

# PUBLICATION

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## Application of the Tip Credit and Potential Retaliation Implications

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The Fair Labor Standards Act (FLSA) generally requires employers to pay a specified minimum wage to its employees and overtime for all hours worked over 40 in a work week. For restaurants and other hospitality-oriented businesses, the FLSA permits employers to pay a minimum wage of \$2.13 per hour to employees engaged in a tipped occupation as long as the employees' tips make up the difference between the \$2.13 hourly wage and the current minimum wage, which is \$7.25 per hour. This \$5.12 difference (\$7.25 – \$2.13) is commonly referred to as a tip credit because it allows the employer to avoid a larger payment to tipped employees. While the concept itself is fairly straightforward, complications can arise when employers attempt to make use of a tip credit. According to the FLSA, a tip credit does not apply to every employee who has ever received a tip. Rather, it only applies to an employee engaged in an occupation in which he or she would customarily and regularly receive more than \$30 a month in tips, and as one recent case demonstrates, the tip credit may not apply to all activities by an employee who receives the requisite monthly amount in tips.

At issue in a recent lawsuit against Applebee's International was how to apply properly a tip credit to employees whom both sides agreed were tipped employees. *Fast, et al. v. Applebee's Int'l, Inc.* In that case, 5,543 current and former Applebee's servers and bartenders filed a class action, alleging that the restaurant chain had violated the FLSA's tip credit policy. Specifically, the plaintiffs alleged that Applebee's had violated the Department of Labor's (DOL) interpretation of its regulation, which the Eighth Circuit Court of Appeals deemed reasonable and entitled to deference. According to the DOL, employees who spend substantial time (defined as more than 20 percent) performing related but nontipped duties should be paid at the full minimum wage for that time without a tip credit. In keeping with this interpretation, the Eighth Circuit affirmed a denial of summary judgment thereby ruling that Applebee's may have violated the FLSA by applying a tip credit to hours that its employees spent performing nontipped duties.

In another recent wage dispute, a group of current and former employees of eight different restaurants owned by Mario Batali and Joseph Bastianich filed a lawsuit, alleging that their employers paid them less than the minimum wage yet improperly retained a portion of the employees' tips. *Stephanie Capsolas, et al. v. Pasta Resources, Inc., et al.* Specifically, the plaintiffs alleged that four to four and one-half percent of the restaurants' wine sales were deducted from the employees' tip pool and that, therefore, the employer could not claim the tip credit. The plaintiffs were told that the deduction was for a number of different reasons, including for wine research and a payment to the house. The district court certified a collective action consisting of tipped employees at all of the related restaurants, but has not yet ruled on the merits.

Since the filing of their lawsuit, the plaintiffs maintain that they have been subject to retaliation. Among other forms of reprisal, the plaintiffs alleged that during an employee meeting, Bastianich stated that the plaintiffs' lawyers rather than the plaintiffs themselves would benefit from the suit and that he would fight the employees bringing the action. In response, the plaintiffs requested that, as a corrective measure, a notice of the pending suit be posted in the Batali-Bastianich restaurants. Although the court ultimately declined to pursue this course of action, it stated that it was troubled by the retaliation reported and approved mailed notices to current and former tipped employees inviting them to join in the lawsuit.

What employers should take away from the Applebee's International and Batali-Bastianich cases is that any allegations regarding the improper application of the FLSA's tip credit provision should be taken seriously—

very seriously. Failure to properly apply the tip credit provision can cost employers thousands, even hundreds of thousands, of dollars in additional minimum wage and overtime payments and legal fees, and can injure a business's reputation. In short, employers will be well-served if they take the time to understand when it is proper to make use of a tip credit and how to apply it properly. An employer also should be careful as to how it responds to allegations of failure to pay minimum wage and overtime properly, due to the FLSA's anti-retaliation provisions. As the *Applebee's International* and *Batali-Bastianich* cases make clear, seeking competent legal advice on this issue can save an employer a lot of time, money and heartache.

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