

The Federal Tip Credit Under Fire: How Do You Properly Pay Tipped Employees?

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Speakers

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Wage-and-Hour Climate



Wage-and-Hour Climate

- 2008 Study in Low Wage Industries
 - 26% of workers paid less than minimum wage
 - 76% of those who work overtime not properly paid
 - 70% of those working outside regular shift not paid
 - 30% of tipped workers not paid min. tipped wage
 - 12% of tipped workers experience “tip stealing”
 - 44% of workers had some pay violation in last year

Wage-and-Hour Climate

- General Rule:
 - Minimum wage (currently \$7.25)
 - Overtime
1 ½ times regular rate over 40 hours/week

Wage-and-Hour Climate

- Tipped employees
 - Minimum wage of \$2.13 per hour, plus tips

Wage-and-Hour Climate

- FLSA Collective Actions
 - One person sues
 - Seeks conditional class certification
 - Unbelievably lenient “Similarly Situated” standard
 - Court approves notice to class members

Wage-and-Hour Climate

- Invitation to opt-in
- Response rate varies - usually 10-25%
- Discovery on entire class
- Company moves to decertify class
- Trial
- Elapsed time: 3 Years +

Tipped Employee Scenario



Tipped Employee Scenario

- 200 servers and bartenders
- Average 30 hours per week
- Paid \$2.13 per hour, with \$5.12 per hour tip credit
- Error causes loss of tip credit

Tipped Employee Scenario

- 30 hours per week
= 1,560 hours per year
- 1,560 x \$5.12
= \$7,987.20 per employee per year

Tipped Employee Scenario

- 200 employees

x \$7,987.20 x 3 years =	\$4,792,320
PLUS Liquidated Damages	4,792,320
Employees' Attorneys' Fees	500,000
Your Attorneys' Fees	<u>400,000</u>
	\$10,484,640

Fast v. Applebee's Timeline



Fast v. Applebee's Timeline

May 2005

- Applebee's acquires 12 stores from franchisee

June 2005

- DOL investigation at former franchisee store

Fast v. Applebee's Timeline

March 2006

- Payment to associates to end DOL action

April 2006

- Bartender Gerald Fast asks HR why he did not get check

Fast v. Applebee's Timeline

July 2006

- Fast files suit

September 2006

- “Blitz” interviews of co-workers

December 2006

- Motion for summary judgment filed

Fast v. Applebee's Timeline

February 2007

- Motion to certify class

May 2007

- Court denies motion for summary judgment, announces new legal standard for tipped employee analysis

Fast v. Applebee's Timeline

June 2007

- Court conditionally certifies class

July 2007

- Applebee's seeks interlocutory appeal
- Applebee's visits Wage & Hour Administrator in D.C.

Fast v. Applebee's Timeline

August 2007

- Court denies interlocutory appeal

September 2007

- Notices sent to 43,000 putative class members

December 2007

- Applebee's begins expert time-and-motion study

Fast v. Applebee's Timeline

February 2008

- 5,550 opt-ins join (13%)

August 2008

- Plaintiffs' experts opine tipped employees spend 47.8% of their time on "non-tipped" work
- Claim lost wages of \$6.1 to \$6.7 million

Fast v. Applebee's Timeline

January 2009

- Motion to decertify class

March 2009

- DOL issues, then withdraws, clarifying opinion letter

Fast v. Applebee's Timeline

August 2009

- Court denies motion to decertify class
- Court allows parties to seek interlocutory appeal, vacates summary judgment ruling

October 2009

- Parties complete briefing on legal issues, await trial court's revised summary judgment ruling

Realities of Class Litigation

- Cost
 - Attorneys
 - Experts
- Business disruption
- Dealing with employee/plaintiffs
- Communication with franchisees, others
- Education of and advice to client
 - Changes in operations?
 - Settlement?

Requirements for Tip Credit



Requirements for Tip Credit

- At least \$30 a month in tips
- Cash wage of at least \$2.13 per hour
- Tips make up difference between cash wage and minimum wage
- Tips not used to satisfy overtime premium
- Employer informs employees of tip credit
- Employees retain all tips, except valid tip pool
- Employee engaged in tipped occupation

Tipped Occupation – Statute

“Tipped employee” is employee
“engaged in an occupation in which he
customarily and regularly receives more
than \$30 a month in tips.”

Tipped Occupation – Regs.

- Record keeping regulation requires record of hours worked in “occupation in which the employee receives tips”
- Other regulations emphasize “occupation”

Tipped Occupation – Dual Jobs Reg.

If employee works in “dual jobs” (such as server and maintenance person), no tip credit for time in non-tipped occupation.

BUT related duties in a tipped occupation (such as making coffee and occasionally washing dishes) need not themselves be directed toward producing tips.

Tipped Occupation – DOL Handbook

If tipped employees spend a substantial amount of time (in excess of 20%) performing preparation work or maintenance, no tip credit may be taken for such time.

Tipped Occupation – *Fast v. Applebee's* Ruling

A *jury* must sort duties into three categories:

1. Tip producing duties
(tip credit available)
2. Duties incidental to tip producing duties
(tip credit only if <20% of overall duties)
3. Duties unrelated to tip producing duties
(no tip credit)

Tipped Occupation – *Fast v. Applebee's* Ruling

- Unworkable result
 - Requires perpetual surveillance
 - Requires hundreds of time entries each day
 - No assurance of compliance because jury decides on case-by-case basis

Where Do We Go From Here?



Where Do We Go From Here?

- If Court of Appeals accepts appeal, briefing and argument (with amicus support) in 2010, decision in early 2011
- If rejects appeal, bench trial in mid-2010

Where Do We Go From Here?

- Applebee's is not alone!
- What can you do?
 - Support trade group efforts
 - Monitor extent of work on ancillary tasks
 - Consider full minimum wage for pre-open and post-close

Questions?

