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Client Alert

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Massachusetts Sees New Wave of Tip-Pooling Cases

Several recent decisions and verdicts against major restaurants in the Boston area have brought the issue of tip-pooling and its appropriate application into the spotlight. The claims revolve around Massachusetts General Laws Chapter 149, section 152A which states in part, "no employer . . . shall require [any employee] to participate in a tip pool through which such employee remits any wage, tip or service charge, or any portion thereof, for distribution to any person who is not a wait staff employee, service employee, or service bartender."

The lawsuits were initiated by wait staff who claimed both that their employers were in violation of the tip-pooling statute, and that they had been retaliated against for complaining about their employer's policies. Under Mass. Gen. Laws c. 149, sec. 148A, it is an unlawful practice to terminate an employee "because such employee has made a complaint to the attorney general or any other person . . . under or related to this chapter."

Tip-pooling is the relatively common practice of taking gratuities received from restaurant patrons and placing either the total tips or partial amounts in a central pool for distribution to other employees. In Massachusetts, tip-pooling is only allowed where the proceeds are divided among serving staff by proportion to the services given to the patron. Mass. Gen. Law ch. 149, sec. 152A. In 2004, the Massachusetts Legislature modified the statute to state that staff may not be required to share their tips with managers or kitchen staff (amendment effective September 8, 2004).

In July of 2006, in the first of 19 "tip cases" to go to trial in the state since the 2004 Amendments prohibiting pooling with management, an Essex Superior Court jury awarded former employees of the Hilltop Steak House $2.5 million in damages due to the employer's illegal pooling of gratuities. The jury also found that the restaurant illegally retaliated against four waitresses who complained about losing their wages to the pool. The Hilltop plaintiffs claimed that the restaurant had a policy of not allowing them to see the final bill and, upon discovery of the restaurant's practice of charging an 18% gratuity but not sharing the entire tip with the wait staff, they complained and were terminated. The restaurant claimed that the managers regularly served food and beverages and were thus entitled to part of the gratuity under the statute. The jury sided with the plaintiffs and awarded three plaintiffs $125,000 each and $75,000 to a fourth. The jury further found that the harm suffered by the waitresses justified the tripling of $610,000 in damages.

In light of this verdict, employers should take great care to avoid distributing wait staff tips to managers, even where the managers are also serving food to customers. Of particular concern for employers, are situations where an employer may use staff with ambiguous or shifting job responsibilities depending on situational factors. These employees may be eligible for tip-pooling where they serve food and beverages, but the inclusion of any management responsibilities whatsoever in their regular duties raises a significant risk of violating the terms of the revised statute.

Retaliation against employees who have complained about violations of the tip-pooling statute should also be a primary focus for concern. In *Smith v. Winter Place LLC*, No. SJC – 09544, 2006 WL 2105983, (August 1, 2006, Mass. Sup. Jud. Court), the plaintiffs brought suit for retaliation against the management of the prominent Locke-Ober restaurant in Boston. Plaintiffs claimed that they all expressed dissatisfaction to the maitre d' and owners about the policy of tips being pooled and a certain amount being given to management. Several of the

employees had filed complaints with the Massachusetts Attorney General's office claiming a violation of the tip-pooling statute, while others had complained only internally. The maitre d' terminated the employees as instructed by management, and was then fired himself several days later, allegedly for bringing the employees' issues to the owner's attention. The employees claimed that the restaurant's action constituted unlawful retaliation under the statute, while the employer argued that the law protects only those who report abuses directly to the Attorney General or other authorities, and not internally to management.

On appeal from summary judgment in the trial court, the Massachusetts Supreme Judicial Court held that "the plain language of section 148A extends the protection of the statute to employees who are penalized for taking 'any action' to seek their rights under the laws governing wages and hours." "A complaint made to an employer (or manager of the employer) by an employee who reasonably believes that the wages he or she has been paid violate such laws readily qualifies as such an 'action.'" The court pointed out that any other result would give employers an incentive to immediately terminate employees at any suggestion of a dispute with wage policies, before they could make a formal complaint.

On the other hand, the court held that the maitre d' who had been terminated was not entitled to protection under the statute because he merely forwarded the complaints of others to the company without advocating for the rights of those employees. Also, because the maitre d' himself was a primary beneficiary of the improper tip-pooling system, he was unable to demand relief as a whistleblower. The ruling concerns only the retaliation issue and does not directly address the tip pooling statute, but mandates caution in dealing with tip-pooling complaints.

While the rulings of the court are not surprising in terms of their application to whistleblowers and wage and hour disputes generally, the fact patterns involved here are becoming increasingly common. The pattern is particularly relevant in Massachusetts, where at least nineteen similar actions have been filed in the short time since the 2004 statutory amendments. Of these, approximately a dozen law suits over tip-pooling are still pending in the state, while several others have been settled.

As the trend grows and jury awards such as the one in the Hilltop Steakhouse case are reported, one can only expect to see increasing complaints and restaurant liability. The current case law suggests that organizations that maintain managerial payments separate from any tips given to service providers will be within the parameters established by the tip-pooling statute, though several cases are now pending that may change the tenor of Massachusetts law.

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