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CLASS ACTION TRENDS REPORT

Minimum wage: Tip traps

Brewster's Homestyle Bar & Grill is a favorite local chain, with eight popular restaurants in the city. The restaurants are constantly busy, with tables turning over at a steady clip. Consequently, Brewster's servers typically earn as much as $16 per hour in tips (well above the applicable $7.25 minimum wage rate).

Brewster's requires servers to contribute a portion of their tips into a tip pool shared among the servers, bartenders, and hosts on duty (and divided among the service staff based on the number of hours they work). The shift supervisor also is included in the tip pool, which irks the servers, because the supervisor doesn't have any tables, and therefore doesn't earn any of his or her own tips to share. The supervisor is also compensated at a higher wage than the $2.13 per hour that the restaurant pays servers. Additionally, the mid-afternoon servers are complaining that the shift supervisors have them "spending half their shift" preparing for the early dinner rush — placing silverware on tables, filling ketchup bottles and salt shakers, replenishing supplies, prepping coffee for brewing, and wiping down tables and booths — tasks that they think should be handled by bussers or by the supervisors themselves, who don't have to "hustle for tips" for their pay.

A disgruntled server has filed suit, claiming that Brewster's violates the Fair Labor Standards Act (FLSA) by taking a "tip credit" against the minimum wage for shifts in which she spends more than 20 percent of her time performing "non-tipped" work. She also alleges that Brewster's mandatory tip pool is unlawful because it includes the shift supervisor among the participants. Contending that these practices were taking place at all of Brewster's eight restaurants, she has asserted a putative collective action, seeking to represent hundreds of current and former servers, bartenders, and hosts employed at the chain's eight restaurants.

Tipped employees are serving up a heaping portion of litigation of late. Challenges to the tip practices of employers in the restaurant and other service industries comprise a significant percentage of recent collective and class action lawsuits. As the *Class Action Trends Report* continues to explore classwide wage-hour litigation, the unique legal considerations of tipped employees and related litigation trends warrant a stand-alone discussion.

Tipped employees and the FLSA

The FLSA requires employers to pay employees at least the federal minimum wage of (currently) $7.25 an hour. However, the statute provides an exception

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A WORD FROM STEPHANIE

We mark our 11th issue of the Jackson Lewis *Class Action Trends Report* with a transition for the Class Actions & Complex Litigation Practice Group. Will Anthony, who has served as its leader since 2007, is turning over the reins.

Will, a Principal in the firm's Albany, New York, and Hartford, Connecticut, offices, and a member of the Jackson Lewis Board of Directors, has seen Jackson Lewis through a period of tremendous growth in class litigation. We have benefited from his innovative management approach and countless contributions to the practice group while at the helm, including his instrumental role in launching the *Class Action Trends Report*. Will brought a wealth of class and collective action experience to the role, having litigated cases in 10 states, with impressive results. Although he relinquishes his managerial role, he will continue to advocate on behalf of our clients, adding to his winning record.

Stepping in to Will's shoes are Eric Magnus and David Golder, who join Stephanie Adler-Paindiris as Co-Leaders of the Class Actions & Complex Litigation Practice Group. Eric and David possess extensive experience in collective and class-action litigations across multiple jurisdictions. They share their insights in this issue of the *Report,* which continues our ongoing focus on wage-hour issues, turning here to the wonderfully confusing world of gratuities.

In these pages, we cover everything from the basics of tip credit eligibility to defenses against class claims for invalid tip practices. We delve into the shifting legal landscape of tip pools and the growing rise of "80/20" claims brought by servers who contend they spend a disproportionate amount of time on non-tipped functions. We also discuss the stringent notice requirements related to tipped employees, among other tip-related issues.

As some states take steps toward eliminating the tip credit, the federal government seems poised to alter the regulatory scheme in a more employer-friendly direction. This obviously creates conundrums for employers with multi-state operations, or those with operations in states with more stringent laws regarding tip practices. Also vexing: an aggressive plaintiffs' bar eager to pounce on inadvertent violations of this hyper-technical area of the law. Employers in the hospitality, restaurant, service, and transportation industries are well aware of the challenges and risks. We hope this issue offers these employers useful, er, "tips" toward compliance and avoiding liability.

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About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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to the minimum-wage requirement for employees who "customarily and regularly" earn tips. In that case, an employer may apply earned tips as a "credit" toward employees' minimum wage and pay employees a reduced, subminimum rate of at least $2.13 per hour in direct wages, as long as employees make enough from their customer tips to otherwise earn at least $7.25 an hour. Employers may take a maximum credit of $5.12 an hour against employees' earned tips.

This "tip credit" provision appears straightforward; however, nothing is simple when the FLSA is involved, and the tip credit is no exception. The tip credit comes with several questions, conditions, caveats, and traps:

This "tip credit" provision appears straightforward; however, nothing is simple when the FLSA is involved, and the tip credit is no exception.

- A "tipped employee" is one who engages in an occupation that "customarily and regularly" earns at least $30 per month in tips. But what is meant by "customarily and regularly"? What is a "tip"? Who owns the tip?
- An employer must comply with hyper-technical employee notice requirements before it can avail itself of the tip credit — requirements ready-made to trip up well-intended employers.
- An employer may use the tip credit only for hours an employee works in an occupation that customarily earns tips. What happens when a tipped employee performs duties that are *not* tip generating?
- Tips are the property of the employee, the law provides. That means the employee is entitled to retain all of the tips that he or she has earned — except for tips that the employee must contribute to a valid "tip pool." What's a valid tip pool, and who can be in it?
- What rules apply when the employer *doesn't* take the tip credit — and pays tipped employees the full hourly minimum wage or higher?

Tip cases are prevalent throughout the restaurant industry. From the point of view of the plaintiff's attorney, all restaurant establishments, from national chains and franchises to local "mom-and-pops," are good targets.

While the presumably "deep pocket" chains may seem to promise the biggest bang for the plaintiff's lawyer's buck, smaller local establishments offer lucrative low-hanging fruit as well. In fact, the local diners may be at greatest risk from the wave of minimum-wage litigation by tipped workers. They operate on the thinnest of profit margins and often, of necessity, pay employees at or near the minimum-wage rate, leaving little room for error. In addition, while national chains have the resources for compliance assistance to lower the risk of claims, the mom-and-pop establishments have little or no budget for such preventive measures. Consequently, the less legally savvy diner may be prone to unwitting technical lapses over statutory notice requirements or tip pool restrictions. Even a relatively small wage-hour collective action, moreover, can threaten a small restaurant's survival.

"The technicalities of the statute with respect to the tip credit are such that it's exceedingly tough for small employers to get it right, without advance advice of counsel," David R. Golder, a Principal in the Hartford, Connecticut, office of Jackson Lewis and Co-Leader of the firm's Class Actions & Complex Litigation Practice Group, points out.

The *types* of claims faced by large employers and small restaurants typically vary. "With the big chains, you might still get cases where employees allege they're working off the clock," said Eric R. Magnus, a Principal in the Atlanta, Georgia office of Jackson Lewis, also a Class Actions & Complex Litigation Practice Group Co-Leader. "Most of the violations by restaurant chains happen because local management doesn't understand the company's national policies, or veers from them. Therefore, the practical advice we provide to our national chain clients is about training local managers to understand the nuances of the law so that they don't get it wrong."

Types of claims against large chains and small restaurants also may differ in whether suit is brought under the FLSA, state, or local law. The local diner may not be covered under the FLSA, leaving it subject only to state and local wage laws. Where that is not the case, the primary distinction on whether federal or state law drives the litigation is the state in which

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the entity is located, rather than the size of the employer. Suits brought in states such as New York and California (which have robust wage-hour and tip laws) invariably will assert state-law allegations, although plaintiffs may bring FLSA claims for good measure, as well. In other regions of the country, such as the south, state wage laws generally afford no greater protections to employees than the FLSA. Therefore, in those states, wage suits often are based on federal law alone. (Staying abreast of state-law requirements is essential. Tools like workthruIT®, Jackson Lewis' digital compliance solution, can help.)

"Most of the litigation in this area comes from 'gotcha' types of claims," according to Golder.

Restaurants are not the only businesses that find themselves defending tip claims. These cases arise in other service industries, too. For example, when airlines first began imposing passenger baggage fees, several high-profile tip cases were brought by airport skycaps claiming the fees cut sharply into their tip earnings. "You still see the occasional baggage-handler cases," Magnus notes. The hotel industry also stands at high-alert for such litigation. On the whole, however, Magnus estimates that 95 percent of the tip litigation in recent years is in the restaurant industry.

"Most of the litigation in this area comes from 'gotcha' types of claims," according to Golder. "Employers are dealing with some technical violation — their notice didn't have the magic words, the obligatory poster wasn't displayed, or they included one person in the tip pool who wasn't supposed to be in there," he said. "You don't typically have the systemic violation types of cases outside the restaurant industry."

Rule change, sea change

The uptick in "gotcha" tip claims corresponds with the 2011 enactment of a federal rule change by the U.S. Department of Labor (DOL) that imposed additional notice requirements and other burdens on employers seeking to utilize the tip credit and tip pooling practices. Significantly, and controversially, the DOL extended legal restrictions as to which employees can participate in a tip pool even to employers that pay servers the full minimum wage and do not utilize the tip credit. Previously, the rules applied only when the tip credit is utilized.

"The most common error we see employers make, by far, is an inadvertent breach of the tip notice requirements," Magnus said, "particularly among the mom-and-pop establishments." He continued, "Even six-and-a-half years since the regulations were amended, the overwhelming majority of small employers still neglect to provide written tip credit notices, a requirement ushered in by the rule change. In terms of litigation, it's far and away the biggest violation right now."

Magnus offers a critical take on the Obama-era rulemaking. "The clear import of those regulatory changes was that the DOL probably didn't believe the tip credit should even exist," he said. "The hyper-technicality of the compliance requirement, coupled with the fervor with which the Obama DOL pressed tip credit issues at the agency level, tells me they thought the subminimum wage simply shouldn't exist."

"The notice requirements were *designed* to be violated," Magnus opined. "For example, the rule requires that an employer cannot claim the tip credit unless it puts into writing the amount of the tip credit that it's claiming — information that is already manifestly obvious to the server. It's designed to be so hyper-technical that unless an employer is consulting with counsel beforehand, it's going to violate the law. If a law is designed to be violated, the implementing agency probably doesn't believe that the law should exist."

However, in December 2017, the DOL granted restaurant employers a partial, but important, reprieve. The DOL issued notice that it will rescind the regulatory requirements as applied to employers that do not take the tip credit. "The new rule is essentially what everyone knew the law should be," Magnus said. "It is a recognition of how silly that 2011 interpretation was in the first place." (See "Regulatory roundup" on page 13 for more on the tip rule and the DOL's stated intention to rescind the Obama-era rulemaking.)

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Tip vs. service charge

The DOL regulations define a "tip" as "a sum presented by a customer as a gift or gratuity in recognition of some service performed for him." It is under the customer's sole control whether to give a tip, the amount of the tip, and who will receive it. If the employer takes the tip credit to offset the minimum-wage requirement, the tip becomes the property of the employee. If, however, the employer does not take the tip credit, and pays tipped employees the regular minimum wage of $7.25 an hour or more in direct wages, then it may retain the employees' tips (although this matter has been a frequent source of legal contention).

The FLSA defines "tipped employees" as those who "customarily and regularly" earn at least $30 per month in gratuities from the customers they serve.

A tip is distinguished from a "service charge" that is imposed upon customers by the establishment to help offset its expenses. A service charge is a fee commonly charged by caterers, banquet facilities, and the like, as a percentage of the billed amount or as a set fee for labor costs, pursuant to a service contract. As long as the servers are paid at least the full minimum wage, these fees are the employer's to disburse to servers (or *not*) as it deems appropriate, even if the customer expects that the service charge will be turned over to the staff. However, this is not the case in certain states; some states, including New York, require that mandatory service charges be turned over to employees unless the employer makes it clear to customers that it intends to keep all or a portion of the money.

Who is a "tipped employee"?

The FLSA defines "tipped employees" as those who "customarily and regularly" earn at least $30 per month in gratuities from the customers they serve. Practically, the $30 figure is seldom at issue. (It is evaluated on average, a month-by-month calculation of tipped employee earnings is not required; it is enough that a server takes home $30 *most* months, or at least more than sporadically. The calculation is made by individual employee, not by job title.) The "customarily and regularly" prong is a steady source of discord, however. It is a key variable in the question of who is a "tipped employee." The question is significant because, under the FLSA, only tipped employees can be included in a mandatory tip pool.

In its 2015 decision in *Montano v. Montrose Restaurant Associates*, the U.S. Court of Appeals for the Fifth Circuit offered an explanation as to when an employee customarily and regularly receives tips. It said the "common thread of the cases and the DOL opinion letters is to require a tipped employee to have more than a de minimis interaction with the customers who leave . . . undesignated tips." But this test is hardly foolproof. As a concurring jurist pointed out, hotel housekeepers seldom interact directly with hotel guests, even though guests frequently leave gratuities that are clearly intended for the housekeeper. In one case, poker room cashiers were deemed tipped employees even though they did not spend a specific amount of time performing direct customer service. In the end, the determination of who are customarily and regularly tipped employees requires careful consideration of custom or practice, as well as a close look at the facts of an individual case.

"Tip generating" duties

When an employer takes the tip credit against tipped employees' minimum wage, those employees must spend the bulk of their shifts engaged in "tip generating" duties. The tip credit may be taken only for work hours in which an employee is engaged in the tipped occupation. However, tipped employees also can be assigned intermittently to perform duties that are "incidental" to their tipped occupation and typically assigned to tipped employees. Consider, for example, the server who also makes a pot of coffee, places silverware at her assigned tables, or adorns a Belgian waffle with a dollop of whipped cream before delivering the breakfast to her customer. These related duties also are subject to the tip credit, even though they do not themselves produce tips, because they are related to the tipped occupation.

On the other hand, an employer may *not* take the tip credit for hours in which a tipped employee performs non-tipped work that is *not* incidental to his or her tip generating

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duties. Routine maintenance and preparatory or closing activities are incidental to tip generating duties; however, cleaning the restrooms is not the kind of work that is typically assigned to a server as incidental to the tipped occupation of serving food to customers.

Which duties are tip generating? What tasks are incidental to those duties? And what duties are more appropriately characterized as non-tipped work, unrelated to the tipped occupation? Given that so many discrete tasks are carried out for the broader purpose of servicing a customer, and thus "generating a tip," the analysis is by no means clear-cut.

Take the following duties, for example. They are all fairly typical tasks of a restaurant server. Are they tip producing, incidental, or non-tip producing?

- Taking a customer's order
- Delivering food to a customer
- Reviewing the day's menu specials to be able to advise customers about them
- Attending a pre-shift meeting regarding menu changes
- Tasting new menu items in order to be able to advise customers about the items
- Cleaning up a drink spilled by a customer mid-meal
- Cleaning up a drink spilled after the bill's been paid, the tip left on the table, but the customers remain at the table drinking coffee
- Helping to clean up a drink spilled by *another server's* customer
- Singing "Happy Birthday" to a customer
- Singing "Happy Birthday" to *another server's* customer
- Providing a new fork to a customer who dropped one on the floor
- Providing a new fork to *another server's* customer
- Sweeping the floor after a child drops french fries and crayons but before the parents pay for their bill
- Sweeping the floor to pick up french fries and crayons left by a child *after* the parents paid their bill
- Closing out customer checks

Tipped employees are also routinely called on to perform these additional tasks, which are one step removed from direct interaction with customers, but essential to the customer's experience:

- Rolling silverware
- Refilling salt-and-pepper shakers and condiments
- Refilling the ice bin used by servers so that ice will be ready for customer drinks
- Stocking coffee and tea
- Stocking glasses, straws, and items for the bar
- Putting garnishes on ice
- Cleaning and adjusting beer kegs
- Washing dishes and glassware
- Setting up table tops, chairs, and the wait station
- Cleaning chairs, tables, and booths
- Cleaning restaurant décor, lights, and windows
- Taking out garbage

For the employer that is legally obligated to distinguish tipped and incidental duties from non-tipped duties, the slope is slippery. Navigating that uncertain terrain while managing a bustling restaurant can be especially challenging. The employer also must ensure that the non-tipped work does not take up a disproportionate share of tipped employees' work time. Which of these duties are tip producing, which are incidental to tip producing duties, and which are neither? There is no clear answer. Yet, getting it wrong can be costly.

According to Magnus, there is a critical distinction between non-tipped work occurring before and after tipped employees' shifts as opposed to mid-shift. The difference is a practical one. The pre- and post-shift time is easily separable from the tipped work. Therefore, it is reasonable to pay tipped employees the full minimum wage for the set-up and clean-up time they spend working before and after the shifts.

"I advise clients that have tipped employees come in early to clean, to track those hours and pay minimum wage for them," Magnus said, in an abundance of caution. (And tipped employees must be reminded of the importance of clocking in for that pre-shift work time; some servers neglect to log in until it's time to start taking orders from customers.) In contrast, the non-tipped work occurring during the shift is totally interspersed with tipped duties, and according to Magnus, "cannot possibly practically be tracked and paid for separately than the tipped work." Therefore, the tip credit can be applied.

The "80/20" rule? Neither the text of the FLSA nor its enabling regulations require employers to track time spent engaged in tip generating duties versus non-tip generating

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duties. Moreover, neither the statute nor the regulations dictate precisely how much time a tipped employee can spend performing non-tipped duties before the right to take the tip credit is forfeited. Yet a wave of lawsuits have contended that tipped employees can be asked to spend no more than 20 percent of their work time engaged in non-tip producing duties, and that at least 80 percent of their shifts are to be spent engaged in tipped work. Plaintiffs contend that any work hours in which a tipped employee spends 21 percent or more engaged in arguably non-tip related duties must be compensated at the full minimum wage. These 80/20 claims are the most legally controversial claims being litigated, by far, according to Magnus.

"80/20 isn't really a rule at all," Magnus says, pointedly calling these claims "nonsense." The 80/20 principle appears only in the DOL's Field Operations Handbook (which has now been incorporated into the DOL's informal "Fact Sheet"), which is intended merely to guide agency investigators in gauging how much time an employee can engage in non-tipped duties while still being deemed to customarily receive tips. The arbitrary 80/20 breakdown is

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"80/20" is *not* the law.

Plaintiffs raising an 80/20 claim assert that if tipped employees spend more than 20 percent of their work time performing non-tip generating duties (whatever those may be) the employer cannot take the tip credit and must pay employees the full minimum wage for whatever percentage of work does not generate tips. The problem with this theory is that it rests on a faulty premise: the "rule" upon which these claims rely is unsupported by the text of the FLSA, the legislative history, or the regulations.

Other than a requirement that the tipped employee customarily and regularly receive at least $30 a month in tips, nothing in the FLSA itself limits the amount of time a tipped employee may spend on any particular activity within the "tipped occupation." The FLSA further defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." Accordingly, the FLSA permits the tip credit to apply based on the "occupation" in which the employee is engaged and whether he or she receives at least $30 a month in tips "customarily and regularly." The Act makes no distinction between duties within the occupation that are tip producing or non-tip producing. Nor is there a single sentence in the legislative history of the statute that mentions or supports any distinction between duties that directly generate tips and those that may not.

The DOL regulations address tipped employment, but, consistent with the statute, they merely provide that the tip credit applies based on the "occupation" of the employee. Like the text of the FLSA itself, the regulations make no distinction between duties that are tip producing and non-tip producing, let alone impose a 20-percent limitation on non-tip producing work.

In fact, the sole basis for the 80/20 theory is a sentence in the DOL's Field Operations Handbook (FOH), which, DOL's own disclaimer states, "is not used as a device for establishing interpretative policy." In its "dual jobs" discussion, the FOH states, without explanation, analysis, or citation to any authority, that "where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties." This nugget was slipped into the document in 1988, without benefit of prior notice or an opportunity for public comment. Other "subregulatory" guidance offers wavering support for the notion, at best. The 80/20 rule was rejected by the DOL in a 2009 opinion letter acknowledging the concept was unworkable, although that guidance was later withdrawn by the then-incoming Obama Administration, thus reflecting the DOL's dizzying inconsistency on this issue.

The DOL could be expected to shift gears once again on this issue under the Trump Administration, which has been clear about its intent to rid burdensome regulations that stifle growth and, as is the case here, exceed an agency's legislative mandate and defy common sense.

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an effort to distinguish those employees who customarily receive tips from those who do not. "Certainly there's some point on the non-tipped work continuum where you can't call them tipped employees anymore," Magnus concedes, "but trying to draw that line is not the source of any litigation that I've seen."

Moreover, as a practical matter, the 80/20 rule as defined by the FOH and adopted by some courts is difficult to follow, Magnus said. Consider the logistics of a restaurant employer being compelled to carefully track their tipped employees' time, and distinguish between tipped and non-tipped tasks, as servers move seamlessly between tip generating functions and tasks incidental to those functions, while occasionally being asked briefly to pitch in with non-tip producing duties essential to restaurant operations.

"We are starting now to finally see some pushback from courts in 80/20 cases," Magnus said.

Even when employers get it right, assiduously adhering to the arbitrary 80/20 prescription, there is no surefire defense. "We've seen cases go forward even though tipped employees signed off every day confirming that they spend no more than *fifteen* percent of their time performing non-tipped work," said Magnus. "There isn't really anything an employer can do about it. Courts have been very sympathetic to employee claims."

Once an 80/20 case ends up in litigation, a defense is difficult to muster. Again, there are typically no time records reflecting the duration of tipped employees' allegedly non-tip producing work during any given workday or workweek. The law does not require such recordkeeping. That makes it an arduous endeavor to defend against unfounded and inflated damages claims. (And that endeavor is usually relegated to depositions of employees — since there typically are no time records, the cases often hinge on employee statements about how much time they spent on non-tipped duties.) Further, although the number of hours of side work would certainly vary by tipped employee, and from week to week, putative class claims generally get certified, and are seldom dismissed, Magnus said.

However, Magnus pointed out, the tide appears to be turning. "We are starting now to finally see some pushback from courts in 80/20 cases," he said. Jackson Lewis has successfully obtained dismissal of several of these claims for clients of late.

Dual jobs. At some point along the tipped versus non-tipped work continuum, the tipped employee is engaged in an altogether separate, non-tipped occupation. The employee is said to perform "dual jobs" for the employer. An employer cannot utilize the tip credit for the hours worked by the employee in the non-tipped position. A classic example is the employee who works several shifts as a cook in addition to shifts as a server. Another common example, prevalent in short-order restaurants, is the employee who takes a customer's breakfast order and then retreats to the kitchen to cook it. The latter scenario may be inescapable for some restaurant employers; nonetheless, it invites trouble.

Tip pools

When an employer has a tip pool in place, some or all tipped employees are required to contribute a portion of their earned tips into a pool that will be divided equally among them. For employers that utilize the tip credit, the FLSA regulations mandate that only employees who regularly earn tips can participate in a tip pool; employees cannot be required to share their tips with coworkers who do not also earn tips or with the employer. Moreover, employees cannot be required to contribute a portion of their tips that would drop them below $7.25 per hour. Finally, an employee cannot be expected to contribute any more into the tip pool than is "customary and reasonable."

Employers that do *not* take the tip credit often utilize tip pooling practices as well. Prior to the 2011 rule change, these employers were unrestricted as to which employees can be included in a valid tip pool; consequently, they often include "back-of-the-house," or non-tipped employees (*e.g.,* cooks, dishwashers, and other restaurant staff) in their mandatory tip pools alongside "front-of-the-house" staff such as servers. The practice reduces pay

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disparities between tipped employees and back-of-the-house staff, who work cooperatively with front-of-the-house staff to ensure that customers enjoy an optimal service experience. Again, the regulation has been the source of contentious litigation, and the DOL has already announced its change of position. For now, though, the rules are in flux as they apply to employers that do not take a tip credit. (See "Regulatory roundup" on page 13 for more on the impending rule change.)

"The FLSA case law is fairly cut and dry as to who can be in the tip pool," according to Golder. "Servers, hosts and hostesses, bartenders, expediters, food runners, and bussers — customer-facing employees who help generate the tips. But *not* back-of-the-house employees — not cooks, sous chefs, custodians. And not managers."

"Still, I've not had an unsophisticated employer that *doesn't* get it wrong," Golder notes. "Larger, more seasoned employers don't make these mistakes; they already know who can be included. But smaller employers, if they haven't obtained advice in advance, always throw in an employee who doesn't belong. It's usually assistant-manager types who do a lot of serving and bussing. These employees make a salary because they're managers, but they spend significant time doing tipped work."

The consequences of an honest tip pool error can be significant, particularly when collective action litigation ensues. An agency enforcement action can result in considerable losses for employers as well. "Currently, the Department of Labor's position is that if you mess up and include any non-customer-facing employee in the tip pool, you lose the tip credit," Golder cautions. "Then you have to pay $5.12 to every tipped employee for every hour going back three years."

Employers also must heed state laws when determining which employees can be included in a tip pool, and multistate employers may find that jobs that may be included in one jurisdiction must be excluded elsewhere. For example, Massachusetts' unique tip statute precludes coffee chain shift supervisors from participating in a tip sharing arrangement, but California allows them to partake of the communal tip jar. Also, some states prohibit retaliation against employees who refuse to share tips. Others require that tip pooling arrangements be voluntary and not the result of coercion. (See "Meanwhile, in the states…" on page 16 for more examples.)

"Chain of service." In cases challenging employees' inclusion in a tip pool, the focus is typically on whether the position in question entails sufficient direct customer interaction to warrant giving the employee a cut of the customer's tip. However, at least when certain more flexible state laws are invoked, courts occasionally have been receptive to the chain-of-service argument — the notion that back-of-the-house workers play an important role in customer service, and that the sharing of tips with these employees encourages them to perform better as well, thereby improving the all-around customer experience and, for all employees, perhaps, reaping the benefits of a larger gratuity (or a portion of it). Restaurant employers may find success asserting the chain-of-service argument to support their decision to include back-of-the-house employees in their tip pools. Of course, notes Golder, for the restaurant industry, "chain of service" is a management principle as much

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Calculating overtime

Did your full-time servers work past their shifts to cover an unanticipated dinner rush? Tip credit or no, the FLSA's time-and-a-half overtime provision still applies.

When tipped employees work overtime, calculate their "regular rate" for overtime purposes based on the regular federal minimum wage, not the subminimum tip credit rate. For example, if an employee's regular rate (*i.e.,* the employee's hourly rate without any credits or allowances taken) is $10.00 and the employer is allowed a legal tip credit of $3.00, the employee's overtime rate would be $12.00 (($10.00 x 1.5) -$3.00).

We'll discuss overtime issues in detail in a coming issue of the *Class Action Trends Report.*

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as a legal defense to a tip pooling claim. The concept has become more prevalent in light of trends in the restaurant industry, such as open kitchens where chefs are encouraged to regularly interact with customers.

Compliance tips and best practices

Avoiding tip claims in the first place is the best means of minimizing liability. To that end, technical compliance with the FLSA's tip regulations, including the employee notice requirements, is essential. Follow these preventive measures:

- Analyze pay records to ensure tipped employees are earning enough in gratuities to satisfy the federal minimum wage. If the employee's tips plus the direct wages (of at least $2.13 an hour) do not equal the minimum hourly wage, you must make up the difference.
- Make sure that tipped employees do not perform non-tipped work outside their shifts. If they *are* working dual jobs, pay the full federal minimum wage for the hours they work in their non-tipped occupation, particularly if it is pre- or post-shift work. If you utilize an electronic time clock, inquire with the vendor about utilizing separate log-ins for employees — one log-in for tipped time, and a separate log-in for non-tipped time.
- If you use a tip pool, clearly document the personnel involved and the procedures used to pool the tips. Doing so can help prevent well-intentioned managers from spreading the bounty — and inadvertently inviting a lawsuit.
- Be cautious about taking deductions from tipped employees' pay. Service industry employees often are required to wear uniforms while performing their tipped occupation, and employers may be inclined to deduct the costs of employer-provided uniforms from employees' pay. However, Magnus cautions against taking deductions when using the tip credit. "You basically can't do a uniform deduction from a tip-credited employee. My advice is don't do it." The DOL has been increasingly scrutinizing uniform deductions of late, he notes.
- Pay attention to the additional recordkeeping obligations that come with employing tipped workers. Keep records of the written notice provided to tipped employees on the use of the tip credit. Maintain accurate records of the tips they earn. The task calls for considerable diligence. "It's a challenge when you've got cash tips out there," Magnus acknowledges.
- Keep in mind that what may be permissible under the FLSA and in one state may make an employer non-compliant in another jurisdiction. Confirm that a tip credit is allowed under applicable state and local laws as to each tipped employee. Likewise, when a customer tips on a credit card, the FLSA allows the employer to reduce the tip amount by the same percentage that the credit card company charges the restaurant as a processing fee. However, some states require the employer to bear the entire cost of that fee and give the employee the full tip amount designated by the customer. Heed state laws on service charges or "catering fees" as well, and the specific customer notice requirements they entail. Consult with outside counsel familiar with the compliance requirements of each jurisdiction in which you operate, or use tools such as workthruIT®, Jackson Lewis' digital compliance solution, to stay abreast of the specific obligations in your state.

Defending class tip claims

Reflecting back on our "Brewster's" scenario, how is the hypothetical local restaurant chain to respond to the putative collective action filed by its server? Was the shift supervisor improperly included in the mandatory tip pool? Does Brewster's lose the tip credit merely because its servers sometimes wipe down booths and tables? Can a server at one restaurant feasibly represent bartenders and other tipped employees working at other Brewster's locations? What's the defense strategy?

Challenging class certification. According to Magnus, 80/20 claims, such as the allegations against Brewster's, are "virtually always" brought as collective actions. "Otherwise, the claims are too low-dollar. They're not interesting to the plaintiffs' bar unless they're collective actions." Moreover, there is a significant likelihood a collective action will be conditionally certified under the FLSA's lenient first-stage standard. There are stronger arguments to be made on FLSA decertification or against proceeding on a Rule 23 classwide basis, or for sharply narrowing the scope of a Rule 23 class, he notes.

Nonetheless, to proceed on a class or collective basis, our hypothetical plaintiff must be able to establish that

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Brewster's has a common unlawful tip policy or practice that applies at all eight of its restaurants. She will be hard-pressed to show that each restaurant has the same side-work policies requiring all tipped employees to spend more than 20 percent of their work time engaged in non-tip producing duties. The server also must convince the court that she is qualified to represent her coworkers in different positions and at different restaurants; however, that bussers and bartenders perform materially different types, and amounts, of side work goes against that argument. Further, the nature of the non-tip producing work will vary by restaurant as well, meaning the server is not qualified to bring 80/20 claims on behalf of these individuals.

In the 80/20 context, the very nature of the claim means that liability depends on how much time individual employees are engaged each week in duties that are not incidentally related to their tipped occupation. That number will vary considerably based on each employee's individual circumstances. Therefore, it is impossible for a plaintiff to use common proof because individualized inquiries would be required, Brewster's must argue. Here, Brewster's objective is to highlight for the court factual questions that will demand individual scrutiny:

- What are and are *not* non-tip producing duties for each employee? Determining which tasks result in a gratuity may require anecdotal testimony from each employee's individual customers to reconstruct the specific duties that their tips were intended to compensate.
- Which specific non-tip producing duties do tipped employees perform? The answer varies based on each individual's job, shift, and the restaurant at which he or she works. (The Brewster's server's allegations indicate as much. She asserts that it is the pre-dinner servers, in particular, who are tasked with dinner-prep duties.)
- How much time do individual servers spend engaged in duties that are not directly in front of customers and earning tips? This answer varies, too, by restaurant, by shift (even within the same restaurant), by how busy the restaurant is during a particular shift, and by the speed with which any given employee carries out his or her non-tipped duties.
- How long is each tipped employee's shift? The answer is necessary to determine whether the ostensibly non-tip producing duties exceed the 20-percent mark.

To avoid classwide resolution of the server's claims, then, Brewster's must demonstrate that individualized determinations would have to be made regarding the type and extent of the allegedly non-tip producing duties the employees perform. As the court would have to conduct a series of mini-trials to determine liability as to each individual worker, collective treatment would be unmanageable.

"80/20 claims are inherently quantitative," Magnus notes. "If liability depends on whether each tipped employee spends 19 percent of her time or 20 percent of her time in non-tip producing duties, it's hard to conceive of a more individualized inquiry than that."

"If liability depends on whether each tipped employee spends 19 percent of her time or 20 percent of her time in non-tip producing duties, it's hard to conceive of a more individualized inquiry than that."

Arguing the merits. Does the Brewster's server state viable claims on the merits? How much time she alleges to have spent on non-tip producing work is unclear. The "half their shift" assertion sounds like hyperbole. However, the tasks she alleges to perform (placing silverware on tables, filling ketchup bottles and salt shakers, replenishing supplies, prepping coffee for brewing, and wiping down tables and booths) are arguably customary duties performed by a restaurant server and incidental to her tipped occupation.

On the other hand, the shift supervisor's participation in the tip pool may be problematic (and, given that Brewster's takes the tip credit, the DOL's tip pool restrictions clearly apply) and could be reason to contemplate a settlement.

"In the end, tip claims are incredibly technical violations," Golder says. "We're not talking about systemic pay practices where people are working off the clock. These aren't allegations that an employer is doing anything really wrong. They're just 'gotcha' cases. And, categorically, these cases don't get to trial. There aren't fact issues

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The legislation

Here are the key statutory provisions related to tipped employees:

FLSA, Section 203(m):

(1) … In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to: The cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996 [the date of the enactment of this paragraph], and
(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title [the FLSA's minimum wage provision].

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

FLSA, Section 203(t):

"Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

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involved. Rather, the question is whether the judge agrees with the DOL's interpretation of what the law requires."

Contending with the DOL. A different defensive posture is warranted when the DOL is involved. In recent years, the DOL has vigorously enforced FLSA Section 3(m), the statutory tip provision, and pursued enforcement actions on behalf of tipped employees. "This is the single most active issue the DOL has been engaged in for the last few years," Magnus said, noting that, of the DOL audits and litigation he's been involved in over the last five years, 80 percent have been tip claims. "I don't know if there is any issue where the agency has been more aggressive."

Notably, however, the agency, does not bring 80/20 cases. "There are many people at DOL who agree that '80/20' was never meant to be the basis of liability or the test of whether the employer was complying with 3(m). Rather, it's the amount of tips they get, not the amount of time they're spending doing something," Magnus said.

As for tip pool violations, however, the agency has assumed an aggressive stance. "When dealing with the DOL on these claims, you definitely want to take a less litigious approach," he advises. "You want to meet their position and agree with it as much as reasonably possible. The agency generally won't make liability findings when you're not in agreement that there's been a violation. The dispute is almost *always* about remedies, about whether the proper remedy is the employer's complete loss of the tip credit or simply restoration of tips that shouldn't have been rounded up. The DOL's remedial view on any violation since 2011 is, 'you lose the tip credit, period, end of story.' "

Will the agency pull back from this position under a Republican administration and with new Labor Secretary L. Alexander Acosta at the helm? Currently, and despite rumblings to the contrary, the DOL is still enforcing its 2011 rule interpretations, according to Magnus. For the restaurant industry and other employers of tipped workers, the most significant factor of potential wage-hour liability is whether the DOL will finally reverse course. ■

Regulatory roundup

DOL reverses tip pool rule

During the Obama Administration, the DOL imposed new compliance hurdles on employers in the hospitality and other industries that employ tipped workers. One significant burden was a controversial rule that expanded restrictions on employers' tip practices. The Trump DOL has issued a proposed rule to revoke this provision.

The Trump DOL explained it now was "seriously concerned that it incorrectly construed the statute in promulgating the tip credit regulations that apply to such employers."

The FLSA requires that when an employer takes a tip credit, it must ensure that tipped employees retain all of their tips, except for those tips that are shared pursuant to a valid tip pooling agreement. A valid tip pool is one that includes *only* bona fide tipped employees. That means employers that take the tip credit cannot compel tipped employees to share their gratuities with non-tipped coworkers, with management, or with the employer itself.

In a regulation issued in 2011, the DOL extended this restriction to employers that do *not* take the tip credit, but instead pay the full minimum wage (or higher, as is often the case) — thus categorically prohibiting *all* employers from retaining tips, or from implementing mandatory tip pools that include non-tipped coworkers. The DOL imposed these conditions on these employers even though the clear language of the FLSA itself does not provide for such a restriction unless the tip credit is taken.

As a practical matter, that meant employers could not require that tips be shared with back-of-the-house employees who do not have direct contact with customers and, therefore, do not customarily receive tips. It also meant that employers could not choose to retain employees' tips and, instead, directly compensate employees at the full minimum wage rate of at least $7.25 per hour.

Court challenges. The 2011 tip rule had caused much consternation in the restaurant industry, in particular. It sparked a considerable amount of litigation challenging both the substance of the provision as well as the DOL's authority to promulgate it with respect to employers that do not use the tip credit.

In 2016, in *Oregon Restaurant and Lodging Association v. Perez,* a divided U.S. Court of Appeals for the Ninth Circuit reversed a federal district court's order invalidating the 2011 revisions. The majority reasoned that the FLSA's "clear silence as to employers who do not take a tip credit has left room for the DOL to promulgate the 2011 rule." The full Ninth Circuit denied a petition for *en banc* rehearing of the decision, with 10 judges dissenting from the denial. (In its latest notice of proposed rulemaking, the DOL noted the strength of the dissent's objections in that case.) Other courts across the country, however, rejected the regulation, creating a circuit split. Most recently, in Marlow v. *The New Food Guy, Inc.* (a June 2017 case that did not involve tip pooling but rather, challenged an employer's right to retain an employee's gratuities), the U.S. Court of Appeals for the Tenth Circuit held the DOL overstepped its authority when it implemented the rule.

The National Restaurant Association has filed a petition for review by the U.S. Supreme Court (*National Restaurant Association v. Department of Labor*, No. 16-920), one of two certiorari petitions pending in the Supreme Court challenging the 2011 regulation.

Rescission pending. Those legal challenges may soon be moot. On July 20, 2017, the DOL issued a non-enforcement policy that said it would no longer police the tip pool provision as to employers that pay tipped workers the full minimum wage, pending completion of new rulemaking. On December 5, 2017, the DOL issued a notice of proposed rulemaking to revoke the 2011 rule. Rethinking the Obama DOL's controversial interpretation of the FLSA's tip provisions, the Trump DOL explained it now was "seriously concerned that it incorrectly construed the statute in promulgating the tip credit regulations that apply to such employers."

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Under the new regulation, the tip pool restrictions once again will apply only to employers that take the tip credit, thus permitting employers that pay the full minimum wage to implement tip pooling arrangements that include their back-of-the-house staff, or to retain those tips. The proposal applies only to employers that pay a full cash minimum wage. If a tip credit is taken, then sharing of tips between tipped and non-tipped employees would still be prohibited.

The rule change "would likely increase the earnings of those employees who are newly added to the tip pool and further incentivize them to provide good customer service," the DOL explained in announcing the rulemaking. "The proposed rule would additionally provide employers greater flexibility in determining pay practices for tipped and non-tipped workers. It also may allow for a reduction in wage disparities among employees who all contribute to the customers' experience."

It's unknown, however, whether the DOL intends to revoke additional notice requirements ushered in with the promulgation of the 2011 rule. Strict adherence to those provisions continues to be essential for employers that utilize the tip credit.

Remember state law. Even when the DOL adopts the new regulation permitting sharing of tips when the tip credit is not taken, applicable state law may still prohibit the practice. In fact, in issuing its notice of proposed rulemaking, the DOL explained that, since 2011, there have been numerous state law changes requiring employers to pay tipped employees a direct cash wage of at least the federal minimum wage rate. These changes have left many more employers unable to claim a tip credit but nonetheless subject to the tip pool restrictions. The agency cited these developments in support of the need for its current rulemaking.

It remains important to confirm compliance with state law before implementing any tip pooling practice. The law governing tip practices under the FLSA (as well as state laws regulating gratuities) continues to evolve, and employers of tipped workers in any industry permitting tipping must inform their business and employment practices by reference to current law in the jurisdictions in which they operate.

Overtime rule, round two

If you recall, the DOL's 2016 overtime rule was going to increase the salary-level minimum for the white-collar exemptions to $47,476. In *Nevada v. Department of Labor,* however, a federal district court in Texas invalidated that updated salary-level test. According to the court, by more than doubling the previous salary level, the DOL "effectively eliminated" the "duties" considerations of whether an individual is employed in a "bona fide executive, administrative, or professional capacity" and "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties." Because the final rule would exclude so many employees who perform exempt duties, it concluded, the rule does not carry out Congress' unambiguous intent.

In October 2017, the DOL confirmed that it intends to "undertake new rulemaking with regard to overtime." Seeking to preserve the agency's authority to adjust the salary level — albeit not the level proposed by the previous administration — the DOL also filed an appeal of the *Nevada v. Department of Labor* order with the Fifth Circuit. However, the agency has asked that the appeals court "hold the appeal in abeyance while the Department of Labor undertakes further rulemaking to determine what the salary level should be," according to the DOL's statement.

The next step is for the DOL to issue a proposed rule, and then a final rule following a formal comment period. (Notably, when it asked for public comment regarding a new overtime rule in July 2017, the agency received more than 140,000 comments.) The agency has signaled it will issue a new proposed rule in October 2018. While the Obama rule set the salary floor for the white-collar exemptions at $47,476, the salary level proposed by the Trump Administration likely will be in the low-$30,000 range. ■

Prevention pointer

Providing notice to tipped employees

To take the tip credit, an employer must notify tipped employees in advance that their tip earnings will be counted toward the applicable minimum wage. The employer first must inform employees of the specific statutory provisions related to the tip credit, FLSA Section 203(m), and notify the employee if he or she will be expected to participate in a tip pool.

An employer must inform employees of the following:

- How much the employer is paying the tipped employee in cash wages (the amount must be at least $2.13 per hour, under the FLSA);
- How much of the employee's tips the employer will claim as a credit against the applicable minimum wage (the amount cannot exceed $5.12, *i.e.*, the difference between the current federal rate of $7.25 per hour and the tipped employee rate of $2.13 per hour);
- That the employer cannot claim a greater amount as a tip credit than the employee actually receives in tips;
- That the employee is entitled to keep all tips he or she has earned, except for tips that go into a valid tip pool; and
- That the employer cannot apply the tip credit to any employee who has not been informed of the statutory tip credit provisions.

Employees who are required to participate in a tip pool also must be notified:

- Of the required tip pool contribution amount or portion of their tips to be included; and
- That the employer may not retain an employee's tips for any other reason.

In addition to the FLSA's requirements, applicable state or local laws may impose additional employee notice requirements on employers seeking to utilize the tip credit.

Employers have an affirmative requirement to give individual notice to each employee for whom it intends to take the tip credit. Employees cannot be presumed to be on notice that the tip credit will apply based on information that appears in their weekly pay statements or other payroll documents. Posting a general notice on the HR bulletin board is not enough.

Tips to ensure legally sufficient notice

- Provide notice to each tipped employee immediately upon hire that the employer intends to take the tip credit (and require participation in a tip pool, if applicable and appropriate).
- Give the notice in writing. While the DOL permits oral notice, it encourages written notice. Having a written record is the safest strategy for employers — how else can you prove beyond question that notice was provided?
- Require the employee to sign and date the written notice acknowledging that he or she has received and understands the notice.
- For current tipped employees, provide written reminder notices, and require their signed acknowledgement, on a yearly basis.
- Provide tipped employees with conspicuous notice of all of their rights under the applicable wage-hour laws, as mandated of all FLSA-covered employers.

Notice requirements are not a mere formality. An employer that fails to provide sufficient and proper notice may lose the right to use the tip credit, incur significant civil penalties through agency enforcement actions, or find itself defending costly class or collective action wage suits brought by private plaintiffs. Any of these can potentially bankrupt a small restaurant or other establishment.

Meanwhile, in the states ...

The FLSA imposes certain requirements upon employers that wish to take a tip. Many states and localities impose additional or more stringent rules. For example, many states, including California, simply do not allow employers to take a credit. They instead require employers to pay the full state minimum wage to employees, regardless of the tips they earn. Other states allow employers to take a tip credit, but utilize different tip credit rates than the FLSA. In fact, the federal $2.13 rate applies in only 18 jurisdictions in the United States.

Following are some of the unique tip provisions under state or local law:

- Coverage requirements that vary by employer size
- Specific tip provisions for particular industries (such as hotels)
- Varying tipped minimum wage rates by job (*e.g.,* bartender vs. waiter)
- A lower criteria than the federal $30 a month for defining employees who "customarily and regularly" earn tips
- A maximum tip credit of 40 or 50 percent of the applicable minimum wage
- Provisions restricting use of the tip credit to employees who earn a combined amount, in customer tips and employer wages, of at least $7.00 an hour higher than the standard minimum wage
- Certification requirements obligating employees to provide a signed certification at each pay period attesting to the amount of tips they earned
- Notice provisions requiring employers to provide written notice both in English and in the employee's primary language
- Requirements that customer service charges be distributed to employees unless the employer makes it clear to customers that it intends to keep all or a portion of the money
- Greater restrictions on which employees may be included in a tip pool, or provisions barring mandatory tip pooling altogether

When there are differences between federal mandates and state or local requirements, employers must follow the provisions that are most favorable to employees.

Employers must stay current with the frequently changing legal obligations affecting tipped employees in the jurisdictions where they operate. Navigating the statutory and regulatory maze can be especially challenging for employers that employ tipped employees in multiple jurisdictions. Compliance tools like WorkThruIT®, Jackson Lewis' digital compliance solution, can be invaluable. In addition, consult with experienced counsel that can guide employers through the patchwork of provisions that apply to their business.

Jackson Lewis advocates — even out of court

By Lisa M. Marrello, Jonathan L. Bing, Thomas Buchan, Kevin Bronner and James Ansorge

Each year, prior to his State of the State Address, New York Governor Andrew Cuomo announces a series of proposals that will substantively change New York State policy, and will potentially have substantial budgetary impacts on Jackson Lewis' clients. Our Government Relations Practice Group monitors these proposals in real time, and assists our clients in preparing and reacting to the proposals.

As his fifth proposal in the 2018 State of the State Address, Governor Cuomo announced that the New York State Department of Labor (NYDOL) will conduct a series of hearings regarding the potential elimination of the tip credit for New York employers. The elimination of the tip credit would be devastating to many employers, particularly in the service and hospitality industries.

While there have not been any regulatory or statutory changes proposed at this time, the threat of the elimination of the tip credit should put employers on notice. Jackson Lewis' Government Relations Practice utilizes its expertise in the legislative and regulatory process to help our clients advocate and negotiate favorable outcomes before regulatory or statutory changes are ultimately enacted.

Our government relations attorneys and directors will be aware of the schedule for the NYDOL hearings as soon as it is released. We can then assist clients in drafting testimony and comments on how the elimination of the tip credit would affect their businesses. After the conclusion of the public hearings, it is possible that the feedback received from businesses and other stakeholders will lead the NYDOL to decide that the elimination of the tip credit would be too harmful — and therefore to decide *not* to propose any regulatory changes. However, it is also possible that the feedback from employees will be strongly in favor of the elimination of the tip credit, and the NYDOL may propose regulations that would eliminate the credit for employers.

If regulations are ultimately proposed, Jackson Lewis' Government Relations Practice can assist clients by leveraging relationships and providing access to staff through meetings in the Executive Chamber and the NYDOL. At these meetings, clients can not only discuss the overall effects of the regulations, but have the opportunity to suggest changes to particular provisions. From there, we can draft proposed amendments to the regulations that, if accepted by the NYDOL, would put the clients in a more favorable position.

As an example, Jackson Lewis' employment and government relations attorneys recently hosted three webinars for statewide organizations ranging from school bus operators to those who work with the developmentally disabled in response to NYDOL proposed regulations regarding on-call scheduling. We provided advice on the types of comments these groups could make which would have the greatest weight with the State, as well as the logistics on how advocacy memoranda could be submitted to NYDOL.

While the current proposal to potentially eliminate the tip credit would be a statewide regulatory change, our Government Relations Practice can also help clients effectuate policy change through legislative proposals and the New York State budget process.

Further, it is important to note that many policy proposals are contemplated by the New York City Council which will apply exclusively to NYC employers. In those situations, our New York City Government Relations Practice has the skills and relationships to position our clients to fight or support those policy, legislative, or regulatory changes at the New York City level. Over the past few years, we have advised NYC employers on how to respond to new laws concerning paid family leave, restrictions on the use of criminal background and credit checks, and limitations on the use of applicant salary history in employment decisions.

Jackson Lewis' Government Relations Practice Group houses a seasoned team of government relations professionals who are uniquely positioned to offer clients in-depth insight into the administrative, regulatory, legislative and budgetary processes in New York State and New York City government. Our bi-partisan team of government relations attorneys and directors provide sophisticated counsel informed by decades of experience working in government and with government officials. Our government relations team has a strong record of helping our clients achieve their advocacy goals. ■

Jackson Lewis spotlight

Compliance basics for New York employers licensed to serve alcohol

By Alissa M. Yohey

Employers that operate a business that is licensed to sell or serve alcohol in New York State have several obligations and responsibilities under the New York State Alcoholic Beverage Control (NYS ABC) Law. Below are some common issues that we regularly counsel employers on as it relates to alcohol service.

Who can you employ?

Felons. The NYS ABC Law generally prohibits licensees from employing felons. However, there are some exceptions to the rule. If you hold an off-premises license (*i.e.*, grocery store, convenience/drug store, liquor/wine store) or an on-premises license for a catering establishment, hotel, restaurant, not-for-profit club, or recreational facility, you are permitted to employ individuals with felony convictions.

If you hold any other type of on-premises license (*i.e.*, bar, tavern, club), you are prohibited from employing anyone with a felony conviction unless you obtain approval from the New York State Liquor Authority (NYSLA) or the individual has a pardon, a Certificate of Relief from Civil Disabilities, a Certificate of Good Conduct, or other relief from disabilities.

Minors. Generally speaking, retail licensees are prohibited from employing anyone under the age of 18 in a position that requires the person to sell, dispense, or handle alcoholic beverages. There are some exceptions, however, to this rule:

- *On-premises establishments*. Hotels, restaurants, bars, catering establishments, taverns, clubs, etc. may employ individuals under the age of 18 to work as dishwashers, busboys, or in other positions involving the handling of alcoholic beverages when they are in the presence of and under the direct supervision of someone who is at least 18 years old.
- *Grocery stores and drug/convenience stores*. These entities are permitted to employ individuals under the age of 18 to handle and deliver beer and to work as a cashier when they are in the presence of and under the direct supervision of someone who is at least 18 years old.

Police officers. On-premises licensees, as well as liquor and wine stores, may not employ police officers. You can arrange for a local police department to provide special detail for your establishment, or for a group of area businesses, as long as the officers are not paid by you or other licensees. Grocery stores and drug/convenience stores may employ police officers if the officer has the permission of his or her commanding officer.

Security guards. If you hire individuals to provide security and/or check patrons' identification, those individuals are considered to be performing a security function and, as such, they must be registered as security guards with the New York State Department of State. You also must register with the Department of State as an employer of security guards. If you contract with a security company for the provision of security guards for your business, you should require that company to provide proof that it is registered with the Department of State.

Are employees required to undergo alcohol server training?

Currently, the NYS ABC Law does not mandate alcohol awareness training for employees selling or serving alcohol. However, we strongly recommend that any establishment licensed to sell or serve alcohol require any employee who may be selling or serving alcohol to complete an approved Alcohol Training Awareness Program (ATAP). A list of NYSLA-approved ATAP providers can be found at https://www.sla.ny.gov/alcohol-training-awareness-program. For licensees with a disciplinary history, having employees complete an ATAP through an authorized provider can reduce any disciplinary fines owed to the NYSLA.

Are employees permitted to consume alcohol while on shift?

It is permissible for employees of a licensed premises to consume alcohol while on duty as long as the employee is 21 years of age or older. We would urge licensees to monitor the amount of alcohol an employee consumes while on duty, and ensure that no employee is compromised in his or her ability to monitor alcohol sales to prevent sales to minors or intoxicated individuals.

Are managers required to be disclosed to the NYSLA?

Except under certain circumstances, the NYSLA no longer requires managers to complete "personal questionnaire" forms. If the owners, officers, and/or directors of a licensed premises are located outside of New York State, the NYSLA often will require that a manager of a premises complete a personal questionnaire form and provide a color photo and a copy of his or her photo ID.

Jackson Lewis' Alcohol Beverage Licensing attorneys practice before the New York State Liquor Authority, New York City Community Boards, local municipalities, and the federal Alcohol Tobacco Tax and Trade Bureau. We represent clients in all areas associated with the operation of a hospitality business, including but not limited to licensing and permitting, investigations and enforcement actions, transactional issues, and corporate matters. Our attorneys utilize relationships with state and local officials to efficiently and effectively obtain results for hospitality clients and monitor changes in laws, regulations, policies, and procedures related to the hospitality industry and ensure our clients are up-to-date with the most recent changes. If you have any questions pertaining to federal or state alcohol beverage licensing, reach out to Alissa Yohey in our Albany office for assistance. ■

STAY IN THE KNOW!

Don't wait until our next issue of the *Class Action Trends Report* for the latest developments in class and collective actions. Jackson Lewis' **Employment Class and Collective Action Update** blog will keep you apprised and enlightened on what's happening in this critical area of the law.

Also visit Jackson Lewis' **Wage & Hour Law Update** blog for recent news and expert analysis.

On the radar

Key class action issue teed up at Supreme Court

The U.S. Supreme Court will consider an important procedural issue related to class litigation this term: "Whether the rule from *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), tolls statutes of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period."

On December 8, 2017, the Supreme Court agreed to review *China Agritech, Inc. v. Resh* (No. 17-432) to decide whether absent members of a class action can later bring a new class claim after the statute of limitations period has passed. In the underlying case, a company's shareholders were making their third attempt to certify a class in a suit alleging violations of the Securities Exchange Act of 1934. The first two motions for certification failed on the merits. Absent members of the rejected classes filed a third class action, this time outside the limitations period. This last try would be untimely unless *American Pipe* tolling doctrine applied.

A federal district court held this tolling doctrine only tolls the limitations period for individual class members to bring individual claims; it does not aid litigants seeking another go at class certification. In a 2017 decision, the Ninth Circuit reversed a district court decision holding that *American Pipe* tolling permits absent class members to sue on behalf of other class members even after the statute of limitations has expired. The holding deepened a circuit split on the question whether, under the *American Pipe* doctrine, absent class members may bring late-filed *class* suits or whether it allows them simply to file individual actions outside the limitations period. ■

Up next...

We continue to explore the complexities of wage-hour law and litigation in the *Class Action Trends Report*. In the next installment of our series, we look at compensable time. What constitutes "hours worked"? What are the pitfalls of tracking employee work time? And what challenges arise when employees are paid by a measure *other* than time?

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