

RECENT LITIGATION TRENDS HIGHLIGHT THE IMPORTANCE OF WAGE & HOUR COMPLIANCE FOR TIPPED EMPLOYEES IN CANNABIS RETAIL SETTING

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As medicinal and recreational cannabis are legalized in many states across the United States, cannabis industry employers should be carefully attuned to wage and hour compliance for their employees. Indeed, as recent litigation against cannabis retail operations indicates, even the simple practice of putting out a “tip jar” can pose risks, making it critical to structure tip pooling and distribution in a lawful manner.

Under the Fair Labor Standards Act (“FLSA”), “tipped employees” are those who customarily and regularly receive more than \$30 per month in tips. Tips are considered the property of tipped employees, and the FLSA prohibits any arrangement by which tips revert to or become the property of the employer. However, employers may be permitted in certain circumstances to use tips as a credit against its FLSA minimum wage obligations. Employers may also use tips to establish a valid tip pool.

In 2018, the Consolidated Appropriations Act (“CAA”) added the following language to the FLSA: “An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit.” Accordingly, the FLSA, as amended by the CAA, prohibits management and supervisory employees from sharing in a tip pool or similar arrangement.

Tuck v. Dreem Green, Inc., a federal class action lawsuit recently filed in an Arizona federal court, illustrates the risks presented by lax structures for tipping practices. In that case, the plaintiff employee alleges that Dreem Green Inc., which does business as Jars Cannabis, violated the FLSA by not providing employees the full value of their tips. She also alleges that Jars Cannabis violated the CAA by unlawfully allowing managers and supervisors to participate in the tip pool, taking a cut of tips that the plaintiff alleges properly belonged to non-management employees.

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According to the Complaint, the plaintiff seeks to recover unpaid tips, liquidated damages, statutory penalties, and interest for a class consisting of all current and former tipped employees employed by Jars Cannabis and its related companies in the last three years, excluding managers, supervisors, and owners. While the case is in its early stages and Jars Cannabis has not yet responded to the Complaint, the allegations illustrate the importance of arranging tip practices in accordance with the FLSA, CAA, and any applicable state law.

If you have questions about tip pooling and other wage and hour issues for your cannabis retail business, please contact [Patrick Hines](#) (716.848.1679), [Lura Bechtel](#) (416.595.2693), [Kinsey O'Brien](#) (716.848.1287), or any other member of Hodgson Russ's [Cannabis & Hemp Practice](#) or [Labor & Employment Practice](#).

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