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LESSONS LEARNED FROM THE LOCKE-OBER CASE

On July 27, 2007, Locke-Ober, the venerable Boston restaurant, prevailed in a lawsuit that was initially brought by three of its former wait staff members and one maitre d'. The restaurant staff claimed that they were illegally terminated from their jobs because they had made an internal complaint regarding the restaurant's policy of sharing tips with other employees, including managers.

In 2001, Locke-Ober had instituted a tip-pooling system that required servers at each shift to share their tips with busboys, bartenders and the maitre d', who was a member of management. As you may know, in 2002 the Legislature amended the Massachusetts wage law to provide that employers could not require wait staff employees, service employees or service bartenders to share any portions of their tips with other employees. The servers believed that Locke-Ober's tip-sharing system violated the recently enacted tips law and they complained to the maitre d', who then brought the complaints to the owners' attention. Subsequently, the owners fired the complaining wait staff and the maitre d'.

The wait staff and the maitre d' brought claims against the restaurant, asserting that their employer had fired them in retaliation for their complaints. Massachusetts wage law prohibits employers from retaliating against employees who assert their rights under the Massachusetts wage and hour law. The lower court found in favor of the restaurant in part and dismissed the claims that were brought by servers who had made only internal complaints to management, as opposed to filing their complaints with the Attorney General's Office. Last summer on appeal, the Massachusetts Supreme Judicial Court reversed this in part and ruled that the law protects employees who take "any action" to protect their rights under the wage law, including employees who make internal complaints to management only. In addition, the court dismissed the claim of the maitre d' on the grounds that merely conveying the employees' complaints to higher management did not constitute asserting the rights of another employee or complaining to management on that employee's behalf.

The Supreme Judicial Court's ruling allowed the case to move forward for a jury to decide whether, based upon the evidence, the restaurant terminated the employees in retaliation for their complaints or whether it terminated the employees for performance issues. At the conclusion of the recent trial, the jury determined that the restaurant sufficiently proved that it had legitimately terminated these employees because of performance problems.

Although the jury ruled in favor of the restaurant, there are still important lessons to be learned from this case:

1. Comply with the law concerning tip pools. Restaurants are allowed to institute tip pooling policies; however, the amendment imposes important restrictions, and tax ramifications should also be considered. No portion of the tips collected can be distributed to any employee who is not a wait staff employee, service employee, or service bartender. Any service charge (a fee charged by restaurants to a customer in lieu of a tip) should be treated the same as a tip, and should not be distributed to non-service employees. Managers and owners are prohibited from receiving any portion of tips, even if they serve food and beverages. Be aware that implementing or changing a tip pooling system can impact income tax reporting requirements, sometimes revoking pre-established agreements with the Internal Revenue Service.
2. Distribute pooled tips in a timely fashion. The amendment provides that any service charge or tips be paid to the wait staff, service employee or service bartender by the end of the same business day and in no case later than the time set forth for timely payment of wages under the law, which is typically within six days from the termination of the pay period during which the tips were earned.
3. Take all internal and external complaints regarding tip allocations and payment of wages seriously. Investigate any questions and concerns, and if the employees have not been paid properly, fix the situation. Do not purposefully or inadvertently take any adverse action against the employee who makes an internal or external complaint. In other words, do not fire, discipline, or treat

the employee disadvantageously in comparison to other employees simply because he or she filed a complaint. Develop internal procedures that require complaints about wage and hour issues to be in writing and submitted to a designated person.

4. Document and act proactively when a member of your wait staff is exhibiting performance problems. As the Locke-Ober case shows, you could be faced with a lawsuit if you suddenly terminate an employee for performance problems and this particular employee had recently made a complaint (either external or internal) about payment of wages. When an employee exhibits a performance problem, you must address the problem in a timely fashion and document the problem and what actions were taken.

If the jury had found that Locke-Ober had retaliated against its employees, it could have been very costly for them. There are steep penalties and significant damages that could be assessed against an employer for violating the Massachusetts wage and hour laws, including awards of multiple damages and attorneys' fees. Overall, it is important to always be in compliance with these laws. If you have any questions regarding how your employees are being compensated or questions regarding employee complaints or discipline issues, please contact us at the information listed below.

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