



# From the Tipping Point to Immigration's Alphabet Soup



**Presentation to Virginia Wineries Association - August 29, 2017**



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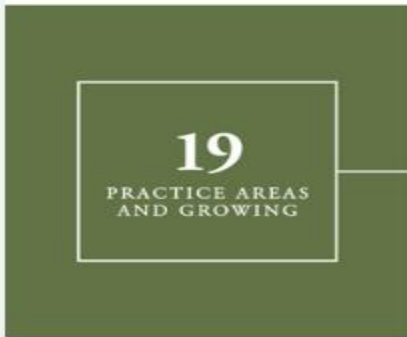
Immigration,  
Labor & Employment



# Who We Are



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## Services:

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- Employment and Litigation Defense
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- ERISA/Employee Benefits Litigation
- Unfair Competition
- Occupational Safety and Health
- Worker's Compensation
- Business Immigration

# Part 1: Employment Law Compliance for Tipped Employees



# Who Is A Tipped Employee?

- Virginia law defers to federal rules, primarily Fair Labor Standards Act (FLSA)
- Federal Definition of a Tipped Employee:
  - An employee who customarily and regularly receives more than \$30 per month in tips
  - Only tips actually received by the employee may be counted in determining whether the employee is a tipped employee (and in applying the tip credit)

# Ownership of Tips

- Tips are the property of the employee
- The employer is prohibited from using an employee's tips for any reason other than:
  - As a credit against its minimum wage obligation to the employee ("tip credit")
  - In furtherance of a valid tip pool
- Even where a tipped employee receives at least \$7.25 per hour in wages directly from the employer, the employee may not be required to turn over his or her tips to the employer



# Tip Credits

- FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees
  - Credit is equal to the difference between the required cash wage (which must be at least \$2.13) and the federal minimum wage (currently \$7.25)
  - Thus, the maximum tip credit that an employer can currently claim under the FLSA section 3(m) is \$5.12 per hour (the minimum wage of \$7.25 minus the minimum required cash wage of \$2.13). Under certain circumstances, an employer may be able to claim an additional overtime tip credit against its overtime obligations

# Tip Credit Notice

- Employers must provide oral or written notice to tipped employees of the use of the tip credit in advance
- Notice must include:
  - The amount of cash wage the employer is paying a tipped employee, which must be at least \$2.13 per hour
  - The additional amount claimed by the employer as a tip credit, which cannot exceed \$5.12 (the difference between the minimum required cash wage of \$2.13 and the current minimum wage of \$7.25)

# Tip Credit Notice (cont.)

- Notice must include:
  - That the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee
  - That all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips
  - That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions

# Other Tip Credit Notes

- If an employee's tips combined with the employer's direct (or cash) wages of at least \$2.13 per hour do not equal the minimum hourly wage of \$7.25 per hour, the employer must make up the difference during the pay period
- Dual Jobs: When an employee is employed by one employer in both a tipped and a non-tipped occupation, such as an employee employed both as a maintenance person and a waitperson, the tip credit is available only for the hours spent by the employee in the tipped occupation

# Non-Tipped Duties

- The tip credit is only available for tipped work
- If tipped employees perform other, non-tipped work (such as cleaning or cooking), non-tipped duties may not exceed 20% of the employee's workweek
  - If those duties do exceed 20%, employer is liable for full minimum wage (i.e., with no tip credit) for all non-tipped duty hours

# Overtime and the Tip Credit

- Where the employer takes the tip credit, overtime is calculated on the full minimum wage, not the lower direct (or cash) wage payment
- The employer may not take a larger tip credit for an overtime hour than for a straight time hour
- Under certain circumstances, an employer may be able to claim an additional overtime tip credit against its overtime obligations

# OT Example

- **Example:** A tipped employee works 50 hours in a workweek. The employee's regular rate of pay is \$7.25 per hour, the applicable minimum wage:
  - **Step 1:** Use the employee's regular rate of pay to calculate the overtime rate:
    - $\$7.25 \times 1.5 = \$10.88$
  - **Step 2:** Subtract the appropriate tip credit from the overtime rate to achieve the adjusted rate and multiply by the number of overtime hours worked that week:
    - $\$10.88 - \$5.12 = \$5.76$
    - $\$5.76 \times 10$  overtime hours =  $\$57.60$  overtime pay
  - **Step 3:** Add the employee's straight pay plus the overtime pay to calculate total pay that week:
    - 40 hours  $\times$   $\$2.13 = \$85.20$  straight time
    - $\$85.20$  straight time +  $\$57.60$  overtime =  $\$142.80$

# Tip Pooling

- The requirement that an employee must retain all tips does not preclude a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips
  - Examples of valid tip pool employees: waiters, waitresses, bellhops, counter personnel (who serve customers), bussers, and service bartenders
  - Invalid tip pool examples: dishwashers, cooks, chefs, and janitors



# Pool Rules

- The FLSA does not impose a maximum contribution amount or percentage on valid mandatory tip pools
- However, the employer:
  - Must notify tipped employees of any required tip pool contribution amount
  - May only take a tip credit for the amount of tips each tipped employee ultimately receives
  - May not retain any of the employees' tips for any other purpose

# Additional Tips

- **Service Charges**: A compulsory charge for service, for example, 15 percent of the bill, is not a tip. Such charges are part of the employer's gross receipts.
- Sums distributed to employees from service charges cannot be counted as tips received, but may be used to satisfy the employer's minimum wage and overtime obligations under the FLSA.
  - If an employee receives tips in addition to the compulsory service charge, those tips may be considered in determining whether the employee is a tipped employee and in the application of the tip credit

# Additional Tips

- **Credit Cards**: Where tips are charged on a credit card and the employer must pay the credit card company a percentage on each sale, the employer may pay the employee the tip, less that percentage.
  - This charge on the tip may not reduce the employee's wage below the required minimum wage
  - The amount due the employee must be paid no later than the regular pay day and may not be held while the employer is awaiting reimbursement from the credit card company

# It's Wasted on the Young

- **Youth Minimum Wage**: Employers may pay a youth minimum wage of not less than \$4.25 per hour to employees who are under 20 years of age during the first 90 consecutive calendar days after initial employment by their employer
- Employers are prohibited from displacing any employee in order to hire someone at the youth minimum wage

# The Law Won

- It is **illegal** to make deductions for walk-outs, breakage, or cash register shortages that reduce the employee's wages below the minimum wage.
  - When employer is making use of tip credit to make minimum wage, no such deductions are allowed!
- Where a tipped employee is required to contribute to a tip pool that includes employees who do not customarily and regularly receive tips, the employee is owed **the full \$7.25 minimum wage** and reimbursement of the amount of tips that were improperly utilized by the employer.

# Recent Developments

- Trejo v. Ryman Hospitality Props.  
(4<sup>th</sup> Circuit Court of Appeals 2015)
  - Plaintiffs concede that they were paid minimum wage in case (i.e., without tip credit), but assert that FLSA permits claim for unlawfully withheld tips.
  - Court affirms dismissal of the plaintiffs claim:
    - FLSA covers minimum wage and overtime
- BUT . . . 9<sup>th</sup> Circuit has ruled that DOL rule may cover all tipped employees, including those paid over \$7.25/hour
  - Appeal to U.S. Supreme Court is pending

# Virginia District Court Cases

- Guerra v. Guadalajara IV (W.D. Va. 2016)
  - Similar to Trejo, but plaintiffs also sue for conversion under state law
  - Held: Plaintiffs may proceed; FLSA does not preempt the claim
- Perez v. Yama, Inc. (E.D. Va. 2016)
  - Defendant asserts that evidence shows it did not retain tips and did not use the tip credit
  - Court denies summary judgment, holding that contrary evidence exists in defendant's payroll records

# Court Cases

- Montgomery v. Lovin' Oven Catering Suffolk, Inc.  
(D. S.C. 2016)
  - Court rules that Trejo does not apply to factual situation where defendant is alleged to have retained portion of service charge
  - In contrast, plaintiffs here allege failure to pay minimum wage; case may proceed
- McFeeley v. Jackson St. Entm't, LLC (4<sup>th</sup> Cir. 2016)
  - Exotic dancers determined to be “employees” not independent contractors
  - Employer may not use tip credit to defer liability due to failure to pay minimum wage and give proper notice



# Part Two: Immigration's Alphabet Soup



# Administrative: Quick Nuts and Bolts

- For every new hire, will need an I-9
- New I-9 Form in place and mandatory for use starting 09/18/2017 (issued 07/17/2017)
- Three pages

# I-9s: Page 1



**Employment Eligibility Verification**  
**Department of Homeland Security**  
 U.S. Citizenship and Immigration Services

**USCIS**  
**Form I-9**  
 OMB No. 1615-0047  
 Expires 08/31/2019

► **START HERE:** Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.

**ANTI-DISCRIMINATION NOTICE:** It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

**Section 1. Employee Information and Attestation** (Employees must complete and sign Section 1 of Form I-9 no later than the **first day of employment**, but not before accepting a job offer.)

Last Name (Family Name)		First Name (Given Name)		Middle Initial	Other Last Names Used (if any)	
Address (Street Number and Name)			Apt. Number	City or Town		State ZIP Code
Date of Birth (mm/dd/yyyy)	U.S. Social Security Number		Employee's E-mail Address		Employee's Telephone Number	

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following boxes):

<input type="checkbox"/> 1. A citizen of the United States	
<input type="checkbox"/> 2. A noncitizen national of the United States (See instructions)	
<input type="checkbox"/> 3. A lawful permanent resident (Alien Registration Number/USCIS Number): _____	
<input type="checkbox"/> 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy): _____ Some aliens may write "N/A" in the expiration date field. (See instructions)	

Aliens authorized to work must provide only one of the following document numbers to complete Form I-9:  
 An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.

1. Alien Registration Number/USCIS Number: _____ <b>OR</b> 2. Form I-94 Admission Number: _____ <b>OR</b> 3. Foreign Passport Number: _____ Country of Issuance: _____	QR Code - Section 1 Do Not Write in This Space
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Signature of Employee	Today's Date (mm/dd/yyyy)
-----------------------	---------------------------

**Preparer and/or Translator Certification (check one):**

I did not use a preparer or translator.  A preparer(s) and/or translator(s) assisted the employee in completing Section 1.  
 (Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator		Today's Date (mm/dd/yyyy)	
Last Name (Family Name)		First Name (Given Name)	
Address (Street Number and Name)		City or Town	State ZIP Code



STOP Employer Completes Next Page STOP



# I-9s: Page 2



**Employment Eligibility Verification**  
 Department of Homeland Security  
 U.S. Citizenship and Immigration Services

**USCIS**  
**Form I-9**  
 OMB No. 1615-0047  
 Expires 08/31/2019

**Section 2. Employer or Authorized Representative Review and Verification**  
*(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")*

<b>Employee Info from Section 1</b>		Last Name (Family Name)	First Name (Given Name)	M.I.	Citizenship/Immigration Status
<b>List A Identity and Employment Authorization</b>		<b>OR</b>		<b>List B Identity</b>	<b>AND</b>
<b>List C Employment Authorization</b>					
Document Title	Document Title	Document Title			
Issuing Authority	Issuing Authority	Issuing Authority			
Document Number	Document Number	Document Number			
Expiration Date (if any)(mm/dd/yyyy)	Expiration Date (if any)(mm/dd/yyyy)	Expiration Date (if any)(mm/dd/yyyy)			
Document Title	<b>Additional Information</b>		<b>QR Code - Sections 2 &amp; 3 Do Not Write In This Space</b>		
Issuing Authority					
Document Number					
Expiration Date (if any)(mm/dd/yyyy)					
Document Title					
Issuing Authority					
Document Number					
Expiration Date (if any)(mm/dd/yyyy)					

**Certification:** I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): \_\_\_\_\_ (See instructions for exemptions)

Signature of Employer or Authorized Representative		Today's Date (mm/dd/yyyy)	Title of Employer or Authorized Representative		
Last Name of Employer or Authorized Representative		First Name of Employer or Authorized Representative	Employer's Business or Organization Name		
Employer's Business or Organization Address (Street Number and Name)			City or Town	State	ZIP Code

**Section 3. Reverification and Rehires (To be completed and signed by employer or authorized representative.)**

<b>A. New Name (if applicable)</b>		<b>B. Date of Rehire (if applicable)</b>	
Last Name (Family Name)	First Name (Given Name)	Middle Initial	Date (mm/dd/yyyy)

**C.** If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

Document Title	Document Number	Expiration Date (if any) (mm/dd/yyyy)
----------------	-----------------	---------------------------------------

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Today's Date (mm/dd/yyyy)	Name of Employer or Authorized Representative
--	---------------------------	---



# I-9s: Page 3

## LISTS OF ACCEPTABLE DOCUMENTS All documents must be UNEXPIRED

Employees may present one selection from List A  
or a combination of one selection from List B and one selection from List C.

LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		1. A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		2. Certification of report of birth issued by the Department of State (Forms DS-1350, FS-545, FS-240)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		3. School ID card with a photograph		3. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
4. Employment Authorization Document that contains a photograph (Form I-766)		4. Voter's registration card		4. Native American tribal document
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status: a. Foreign passport; and b. Form I-94 or Form I-94A that has the following: (1) The same name as the passport; and (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.		5. U.S. Military card or draft record		5. U.S. Citizen ID Card (Form I-197)
		6. Military dependent's ID card		6. Identification Card for Use of Resident Citizen in the United States (Form I-179)
		7. U.S. Coast Guard Merchant Mariner Card		7. Employment authorization document issued by the Department of Homeland Security
		8. Native American tribal document		
		9. Driver's license issued by a Canadian government authority		
		<b>For persons under age 18 who are unable to present a document listed above:</b>		
		10. School record or report card		
		11. Clinic, doctor, or hospital record		
		12. Day-care or nursery school record		
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI				

Examples of many of these documents appear in Part 13 of the Handbook for Employers (M-274).

Refer to the instructions for more information about acceptable receipts.

# I-9 Top Ten Mistakes

- Not understanding the difference between correcting I-9s and correcting bad I-9 practices
- Allowing untrained staff to administer I-9s
- Not conducting an internal I-9 audit
- Having untrained staff engage in the I-9 audit
- Not supervising new employees filling out Section 1, which causes many Section 1 mistakes

# I-9 Top Ten Mistakes (Cont'd)

- Accepting unacceptable documents
- Accepting fraudulent documents, such as fake lawful permanent resident or Social Security cards
- Not recording the document title, issuing authority and expiration date or not recording the information correctly
- Failing to sign and date
- Making corrections without initializing and dating them

# I-9 Tips in General

- Five Tips:

1. Consult legal counsel
2. Put I-9 responsibility in one person or a core group and make sure that person/group knows the rules
3. Employees must choose documents to present
4. Take only what is needed for I-9 completion
5. Create a tickler (calendar) system re reverifications
6. COMPLETE SECTION 1 NO LATER THAN THE BEGINNING OF FIRST DAY OF WORK
  - a) **A change that came about as a result of latest update to Form I-9**



# Types of Workers



# Types of Potential Workers

- Seasonal Workers
  - H-2B Temporary Non-Agricultural Workers
  - H-2A Temporary Agricultural Workers
- Wine Makers
  - H-1B (“specialty occupation”)
- Sommeliers
  - O-1B (“extraordinary abilities”)



# Seasonal Workers

- H-2B; cap = 66k  
(2017 = 15k+)
  - Waiters/bartenders
  - Chefs/cooks
  - Cleaning staff
  - Sale persons
  - Warehouse workers
- H-2A; no cap
  - Harvest workers



# Seasonal Workers

- **Winery must show Dep't of Labor that...**
  - Job is of a temporary or seasonal nature
  - There are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work
  - Employing seasonal workers will not adversely affect the wages and working conditions of similarly employed U.S. workers

# Seasonal Workers

- **Winery must also show Dep't of Labor that it will...**
  - Pay the workers the prevailing wage (determined by DOL)
  - Provide or pay for transportation to USA, housing, daily transportation to and from the worksite, meals, tools and supplies, and return transportation to home country
  - Worker's compensation insurance
  - Treat the workers like all other workers (pay stubs, no discrimination, recordkeeping, etc.)

# Seasonal Workers

- Winery must show USCIS...
  - i. Temporary need
    - Seasonal need for  $\leq 1$  year
    - Peakload need for  $\leq 1$  year
    - An intermittent need for  $\leq 1$  year
    - One-time occurrence for  $\leq 3$  years
  - ii. Authorized country (published list)
  - iii. Period of stay
    - $<1$ ; can be renewed up to max 3 yrs. (includes time on other visas)

H-1B



# Vivian the Vintner and H-1B

## Vivian the Vintner

- Italy
- Wine making certificate
- 20 years in the business
- ABC Winery needs wine maker for 3 year term
- Has 2 dependent children





# Vivian the Vintner and H-1B

## Vivian the Vintner

- Italy
- Wine making certificate
- 20 years in the business
- ABC Winery needs wine maker for 2 year term
- Has 2 dependent children

## H-1B

- “specialty occupation”
- Vintner must have at least a bachelor’s degree in the related field (including from a foreign university), or equivalent work experience, or a combination of the two
- H-4; family member of H-1B

# H-1B

- Winery must show...
  - The job requires the application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree or its equivalent
  - It complied with all DOL requirement for securing a Labor Condition Application and creation of a Public Access File
  - Applicant (Vintner) meets (exceeds) criteria of job posting requirements.
  - Degree transcripts; expert equivalence report if foreign university
  - Resume, certificates, awards, letters of recommendation
  - Winery will pay the prevailing wage

# H-1B

- Problems
  - Cap = 65k bachelor's; +20k master's
  - Lottery
  - Filing deadline (Apr. 1)
  - Long process – need to start early



O-1B



# O-1B

## Pierre the Sommelier

- France
- Level III, advanced
- XYZ Winery needs expert in pairings/tastings
- Spouse



# O-1B

- “Extraordinary ability in the arts” = Distinction!
  - Distinction means a high level of achievement in the field of the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of art.
  - How can we meet this standard?
- O-3; family member of O-1B

# O-1B

- **Winery must show...**

- i. Written employment contract
- ii. Consultation from industry group; waived if here previously w/in 2 years
- iii. Itinerary = list of events extraordinary ability is needed for
- iv. Pro = sommelier can work for more than one winery (i.e., agent of more than one employer)
- v. Achieved national or international recognition for achievements (publications, awards)

# Terms and Terminations

## ■ Term

- H-1B: 3 yr initial term; can be extended up to 6 yrs
- O-1B: 3 yr initial term; can be extended based on event/duties needed

## ■ Termination

- Notify USCIS of “material change” and request to revoke petition (in writing)
- Notify DOL that employer is withdrawing the LCA
- Employer must provide “reasonable costs of transportation” of employee back to foreign residence
- \*May give employee notice to find other employment and sponsor





**WR** WOODS ROGERS  
ATTORNEYS AT LAW

# Questions & Answers



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# Thank you!



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