



ARIZONA

EMPLOYMENT LAW LETTER

Part of your Arizona Employment Law Service

HRHero.com
A division of BLR®

Dinita L. James, Editor
Gonzalez Saggio & Harlan LLP

March 2014

WAGE AND HOUR LAW

Deducting kilt costs tilts against eatery

by Dinita L. James
Gonzalez Saggio & Harlan LLP

Tilted Kilt Pub & Eatery has its headquarters in Tempe, but the Celtic sports bar chain has 90 restaurants throughout the United States and Canada. A couple of workplace issues have put the chain in an unflattering light in the hometown media in recent months.

The most dramatic was a November 2013 incident in which a kitchen employee stabbed and killed another worker. Tilted Kilt issued a statement after that incident grieving the loss of a valued longtime employee and announcing its downtown Phoenix pub, where the killing occurred, would be closed for a week out of respect for the families involved and the other employees.

Costly uniforms

The more recent incident, while far less tragic, cost the chain a total of nearly \$45,000. It seems that the skimpy red tartan kilts worn by servers at the eateries cost a lot given their size, up to \$160 per uniform. The eateries routinely deducted up to \$40 per pay period from servers' paychecks to cover the full price of the uniforms. The servers' paychecks also were reduced for employee parking at some locations.

The Phoenix district office of the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) conducted an investigation and determined that those pay practices violated the law. To resolve the violations, the company agreed to pay back wages covering the required minimum wages and overtime of \$32,087 to 250 employees at two Tilted Kilt establishments in Tempe and Phoenix.

The DOL investigation then spread to three other independently owned Tilted Kilt franchises in the Phoenix metro area. The franchises, which were engaging in

some of the same improper pay practices, resolved the violations by agreeing to pay \$12,462 in back wages for minimum wage and overtime violations to 149 employees of the three independently owned outlets.

Tipping it right

While the DOL's announcement of the settlement in January 2014 didn't provide details of the violations, it did note that the affected employees were tipped servers. Under the Arizona Minimum Wage Act, employers can pay tipped employees up to \$3 less than the minimum wage if the employees receive more than \$30 in tips in a given workweek. Because Arizona's current minimum wage is \$7.90, that means tipped servers in Arizona must be paid at least \$4.90 per hour if their employer claims a tip credit.

That's considerably more than restaurants and other hospitality industries must pay tipped employees in other states where the federal Fair Labor Standards Act (FLSA) sets the minimum wage. Tipped employees subject only to the FLSA can be paid as little as \$2.13 per hour.

Under both state and federal law, however, a server's wages and tips must equal at least minimum wage. Based on the DOL's report on the case, it's a safe bet that Tilted Kilt's \$40 weekly deductions from servers' paychecks to cover the cost of the cute kilts brought the affected servers' wages below the minimum in some weeks.

In general, any deductions that bring a server's hourly pay below the minimum wage and benefit the employer will be a wage and hour violation. That includes:

- Fines or disciplinary penalties;
- Repayment for shortages;



Gonzalez Saggio & Harlan LLP and Gallagher & Kennedy, P.A.,
are members of the *Employers Counsel Network*



- Repayment for theft, unless the employee has been convicted and ordered to pay restitution; and
- Repayment of loans, with interest, if the employer is the lender.

While payroll deductions for the reasonable cost of board and lodging are permissible under federal law even if they bring the employee's wage below the minimum, that isn't the case in Arizona. Arizona law defines wages only as "monetary compensation," so board and lodging cannot count as part of minimum wages.

In Arizona and elsewhere, however, certain payroll deductions are permissible even if they bring the hourly wage below the minimum. Those include deductions for:

- Taxes;
 - Insurance premium payments;
 - Repayment of loans from third parties;
 - Repayment of free and clear advances from the employer; and
- Wage attachments and garnishments, which have their own statutory limits.

Bottom line

The wage and hour laws applicable to tipped employees can present complicated compliance issues. In addition to the limits on permissible deductions, there are strict written notice requirements, limits on who can share in a tip pool, and strict requirements for record keeping and reporting to the appropriate taxing authorities. If you claim a tip credit for tipped employees in your workforce, it's important to conduct regular compliance audits to make sure you don't tilt toward violations of the law. Take up any questions you have with legal counsel.

Dinita L. James, the partner in charge of the Phoenix office of Gonzalez Saggio & Harlan LLP, is the editor of Arizona Employment Law Letter. You can reach her at dinita_james@gshllp.com or 602-840-3301. ❖