

Insights, News & Events

## KAMPAI! SUSHI CHEFS RULED ELIGIBLE FOR TIP POOL

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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 pool applies to many other kinds of establishments.

### **IT'S MORE THAN "HOW DO YOU LIKE YOUR FOOD?"**

DOL concluded that these employees could participate in the tip pool. DOL noted in particular that 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 restore the tips each tipped employee donated to workers who were ineligible.

As with most wage-hour matters, employers 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.