Starbucks Ruling Tips the Scales: Changing California Law to Allow Supervisory Employees Their Fair Share of the Tips

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Abstract

In 2008, a San Diego trial court slapped Starbucks Corporation with a $100 million judgment for violation of California's tip-sharing laws. Shift supervisors, classified as “agents” of the employer by statute, could not share in tip jar proceeds, despite spending 95% of their time performing the same duties as ordinary Starbucks baristas. More recently, the Court of Appeal reversed the judgment, reasoning that tips placed in a tip jar are not personally given to or intended for baristas, and so are outside of the statute's reach. While strong evidence suggests Starbucks supervisors should be allowed a share of the tips, the court's result conflicts with the statute's plain language, which excludes certain classes of employees from tip-sharing arrangements. This article argues that the statutory definition of “agents” should be scrapped and replaced with a more careful distinction between who can and cannot participate in tip pools. The statute's goal was originally to mirrors public expectations about who should be allowed to receive tip shares, and the Starbucks case reveals that the per se exclusion of supervisors from tip-poooling is well outside of customers' intended results. Therefore, this article proposes the Fair Labor Standard Act's definition of “traditionally tipped employee” as a better distinction between employees who should and should not be able to participate in tip-sharing or tip-poooling.

I. Introduction: Chau v. Starbucks Corp.
A. Starbucks Baristas Prevail in Tip Jar Suit

In 2008, Starbucks Corporation was slapped with a $105 million judgment in San Diego Superior Court for violations of California tip-sharing rules. After a bench trial, Judge Patricia Cowlett found that plaintiff Jou Chou, along with a class of fellow baristas, was forced to share tips out of the tip jar with certain baristas known as “shift leads” or “Shift Supervisors,” those baristas with some supervisory responsibility (“supervisory baristas”). Under California Labor Code Section 351, “employers or their agents” (emphasis added) are prevented from participating in tip-sharing (also known as “tip-pooling”) arrangements. The category of “agents” includes “person[s] having the authority to... supervise, direct, or control the acts of employees,” regardless of the role they play in helping customers. The trial court ordered Starbucks to pay ordinary baristas the amount of the tips unlawfully distributed to supervisory baristas, including pre-judgment interest.

Tips at Starbucks coffee shops are ordinarily left in a plastic receptacle, and occasionally given directly to baristas. Until the decision in Chau, any tips placed in the receptacle, or tip jar, were required by company policy to be collected, added up, and distributed between all the baristas, including supervisory baristas. Supervisory baristas wear two hats: on one hand, they spend 95% of their working time performing the same functions as ordinary baristas (making

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2 Id.
6 Starbucks to ignore tip-sharing court ruling, supra note 1.
7 Appellant’s Opening Brief, supra note 3, at 6-7.
drinks, cleaning, etc.), and are without the authority to hire or fire. Supervisory baristas and the other baristas view themselves collectively as a “team.” No insignia distinguishes a supervisory from non-supervisory employee, the latter of whom is free to ask a supervisory barista to assist her or switch duties with her. On the other hand, a supervisory barista directs the other baristas' work, and baristas are disciplined for not following a supervisor's order. A supervisory barista is quite often the “captain of the shift”: they discipline insubordinate employees by sending them home, counsel employees who fail at their tasks, and are held accountable for other baristas' performances.

B. The Case on Appeal

On appeal, Starbucks' primary attack focused on the Superior Court's interpretation of Section 350. First, Starbucks argued that a supervisory barista lacks the requisite authority to qualify as the employer's “agent”, since they cannot compel obedience from other baristas. Second, Starbucks argues that the statute's purpose is to prevent an employer from defrauding customers by permitting its agents to receive tips that are rightfully left for employees, and thus the statute should not be read to include those who “render actual service.”

There was a tone of insistence as Starbucks emphasizes the invisibility of any distinction between baristas:

Starbucks customers have no way of distinguishing baristas from shift leads, nor does it matter to them. All they see, day after day, is baristas and shift leads working side-by-side performing identical tasks, and their tips reward the entire team of employees who contribute to their services. Starbucks policy of assigning all team members a fair proportion of the tips that they themselves earn cannot be deemed a “fraud upon the public” - rather, the trial court's

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8 Harold M. Brody & Joan Chang, Class Action Against Starbucks Revolves Around Misclassification of Workers and Tip-Sharing Arrangements, 35 EMP. RELATIONS TODAY 75, 75 (2008).
9 Appellant's Opening Brief, supra note 3, at 7-8.
10 Respondent's Brief, supra note 3, at 8.
11 Id. at 8-9.
13 Appellant's Opening Brief, supra note 3, at 11-15; see Cal. Lab. Code § 350 (defining employees as those who “render actual service”).
Chou, however, remained equally insistent: the plain meaning of the terms “supervise, direct and control” in the statute clearly describe supervisory baristas, and therefore Chou simply urges the court to find that supervisory baristas are, indeed, “agents” of the employer for the purposes of this rule. Why include such terms in the statute if more should be required to find someone an “agent”?

Although a court might look past the plain language of the statute where the result is particularly “absurd or glaringly unjust,” a departure from the ordinary canon of judicial interpretation seemed unlikely. Even the cases Starbucks cited in trying to build away from the damning language of the Labor Code belie such an effort. At Starbucks, supervisory baristas occupy an undisputed instructional role that other baristas do not, no matter how the untrained observer would classify employees, and no matter how the majority of a supervisor's work-time is spent. An expansive definition of “agents” of the employer has already taken hold in California, and the size of the award in *Chau* has prompted baristas in other states to sue under similarly-phrased statutes. In short, Starbucks was on notice that its mandatory tip-pools might

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14 Appellant's Opening Brief, *supra* note 3, at 13 (citations omitted) (emphasis in the original).
17 *See* Fitch v. Selected Products Co., 36 115 P.3d 1233, 1236 (Cal. 2005) (“We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.' If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.’”) (citations omitted); *see* Starbucks Appellate brief p. 11.
be illegal in California, and Chau's prospect for an affirmance on the substantive legal point seemed high.

In June, however, the Fourth Appellate District in California reversed the Chau case in an unexpected way.\(^{21}\) Rather than addressing the parties' main point of contention, a unanimous court held the tip-sharing statute, as well as cases addressing mandatory tip-pools, inapplicable to tip jar-style tipping.\(^{22}\) As collective tips left for the “team,” tip jar money did not qualify as the kind of personal tip the statute intended to protect.\(^{23}\) The intention behind the customer's tip is key, and when placed a tip is placed in a Starbucks tip jar, this intention is undisputedly to tip all service employees.\(^{24}\)

\( C. \) The Problem Posed by the Statute Itself

The appellate court's effort to respect the equity of Starbucks tip-sharing policy, while admirable, led it away from a careful reading of the law.\(^{25}\) The California tip-sharing statute begins with an obligation: no “agent shall” be permitted to receive tips left for an employee.\(^{26}\) The second sentence declares a policy: tips are the property of employees for whom they're left or to whom they're given. While an “equitable sharing” of the tip jar's proceeds respects a

\(^{21}\) Chau v. Starbucks Corp., D053491 (Cal. Ct. App., filed June 2, 2009). The case was known as Chou v. Starbucks Corp. in the trial court and in the news reports covering the trial. On appeal, the case is known as Chau v. Starbucks Corp.. I refer to the names plaintiff as “Chou” throughout except where the full name of the case is required.

\(^{22}\) Id.

\(^{23}\) Id. at 14; see Cal. Lab. Code § 351 (“Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for.”).

\(^{24}\) Chau, D053491 at 21-23 (Cal. Ct. App., filed June 2, 2009).

\(^{25}\) For example, the court construed the statute by writing, “Under the statute's plain meaning, an agent cannot take a tip 'paid, given to, or left for' another employee.” Id. at 13 (italics in the original). The text of the statute says “an,” not “another,” and when a collective tip is at issue, the difference is material. If the statute said “another,” then a tip intended in part for agents and in part for employees would be fair game for agents, whereas the use of the word “an” suggests an alternative: tips intended to benefit both agents and employees cannot be shared with agents. But see Cal. Lab. Code § 350 (failing to create mutual exclusivity between the terms “employee” and “agent,” but creating exclusivity between “employer” and “employee”).

\(^{26}\) Cal. Lab. Code § 351 (italics added).
property right created when a customer tips intending to benefit collectively all who serve her, it creates a conflict with the underlying obligation when the one to whom the benefit is intended is an “employer or agent.” If the statute's two provisions were of comparable weight, the court's resolution via legislative intent and basic fairness would be appropriate. Yet there is no comparison: the obligatory sentence is the natural starting-point for an analysis of the statute, and must be paid deference. The Chau court very clearly finds an equal and alternative rationale beyond the basic command. In effect, the Chau opinion creates a sweeping “tip jar” exception to the tip-sharing laws, since tip jars are always a medium for the expression of mixed or collective intentions, yet takes pains to limit its holding to this case or other cases where the employer accomplished an “equitable division” of the tips.27 Privileging policy and collective intent over the statute's primary command allows a manager to dip into the tip jar, if it is fair and equitable to do so.28

A more certain path toward giving all employees their due lies in fixing the statute, conflicted as it is. The statutory obligation ought to reflect customer intentions and public policy by excluding from tip-sharing only those persons customers would not want sharing in the tip, rather than per se excluding employees who have limited supervisory authority. Where do we draw the line between unethical tip-taking employers and tip-deserving employees? In order to answer that question, we need to examine two related subjects: the history of tipping in America, and the psychology behind tipping. If there are good reasons to differentiate supervisory from non-supervisory employees, based either in experience, public policy, or probable consequences, then such rules should stand. However, if the rule is a relic or unfairly distinguishes between

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27 Id. at 24-25.
supervisors and other employees, it should be replaced with a better rule. As we shall see, federal law has had occasion to draw a line between who falls on the side of the employer or manager, and who falls on the side of the worker or employee, in the tip-sharing context.

This article argues that the California tip-sharing law's exclusion of “agents” of an employer from tip-sharing arrangements does not express the law's purpose in many situations, including the case of Starbucks supervisory baristas. California's anti-tip-taking rule was originally enacted to address the popular expectation that tips given to the employees would remain with the employees and not be appropriated by their employer. Customers at Starbucks have no way of distinguishing one category of baristas from another, and supervisory baristas are as much the expected recipients and intended beneficiaries of the tip as are other baristas. A better rule, one which permits equity in the Starbucks case, and one more strongly linked to the reasons why we tip, would allow employees to share in tip-pools when they are employed in occupations that are traditionally or customarily “tipped.”

Part Two of this paper tells the story of how tipping, once considered controversial, has become an American institution. As customers began tipping, employers exploited tips by either reducing wages or by taking a portion of the tips. While the former practice grew to be widespread and accepted, tip-taking is qualitatively different and more susceptible to regulation. Part Three demonstrates how the modern tip-taking law in California springs from the concern that employers were dipping into gratuities that the public believed were going to service employees, but grew to allow the employer to mandate tip-pooling amongst eligible employees. This section finds that the common thread running through the law's history is an attempt to reify popular expectations about who gets to keep the tip. Part Four takes a close look at the working
conditions at Starbucks and psychological evidence regarding tipping behavior. This Part asserts that supervisory baristas are the intended beneficiaries of customer tipping, and that allowing them to share in tips avoids the concerns associated with allowing management to share in the tips. Finally, Part Five examines the Fair Labor Standards Act's test for defining who is an employee allowed to participate in tip-pooling, concluding that this test far better captures the legislature's intent to make employers' treatment of tips conform to customers' expectations.

I. The Entrenchment of Tipping in American Life Through Employers' Exploitation of Tipping Practices

A. Tipping Origins and Early Public Reaction

The origins of tipping are vague, but the spread of the practice around the world seems to be linked to the remnants of the feudal system in Great Britain. Tipping became common in the homes of nobleman as sums of money, known as “vails,” were given to servants as compensation for the extra or additional services that the servants provided to guests. It seems that tip-sharing is almost as old as tipping itself: Segrave quotes a nineteenth-century account of a master who shared in and thereby profitted from these “vails.” Thereafter, tipping quickly spread from domestic to commercial settings, where it has remained prevalent. In fact, one of the oldest accounts of tipping dates back to English coffee-houses, where patrons would place coins into a brass-bound box labelled “To Insure Promptitude,” or “TIP” for short.

30 Id. at 1-2; see also Ofer H. Azad, The History of Tipping – From Sixteenth-Century England to United States in the 1910s, 33 J. SOCIO-ECONOMICS 745, 753 (2004).
31 Segrave, supra note 23, at 1.
Contrary to popular opinion abroad, tipping was not an established practice in the United States until the latter part of the nineteenth century. Tipping was a custom imported by wealthier Americans, who tipped in order to demonstrate their familiarity with European customs. As the Industrial Revolution progressed, wages increased and servitude became a thing of the past, more people found themselves in situations where one might tip. The practice took hold rapidly, and by 1890 tipping was fully established in the U.S. During the early 1910’s, it was estimated that five million workers in this country, more than 10% of the labor force, engaged in tip-taking occupations, with an estimated $200-$500 million a year in tips given.

The sudden prevalence of tipping provoked strong responses from employees and from the public. Commentary on the practice ranged from regarding it as a nuisance to regarding it as distinctly “un-American” and degrading to those who accepted tips. Tipping was seen by some as a convention more appropriate to an aristocracy than a democracy, and was generally associated with an attitude of smugness or entitlement on the part of the tippees. The image of tip-receivers as well-paid and exploitative of customers' good will masked the truth, that tip-receivers were an “underpaid, exploited group of employees.” Despite a good deal of activism on the part of anti-tipping patriots, they made little headway, and tipping grew more

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33 See generally Brigid Casey, Tipping in New Zealand Restaurants, 42 CORNELL HOTEL & RESTAURANT Q. 21 (2001) (discussing New Zealand attitudes towards tipping and revealing that an automatic gratuity is heavily associated with the United States, and is even called “U.S.-style tipping”).
34 Azad, supra note 24, at 754.
35 Schein et al., supra note 26, at 20.
36 Segrave, supra note 23, at 5.
37 Id.
38 Azad, supra note 24, at 754.
39 See Segrave, supra note 23, at 5-10.
40 See id. at 11-14.
41 Id. at 11.
entrenched.\textsuperscript{42} Once tipped employees started to rely on tips to earn a certain income, tippers failure to adhere to tippees' standards began to be met with hostility. Tipped employees seem to have tried everything to revenge themselves on non-tippers or poor tippers, from marking their luggage to pouring water on their heads, to the usual tactic of giving them generally poorer service.\textsuperscript{43}

B. Employers Begin to Exploit Tips and the Tip Becomes Part of the Wage

The prevalence of tipping meant an increased amount of money changing hands in the workplace, and the business community sought to take advantage of this development in two different ways. First, employers reduced the wages of tipped employees. A combination of published “standard” tipping amounts and the expectations of the tipped employees helped to establish normal tipping rates and thus eased the uncertainty and discomfort that can accompany tipping.\textsuperscript{44} Anti-tipping activists pointed out that as tipping was becoming standardized, employers took progressively greater advantage of the “extra” that customers were paying employees by reducing wages.\textsuperscript{45} For example, the Pullman company actively circulated the fact that it paid its black employees substandard wages, in order to elicit sympathy on behalf of the employee and increase his tips.\textsuperscript{46} Wage-lowering became so extreme that in upscale restaurants in France and the United States, waiters would be given no wages but tips, and in some cases had to pay the employer for the privilege of working there.\textsuperscript{47}

When an employer could not or would not pay an employee less in wages, they could

\begin{itemize}
\item \textsuperscript{42} Id. at 31.
\item \textsuperscript{43} See id. at 12-13.
\item \textsuperscript{44} Id. at 15, 19-21.
\item \textsuperscript{45} William R. Scott, T\textsc{itching P}al\textsc{m} 23-24 (1926).
\item \textsuperscript{46} Segrave, supra note 23, at 17-18.
\item \textsuperscript{47} Azad, supra note 24, at 755.
\end{itemize}
always deprive the employee of a share of the tips. In hat-check and coat rooms, for example, customers were led to believe that the tipped employee kept the tip, yet the tips were collected by a contractor who operated the coat-check room. In cafés, waiters might be given uniforms with no pockets and instructed to spy on one another's handling of tips, so that policies mandating all tips be turned over to management could be enforced. Workers actually had success challenging employer appropriation of tips by striking against it in 1908. Porters (today called bellboys) in first-class hotels in New York were forced to share tips with a head porter, who was said to have gotten rich off of tips. At least several hotels, the workers' demands were immediately granted.

While the exploitation of tipping and the corresponding expansion of the practice did provoke an anti-tipping response, it also helped to further entrench tipping. Once employers build the tip into the wage scale, and people feel they need to keep tipping in order to ensure a certain wage, tipping is very difficult to eliminate. In the face of wage-lowering employer behavior, not only would the employee lose out on a part of the expected wages if the customer did not tip, but the customer who objected to tipping could no longer feel that he was paying his fair share for service. Customer-driven efforts to get rid of tipping have often met with dismal failure.

The primary way to eliminate tipping would be to drive the employer to increase

48 Segrave, supra note 23, at 15.
49 Tipping is illegal, N.Y. TIMES, February 6, 1912, at 1.
50 Segrave, supra note 23, at 32-33.
51 Id.
52 See generally Rae L. Needleman, Tipping as a Factor in Wages, 45 MONTHLY LAB. REV. 1303 (1937).
54 See, e.g., Leo P. Crespi, The Implications of Tipping in America, 11 PUB. OPINION Q. 424, 434 (1947) (“One Jean Charlot … started in France a one-man anti-tipping campaign . . . . The time came . . . when M. Charlot couldn't get a shave within commuting distance of Paris, France.”).
wages. Labor unions in the early twentieth century discovered this fact when they tried to approach tipping head-on. When the International Hotel Workers' Union began an anti-tipping campaign in late 1911, its verbose and inartful slogan was “Higher wages and no necessity of depending on tips.” By January 5, 1912, the slogan was reduced to “higher wages,” and the union backpedaled hard on the tipping issue. The Teamsters considered the decline of tips in organized workplaces an accomplishment brought about through their achievement of a higher wage.

Unions learned that the way to curtail tipping was to actually win a wage increase. Unfortunately, achieving a wage increase is difficult, particularly amongst non-unionized and tipped employees. An employer who pays higher wages must raise prices, which leads to a decrease in tips. If customers understand that the restaurant has raised prices in order to compensate employees, they might agree to pay the higher prices and recognize that they no longer need to tip. A 1947 study, perhaps the first of its kind, found that although tipping was generally approved by 66% of those polled, an equal percentage would want tipping to be eliminated if workers were paid fair wages. Thus, approval of tipping is, at least where tipping is common, simply approval of fair wages, and therefore a tacit disapproval of some aspects of tipping itself. There is a gap, however, between disapprobation and action – concerted action to end tipping outside of the labor union context has usually ended in defeat. The problem is that even if customers were aware of an effort to raise wages, there are reasons they might want

55 See id. at 1305.
56 Segrave, supra note 23, at 33-34.
57 Id. at 71.
58 See Needleman, supra note 46, at 1309 (analyzing survey data and concluding that “the tendency has been to pay lower wages to those workers receiving tips and higher wages to those who do not receive tips.”).
60 Id.
to tip anyway.

For one, people often tip out of fairness concerns that go beyond fair wages. Considering the low economic status of the historically tipped professions (bootblacks, porters, etc.), the spirit of social welfare, or at least charity, has been a clear motive for tipping. Rich people tip generously because they can afford it, men tip because they want to impress women and people toss their loose change into the tip. Tipping is also a social custom, and customers may continue tipping once employees have decided to stop accepting tips. All of this means that it would take the employee's efforts as well to end tipping. This is difficult, because would very awkward for an employee to try not to accept a tip once given. Employees would therefore be challenged to adhere to a policy of not accepting tips, and a breach of that policy by an employee could provoke jealousy and intrigue among fellow employees.

C. Tip-Taking Fails to Gain Traction

So far, we have focused on the entrenchment of tipping vis-a-vis a corresponding reduction in wages on the part of the employer. The other form of tipping exploitation, tip-taking, bears certain similarities to wage reduction. From the perspective of the employer, tip-taking and wage reduction have the same net result: either lower wages and allow tip-keeping, or keep wages high and take some tips. Although a minimum wage law curtails the employers' ability to lower wages according to tips, the large majority of states, as well as the federal government, allow wage-reduction to continue in one of several forms. In the long run, an

61 See Segrave, supra note 23, at 34 (“One server said, 'If guests leave a coin on a table or under a plate, we shall certainly not run after them to return it, nor shall we throw it away.’”).
62 See U.S. Dep’t of Labor, Wage and Hour Division, Minimum Wages for Tipped Employees, http://www.dol.gov/esa/whd/state/tipped.htm (last visited March 30, 2009). Only 8 states require that the employer pay the full minimum wage to tipped employees. Id. In the vast majority of jurisdictions, the law allows some or all of the tips an employee collects to be credited against the minimum wage. Id. Some of these
employee whose employer adjusts the wage according to the tip does just as well as the employer who adjusts the tip the the employee gets to keep according to the wage. If this is the case, then there should be nothing more objectionable about one practice than the other.

However, when an employer takes the employees tips instead of paying them less, there are a couple of crucial differences. For one, the tipped amount does not benefit the tipped employee directly, and will not benefit him or her at all unless the employer re-distributes the tipped amount or some portion of it to the employee. If a customer leaves a tip in excess of what a server is expecting, say, to reward him or her for providing outstanding service, the employee whose tip is taken realizes little or no benefit from it. By contrast, when the employer reduces wages and allows the tip to be kept, a tip directly increases what the tipped employee takes home. Another difference is that tip-taking feels deceptive to the unsuspecting customer. He or she usually leaves the tip with the employee and expects that employee to have some stake in the tip. Thus, when the tipper learns that a tip above or below the expected amount effects the profit-margin of the business, rather than helping or hurting the employee, the tipper will rightly feel misled. Wage reduction involves no such deception, since wages are seen as a term in a private contract between employer and employee. These insights offer us clues as to why some tipping laws succeeded while others were eliminated.

II. The Development of California's Anti-Tipping Laws and Tip-Sharing Rules: An Attempt to Mirror Society's Expectations About How Tips Are Treated

A. The Brief Existence of Anti-Tipping Laws

establish a certain “minimum minimum wage” below which the employee's hourly rate cannot fall. Id.
Towards the beginning of World War I, anti-tipping sentiment was near its height, and the idea of a legal solution to the problem of tipping gained traction. In 1909, Washington became the first state to pass an anti-tipping law; it provided that “Every employee of a public house or public-service corporation who shall solicit or receive any gratuity from any guest shall be guilty of a misdemeanor,” and that “[e]very person giving any such gratuity . . . shall be guilty of a misdemeanor.” By 1918, at least six more states passed some form of anti-tipping law. While support for these bills was popular, Segrave notes that it was business travelers who organized to see many of these laws put into effect.

By 1926, each of the laws banning tipping was off the books. A number of these laws were repealed due to a lack of observance on the part of the tippers. Anti-tipping advocate William Scott thought that the average citizen “feels more afraid of violating the custom than of violating the law,” even though a number of the anti-tipping laws carried stiff penalties. In that case, a lack of enforcement was likely to blame as well. Another important factor in the repeal of anti-tipping laws was the invalidation of the Iowa tipping law by the Iowa Supreme Court. In *Dunahoo v. Huber*, the court found that the Iowan law discriminated between different “classes,” in violation of the Equal Protection Clauses of the Iowan and U.S. Constitutions, because it allowed employer to receive tips but prohibited employees from

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63 See id. at 36-37.
64 Id.
68 Id. at 38.
69 Scott, *supra* note 39, at
70 Needleman, *supra* note 46, at 1314.
receiving them. The court reasoned that, “Tipping may be an evil, but this does not justify
discrimination between classes in order to put it down. In so far as the public is concerned, the
evil of tipping the employer is quite as obnoxious to good morals as though it were done to the
employee.”

B. California's Tip-Taking Law

Not all of the laws that regulated tipping fell, however. The statute which would
ultimately become California Labor Code Section 351, the rule at the core of Chau v. Starbucks
Corp., was enacted in 1917. It declared that

[any employer or agent or representative of an employer . . . who shall demand
or receive directly or indirectly from any person then in the employment of said
employer, any fee, gift or other remuneration or consideration, or any part or
portion of any tips or gratuities received by such employee while in the
employment of said employer, in consideration or as a condition of such
employment or hiring or employing any person to perform such services for such
employer or of permitting said person to continue in such employment, is guilty
of a misdemeanor . . . .]

The 1917 law thereby added the taking “tips or gratuities” to the list of conditions employers
were banned from making on employees' continued employment. The Bureau of Labor
Statistics, in charge of enforcing the law, explained that the law was intended to “prevent
powerful managers from extorting tips from vulnerable employees,” whom the Bureau was
concerned were afraid to speak up against the practice of taking tips in their workplaces. In
1918, the California Supreme Court struck down the 1917 law as violative of substantive due
process; they assumed the purpose of the law to be one of fraud-prevention, and noted that the

71 171 N.W. 123, 123-27 (Iowa 1919).
72 Id. at 756-57.
74 Stats. 1917, ch. 172, §1, p. 257.
75 Appellant's Opening Brief, supra note 3, at 21.
76 Id. at 21-22.
same goal could lawfully be accomplished by giving customers fair notice of tippers of tip-taking practices.77

Evidently the California Legislature took the court's suggestion, and in 1929 passed a bill requiring notice to be posted of employer tip-taking policies.78 Notice had to be posted if the employer took tips (or reduced wages according to the amount taken in tips), the notice had to specify the extent to which wages would be diminished, and the stated policy behind those rules was the prevention of fraud.79 The legislature codified these rules as Labor Code §§ 351, 352 and 356 in 1937.80 Finally, in 1973, the Labor Code was amended to end the notice requiring, which were recognized as being an exception to a general anti-tip-taking policy, and in 1975 further amendments revoked administrative authority to exempt some employers from tip-taking rules.81

The end of the exceptions to tip-taking was not the only policy guidance provided by the legislature in the 1970's, however. One very important policy worked its way into Labor Code § 351 in 1973: “Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for.” A California court observed that, “the legislative intent reflected in the history of [Section 351], was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefits of the employees who serve them.”82 Another statement, made in a press release accompanying the 1975 changes, clarified the scope of the tip-taking rules: “Anyone who wishes to tip

77 In re Farb, 174 P. 320, 323 (Cal. 1918).
78 Henning, 762 P.2d at 1271.
79 Id.
80 Id.
81 Id. at 1273-75.
management is free to do so if he desires. When a person tips an employee for a service well rendered, he expects the employee, not his boss, to receive the gratuity.”

C. Section 351 Eliminates Fraud by Giving Customers What They Expect

The unity that draws each version of the tip-taking rule together is their shared purpose: each was an attempt to mirror the customer’s expectations and intentions. The earliest iteration of the Californian law prevented employers from defrauding customers by taking tips, implying that the ordinary expectation in the state was that tips would remain with the employees to whom they were given. The 1929 amendment dealt with the same problem by requiring the employer to notify customers when there was a deviation from the norm. Eventually, notice began to be seen as a loophole in the service of tip-taking, rather than fair warning of it, and in 1973 Section 351 became an affirmative command that all tips should remain with the employee providing the service, as it once had originally been in 1917. One possible cause for the 1973 change is an increased disapproval of tip-taking stemming from the notice requirement itself. If a business is required to disclose a practice, such as tip-taking, that customers find objectionable in the first place, there may be a residual discomfort with the employer for engaging in such a practice. The explosion of anti-tip-taking laws in the late 1960's and 1970's suggests an alternative explanation: a previously unrecognized wave of discomfort with the practice at that time. As it stands now, Section 356 declares that the tipping regulations are to prevent fraud to the public, rather than to assist employees by employment guarantees around which they may contract.

83 Appellant's Opening Brief, supra note 3, at 23 (emphasis in the original).
85 See Cal. Lab. Code § 356 (“The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and declares that this article is passed for a public reason and cannot be contravened by a private agreement.”).
Thus, an application of Section 351 consistent with its purpose should examine the norms and expectations associated with tipping in the workplace. California Courts of Appeals have taken this approach in holding that while Section 351 prohibits tip-taking, it does not prohibit an employer from mandating that eligible employees pool tips.86 The court began its analysis by noting that the terms of Section 351 did not obviously preclude mandatory tip pooling, and that “[t]o the contrary, the restaurant business has long accommodated this practice which, through custom and usage, has become an industry policy or standard . . . .”87 In dismissing the argument that customers intend their tip to benefit a single employee, the court opined, “[w]e dare say that the average diner has little or no idea and does not really care who benefits from the gratuity he leaves, as long as the employer does not pocket it, because he rewards for good service no matter which one of the employees directly servicing the table renders it.”88 Accurate or not, it is important that the Leighton court's theory of tipping behavior was a material factor in its analysis. As we will see in the next section, the Leighton court's description of tipping was in part an accurate description, and in part quite an inaccurate description, of the situation in which Starbucks customers find themselves today.

III. Why Allowing Supervisory Baristas to Share In Tips Does Not Defraud the Public

California's anti-tip-taking rule was meant to capture and enact into law the public's expectations about who could share in those tips. This section argues that the rule fails to achieve its purpose when applied to supervisory baristas at Starbucks in 2009. Customers would

87 Leighton, 268 Cal. Rptr. at 650 (emphasis added).
88 Id. at 651.
not expect these employees to be treated differently than other baristas. Rather, customers intend their tips to reward the service that supervisory baristas provide.

A. Supervisors at Starbucks Provide and Model Customer Service

Different professional (or nonprofessional) workplace settings are associated with different tipping norms. It is important to imagine the setting in which Starbucks customers tip. They do so by putting tips into a tip-jar rather than adding a certain percentage onto a bill. Starbucks baristas (known euphemistically as “partners”) make approximately $8.00 per hour in wages, and approximately a dollar or two per hour more in tips. A rigorous set of standards governs everything from how an employee may comment on a customer's order to the type of jewelery a barista may wear. These standards and trained behaviors are part of a comprehensive corporate culture engineered to create feelings of familiarity and instill loyalty in customers. Adherence to these standards is treated very seriously by store employees, and deviations from the norm are recorded and fed back to the employees during a “Customer Snapshot,” or unannounced, anonymous visit by an evaluator. A store can be incredibly busy during peak hours, and the use of caffeine by employees and customers alike feeds the frenetic pace, as well as the need to return on a daily basis.

89 See generally Michael Lynn & Ann Lynn, National Values and Tipping Customs: A Replication and Extension, 28 J. OF HOSPITALITY & TOURISM RES. 356 (2004) (examining tipping percentage differences between taxi rivers and restaurant wait staff in numerous countries).
91 Simon, supra note 84, at 202-03.
92 See Alex Frankel, Confessions of a Starbucks Barista, http://www.brownalumnimagazine.com/features/confessions_of_a_starbucks_barista.html (“Starbucks is all about 'mass customization,' about meeting customers' many individual preferences while maintaining low costs. To study the names for the many beverages, I was sent home with a set of dice stamped with different drinks and modifiers. One throw might yield 'Tall/Mocha/Add Syrup / 1/2 Caf,' and another, 'Single/Decaf/Extra Whip/Coffee.' I had to make sense of the pieces and how they fit together in the proper hierarchy.”)
93 Id.
There is no doubt that all the baristas, assistant managers and the manager in a given store contribute to service quality and the achievement of compliance with the Starbucks corporate programme. However, the Chau case has revealed that a supervisory barista, as the “captain of the ship,” has a special responsibility as a guide for the store. Supervisory baristas operate at the crux of the Starbucks business model. The success of a Starbucks store is built on the performance of baristas in drink-making, greeting, socializing, and other tasks. There is often no manager or assistant-manager present, so the day-in day out-decisions of how to handle the store's affairs usually falls to a supervisory barista.94 These are duties common to any supervisory employee. Perhaps when the California legislature mentioned “foreman” as one group banned from sharing in the tips, they meant just this sort of supervisory employee.95

Yet at the same time, supervisors must perform the ordinary tasks any barista performs, and they perform this task 95% of the time. They carry keys, but almost nothing else distinguishes them from ordinary “partners.”96 Think about the last time you went to Starbucks: did you notice any difference between the employees serving you? Would you have known if there were a supervisory barista serving you? And more importantly, would it have made a difference in the amount of your tip or whom you gave your tip to? If there are any differences between supervisory and non-supervisory baristas, they are immaterial to the customer's tipping decision. The supervisory barista supervises, but the vast majority of his or her impact on the store comes in two other ways: through direct service work and, as skilled, senior employees, through “modelling” behavior. This makes him or her fundamentally unlike a “floor manager” or other employee who enforces compliance with the workplace standards under a threat of

94 Appellant's Opening Brief, supra note 3, at 6-8.
95 See Respondent's Brief, supra note 3, at 24.
96 Conversation with Dana Liberatore, Former Starbucks Barista, April 22, 2009.
One possible counterargument to the notion that customers would not be defrauded by Supervisory Baristas sharing in tips is that the supervisors may be paid more. Even if such a difference does exist, it is unclear whether or not it is of any importance in deciding who should be allowed to share in the tip pool. As previously noted, an employer may mandate a tip-pooling arrangement between various classes of service employees, regardless of those employees respective wages. The Leighton court correctly noted that tips reward all of these employees when each provides direct customer service. Giving up tips to other employees (so-called “tipping out”) is a widely accepted practice that has never been made contingent upon an equality of wages. Thus, a rule that limited tip-pooling to employees who made the same money would itself run counter to popular expectations.

B. Tipping at Starbucks Rewards Supervisory Baristas' Efforts

In the course of the study of tipping, one premise has gained wide acceptance as being true: tips are more contingent upon social norms, conventions and discrete employee behaviors and than upon customer perceptions about service quality. One theory of tipping, known as the “expectancy-disconfirmation model,” argues that customer evaluations relative to customer expectations, rather than evaluations of absolute service quality, is an accurate predictor of tip percentages. The only study to examine expectancy-disconfirmation did so by polling patrons

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98 See, e.g., Grodensky, 2009 Cal. App. LEXIS 324 at *77-90 (finding lawfully mandated tip-sharing where customers gave tips to casino dealers and employer re-distributed tips to other classes of employees); Leighton, 268 Cal. Rptr. at 650 & n. 2 (finding lawfully-mandated tip-sharing where waitresses required to share tips with busboys and bartenders).
99 Michael Lynn, Restaurant Tipping and Service Quality: A Tenuous Relationship, 42 CORNELL HOTEL & RESTAURANT ADMIN. Q. 14, 16 (2001) (reviewing studies); see Segrave, supra note 23, at 142-146.
outside of Maxim, Hong Kong's largest restaurant chain. The study found a strong relationship between positive disconfirmation and tipping, and an even stronger relationship between negative disconfirmation and tipping.\textsuperscript{101} Although this study examined attitudes towards tipping rather than actual tipping practices, expectancy-disconfirmation may play a unique role in tip-jar style tipping at chain establishments like Starbucks.

Customer expectations about service quality at any particular Starbucks branch are likely to be high, given the brand's ubiquity, the large number of dedicated patrons and the fact that these customers are engaging in ritualized, time-sensitive behaviors, such as purchasing coffee on the way to work. The ability of a particular barista to confirm expectations is already strained due to the demanding nature of the job, and a failure to conform to the usual standards is likely to be noticed as a failure to confirm expectations in a situation where conformity is especially valued. Adding to the difficulty is the problem of free riding, or the expectation that others' contributions will pay for a service that everyone enjoys,\textsuperscript{102} to which tip jar tipping is especially susceptible. Thus, a conscious effort to go above the standard of expected service, rather than simply providing the normally high level of service is precisely what will earn the baristas tips.

A supervisory barista's role in modeling these moments and building morale is crucial in making these strategies appear fresh on a daily basis. The business model accounts for and trains baristas to implement these “above and beyond” moments, which include forced pleasantries such as asking customers about their lives or “smiling with [the] eyes.”\textsuperscript{103} Expectations are so high that “legendary service” is one of only five categories used to evaluate

\begin{itemize}
  \item \textsuperscript{101} \textit{Id.} at 465.
  \item \textsuperscript{102} See Yoram Margalioth, \textit{The Case Against Tipping}, 9 PENN. J. OF LAB. & EMP. LAW 117, 122 (2006).
  \item \textsuperscript{103} Simon, \textit{supra} note 84, at 202.
\end{itemize}
a store during a Customer Snapshot visit.\textsuperscript{104} The execution of these behaviors, however, can only come about through constant vigilance on the part of the servers, including in this case supervisors. If the barista fails to provide and model such service, he or she could be disciplined by a manager.

Another factor related to expectation-disconfirmation and shown in cross-cultural studies to motivate tipping is uncertainty-avoidance.\textsuperscript{105} Tips allow customers to ensure cheerful, regular service, as well as augment a server's wages as they see fit.\textsuperscript{106} In environments where uncertainty-avoidance prevails as a norm, tips operate as a signal of server intentions, because individuals believe that only a genuinely committed server would work based on tipping.\textsuperscript{107} Tipping is likely to be especially tied to uncertainty avoidance at Starbucks, where employees interact with a set of customers familiar with the brand, often frequent visitors to the store. The “payoff,” or confirmation of expectations, comes when the customer is rewarded with exceptional service upon their return visit. In fact, unlike typical tipping situations (e.g., restaurants and cabs), a tip at Starbucks may be given to ensure quality service at the initial visit itself. The use of a tip-jar permit pre-service tipping that the employee and other customers can see. As a server, the supervisory barista comes to know his or her typical customers, the potential good tippers, and the bad ones, he or she sees who has tipped, and he or she may be shown a tip in expectation of good service at that visit. In that case, the tip relates directly to his or her service.

Tipping has been found to be related to a number of other factors which important either

\textsuperscript{104} Frankel, supra note 86.
\textsuperscript{105} Lynn & Lynn, supra note 83, at 362.
\textsuperscript{106} Id. at 357.
\textsuperscript{107} Id.
because of baristas' efforts, or which are due to social norms surrounding the presence of baristas. For example, cross-cultural studies by Michael Lynn, perhaps the world's foremost expert on tipping phenomena, have found that tipping increases in environments in which extroversion and neuroticism are prevalent.\textsuperscript{108} The forced extroversion and repetitive behavior that characterizes a busy coffee shop are taken to an extreme at Starbucks, where employees commonly experience physical ailments, including an inability to sleep.\textsuperscript{109} Tipping is also thought to be related to feelings of customer compassion and a sense that employees need the tip in order to take home an adequate wage.\textsuperscript{110} Any difference between supervisory and ordinary baristas in these regards is invisible to the Starbucks customer, and so a customer's tip establishes a relationship with team members which is not in any way exclusive to non-supervisory employees.

\textbf{C. Tipping Supervisory Baristas Betters the Workplace}

Any added benefit that can be realized through a workplace tipping practice would likely endear the public toward such a practice. In other words, the public would expect to find generally beneficial practices in place, not one that harms or advantages any group (whether employer, employee, or customer). While allowing bosses to take tips is perceived as deceptive and unjust enrichment at the expense of others, allowing supervisory baristas to share in the tips confirms their place as equals with other baristas and leads to harmony in the workplace. When employees cannot participate in tip-pooling, they are more likely to engage in harmful

\textsuperscript{109} See Simon, \textit{supra} note 84, at 202-05 (reporting adverse effects work at Starbucks on several baristas).
competition for individual tips,\textsuperscript{111} which Starbucks does allow employees who receive them to keep. This would be a significant detriment to the “team” mentality that Starbucks works to build among baristas.

In general, though, the public also wants the tip received to reflect the tip customers give. Tip-pooling does this in a certain way – by giving each employee a share that fluctuates depending on the total. Assuming employee service is correlated with customer tipping at Starbucks, if the employer is allowed to keep a share of the tips, the utility of employee's tip-earning behavior is less than what it would be if each tip share reflected the mean efforts of the service employees as a whole. On the other hand, when the supervisory barista takes a share, the mean tip share more accurately reflects the mean level of service provided by servers as a whole. Thus, if supervisory baristas are deprived of their fair share, the perceptions of the entire group of baristas about the service they are providing would be skewed.

In addition to being fair because of the large role that supervisory baristas have in earning tips, tipping these employees avoids some pitfalls that could come about if supervisors were allowed to share tips. Michael Lynn has repeatedly suggested that tipping is only weakly related to customer perceptions of service quality.\textsuperscript{112} He therefore cautions employers against looking for meaning in the tips: tipping is a poor method of evaluating server performance, and the use of tips is a poor way for managers to reward servers.\textsuperscript{113} The tendency of management to misuse tips as a proxy for server performance is exacerbated by allowing the employer to participate in the tip-pool and thereby giving them a proprietary interest in the outcome of the tip. Allowing supervisory baristas to participate in the tip-pool, however, does not risk exposing employees to

\textsuperscript{111} Margalioth, supra note 96, at 126.
\textsuperscript{112} Lynn, supra note 93, at 15, 18-20.
\textsuperscript{113} \textit{Id.}
undeserved criticism or other adverse consequences. Tipping is related to a number of influences beyond the control of either staff or management, such as day of the week, sunny weather, and party size.\textsuperscript{114} Since supervisors experience little or no distance from the performance of other staff members or the daily conditions of the store, any factors contributing toward a dissociation between service quality and tipping during a certain time-period are likely to be experienced as such. Thus, supervisors are in a better position to make sense of tipping data than management, as well as being less likely to misuse it.


So if customers expect their tip to reward supervisory baristas, and it would be otherwise expedient to allow them a share, shouldn’t the appellate court conclude that all baristas be allowed to share tips? The problem applying this mode of analysis to the issue in \textit{Chau v. Starbucks Corp.} is, of course, the literal language of the statute, which seems to dictate the result that the trial court reached. Courts have no power to fashion a rule that better effectuates the legislature’s purpose than the legislature's own formulation. Thus, this paper cannot ask the court to find for petitioner; rather, it asks state legislatures to adopt a fairer definition of the “employees” who are allowed to participate in tip-pools that accords with customer expectations. Adopting a uniform rule will help eliminate the pastiche of confusing tipping requirements,\textsuperscript{115}

\footnotesize\textsuperscript{115} See Adele Nicholas, \textit{Tipping the Balance; Service employees file multimillion-dollar lawsuits over tip sharing}, \textit{INSIDE COUNSEL} 30-32 (June 1, 2008) (“State wage-and-hour laws present a minefield of different regulations about how employers compensate tipped employees.”).
and would also help avoid results that resemble a windfall for employees.116

A. Limit Tip Shares to “Traditionally Tipped” Employees

A fairer rule about who should be allowed to participate in tip-pools comes to us from another major context in which courts have had occasion to deal with tip-sharing: federal minimum wage law under the Fair Labor Standards Act (“FLSA”). An employer is allowed to reduce the amount they pay an employee to below the “minimum” wage by crediting the amount received in tips against the minimum wage.117 An employer also may not take a tip credit against the wages of all employees. The tip credit rule applies only to a “tipped employee,”118 defined elsewhere as anyone engaged in an occupation in which the individual customarily or regularly receives at least $30 a month in tips.119 Generally, an employer may not credit tips against the minimum wage unless he has fulfilled two more conditions: he must give notice to the employees whose tips he seeks to credit, and he must not take any portion of the employees’ tips.120 The FLSA qualifies these conditions by expressly permitting the pooling of tips

116 For example, in Martin v. Tango’s Restaurant, Inc., 969 F.2d 1319, 1323 (1st Cir. 1992), in the face of the violation of a notice requirement, described infra, the court acknowledged that “[i]t may at first seem odd to award back pay against an employer, doubled by liquidated damages, where the employee has actually received and retained base wages and tips that together amply satisfy the minimum wage requirements,” but nonetheless found it to be Congress’s intent to promote these regulations. The idea that an employee has a cause of action for an employer’s violation of a tip-taking rule, such as Cal. Lab. Code § 351, that is intended for public benefit, is itself suspect. Section 351 in fact allows for none, and California courts allow such plaintiffs to sue under provisions particular to California state law. Compare Lu v. Hawaiian Garden Casinos Inc., 88 Cal. Rptr. 3d 345 (Cal. Ct. App. 2009) (finding standing under Unfair Competition Laws, with Baldonado v. Wynn Las Vegas, LLC, 194 P.3d 96 (Nev. 2008) (finding no implied cause of action, only an administrative remedy).


118 Id.


120 29 U.S.C. § 203(m) (“The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee . . . .”).
amongst employees “who regularly and customarily receive tips.”\textsuperscript{121} So, if the tip-pool takes a share of the tips from an employee who “regularly and customarily” received tips and gives them to an employee who does not “regularly and customarily” receive them, then the tip-pool is invalid. This determination then turns on the meaning of the terms “regularly and customarily.”

The watershed case interpreting which sorts of employees can participate in the tip-pool is \textit{Kilgore v. Outback Steakhouse of Florida, Inc.},\textsuperscript{122} a Sixth Circuit case based on Outback’s practice of sharing waiter/waitresses' tips with hosts and hostesses. Acknowledging that the $30 per month requirement for participation was circular, since the employer could ensure an employee that amount of tips simply by including them within the pool,\textsuperscript{123} the court pinned eligibility to participate in a tip-pool to being in an “occupation in which he customarily and regularly receives . . . tips.”\textsuperscript{124} Crucially, the court interpreted this provision to include employees who “sufficiently interact with customers in an industry (restaurant) where undesignated tips are common.”\textsuperscript{125} Thus, the level of up-front, visible service that an employee provides is the important factor for deciding who can share in the pool. An employee need not be the sole or even the “primary” point of contact with the customer to qualify.\textsuperscript{126} On the same theory, other courts interpreting the same provision have allowed maitre d’s to participate in the

\begin{enumerate}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} 160 F.3d 294 (6th Cir. 1998).
\item \textsuperscript{123} \textit{Id.} at 301. The court also held that employer-mandated tip-sharing (known here as “tipping out”) was permissible under the statute and the regulations. \textit{Id.} at 303-04. The validity of this holding was premised on two facts: the statute does not expressly ban mandated tip-pools, and the language of the regulations in 29 C.F.R. § 531.54. The plain language of the regulations, however, simply distinguishes between tip-splitting between two groups of employees and tip-pooling arrangements to which “employees . . . have mutually agreed upon themselves,” 29 C.F.R. § 531.54, and includes them both within the scope of 203(m). If anything, the provision implies that such arrangements should be “mutually agreed upon,” and thus not mandated by the employer.
\item \textsuperscript{124} 160 F.3d at 301 (citing 29 U.S.C. § 203(m)).
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.}
\end{enumerate}
tip pool,\textsuperscript{127} while kitchen helpers\textsuperscript{128} and salad preparers\textsuperscript{129} were prevented.

The Kilgore rule is preferable because it at least attempts to account for the expectations and intentions of the customer in tipping. There is a striking similarity between the reasoning of the Kilgore court and the Leighton court in California: both bodies considered the status or title of the employee in question secondary to the directness of the service an employee provides and the usual role of the employee in augmenting table service.\textsuperscript{130} A maitre d' is in some sense superior to a waiter, because he or she may direct a waiter to cover a table or assist patrons, but the maitre d's responsibilities, if well-executed, are tippable responsibilities essential to the job. Considering the case of the Starbucks supervisory baristas, they would easily qualify as employees who customarily or regularly receive tips under Kilgore, because they directly service customers. A supervisory barista, and indeed any member of the “team” that he or she captains, can serve as a primary point of contact for the customer. A Starbucks location is set up in such a way that the preparation duties of each employee, and the level of teamwork amongst the baristas is visible to each tipper. A tip may even be given because a customer sees the supervisor showing another employee how to make a drink. In addition, the amount of tips that a Starbucks barista earns, approximately $1-2 per hour, would easily qualify them as traditionally tipped employees under a $30 per month standard.

\textbf{B. Limit Tip Shares to Non-Employers}

Although the Kilgore standard captures customer motivations behind tipping, it does not

\begin{itemize}
\item \textsuperscript{129} Myers v. Copper Cellular Corp., 192 F.3d 546, 550-51 (6th Cir. 1999).
\item \textsuperscript{130} Compare Kilgore, 160 F.3d at 301-02, with Leighton v. Old Heidelberg, Ltd., 268 Cal. Rptr. 647, 651 (Cal. Ct. App. 1990) ("[The patron] rewards for good service no matter which one of the employees directly servicing the table renders it . . . . More than often [he or she] decides what is good service by the attention the busboy gives."). The Leighton court had rejected the argument that a particular table's tips "belonged" to a waitress, Leighton, 268 Cal. Rptr. At 651, by virtue of it being her table, or the patrons her patrons.
\end{itemize}
directly address the California legislature's concern that someone who qualifies as an owner or boss should not be allowed to participate in tip-taking vis-a-vis participating in a tip-pool. A worker might be engaged in some activity that is “traditionally tipped,” yet that worker may actually be a part owner or full-time manager in that workplace. If a customer discovers they have given a tip to this kind of “managerial server,” a wolf in sheep's clothing, the charitable tipper feels deceived. The tip-sharing cases that have dealt with this situation by employing the FLSA's distinction between “employees” and “employers,” and ruling that the latter may not participate in tip-pools, even if they are engaged as wait-staff.131

The term “employer” includes “any person acting directly or indirectly in the interest of an employer in relation to an employee,”132 thus drawing an expansive circle that encompasses agents or others who have no direct ownership interest in the company.133 In Chung v. New Silver Palace Restaurant, for example, the “black jacket” employees who supervised the floor could arguably have qualified as “tipped employees,” yet the court found them to have been “employers” because of their ownership interest in the restaurant.134 The court read FLSA Section 203, which bars employers from taking tips and allows employees to keep them, not to create a “middle ground” of individuals who were simultaneously both, which would “[allow] an employer both to take the tip and share employees' tips.”135 Such holdings are in keeping with the public purpose of already established tip-sharing laws because they prevent employers and managers from circumventing tip-taking laws by dressing themselves in service uniforms and

133 See Falk v. Brennan, 414 U.S. 190, 195 (1973) (noting the "expansiveness" of this definition).
135 Id. at 230.
giving themselves limited service responsibilities.

In order to determine whether there is an employer/employee relationship, courts use an “economic realities” test\(^\text{136}\) that examines four factors: whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.\(^\text{137}\) Although this test is springs from an expansive definition of “employer”, Starbucks supervisory baristas fall short of satisfying any of these criteria. They can neither hire nor fire. Although they do supervise work, they have no more control over the conditions of employment nor work schedules than any other barista. They have no power to control pay or record payments- these duties are clearly within the purview of management. Although an employee commonly referred to as a “supervisor” might fall into the category of employers under this test, no barista at Starbucks would meet this test. To do so would be to say that these employees have some responsibility for compliance with the requirements of the FLSA,\(^\text{138}\) which falls outside of their duties. Hence, by excluding employees from tip pools only when they could (a) arguably be described as “employees” in light of well-established factors, or (b) are not employees traditionally tipped, legislatures could set more appropriate and common-sense contours on who pay pool tips.

**Conclusion: Prospects for Legal Change in Light of Potential Litigation under Section 351**

Ultimately, justice will only come for Starbucks supervisory baristas if a change in the

\(^{137}\) Hale v. Arizona, 967 F.2d 1356, 1364 (9th Cir. 1992); see also Herman v. RSR Sec. Servs., 172 F.3d 132, 139 (2d Cir. 1999).
\(^{138}\) See Falk, 414 U.S. at 195.
law is effected. While it seems unlikely that the legislature will take notice, further litigation in other professional settings that produces similarly unfair results may help build political will to make legislative change. Restaurant hostesses are one group that would present courts with the same dilemma – they may direct waitresses or busboys, yet lack the power to hire and fire. If they share in tips, liability could ensue in states whose rules resemble California's.

As the economy shifts away from production and further towards service, these problems become more likely to spring up. Charge nurses, for example, recently lost the ability to join their fellow nurses in a union in a recent National Labor Relations Board decision.139 The dissent in that case decried the creation of “a new class of workers . . . : workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees.”140 In the same vein, California's tip-sharing rule fails so long as it deprives mid-level service employees of tips without giving them anything in return. Perhaps, as the situation in Oakwood suggests, change in the tip-sharing laws will depend upon the building of a stronger, more stable identity amongst service employees similar to that already established in other sectors.

140 Id. at 700 (members Liebman & Walsh, dissenting).