

# Hospitality Industry Quarterly

## Labor and Employment Law Report

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### **NLRB Holds that Prohibiting an Employee from Wearing a Union Button in Public Areas of the Hotel does not Violate the Act**

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The National Labor Relations Board upheld the ruling of an administrative law judge that a hotel did not violate Section 8(a)(1) of the Act when it prohibited an employee from wearing a union button in hotel public areas. *Starwood Hotels & Resorts Worldwide, Inc., d/b/a W San Diego* (NLRB No. 24) San Diego, CA Sept. 29, 2006.

The majority also reversed the judge's finding that the hotel violated Section 8(a)(1) of the Act by prohibiting the same employee from wearing a union button in nonpublic areas.

Citing *Pathmark Stores, Inc.*, 342 NLRB 378, 379 (2004); and *Alba Plastics*, 335 NLRB 923, 924 (2001), the Board wrote that an employer may lawfully restrict the wearing of union insignia where "special circumstances" justify the restrictions. A unanimous Board reversed the judge's finding that the hotel violated Section 8(a)(1) by prohibiting another employee from wearing union stickers in the hotel kitchen, a nonpublic area. The Board explained that health and safety concerns may constitute

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### **California Court Holds Karaoke Disc Jockey Must Arbitrate Bias Claims Against Restaurant**

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The U.S. District Court for the Northern District of California granted a restaurant's motion to compel arbitration in a dispute with the restaurant's karaoke disc jockey. The court reasoned that although the arbitration agreement requiring the disc jockey to arbitrate sex and race discrimination claims was procedurally unconscionable, the agreement was not substantively unconscionable. *Miyasaki v. Real Mex Rests. Inc., d/b/a Acapulco Santa Clara*, N.D. Cal., No. C 05-5331, 8/17/06.

The Court rejected the arguments articulated by the disc jockey, Margaret Miyasaki, that the agreement was one-sided and that the restaurant had the burden to show that both the appearance as well as the effect of the agreement was bilateral. The Court also rejected Miyasaki's argument that the agreement unfairly restricted her ability to conduct discovery and required her to bear the cost of producing live witnesses to testify at the arbitration.

Upon commencing her employment at Real Mex's Acapulco Restaurant in Santa Clara, Calif., Miyasaki

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special circumstances which justify the restriction on the employees’ right to wear union insignia, i.e., the danger that loosely-attached stickers would fall into the food or onto food preparation surfaces.

The judge found that interference with the hotel’s public image justified the no-button order while in-room delivery employees were in public areas where they would come in contact with guests. The majority noted that the button would have interfered with the Hotel’s use of the particular in-room server uniform (professionally-designed all-black shirt, slacks, and apron) to create a special atmosphere for hotel customers.

Member Liebman dissented from the majority opinion that the hotel had established “special circumstances” justifying its ban on wearing union buttons in public areas. She stated that the hotel submitted no evidence demonstrating that the Union’s 2-inch square button would significantly detract from the hotel’s efforts to create a “wonderland” atmosphere and that the hotel failed to carry its burden of demonstrating that the employees’ wearing of the Union’s button on their uniforms in public areas could interfere with the creation of that atmosphere.

Chairman Battista found that the hotel demonstrated a different set of special circumstances than was articulated by the majority. He explained that requiring the in-room delivery employees to remove the union button each time they entered a public area was impractical and this impracticality justified the order prohibiting such employees from wearing the button in non-public, as well as public, areas.

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was told it was a condition of employment to sign the company’s dispute resolution agreement. She signed the agreement as well as a form acknowledging her receipt of the company’s employee handbook, which included a dispute resolution policy.

The agreement provided that Real Mex and the employee “mutually agree to resolve by mediation and binding arbitration any claim” under federal or state law that would otherwise be resolved in court. Claims for employees’ compensation and unemployment benefits are excepted from coverage. The arbitration agreement covered claims for discrimination, harassment, retaliation, breach of contract, torts, unpaid wages or benefits, trade secret violations, unlawful competition, and breach of fiduciary duty.

The agreement provided that arbitrations would be governed by the American Arbitration Association’s national rules for the resolution of employment disputes. Under its Rule 7, the arbitrator has “the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.” Under Rule 25, the arbitrator is also authorized to consider witness testimony in the form of an affidavit, and pursuant to Rule 39, the party calling a witness must pay witness expenses.

The Court applied state contract law to determine whether the arbitration agreement was enforceable. The Court explained that “[u]nder California law, an arbitration agreement is invalid as unconscionable only if it is both procedurally and substantively unconscionable.” The Court found the agreement to be procedurally unconscionable because it was “a contract of adhesion:” a form contract drafted by the company and offered on a take-it-or-leave-it basis.

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Miyasaki argued that the agreement is substantively unconscionable because the terms are one-sided. The Court cited *Armendariz v. Found. Health Psychcare Servs. Inc.*, 6 P.3d 669, 83 FEP Cases 1172 (2000) in explaining that there are “two situations in which arbitration agreements between employers and employees might lack the requisite degree of bilaterality to justify their enforcement.” One situation involves an agreement that specifically exempts the employer from arbitrating any claims it may have against the employee, while the other situation arises when an agreement, “even if it purports to apply to both parties,” specifically excludes certain types of claims that would only be brought by the employer.

*Armendariz* stated that a unilateral agreement is not unconscionable if the employer provides a reasonable justification. The Court explained that “*Armendariz* attaches a rebuttable presumption of unconscionability to arbitration agreements that are either explicitly or implicitly non-mutual.” The Court found that the Real Mex agreement “is bilateral on its face and it specifically applies to any trade secret claim” that the company might have against an employee, providing “the requisite ‘modicum of bilaterality.’”

The Court further rejected Miyasaki’s argument that Real Mex was required to show that the arbitration agreement was bilateral in effect as well as appearance under the Ninth Circuit’s decision in *Ingle v. Circuit City Stores Inc.*, 328 F.3d 1165, 91 FEP Cases 1426 (9th Cir. 2003). The Court explained that to the extent that *Ingle* stood for that proposition, it is considered dicta and not binding authority.

Miyasaki further argued that the arbitration agreement was unconscionable because the incorporated AAA employment dispute rules limit the procedural remedies that would otherwise be available in court and shift arbitration costs to the employee. Miyasaki argued that Rule 7 “is clearly an extreme limitation of the discovery that would be available in a court proceeding.” The Court rejected this and found the rule’s limitation of discovery to what “the arbitrator considers necessary to a full and fair exploration of the issues in dispute,” places no explicit limits on discovery, such as a cap on the number of depositions and “does not obviously deprive Miyasaki of her ability to develop her case in arbitration.”

The Court further rejected Miyasaki’s contentions that Rules 24, 25, and 39 “grossly favor” the restaurant

and that Rules 25 and 39 have the effect of depriving her “of the benefit of live cross-examination [of witnesses] as would be available in federal court unless she is willing to bear the expense of producing Real Mex employees as witnesses.” The Court explained that although the arbitrator is authorized to consider affidavit testimony, the rules require the arbitrator to “give it only such weight as the arbitrator deems it entitled to after consideration of any objections made to its admission.”

The Court rejected the argument of unfair cost to Miyasaki based on the terms of the arbitration agreement which require the restaurant to pay most of the arbitrator’s fees the employee to “pay only an amount equal to court fees.” The Court noted that Miyasaki failed to provide any evidence to support her contention that the cost of producing witnesses would preclude her from vindicating her rights. The Court also explained that the arbitration agreement did not unduly restrict her ability to conduct discovery because Miyasaki would have had to bear the cost of deposing the restaurant’s witnesses in a court case, unless she prevailed on the merits of her claims.

The Court also noted that Rule 34(d) of the AAA employment dispute rules authorizes the arbitrator to award “any remedy or relief that would have been available to the parties had the matter been heard in court” and to assess expenses “in favor of any party.”

Finally, Miyasaki argued that the time limits in the arbitration agreement, which provide 30 days to resolve the dispute followed by 30 days for nonbinding arbitration, effectively shorten the statute of limitations for bringing Title VII claims. The Court explained that “[a]pparently, Miyasaki suspects that because no mediation occurred in this case, Real Mex will argue before the arbitrator that she cannot proceed in arbitration.” The Court concluded the arbitrator should decide the issue.

The Court stayed the case, rather than dismissing it, and said: “If, *and only if*, the arbitrator interprets the [agreement] in a manner that time-bars Miyasaki’s claims, the court will entertain a motion for reconsideration by Miyasaki, *provided* that such motion shall not attempt to re-litigate any other ruling in this order.”

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*NEWSWORTHY*

## Three States Raise Minimum Wage

State governments in California, Florida, and Illinois have all raised their minimum wages in recent months.

California Gov. Arnold Schwarzenegger signed into law a bill (A.B. 1835) that increases the state minimum wage from \$6.75 an hour to \$8 an hour by Jan. 1, 2008. The wage will be increased in two increments. The first increase of 75 cents an hour was effective in January 2007, and the second increase of 50 cents an hour will be effective in January 2008.

Schwarzenegger vetoed bills to increase the minimum wage in each of the past three years, but said he signed A.B. 1835, sponsored by Assembly member Sally Lieber (D), because he stated that the economic conditions were right. "Raising the minimum wage is something I have wanted to do for a long time and I am happy that this year, we have the right bill and the powerhouse economy we need to get this done," Schwarzenegger said in a press release.

In 2008, when the second increase goes into effect, California and Massachusetts will have the highest state minimums in the nation, at \$8. The Massachusetts Legislature July 31 overrode the veto of Gov. Mitt Romney (R) to enact the state's new minimum rate. Only San Francisco's current city-mandated minimum wage of \$8.82 an hour is higher, and that rate is indexed to inflation.

Effective Jan 1, 2007, Florida's minimum wage increased to \$6.67 from its former rate of \$6.40 per hour. Florida's minimum wage, which applies to employees covered by the federal minimum wage under the Fair Labor Standards Act, is indexed to inflation. Also effective Jan. 1, 2007 was an increase from \$3.38 to \$3.65 per hour minimum wage for tipped employees meeting eligibility requirements for the tip credit under the FLSA.

Florida employers may count tips actually received as wages under the federal law, but they must pay tipped employees a direct wage in an amount equal to the minimum wage of \$6.67 per hour minus \$3.02, the 2003 tip credit existing under the FLSA, or a direct hourly wage of \$3.65.

Effective July 1, 2007, the minimum wage in Illinois will rise from \$6.50 an hour to \$7.50 per hour with additional increases to \$8.25 per hour over the next four years under leg-

islation (Senate Bill 1268) signed by Gov. Rod Blagojevich. According to the Illinois Department of Labor, the state will have the sixth highest minimum wage in the country.

Under the new legislation the minimum wage will increase to \$7.75 per hour on July 1, 2008, \$8.00 per hour on July 1, 2009, and \$8.25 per hour on July 1, 2010. The legislation permits employers to pay a training wage of 50 cents per hour less than the minimum wage during the first 90 days following a new employee's hiring date. The bill also permits a wage rate of 50 cents per hour less than the minimum wage for employees under the age of 18.

The governor said the new law would benefit 647,000 employees throughout Illinois. Research completed by the Economic Policy Institute and Voices for Illinois Children indicates that more than half of those affected are full-time adult employees.

"One of the best things we can do as state government is to help make sure people who work hard all day, make enough to live on," Blagojevich said in a statement. "Thousands of hard working Illinoisans benefited when the minimum wage went up to \$6.50 an hour. But it's not enough anymore. Raising the minimum wage again will make it a little easier for thousands of families to pay the bills, put food on the table or buy clothes for their children."

Chicago Mayor Richard Daley applauded the minimum wage law, calling it "my top priority in the fall session of the Illinois General Assembly." Over the summer, Daley vetoed a Chicago City Council ordinance that would have created a minimum wage of \$10 per hour for large retailers such as Wal-Mart, Target, and Home Depot. Daley complained that the measure would have driven large-scale retail development out of the city. Instead, he campaigned for a statewide increase in the minimum wage as a more equitable scheme.

"Low-income working families are among the people who deserve our support the most, and I think every caring person would agree they're entitled to a raise," Daley said.

In a statement, the Illinois AFL-CIO applauded the governor's leadership on the minimum wage issue and

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*BARGAINING DEVELOPMENTS*

## **Union Members At San Francisco Hotels Approve New Agreement**

Members of UNITE HERE Local 2 approved a new contract by a 1574 to 16 vote that provides raises of up to \$3 per hour over the next three years for 4,200 employees at 13 San Francisco hotels represented by the San Francisco Multi-Employer Group: Crowne Plaza San Francisco Union Square; Fairmont San Francisco; Four Seasons San Francisco; Grand Hyatt San Francisco; Hilton San Francisco; Holiday Inn Civic Center Hotel; Holiday Inn Express & Suites Fisherman's Wharf; Holiday Inn at Fisherman's Wharf; the Palace Hotel; Hyatt Regency San Francisco; Intercontinental Mark Hopkins San Francisco; Omni San Francisco and Westin St. Francis. The new pact is retroactive to Aug. 14, 2004, and runs through Aug. 14, 2009. The agreement comes two years after a two-week strike at four hotels turned into a seven-week lockout at all the hotels that bargain together as the San Francisco Multi-Employer Group.

Under the new contract, non-tipped employees will receive raises up to \$3 per hour over the next three years and 60-cent-per-hour retroactive pay for hours worked from Aug. 14, 2004, through Aug. 13, 2006. Tipped employees will receive \$1.50 hourly raises over the next three years and 50-cent-per-hour retroactive pay.

The contract also provides for increased health and pension benefits. Employers will pay \$415 in increases over the life of the contract to health and welfare, and eligibility and employee co-pays will remain unchanged. The pact doubles the annual prescription drug cap to \$4,000. The agreement

also provides an \$85 increase in monthly pension contributions over the life of the contract, to \$208.33 per month.

Other provisions include bereavement leave for domestic partners and medical benefits for employees who are on military leave.

Notably, the contract also includes a provision stating that construction contracts worth more than \$2,000 "involving the renovation or painting of the hotel, performed at the hotel, shall be done only by employees of the Employer or of contractors who are covered by a collective bargaining agreement." The contract is believed to be the first in the country to provide that any hotel construction work will be performed by union employees or nonunion employees receiving prevailing wages.

The contract includes successorship language, binding a successor hotel operator and owner to hire all employees with their original hire dates and retain the contract without modification or amendment. The contract also requires hotels to recognize Local 2 when a majority of employees sign representation cards. The agreement also covers newly acquired or newly developed properties in San Francisco and San Mateo counties owned and/or operated or managed by either San Francisco Multi-Employer Group operators or their owners. The San Francisco International Airport and parts of Silicon Valley are located in San Mateo County, where Local 2 represents employees at about half of the properties.

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the General Assembly's support. "The Illinois AFL-CIO praises those General Assembly members who supported this legislation," the labor federation stated. "It was the moral thing to do and will give hard-working, low-wage employees a financial boost as well as a morale boost."

AT THE BOARD

## NLRB Holds Company's Promises to Increase Wages While an Election Petition is Pending Were Lawful

The National Labor Relations Board held that a promise by a company to raise wages at two of its hotels due to concern that a union organizing drive at a third property might spread did not unlawfully interfere with the right of employees to unionize. *Field Family Associates, LLC c/b/a Hamton Inn NY-JFK Airport*, 348 N.L.R.B. No. 2 (8/31/06 [released 9/6/06]).

The Board majority noted that precedent under the National Labor Relations Act establishes that an employer would violate Section 8(a)(1) of the act by promising wage increases while an NLRB election petition was pending or before NLRB proceedings had commenced if the employer was reacting to an awareness that union activity had started.

However, the majority said it was not a violation of the law for a nonunion employer to improve working conditions “in an attempt to reduce the general appeal of unionization when no union is actively organizing.” The majority further explained that the law makes a “clear and appropriate demarcation between a general desire to remain nonunion and a specific intent to interfere with an ongoing campaign.”

The Field family organization owned seven hotels, including three in the New York area. In March or April 2004, the New York Hotel and Motel Trade Council began organizing employees at Field's Crowne Plaza hotel at LaGuardia Airport. Field knew of the Crowne Plaza campaign, which resulted in an election win by the union in May, 2004.

In late April, Field retained a labor consultant to meet with employees at its two hotels near Kennedy Airport, a Holiday Inn and a Hampton Inn. The consultant showed employees a video presentation about unionization, and addressed employees' concerns.

A number of employees told the consultant they were concerned about wages, and on May 25, Field announced in a meeting to the JFK-area employees that they would receive wage increases and improvements in benefits. After the announcement, some employees began to chant “union, union.”

Field claimed that the chanting by employees provided the firm's first knowledge of union activity at the Hampton Inn or

a nearby Holiday Inn and no evidence was presented to establish that union leafleting or other activity would have signaled the existence of a campaign at the JFK hotels before the May 25 incident. In reversing an administrative law judge, the panel majority said “the judge's speculation . . . does not substitute for the required proof.”

The majority said that if the NLRB found an employer's “correctly anticipating union activity” a violation of the NLRA without proof that the employer knew of an ongoing union campaign, “the result would effectively prohibit nonunion employers from improving working conditions in hopes of diminishing the appeal of unionization generally,” and would not, in the majority's view, be consistent with the NLRA.

“[T]o find an employer's promise of economic benefits unlawful,” the majority wrote, “the Board must focus on whether the [employer] intended to interfere with actual union organizational activity among its employees, rather than whether the [employer] wanted to stay ‘one step ahead’ of the union by diminishing the appeal of unionization.” Because the Board's general counsel had not proven that Field executives knew of union activity at the Hampton or Holiday Inns when it promised to raise employee wages, the majority concluded that promise of wage and benefit increases did not violate the NLRA.

In dissent, Member Wilma B. Liebman noted that in *NLRB v. Exchange Parts*, 375 U.S. 405, 55 LRRM 2098 (1964), the Supreme Court focused on the employer's purpose for a wage increase and the effect on employees. She explained: “The inference that employees suffer when they hear the promise of benefit does not depend on what the employer knows.” She further reasoned that if the employer was motivated by a desire to prevent unionization and its employees were in fact organizing the employer's knowledge was “immaterial.”

Liebman concluded that she would find an employer's promise of wage or benefit increases were unlawful whenever (1) the promise was motivated by a desire to prevent unionization, (2) organizing was actually under-

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## VERDICTS AND SETTLEMENTS

## Hostess awarded \$4 Million For Sexual Harassment And Assault

Hostess Eftehea Leontaritis was awarded \$4,000,000 in Los Angeles Superior Court for sexual harassment and assault by the owner Taverna Tony, a popular restaurant in Malibu, California. Leontaritis filed a claim against the restaurant's owner for sexual harassment and assault, alleging repeated acts of sexual harassment over a nine-month period, from 2002 until 2003. *Eftehea Leontaritis v. Tony Koursais*.

Leontaritis alleged that the restaurant's owner would rub up against her while she worked, and claimed that she repeatedly refused his advances and tried to avoid him as much as possible. As a result of the harassment, Leontaritis began cutting back the number of hours she worked, despite the fact that she relied on this job for her livelihood. The alleged acts of harassment culminated in March 2003, when the defendant allegedly called her into his office on the pretext of looking at pictures of his house on-line. According to Leontaritis, after she entered, the restaurant's owner closed the door, unbuttoned his pants, put her hand on his crotch and forced her to masturbate him. She begged him to stop, but he grabbed her, ripped her clothes, and forced himself against her. She eventually fled from the room and told the defendant that she would never work for him again.

Leontaritis sought recovery for her emotional distress and punitive damages and was awarded \$1.8 million for distress, and \$2.2 million for punitive damages, for a total of \$4 million.

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way; and (3) "the employees reasonably would perceive a connection between the employer's promise of benefits and their protected activity."

In a separate decision, the same NLRB panel dismissed identical allegations about the May 2004 promises made to employees at the Holiday Inn. *Field Hotels Assocs. LP d/b/a Holiday Inn-JFK Airport*, 348 N.L.R.B. No. 1 (8/31/06 [released 9/6/06]).

## BARGAINING DEVELOPMENTS

## Hyatt Contracts For Two Hotels In Monterey, California Ratified

Members of UNITE HERE Local 483 ratified a four-year contract with two Monterey, California hotels of Global Hyatt Corp., the Hyatt Regency Monterey and Park Hyatt Carmel Highlands Inn, in a vote with 96 percent membership approval.

The contract, which covers 485 hotel employees, will increase wages, employer contributions to health and pension funds, and add an additional paid holiday, as well as a successor clause if either Hyatt hotel changes ownership during the life of the contract.

Nontipped employees will receive wage increases of \$2.55 an hour during the life of the four year contract. A first-year increase of 65 cents per hour was retroactive to Aug. 1. In both the second and third years of the contract, wages will increase 45 cents per hour, and employees will receive an increase of \$1 per hour in the fourth year of the contract. The contract's 22 percent wage increase will raise hourly pay of housekeepers, the largest job classification at the hotels, from the current rate of \$11.35 an hour to \$13.40 by the end of the pact.

Wages for tipped employees will also increase under the terms of the agreement. Tipped employees will receive four wage increases totaling 60 cents per hour. On Feb 1, 2007, a 20 cents per hour increase in wages went into effect. Wage increases of 10 cents per hour will become effective on Aug. 1 in both 2007 and 2008, and another 20 cents per hour increase will be effective Aug. 1, 2009. Some tipped employees who earn more than the minimum wage also will receive wage increases to provide spacing differential to maintain the wage structure when California state minimum wages increase.

Under the agreement, the hotels will increase their contributions to the health care fund by 70%, or \$2.10 per hour, and will increase their pension fund contributions by at least 42 percent over the course of the agreement. If the full amount of the employers' agreed-upon contribution to the health care fund is not needed to maintain benefit levels, a portion of the contribution will go into the pension fund instead.

Under the contract, employees will also receive an additional paid holiday, for a total of eight annual holidays.

NEWSWORTHY

## Hospitality Employers Subsidized By City Required To Accept Card-Check Recognition in Duluth, Minn.

In Duluth, Minnesota, Mayor Herb Bergson (D) recently signed an ordinance that will require city-subsidized hotels and restaurants to accept card-check union recognition. The Duluth City Council approved the measure by a 6-3 vote, which Mayor Bergson signed two days later.

The ordinance will require hotels and restaurants that receive \$50,000 or more in city subsidies to accept card-check union recognition. Hotels and restaurants with fewer than eight employees will be exempt from the ordinance.

Proponents stated that the measure was needed to boost the city's transitional economy. Duluth, which used

to be an industrialized town, is becoming more of a tourist destination due to its location on Lake Superior, which gives rise to higher paying service jobs.

Although some of the ordinance's opponents argued that the change would discourage businesses from locating in Duluth, supporters pointed out that a number of the city's restaurants and hotels have been unionized for years, and have been successful. Further, supporters argued that businesses should also understand that service employees at both restaurants and hotels are not high on the pay scale and are likely to spend their earnings in the Duluth area.

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AT THE BOARD

## NLRB Upholds Ruling that Hotel Violated the Act By Discharging Employee for Presenting Other Employees' Grievances to a Supervisor

The National Labor Relations Board upheld the ruling that State Plaza Hotel violated Section 8(a)(1) of the Act by discharging an employee, Louis Osorio, because he presented other employees' grievances to a supervisor. *State Plaza, Inc., a wholly owned subsidiary of RB Associates, Inc., d/b/a State Plaza Hotel.*

The Hotel argued that it terminated Osorio because he violated the Hotel's rules regarding clocking in and out, misrepresented the time that he worked, and later lied about this misconduct. The Board majority agreed with the judge's finding of the Hotel's animus against Osorio's protected activity. The judge noted that "where adverse action occurs shortly after an employee has engaged in protected activity an inference of unlawful motive is raised," citing *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), *enfd.* 71 Fed. Appx. 441 (5th Cir. 2003). The judge found

that an inference of unlawful motive was proper in this case and was reinforced "by the feebleness of the Respondent's excuse for the delay-action discharge" of the employee.

Member Schaumber dissented from the majority opinion, arguing that the Hotel implemented and enforced its rules to prevent misconduct, and the record demonstrated that it applied those rules uniformly. He wrote: "I find nothing suspicious or unusual in the Respondent's efforts to investigate the misconduct before imposing discipline, nor do I consider it our province to second-guess an employer's judgment that theft and dishonesty constitute terminable offenses. In short, the General Counsel failed to prove that the Respondent violated Federal Law by disciplining Osorio for unquestionably dishonest disregard of its timeclock policies."

## IN THE COURTS

## Federal Court Says Casino Does Not Owe Table Supervisors Overtime Based On Responsibilities

Table games supervisors at a Harrah's casino in Indiana were not owed overtime because they exhibited the discretion and independent judgment necessary to be classified as administrative employees, a federal court in Indiana recently ruled. *Allen v. Harrahs's Enter. Inc.*

31 table games supervisors at the East Chicago, Indiana casino sued for overtime and the failure to receive allegedly promised compensatory time. The supervisors were one level above dealers on the casino floor and answered to a casino manager. They were responsible for making sure dealers were well trained, and resolving problems on the casino floor, including mediating conflicts with customers. The supervisors were also responsible for deciding when new games needed to be opened or when games should be closed, although these decisions were done in cooperation with managers possessing more authority. In addition, the supervisors helped hire dealers, observed dealers to determine when discipline or commendation was appropriate, and "rated" players to see who deserved special services.

Judge Andrew R. Rodovich of the U.S. District Court for the Northern District of Indiana, rejected the Fair Labor Standards Act claims of the supervisors, saying that the employees who oversee dealers and games during their shifts demonstrated the level of responsibility necessary to satisfy the duties requirement of the administrative exemption.

"The administrative nature of the supervisors . . . is made clear based on the relationship to Harrah's customers," Rodovich explained. "These activities are beyond routine clerical tasks."

The court focused on the evidence that table supervisors were the first group of table games employees who are able to offer discounts or free meals to unhappy customers,

as well as to offer "comps" to casino customers. Further, the court noted that the supervisors were responsible for monitoring games and identifying unusual behavior or irregularities that could affect the integrity of the casino.

"[T]he plaintiffs routinely exercised discretion with respect to significant matters in the operation of the casino," the judge said, pointing to Harrah's argument that the employees coached dealers, developed performance appraisals of dealers, and were responsible for opening and closing games.

In finding there was no FLSA violation, the court explained that the supervisors were being overly literal in interpreting the FLSA regulations, and that they failed to account for all of their responsibilities when determining which tasks were exempt and which were not. For instance, the plaintiffs argued that even though they completed performance appraisals on dealers, those only occurred twice a year and therefore were not tasks performed routinely.

"The arguments present far too literal an accounting of the plaintiffs' time," the judge explained. "While the physical [appraisal] may have been generated only biannually, the content that a table games supervisor was expected to address in [an appraisal] reflected insight into dealers gained through day-to-day observation of that dealer."

Similarly, the judge stated that the plaintiffs were being too literal when they argued that they did not have to offer compensation to unhappy customers on a daily basis.

"[R]egardless of whether Harrah's experienced unhappy customers on a daily basis, it is undisputed that every such occurrence was the responsibility of the table games supervisor to identify and address initially," the court concluded.

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*BARGAINING DEVELOPMENTS*

## **Chicago Starwood, Hyatt and Hilton Hotel Contracts Unanimously Ratified**

**M**embers of UNITE HERE Locals 1 and 450 recently ratified a three year contract with four Hilton hotels in Chicago covering 2,300 employees, as well as three year contracts with Chicago hotels operated by Global Hyatt Corp. and Starwood Hotels & Resorts Worldwide Inc.

The Hilton contract covers the Hilton Chicago, Hilton Chicago O'Hare Airport, the Drake Hotel and the Palmer House Hilton and covers room attendants, bell staff, bartenders, cooks, food services and clerks. The contract expands health care coverage, decreases room attendants workloads, increases wages and employer pension contributions, and provides employer neutrality toward future union organizing at new Chicago hotels built or managed by Hilton Hotels.

The Hyatt contract covers 1,900 employees at the Hyatt Regency O'Hare, Hyatt Regency Chicago, Hyatt Regency McCormick Place and Park Hyatt Chicago; the Starwood contract covers about 900 employees at four Starwood-owned hotels and the Sheraton Chicago hotel owned by Tishman Hotels. In addition to the Sheraton, the Starwood contract covers employees at Westin Michigan Avenue, the W Chicago City Center, the W Chicago Lakeshore and the Tremont Hotel. The contracts also include neutrality agreements for new Chicago hotels built or managed by Hyatt or Starwood.

The hotels that will adopt the same provisions for their contracts are the Fairmont, Allegro, Holiday Inn Mark Plaza, Crowne Plaza Metro Hotel, the Affinia, the Millennium Knickerbocker, the Ambassador East, the Radisson, Holiday Inn City Center, Ritz Carlton, Hotel 71, and Alerton Crowne Plaza Hotel.

Under the new contracts, hourly wages will increase \$2.50 for nontipped employees and \$0.75 cents for tipped employees. In the first year, nontipped employees will receive a \$1.10 per hour wage increase, and wages will increase \$1.40 over the second and third years of the agreement. Wage rates for room attendants, the largest job classification in the hotels, will increase from \$12.10 to \$13.20, and will rise to \$14.60 by the end of the contract. Tipped employees will receive wage increases of 45 cents per hour in the first year of the contract and 30 cents per hour over the second and third contract years.

The new contracts provide that employees on disability leave will receive \$225 per week, triple the amount under the previous agreement. The hotels will also increase contributions to the employee pension plan by 47 cents per hour over the life of the agreement.

Expanding the health care benefits, the new contract adds vision coverage for the first time and expands dental coverage to include a broader network of providers. Although the employee copayments for health care premiums will remain at \$30 per month for family coverage, the contract places caps on employee out-of-pocket expenses.

Further, the new contract allows room attendants to reduce their daily room quota from 16 currently, to as low as 13 on days with a high number of check outs. If at least 11 assigned rooms have guests checking out on a given day, one room will be dropped from the daily cleaning quota. Room attendants can drop two rooms after 12 check-outs, and can drop three after 13 check-outs.

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VERDICTS AND SETTLEMENTS

## Ex-Controller Of Sports Bars Awarded \$2.25 Million For Race And Sex Harassment

A federal jury in Atlanta Nov. 30 awarded \$2.25 million to the former controller of Jocks & Jills Restaurants, a chain of restaurants and sports bars, based on racial and sexual harassment by the firm's chairman. *Tomczyk v. Jocks & Jills Rests.*

The jury concluded that the former chairman was personally liable for \$250,000 in compensatory damages, and \$750,000 in punitive damages, for intentional infliction of emotional harm. The jury also found the restaurant chain liable for \$250,000 in compensatory damages and \$750,000 in punitive damages on the underlying emotional distress claim. It added another \$50,000 in compensatory damages and \$200,000 in punitive damages, based on the employer's continued retention of the chairman when it was "reasonably foreseeable from [his] propensities or tendencies that he could cause the type of harm sustained by [Tomczyk]." Judge J. Owen Forrester of the U.S. District Court for the Northern District of Georgia presided over the trial.

Tracey Tomczyk, the company's former controller, alleged that she was subjected to extensive verbal harassment and vulgarity because of her interracial relationship with an African American. In December 2000, Tomczyk filed a wide-ranging complaint, alleging that the company's board chairman and controlling shareholder discriminated against her on the basis of race and sex in violation of Title VII of the 1964 Civil Rights Act, and that the company violated the Equal Pay Act. She also brought state law claims for intentional infliction of emotional distress and negligent retention.

Tomczyk, who is white, alleged that the chairman "used racial slurs to describe her physical appearance and to characterize her as attractive to African American men" and when she walked out of a meeting to protest his comments, she was fired. Tomczyk's attorney stated that Tomczyk experienced severe racial and sexual harassment over a sustained period of time, including many graphic and "unprintable" remarks.

The case was originally filed in 2000, decided in the employer's favor in 2004, and revived by the U.S. Court of Appeals for the Eleventh Circuit. The appeals court initially directed the parties to engage in mediation, but after they failed to resolve their dispute, it ruled in Tomczyk's favor in an unpublished per curiam opinion, reviving her intentional infliction of emotional distress, retaliation, and negligent retention claims but "remind[ing] the parties that it is never too late to settle.

"The evidence provided a slew of vulgar and harassing comments that continued over a period of years and established genuine issues of material fact exist concerning whether the harassment she suffered was based on race, specifically the race of the man with whom she was romantically involved," the appeals court wrote. Further, the court found that a "reasonable jury could have concluded that [the chairman's] comments were about that interracial relationship, and harassment based on an interracial relationship is forbidden under Title VII."

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## IN THE COURTS

## Ninth Circuit Rules Sovereign Immunity Precludes Claims Against Indian Casino

The U.S. Court of Appeals for the Ninth Circuit, affirming a federal district court decision, held that a casino owned and operated by an Indian tribe is an arm of the tribe and has sovereign immunity from a lawsuit brought by a fired employee. *Allen v. Gold Country Casino*.

Gold Country Casino, wholly owned and operated by the Tyme Maidu tribe, is a tribal entity formed by a compact between the Tyme Maidu and the state of California. Mark S. Allen, a casino employee, alleged that he was fired in retaliation for reporting rats in the casino's restaurant and for applying to "the white man's court" for guardianship of three tribal children. After obtaining a right-to-sue letter from the Equal Employment Opportunity Commission, he sued the casino, the tribe, a tribal member, and several others in federal court in California. The trial court dismissed his case, and the Ninth Circuit affirmed in part but vacated and remanded certain claims under the Civil Rights Acts of 1866 (42 U.S.C. § 1981) and the Civil Rights Act of 1871 (42 U.S.C. § 1985).

Allen argues that the district court erred in failing to scrutinize the nature of the relationship between the tribe and the casino. He further argued that the casino waived sovereign immunity when it stated in his employment application that he could be terminated "for any reason consistent with applicable state or federal law," and when it stated in its employee orientation booklet that it would "practice equal opportunity employment and promotion regardless of race, religion, color, creed, national origin . . . and other categories protected by applicable federal laws." Allen also argued that the court should analogize the purported waiver of tribal immunity to the Foreign Sovereign Immunities Act, which specifies exceptions to the immunity of foreign states.

The Court explained that "[a]lthough the Supreme Court has expressed limited enthusiasm for tribal sovereign immunity, the doctrine is firmly ensconced in our law until Congress chooses to modify it." Moreover, "this immunity extends to business activities of the tribe, not merely to governmental activities." The Court further explained that

"[w]hen the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe." In determining whether the entity function is "an arm of the tribe" the Court explained that the proper inquiry "is not whether the activity may be characterized as a business, which is irrelevant under Kiowa, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." Accordingly, the Court held that "Allen's contention that the district court erred in failing to scrutinize the nature of the relationship between the tribe and the casino fails to accord sufficient weight to the undisputed fact that the casino is owned and operated by the Tribe." Moreover, the Court noted that Allen recognized that the casino was an arm of the tribe when he sued the tribe "d.b.a. ('doing business as') the Casino."

Under the Indian Gaming Regulatory Act, the tribe had to authorize the casino through a tribal ordinance and an interstate gaming compact. The Court found that Tyme Maidu and California entered into such a compact "on a government-to-government basis."

The Court also reasoned that immunity was proper because "extraordinary steps were necessary" given that the casino is not merely a business. The Court explained that "the casino is not a mere revenue-producing tribal business (although it is certainly that)," but rather "[o]ne of the principal purposes of the IGRA is to insure that the Indian tribe is the primary beneficiary of the gaming operation." The Court added that immunity of the casino "directly protects the sovereign tribe's treasury, which is one of the historic purposes of sovereign immunity."

"In light of the purposes for which the tribe founded this casino and the tribe's ownership and control of its operations, there can be little doubt that the casino functions as an arm of the tribe," the court found. "It accordingly enjoys the tribe's immunity from suit."

At most, the statements "might imply a willingness to submit to federal lawsuits," the Court said. But waivers *continued next page...*

## VERDICTS AND SETTLEMENTS

## KFC/Taco Bell Settles Sexual Harassment Claim With Three Former Employees

**K**FC/Taco Bell reached a \$349,800 settlement with three former employees who brought claims for sexual harassment. Marivel Hernandez, Esther Hernandez and Sandra Vargas worked at a KFC/Taco Bell franchise in Sunnyvale, California. The women were all immigrant employees who claimed that their manager sexually harassed them between August 2002 and January 2004. The EEOC filed a sexual harassment lawsuit on their behalf against Harman-Chiu Inc., the entity that owns the franchise. *EEOC and Sandra Vargas, et al. v. Harman-Chiu Inc. aka KFC/Taco Bell.*

The plaintiffs claimed that their manager's behavior created a hostile work environment and sought punitive damages on the grounds that the defendant's behavior was

### "Casino" from page 12

of tribal sovereign immunity must be unequivocally expressed, not implied.

However, the Court revived some of Allen's claims, stating that "[a]lthough the issue is not free from doubt, we conclude that the district court erred in its dismissal of the remainder of the complaint on the ground that it presented no federal claims" against the tribal member and the unnamed defendants. The Court held that Allen, who initially filed suit on his own but was represented by counsel on appeal, should be given the benefit of the doubt in amending his complaint to assert his claims "intelligibly."

The Court noted that if Allen proceeds on remand with his remaining federal claims, the trial court may have supplemental jurisdiction over his state law claims, the Court said. Accordingly, the Court vacated the dismissal of those claims as well.

The Court affirmed the dismissal of Allen's claims under two inapplicable criminal statutes and a jurisdictional statute. It also affirmed dismissal of his claim under the Civil Rights Act of 1871 (42 U.S.C. § 1983), because Allen did not allege that any defendant was acting under the color of state law.

reckless. In addition, they sought damages for humiliation, loss of enjoyment of life, and emotional distress. The plaintiffs also sought an unspecified amount for medical costs and both past and future lost earnings.

The parties settled for \$349,800 and a written apology from their manager. \$345,000 of the settlement amount will serve as compensation for the plaintiffs' physical and emotional injuries, while the remainder will be equally distributed and used by the plaintiffs for vocational therapy. The settlement also requires the defendant to display a copy of its harassment policy at its franchise location, and to keep employees informed of the policy and procedures for filing a sexual harassment complaint.

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### ARBITRATOR'S CORNER

## Hotel's Refusal to Validate Parking For Union Agents Violates CBA

**A**n arbitrator recently held that a hotel's decision to discontinue validating parking for union business agents when they came into the property to provide representation was a violation of the collective bargaining agreement, which granted the union right of access to carry out its representational duties. B. Bogue, *Hilton Hawaiian Village and UNITE HERE.*

The hotel argued that parking validations constituted payment of something of value to union representatives in violation of Section 302 of LMRA. However, a NLRB ALJ decision in a similar case provided persuasive precedent that things of value which facilitate a union's access, and which serve both the employer's and the union's interest in administering the collective bargaining agreement, do not benefit union representatives personally, and accordingly, do not violate the NLRA.

## BARGAINING DEVELOPMENTS

## UNITE HERE Members OK Sheraton/Hilton Contracts For 4,000 Employees At Five Honolulu Hotels

Members of UNITE HERE Local 5 recently ratified a four-year contract covering 2,500 employees at four Sheraton hotels on Waikiki Beach: the Royal Hawaiian Hotel, the Princess Kaiulani, the Moana Surfrider and the Sheraton Waikiki. The new contract, which expires June 30, 2010, was approved by 99 percent of the members who voted.

On average, hotel employees earned \$14 to \$15 per hour under the previous contract. Over the four-year term, wages for nontipped employees will increase \$2.40 per hour, and tipped employees wages will increase up to \$1.20 per hour. The first wage increase of 20 cents per hour for nontipped employees is retroactive to June 6, 2006. The contract subsequently increases tipped and nontipped hourly wages every six months. Nontipped hotel employees will receive hourly wage increases of 30 cents Jan. 1, 2007, 20 cents July 1, 2007, 30 cents Jan. 1, 2008, 25 cents July 1, 2008, 35 cents Jan. 1, 2009, 30 cents July 1, 2009, and 50 cents Jan. 1, 2010. Tipped hotel employees will receive hourly wage increases of 50 cents Jan. 1, 2007, 10 cents on July 1, 2007, Jan 1, 2008, July 1, 2008, Jan. 1, 2009, and July 1, 2009, and 20 cents Jan. 1, 2010.

Over the contract term, Sheraton will also increase its contribution by \$2.06 per hour worked to the multiemployer health and welfare trust fund. The contributions will increase by 57 cents in the first year of the contract, 54 cents in the second year, 50 cents in the third year, and 45 cents in the fourth year. The hotels will increase their pension contributions overall by 15 cents per hour worked by increasing the amount by 5 cents in the third year of the contract and 10 cents in the fourth year.

Housekeepers' workloads has been a particularly important issue in nationwide hotel negotiations because of additional room amenities, such as larger mattresses, extra pillows, bathrobes, and coffeemakers. The new contract addresses this concern and reduces by one room housekeepers' daily 15-room quota if their assignment includes 6 checkouts, by 2 rooms if the assignment includes 9 checkouts, and by 3 rooms if the assignment includes 10 checkouts. Housekeepers assigned rooms in a single day in both

the hotel towers and hotel wings, requiring movement from one section of the hotel to another, may drop 1 room from their daily room quota.

The hotels are also scheduled for renovation during the contract term. The new contract provides that at the completion of that work, the hotels will add housemen positions to assist housekeepers in removal of linen and trash from the rooms.

The Honolulu Sheraton contract contains a local neutrality and card-check agreement. The new agreement also contains subcontracting restrictions, providing that no food and beverage employee will be laid off as a result of subcontracting, but does not prohibit subcontracting.

According to communications posted on Sheraton's Web site throughout negotiations, the parties also agreed to expanded antidiscrimination language that includes sexual orientation, expansion of bereavement leave to include domestic partners, long-term leave for employees to conduct union business, a new-hire probationary period extended from 30 days to 90 days, continuous medical coverage for 12 months for employees and their dependents when called to active duty in the National Guard or Reserves, reimbursement of COBRA payments upon return to work after volunteering for military service, and increases in premium pay, service charges, and gratuities.

Members of UNITE HERE Local 5 also recently approved a four-year contract with Hilton Hawaiian Village Beach Resort & Spa covering 1,554 employees on Waikiki Beach in Honolulu that will also expire in June of 2010. The contract, approved by 98 percent of members who voted, is virtually identical to the contract Local 5 members ratified with four Honolulu Sheraton hotels. Employees will receive hourly wage increases of \$2.40 over term for nontipped and \$1.20 for tipped employees as well as increases in employer contributions for health care and pensions.

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*BARGAINING DEVELOPMENTS*

## **UNITE HERE and Beverly Hilton Agree on Terms of a New Three-Year Contract**

Local 11 of UNITE HERE and owners of the Beverly Hilton hotel recently agreed on terms of a new three-year contract that provides non-tipped employees wage increases of \$2.30 per hour, provides paid family health insurance, as well as incentives for the union to restructure the health plan to lower future health care costs. The contract, which covers 430 union-represented employees, is the culmination of what the union called “several months of intensive labor negotiations.”

The Beverly Hilton was not a member of the Employer’s Council, the hotel owners’ group that for years negotiated jointly with Local 11 and was at the heart of bitter negotiations leading to the last contract, in 2004. Both sides said the focus of negotiations was to avoid the kind of confrontations that have characterized recent contract negotiations, including those in the Los Angeles hotel industry in 2004.

The agreement provides a wage increase of \$1.00 per hour to non-tipped employees and will run through July 15, 2009. The remaining \$1.30 per hour will be spread over the final two years of the contract, representatives of the hotel and Local 11 said. Prior to the new contract, room attendants at the hotel earned \$11.42 per hour in wages, according to press reports.

The new contract also increases pension contributions to 10 cents per hour, and allows hotel employees to begin saving for their own retirement by implementing a first time a non-contributory 401(k) plan.

The agreement also provides incentives for the union to restructure its health plan, specifically offering Local 11 the opportunity to take savings generated by the redesign as wages or pension contributions in future years. The hotel’s goal is to encourage better usage, and lower overall health care costs.

The contract also provides language demonstrating a commitment to improve banquet server hiring and training in order to boost the banquet and convention business and to take advantage of an \$80 million remodel aimed at positioning the Beverly Hilton as a premier hotel on the city’s west side.

Finally, the contract provides for a new program that calls for the hotel, union, and African American community leaders to work together to increase the hiring of African Americans in the hotel industry.

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### ***“UNITE HERE” from page 14***

The employer and union have agreed to extend the contracts at the Ilikai Hotel, the Ala MoAna Hotel, and the Kahala Resort past the June 30 expiration.

Even though cleaning of the public areas of the Hilton Hawaiian Village will continue to be done by subcontracted employees, the new contract specifies that the hotel will add no new subcontracted restaurants.

The Hilton contract addresses diversity in language providing that the hotel will do its best to hire native Hawaiian employees in an effort to recognize the island’s “host culture,” will recognize immigrant rights, by, for example, not forbidding them from speaking their native language at work, and will expand antidiscrimination language to include sexual orientation.

*NEWSWORTHY*

## Potential Gaming Resort In Pennsylvania Signs Card Check Agreement

**T**ropicana Pennsylvania LLC signed a “card check” agreement with International Brotherhood of Teamsters Local 773 to allow the union to organize new employees at a gaming resort being planned for Allentown, PA. The agreement is contingent on Tropicana receiving a state gambling license.

The agreement covers nonsupervisory employees of the planned resort, which could create up to 1,300 unionized jobs. Under the agreement, the union would be allowed access to resort employees for organizing purposes and, if more than half of the employees sign a representation authorization card, the hotel would grant recognition to the union without going through the National Labor Relations Board election process.

In addition to the agreement with the Teamsters, the company has an agreement with the Lehigh Valley Building Trades Council to govern labor relations during the construction phase of the project.

The main portion of the complex, to be called the Lehigh Valley Tropicana, would house 5,000 slot machines and a 500-room hotel. Restaurants, shopping areas, performance spaces, and a convention site are also planned as complements to the gaming complex. Including gambling floor employees, hospitality, janitorial and maintenance employees, the complex is expected to generate about 1,300 jobs at an average income of \$35,000 per year.

One possible obstacle to the Tropicana project may come from a competing slots proposal from Sands BethWorks Gaming LLC in nearby Bethlehem, Pa. The competing slots proposals are both being offered by gaming companies with operations elsewhere in the country. Tropicana Pennsylvania is a unit of Aztar Corp., which operates large casinos in Atlantic City, N.J. and Las Vegas, and smaller casinos elsewhere. Sands BethWorks is a unit of Las Vegas Sands Corp., which operates two large casino/hotels in Las Vegas and another in Macau.

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*VERDICTS AND SETTLEMENTS*

## Luby's Pays \$366,864 In Back Wages To Employees In Three States

**T**he Labor Department announced that Luby's Restaurants LP of Houston, Texas has paid \$366,864 in back wages to 1,680 employees following a federal investigation that found that the company had violated the Fair Labor Standards Act by failing to pay all overtime pay owed to employees.

The violations were discovered during an investigation lasting from Feb. 24, 2003, to Nov. 8, 2005, at Luby's restaurants in Houston, San Antonio, Albuquerque, N.M. and New Orleans, the agency said. The investigations resulted in a compliance agreement which addressed

overtime violations that left some current and former wait staff, cashiers, and checkers below the federal minimum wage because of the practice of tip pooling or sharing.

The FLSA requires employees to be paid the federal minimum wage for all hours worked, and time and one-half their regular rate of pay for hours worked over 40 per week. Tip pooling is limited to employees - including waiters, waitresses, counter men, buspersons, and service bartenders - who routinely receive more than \$30 a month in tips.