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What's Inside

Mark's In Box

Is stereotyping the new weapon in the war against stereotyping? 3

CA News in Brief

State, federal agencies go after California employers for wage violations 5

Public Sector

10 essential tips when faced with bargaining over major changes 6

Discrimination

Court refuses to give fired employee second bite at litigation apple 8

Employer Retaliation

Federal justices say evidentiary burden too easy for employees 9

On HRHero.com

Health Insurance

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INDEPENDENT CONTRACTORS

Strip clubs can't dance around wage and hour laws

by Michael Futterman and Jaime Touchstone

Two exotic dancers rallied a troupe of colleagues nationwide to sue a group of strip clubs, including the industry leader, Spearmint Rhino. The dancers charged that the clubs improperly classified them as independent contractors and unlawfully dipped into their nightly tips. In a resolution bound to shine a spotlight on the exotic nightclub industry, the U.S. District Court for the Central District of California approved a settlement in which the clubs agreed to pay nearly \$13 million to the dancers and cease classifying them as independent contractors.

Exotic dancers choreograph class-action suit

Tracy Dawn Trauth and Christeen Rivera worked as exotic dancers at the Spearmint Rhino nightclub in Oxnard. Spearmint Rhino and its affiliated entities operate strip clubs in states across the country. In those clubs, female dancers perform exotic table, chair, couch, lap, and/or VIP room dances for patrons. The clubs treat dancers as independent contractors, not employees, so dancers generate their income from tips, not regular wages. Some of the exotic dancers reportedly generated an average of \$500,000 per year in tips. According to the lawsuit, the clubs required the dancers to split their tips with the clubs, club managers, doormen, "floor

walkers," DJs, and other employees, sometimes referring to those charges as "rent," "house," and/or "stage" fees.

In 2009, Trauth and Rivera filed a class action lawsuit alleging various wage and hour claims on behalf of dancers in California, Florida, Idaho, Kentucky, Nevada, and Texas. The dancers claimed the clubs misclassified them as independent contractors, depriving them of employment benefits, and engaged in unlawful tip splitting. They sought back pay, monetary damages, injunctive relief, penalties, interest, attorneys' fees, and costs.

Dancers claim they're employees

In the lawsuit, the dancers argued that the clubs managed them as employees but reported them on the books as independent contractors to avoid paying minimum wage, workers' compensation, unemployment, and health insurance. The key test to determine whether a worker is an employee or an independent contractor is whether the principal has the right to control the manner and means of accomplishing the result desired. Courts also will consider:

- Whether the principal has the right to terminate without cause;
- The kind of business, with reference to whether, in the locality, the

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work is usually done under the direction of the principal or without supervision;

- The skill required in the particular occupation;
- Whether the principal or the worker supplies the tools and the place of work;
- The length of time for which the services are to be performed;
- The method of payment, whether by time or by job;
- Whether the work is part of the principal's regular business; and
- Whether the parties believe they are creating an employer-employee relationship.

The dancers asserted that the clubs exercised control over all aspects of their work. The clubs advertised and promoted the shows and manipulated the flow of customers. They set the hours of operation, show and shift times, the format and theme of the dancers' performances, and the manner and procedure in which tips were collected from customers. The clubs required the dancers to clock in and out, prevented them from leaving early, and allegedly subjected them to fines when late or absent. According to the dancers, they had to abide by strict rules of conduct requiring them to be either on stage or on the floor mingling and selling a minimum number of drinks to patrons or else risk being fined. Club management allegedly responded to complaints by threatening to confiscate tips or terminate the dancers.

The dancers claimed to exercise no business management or skill. They made no capital investments and maintained no separate business facilities, and the scope of their decision making was restricted to the manner in which they danced. They were entirely dependent on the clubs for their earnings and generally had no other source of income. Furthermore, the dancers were an integral part of the clubs' business. The clubs exist to showcase the dancers' physical attributes for customers, and the primary products the clubs sell are stage and lap dances provided by the dancers. For those reasons, the dancers argued that the clubs exercised significant control over their wages, hours, and working conditions in a manner inconsistent with a true independent contractor relationship.

Dancers allege illegal tip sharing and wage diversion

The dancers charged that California's Labor Code states that all money given to dancers by patrons for stage and lap dances is the sole property of the dancer. Under California law, it's unlawful for an employer to divert any part of an employee's wages for its benefit. The dancers argued that the clubs violated those rules by, among other things, requiring them to:

- (1) Pay rent and stage and house fees to the clubs;
- (2) Pay the clubs a portion of their customer tips; and
- (3) Tip-out club employees who normally wouldn't receive tips.

In fact, the clubs posted a "corporate introduction video" on their website confirming that the "dancer income stream" resulted in high profitability because "the dancers don't receive a payroll or a salary." The dancers claimed the clubs' actions were part of a strategy to maximize profits by disregarding applicable wage and hour laws despite the fact that they knew of previous employment lawsuits and enforcement actions filed by exotic dancers against other clubs yet continued to "flout" the law.

continued on pg. 4

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Clubs agree to 'pay up' in landmark settlement

After two years of negotiations, federal Judge Virginia Phillips approved a settlement by which the clubs agreed to pay \$12.97 million to an unknown number of dancers in six states. A small portion of that amount is allocated to penalties. Each named class representative will receive an incentive award for time spent on the case and for allowing her name to be used.

Perhaps more important, the clubs have also agreed that within six months, they will reclassify dancers as employees, shareholders, partners, or owners. In California specifically, the dancers no longer will have to pay "stage" fees to the clubs to dance. This settlement likely will have nationwide implications for employment practices in the strip club industry. *Tracy Dawn Trauth, et al. v. Spearmint Rhino Companies Worldwide, Inc., et al.*, Case No. EDCV09-1316 VAP (C.D. Cal).

Bottom line

In pursuing this case, the exotic dancers proved that strip clubs can't dance around the labor laws. Even if scantily clad and mightily profitable, dancers are entitled to the full protections of wage and hour laws, and employers simply can't dip into their hard-earned tips.

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