

Labor & Employment Law Daily Wrap Up, EXPERT INSIGHTS—The road to hell is paved with good intentions: top 7 wage and hour mistakes for hospitality employers to avoid, (Jan 19, 2023)

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Innovative solutions to challenges in the hospitality industry might create legal risks for employers unaware of certain wage and hour requirements.

Employers in the hospitality industry have been through it all in recent years – from the devastation of the pandemic to ongoing labor shortages to an impending recession. These challenges and dramatic changes have surely motivated you to come up with creative ways to recruit, retain, and reward employees. Unfortunately, however, your innovative solutions might also create wage and hour risks if you are unaware of certain legal requirements. Indeed, the adage “no good deed goes unpunished” often rings true when it comes to compensating your employees – but we’re here to help. What are the top seven wage and hour mistakes hospitality employers make and how can you avoid them?

1. Donating the Proceeds of The Tip Jar

While the concept is benevolent (hey, who doesn’t like donating to a noteworthy charity?), it’s risky to divert tips that are owed to employees to any source other than the employees themselves. Under federal law, tips are the property of the employees who earn them, and employers are strictly prohibited from keeping these funds (or in this case donating them on behalf of the employee). Employers that donate tips without employees’ consent could be responsible for repaying those tips to the employees plus an equal amount in liquidated damages.

Pro Tip: Maintain a proper tip pool and distribute the funds to all participants in accordance with a tip pooling agreement. You can provide a method for employees to voluntarily contribute funds to an employer-sponsored charity – or a charity of their choice – but you should ensure that it’s truly voluntary. Also, if you would like to highlight a particular charity and want customers to donate, make clear that you are asking for donations for that charity.

2. Including Supervisors or Managers in the Tip Pool

While managers, supervisors, and owners are strictly prohibited from participating in the tip pool, many hospitality employers have managers or supervisors who also work part time as servers. You understandably want all your employees to benefit from the tip pool – and in an effort to comply with the law you may have taken extra steps to ensure supervisory employees clock in as “servers” for those hours so they can participate in the tip pool. These same employees clock in as a manager for their other hours and do not participate in the tip pool during that time. Seems like all requirements are met, right? But alas, these good intentions are a major issue for the Department of Labor, as many managers actually perform managerial duties even when clocked in as a server. However slight this role may be, this has repeatedly been found to be out of compliance.

Consider this: Does your manager still perform managerial duties when acting as a server? Do other employees look to them as an authority? Even if you think you have neatly drawn the lines between what the managers can and cannot do when participating in a tip pool, situations can arise that blur these lines.

Pro Tip: Create a policy barring managers, supervisors, and owners from participating in the tip pool regardless of whether they have dual roles. While the law is not yet settled on this issue, the risk is far too high to take the chance.

3. Including Your Back-of-House Employees in the Tip Pool and Taking the Tip Credit

Tips provide a way to ease the burden of labor costs in the hospitality industry and historically this has helped keep

many businesses afloat. Likewise, many hospitality employers use the tip credit for the same reason. In an effort to spread the wealth and create a more customer focused environment, many hospitality employers have created mixed tip pools that allow back-of-house employees – such as cooks and dishwashers who are not traditionally tipped employees – to share in the tips received by front-of-house employees, such as servers and bartenders.

This generous effort, however, is not without its potential landmines. While federal law allows mixed tip pools, each participant must receive at least the minimum wage. That means employers cannot utilize the tip credit for the servers and other traditionally tipped employees if they are sharing in the pool with non-tipped employees (back-of-house).

Pro Tip: If you have a mixed tip pool (with BOH and FOH), make sure everyone is paid at least minimum wage. Otherwise, limit the tip pool to only tipped employees like servers and bartenders. You should also check the applicable state law, as some states have stricter rules and very specific requirements for tip pooling.

4. Requiring Your Smokers to Clock-Out for Cigarette Breaks

Picture this: Your non-smoking employees complain that your smokers are taking too many smoke breaks. “Why do the smokers get more breaks than me?” they ask. And you agree with them. It’s inherently unfair for smokers to get more breaks than non-smokers. So, you implement a new policy that you think will create some fairness: *All smokers are required to clock out while taking their breaks.* Unfortunately, by doing so, you have created some risk by requiring them to clock out. Fair Labor Standards Act (FLSA) regulations state that rest periods between five and 20 minutes are compensable, meaning any breaks of that length must be paid and on the clock.

Pro Tip: Require your smokers to limit their smoking to when they take the set breaks that all employees are allotted.

5. Not Including Bonuses in the Regular Rate for Your Hourly, Non-Exempt Team Leads

To further sweeten the compensation pot for your hourly team leads, perhaps you pay them a bonus based on performance and sales like you do for your salaried, exempt managers. However, what if you fail to include the bonuses in the team leads’ regular rate for overtime purposes? This results in some legal risks regarding unpaid overtime premiums.

Pro Tip: If you regularly pay bonuses to your hourly, non-exempt employees, you will want to review how frequently you are paying these bonuses, as well as the period they are intended to cover. You should also consult with your favorite FP lawyer to confirm that you are properly calculating the regular rate moving forward. (If you ask extra nicely, you may get a handy reference guide that will walk you through this concept).

6. Not Including Service Charges in the Regular Rate of Pay

It is understood that genuine tips employees receive do not increase their rate of pay for overtime purposes (assuming you are relying on the tip credit). But what about service charges and auto-gratuities? Under federal law, any service charge monies paid by an employer to the employee must be considered wages and can impact an employee’s regular rate of pay.

Pro Tip: If your establishment assesses an automatic service charge and you pay any portion of that amount to your employees, be sure that your payroll system includes those payment in the regular rate calculations. Since this can lead to higher labor costs, consult with your FP attorney about whether the FLSA’s Section 7(i) exemption from overtime requirements is an option for you.

7. Having Your Salaried Exempt Managers Perform Hourly Tasks

When times are hard – and they have been hard on the hospitality industry – employers want to do everything and anything to ensure they are keeping their most loyal people employed. We saw this especially during the pandemic

when managers were staffing makeshift drive through windows and curbside pick-ups, performing maintenance tasks at the restaurant, and engaging in other routine tasks. Albeit this is rooted in the noblest of intentions, the Department of Labor's Wage and Hour Division (the federal agency charged with enforcing the FLSA) may conclude that you lose the exemption for these employees depending on just how much non-exempt work your managers are performing.

To meet the executive exemption, the employee's primary duty must be managing the establishment. While "primary duty" is not necessarily determined by the percentage of time spent on that duty, it is a significant factor a DOL investigator will examine when determining whether your managers are truly exempt.

Pro Tip: You should regularly evaluate and audit your salaried, exempt managers' duties to ensure they are primarily performing management functions. If not, you should consult with your FP attorney regarding whether to convert these employees to non-exempt status.

Conclusion

As you adapt to changing times and think of creative ways to keep your business and your employees thriving, you'll want to be sure that your practices aren't unintentionally running afoul of wage and hour laws.

We will continue to monitor wage and hour developments and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, any attorney in our [Wage and Hour Practice Group](#), or any member of our [Hospitality Industry Team](#).

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