



Employment Law Update

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Collective Tip Jars: Low Level Supervisors Who Provide Service May Share In The Wealth

In a decision with implications for California employers, a Court of Appeal *reversed* a lower court ruling that ordered Starbucks Corporation to pay its baristas almost \$106 million in restitution as a result of Starbucks' policy of permitting shift supervisors to share in customer tips placed in a collective "tip jar." The Court of Appeal rejected the claim that shift supervisors could not share in tip proceeds.

Brief History on the Starbucks' "Tip Pooling" Case

In October 2004, Jou Chau, a former barista, filed a class action lawsuit against Starbucks alleging the company violated California Labor Code section 351 by allowing shift supervisors to receive a portion of tips left by customers in tip jars. The issue was whether Starbucks' shift supervisors (who are responsible for assigning tasks to other employees as well as preparing and serving coffee) were "agents," and thus precluded from sharing in customer gratuities. The Superior Court Judge found that 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.

The Court of Appeal found for Starbucks holding that California law does not prohibit Starbucks from permitting shift supervisors to share in the proceeds placed in collective tip boxes. California Labor Code section 351 precludes managers and employer agents from taking tips from employees, but does not preclude managers from receiving tips. The Court of Appeal further found that the Superior Court improperly based its ruling on a line of "tip pooling" decisions that relate to an employer's right to require that a tip given to an *individual* service employee must be shared with other employees. The Starbucks policy at issue, instead, involved the equitable allocation of tips put in a collective box for those employees providing service to the customer, which included shift supervisors who performed the same services as a barista.

Brief Summary of the Law on Tip Pooling

California Labor Code section 351 provides that tips are the sole property of the employee to whom it is paid. However, 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." Therefore, the employer and/or its managers may not share in the tip. In recent years, California courts have provided guidance on who may legally share in tip pooling arrangements, which includes bartenders, bussers, and most recently kitchen staff.

Cautionary Tale For California Employers

The Starbucks ruling provides some guidance to employers who utilize collective tip jars or similar mechanisms to collect and allocate customer tips to the employees who service the tipping customers. Such tip policies are permissible and may include some supervisory employees, as long as the supervisory employee provides service and is part of the service team for whom the tips are intended. Employers should continue to *proceed with caution*, as the Starbucks decision was primarily based on the fact that shift supervisors and baristas performed the same jobs, i.e. providing service to customers the vast majority of their shift, thus customers likely intend that their tips placed in the collective tip boxes reward all of these service employees. Had the shift supervisor only spent fifty percent (50%) of his/her time servicing customers, the decision may have come out differently and against Starbucks. Unfortunately, the appellate court did not address the important issue of whether a shift supervisor that minimally directs employees is considered an agent under California law. Employers should also be aware an appeal of the Starbucks decision to the California Supreme Court is in process, so employers may not have definitive guidance on the law regarding collective tip jars for several months, if not years.

Due to the complex and ever-changing wage and hour laws in California, it is recommended that employers commence with the following:

- **Review tip-pooling policies to ensure the policy is in compliance with California law. If low-level managers/supervisors share in collective tips, employers must ensure they provide service to the customers;**
- **Employers who utilize shift supervisors should consult an attorney about the unique issues that arise with this type of hybrid management employee;**
- **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.

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