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Hospitality Update

Oregon Court Invalidates Revised Tip-Pool Regulations And Sides With Hospitality Industry Group In Fight With DOL

Employers in the hospitality industry use tip pools to incentivize and reward employees who are part of the line of service. Although the FLSA permits the use of tip pools, the statute and its regulations limit the types of employees who can participate in a tip-pool to those who "customarily and regularly" receive tips like waiters, bartenders, busboys, bellhops, and other front-of-the-house employees. But, if the employer does not take a tip credit (that is, if the employer does not pay less than the federal minimum wage to tipped employees), employers and employees can agree to include non-tipped employees like dishwashers and cooks in the tip pool. At least this was the general consensus before April 2011, as illustrated by the Ninth Circuit's decision in *Cumbie v. Woody Woo, Inc*. In *Woody Woo*, the Ninth Circuit found that under the clear and unambiguous text of Section 3(m) of the FLSA, Congress intended only to limit the use of tips by employees when the employer claims a tip credit. If the employer does not take a tip credit and restaurant employees thus receive wages at or above minimum wage, then federal minimum wage law does not regulate the tip pool.

In April 2011, however, the DOL expressly rejected *Woody Woo* and revised its regulations (29 C.F.R. §§ 531.52 and 531.54) to state that tips are the property of the employee whether or not the employer has taken a tip credit and that a valid tip pool may only include "those employees who customarily and regularly receive tips"—without exception. In *Oregon Restaurant and Lodging v. Hilda L. Solis*, various hospitality industry groups sued the U.S. Department of Labor to challenge the validity of these revised regulations.

In a June 6, 2013 opinion, a district court from the U.S. District of Oregon followed the Ninth Circuit's decision in *Woody Woo* and ruled that the DOL's amended tip-pool regulations were invalid because they conflicted with the clear intent of Congress in the FLSA—even though the FLSA is silent regarding the use of tip pools when an employer does not take a tip credit.

This decision is certainly good news for restaurants, hotels and other businesses in the hospitality industry, particularly in the western United States where state laws generally prohibit employers from taking a tip credit. But the DOL's enforcement actions will likely not end until the revised regulations are struck down by a majority of the U.S. Circuit Courts or the Supreme Court, or until they are repealed by Congress. Until such time—because the rules and regulations surrounding tipped employees are often difficult to apply and decipher, especially when they are combined with concurrently-applicable state laws—employers should continue to review their practices and confer with knowledgeable counsel to ensure that they are in compliance.

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