Legal Update Article

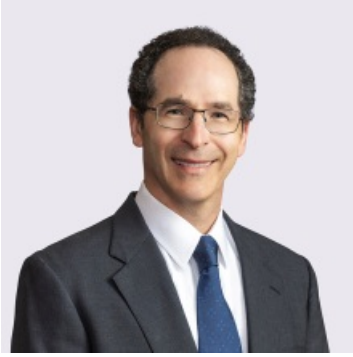
Connecticut Appellate Court Finds No Private Right of Action for State Tip Recordkeeping Errors

By Allison P. Dearington & David R. Golder

June 12, 2023

Meet the Authors

Allison P. Dearington
Principal and Office Litigation Manager
(860) 331-2585
Allison.Dearington@jacksonlewis.com



David R. Golder
Principal
(860) 522-0404
David.Golder@jacksonlewis.com

Related Services

Class Actions and Complex Litigation
Litigation
Wage and Hour

There is no private right of action for violations of a recordkeeping regulation for restaurant industry employers that take the tip credit against the minimum wage for tipped employees, the Connecticut Appellate Court has held under state law. ***Nettleton v. C & L Diners, LLC***, No. AC-44554 (Conn. App. June 6, 2023).

The Appellate Court also ruled that a fact-intensive analysis is required to determine whether a tipped employee's duties are incidental to their role as a server or, rather, must be counted as "nonservice" work for tip credit purposes.

The Law

Connecticut § 31-60 (b) allows restaurant employers to take a tip credit against the state's hourly minimum wage rate for employees who "regularly and customarily" receive tips from customers.

Section 31-62-E3 ("E3") of the state's minimum wage regulations sets forth recordkeeping provisions for employers that take the tip credit. Prior to September 24, 2020, the regulations provided that employee gratuities must be "recorded on a weekly basis" and that employers claiming the tip credit must "obtain a weekly statement signed by the employee attesting that he has received in gratuities the amount claimed as credit for part of the minimum fair wage."

After the events that gave rise to this case, Connecticut's tip recordkeeping regulation was amended on September 24, 2020. Now, restaurants may record gratuities on a daily, weekly, or biweekly basis.

Background

The defendant restaurant requires servers to record the amount they earn in tips at the end of each shift. Servers record their cash tips in the digital payroll system and confirm their credit card tips (which the digital system automatically tracks). Servers also sign and verify a biweekly tip credit statement reporting the amount of tips they earned in that pay period.

A former server sued the restaurant, contending it was not entitled to take the tip credit against the minimum wage rate because its practice of maintaining daily and biweekly tip credit records, but not weekly records, did not comply with E3.

Recordkeeping Error Not Actionable

The Connecticut Appellate Court reversed the trial court's judgment. It ruled that, although the restaurant violated the tip credit recording regulation, "[T]he full regulatory scheme does not suggest an intent to impose mandatory requirements as to the format of the required records."

The Appellate Court explained that the underlying purpose of the tip credit regulation was to ensure proper payment of minimum wage to tipped workers, not to mandate the specific form in which tip records are kept.

It also emphasized that the employee did *not* allege that she ever was paid less than the applicable statutory minimum wage. To find the recordkeeping provision mandatory would have meant a $10,000 windfall for a purely technical violation.

Consistent with Connecticut Supreme Court precedent, the Appellate Court would not interpret the regulation to allow a windfall for a purely technical violation with no wage harm.

"Nonservice" Work a Fact-Intensive Inquiry

The employee also claimed the restaurant did not segregate her time spent on "service" and "nonservice" duties, in violation of § 31-62-E4 (which has since been repealed).

Prior to September 24, 2020, the regulations did not identify any specific tasks that could be considered service work or "incidental" to service work. Rather, the regulations defined service duties as those that "relate solely to" serving food or drinks to seated customers or are "incidental to" or "related to" serving food or drinks to seated customers. The dispute lied in whether certain tasks are incidental to or related to serving food or drinks, for which the tip credit could be taken, or nonservice work, for which the full minimum wage had to be paid.

The trial court ruled that all "side" work performed "away from the tables" was nonservice work as a matter of law.

The Appellate Court rejected this conclusion. It found, based on the specific evidence as to the plaintiff at issue, a few tasks (such as preparing food or handling takeout orders) were nonservice work as a matter of law. However, it held that for most tasks (like making coffee, stocking the salad bar, or filling ketchup bottles), a complex, fact-intensive inquiry is required to determine whether they are incidental to or related to serving food or drinks to patrons (and, therefore, can be counted as service work) or segregable as nonservice duties.

Chief Judge William Bright, writing for the court stated:

The ultimate determination involves a fact intensive inquiry as to the nature of the task, where it is performed, and its relation to the service of patrons at tables and booths. Thus, in many cases, whether the tasks performed by a server are service duties or incidental to such service cannot be determined as a matter of law.

***

Contact a Jackson Lewis attorney if you have questions about the impact of this decision on Connecticut restaurant employers or the application of Connecticut's tip regulation to your business.