



## **Don't Drown In the Tip Pool**

By David W. Robinson, Esq.

Recent decisions highlight the dangers from improper tip pooling practices and mishandling of employee complaints. With these decisions in the public eye, it is a good time for restaurants, banquet facilities and other places where prepared food or beverages are served to review their tip pooling and personnel policies and practices.

Tip pooling is the practice of taking gratuities received from patrons and either pooling all or a part of the gratuities to be distributed to other employees. Under Massachusetts law, an employer may distribute pooled tips only to employees who are categorized as “wait staff,” “service bartenders” or “service employees.” Such employees are generally defined as those persons who (i) serve beverages or prepared food directly to patrons, (ii) clear patrons’ tables, (iii) prepare beverages for patrons to be served by another employee, or (iv) provide service directly to customers in a position in which one customarily receives tips (such as coat check employees), and who do not have any managerial responsibilities.

For example, a dining room manager, maitre’d or other employee that occasionally serves food or beverages cannot receive any pooled tips if he or she has any managerial responsibility. This prohibition applies regardless of whether the tip pool arrangements are voluntary or required by the employer. Accordingly, the tip pool cannot be used to pay a function manager, coordinator or any similar employee.

Restaurants should be aware that if they choose to add a service charge to a customer’s bill (as opposed to permitting the customer to leave a discretionary gratuity), they must distribute all proceeds of that service charge to wait staff, service bartenders or service employees in proportion to the service provided by those employees. Restaurants may impose a “house” or other administrative fee in place of a service charge and retain or distribute that fee at its discretion. However, they should use caution when imposing any such fees to carefully identify them as administrative so that it is evident to customers that the fee is not a gratuity or tip that will be distributed to service employees. Fees that are ambiguously described will be treated as service charges that must be remitted by the employer.

### **Hilltop Jury Verdict**

Recently, a jury ruled on the first tip pooling violation case in Massachusetts to go to trial. A group of wait staff brought a class action against Hilltop Steak House alleging that Hilltop charged an 18 percent gratuity but only distributed to the wait staff 14

percent. The jury awarded the employees a verdict of approximately \$2.5 million in damages and legal fees. The jury found that Hilltop's tip pooling policies and practices violated the statute and Hilltop illegally retaliated against certain wait staff who complained about the tip pooling violations.

### **Retaliation Claim Against Locke-Ober**

In another case, a group of wait staff initiated a lawsuit against Locke-Ober restaurant claiming that their employer was in violation of the tip pooling statute and that their employer illegally retaliated against them for complaining by terminating their employment. The wait staff claimed that they had complained to the restaurant that their policy of sharing tips with the maitre d' was illegal. Locke-Ober thereafter fired both the servers and the maitre d'. The wait staff alleged that the terminations constituted unlawful retaliation. The lower court dismissed the retaliation claim because the employees had only complained to their employer and not to the Attorney General.

However, the Supreme Judicial Court recently overturned the lower court's dismissal of the retaliation claim. The court found that under the plain language of the statute, an employer may not retaliate against an employee for complaining about tip pooling policies, whether the complaint was to the employer or the Attorney General. The court pointed out that any other result would encourage employers to terminate employees immediately rather than risk a complaint with the Attorney General.

These two cases highlight the need to proactively review tip pooling policies and personnel practices. Employers should inform employees who have any managerial duties (even if they occasionally serve food or beverages) that they are prohibited from accepting any portion of an employee's tips or from participating in a tip pool. The law applies to all tip pools, whether merely permitted or mandated, and can not be avoided by entering into a special agreement or contract with an employee. Moreover, managerial personnel must be aware that they cannot retaliate against or discipline employees for complaining about the tip pooling policies, even if there is no merit to the complaint. Otherwise, the employer could be subject to a claim and potential exposure for a retaliation claim in a case where the underlying tip pool complaint was merit less.

Restaurant owners and managers should consider reviewing their tip pooling practices or instituting a written policy to be sure they are in compliance with the laws of their particular state. Laws for tip pooling vary from state to state. Accordingly, it is important to consult with an experience attorney before instituting or revising a tip pool policy.

**If you have any questions or concerns regarding tip pooling or handling employee complaints, please contact the writer at [dwr@riw.com](mailto:dwr@riw.com).**