CALIFORNIA COURTS SET THE FRAMEWORK FOR LAWFUL TIP POOLING

By Christine H. Long and Kara L. Arguello

It is not uncommon for restaurants to require a "tip pool" among its employees – waiters, bartenders, busboys and bar-backs may be required to share in all of the tips collected in a day. The issue has been raised in the courts as to whether this is an acceptable practice.

Under the California Labor Code, tips that are left for an employee are considered to be the property of the employee. This is true whether the tip is in the form of cash or added to a credit card charge. California law differs from federal law in that a California employer cannot use any part of the tips collected to offset its obligation to pay its employees at least minimum wage. In other words, the employer must turn over all tips collected to the employees.

In recent years, California courts have held that an employer such as a restaurant is not prohibited from requiring the practice of "tip-pooling" among employees. However, the employer, or an agent of the employer, such as a manager or supervisor who has the power to hire and fire, may not share in the employees' tips. In a string of cases in 2009, the California courts set out the parameters of what it deems to be an acceptable form of tip pooling.

California Supreme Court Expected to Hear Case

First came *Lu v. Hawaiian Gardens* (2009) 170 Cal.App.4th 466, which involved dealers at the Hawaiian Gardens casino who were required by the employer's tip pool policy to segregate 15 to 20 percent of the tips they received at the close of each shift. The casino then deposited the tip pool money in a tip pool bank account for later distribution to designated employees who provide service to customers, such as chip runners, poker tournament coordinators, poker retention coordinators, hosts, customer service representatives, and concierges. The tip pool policy specifically forbid employers, managers, or supervisors to receive money from the tip pool. This case held that the practice of tip pooling is permissible in the casino context, just as it is in the restaurant industry. The Court held, however, that the employees did not have a private right of action under Labor Code section 351, which provides that employers or managers may not take any tips or wages left for an employees. The employees had to look to the Labor Commissioner to sue on their behalf. *NOTE:* The California Supreme Court is expected to hear oral arguments in this case in 2010.

This was followed by *Grodensky v. Artichoke Joe's Casino* (2009) 171 Cal.App.4th 1399. Artichoke Joe's Casino implemented a mandatory tip pooling policy for its dealers. Grodensky filed a class action lawsuit and claimed that the casino had violated Labor Code section 351, because shift managers were agents of the employer who should not share in the employees' tips. Artichoke Joe's claimed that Labor Code section 351 did not provide employees with a private right of action. The Court of Appeal held that employees do have a private right of action under Labor Code section 351 (in contrast to the holding in *Lu v. Hawaiian Gardens*), and that requiring the dealers to tip out the shift managers was illegal conduct. **Note:** The issue of whether employees have a private right of action under Labor Code section 351 is pending before the California Supreme Court. The California Supreme Court granted hearing in *Grodensky* but placed it on hold.

Class Action Suit

Budrow v. Dave & Buster's of California, Inc. (2009) 171 Cal.App.4th 875 was a class action lawsuit against Dave & Buster's, claiming that their tipping policy, which required that servers contribute tips equal to one percent of their gross sales, to bartenders and other employees, violated Labor Code section 351, which prohibits an employer or manager from sharing in employee tip pools. Budrow claimed that section 351 limited who may share in tip pools to persons who provide "direct" table service. The Court of Appeal found that Dave & Buster's tip pooling policy did not violate section 351 by including the bartender or individuals who did not provide "direct" table service, because it did not result in managers or employers sharing in the employees' tips.

In *Etheridge v. Reins International California, Inc.* (2009) 171 Cal.App.4th 908, Defendant Reins operated several restaurants in California. Etheridge and other servers brought a complaint on behalf of a class of servers employed by Reins. The plaintiffs challenged the legality of Reins' mandatory tip-pooling arrangement which required servers, as a condition of their employment, to share tips with certain other employees at the restaurant, including those who do not provide "direct table service." The Court of Appeal affirmed the lower court's ruling that even those employees who do not provide direct table service may share in tip pools so long as they are not managers or supervisors.

A California Court of Appeal overturned a recent trial court verdict awarding a class of current and former Starbucks baristas $86 million in tips they were required to share with shift supervisors. The Court of Appeal held in *Chau v. Starbucks* (2009) 174 Cal.App.4th 688 that the trial court erred in ruling that Starbucks' tip allocation policy violated California law. Each customer at the stores was served by a customer service team, rather than by an individual employee. The team consisted of one or more entry-level employees and one or more shift supervisors, who rotated jobs throughout the day and spent more of their time performing the same service tasks. The money in the collective tip box was divided among the entry-level employees and the shift supervisors. The court explained:

> "The applicable statutes do not prohibit Starbucks from permitting shift supervisors to share in the proceeds placed in collective tip boxes. The court's ruling was improperly based on a line of decisions that concerns an employer's authority to mandate that a tip given to an individual service employee must be shared with other employees. The policy challenged here presents the flip side of this mandatory tip-pooling practice. It concerns an employer's authority to require equitable allocation of tips placed in a collective tip box for those employees providing service to the customer. There is no decisional or statutory authority prohibiting an employer from allowing a service employee to keep a portion of the collective tip, in proportion to the amount of hours worked, merely because the employee also has limited supervisory duties."

The Court of Appeals concluded that Starbucks did not violate Labor Code section 351 because even if the shift supervisors were agents of the employer, they were allowed to keep tips that were received for their own services. Section 351 did not prohibit the employer from allowing each shift supervisor from retaining his or her own portion of a collective tip that was intended for the entire team of service employees, including the shift supervisors.

Conclusion

Every employer should review its current tip pool policies to ensure that the policy is in accordance with the laws. The law is different in terms of tips that are collected collectively versus direct tips that are then mandated to be divided. If you are uncertain whether your current policy is in accordance with the law, you should consult a qualified attorney.

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