McNees Wallace & Nurick LLC

Harrisburg, PA • Lancaster, PA • Scranton, PA • State College, PA • Columbus, OH • Washington, DC

LIQUOR LAW UPDATE

MAY 2013

EMPLOYEE TIP POOLS: DIVE IN WITH CAUTION *By Adam L. Santucci*

For those employers who employ "tipped employees," i.e., employees who generally receive $30 or more per week in tips, a tip pooling arrangement may have some appeal. After all, such arrangements allow for an equitable distribution of tips to employees who may not directly interact with customers. While tip pools certainly have their appeal, they have also drawn close scrutiny from regulators and disgruntled employees.

Keep in mind that some state laws ban or significantly restrict tip pooling arrangements. The federal Department of Labor (DOL) approves of tip pooling, but as you may expect, there are a number of strings attached to tip pools. Employers must notify tipped employees of any required tip pool contribution amount, may only take a "tip credit" toward the payment of the minimum wage for the amount of tips each tipped employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

Furthermore, employees sharing in the tips must somehow participate in serving the customers who left the tips. In determining whether employees participated in serving the customers who left tips, the DOL and the courts look to whether the employees interacted with the customers, assisted in providing a pleasurable dining experience, and whether the employees provided direct table service during the meal. Employees who might properly share in tip pools include: servers, bussers, bar-backs, service bar tenders and hosts. A valid tip pool may not include employees who do not regularly and customarily receive tips, these employees might include: janitors, dishwashers, chefs and cooks.

Furthermore, because the Fair Labor Standards Act (FLSA) prohibits employers from withholding tips, managers may not participate in tip pools. The theory is that managers, and even some supervisors, are agents of the employer and are therefore prohibited from participating in the tip pools. Several employers, including Starbucks, who was hit with a $105 million judgment, have learned this lesson the hard way. As these employers have learned, class action lawsuits challenging tip pooling practices are becoming more popular.

As noted above, employers with tipped employees may also seek to take credit for those tips toward the minimum wage requirement. Again, however, there are restrictions on an employer's ability to apply the tip credit. An employer may take the tip credit for some time that the tipped employee spends in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips. However, the DOL takes the position that if tipped employees spend more than 20% of their time performing non-tipped duties such as general preparation work or maintenance, no tip credit may be taken for the time spent performing these duties. Furthermore, if an employee is employed in both a tipped and a non-tipped occupation, such as an employee employed both as a maintenance person and a waitperson, the tip credit is available only for the hours spent by the employee in the tipped occupation.

The DOL also requires employers to provide notice to tipped employees of the requirements of the FLSA's tip credit provisions before using the tip credit toward the FLSA's minimum wage requirements. An employer must provide the following information to a tipped employee before the employer may use the tip credit:

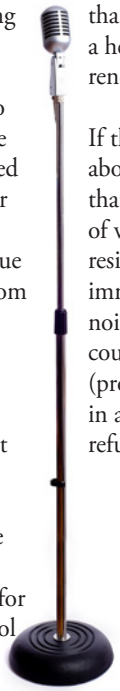
- the amount of the employee's cash wage, which must be at least $2.13 per hour;
- the additional amount claimed by the employer as a tip credit, which cannot exceed $5.12 (the difference between the minimum required cash wage of $2.13 and the current minimum wage of $7.25);
- the tip credit claimed will not exceed the amount of tips actually received by the tipped employee;
- all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
- the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

Employers with tipped employees should review their pay practices, especially if they use tip pools or take a tip credit toward the minimum wage requirement, to ensure compliance with both state and federal law in light of the increased popularity of class-based claims and regulatory restrictions. ■

Adam L. Santucci is an associate in the Labor and Employment Law and Alcoholic Beverage and Liquor License practice groups.
717.237.5388 / asantucci@mwn.com

AHHHH…..SPRING *By Barbara A. Darkes*

With Spring comes the emergence of many things, including reopening of decks, porches, sidewalk cafés, patios and other outdoor seating options. It's a lovely idea to have music or other entertainment in these areas, whether live or piped to the outside area from inside. In doing so, however, be mindful of the Liquor Code's noise restrictions. Specifically, that the use or permitted use of a loudspeaker or similar device which results in music or other entertainment, including the advertisement of that entertainment, being heard beyond a licensee's property line is prohibited. This is true regardless of whether the music or other entertainment originates from inside or outside of the licensed premises.



Municipalities may seek an exemption from the Liquor Code noise restriction. Generally, licensees prompt municipalities to seek this exemption. To be eligible to seek the exemption, municipalities must have a local noise ordinance and must also have passed a resolution confirming its support of seeking the exemption and its intent to enforce the local noise ordinance. Often, municipalities will seek the exemption for specific geographical areas in the municipality rather than the entire municipality. Within 60 days of receiving a petition for an exemption from the noise ordinance, Pennsylvania Liquor Control Board (PLCB) must disapprove it, approve an area more limited than what was requested or approve it in its entirety. Public notice and a hearing must take place within the identified area prior to PLCB rendering its decision.

If the Bureau of Liquor Control Enforcement receives a complaint about a noise violation, they will investigate it, and the likelihood is that the licensee will not know about the investigation until a notice of violation is received. Complaints come not only from disgruntled residential neighbors, but also competitors, so don't think you are immune from the filing of a complaint. If you receive a citation for a noise violation, it is recommended that you contact your attorney for counsel. Even though a first offense has a fairly minimal repercussion (probably a fine for several hundred dollars), repeat offenses will result in a more severe penalty and can even lead to a license suspension or refusal to renew a license. ■

Barbara A. Darkes is Chair of the Transportation, Distribution and Logistics group and Co-Chair of the Litigation group. She also practices in the Automotive Dealership and Alcoholic Beverage and Liquor License groups.
717.237.5381 / bdarkes@mwn.com

THE SKA / DUCLAW TRADEMARK DISPUTE OVER EUPHORIA, TRADEMARK LESSONS FOR THE CRAFT BREWER *(originally published on JDSupra as a video post by Brian P. Gregg of McNees Wallace & Nurick LLC)*

The craft beer industry is expanding rapidly and it seems a new brewery opens, or an existing brewery expands, almost daily. As a result, craft beer industry trademark disputes are occurring with increased frequency. Colorado's Ska Brewing Company recently initiated what may prove to be a messy trademark dispute with Maryland's DuClaw Brewery, when Ska filed a petition to cancel DuClaw's trademark registrations for EUPHORIA and EUFORIA before the United States Patent and Trademark Office Trademark Trial and Appeal Board. While DuClaw owns registrations for EUPHORIA, Ska has argued that those registrations were applied for after it had established common law rights to the EUPHORIA trademark. It is likely this dispute would have been avoided if either brewery had followed some basic trademark practices. Regardless of how it is resolved, there is a lot a craft brewer can take away from the Ska/DuClaw dispute.

The key to avoiding the disruption and financial drain of a trademark dispute is to have a strategy that involves (1) comprehensive trademark searching and clearance before launching a new trademark and (2) registration of key trademarks (i.e., the brewery's name and flagship products). More and more brewers are realizing the value of investing a little time and money up front to avoid major trademark headaches and expenses down the road. Not conducting trademark searches or registering trademarks is risky and likely to lead to a Ska/DuClaw type of dispute where both breweries spend time and money but neither really wins. ■

Visit www.mwn.com/pubs/ska_duclaw to view the entire online video post on The Ska / DuClaw Trademark Dispute.

Alcoholic Beverage & Liquor License Group

Kimberly A. Selemba, Chair
717.237.5359 / kselemba@mwn.com

Timothy J. Horstmann
717.237.5462 / thorstmann@mwn.com

Robert K. Bertram
717.237.5228 / rbertram@mwn.com

Erik M. Hume
717.237.5340 / ehume@mwn.com

Barbara A. Darkes
717.237.5381 / bdarkes@mwn.com

Samuel N. Lillard
614.719.2848 / slillard@mwncmh.com

Tony D. Dick
614.719.2843 / tdick@mwncmh.com

Adam L. Santucci
717.237.5359 / asantucci@mwn.com

Brian P. Gregg
717.237.5456 / bgregg@mwn.com