Legal Alert: A Lesson for California Employers to Learn with their Morning Cup of Coffee

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A San Diego, California Judge just ordered Starbucks to pay $100 million in back tips and interest to coffee baristas who were forced to share their tips with their shift supervisors. While Starbucks vows to appeal the ruling, it brings to light certain lessons that California employers of tipped employees should learn.

California treats tips left for servers or other tipped employees differently from much of the rest of the country. For example, many states permit a “tip credit,” allowing employers to use tips as a “credit” against their obligation to pay tipped employees minimum wage. California does not give employers that right.

California Labor Code Section 351 expressly states that gratuities are the “sole property” of the employees for whom they are left. Hence, employers are not entitled to any portion whatsoever of tips that are left for employees. Indeed, employers may not even “collect, take, or receive” any gratuity left for an employee. Thus, even if employers have “tip pools” at work, which are entirely permissible (assuming the employees who participate are entitled to participate), the employer may not even touch the tips. Literally.

A question that arises in these cases, and which caused problems for Starbucks, is the definition of who is the “employer.” It appears that “shift supervisors” at Starbucks, who likely were employees who made coffee alongside the baristas but who were the “supervisor” on the particular shift, shared in the tips. Is that person a true supervisor? If so, then he or she should not be sharing in the tips, under Labor Code Section 351. If that person was not a true supervisor, then maybe they were “misclassified.” One of the most significant issues plaguing California employers today relates to the misclassification of employees as supervisory (or “exempt” from overtime) when they, in fact, were not true supervisors, and should be classified as non-exempt.

Another issue to consider is what classifications of employees can lawfully share in tips? It is clear that supervisors (who are considered the “employer” for Labor Code Section 351 purposes) cannot share in tips. But, in restaurant or other hospitality settings, how about bartenders, bussers, or other employees? Should those employees be permitted to share in a “tip pool?” Reasonable minds can differ, and California has case authority that analyzes which positions can, and cannot, share in tip pools. Additionally, while tip pools generally are permissible under federal wage and hour law, tipped

employees cannot lawfully be required to share tips with nontipped employees (such as cooks or dishwashers).

Employers' Bottom Line:

The issues that will be raised on appeal in the Starbucks case may shape some aspects of employment law and class action administration. However, it is doubtful that it will alter Labor Code 351 and its impact on employers in the hospitality and other “tipped” industries.

Should you have any questions about the impact this case may have on your operations, or any other issue of wage and hour law, contact the Author of this Alert, Helene Wasserman, in the Los Angeles office of Ford & Harrison at (213) 237-2403 or hwasserman@fordharrison.com.

Helene is the host of the Employer Helpcast, which is a "one stop website" for both "nuts and bolts" employment law advice and insight into new legal developments affecting employers. The Employer Helpcast can be found at http://employerhelpcast.blip.tv.