

Restaurant Newsletter

[Presented by the Law Offices of Ashley A. Baron]

Legal News for the Restaurant Ind.

AVOIDING IMMIGRATION PROBLEMS

The Department of Homeland Security unveiled in April of this year, what it refers to as “a comprehensive immigration enforcement strategy for the Nations interior” that includes a “strategic shift” in its attitude concerning work-site enforcement and compliance programs. Homeland Security is now sending out formal, three day “Notice of Inspection” forms to conduct I-9 audits. So what do you need to know about I-9's and what to do if you are audited?

First, Federal law requires you as an employer to verify the identity and work authorization of all persons who you hire. This is accomplished by completion of the I-9 form. Employers are required to keep a completed I-9 form on file for each of their current employees who were hired after November 7, 1986. Section 1 of the I-9 must be completed at the time of hire and Section 2 must be completed and signed by the employer (or his representative) within 3 days of the hire.

I-9's must be retained for 1 year after the employee is terminated, or for at least 3 years from the date of hire,

whichever is later.

The Department of Homeland Security's Immigration and Customs Enforcement Agency (ICE), formerly the INS, has the authority, without the necessity of a subpoena, to inspect any employer's I-9 forms to verify compliance and to check its accuracy. This inspection is called an I-9 audit.

ICE cannot conduct a surprise audit. An investigator could show up unannounced at a restaurant, but the investigator can not demand an immediate production of I-9 records. Under the law, an employer is entitled to receive a 3 day notice prior to the I-9 audit. The ICE, in the past, has been willing to negotiate for longer time periods for the audit, up to 10 days after notice. Employers who are the subject of an I-9 audit have the right to be represented by legal counsel. It is always advisable to contact an attorney if you are served with a notice of audit and have the attorney review your I-9s prior to the audit and be represented at the audit.

If any deficiency or illegality is found, ICE will issue a Notice of Intent to Fine (NIF) to the employer. Form I-9 paperwork violations are subject to fines of between \$100 and \$1,000 dollars per infraction. More serious violations, e.g., hiring unauthorized aliens, are subject to steeper fines. Arrest and imprisonment are possible for those who are found to have engaged in a regular pattern or practice of willful violations. An employer has 30 days to contest an NIF by requesting a hearing before an administrative law

judge. NIF penalties can be reduced by mitigation factors such as size of the employer, the employer's good faith, a good compliance history, the seriousness of the violation at hand, and whether the employee listed on an incomplete or inaccurate I-9 is actually authorized to work.

What proactive measures should be taken to avoid an unintentional violation? It is highly recommended that each employer conduct a regular internal audit of it's records to re-verify the legitimacy and appropriateness of the documents on file, to confirm that all I-9 forms are accurate and complete, and to assure that any temporary work authorizations have not expired.

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TIPS & TIP-POOLING

California Labor Code Section 351 et seq prohibits employers from taking any portion of a tip left for servers. This prohibition also prevents tip-pooling policies that require employees to distribute or share any portion of their tips with any owner, manager or supervisor. Thus, no one in a supervisory capacity can collect, take or receive any portion of any gratuity that is paid given to or left for an employee by a patron of the business.

The employer, under the law revised after Ashley A. Baron won on this question in the trial court, can not even deduct from the tip the portion charged by a credit card service provider for a tip placed on a credit card. Thus, if the owner is paying 3% of the credit charge and a \$50 tip is left, even though the employer is paying 3% of that \$50 or \$1.50 to the credit card service provider he must nonetheless pay the employee the entire \$50 tip. The Orange County Superior Court ruled against such fuzzy logic reasoning that the patron could choose to leave cash for a tip or to put the tip on a credit card and would be aware that the credit card charged a service fee and the tip would be a little less because of the fee. However, the statute was amended almost immediately after the ruling to force the employer to bear the burden of paying the credit card service fee on the tip portion.

The law has deemed the tip left by a patron to be the "sole property of the employee or employees to whom it was paid, given or left for..." This is not to say that all tip-pooling policies are illegal. Many tip-pooling policies are legal under the California law.

A distinction has been made between tip-pooling policies which

require employees to share their tips with supervisors and those that require tip sharing with co-workers who are not supervisors. A restaurant may have a policy that requires servers to share tips with bussers, maitre-d's, barbacks, or even bartenders so long as those employees who the server is required to share the tips with do not have the authority to hire or discharge any employee or to supervise, direct, or control the acts of employees. If you choose to set up a tip-pooling policy, it should be done in writing and presented to servers at the time of employment and they should be required to sign an acknowledgment of that policy so they do not later make a claim that they were unaware of it.

The U.S. Department of Labor has recently held that under federal law restaurants cannot deduct uniform laundering costs from wait staff pay. The Wage and Hour Opinion Letter, FLSA 2006-21, 6/9/06, stated that "no portion of an employee's tips may be kicked back to the employer to cover the cost of uniform laundering," and "even if the tips actually received exceed the maximum tip credit the employer needs to claim toward payment of the minimum wage, these excess tips are not deemed to be wages for purposes of the FLSA."

A related area to tips and tip-pooling is the service charge. The designation of a portion of a banquet or catering check as a service charge changes it from a tip and renders it not subject to the law regarding tipping. This prevents problems with taking all or a portion by management. Thus, if all banquet or cater contracts contain a 15% service charge, a portion or all of that charge can be paid to supervisory personnel or the owner. Because the amount is not voluntary and not left at the end of the meal to reward the server it falls outside of the tipping and tip-pooling criteria. However, if tips are left for the servers or bartender by guests at the banquet or catered event, the employer must treat them separate

from the service charge and allow servers to keep them.

Some companies take the entire service charge for the owner to compensate the owner for wear and tear on and breakage of equipment. Some companies take a percentage of the service charge, pay a percentage to the banquet manager, sales manager or banquet captain and divide the remaining portion between the servers and bartenders who work the function. The distribution of any of the service charge is at the discretion of the owner, unlike the tip.

California employers should be careful with policies regarding tips, tip-pooling and service charges because while servers will probably not challenge the employers policies, the California Labor Commissioner scrutinizes these areas carefully. Should the Labor Commissioner find that employees were not properly being paid tips the award of tips, interest and penalties can be extremely expensive.

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