



Kampai! Sushi Chefs Ruled Eligible For Tip Pool

By John Thompson (Atlanta)

The hospitality industry has not escaped the nationwide wave of wage-hour lawsuits. A contentious area under the federal Fair Labor Standards Act has involved the practice of requiring tipped employees to contribute some of their tips to a pool that is split among other workers. The U.S. Labor Department recently addressed an important tip-pooling question: Under the FLSA's tip-credit standards, who may receive tips from such a pool?

Tipped employees may not be required to share their tips with workers who do not customarily and regularly receive tips. Over the years, DOL has said that waitstaff, bellhops, counter personnel serving customers, and service bartenders are among the kinds of employees who are permissible pool participants.

But DOL has also taken the position that workers such as chefs, cooks, dishwashers, janitors, and laundry-room attendants generally must not be allowed to join in mandatory tip-pooling arrangements. Uncertainty about where the dividing line is led one restaurateur to ask for a DOL opinion as to which group itamae-sushi chefs and teppanyaki chefs fell into. Although the job categories sound (and are) somewhat specialized, the reasoning behind allowing their participation in the pool applies to many other kinds of establishments.

It's More Than "How Did You Like Your Food?"

DOL concluded that these employees could participate in the tip pool, particularly because the chefs engaged in direct customer contact and received more than the FLSA "tipped employee" threshold of \$30 a month in tips. It noted servers and bussers assisted the chefs by taking orders, serving water, and clearing tables, while the chefs interacted with customers by preparing and serving them their food in a bar area or at the customers' tables. DOL viewed the chefs as providing direct service to patrons similar to that furnished by a counterperson who serves customers, whom it has long seen as the kind of employee who may be a pool participant.

This most-recent DOL pronouncement reveals the principles the agency tends to apply in deciding whether an employee may or may not participate in a mandatory tip pool. Although the letter does not expressly say so, DOL evaluates whether and to what extent the employee performs significant customer-service functions in contact with patrons. This typically involves analyzing such considerations as whether the nature, frequency, and quantity of an employee's direct customer service and customer interaction support characterizing the worker as being among those who customarily and regularly receive tips. For instance, it is unlikely that an employee who engages in customer contact infrequently or only to a trivial extent would be classified that way.

As an illustration, DOL has concluded in the past that cooks and salad-preparers at a buffet-style restaurant could not take part in the employer's mandatory tip-pool. The workers' principal activities consisted of: cooking and preparing food in the kitchen; placing the food on serving tables and wiping spills; replenishing items; and stirring and keeping food warm. The employees sometimes answered customers' questions about the food, but this was the limit of the workers' interaction with them.

Courts need not follow DOL letter interpretations, but employers should expect a similar analysis from judges. For example, a federal appellate court has ruled that an employer's tip pool should not have included waitstaff members whose work was limited to salad preparation and related tasks. The employees had no personal contact with patrons and instead worked outside of their view. Moreover, the employees' duties were, as the court put it, restricted to work traditionally classified as food preparation or kitchen support.

The Cost Of Getting It Wrong

The FLSA financial exposure flowing from allowing ineligible employees to share in a required tip pool can be serious. For one thing, DOL could be expected to insist that the employer both pay enough in cash wages to make up for any tip credit it took, and also restore the tips each tipped employee donated to workers who were ineligible.

As with most wage-hour matters, you must also follow any stricter requirements and prohibitions of state or local laws. Some jurisdictions might not permit tip-pooling at all; others might allow it only on different and more-limited terms.

For more information email the author at jthompson@laborlawyers.com or call 404.231.1400

Box Score Compiled by the HLL Staff

During the last quarter of 2008 we were aware of 14 petitions filed against hospitality employers.

Employer	City & State	Union	Date
Parkhurst Dining Service	Rochester, NY	Service Employees	10/02/08
13 Coins Acquisition (hotel/restaurant)	Seattle, WA	Hotel Employees, Restaurant Employees	10/14/08
Carlton Westchester Hotel	White Plains, NY	Novelty & Production Workers	10/14/08
Sebastians Café	Boston, MA	Food & Commercial Workers	10/16/08
Ritz Carlton Westchester Hotel & Residences	White Plains, NY	Amalgamated Transit	10/21/08
Four Seasons Hotel	St. Louis, MO	Operating Engineers	10/23/08
Bellagio Hotel & Casino, Inc.	Las Vegas, NV	Steelworkers, Paper, Rubber, Manufacturing, Energy Workers	10/29/08
Golden Bridge Restaurant	New York, NY	Restaurant Workers Union	11/06/08
Sodexo, Inc. – Campus Services Division	Green Bay, WI	UNITE HERE	11/19/08
Divi Cavina Bay Casino	Ciuted, VI	Our Virgin Islands Workers Union	11/18/08
Planet Hollywood Hotel and Casino	Las Vegas, NV	Operating Engineers	12/05/08
McKinley Grand Hotel	Canton, OH	UNITE HERE	12/09/08
Jing Fong Restaurant	New York, NY	318 Restaurant Workers Union	12/22/08
Radisson Hotel	Roseville, MN	Sheet Metal Workers	12/22/08

California Restaurants Learn: Workers' Compensation Insurance Is Essential

By Christina Kotowski (San Francisco)

Workers' compensation coverage is a substantial expense for many smaller restaurants, but essential (and required) for all employers. The workers' compensation system is a no-fault system that provides medical coverage, disability payments or compensation for employees injured or killed on the job. In exchange for this no-fault coverage, employees are generally not permitted to sue their employers for the tort of negligence in civil courts. Awards for disabling industrial injuries and death are typically significantly lower than what employees could recover if they were allowed to file a civil lawsuit.

The insurance coverage for workers' compensation is an expense that must be borne by the employer as part of the cost of doing business. Employees cannot be required to share in the premium costs, and employers cannot pay medical providers in cash to avoid having insurance coverage.

Employers are sometimes tempted to forego workers' compensation insurance coverage when business is bad or the premiums are increased, but this is a mistake. Employers are required to maintain such coverage and states can impose severe fines on non-compliant employers. While a few states, such as Texas, allow employers to opt out under certain circumstances, others such as California, consider the failure to secure workers' compensation coverage as a criminal offense punishable by either a fine of up to \$10,000 or imprisonment for up to one year, plus additional penalties of up to \$100,000 levied by the state.

And when the employer fails to maintain required insurance coverage, the employee or his estate can sue the employer in civil court for injury, illness, or death. The recovery for the employee is likely to be far greater outside the workers' compensation system than in it.

Hospitality Crackdown

The California Labor Commissioner recently issued more than \$800,000 in fines to businesses in the restaurant industry for labor law fines during a statewide enforcement effort. A total of 29 investigators conducted 245 inspections in 26 counties around the state over two days in January 2009. Of the 245 businesses inspected, 143 were cited for various labor law violations and fully 129 of the 143 businesses cited did not carry workers' compensation insurance.

Labor Commissioner Angela Bradstreet said of this enforcement action, "We issued penalties of \$676,000 to employers who failed to carry workers' compensation [coverage] during this enforcement action. All businesses must provide workers' compensation insurance for their employees. If they continue to operate without the proper coverage, we will refer the case to the local district attorney's office for possible criminal prosecution." The fines for workers' compensation coverage violations averaged to more than \$4,700 per cited employer.

This sweep targeting the restaurant industry was just one in a long series of monthly enforcement actions targeting various industries. Employers can expect these enforcement actions to continue, even as the economy continues to make it difficult for employers to pay the premiums.

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Box Score Compiled by the HLL Staff

During that same period (the last quarter of 2008) we are aware of eight petitions which went all the way to an election. In a chilling reversal of statistics we've seen in the past, unions were victorious in all eight elections.

Employer	City & State	Union	Date	Result
Grand Wallea Resort Hotel & Spa, TNA of CNL Resort Lodging Tenant, LLC	Wallea, HI	Longshoremen & Warehousemen	10/17/2008	Union Win 4 – 0
Grand Wallea Resort Hotel & Spa, TNA of CNL Resort Lodging Tenant, LLC	Wallea, HI	Longshoremen & Warehousemen	10/17/2008	Union Win 26 – 5
Grand Wallea Resort Hotel & Spa, TNA of CNL Resort Lodging Tenant, LLC	Wallea, HI	Longshoremen & Warehousemen	10/17/2008	Union Win 27 – 0
Hyatt Regency at St. Louis Riverfront Hotel	St. Louis, MO	Operating Engineers	10/23/2008	Union Win 14 – 0
Trilogy Golf Club at LaQuinta	LaQuinta, CA	Laborers	11/4/2008	Union Win 19 – 4
Edgewater Hotel	Seattle, WA	Operating Engineers	11/6/2008	Union Win 4 – 3
Holiday Inn O'Hare	Chicago, IL	Teamsters	11/7/2008	Union Win 18 – 7
Parkhurst Dining Service	Rochester, NY	Service Employees	11/19/2008	Union Win 32 – 15