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Which Employees Can Have Their Hands in the Tip Jar? Finally Some Clarification

By Michael Weber, Andrew Marks, George Pauta, and Sarah Moss

On June 26, 2013, the New York Court of Appeals issued a decision concerning who may lawfully participate in a restaurant tip-sharing system. The state's highest court stated that for employees to receive tips from a tip-sharing arrangement, they must perform, or assist in performing, personal service to patrons as a regular part of their duties. Employees with limited supervisory authority are still eligible to receive tips if they regularly provide service to patrons, but become ineligible once their supervisory duties rise to the level of "meaningful authority." The court also determined that an employer may exclude eligible employees from the tip-sharing arrangement, although the discretion to do so is not unlimited.[1]

Legal Background

In 2008, two separate lawsuits were filed against Starbucks, one by baristas and another by assistant store managers, arising out of the practice of distributing the contents of the common tip jar to baristas and shift supervisors, but not to assistant store managers.[2]

Both lawsuits hinged on an interpretation of New York Labor Law § 196-d, which prohibits employers and their agents or officers from directly or indirectly retaining any part of a gratuity received by an employee. The statute also expressly permits tip-sharing arrangements by waiters, busboys, and "similar employees." The law's stated purpose was to prevent employers from retaining money paid by customers whose intent or belief was that the money would go to the employee, not to the employer.[3] The ambiguous but broad language of this statute has given rise to numerous class action lawsuits in New York over the past five years.

In *Barenboim*, the baristas argued that shift supervisors were not eligible to share tips even though they served customers, contending that any amount of supervisory authority is sufficient to render an employee a (tip-ineligible) "agent" of the employer. In *Winans*, however, the assistant store managers claimed that they were improperly excluded from receiving tips from the tip jar, arguing that the law required that an employee have final authority to terminate subordinates in order to be considered an "agent."

1 The court also opined in a footnote that retroactive application of the tip sharing/pooling provisions of the 2011 Hospitality Wage Order was not an issue because the Wage Order merely elaborated upon the DOL's pre-existing understanding.

2 *Barenboim, et al. v. Starbucks Corp.*, 1:08-cv-03318, and *Winans, et al. v. Starbucks Corp.*, 1:08-cv-03734.

3 *Samiento v. World Yacht, Inc.*, 10 N.Y.3d 70, 79 n. 4 (2008), quoting Mem. of Indus. Commr., June 6, 1968, Bill Jacket, L 1968, ch. 1007, at 4.

As a result of these lawsuits, two questions were certified from the Second Circuit Court of Appeals to the New York State Court of Appeals: (1) what factors determine whether an employee is eligible or ineligible to receive distributions from an employer-mandated tip-sharing arrangement, and (2) whether an employer may lawfully deny an otherwise tip-eligible employee participation in a tip-sharing arrangement.

Issue 1: What factors determine whether an employee is tip eligible?

According to the facts of the case, the shift supervisor's primary responsibility is serving food and beverages to customers. They also spend nearly all of their time performing the same customer-related duties as baristas. Shift supervisors have some supervisory responsibilities, such as assigning baristas to particular positions during their shifts, directing the flow of customers and providing baristas with feedback about their performance. They may also open and close stores, change the cash register tills and, if neither an assistant store manager nor store manager is present, make bank deposits.

The assistant store managers also spend the majority of their time performing customer-oriented services, but possess greater managerial and supervisory authority than shift supervisors. They assist managers in interviewing applicants, assign work shifts to baristas and shift supervisors, evaluate employee performance, participate in decisions to hire or fire employees, recommend corrective action for employee infractions, and process payroll. They also are full-time employees who receive a salary if they work at least 37 hours per week and are eligible for quarterly bonuses and benefits, including holiday and sick pay.

The baristas argued that possession of any level of authority made a supervisor an agent of the employer and precluded the supervisor from receiving tips under Section 196-d. The assistant store managers argued that only final decision-making authority was enough to render them ineligible to receive tips. Starbucks argued the line was somewhere in the middle, with the shift supervisors not having enough authority to render them tip-ineligible and the assistant store managers possessing too much authority.

The court agreed in principle with Starbucks. The court explained that an employee whose personal service to patrons is a principal or regular part of his or her duties may participate in an employer-mandated tip allocation arrangement, even if that employee possesses limited supervisory responsibilities. The court also gave deference to the New York State Department of Labor's Hospitality Wage Order, which includes as tip eligible employees, those who "assist in performing" personal service to patrons. The court, however, stopped short of explaining what type and how much assistance is actually necessary.

The court explained that an employee with "meaningful authority or control" over subordinates is not eligible to participate in a tip-sharing arrangement because they cannot be considered "similar" to waiters and busboys within the meaning of section 196-d. Examples of duties that may constitute meaningful authority, the court stated, include: the ability to discipline subordinates; assisting with performance evaluations; participating in hiring or terminating employees; and having input in the creation of employee work schedules. The court did not give any examples of supervisory duties that do not rise to the level of meaningful authority, leaving this standard open for interpretation in future cases.

Having rendered its opinion on "meaningful authority," the court did not feel the need to make specific determinations about the eligibility of the shift supervisors or assistant store managers to receive tips, instead referring the case back to the federal courts for further determination in line with the court's decision.

Issue 2: Can an employer exclude an employee from a tip-sharing arrangement who is otherwise eligible to share in tips under section 196-d?

This question was only an issue with respect to the assistant store managers, as Starbucks took the position that even if the assistant store managers were tip-eligible, Starbucks had the right to exclude them from the company's tip-sharing arrangement.

Interpreting section 196-d as Starbucks did, the court held that 196-d merely defines who is eligible or ineligible to participate in a tip-sharing arrangement and does not grant an otherwise eligible employee an affirmative right to participate in tip pools or receive tips from a tip-sharing arrangement. In other words, even if the assistant store managers were eligible to receive tips under the law, Starbucks had the right to exclude them from the tip jar. The court recognized that there may be some limit to an employer's ability to exclude classifications of employees from a tip pool, but declined to shed any light on such limits.

Recommendations for Employers

Although this decision answered some questions on tip-sharing in New York, it created a host of new questions that are likely to be litigated for the next several years. For example, by drawing the line for tip eligibility at "meaningful authority," but not providing guidance as to how many supervisory duties an employee must perform before his authority rises to the level of "meaningful," the court has left this question ripe for litigation. In the meantime, employers can help protect themselves against lawsuits by performing the following tasks:

- Eliminate the practice of tip-sharing or use of a common tip jar;
- Undertake a thorough analysis of the supervisory duties of employees who participate in tip-sharing arrangements (e.g., hiring, firing, discipline, scheduling), to determine whether they potentially have "meaningful authority;"
- Develop job descriptions to clearly specify each position's duties and obligations to remove any indications that tipped positions possess meaningful authority;
- Remove employees with "meaningful authority" from tip-sharing arrangements or reduce the scope of their supervisory authority so they no longer have meaningful authority;
- Review handbooks and manuals to ensure that employees who participate in tip-sharing arrangements are not referred to as managers or described as having any of the duties that constitute "meaningful authority;" and
- Undertake an analysis of positions in the past six years—even if not currently used—to determine if the company possesses any potential exposure for previously operated tip-sharing arrangements.

Non-compliance or partial compliance with the rules of tip-sharing can be costly and the rules of compliance are tricky.

Michael Weber, Andrew Marks, and George Pauta are Shareholders, and Sarah Moss is an Associate, in Littler Mendelson's New York City office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Weber at mweber@littler.com, Mr. Marks at amarks@littler.com, Mr. Pauta at gpauta@littler.com, or Ms. Moss at smoss@littler.com.