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Tip Pools Make Waves In California Courts

Law360, New York (June 29, 2009) -- In the first half of 2009, five California appellate opinions weighed in on the law in California regarding its gratuity, or tip, statutes found in Labor Code § 350 et. seq. The common issue in all the cases was the legality of tip sharing, sometimes called tip pooling. The practice is common in industries in which employees receive gratuities, such as restaurants.

Often employees make minimum wage and their real bread and butter comes from gratuities. A tip pool is when employees place some or all of the gratuities they receive into a pool to be redistributed among employees.

Some tip pools are voluntary, while others are required by management. One type spreads the risk of low tipping patrons among all participating employees. Others distribute gratuities from regularly tipped employees to those who receive fewer or no tips because of tradition or location.

An example of this second type of tip pool is a carwash where the person who delivers the car to the customer generally receives the gratuity, while the person who vacuumed the car, and who does not interact with the customer, is not tipped. How tips are distributed, and to whom they are distributed, varies among industries and establishments.

The statutory code section that is the focus of the new cases is Labor Code section 351. This section provides that employers, and their agents, cannot “collect, take, or receive any gratuity ... that is paid, given to, or left for an employee by a patron.”

For purposes of the statute, “agent” is defined by Labor Code section 350(d) as “every person other than the employer having the authority to hire or discharge any employee, or supervise, direct, or control the acts of employees.”

On its face, Section 351 prohibits employers from taking gratuities “paid, given to, or left for an employee or employees” but it is silent on tip pooling. California courts, however, have long recognized that tip pooling can be lawful.

For years, the employment bar had Leighton v. Old Heidelberg Ltd. (1990) 219,Cal.App.3d 1062, followed 13 years later by Jameson v. Five Feet Restaurant, Inc. (2003) 107 Cal.App.4th 138, interpreting California’s gratuity statutes.

Leighton held that mandatory tip pools are not a prohibited employer “taking” as that term is meant in Section 351. Leighton ruled that a mandatory pooling arrangement that required a waitress to share her tips with bartenders and busboys was legal.

Leighton further held that the intent of the patron as to whom the tip is intended is virtually impossible to ascertain, leaving management to determine who should share the pool proceeds.

Jameson, relying on Leighton, held that mandatory tip pooling is permissible under California law if an “employer” or “agent” does not take any part of a gratuity given to an employee by a patron.[1]

The issues addressed in recent cases involve whether Leighton’s approval of mandatory tip pools extends to industries other than the restaurant business, to what extent an employee must exercise control over other employees to be considered an “agent,” which rank and file employees may share in the proceeds of the tip pool, and the extent to which an employer must ascertain the intent of the tipping patron in formulating its gratuity sharing policies.

Employers have responded to the wave of tip pool litigation by asserting that Section 351 does not provide a private right of action. That issue is on appeal to the California Supreme Court in Lu v. Hawaiian Gardens.

While this may be fascinating to the employment bar, it is not going to guide employers on how to manage their tip pool arrangements.

The issue of whether Leighton’s approval of mandatory tip pools extends to industries other than the restaurant business was addressed in Lu v. Hawaiian Gardens (2009) 170 Cal.App.4th 466, rev. granted and Grodensky v. Artichoke Joe’s (2009) 174 Cal.App. 4th 1399, both of which involve California card rooms.

The dealers in the cardrooms assert that Leighton’s rationale in permitting mandatory tip pools does not extend to the context of a cardroom because patrons give dealers the tips directly rather than leaving them on the table as in the restaurant context.

Accordingly, the dealers argue, the patron in a cardroom “intends” that tips are exclusively for the dealers and the employer “takes” the tips in violation of Labor Code section 351 when it requires its dealers to share their gratuities.

In both Lu and Grodensky, the courts said that the holding in Leighton permitting mandatory tip pools may be extended to industries other than restaurants. These appellate courts did not find persuasive the distinction between direct tipping and leaving tips.

Although Lu has been granted review by the Supreme Court, the only issue before the Court is whether there is a private right of action.

The issues implicated by direct tipping versus tip leaving are not part of that review. The plaintiffs in Grodensky have petitioned the Supreme Court to review these issues. At the time this guest column was written, the Supreme Court had not ruled on the petition.

If review is granted in Grodensky on this issue and the card dealers successfully persuade the Supreme Court that direct tipping somehow evidences the patron's intent that the person to whom the tip is handed to is the sole beneficiary, the same rationale will implicate tip pools in many industries, such as car washes, cab drivers and beauty salons where direct tipping is the norm.

The issue of who is an "agent" and therefore is not permitted to share the proceeds of a tip pool was also addressed in Grodensky, where the court found that the shift managers were "agents" but that the floor managers were not.

The court found that floor managers did not have authority to hire or fire any employee and they did not schedule the dealers' shift assignments, approve vacation or medical leave. In addition, they had no role in setting wages, benefits or work hours of employees and did not handle matters such as dealers' being late or absent.

The appellate court noted that while there was some evidence that the floor manager had some authority over the dealers, occasionally directing someone to do something was not sufficient to make them "agents" under the tipping statutes.

Starbucks made headlines in March 2008, over losing a more than $100 million verdict on the issue of whether its tip sharing policy that included shift supervisors violated Section 351 because the shift supervisors are "agents."

Starbucks argued that because its hourly shift supervisors work side-by-side with the baristas as part of a team to provide customer service they are entitled to share the collective gratuities.

On June 2, 2009, the appellate court in Chau v. Starbucks Corporation ducked the issue of whether the shift supervisors were "agents."

Chau differentiated policies that involve the sharing of collective gratuities, which it called a "tip apportionment policy," from a mandatory tip pool policy.

A mandatory pool, it reasoned, is where employees are required to pool personal gratuities with other employees while a tip apportionment policy concerns the division of gratuities among a group of employees for whom the tip was specifically given.

Chau held that the applicable statutes do not prohibit Starbucks from permitting its shift supervisors to share in gratuities that are placed in collective tip boxes merely because the employee may also have limited supervisory duties.

The Chau court reasoned that the collective tip boxes indicate that customers intend their tips to go to the entire team that serves them, and there is nothing in the existing statutes that preclude “agents” from keeping a tip that is meant specifically for them.

Chau declined to interpret the definition of “agent” and hinted that the outcome would have been different if the store managers shared the proceeds from a collective tip box.

The issues of who among the rank and file employees may share the proceeds of the tip pool were addressed in Etheridge v. Reins International California, Inc. (2009) 172 Cal.App.4th 908, and Budrow v. Dave & Busters Of California, Inc. (2009) 171 Cal.App.4th 875.

Both of these cases rejected a reading of Leighton that employees who share the tips must be in the direct line of service.

Etheridge held that all employees who participate in the “chain of service” of a patron may share tip pool proceeds. “Chain of service” is apparently broader than “direct line of service.” The employees permitted to share gratuities in Etheridge were restaurant dishwashers and other members of the kitchen staff.

Adding to the confusion, Budrow mentions that “the decision about which employees are to participate in the tip pool must be based on a reasonable assessment of the patrons’ intentions.”

Budrow explained that the distinction between direct versus indirect table service “serves no useful purpose when the statutory touchstone is whether the gratuity has been ‘paid, given to, or left for’ the employee or employees” in determining who should share the tip.

Rather, it is the general experience of each establishment that is “only broadly predictive of the reasons for and the patterns of tipping in that particular restaurant and that, in the final analysis, this is the best that anyone can do.”

Unfortunately, neither Etheridge nor Budrow provide a bright line rule as to who can share in the tip pool.

On June 17, 2009, the Supreme Court declined to review Etheridge and Budrow. This reaffirms the legality of mandatory tip pools, at least in the restaurant industry. It

remains to be seen if review will be granted in Grodensky, which could have an impact on industries other than restaurants.

In the meantime, tip pool policies, even those that involve tip jars, should be carefully reviewed to make sure they are consistent with all these cases.

The one thing that is clear from all of these cases is that the factual situation, which varies from establishment to establishment, will be carefully reviewed by the courts in determining the legality of any tip sharing arrangement.

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The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] The federal courts relied on Leighton and Jameson when they reached similar conclusions about the legality of tip pooling under California law. See Louie v. McCormick & Schmick's Restaurant Corp. (C.D. Cal. 2006) 460 F. Supp. 1153 and Matoff v. Brinker Restaurant Corp. (C.D. Cal. 2006) 439 F.Supp.2d 1035.