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LABOR & EMPLOYMENT LAW ALERT

Regulations Affecting Wage Payments to Tipped Employees Entered Into Effect May 5th

The U.S. Department of Labor published final amendments to regulations interpreting the Fair Labor Standards Act of 1938 (FLSA) which went into effect on May 5, 2011. These regulations provide detailed guidance to employers regarding the payment of wages to “tipped” employees who customarily and regularly receive more than \$30 a month in tips. Specifically, the revised regulations clarify the following:

General Characteristic of “tips”: Tips are discretionary sums given by a customer to the employee in recognition of some service received. They are property of the employee. The regulations prohibit an employer from using an employee’s tips for any reason other than as a credit against its minimum wage obligation to the employee (“tip credit”) or as part of a valid tip pool.

Tip credit: An employer covered by the FLSA must pay the tipped employee a required cash wage of at least \$2.13 an hour. The employer may then take a “tip credit” equal to the difference between the required cash wage and the federal minimum wage. Thus, the maximum tip credit that an employer can currently claim under the FLSA is \$5.12 per hour (the minimum wage of \$7.25 minus the minimum required cash wage of \$2.13).

The tip credit cannot exceed the value of tips actually received by the employee. Also, in order for employers to receive this tip credit, the regulations require that employers first *inform* employees of the tip credit provisions (see below) and that employees *retain* all tips received (unless part of a valid tip pool, see below).

Tip pool: The FLSA does not impose a maximum contribution on mandatory tip pools. However, the employer *must inform* the employees of any required contribution amount to the tip pool. Tip pools can only include those employees that *customarily and regularly* receive tips.

Duty to Inform tip credit: The regulations require that an employer inform a tipped employee in advance of its use of the tip credit. The required information to the tipped employee includes (1) the amount of the required cash wage to be paid to the tipped employee; (2) the amount by which the tip credit increases the wages of the tipped employee; (3) that all tips received by the employee must be retained by the employee except for tips contributed to a valid tip pool; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements. Although verbal notice is sufficient, it is recommended to provide and retain a copy of a written notice.

Charges that are not considered tips: Compulsory service charges imposed on a customer by an employer's establishment which may be described as a "tip," are not considered tips under the FLSA, even if distributed by the employer to its employees.

Service charges that become part of the employer's gross receipts do not count as tips under the FLSA, even if they are distributed among the employees. However, an employer may use these amounts to satisfy any monetary requirements imposed by the FLSA.

Dual capacity: When an employee works in a dual capacity, an employer may only use the tip credit towards the hours that the employee worked as a *tipped* employee.

If you have any questions or comments, or wish additional information regarding these matters, please contact any of the following attorneys:

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