Restoring Common Sense To Determining Who is a Tipped Employee. Case Summary: Marsh v. J Alexander's

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In Marsh v. J. Alexander's, The Ninth Circuit issued a fundamentally important opinion supporting the hospitality industry nationwide. Specifically, the Ninth Circuit rejected the U.S. Department of Labor's ("DOL") disastrous 20% rule that was adopted by the Eighth Circuit in Fast v. Applebee's in 2011. In Fast, the court held that restaurateurs had to monitor every hour worked by members of the wait staff and only take the tip credit in hours worked by the wait staff when they spent no more than 20% of their time on non-tip-producing activities. The DOL's "timesheet and stopwatch" approach was not only unworkable in real life (leading many restaurateurs and hoteliers to stop using a tip credit at all) but also a misguided effort on the DOL's part to clarify the so-called "dual jobs" regulation.

The Ninth Circuit opinion restores the focus on where it should have always been, namely that if an employee works in a tip-producing job, even if that tip-producing job involves some duties that do not go directly to generating tips but are accepted elements of the job, the employer can pay using a tip credit (a reduction off the minimum wage to account for tip, which is a maximum of $5.12 per hour under federal law).* If the employee works a tipped job and a non-tipped job, or performs activities during a distinct portion of the day that are different than the tipped job tasks (e.g. a waiter preparing salads or handling cooking duties before a service shift), the employer cannot take a tip credit when paying the employee for the hours worked in the non-tipped job.

Not only is the Marsh approach consistent with Congressional intent when the FLSA was expanded to cover the hospitality industry in 1966, but this approach is immensely easier to apply and allows employers and employees to have far greater certainty about what jobs qualify for the tip credit. Hospitality employers throughout the country will take note of the decision, and lawyers will note the split between two federal courts that can only be resolved in one of two ways: (1) via a U.S. Supreme Court ruling; or (2) via a DOL revision of its internal guidelines to adhere to the *Marsh* ruling.

*Not all states allow a tip credit and some limit it further than federal law. In California, employers cannot take a tip credit. In Arizona, where the decision originates, the tip credit is capped at $3/hour.

Buchalter's Hospitality Industry Law Group

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