

FLSA Alert

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Jury Awards Diverted Tips to Wait Staff in Growing Area of FLSA Litigation

A federal jury in Houston, Texas recently awarded a group of 55 waiters and waitresses \$270,000 in back pay after finding that their employer forced them to share or pool their tips with quality assurance workers. *Roussel v. Brinker Int'l*, S.D. Tex., No. 4:05-cv-03733. This ruling, and numerous other high-profile verdicts and settlements involving well-known chains like Chili's, Applebee's and Starbucks, reflects the growing area of FLSA litigation involving disputes over employer-imposed tipping practices.

The plaintiffs alleged that the restaurant company, Brinker International, required them to contribute a portion of their total gross sales during each shift to a tip pool controlled by the restaurant that allocated 1 percent to the quality assurance workers. The tip pool also was shared with normally-tipped employees, such as bartenders and table bussers. The jury accepted the plaintiffs' legal theory that quality assurance workers are not "tipped employees" under the FLSA. Thus, because the restaurant forced wait staff to give part of their tips to non-tipped employees, the restaurant was not allowed to take the "tip credit" toward the hourly minimum wage for its wait staff.

Issues also frequently arise concerning overtime pay for tipped employees as employers may improperly calculate the hourly rate of pay by taking an expanded tip credit as part of the overtime rate. Employers are reminded to carefully consider state and federal laws that apply to employees who receive tips and to whom the employer pays an hourly wage lower than the state or federal minimum wage.

As a reminder, under the federal FLSA, an employer of a tipped employee is only required to pay \$2.13 an hour in direct wages if that amount plus tips equals at least the federal minimum wage, the employee retains all tips and the employee customarily and regularly receives more than \$30 per month in tips. If an employee's tips combined with direct wages of at least \$2.13 an hour do not equal the federal minimum hourly wage, the employer must make up the difference. Some states also have minimum wage laws specific to tipped employees. When an employee is subject to both the federal and state wage laws, the employee is entitled to the greater benefits. In Illinois, for example, the tipped employee must receive at least \$4.65 per hour in direct wages, plus tips, or the employer must make up the difference to the Illinois minimum wage of \$7.75 per hour. Both of these rates are scheduled to increase on July 1, 2009. Other states, like California and Minnesota, do not allow employers to use tips to make up a portion of the mandatory minimum wage.

If you have questions or you are evaluating whether your company properly pays tipped employees, please contact Joe Tilson, Jeremy Glenn, Jason Barsanti, or any member of the MBT labor and employment team at (312) 474-7900.

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