

Recent Developments Regarding Tip Pooling

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May employers maintain full control over the distribution of customers' tips to employees?

Until recently, the DOL has unequivocally said that they may not. However, the DOL's regulation restricting tip pooling and distribution is apparently on the chopping block. And, to further complicate matters, a circuit split on this issue may result in review by the U.S. Supreme Court.

Background—The Tip Credit, *Cumbe*, and the DOL Regulation

Under the FLSA, as well as many state wage and hour laws, an employer may pay tip-earning employees a reduced, subminimum hourly wage as long as they receive sufficient tips that, when combined with the subminimum wage, meet or exceed the prevailing minimum wage. In addition to tips that employees receive directly, the FLSA allows an employer to claim the credit for tips distributed from a tip pool in which participation is limited to employees who customarily and regularly receive tips, such as servers and bartenders in the restaurant industry. Participation in a tip pool by non-tip-earning employees, such as cooks and dishwashers, invalidates its use for the tip credit.

More controversial, however, is that the DOL expanded its regulation of tip pools, maintaining that it may do so regardless of whether an employer takes a tip credit against the wages of employees participating in a tip pool. The controversy stems from the fact that the courts did not initially interpret the rules regulating tip pooling to apply to employers that *did not* take a tip credit against employees' wages.

Thus, in *Cumbe v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010), the Ninth Circuit held that the FLSA did not bar an employer from distributing pooled tips to "back of the house" employees where the employer did not take a tip credit against its employees' wages. In response to the *Woody Woo* decision, the DOL issued a regulation explicitly barring distribution to non-tipped employees even when a tip credit is not taken.^[1]

Judicial Response to the DOL Regulation and Likely Supreme Court Review

Challenges to the DOL regulation initially succeeded in two federal district court cases: *Oregon Restaurant*^[2] and *Wynn Las Vegas*.^[3]

However, in a consolidated decision on appeal,^[4] the Ninth Circuit—which previously decided *Cumbe*—upheld the DOL's regulation as a proper exercise of its discretion.

The Tenth Circuit disagreed, however. In *Marlow v. The New Food Guy, Inc.*, 861 F.3d 1157 (10th Cir. 2017), the Tenth Circuit explicitly rejected the *Oregon Restaurant* decision, finding that (i) the FLSA does not state that tips are always the property of employees and, if the tip credit is not taken, tips may be distributed by employers at will, and (ii) the DOL was not vested with such rulemaking authority in this instance.

This divergence between the Ninth and Tenth Circuits increases the likelihood that the Supreme Court will grant pending requests for review of *Oregon Restaurant*. The issue of whether the DOL exceeded its rulemaking



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authority is particularly ripe and transcends just tip-pooling regulations. (As discussed by our colleagues above, the U.S. District Court for the Eastern District of Texas recently struck down as improper a DOL rule increasing the annual salary threshold requirement from \$23,660 to \$47,476.)

The Trump Administration's Input

Further complicating the issue, on July 20, 2017, the DOL announced its plan to rescind this controversial regulation (although to date it has not done so). The DOL also indicated that it would not enforce the regulation, suggesting that it may either decline to defend the regulation before the Supreme Court or argue that a review is not necessary because the regulation is not being enforced and will soon be rescinded.

Takeaway

Even if the DOL does not enforce the regulation, employees can still pursue private lawsuits in connection with invalid tip-pool claims and, more generally, claims concerning tip redistribution from tip pools. Accordingly, employers should continue to proceed with caution in this area and consider applicable state laws.

For example, in California, all tips must be distributed to employees, including the full value of credit card tips. And Minnesota and New Hampshire require all tips to be distributed to employees and bar mandatory tip pools.

[1] 76 Fed. Reg. 18,831, 18,855 (April 5, 2011), amending 29 C.F.R. §531.52.

[2] *Oregon Rest. & Lodging v. Solis*, 948 F. Supp. 2d 1217 (D. Or. 2013).

[3] *Cesarz v. Wynn Las Vegas, LLC*, No. 2:13-cv-00109-RJ-CWH, 2014 U.S. Dist. LEXIS 3094 (D. Nev. Jan. 10, 2014).

[4] *Oregon Restaurant and Lodging v. Solis*, 816 F.3d 1080 (9th Cir. 2016), *pet. for reh'g en banc denied*, 843 F.3d 355, *pet. for cert. filed sub nom. Wynn Las Vegas, LLC v. Cesarz*, No. 16-163 (Aug. 1, 2016), and *sub nom. National Restaurant Assoc. v. U.S. Dept. of Labor*, No. 16-920 (Jan. 19, 2017).

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