STATE OF CALIFORNIA PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
*LEGAL SECTION*
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MILES E. LOCKER, *Chief Counsel*

December 28, 1998

Jason L. Glovinsky
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Los Angeles, CA 90025-1520

Re: **Tip Pooling**

Dear Mr. Glovinsky:

This is in response to your letter, dated June 12, 1998, in which you requested an opinion letter[1] from the Division of Labor Standards Enforcement on the parameters of allowable tip pooling. At the outset, please accept my apology for the long delay in providing this response.

Labor Code section 351 provides, in relevant part:

> "No employer or agent shall collect, take, or receive any gratuity or part thereof, paid, given to or left for an employee by a patron, or deduct from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as part of the wages due the employee from the employer. Every such gratuity is hereby declare to be the sole property of the employee or employees to whom it was paid, given, or left for."

In Leighton v. Old Heidelberg, Ltd. (1990) 219 Cal.App.3d 1062, the court of appeal held that employer-mandated tip pooling among employees is not prohibited by Labor Code §351. In its analysis of legislative intent, the court noted that the purpose of the statute "was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for

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[1] In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, the California Supreme Court upheld the Labor Commissioner's authority to "provide parties with advice letters which are not subject to the rulemaking provisions of the APA." Courts may accord deference to such opinion letters under the standard set out in *Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal.4th 1.

the sole benefit of those employees who serve them." Ibid., at p. 1068. Thus the court upheld an employer mandated practice under which tips left on restaurant tables are "pooled and distributed among employees who provide direct table service." Ibid. Such employees could conceivably include waiters and waitresses, busboys, bartenders, hostesses and maitre d's. Employees who do not provide "direct table service" include dishwashers, cooks and chefs (except at a sushi restaurant, or similar facility, where the chef prepares the food at the customer's table). Employees who do not provide direct table service cannot be included in any tip pooling arrangement.

There are two important limitations on the employer's right to institute tip pooling among employees who provide direct table service. First, tip pooling cannot be used as a mechanism for compensating the owner(s) of the restaurant or any managers or supervisors who have the authority to either hire, fire, discipline, assign work, schedule shifts, set wages, or adjust employee grievances. Section 351 prohibits an "employer or agent" from receiving any part of a gratuity left by a patron for an employee. The term "employer" is defined in Industrial Welfare Commission Wage Order 5 (8 Cal. Code of Regs. §11050, the wage order that governs the restaurant industry) as "any person defined in Section 18 of the Labor Code[2], who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours or working conditions of any person." For this reason, the Labor Commissioner interprets Section 351 to prohibit the inclusion of the restaurant owner(s), managers, and supervisors from participating in any tip pooling arrangement. Such persons, even if engaged in providing direct table service to restaurant patrons, cannot receive any part of the gratuities collected in a tip pooling arrangement.

Second, any tip pooling arrangement must be fair and reasonable. The tip pooling arrangement approved in Leighton provided for distribution of the collected gratuities as follows: 80% to the waiters and waitresses, 15% to the busboys, and 5% to the bartender. The court acknowledged that this manner of distribution was consistent with industry practice, and found that it "ensures a fair distribution of the gratuity to those who earned it, making certain that each gets his fair share." Ibid., at p. 1071. Indeed, the very purpose of employer mandated tip

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[2] Labor Code §18 defines "person" to include "any person, association, organization, partnership, business trust, limited liability company, or corporation."

pooling is "to ensure an equitable sharing of gratuities in order to promote peace and harmony among the employees and provide good service to the public." Ibid.

Of course, the percentages described in Leighton are not carved in stone. But if the purpose of tip pooling is to ensure a fair distribution of gratuities among those employees who provide direct table service to customers, there must be some reasonable relationship between the degree to which the employee or category of employee provides such table service and the distribution of pooled tips. The prevailing industry practice distributes the overwhelming majority of the pooled gratuities to waiters and waitresses, followed by a smaller percentage to busboys, and a still smaller percentage to other categories of employees who provide limited direct table service (i.e., bartenders, hostesses, and maitre d's). This practice reflects, in an admittedly inexact way, the extent to which these categories of employees contribute in providing direct table service to a restaurant's customers. It is this rough correlation that makes tip pooling a fair and equitable system, and that satisfies the requirement, set out in Labor Code §351, that every gratuity is "the sole property of the employee or employees to whom it was paid, given, or left for."

We do not suggest that there can be no deviation from the percentages recognized in Leighton as an industry practice. But we do read Leighton to require reasonableness and fairness in any tip pooling arrangement. While an employer must have the necessary discretion and latitude to implement a tip pooling distribution that is appropriate to circumstances that may be unique to a particular restaurant, a tip pooling distribution that is patently unfair or unreasonable would violate Labor Code §351. To take an extreme example, an arrangement that distributes 90% of the pooled tips to hostesses, when the hostesses do nothing more than initially direct the customers to the table, would be unlawful. Obviously, the determination of whether a particular arrangement is unfair or unreasonable can only be made on a case by case basis.

We hope this letter will assist you in advising your client.

Sincerely,

Miles E. Locker
Chief Counsel

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cc: Jose Millan
Tom Grogan
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