



Here's A Tip – Restaurant Workers Allege Wage And Hour Violations Amid COVID-19 Pandemic

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As the Barnes & Thornburg Wage and Hour Practice Group continues to track and catalogue [COVID-19 related workplace complaints](#), this week we want to spotlight an example of the pandemic as an accelerant for wage and hour class and collective actions. The setting for this particular case is an industry hit particularly hard by COVID-19: the restaurant industry. The allegations in this featured complaint highlight many of the wage and hour issues that can present themselves when dealing with tipped workers.

In *Smith, et al. v. Local Cantina, LLC, et al.*, the plaintiff brings a class action lawsuit on behalf of all servers and bartenders at nine restaurants operated by the defendants. The plaintiff alleges that prior to May 2020, the defendants paid their tipped workers the minimum wage minus the maximum allowable tip credit. The plaintiff goes on to allege that since May 2020, however, the defendants have retained all of the credit card tips received by tipped workers, and have forced the tipped workers to share cash tips with non-tipped employees who are ineligible to participate in the tip pool. Further, the plaintiff alleges that since May 2020, the defendants have paid the tipped workers a fixed amount every week.

In addition to these tip credit and tip pool violations, the plaintiff alleges that the defendants have required the tipped workers to work more than forty hours per week, but have not paid the tipped workers overtime for these additional hours. The plaintiff alleges that the defendants' new pay policy is

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designed to maximize the amount of money that may be treated as forgivable under a Paycheck Protection Program loan the defendants received due to the COVID-19 pandemic.

Although the tipped workers receive more money in the form of wages, the plaintiff alleges that they were deprived of their tips, which are retained by the defendants, and that the defendants seek to compensate the employees using one hundred percent forgivable PPP loan money. The plaintiff brings claims for failure to pay minimum wages under the Fair Labor Standards Act (FLSA) and the Ohio Constitution, failure to pay overtime wages under the FLSA and the Ohio Constitution, untimely payment of wages under Ohio law, and unjust enrichment.

While the [Department of Labor issued proposed rules](#) last fall concerning certain tip pools when no tip credit is taken and rules that would effectively [abolish the 80/20 side work](#) “rule,” many wage and hour pitfalls remain for employers of tipped workers. The Smith case presents an interesting illustration of how COVID-19 can bring those issues to the forefront. As another reminder, several of the contributors to the COVID-19 Related Workplace Litigation Tracker will be [presenting on this and other workplace litigation trends](#) on July 1, 2020. We will continue to track these trends as they unfold, and will continue to update the tracker twice each week. As always, stay tuned.