; see also, 29 C.F.R. § 516.4.

<sup>8</sup> See *Id.*