

Duff on Hospitality Law

Tip Pooling in Oregon and Washington

By Greg Duff on 11.12.10 | Posted in Food and Beverage

Given the number of questions I've received recently from clients who've heard rumors about tip pooling becoming legal, I thought it time to update everyone. The short answer is (at least for now) that employers in Washington and Oregon **may** initiate mandatory tip pools under certain circumstances.

In a federal appeals court decision issued earlier this year, *Cumbie v. Woody Woo, Inc.*, the Ninth Circuit Court of Appeals rejected a waitress' claim against Vita Cafe in Portland, Oregon that the Cafe's mandatory tip pool violated the federal wage and hour laws because the pool (i) included employees who did not regularly receive tips (in this case, the kitchen employees) and (ii) required the servers to contribute tips far exceeding previously established federal contribution guidelines. In issuing its decision, the appeals court also rejected the Department of Labor's contention that widely known tip pooling restrictions applied regardless of whether the employer takes a tip credit.

So what does this mean for restaurant owners and operators in Oregon and Washington? Here's what we know right now:

Employers in Washington and Oregon may initiate and maintain mandatory tip pools that include employees who don't "traditionally and customarily" receive tips, provided that the employer does not claim a tip credit and pays its employees the higher of the federal or state minimum wage and provided that applicable state law doesn't direct otherwise.

Previous established Department of Labor thresholds for the maximum percentage of tips that employees can be required to contribute to a tip pool (previously, 15%) may be exceeded, but the exact amount is unknown.

Whether mandatory tip pools may include restaurant owners, managers or other supervisory employees is unknown. The *Cumbie* court did not address this issue. Employers who impose tip pools including managerial employees run the risk that a court may find that such pools violate federal law.

The *Cumbie* court's recent decision constitutes federal law, not state law. Washington and Oregon employers must comply with both federal and state wage and hour laws, and the law most favorable to employees always applies. To date, neither Washington nor Oregon courts have addressed the issue of mandatory tip pools under state law. Until their state court says

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otherwise, employers in Washington and Oregon should be able to rely on the *Cumbie* court's decision to support the initiation of a mandatory tip pool.

Notwithstanding the *Cumbie* court's decision, tip credits (as opposed to tip pools) remain illegal in both Washington and Oregon.

Much of the credit for this positive court decision goes to both the [Oregon Restaurant & Lodging Association](#) and [Washington Restaurant Association](#). Both played instrumental roles in financing and otherwise supporting Cafe Vita throughout the lawsuit and both continue to provide their members valuable guidance as members consider how best to implement the *Cumbie* court's decision.

Tags: Association, Cafe, Cumbie, Cumbie v. Woody Woo, Department, Department of Labor, Hospitality, Inc., Labor, Law, Legal, Lodging, Oregon, Oregon Restaurant & Lodging Association, pooling, Portland, Restaurant, restaurants, Tip, Tip pooling, v., Vita, Vita Cafe, Washington, Washington Restaurant Association, Woo, Woody