

Duff on Hospitality Law

## Tip Pooling Remains a Hot Topic

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As many of you will recall, I dedicated two posts earlier this year to tip pooling and Oregon and Washington restaurant owners' ability to share tips with traditionally non-tipped employees - [Tip Pooling in Oregon and Washington, Tip Pooling - UPDATE](#). With the amount of attention that tip pooling continues to receive, I thought it time to enlist my Portland, Oregon partner, Eric A. Lindenauer, the lawyer who actually represented the Portland restaurant owner in the seminal *Cumbie v. Woody Woo, Inc.* decision, to provide a brief summary of the *Woody Woo* decision and recent developments in the ongoing tip pooling saga.

Thank you Eric for updating all of us.

The extent to which an employer can require employees to share tips with non-tipped employees remains a hot topic, especially in the federal Ninth Circuit, which encompasses Alaska, Washington, Montana, Idaho, Oregon, Nevada, California, Arizona and Hawaii.

Under the Fair Labor Standards Act ("FLSA") where an employer claims "tip credit" toward the federal minimum wage, the employer may only require that employees pool tips with other employees who "customarily and regularly receive tips." Assuming an employee is informed of the intent to take tip credit and other requirements are met, an employer can use an employee's tips to offset all but \$2.13 of the federal minimum wage.

In *Cumbie v. Woody Woo, Inc., dba Vida Cafe*, 596 P.2d 577 (9th Cir. 2010), the Court of Appeals held that the FLSA's mandatory limitation on tip sharing to customarily tipped employees applies only when the federal tip credit is claimed. Accordingly, where no tip credit was claimed, a restaurant could require servers to share tips with "back of the house" employees (cooks and dishwashers) who did not customarily receive tips.

The United States Department of Labor ("DOL") has explicitly stated disagreement with the Ninth Circuit's ruling in comments published in the Federal Register accompanying newly promulgated DOL regulations governing tipped employees. According to the DOL regulations "tips are the property of the employee whether or not the employer has taken a tip credit under Section 3(m) of the FLSA." 29 C.F.R. § 531.52. The regulations restrict tip pools to "customarily" tipped employees. Notwithstanding the DOL's position and the new regulations, it is unlikely the DOL can enforce its position in Ninth Circuit states unless *Cumbie v. Woody Woo* is overturned. Accordingly, the battle over tip sharing with non-tipped employees has shifted to state law and state courts.

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Last month a Nevada trial judge ruled that the Nevada State Labor Commissioner erred when he held that a Wynn Resort Ltd. (“Wynn”) tip sharing policy did not violate Nevada state law. The issue is significant in the casino industry, because dealers often receive hefty tips and typically make more than their bosses. Wynn required card dealers to share tips with floor supervisors and pit managers. Clark County, Nevada, Judge Kenneth Cory held that Nevada state statutes prohibited Wynn’s tip sharing requirement. The attorney for the dealers believes if the ruling stands, he may be able to recover up to \$30 million he believes was wrongfully taken from Wynn dealers since 2006. The issue is expected to be ultimately decided by the Nevada Supreme Court.

If you have questions or would like more information on tip pooling or any related tip issues, please don't hesitate to contact [Greg](#).

**Tags:** 29 C.F.R. § 531.52, Back Of The House, Court of Appeals, Cumbie v. Woody Woo, Customarily Tipped Employees, DOL, Federal Minimum Wage, FLSA, Judge Kenneth Cory, Nevada State Labor Commissioner, Nevada Supreme Court, Ninth Circuit, Non-Tipped Employees, Section 3(m), Tip Credit, Tip pooling, Vida Cafe, Wynn Resort Ltd.