

Credit where credit is due: Taking advantage of the tip credit

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As common practice in the restaurant industry, restaurant owners depend on bartenders and servers to perform various duties beyond serving food and beverages, for which they are not tipped. Usually these non-tipped duties are intermingled with tipped work (i.e., serving tables) during an employee's shift and include preparation and cleanup. However, when such duties become more than "de minimis" and comprise greater than 20% of a tipped employees' time, an employer may be liable for violations of the Fair Labor Standards Act ("FLSA").

The nationwide Applebee's Neighborhood Bar & Grill ("Applebee's") chain is at the center of a wage and hour dispute, in which employees of Applebee's claim they were underpaid because they spent more than 20% of their time on the job performing non-tipped duties. Gerald Fast, an employee of Applebee's since 1998, who now exclusively works as a bartender for the chain, filed the lawsuit in the Western District of Missouri in 2006. The lawsuit alleges that Applebee's has taken advantage of the "tip credit", allowed to restaurant owners under 29 U.S.C.A. § 203(m), although its employees have performed non-tipped duties comprising more than 20% of their time at work.¹

As employers in the hospitality industry are aware, the U.S. Department of Labor allows employers of tipped employees (i.e., employees who regularly receive more than \$30 a month in tips) to pay tipped employees under the tip credit system. That is, an employer is not required to pay tipped employees the full minimum wage rate, which was recently raised to \$5.85 as of July 24, 2007. Rather, the employer can elect to take advantage of the tip credit and pay the tipped employees a direct wage rate of only \$2.13 an hour, as long as the employees' tips make up the difference between the direct wage rate and minimum wage.² However, under FLSA guidelines, when tipped employees spend more than 20% of their time on non-tipped duties, such as preparation or maintenance, they are entitled to the full minimum wage for time spent on such non-tipped duties.

In June 2007, the *Fast v. Applebee's International Inc.* lawsuit was granted class-action status, and some project that the class could include as many as 42,000 former and current employees.³ The class size will be determined by the end of the year as Applebee's employees have until December 24, 2007 to decide whether to opt out or to join the class. Then, on February 5, 2008 the parties will participate in a court-ordered mediation conference.⁴ In the end, Applebee's may be required to pay a multi-million dollar settlement.

¹ Prewitt, Milford, "Applebee's wages fight over nontipped duties," *Nation's Restaurant News*, Vol. 41, No. 42, October 22, 2007.

² U.S. Department of Labor, "Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act," www.dol.gov/esa/regs/compliance/whd/whdfs15.htm.

³ Prewitt, *supra*.

⁴ Prewitt, *supra*.

The issues recently brought to the forefront of the restaurant industry are by no means new.⁵ However, the nationwide reach of Applebee's provides a key opportunity for restaurant owners of single restaurants or chains alike to be reminded of their obligations under FLSA.

According to the Department of Labor, to take advantage of the tip credit, the employer must:

1. Inform each tipped employee about the tip credit allowance (including the amount to be credited) before the credit is utilized;
2. Be able to show that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined; and
3. Allow the tipped employee to retain all tips, whether or not the employer elects to take a tip credit for tips received, except to the extent the employee participates in a valid tip pooling arrangement.⁶

To avoid liability, restaurant owners should ensure that they are maintaining accurate records, not only of shift hours, but also of an employee's actual hours worked.⁷ For instance, in the Applebee's lawsuit, the employees claim that they were required to check in at work fifteen minutes prior to the start of their shift for "Appletime" and also that they rotated between server work and nonserver work, but that Applebee's records failed to account for this time.⁸

In *U.S. Dept. of Labor v. Cole Enterprises, Inc.*, when restaurant employees made similar allegations that their employer did not account for their preshift and postshift time, and only recorded their scheduled shift time, the Sixth Circuit held that the extra half hour per day was not merely "de minimis". As a result, the Court held the employer liable for back wages.⁹ As stated in 29 C.F.R. 785.47, "an employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him."

From these lawsuits, restaurant owners can learn that if they intend to take advantage of the tip credit, they should maintain accurate records of employees' time and use the records to track whether tipped employees have exceeded the 20% non-tipped duty threshold. This can certainly become burdensome to restaurant owners. However, restaurant owners must be mindful of their obligations under the FLSA and weigh the burdens imposed by the FLSA against the potential for back wages liability as well as the negative publicity that accompanies it.

⁵ See *U.S. Dept. of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775 (1995)(Holding, even with tip credit, total weekly wage did not meet minimum wage requirements once preshift and postshift work was considered).

⁶ U.S. Department of Labor, *supra*.

⁷ 29 C.F.R. §§ 516.28; 785.47.

⁸ Prewitt, *supra*.

⁹ See *U.S. Dept. of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775