

RESTAURANTS CAN REQUIRE “TIP POOLING”

By Neil V. McKittrick

A Massachusetts Superior Court judge recently decided a case involving a restaurant policy that required waiters to share customer gratuities in a “tip pool” to be distributed among all employees who aid in serving customers. The Court held that a restaurant may in fact require its waiters to share tips in a tip pool without violating the Massachusetts wage payment statute. This is apparently the first case to deal with this issue in Massachusetts and one of only a few cases that have dealt with this issue in the country. The Court’s decision is also inconsistent with an opinion of the Massachusetts Attorney General, which had stated that restaurants could not mandate tip pooling among their service personnel.

The case arose at L’Espalier, a French restaurant in Boston, which required its wait staff to share their tips pursuant to a “tip pool” policy. Under the policy, the waiter or “front waiter”, as he or she was known, was required to share his or her tips from a shift with the other serving staff on duty, which included the maitre’d, the back waiters or bussers, the wine steward and the bartender. In June 2001, the restaurant’s front waiters refused to submit their tips to the tip pool. The owner of the restaurant directed the waiters to comply with the policy, but they continued to refuse. Accordingly, the restaurant fired the waiters. The waiters then brought a lawsuit claiming, among other things, that the restaurant’s “tip pool” policy violated the Massachusetts wage payment statute.

The relevant portion of the wage payment statute provides:

No employer or other person shall solicit, demand, request or accept from any employee engaged in the serving of food or beverage any payment of any nature from tips or gratuities received by such employee during the course of his employment, or from wages earned by such employee or retain for himself any tips or gratuities given directly to the employer for the benefit of the employee, as a condition of employment...

The waiters claimed that the “tip pool”, a condition of their employment, violated the Massachusetts wage payment statute because it deprived them of their tips. The Court disagreed and granted summary judgment for the restaurant. The Court concluded that the restaurant did not violate the statute because it did not “retain” any of the tips, but simply distrib-

uted them among the relevant service employees. In reaching this decision, the Massachusetts Superior Court judge rejected the Massachusetts Attorney General’s opinion, as set forth in a document entitled “Commonly Asked Questions about the Massachusetts Wage and Hours Law,” which had stated that service employees cannot be required to pool tips. The Court also relied on a 1990 California Appellate Court decision interpreting the California wage statute, which held that employer-mandated tip pooling is a policy of common sense and fairness that ensures that the employees, and not employers, receive the full benefit of gratuities that patrons intended for the sole benefit of those employees who serve them. Given that the employer did not receive any portion of the gratuities, the Massachusetts Superior Court held, the tip pool policy at issue did not violate the statute.

Although the lawyer for the waiters has stated that they intend to appeal this decision, for the time being at least this case is the only reported Massachusetts decision to interpret the Massachusetts wage payment statute in the context of tip pooling. Although we cannot predict with certainty how the Massachusetts appellate courts will rule on this issue on appeal, the Superior Court’s decision is well-reasoned, and the fact that the California Appellate Court reached the same conclusion interpreting an analogous California law suggests that the Superior Court’s ruling may likewise be upheld here. We will of course keep our many restaurant clients apprised of any further developments in this case.

In the meantime, restaurant owners and operators who use a “tip pooling” system should ensure that all tips and gratuities are distributed to employees and that no portion is retained by the employer. By so doing, restaurant operators will be able to argue that they are complying with the Massachusetts wage payment statute, at least as interpreted by the only Superior Court judge to rule on this issue, notwithstanding the Attorney General’s opinion to the contrary.

If you have any questions concerning this decision or any other aspect of the employment relationship, please contact:

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