

Restaurant Industry in 2021 Series: Tips

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Restaurateurs continue to be challenged by the mandated closures and limitations on operations because of the COVID-19 pandemic. Nevertheless, the industry may be facing new legal challenges in 2021 as this sector's economic recovery begins. This article examines one potential issue that may await the restaurant industry. This is the first of a series from the Jackson Lewis Hospitality-Restaurant Industry Team on workplace law issues that restaurants may consider as businesses prepare to re-emerge in 2021.

Background: Equal Employment Opportunity Commission (EEOC)

Late in September 2020, discrimination charges were filed with the EEOC against a leading national restaurant brand alleging race and gender discrimination based on the effects of the restaurant's lawful tipping policies that utilized a tip credit. These charges were filed by a not-for-profit organization that claimed paying workers a tip credit resulted in an unlawful disparity in tip earnings, because women and people of color purportedly earn less tip income than white men. More recently, [in December 2020](#), reports indicated that workers in a number of locations across the country filed additional charges against this same company, alleging their earnings were affected by discriminatory practices. The workers claimed that policies relating to assignments and work schedules negatively affected the earnings of women and workers of color. They alleged they are not assigned to work on the busiest shifts, where they claim tip earnings are highest, and to sections of the eating establishment where the "best" seats are located. While the EEOC has made no findings, and the agency's filings appear to be in the preliminary stages of investigation, it is important that restaurant operators understand what is alleged and how to lower the risk of such allegations.

Tips

Tips are an important part of our dining out culture. Establishments where tipping is not permitted are rare. Whether tipped employees are paid a full minimum wage, or the employer applies a lawful tip credit, tips are a critical part of service employees' earnings.

The importance of tips as a part of service workers' income is not likely to change in the near or even distant future, regardless of [new regulations that may alter](#) the categories of restaurant workers who may earn tips. Therefore, the claims alleged in these EEOC filings should be examined and steps be taken to lower the likelihood such claims will be asserted by other industry workers.

If tipping restaurant workers is here to stay, how can restaurant operators lower the risk of these claims? How can restaurant employers make tipping fairer, when guests, not the employer, control how much they tip?

Tip Pools Instead of Tip Shares

Among the steps that restaurant operators can take to avoid any appearance of favoritism or bias in the administration of policies is replacing tip sharing with tip pooling.

Tip sharing is the practice where a server collects the tips they earn and share them with coworkers who contribute to the service provided to the guests the service team serves. Often, the tip share includes a tip-out to a busser, food runner, and to the bar staff (if the venue employs service employees in these positions). With tip sharing, each server is on their own, largely responsible for a particular section of the restaurant, and the server's tip earnings will reflect how many guests are seated in that server's section, the value of the food and beverages those particular guests ordered, and the generosity of the particular group of guests. These factors determine the server's ability to generate revenue to the restaurant and the related tips.

Tip pooling is the practice where tips are grouped together, such that an individual's tip earnings are based on the tips generated by all, or a portion, of the service staff. The term "pooled house" typically refers to a practice where all tips collected by all servers are collected and then divided according to position in most instances. When a restaurant uses the pooled house method for dividing tips, many of the concerns

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regarding section assignments disappear, because all service staff benefit when a guest is a generous tipper (and all are equally affected when tip earnings are marginal).

Moving from the practice of tip sharing to tip pooling or pooled house will not eradicate all complaints of unfairness associated with tip earnings, but it can help eliminate one point of contention: section assignments and perceived bias associated with which guests a server will be assigned to. Some restaurant operators view the tip pool arrangement as a way to ensure better service to guests, because pooling encourages teamwork among all service staff. When the entire service team's tip earnings are generated from service to all guests, will staff be more motivated to help one another and provide better guest service or does the individually awarded tip provide more motivation for a server and lead to better overall service? Those who think the former support a pooled house.

Moving from the practice of a tip share to a tip pool may be a daunting cultural shift for a venue, but this change is worth considering as a means toward greater collaboration and fairness. A well-planned communications campaign is important. Employees need to understand how a tip pool can eliminate perceived issues of fairness and bias. Operators also should be sure to include in any tip pool or sharing arrangement only those who are legally able to participate. This will depend not just on the Fair Labor Standards Act and U.S. Department of Labor regulations, but also on state and local regulations.

Employers should consult with counsel to ensure compliance with all laws.

Establish Objective Scheduling Protocols

Scheduling also plays a key role in tip earnings. Tip earnings are high on busy shifts, low on quiet ones. Managers with scheduling authority have the power to reward and punish service employees by deciding which employees work on the busiest shifts. In the absence of transparency in scheduling protocols, service employees assigned to less lucrative shifts may perceive bias in scheduling.

What measures can restaurants take to avoid employee perceptions of unfairness and bias? Rotating the prized lucrative shifts among all service staff might be one way — but many service employees may prefer a regular, predictable schedule. An alternative is sharing lucrative shifts — for example, if weekend dinners provide high sales, assign every service employee one weekend dinner shift.

Transparency is key. When employers create scheduling protocols and stick to them, there is less room for deal-making, and greater integrity behind the employer's decision-making. Employees will have greater confidence that scheduling decisions are not subject to favoritism or bias.

Should employee performance and experience be part of the scheduling equation? Tenure and performance are objective criteria by which scheduling decisions may be made; but are not easy to apply consistently. For example, how is performance measured? Performance evaluations could serve as a measure, but few restaurants conduct regular employee performance reviews. Where there is a track record of regular, objective, and meaningful evaluations, the evaluations can be the basis for rewarding high performers with the more desirable shifts. In the absence of a reliable evaluation tool, however, it is unclear what criteria can fairly substitute and be applied in a consistent manner. Employers who seek to assign the best service employees to the busiest (and most lucrative) shifts must be certain they can point to the legitimate, non-discriminatory basis for making their scheduling assignments if the assignments are challenged as biased.

When is the Right Moment to Make Change?

The right moment may be now. For many hospitality industry employers, particularly restauranteurs, the first part of 2021 unfortunately likely will be a continuation of reduced operations due to state and local orders limiting on-site dining, as well as lower demand. This is an opportunity to implement new policies, including those regulating tips and scheduling discussed in this article. Instituting new protocols before a hiring surge provides employers an opportunity to evaluate and adjust new procedures to avoid having to defend their policies to the EEOC or in a court of law.

As always, restaurant employers must be certain that their workplace policies comply with local laws, which vary across the country. Employers are advised to speak with counsel knowledgeable in workplace laws.

For additional guidance on this issue, please contact a Jackson Lewis attorney.

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