

Tip-Pooling Policies Can Land Nevada Casinos in Court

By Dora Lane

From dealers to wait staff, casinos employ a wide range of tipped personnel. In some gaming establishments, individual employees may keep the entire amount of gratuities left by their customers. In others, management (or the employees themselves) may institute a tip pool in which employees who receive tips must pool their tips together for distribution among a group of employees. Tip pools continue to be a hotly-contested issue in Nevada, as disputes frequently arise as to who can properly participate in a tip pool or how tips are to be distributed among those in the pool. One particular litigation hotbed has involved tip-pooling policies pursuant to which management requires tipped employees to share their tips with customarily non-tipped personnel. Defending such lawsuits can be costly and disruptive to casino operations. This article will discuss the potential issues surrounding tip-pooling arrangements and highlight recent developments in federal case law.





NEVADA LAW ON TIP POOLING

Nevada does not permit an employer to take or retain any part of the tips received by its employees.¹ Our state also is one of a handful of states that do not allow employers to offset a portion of the hourly minimum wage through a tip credit.² Accordingly, Nevada employees must be paid at least the applicable minimum wage for each hour worked, regardless of the amount of tips they receive. But, Nevada law does allow employers to mandate tip pools among employees,³ so long as, essentially, none of the pool participants can be deemed to be the “employer.”⁴

In recent years, the Nevada Supreme Court was asked to decide whether a tip pool at Wynn Las Vegas that required casino dealers to share their tips with casino service team leads and boxpersons violated Nevada wage law.⁵ The controversy stemmed from the fact that a number of the dealers filed a class action in Nevada state court challenging the tip-pooling policy.⁶ Initially, the Nevada Supreme Court dismissed the complaint by holding that the applicable Nevada wage statutes did not provide a private right of action. However, the Nevada Supreme Court ultimately addressed the tip pooling issue on appeal following an administrative decision by the Nevada Labor Commissioner.⁷ In relevant part, the court held that Wynn’s tip pooling policy did not violate Nevada law because the law does not prohibit a tip policy that splits gratuities among employees so long as the employer does not keep any of the tips for itself.⁸ On a state level,

the case essentially granted casinos and other Nevada employers the ability to mandate tip pooling in which tips are shared between both tipped and non-tipped employees, conditioned upon the requirement that none of the pool participants are synonymous with the “employer.”

Tip Pooling Under the FLSA

Compliance with Nevada state law is, however, only one aspect of the inquiry because Nevada employers must also comply with federal wage law. Under section 203(m) of the Fair Labor Standards Act (FLSA), employers are allowed to fulfill part of their hourly minimum wage obligation for tipped employees by taking a tip credit.⁹ An employer must give notice to its employees that it will be utilizing a tip credit, and must allow its employees to retain all the tips the employees receive, unless such employees participate in a valid tip pool.¹⁰ Under the FLSA, a tip pool is valid if it is comprised exclusively of employees who are “customarily and regularly” tipped.¹¹

So what about an employer who does not take a tip credit but implements a tip-pooling policy that requires tipped employees to share tips with non-tipped employees – is that addressed by section 203(m) of the FLSA?



To understand the issue, we need to review some historical developments. In a 2010 case, *Cumbie v. Woody Woo, Inc.*, the Ninth Circuit ruled that under the FLSA an employer who did not take a tip credit was permitted to have a mandatory tip-pooling policy requiring that tips be combined and distributed to both

customarily tipped and non-tipped employees.¹² The court's rationale was that section 203(m) of the FLSA specifically addressed tip pooling by employers who took a tip credit, but was silent as to employers who did not take a tip credit.¹³

Shortly after the *Cumbie* case was decided, the Department of Labor (DOL) promulgated a formal rule that extended the FLSA's tip pool restrictions in section 203(m) to all employers, not just those who take a tip credit.¹⁴ Accordingly, the DOL determined that under the FLSA, a valid tip pool for any employer may only be comprised of employees who are "customarily and regularly" tipped.

When a group of dealers again sought to invalidate Wynn's tip-pooling policy, this time in federal court alleging a violation of the FLSA, the federal district court held that the Ninth Circuit's 2010 *Cumbie* decision foreclosed the DOL's ability to create the contradictory rule in 2011.¹⁵ The district court also held that the 2011 DOL rule was contrary to Congress's clear intent, so, therefore, ruled in favor of Wynn Las Vegas, upholding its tip-pooling policy.



But this past February, the Ninth Circuit Court of Appeals disagreed, reversing the district court's decision.¹⁶ The court held that the DOL may regulate tip-pooling practices of employers who do not take a tip credit.¹⁷ The court reasoned that section 203(m)'s silence as to employers who do not take a tip credit had opened the door for the DOL to promulgate a rule addressing such employers.¹⁸ The court then determined that the DOL's 2011 rule extending the

tip pooling requirements to all employers was reasonable and remanded the case back to the district court for proceedings consistent with its opinion.¹⁹

CONSIDERATIONS FOR A COMPLIANT TIP-POOLING POLICY

Casinos who wish to impose a tip-pooling policy should consider both applicable state and federal law. First, the tip-pooling policy must allow for the entire amount of pooled tips to be distributed to employees with no tips kept by the employer. Second, as reflected in the recent Ninth Circuit decision, a valid tip pooling policy must share tips exclusively between employees who are "customarily and regularly" tipped. This determination may vary by employer and/or employee, so individualized analysis should be conducted. Third, employers should inform affected employees that they will be subject to a tip pool.

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¹ NRS 608.160.

² *Id.*

³ *Id.*

⁴ See NRS 613.120(1) (providing that it is "unlawful for any manager, superintendent, officer, agent, servant, foreman, shift boss or other employee of any person or corporation, charged or entrusted with the employment of any workers or laborers, or with the continuance of workers or laborers in employment, to demand or receive, either directly or indirectly, from any worker or laborer, employed through his or her agency or worked or continued in employment under his or her direction or control, any fee, commission or gratuity of any kind or nature as the price or condition of the employment of any such worker or laborer, or as the price or condition of his or her continuance in such employment."); see also NRS 608.011 (defining employer to include "every person having control or custody of any employment, place of employment or any employee").

⁵ *Wynn Las Vegas, LLC v. Baldonado, et al.*, 311 P.3d 1179 (Nev. 2013).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 29 U.S.C. §203(m).

¹⁰ *Id.*

¹¹ *Id.*

¹² 596 F.3d 577 (9th Cir. 2010).

¹³ *Id.*

¹⁴ 76 Fed. Reg. 18,832, 18,841-42 (April 5, 2011).

¹⁵ See *Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*