Insight

IN-DEPTH DISCUSSION

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Ninth Circuit: FLSA's Tip-Pooling Restrictions Apply Regardless of Whether Employers Use Tip Credits

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On February 23, 2016, the U.S. Court of Appeals for the Ninth Circuit in a 2-1 panel decision upheld the U.S. Department of Labor's (DOL) 2011 revisions to 29 C.F.R. § 531.52 applying tip-pooling restrictions to employers that do not use a tip credit to satisfy minimum wage obligations.[1] Under the revised rules, tips are the property of the employee who receives them, whether or not the employer uses the tip credit. The employer is prohibited from using the tips for any reason other than the tip credit, or in furtherance of a valid tip pool that includes only employees who "customarily and regularly" receive tips. This means that employees in "back-of-house" or other positions that are not "customarily and regularly" tipped may not share in any portion of tips left by customers.

Prior Rule: Cumbie v. Woody Woo, Inc.

Oregon Rest. & Lodging Ass'n involved interpretation of the DOL's rule-making authority with respect to section 203(m) of the Fair Labor Standards Act (FLSA). Under section 203(m), an employer may fulfill part of its hourly minimum wage obligation to a tipped employee by taking a credit for the employee's tips if certain criteria are met. Specifically, the employer must (1) pay a cash wage to the tipped employee of at least $2.13 per hour; (2) pay additional wages to bring the employee's wages up to the current federal minimum in the event the tip credit is insufficient to do so; (3) inform the employee of the tip-credit rules; and (4) permit the employee to retain all tips he or she collects. As to this last point, section 203(m) does not prohibit "the pooling of tips among employees who customarily and regularly receive tips."

The issue of the application of the section 203(m) rules regarding tip pooling to employers who do not use tip credits was first presented to

1 Oregon Rest. & Lodging Ass'n v. Perez, 2016 WL 706678 (9th Cir. Feb. 23, 2016).

the Ninth Circuit in Cumbie v. Woody Woo, Inc., 596 F.3d 577 (9th Cir. 2010). In Cumbie, a server working at an Oregon restaurant sued her employer alleging that its tip-pooling arrangement violated section 203(m) because it included kitchen staff in addition to servers. The employer in Cumbie argued that section 203(m) did not apply to its tip-pooling arrangement since it did not take a tip credit toward payment of the minimum wage. The Ninth Circuit writing en banc agreed with the employer and held that section 203(m)'s restrictions on tip pooling applied only to employers that use a tip credit to satisfy minimum wage obligations.

The court, in analyzing section 203(m), reasoned that the FLSA "imposes a condition on taking a tip credit and does not state freestanding requirements pertaining to all tipped employees. A statute that provides that a person must do X in order to achieve Y does not mandate that a person must do X, period."

2011 Department of Labor Regulations

In 2011, in the wake of Cumbie, the DOL revised its rules to state that all employers are bound by the tip-pooling restrictions "whether or not the employer has taken a tip credit under section 203(m) of the FLSA." According to the DOL, tip pooling is permissible only "among employees who customarily and regularly receive tips," regardless of whether the employer uses a tip credit. However, the DOL's revisions to § 531.52 were generally viewed as directly conflicting with the Ninth Circuit's holding in Cumbie. As a result, courts consistently applied section 203(m) only to employers who used tip credits. Oregon Rest. & Lodging Ass'n was the consolidation of two such cases, one from the District of Nevada (Cesarz v. Wynn Las Vegas) and the other from the District of Oregon (Or. Rest.& Lodging v. Solis). Both of these cases involved employers who did not take a tip credit against the minimum wage but required employees to participate in tip pools that were comprised of both customarily tipped employees and non-customarily tipped employees. In both cases, the district courts, citing Cumbie, held the 2011 rule invalid because it was contrary to Congress's clear intent.

New Rule: Oregon Rest. & Lodging Ass'n v. Perez

In Oregon Rest. & Lodging Ass'n, the Ninth Circuit upheld the validity of the DOL's 2011 amendment to § 531.52 applying section 203(m)'s tip-pooling requirements even where the employer does not use tip credits. The court reviewed the validity of the DOL's regulatory interpretations under the two-step Chevron framework. At the first step, it determined that section 203(m)'s silence as to employers who do not use tip credits "left room" for the DOL to regulate that practice. At the second step, it determined that, because the DOL considered comments prior to promulgating its revisions to the rules and because the DOL's revisions did not conflict with the legislative history of section 203(m) of the FLSA, the DOL's rules were not arbitrary and capricious. Accordingly, the court held the DOL revisions were valid and properly extended tip pooling restrictions of section 203(m) to employers that do not use a tip-credit to satisfy minimum wage obligations.

The parties in Oregon Rest. & Lodging Ass'n may request an en banc review from the Ninth Circuit or file a petition for writ of certiorari with the U.S. Supreme Court. But until further ruling by the Ninth Circuit en banc or by the Supreme Court, Oregon Rest. & Lodging Ass'n represents the new state of the law, at least in the Ninth Circuit.