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Five Rules to Help Employers Avoid Common Mistakes with Their Tipped Employees

Employers who employ tipped employees (e.g., wait staff, bartenders, valets, etc.) are frequently subjected to wage and hour claims or audits by state and federal agencies. Violations are costly because they rarely affect just one employee. For example, an employer may find itself liable for several years of back pay for its entire wait staff, plus statutory damages and attorney's fees.

Often times, violations involving tipped employees are due to a simple misunderstanding of state and federal wage and hour laws. Here are five rules to help employers avoid common mistakes with their tipped employees:

1. **Tips Belong to the Employee.** An employer may not require its employees to turn over any portion of their tips. The only exception is if an employer has a valid tip pooling arrangement, which may not include employees who are not customarily tipped (e.g., cooks, dishwashers, busboys, etc.).
2. **Properly Apply the Tip Credit.** An employer may apply tips towards its minimum wage obligation, which is $7.25 per hour in Wisconsin. Called a "tip credit," a Wisconsin employer may instead pay its tipped employees as little as $2.33 per hour with a maximum tip credit of $4.92 per hour. The employer's payroll records must verify that each tipped employee's wages plus tips equals at least $7.25 per hour for each week in which a tip credit is taken.
3. **Provide Proper Notice Before Using Tip Credit.** Before an employer may take a tip credit, it must provide its tipped employees with the following information: (a) the amount of the cash wage being paid to the employee; (b) the share of the employee's tips the employer will claim as a tip credit; (c) that the tip credit taken cannot be more than the tips actually received by the employee; (d) that the employee is entitled to keep all of his or her tips (unless a valid tip pooling arrangement is in effect); and (e) that the employee must receive proper notice of these tip credit rules prior to the employer applying the tip credit. Wisconsin employers must also obtain, for each pay period and from each tipped employee, a signed declaration stating the amount of the tips received on a daily, workweek or pay period basis.
4. **Use Mandatory Service Charges Properly.** Mandatory service charges (e.g., a service charge of 18% for a party of eight or more) imposed on

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customers may not be considered tips or credited towards the employer's minimum wage obligations unless the service charge is passed on to the tipped employee.

5. **Tip Credit Can Only Be Taken for Time Spent Performing Tipped Work.** If an employee performs both tipped and non-tipped work, the tip credit can only be taken for the time spent performing tipped work. For example, if an employee works four hours as a waitress and four hours as a cook, only the employee's time spent waitressing qualifies for the tip credit. Special rules may apply when an employee is performing minimal non-tipped work that is related to tipped work (e.g., filling ketchup bottles, folding napkins, making coffee, etc.).

If you have any questions about wage and hour laws as they apply to tipped employees, or would like assistance in reviewing your wage and hour policies, please contact Katie D. Triska, Robert S. Driscoll or your Reinhart attorney.

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