

## Tip Pooling Policy Held Lawful by California Court—So Long As Recipients Are Not Management Level

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*Avidor v. Sutter's Place, Inc.*, No. H037142 (January 23, 2013): A California Court of Appeal recently upheld a casino's tip-pooling arrangement with card dealers who work at the casino. In this case, a class of current and former card dealers sued Sutter's Place (doing business as Bay 101) claiming that the casino's policy compelling them to participate in a tip-pooling arrangement violated California Labor Code section 351.

Dealers at the casino received \$750 to \$1,500 in tips per week from players who customarily tipped the dealers when they won a hand. Occasionally, players or dealers would tip other employees, including chip runners, waitresses, or porters. Bay 101 required dealers to "contribute a set amount per hour [generally between \$2.50 and \$5.00] into a tip pool, which was distributed to nondealer employees." The dealers generally contributed no more than 15 percent of the tips they received from customers each day.

The dealers filed a class action lawsuit alleging that by compelling them to participate in tip pooling, Bay 101 was illegally taking tips that players had given to them. The trial judge ruled in favor of the casino. In affirming this decision, the California Court of Appeal looked to Labor Code section 351, which states that a gratuity is the property of the employee to whom it was paid or left for, and prohibits employers or their "agents" from taking any part of the gratuity or deducting it from the employee's wages. However, the court pointed out that nothing in the statute prevents employers from pooling tips to share among the employees—as long as the employees are not in a managerial position where they may be considered "agents" of the employer.

The court stated: "Having examined the 'actual duties of Bay 101 employees who received distributions,' the trial [judge] found that none of them was an agent, as none had 'management level authority.'" The appellate court agreed with the trial judge that "[m]erely 'directing another employee in the performance of some of his or her duties' did not amount to the degree of supervision and control possessed by an agent of the employer" within the meaning of Labor Code section 351.

In dicta, the court suggested that the dealers who contributed to this particular tip-pooling arrangement might not be able to challenge its legality even if management representatives received distributions from the tip pool due to the fact that this was a fixed contribution

arrangement. However, the court noted: “We further query whether plaintiff's argument is moot in any event. The amount dealers were required to drop each day was a set amount regardless of the number of recipients in the pool. If some of the recipient employees were forced to share that pooled money with management, that was a matter for their own challenge and did not affect the dealers.” This issue was not actually decided by the court.

According to Spencer Skeen, a shareholder in Ogletree Deakins’ San Diego office: “The court seems to be suggesting that set contribution tip-pooling arrangements may be immune from challenge by tip-pooling contributors. I expect we will see more fixed contribution tip-pooling arrangements in the months to come. This decision is also noteworthy because it proves that employer-mandated tip pooling is not confined to restaurants, coffee houses, or similar establishments. Now that California courts have allowed tip pooling in the casino setting, employers in other business contexts may consider handling tips in a similar fashion.”

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