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# HOSPITALITY LAW

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## Disparities in head chefs' roles led to opposite results in lawsuit

### Chefs at competing branches contested FLSA exempt status

*By Adriana S. Kosovych, Esq.*

A New York federal court recently analyzed the job duties of two head chefs at competing branch restaurants of an upscale gourmet burger chain, to find that only one of them had all of the necessary ingredients to be properly classified as a bona fide executive exempt from the overtime pay requirements under the Fair Labor Standards Act and New York Labor Law.

In *Tamayo et ano. v. DHR Restaurant Co. LLC d/b/a Rare Bar & Grill et al.*, No. 14-CV-9633 (S.D.N.Y. 02/03/2017) employees Francisco Garcia Tamayo and Norberto Farciert sued DHR Restaurant Co., LLC and Rare Chelsea Restaurant Group — the entities that own and operate two Rare Bar & Grill locations in New York City where Garcia and Farciert worked — claiming they were misclassified as exempt and asserting claims for overtime pay under the FLSA and NYLL, as well as spread of hours pay, for the 72 to 80 hours minimum they worked per week. After Rare moved for summary judgment on the grounds that Garcia and Farciert were bona fide exempt executives, the court applied the same four-pronged legal standard to both plaintiffs but reached opposition conclusions with respect to each.

While the parties in *Tamayo* did not dispute that the first and third prongs of the executive exemption were met, they disagreed as to the second and fourth prongs: whether the chefs' primary duties were managerial; and whether they had the authority to hire and fire. As head chefs, both Garcia and Farciert were second in command in their respective kitchens behind Executive Chef Edgar Hernandez. But because neither the job title nor rank in the restaurant's hierarchy was alone sufficient to establish exempt status, the court's analysis focused on how

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## Court holds that restaurant has right to dictate tipping policies

### Court dismissed server's claims that Benihana tip pool was unlawful

*By Shira M. Blank, Esq.*

Tip pools can be a useful device for apportioning tips among tip-earning workers, which generally includes front of the house employees involved in direct customer service. Whether non-tip earning, back-of-the-house employees also may participate in a tip pool is currently unclear and may be ripe for adjudication by the Supreme Court in the consolidated cases, *Oregon Restaurant and Lodging, et al. v. Thomas Perez, et al., Cesarz et al. v. Wynn Las Vegas et al.*, in which the 9th Circuit Court of Appeals held that the U.S. Department of Labor is empowered to restrict employers from tip pooling.

A California federal court has recently weighed in on this issue in *Wilkes v. Benihana, Inc.*, No. 16 Civ. 2219 (JM) (DHB), 2017 U.S. Dist. LEXIS 29127 (S.D. Cal. 02/28/2017), holding that commercial enterprises, rather than courts, should be able dictate their tip pooling policies and finding that a tip pooling policy allowing front and back of the house employees to participate in the tip pool was lawful.

In *Wilkes*, the employee alleged that during his one-year employment as a server in Benihana's restaurant in Carlsbad, Calif., the restaurant collected all customer tips and, before paying them out to the servers, distributed to non-servers a pre-determined percentage of those tips based on the restaurant's sales. The employee alleged that this mandatory tip pool policy allowed the restaurant chain to pay non-servers' wages using servers' tips, because Benihana took an illegal tip credit against wages owed to back-of-the-house employees. Specifically, the employee claimed that Benihana used its tip pool policy to subsidize the sub-market wages that it paid its non-servers, thereby lowering its payroll expenses while simultaneously

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*"Hospitality owners/operators should ensure that the employee's actual job activities demonstrate that the employee's primary duty is managerial and that the employee has the requisite authority to hire and fire, or makes recommendations regarding hiring and firing that are given particular weight."*
*— Adriana Kosovych, Esq., attorney*

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Garcia and Farciert spent their working time (a question of fact) and whether their activities in their respective kitchens excluded them from the overtime benefits of the FLSA (a question of law).

While Garcia performed some managerial functions — such as managing the ingredient inventory and quality; overseeing the preparation of ingredients prior to the kitchen opening for business; serving as quality control for the restaurant's cooking; conducting interviews with candidates and recommending a few candidates to the executive chef for hire — other facts suggested those managerial duties were not necessarily the most important part of his job. For example, Garcia testified that he regularly covered cooking shifts whenever there was a need, and not necessarily by choice, and functioned as a regular line cook for up to 70 hours of his 80-hour work week, and for which he was paid less on an hourly basis than the non-exempt line cooks for doing the same non-exempt work.

Garcia also claimed that he only supervised the kitchen when Hernandez was absent, which was roughly 60 percent of the time, and that he often had to run decisions by Hernandez via phone when the executive chef was not present. Finally, the record reflected that Hernandez gave particular weight to Garcia's recommendations regarding the hiring of at least two to four kitchen personnel and Garcia admitted that he believed it was part of his job responsibilities to provide Hernandez with feedback on the kitchen workers' performance. Based on these facts, the court found that Garcia satisfied the fourth prong of the executive exemption test, but that there still were material disputes of fact about the second — namely, extent to which Garcia's exempt duties were more important than his non-exempt duties, as well as the percentage of time he spent performing exempt duties. Garcia, therefore, was entitled to proceed with his claims to recover overtime pay and spread of hours pay.

Farciert's experience in the kitchen was similar to Garcia's in a few ways: he managed ingredient inventory and quality; oversaw the preparation of those ingredients prior to the kitchen opening for the day; served as quality control for the restaurant's cooking; and recommended candidates to Hernandez for hire. Otherwise, Farciert's role as head chef was starkly different. Although he also covered cooking shifts, the little evidence in the record of how often or for how long Farciert would cover such shifts suggested that it was not very often. Farciert also made numerous recommendations to Hernandez to hire prospective applicants, including his own father, and Hernandez approved all of them. Three of those applicants began working before ever meeting Hernandez. On this record, the court found that there was no genuine issue of material fact regarding Farciert's exempt status.

The court's analysis in *Tamayo* serves as an important reminder to owners/operations in the hospitality industry that a job title alone is insufficient to establish the exempt status of an employee. Rather, hospitality owners/operators should ensure that the employee's actual job activities demonstrate that the employee's primary duty is managerial and that the employee has the requisite authority to hire and fire, or makes recommendations regarding hiring and firing that are given particular weight. In the absence of such facts, a court may determine that the employee is misclassified as exempt.

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## FLSA primary duties test

***By Adriana Kosovych, Esq.***

In *Tamayo*, the district court considered several factors to determine whether each of the two head chef's "primary duty" was managerial for the second prong of the exemption test: These duties include

- The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work;
- The employee's relative freedom from direct supervision; and
- The relationship between the employee's salary and the wages paid to other employees for the kind of non-exempt work performed by the employee.

For the fourth prong, the court considered whether it was part of each chef's job duties to hire or fire, or to make such suggestions and recommendations. The court also analyzed the frequency with which such recommendations were made, and the frequency with which the employee's suggestions and recommendations were relied upon by the executive chef of the restaurant chain. ■

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withholding earned tips from the servers.

The court disagreed. In dismissing the complaint, the court found that Benihana's tip pooling policy was not unfair and unreasonable. Although taking a tip credit against wages would be prohibited by California law if used as an offset against the minimum wage, the court noted that the employee did not allege in his complaint that Benihana paid its employees below minimum wage. Additionally, the court rejected the employee's argument that the tip pooling policy was nonetheless unlawful because it lowered servers' payroll expenses, noting that there are many types of jobs that give employers leeway to pay their workers less when they will be receiving tips. According to the court, accepting the employee's argument on this point "would call into question almost all tip pools, if not the practice of tipping itself."

Finally, the court found that Benihana's tip pool policy did not violate the public policies of promoting harmony among employees and providing good service to the public, and therefore declined to impose an alternative policy. Acknowledging that Benihana's tip pooling policy may not have been perfect or popular with all of its employees, the court held that the policy met the statutory purpose behind tip pooling in restaurants, i.e., to ensure that employees are paid gratuity for their services. The court observed that while the employee "may have preferred to keep a larger share of tips, an employer has wide latitude in devising tip-pooling policies to meet its business needs."

### Tip pools under California

California Labor Code section 351 provides that "no employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee 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."

California courts have consistently held that, based on the language of Labor Code sections 350, that tip pooling is lawful in the state under certain circumstances. ■

The court's analysis in *Wilkes* presents just one example of how a federal district court in the 9th Circuit has assessed a restaurant's tip pooling policy to determine whether it is fair and equitable and meets the statutory purpose after the circuit court's controversial decision in *Oregon Restaurant and Lodging*.

Hospitality owners/operators should review their tip pooling policies to ensure that, to the extent the policy allows back-of-the-house to take a cut of the tips, it does so fairly and equitably, without imposing an undue burden on the front-of-the-house employees. Owners and operators should keep an eye out for further developments on this issue, as it may soon catch the attention of the Supreme Court.

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