

# Tip Pooling Options

## *Court Ruling Affects Tip Pooling Arrangements Already in Place*

As of September 6, 2016, the Ninth Circuit denied Oregon Restaurant & Lodging Association's (ORLA) petition for a panel rehearing and rehearing *en banc*.

On September 13, 2016, our motion for a stay (which means temporary suspension of the Ninth Circuit Court's decision) of the mandate was granted.

In addition, ORLA is moving forward with a petition for rehearing with the United States Supreme Court. Our stay remains in force until either the Supreme Court denies our petition for rehearing or makes a final decision if they take the case.

Given the current uncertainty regarding a final decision from the Court on tip pooling in Oregon, ORLA recommends consideration of the following options.

### **1 Eliminate tip pooling with BOH employees immediately.**

By immediately reverting to tip pools that only include "customarily and regularly tipped employees" restaurateurs are choosing to avoid any additional liability that could be brought forward by a private lawsuit.

**UPSIDE:** Protecting yourself from any private claims instigated by employees against your restaurant who feel their tips are now being pooled unlawfully. Only you can determine the real risk being avoided here.

**DOWNSIDE:** If the case is heard by the Supreme Court and ruled in our favor, tip pooling with BOH employees would remain legal. If that happens and you have already changed your policy to eliminate BOH tip pooling, then it may be more difficult to change the policy yet again to the original policy you had in place before the most recent ruling.

### **2 Keep tip pooling in place with BOH employees until ORLA hears from the U.S. Supreme Court**

Because the Ninth Circuit Court denied our rehearing and a motion for a stay was granted, you have until at least December 5 to comply with the Department of Labor rules regarding tip pooling. Our stay remains in effect until we hear from the Supreme Court. This means you have until the mandate is lifted to fully comply with the rules and eliminate BOH involvement.

**UPSIDE:** You have time to inform, educate and put into practice a new tip pooling system that does not include BOH employees.

**DOWNSIDE:** A private claim could be instigated against your restaurant by employees who feel their tips are now being pooled unlawfully. Only you can determine the extent of that risk.

### **3 Eliminate tips altogether.**

**UPSIDE:** Tipping continues to invite litigation in the court system. Replacing tipping with service charges and/or menu price increases and moving to more standardized wages across the entire restaurant operation provides a compensation model less likely to draw challenges from lawyers or organized labor.

**DOWNSIDE:** Oregonians are accustomed to tipping and may be displeased with mandatory service charges. In addition, front-of-the-house workers could feel demoralized and frustrated by this different approach that results in less pay overall.

**4 Consider alternative ways to share tips such as adding a kitchen gratuity line to checks or using a tip jar** (if the jar stipulates that the tips are for all employees - or shared amongst all employees).

**UPSIDE:** Restaurateurs can give their customers a choice about whether the tip that they provide goes only to the server, or if they want the tip (or a portion of it) to go to the kitchen staff.

**DOWNSIDE:** Customers are not accustomed to seeing more than one tip line on a check and may feel obligated to add more than they are comfortable with.

**Q What if my servers decide they want to voluntarily tip-out to the BOH employees? Is that allowed?**

**A** Yes, voluntary tipping-out is allowed. To protect your restaurant however, ORLA recommends servers be asked to provide management with a signed note or letter created by the server stating they are voluntarily tipping out to BOH employees. As a side note, voluntary tip pools are frequently under scrutiny and challenged as not being truly voluntary. A signed document alone will not ensure that someone cannot still challenge that type of tip-out as involuntary.