Connecticut Supreme Court Holds Restaurant-Employer May Not Use 'Tip Credit' for Delivery Drivers

By David R. Golder

March 31, 2017

Finding the Connecticut Department of Labor regulations on tip credit are "not incompatible" with the state tip credit law, the Connecticut Supreme Court has ruled that an employer's pizza delivery drivers are not subject to a tip credit. *Amaral Brothers, Inc. v. Department of Labor,* No. SC 19622 (Apr. 4, 2017).

A tip credit allows an employer to pay an employee below the usual minimum wage inasmuch as the employee receives tips from customers to supplement that salary. The Connecticut DOL's regulations provide that the tip credit applies only to bartenders and traditional waitstaff. They prohibit the counting by employers of gratuities toward the minimum wage for other employees. The Court considered whether those regulations conflict with Connecticut General Statutes § 31-60(b), the enabling statute. After a trip through the history of Connecticut's tip credit laws (spanning almost 70 years), relevant precedent, and legislative history, the Court concluded they did not and the pizza delivery drivers at issue are not subject to a tip credit.

Background

Amaral Brothers, Inc. is a Connecticut corporation. It employs approximately 40 driver-employees who commonly receive gratuities from customers for delivering pizzas to their homes.

Amaral filed a petition with the DOL requesting a declaratory ruling from the Labor Commissioner that Amaral could pay a reduced minimum wage to its delivery drivers because the drivers regularly receive gratuities that result in them earning more than the minimum wage. Amaral relied on Section 31-60(b), a statute enabling the Commissioner to adopt regulations. Section 31-60(b) directs that the Commissioner "shall recognize, as part of the minimum fair wage, gratuities in an amount…equal to [a] per cent of the minimum fair wage per hour for persons, other than bartenders, who are employed in the hotel and restaurant industry…who customarily and regularly receive gratuities." Amaral also targeted the regulations distinguishing between service employees (for whom employers can apply a tip credit and pay the reduced minimum wage) and non-service employees (who must receive full minimum wage).

The Commissioner's declaratory ruling found that the exclusion of restaurant employees other than waitstaff (*e.g.,* Amaral's drivers) from the ambit of the tip credit regulations was valid. Amaral appealed that ruling to the trial court.

The trial court affirmed the Commissioner's decision and dismissed the appeal, finding the regulations challenged by Amaral were valid and the drivers were not "service employees" under the regulations. Amaral appealed to the Connecticut Appellate Court, and the Connecticut Supreme Court transferred the appeal to itself pursuant to Conn. Gen. State. § 51-199(c) and Connecticut Practice Book § 65-1.

Connecticut Supreme Court Opinion

The Supreme Court affirmed the trial court's decision that the drivers are not "service employees" subject to a tip credit.

The Court reviewed every iteration of Connecticut's tip credit laws since 1950, noting that the distinction between service and non-service restaurant employees, along with the differing minimum wage practices, were in place even before the legislature authorized a formal tip credit. When the first minimum wage statute was enacted in 1951, it permitted but did not require the DOL to recognize a tip credit against the minimum wage.

The landscape changed in 1958, when DOL issued a revised wage order for restaurant employees,

Meet the Author

David R. Golder

Principal
Hartford 860-522-0404
Email

recognizing that gratuities could count toward the minimum wage in certain circumstances. The Supreme Court noted that the tip credit regulations have stayed in place without material amendment since 1958, but the legislature amended Section 31-60(b), the enabling statute, many times — in 1980, changing the precatory language from "[the commissioner] *may* recognize, as part of the minimum fair wage, gratuities...for persons employed in the hotel and restaurant industry" (emphasis added) to mandatory language: "[the commissioner] *shall* recognize...." (emphasis added). In 2000, the legislature amended the enabling statute to distinguish between (1) persons employed in the hotel restaurant industry who customarily and regularly receive gratuities and (2) bartenders, providing different minimum wages for the two groups.

Relying on *Dugas v. Lumbermens Mutual Casualty Co.,* 217 Conn. 631 (1991), the Supreme Court held:

1. Section 31-60(b), as amended, did not need to be read to conflict with the regulations at issue;
2. there is "strong evidence" of legislative acquiescence in the DOL's longstanding tip credit rules (*e.g.,* the fact that the legislature amended 31-60(b) 10 times since 1980, that the amendment making clear that bartenders are subject to the tip credit did not preempt the long-standing distinction between service and non-service employees, and that in 2014, the legislature repealed "thousands of pages" of "unnecessary" regulations but left the regulations at issue undisturbed);
3. the legislature granted broad authority to the DOL ("substantial discretion") to interpret and apply the law; and
4. the plain language of section 31-60 is ambiguous, and the legislative history reveals that "legislators considering amendments to the statute consistently have suggested that the mandatory tip credit applies specifically to waitstaff," which is in accord with the DOL's interpretation of the statute.

Accordingly, the Supreme Court concluded that "the 1980 amendment to section 31-60(b) did not repeal by implication the department's tip credit regulations as applied to restaurant workers, other than waitstaff and bartenders, who regularly and customarily receive gratuities, and that the department did not act arbitrarily, capriciously, or in violation of its statutory authority in declining the plaintiff's invitation to apply the tip credit to delivery drivers."

***

A petition for a *writ of certioriari* regarding the tip credit issue is pending before the U.S. Supreme Court in a case in which Jackson Lewis represents Petitioner National Restaurant Association. *See National Restaurant Ass'n v. Dep't of Labor,* Supreme Court No. 16-920.

Following *Amaral Brothers,* restaurants should review their tip credit practices and update them as necessary. Please contact your Jackson Lewis attorney to discuss these developments and your specific organizational needs.