From Joint Employers to Oyster Shuckers: DOL Issues Opinion Letters on Hospitality Sector Wage Issues

Insights
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Is an oyster shucker who works in the "front of the house" allowed to share in the tip pool? Are a hotel restaurant and related members club joint employers for overtime purposes? The US Department of Labor (DOL) recently issued opinion letters on these topics and explained why the answer is "yes" to both questions under the Fair Labor Standards Act (FLSA). While the opinion letters apply only to the specific facts as presented, the analyses can serve as a roadmap for hospitality sector employers. Here's what you need to know and the steps you can take to ensure compliance with the applicable rules.

First, What Are Opinion Letters?

Opinion letters are formal, written guidance from DOL officials explaining to the public how the agency would apply the law to a specific set of facts. While the letters are not binding on courts, they do serve as a powerful compliance tool and can be used as persuasive authority in defending against a legal claim. Anyone can request an opinion letter, and they've been used since the 1930s as a compliance lifeline for employers, unions, and workers alike. You can read more about the benefits here.

Sharing in the Tip Pool

The Question

The DOL's Wage and Hour Division recently addressed a question involving an employer that takes a tip credit and whether its front-of-the-house oyster shuckers could share in the tip pool.

Here's a quick refresher on the relevant rules:

- The FLSA allows employers to take a so-called **"tip credit"** and pay employees who traditionally receive a certain amount of tips – such as servers and bartenders – as little as $2.13 an hour, so long as they make at least the standard minimum wage ($7.25 an hour) when tips are factored in.
- If an employer takes a tip credit, it may require employees to pool tips, but only if the tip pool is limited to employees who customarily and regularly receive tips.
- There are other important tip-credit requirements, but the key analysis for this September 30

DOL opinion letter was whether the oyster shuckers were employed in a customarily and regularly tipped occupation."

The Verdict

The DOL concluded that the seafood restaurant's oyster shuckers did qualify to share in the tip pool for the following reasons:

- They directly serviced the customers by going over the oyster offerings with them, making suggestions, and fielding questions about the different options.
- They also prepare the oysters in plain view of customers, similar to the front-of-house sushi chefs and other similar jobs the DOL has deemed to customarily and regularly receive tips.
- The oyster shuckers are similar to counter persons who serve customers, and whom WHD has long regarded as employees who customarily and regularly receive tips.

An oyster shucker may be a somewhat uncommon job position in the restaurant industry. But the DOL's rationale for finding they may share in a tip pool supports including hosts/hostesses, a very common position. Hosts and hostesses are front of house employees who have a substantial amount of interaction with customers. They often field questions from customers, make dining suggestions, and perform other table attendance duties. Employers who already include them in tip pools should be encouraged by DOL's analysis.

Compliance Check

When determining whether front-of-the-house staff meet the definition of "tipped employee," the DOL and the courts have looked at the extent to which the employees interacted with customers and performed duties that traditionally generated service gratuities. Some key considerations may include:

✓ Customer interactions

✓ Table attendance duties

✓ Whether undesignated tips are common in the industry or geographic location

✓ Whether employees in similar establishments in the area receive tips, either directly or from a tip pool

 In this scenario, the DOL noted that the seafood restaurant also employed "back-of-the-house" oyster shuckers who did not interact with customers and did not participate in the tip pool. Those employees didn't qualify because they lacked sufficient interaction with the customers who leave tips.

 Don't forget that state rules also come into play and could vary significantly, so be sure to check the rules that impact your locations. Consult with experienced legal counsel to ensure your wage and hour practices are compliant.

Joint Liability For Overtime Under the FLSA

The Question

In another September 30 opinion letter, the DOL was asked by a hostess whether her work hours at a hotel restaurant and a connected members club should be combined for overtime purposes. Here are the key facts as presented by the hostess to the DOL:

- She primarily works at the restaurant for $28 per hour and has been offered shifts at the members club for the same rate.
- The restaurant is located in a hotel. The members club is on the second floor of the restaurant, shares the same kitchen, offers mostly the same menu, and operates under a similar name.
- Employees, including staff and management, frequently perform work in the restaurant and members club in the same workweek.
- The hostess occasionally clocks in at the restaurant and is assigned work at the members club.
- Managers from the restaurant have to participate in disciplinary matters at the members club.
- Although the restaurant and the club claim to be separate businesses and might use different timekeeping and payroll systems, the hostess believes they have common ownership.
- She does not work more than 40 hours a week at either the restaurant or the members club individually, but when combined, her hours do exceed 40.
- The hostess was told she is not entitled to overtime premiums because the restaurant and the club are different businesses, but she believes they are joint employers and that she is entitled to overtime pay.

The Verdict

The DOL concluded that the hours she worked for each business should be combined and she should be paid overtime for hours worked beyond 40 in a workweek. Key factors that contributed to the DOL's joint employer determination included:

- The companies' physical proximity, common kitchen, and similar food and beverage menus.
- Shared ownership and periodic shared supervision, even if the two facilities have separate management teams.
- Employees could be "clocked in" at the restaurant and told to work in the members club, in addition to earning the same pay.

Compliance Check

Under the FLSA, "horizontal joint employment" may occur when employers share employees and are "sufficiently associated" with each other regarding those employees' work. If a joint employer relationship exists, both entities will need to consider an employee's total hours for the workweek to:

✓ confirm that the employee has received the FLSA minimum wage; and

✓ determine the employee's entitlement to overtime pay.

 An employee's hours worked for all joint employers must be totaled together for the workweek, and each employer is jointly and severally liable wages owed under the FLSA.

Conclusion

If you have any doubt as to whether you are compliant with the applicable wage and hour rules, reach out to your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Hospitality Industry Team or in our Wage and Hour Practice Group. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information, as we will continue to monitor this situation and provide updates as appropriate.

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