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California Employment Law Update

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Employees May No Longer Sue Employers For The Alleged Mishandling Of Tips Under California Labor Code Section 351.

In a partial win for employers, the California Supreme Court ruled that Labor Code section 351 does not provide a private right of action for employees to sue their employers for purported mishandlings of gratuities left by customers. *Lu v. Hawaiian Gardens Casino, Inc.*, 2010 Cal. LEXIS 7623 (Cal. Aug. 9, 2010). Section 351 declares that a tip or gratuity is the sole property of the employee or employees to whom it was paid or given. Specifically, Labor Code section 351 states, in relevant part, that "[n]o employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee...or deduct any amount from wages due an employee...or require the employee to credit the amount...of a gratuity against and as part of the wages due to the employee from the employer."

The *Lu* matter involved a casino card dealer who challenged his employer-casino's mandatory tip pooling policy that required him to contribute a percentage of his tips to other employees who provided service to the casino customers such as chip service people, hosts, and customer service representatives. The policy expressly prohibited the sharing of tips with managers or supervisors. *Lu* sued his employer alleging, among other things, that the tip pooling policy violated Labor Code section 351 because the policy resulted in an illegal conversion that required him to give a percentage of his tips to other employees. The Supreme Court decided to take up the issue of whether Labor Code section 351 provides employees with an avenue by which to sue their employers for mishandled tips and gratuities since two prior Court of Appeal decisions reached conflicting results on whether Section 351 provides a private right of action.

The *Lu* decision forecloses California employees from bringing individual or class action lawsuits under Labor Code section 351. The Court found that the language of Section 351 does not expressly provide for a private right of action nor does the legislative history of the statute indicate the Legislature's intent to create such right. Instead, Section 351 establishes criminal liability (misdemeanor offenses) on employers for violations of the statute and permits the Department of Industrial Relations to enforce its provisions. Indeed, the Court found that the definitive objective of Labor Code section 351 was to preclude employers from crediting an employee's tips against their earned wages.

While the *Lu* decision is ultimately a win for California employers, the Supreme Court did not completely foreclose an employee's right to sue for alleged misappropriated tips and gratuities. The Court observed that though Labor Code section 351 does not provide a vehicle by which employees may sue to recover mishandled tips, an employee may seek recovery under other legal theories such as common law conversion, a civil theft cause of action. The Court also refused to issue any opinion or give guidance to employers on whether tip pooling arrangements are allowable under Labor Code section 351. Accordingly, employers still do not have definitive guidance on the law regarding collective tip pooling arrangements and should continue to proceed with caution when implementing such policies. It is recommended that employers make sure they are following best practices such as:

- Review your tip-pooling policies to ensure the policy is limited to employees involved in the chain-of-service to the customer. If low-level managers/supervisors share in collective tip pools, California employers must ensure they actually provide service to the customers;
- Make certain that the distribution of pooled tips to other employees in the chain-of-service is reasonable and that there is a relationship between the service provided and the percentage of the tip received from the pool;
- California employers must ensure that their payroll policies do not credit employees' tips to satisfy wage obligations, especially your minimum wage obligations; and
- If customers pay tips via a credit card, California employers must provide their employees with the tips/gratuities no later than the next regular payday.

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