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TIPS YOU NEED TO AVOID TIPPING HEADACHES

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Two months ago, the United States Department of Labor ordered a Mexican restaurant chain in Boise, Idaho to pay $230,000 in back wages and liquidated damages to fifty-one employees, after uncovering multiple overtime violations at area restaurants. In part, the restaurant chain was cited for failing to maintain accurate records of employees' wages, hours, and other conditions of employment, as required by the Fair Labor Standards Act ("FLSA"). The substantial damages payment underscores the importance of keeping accurate records of employees' hours and wages in the restaurant industry, in which employees tend to work varying shifts and in a variety of capacities. To protect themselves from potentially hefty fines, employers should be mindful of the following special rules that apply to employees in the restaurant industry.

Tipped Employees

Both the FLSA and the Pennsylvania Minimum Wage Act require employers to pay employees a minimum wage of $7.25 per hour. Effective January 1, 2015, however, the hourly minimum wage in New Jersey is now $8.38 per hour. While these rates may apply to some restaurant employees, employers may elect to receive a "tip credit" and pay a smaller hourly wage to "tipped employees." Tipped employees are those who regularly receive more than $30 per month in tips and gratuities from customers.

Tip Credits

Under both federal and state law, restaurant owners may elect to receive a "tip credit." Under the FLSA and New Jersey law, the tip credit permits employers to pay tipped employees no less than $2.13 per hour in cash wages and take a credit equal to the difference between the wages paid and the minimum wage. Thus, restaurant owners in New Jersey may receive a tip credit of $6.25 per tipped employee. In Pennsylvania, however, employers must pay at least $2.83 per hour, leaving them with a tip credit of $4.42.

If a restaurant owner chooses to pay the tipped minimum wage amounts, that employer must ensure that tipped employees receive the standard minimum wage when their paid wages are combined with tips received. Thus, if an employee's $2.13 or $2.83 hourly rate, plus tips, does not add up to the $8.38 or $7.25 minimum wage in New Jersey and Pennsylvania respectively, then the employer must pay the difference. Employers should keep detailed records to establish that they are properly applying the tip credit. In addition to ensuring that employees receive the full minimum wage, employers must also provide notice to tipped employees about the tip credit amount and allow tipped employees to retain all tips, except to the extent that a valid tip pooling arrangement is in place.

Tip Pooling

Restaurant owners should also be mindful of special rules that apply to “tip pooling.” Tip pooling refers to an arrangement whereby all employees subject to the pool contribute a portion of their tips, and then, those tips are divided evenly among the employees in the pool. There can be many benefits to pooling employees’ tips in a restaurant setting, and the FLSA and Pennsylvania and New Jersey laws permit employers to implement such policies. However, restaurant owners who employ tip pooling arrangements should note the following: first, employers cannot require an employee to contribute more than a “customary and reasonable amount” to the pool. Second, employers and managers cannot share in the tip pool. Third, contributing employees must still receive the full minimum wage.

Finally, only employees who regularly receive tips may participate in the pool, and tipped employees cannot be required to share tips with non-tipped employees, such as cooks, janitors, and dishwashers. For instance, the United States District Court for the Middle District of Pennsylvania recently ruled that to properly take part in a tip pool, restaurant employees must have “direct customer interaction.” *Ford v. Lehigh Valley Rest. Grp., Inc*., No. 14-cv-227, 2014 WL 3385128, *4 (M.D. Pa. July 9, 2014). In the Ford case, the court declined to dismiss the plaintiffs’ claims in which they asserted that the restaurant violated the FLSA by distributing a portion of the tip pool proceeds to food expediters, who may or may not have direct customer interaction.

Special Concerns

Issues also arise when supervisors participate in tip pools. For instance, in two widely publicized cases, Starbucks baristas brought class action lawsuits against the coffee giant, alleging that shift supervisors’ sharing in tip pools violated applicable wage laws. Two federal circuits reached opposite conclusions in these cases, leaving ambiguity as to who may receive portions of a tip pool. In 2012, the First Circuit held that shift supervisors constituted managers under Massachusetts’ Tips Act and therefore could not take a portion of the baristas’ tip pools. A year later, however, in a nearly identical case, the Second Circuit reached the opposite conclusion, determining that under New York’s labor laws, shift supervisors are more like baristas than managers. Thus, the shift supervisors were entitled to a portion of proceeds from the tip pool.

While the Third Circuit, which encompasses Pennsylvania, New Jersey, and Delaware, has yet to rule on this issue, employers should pay careful attention to which employees are participating in tip pools and ensure that managers are not dipping into employees’ tips. Keeping accurate records of each employee’s duties and hours worked is the best practice to follow to avoid potentially costly wage and hour violations.