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This article addresses an initiative petition in Nevada seeking to reverse long-established state law permitting employers to institute tip-pooling arrangements among employees involved in the chain of service to customers and allowing class actions, punitive damages and attorneys fees for state law wage and hour violations in Nevada.

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Union-Supported Petition Initiative in Nevada Would Prohibit Employer Required Tip Sharing

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On January 16, 2008, a Las Vegas-based union campaigning to organize dealers in Nevada filed an initiative petition with the Nevada Secretary of State seeking to reverse a decade-old state law permitting employers to institute tip-pooling arrangements among all employees involved in the provision of service to customers. The petition filed by the International Union of Gaming Employees (IUGE) needs at least 58,628 signatures by November 11, 2008, in order to go to the 2009 legislature. If the petition has the necessary signatures by November 11th but does not pass in the legislature in 2009, it will then be placed on the 2010 ballot for voters to decide.

The tip petition is similar to a bill supported by IUGE last year in the Nevada legislature that failed to come up for a vote in the Senate. While proponents of the tip petition portray it as a response to a recent court decision, the provisions of the petition go far beyond the facts of the case and would directly impact every tipped employee in Nevada. Indeed, the petition would reverse more than 30 years of legal precedent and permit any dealer or other employee receiving tips to refuse to share those tips with fellow employees involved in rendering the service to customers. In addition, the petition would greatly expand the monetary and civil remedies available under Nevada wage and hour laws and increase the number of individual and class action lawsuits that can be filed against Nevada-based employers.

Current Law

Nevada employers have been legally prohibited from taking any part of the tips or gratuities of their employees for the

better part of a century. Indeed, in 1931, recognizing the importance of tip income to employees in Nevada's heavily service-oriented economy, the Nevada legislature enacted what is currently known as NRS 608.160. That statute simply provides:

- It is unlawful for any person to:
 - Take all or part of any tips or gratuities bestowed upon his employees.

However, while seeking to protect employee tips, the Nevada legislature also recognized the legitimacy of the long-standing practice of pooling tips to be shared among all employees involved in the provision of service to customers. For this reason, subsection 2 of NRS 608.160 specifically permits such tip-pooling arrangements.

- Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.

Tip pooling has long been seen as a way to ensure that all employees involved in the provision of service benefit from the tips bestowed by customers. Subsequent case law has repeatedly upheld the practice of tip pooling in Nevada. Indeed, the Nevada Supreme Court has specifically ruled under NRS 608.160 that employers in Nevada may require their employees to pool tips as a condition of employment. *Alford v. Harolds Club*, 99 Nev. 670, 669 P.2d 721 (1983). Federal courts have also recognized the mandatory pooling of tips is a legal way to ensure that all employees involved in the service may share in the rewards of the service. *Cotter v. Desert Palace, Inc.*,

880 F.2d 1142 (9th Cir. 1989); *Moen v. Las Vegas Int'l Hotel, Inc.*, 402 F. Supp. 157 (9th Cir. 1975). NRS 608.160 in its current state, therefore, permits an employee who may not actually receive the tip but who performs work down the line of service that leads to the tip, to be able to share in the tip as part of his or her service.

The Union's Tip Petition

The IUGE petition does not change or enhance in any way the decade-long prohibition against an employer taking any part of the tip income of its employees. On the other hand, what the petition does is give the individual employee actually receiving the tip a veto over any agreement to share tips between co-employees involved in the provision of service. This tip veto is accomplished by two very significant changes to the wording of NRS 608.160.

First, the IUGE petition narrows the scope of the statute to protect only the employee at the end of the chain of service. In other words, only the employee actually receiving the tip from the customer is protected by the statute as amended by the petition. The IUGE petition would amend subsection (1)(a) of NRS 608.160 as follows (matter in italics is new; matter in brackets to be omitted):

- It is unlawful for any [person] employer to:
 - Take all or part of any tips or gratuities bestowed upon his employees.
- Eligible employees receiving tips is defined as those who are the actual and direct recipient of the tips or gratuities.**

Second, the IUGE petition then specifically prohibits an employer from requiring all employees involved in the provision of service to benefit from pooling tips. Instead, under the petition tip pooling is only legal where "eligible employees" agree to share tips. Eligible employees only may determine who will be included in the tip pool, if any. Eligible employees of course are only those employees actually receiving the tip from the customer.

Finally, the IUGE petition would significantly expand the number, and types of employment-related lawsuits that plaintiffs' attorneys can file against Nevada-based

employers. In this regard, the petition does four significant things. First, the petition specifically creates a private right of action for all provisions of Chapter 608 of the Nevada Revised Statutes. This is a significant departure over current law that has entrusted the Nevada Labor Commissioner with the enforcement of many Nevada statutes. Second, the petition specifically authorizes class action lawsuits against employers. Third, it permits recovery of punitive damages in addition to money damages. Fourth, the petition mandates awards of attorneys' fees to plaintiffs' attorneys who prevail on any action under the Chapter.

What Would the Tip Petition Mean for Employees

All tipped employees in Nevada are affected by the tip petition, no matter the industry. Unless an employee is the actual and direct recipient of the tip (in other words, unless the tip is handed to the employee), he or she has no right to share in tips. By permitting one employee in the chain of service to determine whether he or she keeps or shares tips with fellow employees, the IUGE petition arguably strips the right many employees who contribute to the provision of service now enjoy to fully participate in tip-pooling arrangements. This means the right of the bus person to receive tips would now be entirely dependant on the good graces of his or her waiter or waitress. The persons handing the client her keys at the car wash would also be able to refuse to share tips with the other employees who helped vacuum, wash and dry the customer's car. It is clear that the IUGE petition will directly and adversely affect the compensation of many thousands of employees in different industries all over Nevada.

What Would the Tip Petition Mean for Employers

The tip petition runs contrary to established case law allowing employers to require that employees pool their tips. Employers like the flexibility of tip pools because, among other things, job assignments are easier to implement if all employees share equally in tips. In the gaming industry, tip pools are sometimes instituted to lessen the possibility of tip hustling. Under the IUGE petition, Nevada employers would not be

able to institute tip pooling on any level. As a practical matter, under the IUGE petition, tip pools may only be feasible for collectively bargained employees, which may be the real motivation behind the petition.

Another troubling aspect of the tip petition is that it would permit any employee, either individually or as part of a class, to initiate a civil action against an employer for allegedly violating any provision of Chapter 608 of the Nevada Revised Statutes. While, Nevada law already permits employees to file suit for unpaid wages, the Nevada legislature has charged the Labor Commissioner exclusively with enforcing most of the remaining statutes of the Chapter. If the petition became law, any employee believing his employer failed to abide by any provision of the Chapter would then be entitled to file a class action suit and could potentially recover punitive damages and attorneys' fees. This means Nevada employers may in the future see more class action lawsuits over topics such as ten-minute rest breaks, records of wages, the cost of uniforms, the posting of paydays, meal credits and any one of the myriad other subjects contained in Chapter 608.

Some of the Other Problems with the Tip Initiative

There are a host of other logistical questions raised with the tip initiative. For instance, how do employees agree on a tip-pooling arrangement? Is it by vote? If so what employees are eligible to vote: all employees or employees on a particular shift or job? Is a tip-pooling agreement done by a secret vote? If the agreement is not by vote, does it have to be in writing? How can a tip-pooling agreement, once finalized, be superseded? What if an employee does not want to participate in a tip-pooling agreement and wants to keep his or her own tips? Does this mean that an "eligible employee" may effectively veto any tip-pooling arrangement because anyone who does not agree to pool tips must be excluded? The possible ramifications are endless.

Conclusion

The tip petition appears to be an attempt by the IUGE to curry favor among the very employees it seeks to represent, dealers. In giving absolute right over tips to the employee at the end of the chain of service,

the petition effectively strips the host of other employees involved in the service of the rights they now enjoy under Nevada law. The IUGE petition also promises to be a boon to the plaintiffs' bar and will certainly diminish the importance of the Nevada Labor Commissioner. Both employers and employees have reason to be wary of the IUGE tip petition.

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