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Employment Law Alert

August 18, 2010

California Supreme Court Says Employees Can't Sue for Labor Code Section 351 Tip Violations

In a new decision, *Lu v. Hawaiian Gardens Casino, Inc.*, No. S171442 (Aug. 9, 2010), the California Supreme Court has ruled that Labor Code § 351 -- which, in relevant part, provides that tips are the "sole property" of the employees who receive them -- does not create a private cause of action (*i.e.* right to sue) for employees whose tips are misappropriated. The plaintiff in this case sued his employer under section 351 contending that the employer violated the statute by requiring him to contribute a percentage of his tips to a pool to be distributed among various employees. Two prior Court of Appeal decisions had reached conflicting results on whether section 351 supports a private right of action. *Lu* resolves this conflict, and as a result of the new ruling, employees are now foreclosed from bringing individual or class action lawsuits under section 351.

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The Court explained that a statute may expressly provide for a private right of action, or its legislative history may indicate the Legislature's intent to create such an action. In the case of section 351, the Court ruled that the statute's language did not establish a private right of action. Rather, section 351 merely creates employer liability for violations of the statute and authorizes the Department of Industrial Relations to enforce its provisions. After summarizing section 351's legislative history, the Court further concluded that the Legislature's "ultimate goal" was to prevent employers from benefiting from tips "by crediting an employee's tips against any wages earned."

A few other aspects of *Lu* are worth noting. In particular, the Court observed that although section 351 does not create a private right of action, an employee may have other remedies if gratuities are misappropriated, such as a common law action for conversion (the civil counterpart to theft).

Also, *Lu* leaves open the question of whether tip pooling arrangements are permissible under section 351, as the Court declined to weigh in on this issue. For now, employers that require tip pooling should make sure that they are following current best practices, keeping in mind that tip pooling arrangements will be closely scrutinized. The arrangement must be limited to employees in the chain of service, such as a busboy, bartender, or hostess who directs a customer to a table; owners, managers, and supervisors (in most

instances) cannot share in tips; and the distribution of pooled tips must be fair, and there must be a reasonable relationship between the tip distribution and the degree to which the employee or category of employee provides service. For example, in an earlier case, a California court approved a pooling arrangement that distributed 80 percent to waiters, 15 percent to busboys, and 5 percent to bartenders.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about this new development or your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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