Tips on Tip Pooling

By Philip I. Person

The rule relating to tip pooling practices has varied depending on the state and federal circuit where the tip pooling practice has been implemented. Employers and employees alike have sought clarity on if, and how, mandatory tip pooling practices can be implemented.

Section 203(m) of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA), regulates tip crediting in connection with tip pooling practices. "Tip crediting" is the practice by which an employer fulfills part of its hourly minimum wage obligation to a tipped employee by using the employee's tips. Section 203(m) of the FLSA provides that if an employer takes a tip credit, it must (a) provide notice to its employees and (b) allow its employees to retain all of the tips they receive, unless the employees participate in a valid tip pool. Section 203(m) further provides that a tip pool is valid if it is comprised exclusively of employees who are customarily and regularly tipped.

Employers have argued, based upon the express language of Section 203(m), that the FLSA limits only employer-mandated tip pooling practices when linked to a tip credit or sub-minimum wage. For instance, in a 2010 Ninth Circuit opinion, *Cumbie v. Woody Woo, Inc.*, the Ninth Circuit held that that the FLSA does not expressly prohibit an employer from requiring its employees to participate in tip pooling agreements when the employer does not take a tip credit. Stated differently, the Ninth Circuit read Section 203(m) to apply only to employers who took a tip credit and found that the statute was silent with respect to employers who require employees to participate in tip pooling without taking a tip credit.

Cumbie has been cited by 36 federal district courts and circuit courts, 23 of which have been by courts outside of the Ninth Circuit. One judge opined that "the analysis in [*Cumbie*]" is persuasive . . . ."

Just when employers and employees thought they had a grasp on the tip pooling restrictions relating to Section 203(m), the Ninth Circuit and the Department of Labor ("DOL") have now announced a change of course or clarification regarding tip pooling practices.

In 2011, shortly after *Cumbie* and its progeny of cases, the DOL promulgated a rule ("the 2011 rule") that extended the FLSA's tip pooling restrictions to all employers, not just those that take a tip credit. Simply put, under the 2011 rule, a tip pool is valid only if it is comprised exclusively of employees who are customarily and regularly tipped.

Until recently, litigants have challenged whether the DOL had the authority to promulgate the 2011 rule, arguing that the rule was contrary to Congressional intent. In a 2016 opinion, *Or. Rest. & Lodging Ass'n v. Perez*, the Ninth Circuit concluded that (1) the DOL has the authority to regulate the tip pooling practices of employers who do not take a tip credit and (2) the DOL reasonably interpreted Section 203(m). The Court reconciled its prior ruling by explaining that the statute was silent as to employers who do not take a tip credit and, therefore, left room for the DOL to promulgate the 2011 rule.

In light of *Perez*, counsel (both for employers and employees) should advise their clients on the recent tip pooling restrictions. Specifically, counsel and their clients should be aware that, under *Perez*, any tip pool mandated by an employer must include only employees who are customarily and regularly tipped. Whether an employer engages in a tip credit practice has no bearing on whether tip pooling restrictions apply.

Although *Perez* is a fairly recent case in the Ninth Circuit, counsel practicing outside of the Ninth Circuit should analyze the effect *Perez* could have on courts within its jurisdiction. If district courts outside of the Ninth Circuit relied on the Ninth Circuit's analysis in *Cumbie*, they could now adopt the more recent rationale set forth in *Perez*. Conversely, a district court outside of the Ninth Circuit could also reach an opposite conclusion. It could conclude that the *Cumbie* analysis—with its statutory interpretation and discussion of the legislative intent behind Section 203(m)—is more persuasive than the *Perez* analysis and, thereby, decline to find that the DOL had the authority to extend the restrictions set forth in Section 203(m)1. Therefore, *Perez* should be on employment lawyers' radar when analyzing tip pooling issues. ■

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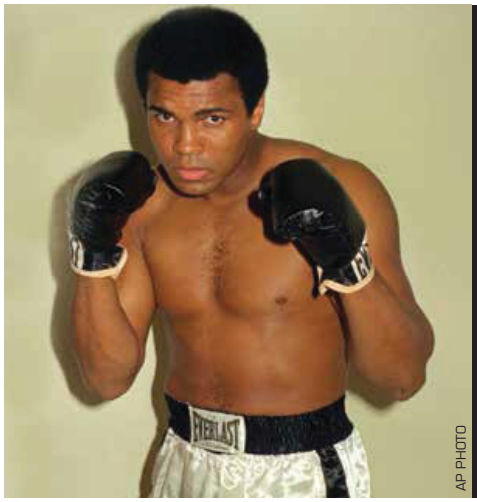

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