How Much Is Too Much?

Insights
9.01.11

(Hospitality Update, No. 3, September 2011)

The U.S. Court of Appeals for the 8th Circuit recently issued a decision that has significant ramifications for employers making use of the tip-credit provisions of the Fair Labor Standards Act (FLSA). The decision mandates that employers who use the FLSA tip credit provisions to pay tipped employees should pay close attention to the amount of time those employees spend performing non-tip-producing work. *Fast v. Applebee's International, Inc.*

How It All Began
This case resulted from a lawsuit filed by servers and bartenders against Applebee's claiming that they were not properly paid for all the work they performed. Under the FLSA employers are permitted to pay employees in a tipped occupation a cash wage of $2.13 per hour so long as employees receive tips sufficient to ensure that they receive at least the minimum wage (currently $7.25) for all hours worked in a workweek.

This action was filed because the employees (who admitted they received tips that resulted in their wages at least equaling the federal minimum wage for all hours worked) claimed that Applebee's required them to perform non-tip-producing activities while still paying them only the tip-credit wage of $2.13. They argued they should have been paid the full minimum wage ($7.25 instead of $2.13) when they were engaged in non tip-producing activities.

The bartenders' non-tipped work included wiping down bottles, cleaning blenders, cutting fruit for garnishes, taking inventory, preparing drink mixers and cleaning up after closing. Similarly, the servers in the litigation claimed that duties such as sweeping, cleaning and stocking service areas, general cleaning before and after the restaurant was open, preparing the restaurant to open, etc. were non-tip-producing activities.

These are all duties typically performed by bartenders and servers in almost every bar and restaurant in America. But the bartenders and servers in the Applebee's lawsuit contended they performed *so much* non-tipped work that they should have been paid the full minimum wage of $7.25 instead of at the tip-credit cash wage of $2.13 whenever they were performing duties that did not directly result in a tip. This is clearly a significant issue, and we reported on this case in prior issues of the Hospitality Update. [See, *"Applebee's Automated Timekeeping Leads To Lawsuit,"* in

our Oct/Nov., 2007 issue and *"Implications In Applebee's Case Still Worrying The Industry,"* in the Winter, 2008 issue].

U.S. Department of Labor regulations have long recognized that a tipped employee may be engaged in dual jobs, meaning a job for which tips are received and a job which does not generate tips. DOL recordkeeping regulations require you to keep records for your tipped employees' hours worked each workday in any occupation in which the employee does not receive tips, and hours worked each workday in occupations for which the employee does receive tips.

In situations involving dual jobs (tipped and non-tipped classifications), the Labor Department's tip regulations also provide that you may not take the tip credit for hours of work in an occupation not subject to tips. An example of a dual-job situation would be a hotel employee who works both as a bartender and a maintenance employee. In this example no tip credit may be taken for hours of employment when the individual is working in maintenance. All hours worked in a non-tip-producing maintenance position would have to be paid at no less than the rate of $7.25 per hour.

This doesn't mean that you are precluded from taking a tip credit for non-tip-producing activities even if the employee performs only a relatively small amount of that work within the confines of a tipped occupation. DOL regulations permit an employer to take the tip credit for time spent in duties *related to the tipped occupation* even though such duties are not by themselves directed toward producing tips.

The regulations give examples of such work as preparatory and closing activities, cleaning and setting tables, making coffee and occasionally washing dishes or glasses. The DOL has said elsewhere that such duties must be "incidental to the regular duties of the server" and must be "generally assigned to the servers." So the question becomes one of when non-tipped work is and is not merely "incidental" to a tipped occupation.

But the Labor Department's internal interpretation of its own regulations sets a limit on the amount of non-tipped duties which can be performed without eliminating the employer's right to take a tip credit for those duties. "Where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20%) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties." The 8th Circuit decided that the Labor Department's view is a reasonable one and ruled that the lower court should follow it.

What This Means To Employers

Further refinements on this 20% limitation on non-tip-producing work are found in various Department of Labor Opinion Letters, but the upshot of the guidance provides that non-tipped duties incidental to the regular duties of a tipped employee are properly included in hours for which the employer takes a tip credit, so long as the incidental duties are assigned generally to all wait staff and not just to specific employees. Under this interpretation, a waiter assigned to perform opening

prep work, where he is the only one so assigned and he spends 30-40% of his shift performing the prep work, is not performing this work within the confines of a single tipped occupation – he works in dual occupations, one of which involves non-tipped work for which no tip credit may be taken.

Thus, if non-tipped duties are performed by only one or two employees among a larger wait staff, the Labor Department's approach would mean that the employer cannot take a tip credit in paying those employees for time spent performing those functions. And under a scenario in which employees do more than incidental non-tipped work – in excess of 20% – the view accepted by the 8th Circuit means that they are due at least the full minimum wage of $7.25 for the time spent performing non-tip-producing activities.

Our Advice
There are several cautions that flow from the Applebee's decision:

1) keep accurate records of hours spent in tip-producing vs. non-tip-producing activities; and

2) ensure that general preparation and maintenance duties related to the tipped work are performed by all tipped employees as opposed to only a few, *and* that the non-tip-producing activities are less than 20% of the employee's total work hours in the workweek; or

3) if you do require certain employees to perform large amounts of non-tip-producing work, such as general prep and maintenance duties, or if you permit tipped employees to spend more than 20% of their time in non-tip-producing work, pay them at least the federal minimum wage for all hours spent in non-tip-producing activities.

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