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Hospitality Update

The Battle "Grande" over Starbucks' Tip Pools: New York Court of Appeals Affirms Starbucks' Policy

Hospitality employers should perk up at the recent decision by the New York Court of Appeals to affirm Starbucks' tip pooling policy. This decision comes on the heels of another favorable decision for employers -- *Oregon Restaurant and Lodging v. Solis* -- in which a district court in Oregon struck down amended federal regulations relating to employers' use of tip pools.

In the New York decision, the court resolved questions certified by the Second Circuit in two consolidated class actions, *Barenboim v. Starbucks* and *Winans v. Starbucks*. The questions addressed the appropriate interpretation of the New York Labor Law's prohibition against employers and their "agents" participating in tip-pooling arrangements.

The first certified question was: what factors make employees eligible or ineligible to participate in tip pools under state law? In *Barenboim*, the court held that an employee who provides personal service to customers as a regular or principal part of her duties is eligible, *even if that employee has limited supervisory responsibilities*. The court squarely rejected the argument by the Starbucks' "baristas" that shift supervisors cannot participate because they exercise some supervisory functions.

But the court also held that employees with "meaningful authority or control" over subordinates cannot participate in tip pools. An employee who, for example, has the ability to discipline subordinates, assist in performance evaluations, participate in hiring and firing decisions, or provide input in creating employee work schedules may have "meaningful authority or control." In reaching this conclusion, the court rejected the argument by the plaintiffs in *Winans* that only employees with final authority to hire and fire should be excluded.

On the second question certified by the Second Circuit -- can employers exclude otherwise eligible tip-earning employees from participating in tip pools? -- the court's answer was, in essence, "yes, but there may be limits."

The court generally agreed with the decision of a New York federal court, which upheld Starbucks' practice of excluding assistant store managers from tip pools. Section 196-d prevents employers from retaining tips. It does not require that employers mandate that any tip-eligible employees participate in these pools. Thus, even if Starbucks' assistant store managers *were* eligible to share tips, Starbucks did not violate Section 196-d by excluding them from tip pools, the Court reasoned.

But the court also qualified its answer, opining that there may be an "outer limit" to this practice. Employers should not, for example, be allowed to exclude all but the highest-ranking eligible employees from these pools. However, to the court, this was a mere hypothetical since Starbucks properly excluded assistant store managers from tip pooling.

In *Barenboim* and *Winans*, the court interpreted New York's tip pooling statute in a manner generally favorable to employers. Employees that are serving customers as a principal or regular part of their jobs are generally eligible to participate in tip pools, unless their managerial responsibilities are substantial.

The court's decision is important for employers to determine whether their employees that serve customers but also have managerial roles can share or pool tips. The key question will be whether these employees have "meaningful authority or control" over subordinates. The Court has not provided definitive guidance as to what supervisory or managerial duties qualify as "meaningful authority or control." Consequently, further litigation is sure to brew in New York over whether various classes of employees meet this standard.

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