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Donna M. Dell
State Labor Commissioner & Chief,
Division of Labor Standards Enforcement

September 8, 2005

Mr. Andrew Schneiderman
Vice President and General Counsel
Commerce Casino Club
6131 E. Telegraph Road
Commerce, Ca. 90040

Re: Tip Pool Policy

Dear Mr. Schneiderman,

This letter is in response to your Request for Tip Pool Policy Approval, dated August 4, 2005, wherein you have asked for an opinion[1] from the Division of Labor Standards Enforcement ("DLSE") as to the lawfulness of a mandatory tip pool policy as a mechanism for ensuring that gratuities left by patrons are shared by other employees in the chain of customer service.

Section 351 of the California Labor Code provides, in pertinent part, as follows:

"No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to or left by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip . . ."

Section 353 of the Labor Code states:

"Every employer shall keep accurate records of all gratuities received by him, whether received directly from the employee or indirectly . . ."

[1] In *Tidewater Marine ,Inc. v Bradshaw* (1996) 14 Cal. 4th. 557, 571, the California Supreme Court upheld the Labor Commissioner's authority to "provide parties with advice letters which are not subject to the rulemaking provisions of the APA". Courts may accord deference to such opinion letters under the standard set out in *Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal. 4th. 1.

While these two statutes are seemingly inconsistent, the court in *Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.3d 1062, held that employer-mandated tip pooling among employees is not prohibited by Labor Code section 351. The court noted that "The purpose of section 351, as spelled out in the language of the statute, is to prevent an employer from collecting, taking or receiving gratuity income or any part thereof, as his own as part of his daily gross receipts . . ." (*emphasis added).* The court went on to say that "the legislative intent, reflected in the history of the statute, was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them." *Id,* at 1068. The implementation of an employer administered tip pooling program is not, of itself, in conflict with this intent.

The *Leighton* court explained its reasoning further in a footnote, stating: "Our ruling is intended to ensure that all such employees (other employees who render service to the same patron) be placed in a fair and equitable position. It is because we are not insensitive to the plight of those employees that our ruling allows for a fair distribution of the gratuity to all those who earned it by contributing to the service afforded the patron . . ." n.6 *Leighton v.Old Heidelberg,* supra, 219 Cal.App.3rd, at 1072.[2]

While, in *Leighton*, the tip pooling policy in question applied to employees who provided "direct" table service, the court recognized that this was a long-standing practice in the restaurant industry. The acknowledgment of prevailing industry practice was also recognized in a DLSE opinion letter interpreting *Leighton* issued in 1998. The DLSE opinion states that it is the correlation with prevailing industry practice "that makes tip pooling a fair and equitable system". (DLSE Opinion Letter No. 1998.12.28-1).

The tip pool policy in question herein provides that the employee receiving the tip contribute 15% of the actual tips to the tip pool. All money from the tip pool is then distributed to the other employees in the chain of service based on the number of hours they worked, as is consistent with industry custom. Based on these facts, I would interpret Labor Code section 351 to allow for such a tip pool policy, provided:

1) Tip pool participants are limited to those employees who contribute in the chain of the service bargained for by the patron, pursuant to industry custom[3], and

2) No employer or agent with the authority to hire or discharge any employee or supervise, direct, or control the acts of employees may collect, take or receive any part of the gratuities intended for the employee(s) as his or her own. (also see Definitions for "Employer" and "Agent", Cal Labor Code section 350)

[2] Employees who contribute to the service provided to a patron might conceivably include persons such as those who vacuum, wash, polish and/or dry a car in the car wash industry, but not the cashier who collects payment since cleaning the car is the service which was bargained for rather than cashiering. Other such employees might include (a) towel or locker attendants, hair washers, stylists, manicurists and masseuses in the salon or spa industry, (b) parking attendants and valet or shuttle drivers in the car parking industry, (c) porters, dealers and runners in the gaming industry, and (d) waitpersons, buspersons, bartenders, hostesses, wine stewards and "front room" chefs in the restaurant industry. This list is by no means all inclusive.

[3] We recognize that prevailing industry practice is likely to evolve over time as a result of competitive market demands and changing technology.

Such a policy should include the conditions for payment to the participating employees, consistent with Section 350 et.seq. of the California Labor Code.

Mr. Schneiderman, I hope that this interpretation serves to answer any questions you had with regard to your client's tip pool policy.

Sincerely,

/s/ *Donna M. Dell*

California State Labor Commissioner

2005.09.08