Take-Out and Drive-Thru Only: Have Your Tipped Employees Just Become Hourly?

March 26, 2020

Wage Payment Considerations for Restaurant Employers During the COVID-19 Pandemic

In order to combat the spread of COVID-19, many state and local governments have limited restaurants to delivery, take-out, and drive-thru orders only. With these government directives, restaurant employers may be required to convert tipped workers to regular hourly workers.

How should restaurant employers treat at-will employees who convert from tipped employees to purely hourly employees?

The restaurant industry employs more tipped workers than any other industry in the United States. The Fair Labor Standards Act (FLSA) defines tipped employees as those employees who customarily and regularly receive more than $30 per month in tips and requires that employers ensure that those employees receive at least minimum wage.

Under the FLSA, an employer of a tipped employee is only required to pay $2.13 per hour in direct wages if that amount combined with the tips received equal at least the federal minimum wage of $7.25 an hour. Employers may claim a "tip credit" under the FLSA for the difference between the direct wage and the federal minimum wage. However, if the employee's tips combined with the employer's direct wages of at least $2.13 per hour do not equal $7.25 per hour, the employer must make up the difference. Keep in mind that many states require direct wage amounts for tipped employees which is higher than the $2.13 required by the FLSA.

As a result of the COVID-19 restrictions on restaurant operations, restaurant employers may need to convert some of their tipped waitpersons to pure regular hourly workers. Any time a restaurant employer uses a tipped employee in a role where the employee receives no tips at all, the employer is required to pay the employee the full federal minimum wage for all time worked.

Restaurants may also need to use employees in dual tipping and non-tipping roles. For this type of employee, the FLSA permits a restaurant employer to take the tip credit for some time that the tipped employee spends in duties related to the tipped occupation, even if such duties are not by themselves directed toward producing

tips. However, where a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing related duties, no tip credit may be taken for the time spent performing any of the non-tipped duties. The restaurant employer would also have to pay the employee as a regular hourly worker for that time. This principle is especially important in the new COVID-19 business environment. Employers will now likely need to monitor and keep a record of the time spent by their employees based upon the nature of the work performed by their employees (i.e. distinguishing between time spent on tipping and non-tipping roles).

What is the impact of tipping on to-go orders, which may be shared among employees?

Under federal law, tips are the sole property of the employee. Accordingly, when customers tip an employee on a to-go order, the employee must retain all of those tips. Several studies show, however, that only about a third of people tip on to-go orders at restaurants. In addition, tips received on to-go orders are often much smaller than tips received for a sit-down dining experience. As a result, it is important for employers to track employee tips to determine if the FLSA's $30 per month threshold is met.

Additionally, the FLSA allows for valid tip pooling or sharing arrangements. The FLSA does not impose a maximum contribution amount or percentage on valid mandatory tip pools. It is important that restaurant employers clearly communicate tip pooling criteria to all employees. Employers must notify tipped employees of any required tip pool contribution amount and may only take a tip credit for the amount of tips each tipped employee ultimately receives. Note that there has been a significant amount of litigation regarding employers' tip pooling and tip credit notice requirements under the FLSA. Some state laws also slightly vary or add to the federal requirements. As a result, it is important for restaurant employers to consult an experienced employment attorney regarding wage payment and employee notice issues.

As always, the McGlinchey employment team is here to help. Please contact us with any questions on the above topics or employer/employee relations in general. We look forward to helping.

Visit our **COVID-19 Resource Center**.

Related people

Amanda S. Stout