



## Client Law Update

Cathy Arias and Allyson Cook

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### **Court's Finding that Shift Managers Are Agents May Expand an Employer's Liability**

A California Court ordered Starbucks Corp. ("Starbucks") to pay its baristas almost \$106 million in restitution as a result of Starbucks' policy of permitting shift supervisors to share in customer tips. This decision is significant to any California business that employs shift supervisors or maintains tip-sharing policies between supervisors and subordinate employees.

#### Background

In October 2004, Joe Chou, a former Starbucks barista, filed a class action lawsuit against Starbucks alleging the company violated California Labor Code section 351 in allowing shift supervisors to receive a portion of tips left by customers in tip jars. The primary issue before the Court was whether Starbucks' shift supervisors (who are responsible for assigning tasks to other employees and preparing and serving coffee) were "agents," and thus, precluded from sharing in customer gratuities. Although Starbucks classified its shift supervisors as non-exempt, hourly employees, Mr. Chou argued shift supervisors were misclassified management employees, and thus, precluded from participating in tip-sharing as set forth in Section 351. Starbucks contended its shift supervisors were properly classified since they spent fifty percent or more of their time preparing coffee and serving customers, thus, entitled to participate in tip-pooling. The Judge ultimately agreed with Mr. Chou finding shift supervisors were agents and ordered Starbucks to pay \$86.7 million in back tips and \$19 million in interest to approximately 100,000 current and former Starbucks baristas.

#### Brief Summary of the Law on Tip Pooling

In 1990, a court found tip pooling is permitted, as long as it does not run afoul of California Labor Code section 351 which states, in pertinent part, that "[n]o employer or agent shall collect, take, or receive any gratuity...paid, given to, or left for an employee." The term "agent" is defined in Labor Code section 351(d) as "every person...having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees." Accordingly, employers are allowed to implement a policy of tip-pooling, by which employees share gratuities among themselves, as long as the employer and/or their agent do not receive any portion of the tips. In 2003, a court held that the performance of both customer service and supervisory duties by managers did not prevent them from being considered agents.

## Impact of this Ruling on California Employers

The Starbucks' ruling illustrates the on-going risks employers take in order to conduct business in California. This decision is particularly difficult for employers in the restaurant industry because shift supervisors typically have dual roles in the workplace, i.e. supervise employees while also performing similar duties as to those they are directing. In the case of Starbucks, its shift supervisors made coffee, worked the cash register, and served customers while also creating schedules and directing employees on duty. It now appears low-level managers are placed in the position of employer with respect to tip-pooling notwithstanding the fact that shift supervisors are really hourly workers who devote most of their time to customer service. The Starbucks' decision also potentially impacts other employment law arenas. It is easy to see a situation involving shift supervisors who engage in sexually harassing conduct and an employer is found strictly liable for their actions even when the employer has no notice of such conduct.

Due to the complex and ever-changing wage and hour laws in California, as highlighted by the decision ordered against Starbucks, it is recommended that employers commence with the following:

- **Review tip-pooling policies to ensure low-level managers/supervisors are not sharing tips with employees;**
- **Train all supervisors, including low-level managers, on the prevention of sexual harassment and discrimination;**
- **Continue tracking all non-exempt employees' hours and meal and rest breaks.** Ensure you are maintaining all employment records for at least four years; and
- **Conduct routine audits of your employment and payroll practices to ensure compliance with all relevant employment laws.** This may include retaining a lawyer to review your practices, analyze your job descriptions and positions, and update your employee handbooks. Burnham Brown employment attorneys are available to assist in such audits

*Cathy Arias is the chair of Burnham Brown's Employment Law Department and specializes in counseling and defending employers. She can be reached at 510.835.6806 or [carias@burnhambrown.com](mailto:carias@burnhambrown.com). Allyson Cook is a member of Burnham Brown's Employment Law Department and can be reached at 510.835.6811 or [acook@burnhambrown.com](mailto:acook@burnhambrown.com).*