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Rebecca Ahmed

University of Nevada, Las Vegas

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Legal Regulations of Tip Pooling and Tip Sharing in the United States Hospitality Industry

Tip sharing and tip pooling are common practices within the hospitality industry, particularly in foodservice and in hotels. Several companies merely encourage these practices while others require participation. Not all of these companies comply with their state and federal labor laws. More and more cases have surfaced where employees are challenging the legality of tip pooling and tip sharing in the past few years. Some of those cases have resulted in significant losses to the employers. Starbucks, for example, has just been ordered to pay back \$105 million to their baristas for violating California labor laws regulating tip pooling.

Hospitality driven companies can benefit from understanding their state and federal laws pertaining to tips to avoid expensive lawsuits and negative media. The purpose of my paper is to create a resource that describes the legal boundaries in which employers can develop or evaluate their own tip pooling and tip sharing policies and practices.

The U.S. Department of Labor (“DOL”) and state employment regulations establish the boundaries within which employers can reliably evaluate tipping policies for legal compliance. The guidelines addressed throughout this paper will help companies understand:

- The definition of a “tip” and “tipped employee” is under the Fair Labor Standards Act.
- FLSA provisions concerning tip pooling and tip sharing.

- Legal limitations on voluntary and mandatory tip pooling and tip sharing arrangements.
- Variance among parallel laws and administrative regulations of four of the largest tourism destination states. (Nevada, California, New York and Florida)
- The potential liabilities for failing to comply with state and federal laws.

FEDERAL REGULATIONS

DOL defines a tip as “a sum presented by a customer as a gift or gratuity in recognition of some service performed for him” (29 C.F.R. § 331.52). A tip is received from a guest without the influence of an employer. DOL does not include service charges such as mandatory banquet gratuities as tips. (29 C.F.R. §531.55) There is no legislation that dictates whether service charges for parties of six or greater and room service charges is or is not a gratuity. DOL regulations state that tips must come in the form of a monetary value; flowers or gifts are not classified as tips. (29 C.F.R. §531.53)

DOL defines a “tipped employee” as one that “engages in an occupation in which he or she customarily and regularly receives more than \$30.00 per month in tips” (29 C.F.R. §531.56). This means that every month of the year, a “tipped employee” will at least receive \$30.00 per month. Employees who make more than \$30.00 in tips on certain holidays and events, but do not regularly receive tips are not classified as “tipped employees”. In addition to the frequency of \$30.00 per month, the monetary amount of \$30.00 is limited per job, whether it is full time or part time. If an employee works part time and does not make \$30.00 per month in tips, he or she is not considered a tipped employee. The same is true with an employee works two jobs and in one of their jobs

they makes \$30.00 or more per month in tips. The employee is defined as a “tipped employee” only for the particular job that meets the “tipped employee” requirements.

TIP POOLING

Tip pooling is permitted by the FLSA as long as employees partake in the practice either voluntarily or are only required to pool with fellow “tipped employees” only an amount that is “customary and reasonable.” “DOL has recognized that the following occupations may participate in a tip pool: (1) Waiters/Waitress (2) Bellhops (3) Counter personnel who serve customers (4) Server helpers (busboys/girls) (5) Service bartenders” (U.S. Dept. of Labor, 1982; U.S. Dept. of Labor 1978; U.S. Dept. of Labor, 1976). Back of the house staff who do not regularly engage with customers such as cooks and janitors do not classify under the regulations of a “tipped employee.” For purposed of The Act, DOL believes that disseminating 15% of the tips pooled to each occupation is “customary and reasonable” by federal law. This means that an employee must retain at least 85% of the tips he or she receives from customers.

TIP SHARING

The main difference between tip sharing and tip pooling is that tip sharing is strictly voluntary. DOL permits mandatory tip pooling, but does not permit mandatory tip sharing. This is different because employees can voluntarily share their tips with back of the house employees, but cannot be required to share because back of the house employees are not defined by DOL as “tipped employees.” Second, employees do not have to share with all employees that help them. An employee can chose to share his or her tips with their busser, but not include their bartender. Lastly, employees can share any

amount they voluntarily chose to with other employees. These amounts do not have to be equal across the board like tip pooling and are not limited to 15% of the tips received.

TIP POOLING & TIP SHARING WITH TIP CREDIT

A tip credit allows employers to pay their employees less than the federal minimum wage and apply their tips as wage credit to fulfill the federal minimum wage. The FLSA, however, leaves to each state the authority to determine whether tip credit is permitted in that state for purposes of both state and federal law. Currently, 36 states allow tip credits.

There are four conditions that must be met in order for a company to engage in tip wage credit. If any of these conditions are not met, the tip pool and the tip credit become illegal, requiring the employer to pay back wages to their employees. This can be a significant liability because it includes the amount of tips the employee was required to contribute to the invalid tip pool and the balance between the hourly wages paid and the applicable minimum wage for each hour worked. The liability is further compounded by the number of employees were affected by the invalid pool, which in some cases has reached into the thousands.

First, the employer must notify each employee of the tip credit policy. The law does not require the employee's agreement or consent. Second, the employee must fall under the FLSA definition of a "tipped employee". The classification of who a "tipped employee" is important because in the case *Myers v. Cooper Cellar Corp.*, (1999), the court decided that salad preparers did not qualify as "tipped employees" and thus, that the restaurant chain violated FLSA by including them in the wait staff's tip pools, which invalidated the tip credit it claimed. Hostesses and Food runners who regularly interact

with employees may qualify as a “tipped employee”, but each individual occupation must be distinguished by the employer and confirmed by the state and federal regulations.

Third, the employer must show that each week the payment of wages plus an employee’s tips equal or exceed the federal minimum wage per hour. The amount \$2.13 must be paid regardless of the amount of tips received. \$2.13 was half of the federal minimum wage of \$4.25, which is why companies were only allowed to apply half of the employee’s tip credit to their minimum wage. Now that the minimum wage has increased, the federal government has kept the original \$2.13 required by the employer to be paid to the employee, thus allowing the employer now to apply more than 50% of a tip credit towards a higher minimum wage. The last condition to applying a tip credit is that “an employer may not take credit for any tips received by the employee unless, inter alia, the employee has been allowed to retain all of the tips he received” (29 U.S.C.A. § 203m 2006).

Additionally, each state contains their own set of regulations that may or may not differ from the federal government regulations. Through court cases we can examine the parallels and differences of tip pooling, tip sharing and the allowance of tip credits of four of the largest tourist destination states, New York, Nevada, California, and Florida.

NEW YORK

New York labor laws outline the state’s position on gratuities more than Nevada, California and Florida. New York law breaks down into three main sections. N.Y. Comp.Codes R & Regs. title 12, §137-1 addresses the minimum wage and allowance for each service position within the hospitality field. N.Y. Comp.Codes R & Regs. title 12, §137-2 defines the regulations involved for New York service employees. N.Y.

Comp.Codes R & Regs. title 12,§137-3 defines each member that qualifies as a “tipped employee”. In addition to these Official Compilation of Codes, N.Y. McKinney’s Labor Law §196-d states,

No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to the checking of hats, coats or other apparel. Nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter nor as affecting practices in connection with banquets and other special functions where a fixed percentage of the patron’s bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee. (N.Y. Lab. § 21 McKinney 2005)

The following cases illustrate the importance of understanding each and every provision and definition outlined by New York labor laws. One misinterpretation can lead to thousands of dollars in liability.

Ayres v. 127 Restaurant Corp., (1998) developed into three cases. Kevin Ayres and numerous other servers of Le Madri Restaurant doing business as 127 Restaurant Corp. claimed that 127 Restaurant Corp. violated N.Y. McKinney’s Labor Law §196-d as well as numerous provisions listed under N.Y. Comp Codes R. & Regs. title 12 §137-1.1 to §137-1.3.

127 Restaurant Corp. allowed their general manager, Eklaim to be included in the

servers tip pool, even though he was paid a salary of \$2,000.00 per week. “On cross-motion for partial summary judgment, the District Court, Chin J., held that (1) general manager was an ‘employer or his agent’ under New York Labor Law, and thus he could not share in proceeds of the wait staff’s tip pool” (Ayres v. 127 Restaurant Corp., 1998, p. 305). The District Court also deemed the restaurant’s tip credit policy illegal due to its use of an illegal tip pool. The plaintiffs were primarily awarded back wages from the illegal tip pool and illegal tip credit that occurred from January 1995 to December of 1995. During that time, Elkaim was titled the general manager and was taking part of the wait staff’s tips. The Court stated a jury would have to decide if Elkaim was defined as an agent prior to January 1995 when he did not have the “general manager” title, but still managed the servers and had the power to hire and fire employees upon consulting the owner of 127 Restaurant Corp.

New York’s penalty for a company that knowingly defies New York Labor Laws is an additional 25% charge of liquidated damages on top of to back wages. “Here a reasonable jury could only find that Le Madri intentionally, or at least recklessly, permitted Elkaim to share in the wait staff’s gratuities” (Ayres v. 127 Restaurant Corp., 1998, p. 309). The parties settled the case for \$200,000.00 awarded to the 18 members of the wait staff. In 1999, plaintiff’s appealed for attorney fees and costs that were not negotiated in the first settlement. In *Ayres v. 127 Restaurant Corp.*, (1999) the Court awarded the wait staff, “attorney fees of \$231,693.84 and costs of \$22,086.91 for a total award of \$253,780.75” (Ayres v. 127 Restaurant Corp., 1999, p.1). In total, 127 Restaurant Corp. had to pay plaintiff’s \$453,780.75 for attorney fees, additional costs, back wages and penalties. 127 Restaurant Corp. appealed to the United States District

Court for the Southern District in New York, demanding that the “district court abused its discretion in making the award” (*Ayres v. 127 Restaurant Corp.*, 1999). The Court affirmed the judgment, and all penalties and costs stood as declared by the District Court.

Lu v. Jing Fong Restaurant Inc., (2007) addresses New York and the federal government’s stance on service charges for banquet servers. Hai Ming Lu sued Jing Fong Restaurant claiming that the 15% charge added to each bill was a gratuity and belonged to the “tipped employees” who assisted the customers. Because Jing Fong illegally kept part of the server’s gratuities, the plaintiff claimed that the restaurant’s tip credit was invalid, and that he and others deserved to be paid back wages as well. The defendant contended that the 15% added to each bill was a service charge, rather than a gratuity. Therefore, the restaurant stated keeping 35% of the service charge did not constitute an illegal tip pool.

The Court agreed with Jing Fong Restaurant stating, “New York Courts have repeatedly held that with respect to mandatory service charges in the restaurant industry, ‘[s]uch a charge is not in the nature of a voluntary gratuity presented by the customer in recognition of the waiter’s service, and therefore need not be distributed to the waiters pursuant to Labor Law 196-d, notwithstanding that the customer might believe that the charge is meant to be so distributed’”(Lu v. Jing Fong Restaurant Inc., 2007, p.710). Jing Fong followed procedures in regards to the Courts ruling before and after this case. They always advised their customers that the 15% service charge on the bill was not a direct gratuity to the server. 65% was distributed to the server, and if the customer would like to add a gratuity to the bill for the server, they were encouraged to do so.

Sung Yue Tung Corporation doing business as 88 Palace added a service charge of

15% to their bills in their restaurant but did not note the 15% as a service charge to their customers. Additionally, the restaurant failed to inform their employees of their tip credit policy. These two violations cost Sung Yue Tung a total of \$1,800,022.58 for eleven wait staff members.

Heng Chan and ten other wait staff members filed suit against Sung Yue Tung Corporation claiming the restaurant violated New York in reference to tip pooling and tip credit. The restaurant implemented a 15% service charge to each bill that was noted in Chinese as a tip. “The additional 15 percent payment is referred to by defendants and their employees by the Mandarin and Cantonese words used to refer to tips” (Heng Chan v. Sung Yue Tung Corp., 2007a, p. 5). Sung Yue Tung divided the 15% from each party into two parts. 75% was pooled among employees and used to pay part time employees that assisted with the banquet staff. The restaurant kept the additional 15% of the fee. Sung Yue Tung claimed they did not violate New York labor laws because the 15% they kept was part of a guest service charge. A manager of the restaurant testified that this 15% fee was not represented as a service charge, stating that, “he never advised customers that the restaurant would retain a portion of the additional payment” (Heng Chan v. Sung Yue Tung Corp., 2007a, p. 6). Additionally, the restaurant and its employees claimed their cut of the service fee as a tip on their tax returns. The court noted this with regards to tax fraud but stated, “relatively little weight will be given to the underreporting as a factor in assessing how 88 Palace treated the banquet charges...” (Heng Chan v. Sung Yue Tung Corp., 2007a, p. 8). Based on these three reasons the Court found Sung Yue Tung in violation of retaining 15% of their wait staff’s tips according to N.Y. Lab. Law §196 (d).

The Court also found Sung Yue Tung in violation of N.Y. Lab Law§ 661 in regards to using a tip credit. The restaurant paid less than minimum wage to their employees but failed to notify their employees of their tip credit policy. Defendants showed the court that signs had been posted, but discrepancies developed of when the actual dates of the posting occurred, while these eleven workers were at the restaurant or prior and after their employment. Posting a sign describing a company's tip credit does not fulfill the company's obligation to inform employees of their tip credit policy. (*Bonham v. Copper Cellar Corp.*, 1979) The time line discrepancies did not alter the courts decision with regards to the posting of the tip credit policy. "Regardless of when the signs were posted, however, it is clear that they were in English, not Chinese, a language which is not understood well by any of the plaintiffs" (*Heng Chan v. Sung Yue Tung Corp.*, 2007a, p. 8). Failing to inform your employees of your tip credit policy is a stipulation that strikes the legality of using a tip credit policy.

The Court charged Sung Yue Tung for each infraction they were found guilty of. These infractions included illegal tip pooling, illegal use of tip credit, uniform violations, minimum wage violations in reference to overtime worked, and failure to keep detailed records of their employee's hours worked, tips collected and tip credit applied to their wages. New York labor laws place the burden of record keeping very high on employers, and Sung Yue Tung's negligence in this area turned the floor over to the plaintiffs. The Court ruled that, "therefore, in the absence and rebuttal by defendants, plaintiff's recollection and documentation of hours worked and compensation owed is presumed to be correct." The Courts awarded each plaintiff compensatory damages covering each violation Sung Yue Tung committed. In addition, Sung Yue Tung was charged liquidated

damages for failing to show that they violated New York labor laws in good faith. These liquidated damages accounted for an additional 100 percent of the compensatory damages awarded for back wages from the illegal tip credit and illegal tip pool and 25% of the compensatory damages for over-time pay and uniform violations. In total, the Court awarded the plaintiffs \$699,374.32.

The total of \$699,374.32 did not cover attorney fees and costs just like *Ayres*. Plaintiffs returned in May of 2007 to collect attorney fees and interest accrued from the first case. In this case, the Court awarded plaintiffs an additional “957, 710,000 in attorney’s fees, \$59,732.54 in costs, and \$83,205.72 in prejudgment interest...” (Heng Chan v. Sung Yue Tung Corp., 2007 b, p. 10)

New York Courts penalize companies heavily for failing to comply with New York labor laws. Companies have to pay back wages for illegal tip pools and illegal tip credits. Courts charge additional liquidated damages for companies that violate these regulations recklessly. All of these stipulations in New York differ from Nevada, California and Florida. Looking at cases in the following states show much each state differs from the next in terms of courts decisions, penalties and the administrative processes.

NEVADA

There are three labor law statutes that Nevada court cases examine concerning tip pooling, tip sharing. Nevada law does not allow companies to use a tip credit towards their minimum wage requirements (N.R.S. § 608.100). Nevada statute N.R.S. § 608.160 states,

It is unlawful for any person to: (a) Take all or part of any tips or gratuities bestowed upon his employees. (b) Apply as a credit toward the payment of the

statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon his employees. 2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves. (N.R.S. § 608.160)

These provisions under N.R.S. § 608.160 were created in a 1971 amendment from the former Act of 1939. The 1939 statute focused on requiring employers to post signs to notify customers of their tip pooling policy. “NOTICE: Tips Given to Employees Belong to Management.’ The letters of these words shall be in bold black type at least one inch in height” (N.R.S. § 608.160). Currently, the main concern in N.R.S. § 608.160 is that employers do allow tip pooling and tip sharing, and can even require employees to participate in tip pooling as part of their job description. The only stipulation is that an employer must not benefit from requiring their employees to pool tips.

There are four main court cases that have set precedent for the labor regulations in the state of Nevada. The federal court case *Moen v. Las Vegas International Hotel, Inc.*, (1997) set precedent that hotels could not only require tip pooling among dealers, but dealers were also required to include boxmen, floormen and casino cashiers into the tip pool. *Moen* is very important because it is later referenced in the milestone cases, *Alford v. Harolds Club* (1983) and *Cotter v. Desert Palace, Inc.*, (1989). Even more recently, Wynn Las Vegas has been able to include supervisors and managers into their dealers tip pool based on a loose interpretation of *Moen*.

Robert Wallace Moen sued Las Vegas International Hotel Inc. claiming that the company violated N.R.S. § 608.160 by requiring dealers to pool their tips with floormen, casino cashiers and boxmen. According to Moen, floormen, casino cashiers and boxmen

were not employees that received tips regularly, and therefore should not be allowed to be included in the dealers tip pool. The District Court sided with the defendants, allowing the tip pool to include floormen, boxmen and casino cashiers.

This decision challenges two notions regarding tip pooling. The first notion is that only employees who regularly receive tips and interact with customers should be allowed in tip pools. The District Court stated that just because floormen and casino cashiers don't get tipped directly from the customer does not mean they should not be part of dealer's tip pool. The District Court believed floormen and boxmen's jobs could be compared to busser's jobs in the food service industry. "For example, a busboy as well as a waitress contributes to the good service and well-being of a customer in a restaurant. Similarly, in a casino, the floormen, boxmen and cashiers all contribute to the service rendered to the player" (Moen v. Las Vegas International Hotel, Inc., 1975, p. 160). Moen argued that when customers gave a dealer a tip they believe that their tip was intended only for that person rendering the service. The District Court dismissed this argument pointing out that 4 types of "dealers", two dealers, one stickman and one boxmen, all operate the game of craps. When a customer gives the dealer accepting the money a tip, the customer is clearly tipping all four employees running the game, not just the dealer accepting the money.

The second notion the District Court's decision challenged is that N.R.S. §608.160's main stipulation is that all employees can be involved in a tip pool as long as the employer does not benefit. Moen argued the hotel does benefit from using tips to pay employees. The employer could now pay non-tipped employees minimum wage plus tips, saving the employer money instead of having to pay employees who do not regularly

receive tips a higher salary than minimum wage. The District Court stated, “The legislative history shows that legislation of the type was initially passed to protect the public against a presumed fraud and that the 1971 amendment merely established greater assurance that a customer who wanted to “toke” an employee would not ultimately learn that he had merely enriched the coffers of the employer” (*Moen v. Las Vegas International Hotel, Inc.*, 1975, p. 161). Summary judgment was awarded to the defendant, Las Vegas International Hotel, Inc.

In 1983 the Supreme Court of Nevada ruled in favor of Harolds Club in *Alford v. Harolds Club* (1983). In 1980, Harolds Club changed its policies and procedures from allowing dealers to individually keep their tips they received to requiring employees to participate in a tip pool. Harolds Club did not retain any of the tips for itself. Many employees refused to comply with the new policy. Harolds therefore fired nine of the ten dealers. The tenth dealer resigned before being terminated by Harolds Club for refusing to comply with the new tip policy. The appellants stated that Harolds Club violated N.R.S. §608.160. The district court did not find Harolds Club to be in violation of N.R.S. §608.160. The court ruled that N.R.S. §608.160 did not prohibit employers from imposing mandatory tip pooling, citing *Moen*. The Supreme Court affirmed, “We hold that the district court correctly concluded that N.R.S. § 608.160 does not prohibit an employer from requiring employees to enter into a tip-pooling arrangement such as that imposed in the instant case” (*Alford v. Harolds Club*, 1983, p. 671).

In a similar case, Edward Cotter sued Desert Palace Corporation in 1988 for changing the tip pooling policies at the Desert Inn. Dice dealers worked in teams of four and pooled their tips among their dicing teams. Desert Palace Corporation changed the

policy to a mandatory tip pool to be distributed on a 24-hour basis to all dealers evenly. Plaintiffs claimed that their team worked harder and therefore made more money than other teams. “Plaintiffs have identified a number of ways in which they may be injured by the tip-distribution policy: heavily tipped dealers will be forced to subsidize lightly-tipped dealers; forced sharing may destroy the dealers’ incentives or discourage customers from taking tips...”(Cotter v. Desert Palace, 1989, p.1145). The United States District Court for the District Court of Nevada denied Cotter’s request for preliminary injunction relief. An “injunctive relief consists of a court order called an injunction, requiring an individual to do or not do a specific action. “The Court stated that that the injuries the plaintiff’s were claiming were “purely monetary in nature” (Cotter v. Desert Palace, 1989, p. 1142). Therefore, even if the court found the Desert Palace in violation of Nevada labor laws, Desert Palace would just have to pay back the money owed to the employee for violating Nevada statutes. The Court of Appeals affirmed this decision. The Desert Palace Corporation was not found in violation of Nevada’s tip pooling statutes.

Baldonado v. Wynn Las Vegas LLC, (2008) not only questions N.R.S. § 608.160 like the three previous cases, but also questions the court’s position on N.R.S. §613.120, “unlawful for managers and shift bosses to receive gratuities from employees as a condition of the employees’ employment” (N.R.S. §613.120). Wynn Las Vegas implemented their new tip pool policy to include supervisors into dealers tip pool. Wynn Las Vegas executives reasoning for the inclusion of supervisors was, “At the time the new policy was introduced that the casino’s dealers were earning \$100,000 annually in salary and tips. The new tip-pooling policy meant an average pay reduction of about 20 percent” (Whaley & Knightly, 2008). In New York cases the court upheld that

supervisors could not be included in tip pools because the employer, the owner or the “agent” benefited from the tip pool.

Wynn dealers “sought compensatory and punitive damages and any appropriate injunctive or equitable relief...” (Baldonado v. Wynn Las Vegas, LLC, 2008, p.102) Wynn Las Vegas also requested summary judgment, claiming that only the Nevada Labor Commissioner had the authority to enforce the Nevada Statutes. The court sided with Wynn Las Vegas. “The court noted that the Labor Commissioner is charged with enforcing the specified statutes, and thus, it stated, appellants must follow ‘the administrative process’ before seeking relief in the district court” (Baldonado v. Wynn Las Vegas, LLC, 2008, p.102).

Labor Commissioner Michael Tanchek stated, “I am going to get everybody together and see where they want to go next” (Whaley & Knightly, 2008). Wynn pushed for their attorney fees to be compensated for from plaintiffs claiming the plaintiff’s had no grounds to sue. “The district court, determining that appellants’ claims were not brought or maintained without reasonable grounds, denied the Wynn’s request for attorney fees” (Baldonado v. Wynn Las Vegas, LLC, 2008, p.102). Plaintiffs stated they will continue to pursue their case after procedural processes are followed.

As seen in *Baldonado*, the Nevada state labor commissioner’s job is to enforce any statutes between N.R.S. § 608.005 to N.R.S. § 608.195. Failure to comply with the Labor Commissioner or the District Court results in heavy fines, back wages accrued to employees as well as criminal penalties of a misdemeanor defined under N.R.S. § 608.195. Attorney fees are additional costs incurred with lawsuits, even if you win the lawsuit.

CALIFORNIA

California Labor Code §351 is continually interpreted throughout California court cases regarding gratuities. Cal. Labor Code § 351 states,

No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for...(Cal. Labor Code Section§ 351).

Leighton v. Old Heidelberg, Ltd., (1990) is one of the first cases that interprets Cal. Labor Code Section §351 and is cited in multiple cases that lead to today's decisions on tip pooling and tip sharing. Marilena Leighton sued Old Heidelberg, Ltd. based on the belief that Old Heidelberg violated Cal. Labor Code §351. Old Heidelberg's tip pooling policy required servers to tip out their bussers 15% of their tips, and 5% to bartenders. Leighton believed that her bussers did not deserve to be tipped out 15% and refused. Leighton was suspended for 10 days and ultimately fired for not complying with Old Heidelberg's tip pooling policy. Leighton believed that being forced to tip out her bussers was unlawful. She also requested for Old Heidelberg to pay back all wages that she was forced to tip out to her bussers as well as her attorney fees. The court ruled in favor of Old Heidelberg, determining that Cal. Labor Code§ 351 did not state that mandatory tip pools were illegal. The Court also interpreted that Cal. Labor Code §351 included bussers in their definition of "tipped employees." The Court stated that the main purpose of

California Labor Code §351 is to ensure that employers do not participate in tip pools. Leighton argued that since management mandated a 20% tip out to other employees, they were involved with the tip pooling of the Old Heidelberg. The Court dismissed this argument re-stating that since Old Heidelberg did not keep any of the tips, they were not violating Cal. Labor Code § 351.

Five Feet Restaurant, Inc. violated California in *Jameson v. Five Feet Restaurant, Inc.*, (2003). Five Feet Restaurant, Inc. required all of its servers to tip out 10% of their tips to the restaurant's floor manager. The floor manager's duties at Five Feet Restaurant, Inc. included greeting and seating the customers, setting up reservations, assisting servers with their tables, supervising servers, hiring and firing staff members.

In 1999, Five Feet Restaurant, Inc. hired Karla Jameson as a server and soon after disciplined her not following Five Feet Restaurant, Inc. mandated tip pool. As seen in *Leighton*, mandated tip pools in California are legal. On May 4, 2000, Jameson filed a complaint against Five Feet Restaurant, Inc. which included a complaint against their illegal mandated tip pool including floor managers.

Cal. Labor Code § 50 defines each position within hospitality's legal right to be or to not be included in a tip pool. The Court found Five Feet Restaurant, Inc. in violation of Cal. Labor Code §50, classifying the floor manager in Five Feet Restaurant, Inc. as an agent. The court defined an agent 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" (*Jameson v. Five Feet Restaurant, Inc.*, 2003, p.142).

Agents are not allowed under California law to participate in tip pools because of their power to hire, fire, and supervise employees. The Court mandated that Five Feet

Restaurant, Inc. pay back wages to their servers, which totaled \$1,075, and “issued a permanent injunction” requiring the restaurant to discontinue their tip pooling policy. (Jameson v. Five Feet Restaurant, Inc., 2003, p. 142).

Louie v. McCormick & Schmick Restaurant Corp., (2006) determined that bartenders were allowed to be in tip pools even though they did not directly meet the customers they were providing drinks for. Louie was a server at McCormick & Schmick and sued the company because she was required to share tips with bartenders. She stated McCormick & Schmick violated Cal. Labor Code § 351 because she was required to share tips with bartenders that, “did not offer direct table service to her customers” (Louie v. McCormick & Schmick Rest. Corp., 2006, p. 1155). Louie referenced *Elkins v Showcase, Inc.*, (1985) which determined that bartenders located behind a wall in the restaurant were not included as “tipped employees” because they never met with the customer.

Louie argued that not only was this tip pooling with bartenders unlawful, but that she should be paid back all the tips paid out to the bartenders as well. The court referenced two previous court cases, *Leighton* and *Jameson*. Both cases set precedent that mandatory tip pools in California are not unlawful. *Leighton* also concluded that bussers were allowed to be included in mandatory tip pools. The Court references *Leighton* because *Leighton* was also required to tip out her bartenders 5% at Old Heidelberg, and that was determined lawful under Cal. Labor Code § 351. “The legislative history of the statute cited by Louie underscores the fact that the legislature intended to ensure that employers did not take tips intended for employees, and that it was not focused on tip sharing among service workers” (Louie v. McCormick & Schmick Rest. Corp., 2006, p. 1158).

Much like the cases in Nevada, Hawaiian Gardens Casino, Inc. was found not guilty of violating Cal. Labor Code §351 in *Louie Hung Kwei Lu v. Hawaiian Gardens Casino, Inc.*, (2009). Lu was a casino dealer at the Hawaiian Gardens Casino and was required, “to contribute part of the gratuities they received to a tip pool for employees who provided service to casino patrons” (Lu v. Hawaiian Gardens Casino, Inc. 2009, p.1). The other casino patrons defined by the casino included “chip runners, poker tournament coordinators, poker rotation coordinators, hosts, floormen and concierges” (Lu v. Hawaiian Gardens Casino, Inc. 2009, p. 3). Unlike Wynn Las Vegas, Hawaiian Gardens Casino did not include any positions that managed or supervised other employees into the tip pool. Lu argued that Hawaiian Gardens Casino, Inc. violated Cal. Labor Code §351 and Cal. Labor Code §221, which states, “It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee” (Cal. Labor Code §221)

The Court did not find Hawaiian Gardens Casino in Violation of Cal. Labor Code§351 or Cal. Labor Code§221. Since the Casino did not take any part of the dealer’s wages for themselves or their supervisors, the court confirmed as in *Leighton* mandated tips pools are not illegal.

Cal. Labor Code §354 and §218.5 addresses California’s stance on penalties incurred for violating California. California enforces a, “misdemeanor, punishable by a fine not exceeding one thousand dollars (\$1,000) or by imprisonment for not exceeding 60 days, or both” (Cal. Labor Code §354). The winning party can also request payment of attorney fees and costs once their case has been completed in the District Court. The cases discussed above are just the start of California lawsuits in relations to labor law

violations. Nation's Restaurant News published an article, "Wave of Tip Pooling Lawsuits Snares More Operators" after hearing of Starbucks's lawsuit which cost them \$105 million in back wages to their California baristas. "One Southern California law firm alone has filed about 25 lawsuits since March involving allegedly improper workplace policies requiring the sharing of tips. Among the defendants in those California cases are such national chains as Chili's parent Brinker International, Red Lobster parent Darden Restaurants, California Pizza Kitchen, McCormick & Schmick's and Hard Rock Café" (Jennings, 2006).

FLORIDA

Florida's laws differ from Nevada, California and New York. Florida does have any statutes that regulate tip pooling and tip sharing. The only regulation stipulated is in Florida's Constitution addresses their stand on tip credit, not tip pooling. Article 10, §24 under Florida Minimum Wage states,

Employers shall pay Employees Wages no less than the Minimum Wage for all hours worked in Florida. Six months after enactment, the Minimum Wage shall be established at an hourly rate of \$6.15...For tipped Employees meeting eligibility requirements for the tip credit under the FLSA, Employers may credit towards satisfaction of the Minimum Wage tips up to the amount of the allowable FLSA tip credit in 2003. (Fl. Const. art.10, § 24)

Because Florida only has a regulation on tip credits that refers back to federal regulations, how the court interprets cases such as *Pellon v. Business Representation International* (2007) and *Wajcman v. Investment Corporation of Palm Beach* (2009) sets precedent for tip pooling within Florida.

Pellon .v Business Representation International (2007) is a very different case from previously discussed cases, addressing tip sharing and tip credits within the airline industry. Pellon, along with 52 other skycap's from Miami International Airport requested summary judgment stating that Business Representation International violated the federal minimum wage laws in regards to tip sharing, their duties as tipped and non tipped employees and tip credit.

The court denied the plaintiffs motion for summary judgment for three reasons. First, the Court did not find Business Representation International in violation of federal tip sharing provisions. American Airlines cost to customers to use their skycaps' service cost each customer \$2.00. The skycaps retained \$.50 for every \$2.00 collected. The skycaps stated that this arrangement constituted a tip sharing agreement, and the skycaps were entitled to keep all of their tips. The court stated that, "The alleged agreement to pay 50 cents to the skycap for every two dollars collected does not constitute a tip sharing agreement" (*Pellon v. Bus. Representation Int'l, Inc.*, 2007, p. 1315). The two dollars collected was a required fee, much like a required service charge in banquet parties.

Secondly, the Court believed that the skycap's duties did fall within DOL's definition of a tipped employee. "The common meaning of a 'skycap' is a 'porter who helps travelers with their luggage at an airport'" (*Pellon v. Bus. Representation Int'l, Inc.*, 2007, p. 1312). The skycaps tried to argue that when they solely assisted with luggage they were qualified as tipped employees. When they aided in other aspects of a travelers experience at the airport, their duties were no longer covered under DOL's definition of a "tipped employee." The Court's rebuttal pointed out that all of the duties the skycaps performed classified them as tipped employees. Plaintiffs believed their case was similar

to a case when a waitress was required to cook and prepare food. In that case, her additional duties did not fall within DOL's definition of a "tipped employee." (*Dole v. Fred Bishop & Carol Bishop*, 1990) The Court pointed out that there are no cases where performing dual jobs, one tipped and one non-tipped led to higher wages during your non-tipped activities. The only way the skycaps would be paid back wages is if the court found their tip credit to be in violation of federal regulations.

The court did not find any violation of the federal tip credit provisions in *Pellon*. Business Representation International notified employees of their tip credit policy. The Court believed Business Representation International followed U.S.C. §203 with regards to the amount they could apply from employee's tips as tip credits to the federal minimum wage.

Once again dealers filed for summary judgment in *Wajcman v. Investment Corporation of Palm Beach Kennel Club* (2009). Hawaiian Gardens Casino was granted summary judgment because no supervisor members were included in their tip pool. Wynn Las Vegas did include supervisors in their tip pool but Boldonado was still denied summary judgment and was advised to follow the legal process and contact the Nevada Labor Commissioner.

The Palm Beach Kennel Club required John Wajcman among other dealers to contribute 5% of their tips to a tip pool. The casino distributed the money within the tip pool to other members in the casino. These members included cashiers, hostesses and floor supervisors. The Palm Beach Kennel Club also applied a tip credit to the dealers pay, paying them less than minimum wage. Wajcman argued that the Palm Beach Kennel Club violated federal labor law by allowing non-tipped employees and supervisors to be

included into their tip pool. Based in this violation, the tip credit applied to employees was also illegal.

The Court decided that head cashiers and hosts did qualify under DOL as “tipped employees” because they aided guests with customer service and assisted the dealers within the hotel. The supervisors stated that 90% of their duties assisted with customer service on the casino floor. They did not have the power to hire or fire or even manage the dealers. The Court took this into consideration but still determined that the supervisors did not qualify as “tipped employees.” “In other words there is no evidence tending to show that the floor supervisors were engaged in services on the floor that were likely subject of tipping” (Wajcman v. Inv. Corp. of Palm Beach, 2009, p. 10).

Article 10, §24 enforces Florida’s labor laws stating that plaintiffs may bring,

A civil action in a court of competent jurisdiction against an Employer or person violating this amendment and, upon prevailing, shall recover the full amount of any back wages unlawfully withheld plus the same amount as liquidated damages, and shall be awarded reasonable attorney's fees and costs. In addition, they shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, reinstatement in employment and/or injunctive relief. Any Employer or other person found liable for willfully violating this amendment shall also be subject to a fine payable to the state in the amount of \$1000.00 for each violation. The state attorney general or other official designated by the state legislature may also bring a civil action to enforce this amendment. Actions to enforce this amendment shall be subject to a statute of limitations of four years or, in the case of willful violations, five years.

Such actions may be brought as a class action pursuant to Rule 1.220 of the Florida Rules of Civil Procedure. (Fl. Const. art.10, § 24)

RECCOMENDATIONS

The federal government and each state have regulations regarding tip pooling and tip sharing. Each state differs from the federal government on their minimum wage requirements and the % amount each employee may be required to contribute to the tip pool. Some states allow a tip wage credit to be applied to their minimum wage requirements, and some states do not allow a tip credit. The table below is a basic guideline to see the differences among the federal and state regulations.

	Minimum Wage	Tip Credit	Max. Tip Credit Amount allowed towards min. wage	Mandatory Tip Pooling Allowed	% “customary and reasonable”
Federal	\$6.55	Yes	\$4.42	Yes	15%
New York	\$7.15	Yes	\$2.55 (Food Service Workers)	Yes	Per case
Nevada	\$6.85	No	\$0.00	Yes	Per case
California	\$8.00	No	\$0.00	Yes	Per case
Florida	\$7.21	Yes	\$3.02	Yes	Per case

In addition to these differences, there are five standard guidelines that court cases demonstrated must be followed. Beyond understanding each state’s differences and court cases, a sample policy that can apply in each state outlines the basic federal regulations that must be followed.

STEP 1: KNOW YOUR STATE’S TIP POOLING, TIP SHARING AND TIP CREDIT REGULATIONS

The table above shows the federal and four states discussed tip pooling, tip sharing, tip credit and minimum wage requirements. Look up each state’s current regulations before incorporating any tip pooling policy. Minimum wage regulations and

tipping regulations constantly change and are different from state to state. Update company policies each time any labor regulations in this category are revised.

STEP 2: INFORM YOUR EMPLOYEES

Provide a paper upon hiring an employee stating company's tip pooling and tip credit policy. Post a sign in multiple languages of the company's tip pooling, tip sharing and tip credit policy. Federal and state regulations state that employees must be informed of a company's tip pooling and tip credit policy. Employees do not need to consent of the policy for it to be in effect, but they must be informed. Most states require a written document or posting of a company's tip pooling and tip credit policy in addition to telling their employees. Posting a sign but not telling your employees does not fulfill this requirement. The policy does not need to be explained in depth to the employee, but the employee must be able to read the policy in their language. Failure to provide the proper notice or to have no hard evidence that it was done may result in the entire policy being invalidated.

STEP 3: WHO CAN AND CANNOT BE IN THE TIP POOL

Carefully determine which employees meet the definition of "tipped employee." Employees must regularly make at least \$30 per month to be included in this definition. A one to two month study confirming that all "tipped employees" make at least \$30 per month is well worth the protection from legal challenges to the policy.

Employees who do not fall within this definition cannot be incorporated into the company's mandatory tip pool. Servers, bussers, valet, dealers, service bartenders and customer service personnel are allowed to be included in mandatory tip pools. In most cases, owners, agents, managers and supervisors cannot be part of a tip pool. Back of the

house employees who do not assist in the guest service process, such as cooks, janitors, dishwashers, are not allowed to be included in mandatory tip pools.

Be aware of questionable positions that do not directly receive tips from guests but assist with the guest service process. Contact legal counsel or local Wage and Hour division to confirm if these employees can or cannot be included in company's mandatory tip pool. Questionable positions include: hosts, maître'd, food runners, chip runners, cashier, back of the house bartenders, floormen, boxmen, casino coordinators.

STEP 4: TIP SHARING

Tip sharing must be voluntary. Employers cannot fire employees for not participating in voluntary tip sharing. Employees can share any amount of their tips to whomever they would like as long as it is voluntary. Non- "tipped employees" who receive \$30 or more worth of tips from "tipped employees" are still not classified as "tipped employees." Employers cannot use a tip credit against non- "tipped employees" who receive voluntary tips from tipped employees.

STEP 5: RULES TO USING A TIP CREDIT

Not all states allow a tip credit to be used towards the state minimum wage. Contact state regulations to see which states allows tip credit and how much may be applied towards state's minimum wage. A tip credit can only be used if all regulations are followed. A tip credit is not allowed if an employer requires tip pooling with any staff members that are not defined under "tipped employees". If an employer keeps any of a "tipped employees" tip, even for meal compensation or vacation credit, a tip credit is not allowed. The employer is not allowed to retain any of an employee's tips. The employer

may not apply the tip credit towards employees that may receive voluntary tips from fellow employees, but are not defined by FLSA as “tipped employees.”

SAMPLE POLICY

1. Every employee shall receive and acknowledge written notice of tip policy before implemented.
2. These acknowledgements shall be part of employee’s personal file.
3. Only employee’s who contribute to the pool are eligible to receive a share of the pool.
4. The following classifications are eligible to share in a tip pool: Waiter/Waitress, bellhops, counter personnel who serve customers, busboys/girls, bartenders, dealers, boxmen, chip runners.
5. All employees must make \$30.00 or more in tips per month to be included in tip pool.
6. Each pay period the payroll department has to verify that in a tip credit situation each hourly employee’s pay including tips equals or exceeds the minimum wage for each work week.
7. No supervisors or managers shall request to receive any share of the tip pool.
8. Payroll must ensure that each employee retains 85% of their original tips.
9. Employees must report all tips.

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