

DAILY BUSINESS REVIEW

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New rules for tipped workers may add litigation in Florida



Commentary by Frank Scruggs

Operators of hotels, restaurants and other hospitality businesses are accustomed to using the “tip credit” in meeting the minimum wage requirements of federal law. But, on its website, the Florida Restaurant Association expresses worries that new tip credit rules of the U.S. Department of Labor “are confusing and will make restaurants vulnerable to damaging litigation and penalties.”

Why the worries?

If an employer meets certain prerequisites under the U.S. Fair Labor Standards Act, the effective hourly wage of an employee who customarily and regularly receives more than \$30 monthly in tips from customers can include the amounts paid to the employee by the employer, plus an additional amount on account of the tips the employee received from customers.

New regulations of the U.S. Department of Labor elaborate upon FLSA prerequisites by providing that an employer seeking the tip credit must inform employees of the amount of the cash wage the employer is to pay a tipped employee and the additional amount claimed as wages by the employer based upon a tip credit.

In addition, the employer must inform employees that the tip credit claimed by the employer may not exceed the amount of tips actually received by the tipped employee, that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips, and that the tip credit shall not apply to any tipped employee unless the employee has been informed of the Fair Labor Standards Act credit provisions.

Disputes regarding the adequacy of notice under these regulations, and judicial decisions interpreting this provision in the Fair Labor Standards Act, can lead to litigation. This

explains Florida restaurateurs’ concern that these new regulations will increase litigation risks in what already is the epicenter of FLSA litigation in the United States.

In 2003, Floridians approved a Minimum Wage Amendment to the Florida Constitution, Article 10, Section 24, which fixed the



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amount of tips that employers in Florida may credit toward satisfaction of the minimum wage at the 2003 FLSA level of \$3.02.

On June 1, the Florida hourly minimum wage increased to \$7.31, based upon a judicial decision enforcing the provisions of the Florida constitutional amendment that require a state agency to adjust the minimum wage for inflation. The combined effect of an inflation-adjusted minimum wage and a constitutionally fixed tip credit is to require payment to tipped employees of a direct cash wage of \$4.29, based upon Florida’s minimum wage (\$7.31) minus the 2003 tip credit (\$3.02).

More Fair Labor Standards Act cases are pending in the federal courts in Florida than in any other state. As of Dec. 31, more FLSA cases were pending in the U.S. District Court for the Southern District of Florida (8,915) than in all of the federal courts in all of the following states combined: New York, California, Illinois, Pennsylvania, New Jersey, Michigan and Massachusetts (8,883).

In fact, the number of FLSA cases pending in the federal courts in Florida (14,572) represented more than 37 percent of all FLSA cases pending in all of the United States District Courts in America (39,275). Florida — especially South Florida — is the epicenter of federal litigation under the Fair Labor Standards Act.

Business owners face potential personal

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liability if their companies fail to pay the minimum wage (and overtime) in accordance with FLSA. The recent case in Illinois of *Dominguez v. Quigley’s Irish Pub, Inc.*, illustrates the point. The pub paid two servers less than the applicable minimum wage and instead paid the lower “tipped employee” rate.

The court found the pub owners individually liable for the pub’s failure to make admittedly required but unpaid minimum wage payments and for the pub’s falsification of employee pay records. The court’s opinion recited the tests for determining the personal liability of owners and officers. The tests involve consideration of whether they exercise operational control over an employing entity.

Disputes regarding an employer’s entitlement to take the tip credit when calculating the minimum wage due a tipped employee in Florida can lead to litigation.

Employers in Florida, especially South Florida, face more federal court Fair Labor Standards Act litigation — by far — than anywhere else in the United States. So to avoid minimum wage violations, employers should seek employment law advice.

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