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Protecting gratuities: Minnesota law on tip pooling

Teamwork doesn't mean
sharing tips with co-workers

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At most dine-in restaurants around the country, it is routine for wait staff to share the gratuities they receive from customers with their coworkers. A server, for example, may share her gratuities with the busser who helped her clear a table.

As another example, all of the servers at a restaurant may combine (or pool) a portion of their gratuities and then distribute those gratuities to the bussers, hosts, or other service staff. Commonly, the restaurant-employer will, itself, organize and run this practice by requiring its servers to contribute a preset portion of their sales to a fund (or tip pool) that the employer



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then distributes to other employees.

These types of practices — commonly and interchangeably referred to as “tipping out,” “tip pooling,” or contributing to “tip share” — are not per se illegal under the federal Fair Labor Standards Act. Under the FLSA, an employer can require its employees to pool their tips. Depending on the circumstances, the employer may then be required to pay its employees at least the full minimum wage of \$7.25 (as opposed to the reduced tipped wage of \$2.13), but mandatory tip pooling is not, in and of itself, illegal under the FLSA.

The same is not true, however, under the Minnesota Fair Labor Standards Act. This creates a substantial risk of liability for employer-restaurants who expand into Minnesota without first examining Minnesota's laws on tip pooling.



Prohibition against tip pooling

The MFLSA, unlike the FLSA, only allows tip pooling in very limited circumstances. In fact, the MFLSA, at Minn. Stat. sec. 177.24, subd. 3, bestows on employees a property right to their gratuities, stating that “any gratuity received by an employee or deposited in or about a place of business for personal services rendered by an employee is the sole property of the employee.” The strictness of this property right is codified within that same subdivision, which

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provides the rule that “No employer may require an employee to contribute or share a gratuity received by the employee with the employer or other employees or to contribute any or all of the gratuity to a fund or pool operated for the benefit of the employer or employees.”

Further, while employees may voluntarily share their gratuities with other employees, Minn. Stat. sec. 177.24, subd. 3, explicitly provides that “[t]he agreement to share gratuities must be made by the employees without employer coercion or participation.” This statutory requirement is fatal to the employer-run tip pool. In short, even if the employer itself does not take its employees’ gratuities, the employer could still violate the MFLSA by simply designing or running the tip pool. Indeed, only at its employees’ request may an employer even safeguard gratuities to be shared by employees and disburse those gratuities to employees participating in any sharing agreement.

The divided gratuities rule

There is one exception to the MFLSA’s prohibition against tip pooling. Under Minn. R. 5200.0080, subd. 8, the so-called “Divided Gratuities Rule,” mandatory tip pooling or employer participation in the agreement to pool tips is permissible among “direct service employee[s]” who provide “direct service to a customer or customers in a given situation.”

The rule goes on to list “banquets, cocktail and food service combinations, or other combinations” as examples of the “given situation” in which tip pooling is allowed. The rule, at subdivision 6, also defines a direct service employee as “one who in a given situation performs direct service for a customer and is to be considered a tipped employee” and “indirect service employee” as “a person who assists a direct service employee... includ[ing] but are not limited to, bus people, dishwashers, cooks, or



BLOOMBERG PHOTO: BRENT LEWIN

Starbucks Corp. signage outside a store in Toronto in July 2013. The retail coffee giant has been at the center of key litigation in the tip pooling issue.

hosts.”

As discussed below, incorrectly interpreting and applying the Divided Gratuities Rule can pose large problems for

employers. Indeed, the MFLSA, at Minn. Stat. sec. 177.27, provides employees a private right of action and permits them



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to sue their employer for improperly diverted gratuities, an equal amount as liquidated damages, attorneys' fees and costs.

Tip pooling litigation in Minnesota

The statutory landscape described above has given rise to disputes over what constitutes illegal employer participation in the tip pool, what constitutes the "given situation" referenced under the Divided Gratuities Rule, and over which employees are direct or indirect, and has fueled litigation over tipping practices in Minnesota. See e.g., *Matter of Wage and Hour Violations of Holly Inn, Inc.*, 386 N.W.2d 305 (Minn. App. 1986); *Delsing v. Starbucks Coffee*, 08-CV-1154 (PJS/JSM), 2009 WL 3202378 (D. Minn. Sept 30, 2009); *Ballard v. Fogo de Chao Churrascaria (Minneapolis), LLC*, No. 27-CV-09-7621 (Henn. Cty., Minn., filed April 3, 2009); *Cosgrove v. OS Restaurant Serv., Inc.*, 0:10-cv-01937-SRN-SER (D. Minn., filed April 30, 2010); *Fearn et al v. Blazin' Beier Ranch, Inc.*, 0:11-cv-00743-DSD-TNL (D. Minn., filed March 28, 2011); *Foss v. Honker Enter., Inc.*, No. 55-CV-12-3213 (Olmsted Cty., Minn., filed May 14, 2012); *Huff v. Pinstripes, Inc.*, 972 F. Supp. 2d 1065 (D. Minn. 2013).

Holly Inn, decided almost 30 years ago, involved the currently extinct "tip credit" under the MFLSA, which gave restaurants the ability to pay a lower wage if certain requirements were met. Notably, despite its focus on the tip credit, *Holly Inn* is relevant to tip pooling at restaurants today because of its discussion of how an employer-mandated tip pool can be illegal even if the employer does not share in the pool. The restaurant in *Holly Inn* required servers to share their tips with bussers and bartenders. Restaurant management admitted that the tip sharing method was a "policy" devised by management and that management had "threatened" or "strongly suggested" that the servers abide by the policy. The

Minnesota Department of Labor found this to be a violation of the MFLSA.

The Court of Appeals agreed, citing to language nearly identical to that found in the MFLSA today: "No employer may require an employee to contribute or share a gratuity received by the employee with the employer or other employees.... The agreement to share gratuities must be made by the employees free of any employer participation."

The ban on employer-mandated tip pools and employer participation in the agreement to pool tips was most recently discussed by the U.S. District Court for the District of Minnesota last year in *Huff*. In *Huff*, the restaurant required servers to contribute a preset portion of their sales to a fund that the restaurant then divided and distributed to "server assistants." The dispute in *Huff* focused on whether the divided gratuities rule applied and, if it did, whether the "server assistants" were direct or indirect service providers.

In holding the employer-mandated tip pool illegal, the court first found that the divided gratuities rule did not apply to the situation at hand – i.e., regular dine-in restaurant service, as opposed to a banquet or other food service combinations contemplated by the rule. In so finding, the court rejected the restaurant's "team-based approach" argument that servers and "server assistants" worked together to serve tables. The court found that, despite teamwork, a regular restaurant setting was not one contemplated by the divided gratuities rule.

The court went on to find that, even if the rule could apply, "server assistants" were indirect service providers and, thus, the restaurant could not require servers to pool tips with them. Focusing on the record demonstrating that server assistants act as support to servers and an earlier citation to the legislative history of the divided gratuities rule that paired the concept of "direct service" with "main service," the court granted the servers' motion for summary judgment.

After *Huff*, it is clear that employers cannot rely on teamwork or the fact that their employees cooperatively work together to support an employer-run tip

pool in a regular restaurant setting. The Divided Gratuities Rule that could allow mandatory pooling just cannot apply outside of the "given situations" contemplated by the rule.

Notably, a tip jar at a coffee counter, despite not being explicitly listed in the rule, can be one such situation. In the *Delsing* case, cited above, baristas at Starbucks brought suit alleging that Starbucks illegally required them to share the tips left by customers in the jar at the counter.

Specifically, Starbucks required that certain baristas share the tips left in the tip jar over the course of a week. The U.S. District Court for the District of Minnesota held that this practice violated the MFLSA. The court reasoned that the "given situation" under the divided gratuities rule was not each week at Starbucks but, rather, each shift. The court went on to explain that the divided gratuities rule provides that a group of employees who, as a team, directly serve a group of customers may be required to share tips received from those customers through a tip jar. In other words, the direct service employees whose efforts produced the tip left in the jar (i.e., those that worked during the shift when the tip was left) may be required to share those tips. Because, however, sharing on a weekly basis would result in employees sharing tips they did not help produce, Starbucks' practice violated the law.

Delsing, *Huff* and *Holly Inn*, as well as the plain language of the MFLSA and implementing rule, demonstrate that, in Minnesota, employees' gratuities are theirs to do with as they please except in very limited circumstances. Employers should take care to review whether those circumstances apply before implementing tip pooling practices in Minnesota. Failure to do so can be costly. 🐼

Steven Andrew Smith and Anna P. Prakash are with the law firm of Nichols Kaster, PLLP in Minneapolis. Nichols Kaster, PLLP represented the employees in the *Delsing*, *Ballard*, *Cosgrove*, *Fearn*, *Foss*, and *Huff* litigation discussed above.