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BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC
EXPAND YOUR EXPECTATIONS℠

Loyalty Reward Programs Raise a Host of Questions under State Unclaimed Property Laws

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Unclaimed or abandoned property is a multi-billion dollar revenue source for states. States are constantly seeking out new types of unclaimed property, especially given difficult fiscal situations. According to the National Association of Unclaimed Property Administrators (NAUPA), almost $33 billion of unclaimed property is currently held in state treasuries. As unredeemed balances on gift cards and stored value cards (i.e., breakage) have become a common type of unclaimed property in most states, will they also turn their attention to unused loyalty

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Summary Judgment Award for Attorneys' Fees Against the EEOC

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A recent magistrate judge's decision in the Western District of Michigan awarded $751,942.48 in attorneys' fees against the EEOC in a Title VII of the Civil Rights Act of 1964 action handled by Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. The *EEOC v. Peoplemark* opinion highlights the burden the EEOC can place on private employers in defending baseless claims.

On September 29, 2008, the EEOC filed a lawsuit against Peoplemark, a

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YOURTRADEMARKHERE.XXX: How Your Trademark Could Become Associated With the Adult Entertainment Industry

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ICANN, the organization responsible for administering internet domain names, recently approved the .XXX top-level domain (TLD) for use by those in the adult entertainment industry. As a result, individuals, business, entities and organizations that provide online, sexually-oriented adult entertainment and those who provide products or services to the adult entertainment industry will soon be eligible to register domain names in the .XXX

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Greetings from *Hospitalitas*

Hospitalitas is the Baker Donelson newsletter for our clients and friends in the hospitality industry – hotels, restaurants and their suppliers. It is published several times a year when we believe we can deliver first class, useful information for your business. Please send us your feedback and ideas for topics you would like to know more about. True to our Southern heritage of hospitality, we'll work hard to make each visit with us something special and worth repeating.

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Loyalty Reward Programs Raise a Host of Questions under State Unclaimed Property Laws, *continued*

reward program values? If so, how should issuers of loyalty reward cards respond?

Loyalty Reward Card Programs

Loyalty reward cards are structured marketing programs that reward and encourage loyal behavior on the part of customers. These programs are variously described as discount cards, club cards or rewards cards. The owner of the card is typically entitled to either a discount on current or future purchases or an allotment of points that can be used toward making future purchases. According to one study, $48 billion of consumer loyalty reward points are dispensed each year, but at least $16 billion of those points are never used by consumers.[1]

The study also found that the financial services sector provides the most rewards, at $180 billion per year, followed by the travel and hospitality sector at $17 billion a year. Although retailers make up 40 percent of all loyalty reward program memberships, the study indicated that the retail sector issues loyalty rewards of $12 billion a year. In 2010, loyalty reward memberships in the U.S. exceeded 2 billion, up from 1.8 billion memberships in 2009. On average, a U.S. household has 18.4 memberships.

An Unclaimed Property Primer

Property is presumed abandoned by the owner after the running of a state's dormancy period applicable to the type of property involved (typically three or five years; one year for unclaimed wages) and subject to escheat to a state.[2] In general, the unclaimed or abandoned property is reportable first to the state of the owner's last known address. If the holder's records do not contain the owner's name or address, or if the last known address state does not escheat the property, then the holder's state of domicile (incorporation) has the secondary right to the unclaimed property.[3]

Recently, some states have begun using a "deemed owner address" rule for gift and stored value cards. If the issuer of the gift card does not maintain the owner's last known address in its records, then the owner's address is presumed to be in the state where the card was sold.[4]

States have become increasingly aggressive and routinely schedule holders for unclaimed property audit examinations. Employment of third party audit firms by states, such as Kelmar Associates, LLC, ACS Unclaimed Property Clearinghouse, Revenue Discovery Systems and Verus Financial LLC, is now common. These firms typically audit holders on behalf of one or more states for a contingent fee that is measured by a percentage of unclaimed property recovered from a holder. It is common for an audit to cover a 10-year look-back period, plus the applicable dormancy period, for a 13- to 15-year audit period. Certain states, such as Delaware, will audit as far back as 1981. Because a holder typically does not maintain records for such a lengthy period, unclaimed property audit liabilities are often determined using estimation methods and extrapolation. As a result, while a single year's actual unclaimed property liability may be immaterial, the total extrapolated liability determined using an estimation method frequently runs into the millions of dollars.

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EVENTS

Join Joel Buckberg for "Successful Negotiation of Distribution Agreements"
Join Baker Donelson Shareholder and Hospitality Industry Service Team Co-Chair Joel Buckberg for the webinar "Successful Negotiation of Distribution Agreements" on July 26, 2011 at 1:00 p.m. Eastern/12:00 p.m. Central. To register, please go to www.lorman.com or call 1.866.352.9539. Provide the following information during registration to receive a 20 percent discount: Discount code F2716129; Priority code 15000.

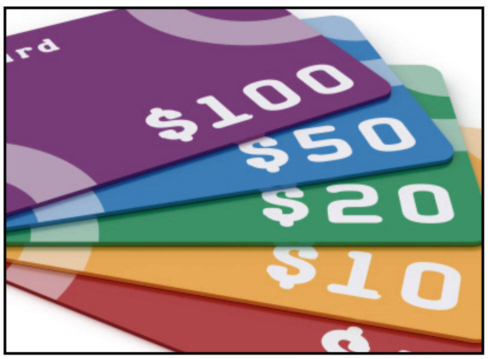
Join Gene Podesta at DRI's Strictly Hospitality Seminar
Gene Podesta, Shareholder and Co-Chair of Baker Donelson's Hospitality Industry Service Team, will present "Second Verse, Same as the First: The Plaintiffs' Bar's Latest Attempts at Forum Shopping and How to Defeat Them" on Thursday, September 22 at 11:10 a.m. during DRI's Strictly Hospitality Seminar in Scottsdale, Arizona. During this program, Mr. Podesta will explore how the modern reservation practices and Internet marketing activity have opened the door for plaintiffs' counsel seeking to sue a distant hotel or other hospitality-related entity in fora unrelated to where the incidents occurred. Franchisors and franchisees should be cognizant of the ramifications of personalized Internet marketing offers based on initial interest about the brand's products or services, given many courts' practices of allowing parties great leeway in proving jurisdiction. If contacts are sufficient, both parties could be forced to litigate in the jurisdictions where their guests reside or in other unrelated jurisdictions. Learn from Mr. Podesta about how to prevent this scenario from playing out.

Don't Miss Our Gaming Update at The Lodging Conference 2011
Please join Danny McDaniel, Shareholder and Chair of Baker Donelson's Gaming Industry Service Team, for his panel, "Gaming Update" during The Lodging Conference 2011 on Thursday, September 22, at 4:00 p.m. The panel will discuss the opportunities for expansion and investment in the still vibrant non-traditional gaming markets outside Las Vegas and Atlantic City. Mr. McDaniel will moderate the panel, which includes panelists Greg Guida, Principal with the Foundation Gaming Group, and Robert A. LaFleur, Managing Director of Gaming, Lodging and Leisure Equity Research with Rodman & Renshaw. Baker Donelson is a proud sponsor of The Lodging Conference 2011.

Loyalty Reward Programs Raise a Host of Questions under State Unclaimed Property Laws, *continued*

Loyalty Reward Cards are not Gift or Stored Value Cards

During an audit examination of a loyalty rewards card holder, states may attempt to treat uncashed loyalty rewards as unclaimed property by applying their gift and/or stored value card statutory provisions to loyalty reward cards. In addition to the important corporate domicile state, Delaware, a number of states treat unredeemed gift card and stored value card balances as unclaimed property, including the District of Columbia, Georgia, Nevada, New Jersey, New York and Texas.[5] While some states may generally exempt unredeemed gift or stored value card balances from being unclaimed property, including Florida, Ohio and Virginia,[6] others provide exemptions only if the cards carry no expiration dates, no dormancy or service charges, and are gift cards issued for merchandise. These states include California, Illinois and Tennessee.[7]



States may come to understand the distinction between loyalty reward cards and gift or stored value cards. Even New Jersey explicitly provides that its broad (and controversial) unclaimed property statute concerning gift and stored value cards does not apply to loyalty reward cards. Nonetheless, a holder of uncashed loyalty rewards should be prepared to show that its loyalty reward cards are not gift or stored value cards. Loyalty rewards programs are distinguishable.

A gift card is not a stored value card, per se, as the value is not stored on the card. Rather, the value associated with a gift card is stored on the issuer's database which is accessed via a magnetic strip or barcode on the card, a microprocessor chip in the card using radio frequency identification (RFID), or by use of a code entered into a numeric key pad. A true stored value card has its value held on the card, such as a public transit system farecard. A prepaid card is different still, as the value of the prepaid card is on deposit with the issuer (i.e., prefunded).

Gift cards are either open loop (i.e., issued by a bank or credit card company and can be used at any retailer or business) or closed loop cards (i.e., issued by a retailer or restaurant and the card can only be used at the establishment).

Mobile and virtual gift cards are becoming more common. Mobile gift cards are delivered to mobile phones via SMS messages using iPhone or Android "apps." Virtual gift cards are delivered via email to their recipient, who can print the card or open the card on a mobile device.

Are Unused Loyalty Rewards Unclaimed Property?

Just as states should not be able to rely on statutory provisions that treat unredeemed balances on gift or stored value cards as unclaimed property, a holder should similarly not be able to rely on gift or stored value card exemptions provided by other states. Therefore, if the customer does not redeem loyalty rewards within a state's dormancy period (typically three or five years after the card was issued), are the rewards reportable as unclaimed property?

As with yesteryear's gift certificates, a state would likely consider uncashed loyalty rewards as intangible, not tangible, property since the value is represented by the reward points and not the physical card.[8] Section 1(13) of the 1995 Uniform Unclaimed Property Act defines "property" to include ". . . a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business . . ."[9] Section 2 of the Act provides various dormancy periods for specific types of property to determine when they are presumed abandoned and subject to reporting as unclaimed property. A catch-all provision in Section 2(a)(15) provides that "all other property [is presumed abandoned], five years after the owner's right to demand the property or after the obligation to pay or distribute the property arises, whichever first occurs."

An owner is defined by Section 1(11) of the Act to mean ". . . a person who has a legal or equitable interest in property subject to this Act." Section 1(6) of the Act defines a holder to mean "a person obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this Act." While not every state has enacted the Act (or has enacted one of its 1981, 1966, or 1954 predecessors), many states provide the same or similar statutory treatment of the issue.

An owner of a loyalty reward card has a right to demand products or services in exchange for his reward points, but not a cash equivalent value of the points on his card. Likewise, the holder has no obligation to pay a cash equivalent value to the owner; rather, the holder's obligation is to exchange a product or service, but only when the owner uses or redeems her or his points. Further, the owner has not offered cash or services in exchange for the card or rewards. The card is not prefunded. Therefore, the owner or customer has not given any monetary consideration in exchange for the loyalty reward. The underlying business transaction that caused the points to be generated should

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Loyalty Reward Programs Raise a Host of Questions under State Unclaimed Property Laws, *continued*

not count as monetary consideration because presumably the transaction was a fair exchange for goods or services at their market value.

However, Section 2(e) of the Act provides that "[p]roperty is payable or distributable . . . notwithstanding the owner's failure to make demand or present an instrument or document otherwise required to obtain payment." Could a state rely on this provision and the broad definition of "property" to argue that unused loyalty rewards are unclaimed property, regardless of the owner's inability to demand cash redemption or the absence of monetary consideration for the owner's loyalty reward?

A holder may need to rely on the derivative rights doctrine. That is, a state succeeds only to the rights an owner of unclaimed property has to or in the property that is presumed abandoned.[10] Just as the owner has no right to cash equivalent of the loyalty reward, neither does the state have the authority to demand the cash equivalent. Still, the holder could be confronted by the no private escheat public policy that has prevailed in the other cases, including those involving gift certificates.

If loyalty rewards are reportable unclaimed property, what is the value to be reported? Like loyalty rewards cards, gift cards usually do not allow the owner to demand a cash equivalent of the face value or balance of a gift card. For this reason, state unclaimed property statutes provide that the amount of a gift card that is presumed abandoned is the face value, percentage of face value or the unredeemed balance.[11] Since loyalty reward cards are not gift or stored value cards, a state may not be able to rely on this provision. As a result, loyalty reward cards should have no reportable value.

Conclusion

The popularity of loyalty reward card programs for issuers and consumers make them a valuable marketing tool. This value, however, will likely not escape the attention of state unclaimed property administrators and auditors in this era of state budget shortfalls. Loyalty reward cards raise a number of questions for holders and states with respect to unclaimed property, including classification and valuation, among others. For these reasons, issuers of loyalty reward cards should be prepared to vigorously defend their rights in an unclaimed property audit examination while proactively addressing the treatment of their loyalty reward programs under state unclaimed property laws.

Mr. Smith is an attorney in our Washington, D.C. office.

1. *Media Post News Marketing Daily,* "Study: One-Third of Loyalty Rewards Uncashed" (April 19, 2011).
2. Property "escheats" to a state after it has become presumed abandoned or unclaimed when the state requires the holder to report and deliver the property or its cash value to the state for custodial holding until the owner establishes a rightful claim to the property.
3. *Texas v. New Jersey*, 379 U.S. 674 (1965); *Delaware v. New York*, 507 U.S. 490 (1993). If the state of corporate domicile does not escheat the property, some states then rely on a place of transaction to report the unclaimed property. This "third priority" rule is constitutionally suspect and rarely applied in practice.
4. For example, Maine, Nevada, New Jersey and Texas have adopted "deemed owner address" provisions. 33 M.R.S.A. § 1958(2)(B-1); Nev. Rev. Stat. § 120A.520(2); N.J.S.A. § 46:30B-42.1.c; Tex. Prop. Code § 72.1016(c).
5. 12 Del. Code § 1198(11); D.C. Code § 41-114; O.C.G.A. § 44-12-205; Nev. Rev. Stat. § 120A.520 (but reportable at 60 percent of unredeemed balances); N.J.S.A. § 46:30B-42.1; N.Y. APL § 1315; and Tex. Prop. Code § 72.1016.
6. Fla. Stat. § 717.1045, Ohio Rev. Code § 169.01(B)(2)(d); and Va. Code § 55-210.8.1.B.
7. Cal. Code Civ. Proc. § 1520.5; 765 I.L.C.S. § 1025/10.6; and T.C.A. § 66-29-135. Federal consumer protection law, the Credit Card Accountability Responsibility and Disclosure Act (CARD Act) and the Electronic Funds Transfer Act, 15 U.S.C. § 1693l-1(c), prohibit the sale or issuance of gift certificates or cards with expiration dates of less than five years. In the absence of unclaimed property statute prohibitions on expiration dates, some courts have held expiration dates violate public policy as a "private escheat." *Callahan v. Marshall Field & Co.*, 83 Ill. App. 3d 811 (1980); *Screen Actors Guild, Inc. v. Cory*, 91 Cal. App. 3d 111 (1979).
8. *Marshall Field & Co.*
9. The Act's definition of "property" includes, among other items, money, credit balances, credit memoranda and gift certificates.
10. *Bank of America National Trust and Savings Ass'n v. Cranston*, 252 Cal. App. 2d 208 (1967); *Violet v. Travelers Express Company, Inc.*, 502 A. 2d 347 (R.I. 1985); *Kane v. Insurance Company of North America*, 392 A. 2d 325 (Pa. Commw. 1978).
11. For example, Section 2(a)(7) provides that the amount of a gift certificate presumed abandoned is 60 percent of the face value. New Jersey provides that the "proceeds of a stored value card presumed abandoned shall be the value of the card, in money, on the date the stored value card is presumed abandoned." N.J.S.A. § 46:30B-42.1.b.

Summary Judgment Award for Attorneys' Fees Against the EEOC, *continued*

temporary staffing company that hires people for light industrial, clerical and receptionist positions. In the complaint, the EEOC alleged that Peoplemark maintained a policy "which denied the hiring or employment of any person with a criminal record," resulting in a disparate impact on African Americans. The EEOC sought relief for Sherri Scott, an African-American applicant with two felony convictions, and other similarly situated but unidentified African Americans.

The magistrate judge described this case as one "where the complaint turned out to be without foundation from the beginning." Peoplemark's expert report showed that 22 percent of the 286 alleged victims of this blanket policy were hired despite having felony records. Prior to the initiation of the lawsuit, the EEOC completed years of administrative investigations on Peoplemark. Additionally, the EEOC gained access to virtually all of their personnel documents by the end of August 2009. The EEOC possessed the information to show that Peoplemark did not have the blanket discriminatory policy the EEOC complained of, yet made no effort to halt the litigation until the end of March 2010.

Since the beginning of the suit, the EEOC recognized the case would come with a "major price tag" for both sides, involving expansive discovery of voluminous records, data collection and organization from numerous databases, and expert statistical analysis. Nonetheless, the EEOC did not identify a key expert until July 31, 2009 and did not hire that expert until well after the expert's report was to have been completed. The EEOC was granted a continuance for four months to provide the expert's report, but still could not produce it within the extended deadline. Without this report, it would be nearly impossible for the EEOC to prevail since the expert testimony was essential to proving its disparate impact claim.

The dismissal of this case deserves celebration, but a great concern for private employers still looms.

Instead of conducting preliminary investigations or recognizing defeat once it could not provide an expert, the EEOC forced Peoplemark to expend considerable amounts of money on defense costs for nearly two years on a frivolous and unnecessary lawsuit. On March 29, 2010, the two parties submitted a joint motion to dismiss, naming Peoplemark as the prevailing party for the purposes of determining Peoplemark's entitlement to costs and attorneys' fees. Thereafter, Peoplemark submitted a motion for fees, costs and sanctions, seeking compensation for the unnecessary delay and expense of defending a "very time consuming and complex case" due to the EEOC's "unreasonable and meritless litigation strategy." The magistrate judge based his decision on the EEOC's persistence in belaboring a meritless claim and its failure to produce an expert report. The district court recognized the unnecessary burden imposed on Peoplemark and ordered the EEOC to pay $219,350.70 in attorneys' fees, $526,172 in expert witness fees and $6,419.78 in other expenses.

The dismissal of this case and the award of attorneys' fees against the EEOC deserve celebration, but a great concern for private employers looms in the background. Many could find themselves in the same position as Peoplemark, forced to defend a meritless claim against the EEOC. The problem for private employers is that the EEOC lacks incentives to resolve cases like normal private businesses. Cost of litigation does not concern the EEOC, given the amount of resources it has at its disposal. EEOC litigation can essentially grind a defense to the ground by continuing to pursue a claim even when it becomes clear there is none. While private employers may pursue costs and fees if they are the prevailing party in a frivolous suit under Title VII, this remedy comes only after months or even years of burdensome discovery requests and the stress of having to defend against a meritless claim.

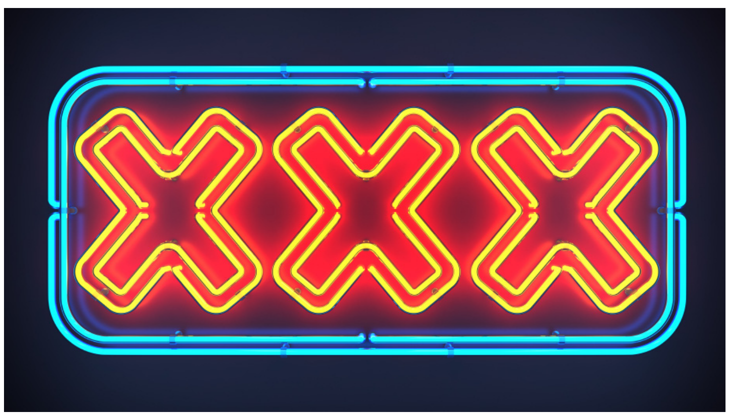
Mr. Young is an attorney in our Memphis office.

YOURTRADEMARKHERE.XXX: How Your Trademark Could Become Associated With the Adult Entertainment Industry, *continued*

TLD. But what if a party in the adult entertainment industry registers your trademark in the .XXX TLD, thereby associating your brand with that industry? Can trademark owners do anything to prevent this?

Submit a Reservation Request for Your Trademarks in the .XXX TLD

ICM, the registry that will operate the .XXX TLD, established a reservation request process that trademark owners can use to express interest in a particular .XXX domain name. There is no fee for submitting reservation requests, which can be submitted here: http://domains.icmregistry.com/. Parties in the adult entertainment industry who already own a particular domain name in another TLD (such as .com) can use this reservation process to obtain an advantage in securing the corresponding .XXX domain name. For those outside of the adult entertainment industry, this reservation will enable the trademark owner to receive updates regarding when the trademark owner will be eligible to submit a blocked name application as detailed below.



Submit Blocked Name Applications for Your Trademarks in the .XXX TLD

ICM is expected to have two initial registration periods for .XXX TLDs, often referred to as Sunrise Periods. Sunrise Period A is exclusively for members of the adult entertainment industry, and, as you would expect, domain names registered during this period will resolve to adult entertainment related sites. Sunrise Period B is intended for parties outside of the adult entertainment industry. .XXX domain names registered during Sunrise Period B will not resolve to an active website but rather to a generic page indicating that the name is reserved through ICM's rights protection program, thereby preventing third parties from registering that domain name in the .XXX TLD. At present, ICM indicates that these types of blocked name registrations will continue indefinitely without need for periodic renewal. The fees and timing for these Sunrise Periods have not yet been announced, but the Sunrise Periods are expected to begin in early fall. Making a .XXX reservation request as detailed above can help trademark owners stay informed.

Make Use of the Start Up Trademark Opposition Procedure and Rapid Take Down

While the details have not yet been finalized, ICM has indicated that during the early .XXX registration stages they will make available to trademark owners a Start Up Trademark Opposition Procedure (STOP). ICM has stated that STOP will enable a trademark owner to notify a potential .XXX registrant of the trademark owner's claim and prevent the objectionable .XXX domain name from resolving for a fixed period while any challenge to the registration is made. Additionally, it appears ICM will also establish a Rapid Take Down procedure. Again, the details have not yet been published, but it appears trademark owners will be able to make a complaint asserting that a third party has in obvious bad faith registered a .XXX domain name incorporating the complainant's trademark. Within 48 hours a panel will decide whether the offending website should be temporarily taken down pending a full proceeding under the Uniform Domain Name Dispute Resolution Policy (UDRP).[1] Unlike STOP, presumably this Rapid Take Down procedure would continue to be available for use even after the early .XXX registration stages.

Conclusion

Trademark owners need to be mindful of the launch of the .XXX TLD in order to prevent their valuable brands from potential associations with adult entertainment. While it appears the .XXX registry will provide mechanisms for protecting intellectual property, it is up to trademark owners to become informed and take advantage of those mechanisms.

Ms. Robertson is an attorney in our Memphis office.

1. *The Uniform Domain Name Dispute Resolution Policy (UDRP) is a process established by ICANN for the resolution of disputes regarding the registration of domain names and is commonly used to settle disputes involving domain names in the .com, .net and .org TLDs.*

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Application of the Tip Credit and Potential Retaliation Implications

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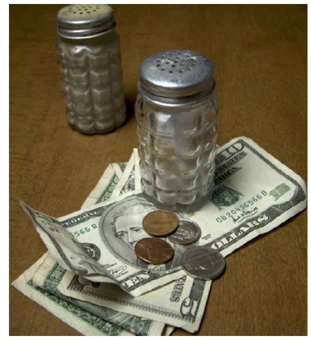
*Julie Schiff**

The Fair Labor Standards Act (FLSA) generally requires employers to pay a specified minimum wage to its employees and overtime for all hours worked over 40 in a work week. For restaurants and other hospitality-oriented businesses, the FLSA permits employers to pay a minimum wage of $2.13 per hour to employees engaged in a tipped occupation as long as the employees' tips make up the difference between the $2.13 hourly wage and the current minimum wage, which is $7.25 per hour. This $5.12 difference ($7.25 – $2.13) is commonly referred to as a tip credit because it allows the employer to avoid a larger payment to tipped employees. While the concept itself is fairly straightforward, complications can arise when employers attempt to make use of a tip credit. According to the FLSA, a tip credit does not apply to every employee who has ever received a tip. Rather, it only applies to an employee engaged in an occupation in which he or she would customarily and regularly receive more than $30 a month in tips, and as one recent case demonstrates, the tip credit may not apply to all activities by an employee who receives the requisite monthly amount in tips.

At issue in a recent lawsuit against Applebee's International was how to apply properly a tip credit to employees whom both sides agreed were tipped employees. *Fast, et al. v. Applebee's Int'l, Inc.* In that case, 5,543 current and former Applebee's servers and bartenders filed a class action, alleging that the restaurant chain had violated the FLSA's tip credit policy. Specifically, the plaintiffs alleged that Applebee's had violated the Department of Labor's (DOL) interpretation of its regulation, which the Eighth Circuit Court of Appeals deemed reasonable and entitled to deference. According to the DOL, employees who spend substantial time (defined as more than 20 percent) performing related but nontipped duties should be paid at the full minimum wage for that time without a tip credit. In keeping with this interpretation, the Eighth Circuit affirmed a denial of summary judgment thereby ruling that Applebee's may have violated the FLSA by applying a tip credit to hours that its employees spent performing nontipped duties.

In another recent wage dispute, a group of current and former employees of eight different restaurants owned by Mario Batali and Joseph Bastianich filed a lawsuit, alleging that their employers paid them less than the minimum wage yet improperly retained a portion of the employees' tips. *Stephanie Capsolas, et al. v. Pasta Resources, Inc., et al.* Specifically, the plaintiffs alleged that four to four and one-half percent of the restaurants' wine sales were deducted from the employees' tip pool and that, therefore, the employer could not claim the tip credit. The plaintiffs were told that the deduction was for a number of different reasons, including for wine research and a payment to the house. The district court certified a collective



action consisting of tipped employees at all of the related restaurants, but has not yet ruled on the merits.

Since the filing of their lawsuit, the plaintiffs maintain that they have been subject to retaliation. Among other forms of reprisal, the plaintiffs alleged that during an employee meeting, Bastianich stated that the plaintiffs' lawyers rather than the plaintiffs themselves would benefit from the suit and that he would fight the employees bringing the action. In response, the plaintiffs requested that, as a corrective measure, a notice of the pending suit be posted in the Batali-Bastianich restaurants. Although the court ultimately declined to pursue this course of action, it stated that it was troubled by the retaliation reported and approved mailed notices to current and former tipped employees inviting them to join in the lawsuit.

What employers should take away from the Applebee's International and Batali-Bastianich cases is that any allegations regarding the improper application of the FLSA's tip credit provision should be taken seriously—very seriously. Failure to properly apply the tip credit provision can cost employers thousands, even hundreds of thousands, of dollars in additional minimum wage and overtime payments

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Application of the Tip Credit and Potential Retaliation Implications, *continued*

and legal fees, and can injure a business's reputation. In short, employers will be well-served if they take the time to understand when it is proper to make use of a tip credit and how to apply it properly. An employer also should be careful as to how it responds to allegations of failure to pay minimum wage and overtime properly, due to the FLSA's anti-retaliation provisions. As the Applebee's International and Batali-Bastianich cases make clear, seeking competent legal advice on this issue can save an employer a lot of time, money and heartache.

Mr. Redmond is an attorney in our Birmingham office. Ms. Julie Schiff co-authored the article and is a law student at the University of Virginia School of Law.