Ask the Experts

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Kelly **Allen,** Adkison, Need, Allen & Rentrop PLLC

Q "If I want to change the design or image of my restaurant do I need to obtain approvals from the Michigan Liquor Control Commission ("MLCC") and/or the municipality?"

A Those who have opened restaurants know there are many moving parts and approvals needed by the state, county, and municipality. However, once the restaurant is open and changes are to be made, owners must remember that various government approvals may be required. For many restaurants, especially those that have been in business a long time, change is good. Updating is essential for continued success. The following are a few examples of improvement decisions which require government approvals.

Image Change. If you are looking to change your concept, it is possible that the assumed name of the business will change. If the assumed name changes, the business is required to file a new Certificate of Assumed Name with the state of Michigan. This can be done online by accessing the LARA website services for business entity changes. If there is a change you should also make sure that your signage complies with all local ordinances. While the MLCC does not require that you notify it of a name change, it is advisable to inform them with a simple letter so that the MLCC's records are updated accordingly.

Design Change. If the restaurant is changing its internal design, local and MLCC approvals may be required depending on the type of changes or improvements. You must seek approval from the MLCC if you are changing the footprint of the licensed premises. If you are adding or dropping space in your restaurant, an application must be filed with the MLCC as the MLCC requires "prior approval" of this type of change to the licensed premises. Once the MLCC approves the change, a final inspection may be required and it is important to give yourself enough time to obtain MLCC approvals. In other words, refrain from scheduling a grand reopening until you have the approval so last minute issues can be avoided. Also, it is likely that local approvals from the building, electrical, or fire department may be required. It is advisable to work with a local builder or architect to make sure that appropriate permits are obtained.

Outdoor Service: If you are adding a patio or changing the dimensions or seating on your patio, MLCC and/or local approvals may be needed. Again, to operate an outdoor service area, prior approval of the MLCC is required. At this time of year, the MLCC considers a large number of applications for outdoor service. Be prepared to submit a detailed drawing with the application and give yourself plenty of time to obtain the required approval. If the outdoor patio is located on a city sidewalk, approval from the city in the form of a resolution must be submitted. If you wait until the spring or summer to file the application for outdoor service, chances are you will miss the opportunity to serve outdoors for the season. Also, many municipalities require restaurants to have sidewalk café permits. These permits often require approval of the municipal board, such as the city council.

Mark **Burzych,** Fahey Schultz Burzych Rhodes PLC

Q "Are there areas of copyright law pertaining to my restaurant's design and image of which I may be unaware?"

A Copyright law protects original works of composition that are reduced to a tangible medium, which include artistic works such as photographs. In this internet age, professional and novice photographers alike generally post their photographs on their own websites and sell them for use through copyright license agreements. Unfortunately, this also means that third parties often download those same photographs and upload them to sharing websites where they are then picked up and displayed by major search engines. You may have photos on your websites, other social media platforms, and in print, such as menus or billboards, that are impacted by copyright law. You need to make sure that you have the rights to use those photos in all of your media.

A common misconception is that just because something is available on the internet does not mean it is free to use. In fact, downloading and using a photograph found on the internet can be a costly mistake, and if you do, you may find yourself on the receiving end of a copyright infringement demand letter. Enter the copyright troll. In recent years, there has been a large upswing in demand letters sent by photographers who claim infringement based on use of their photographs downloaded from the internet and incorporated in a website, marketing material, or used in some other capacity. These same photographers have sophisticated software that crawls the internet to find unauthorized use, so it usually is not a matter of if, but rather when they find out.

To avoid being the subject of a copyright troll demand letter, ensure that you have the right to use all the photos you are using in your media. Certify that the consultants and contractors who help you with your media, (website developers, menu consultants, etc.) obtained a license for you to use those photos. Don't take their word for it because their contracts with you probably do not give you a warranty that they have provided you with the necessary licenses. If you find yourself on the wrong end of a copyright troll's demand letter, we recommend contacting an attorney immediately. A sophisticated copyright attorney should be able to counsel you regarding the risks associated with responding to the initial letter, which usually comes with an exorbitant financial demand. For example, prior to responding, you should determine if the photograph is federally registered, who the copyright owner is, and request a deposit copy of the registration. You should also determine if your use began prior to the federal registration date, because absent a reliable defense, statutory damages and attorneys' fees depend on it.

Jennifer **Muse,** Honigman Miller Schwartz and Cohn LLP

Q "My staff has been asking whether our restaurant will begin tip pooling. What issues should we be concerned about, and should we ultimately institute a tip pool?"

A A spotlight in the news and social media has recently illuminated tips and gratuities. Tips are considered the property of the employee, not the employer. Any redistribution of tips falls into two possible categories: (1) tip splitting, and (2) tip pooling. Tip splitting is where an employee voluntarily shares some of his or her tips with an untipped worker. Tip pooling is where the employer requires employees to pool a portion of the tips collected by the tipped staff which are then redistributed among employees. Tip pooling has significant legal implications, many of which have come to light in the last six months.

Tip pooling has been the buzz since December 2017, when the DOL announced a proposed change to its handling of tip pooling. Advocates of tip pooling state that sharing tips among all staff members recognizes everyone's contribution to the service of the restaurant. Those against tip pooling cite concerns such as employers lowering wages of back-of-house staff if included in a tip pooling arrangement.

The Department of Labor's Regulations

Under the Department of Labor (DOL) rules, tip pools can only be shared among employees who "customarily and regularly" receive more than $30 in tips per month. This may include wait staff, bellhops, bussers, counter personnel who serve customers, and service bartenders (front-of-house staff). The DOL's proposed change in December 2017 allowed for the expansion of a tip pool to include employees who do not traditionally receive direct tips, such as restaurant cooks, chefs, dishwashers, and janitors. The change would only apply when employers pay a full minimum wage to all staff (i.e., $9.25 per hour in Michigan), but it has not yet been formally instituted.

Congressional Amendment and Subsequent Interpretation

Further muddying the waters, in March 2018, Congress added language to the FLSA, prohibiting employers and "managers and supervisors" from keeping any portion of an employee's tips, "regardless of whether or not the employer takes a tip credit." The Act does not define "manager" or "supervisor."

Following the amendment, the DOL issued a field bulletin announcing two points of interpretation: (1) that it would use the duties test for the executive exemption of the FLSA to determine whether an employee qualifies as a manager or supervisor; and (2) that "employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools."

Under the executive exemption of the FLSA, an employee must have the following duties to qualify:

- The employee's primary duty must be managing the enterprise, or managing a department or subdivision;
- The employee must "customarily and regularly" direct the work of at least two or more other full-time employees, or their equivalent; and
- The employee must have authority to hire or fire other employees, or the employee's recommendation as to another employee's change of status (hire, fire, promotion, etc.) must be given particular weight.
- However, the DOL's announcement regarding this test is merely its current enforcement position, which could change, and the courts could ultimately adopt a different rule.

The Wage and Hour Division (WHD) also issued guidance stating it would not enforce the DOL's regulations on the "retention of employee's tips with respect to any employee who is paid a cash wage of not less than" the full federal minimum wage ($7.25) and "for whom their employer does not take a . . . tip credit."

So, what's a Michigan employer to do?

To comply with current law, if you take advantage of the tip credit (i.e., pay tipped employees $3.52 an hour, counting an additional $5.73 an hour in received tips), any tip pool should:

1. Be shared among only front-of-house staff, meaning those "customarily and regularly" tipped, such as wait staff, bellhops, bussers, counter personnel who serve customers, and service bartenders.
2. Not include any managers or supervisors in the tip pooling arrangement.
3. Not include any "back-of-house" staff, such as cooks and dishwashers.
4. Not have a provision for the employer to keep any part of the tip pool.
5. Give your employees advance notice of the tip pool and the required contribution amount.

If you pay your employees the full minimum wage (i.e., $9.25), a tip pool is not prohibited from including back-of-house staff, according to DOL and WHD interpretations. Michigan courts and law have not yet weighed in on this area. Employers should stay tuned for additional rules and regulations from both federal and state levels that may come out in the coming months, which will provide additional clarity and security on this position.

Whether you decide to institute a tip pool or not, keep in mind that this area of law is currently in flux. As always, continue to be mindful of who participates in any tip pooling arrangement and what the contribution rate is for the tip pool.