



## A Service Charge is Not a Tip: 11th Circuit Court Rules Restaurant Mandatory Service Charge is Not Considered a Tip

The Eleventh U.S. Circuit Court of Appeals recently held that service charges added to diners' bills are not considered tips under the Fair Labor Standards Act ("FLSA").

A group of current and former employees of an upscale steakhouse initiated a collective action lawsuit against Nusr-Et Steakhouse Miami—an upscale Brickell steakhouse, owned by celebrity chef "Salt Bae"—alleging that Nusr-Et violated the Fair Labor Standards Act when the 18% service charge was used by the restaurant to pay its minimum and overtime wage obligations.

Under the FLSA, tips are not considered wages and are not part of a worker's regular rate of pay. Thus, employers are not allowed to utilize tips to offset the employer's obligations to pay minimum and overtime wage obligations. When evaluating whether the 18% service charge was a tip, the Court rejected the employees' argument because a diner had no discretion to not pay the service charge.

In weighing the employees' arguments, the Court considered whether the employees' regular rate of pay was in excess of one and one-half times the minimum hourly rate. It was determined that Nusr-Et paid its employees amounts ranging from \$23.68 to \$51.58 per hour: well in excess of Florida's minimum wage.

Citing 29 C.F.R. §531.52, the Court noted that for a payment to be considered a tip, the payment must be "voluntary [in] nature" and that the amount of the tip be "determined solely by the customer." The Court also evaluated 29 C.F.R. §531.55, which provides that a "compulsory charge for service ... cannot be counted as a tip ...."

In viewing the service charge, the Court found that "whether and how much to pay are not determined solely by the customer." Thus, service charges imposed on the consumer do not constitute tips under the FLSA and, in cases of retail or service establishments, may be used to satisfy the employers wage obligations.

While this case will impact restaurant owners and employees, as customers we should remember this ruling when deciding whether to tip our servers when paying a service charge.

The case style is *Melissa Compere, et al. v. Nusr-Et Miami, LLC, et al.*, Case No. 20-12422 (11<sup>th</sup> Cir. 2022) and the order can be found [here](#).

### KD IS HERE TO HELP

The experienced Labor & Employment attorneys at Kaufman, Dolowich & Voluck are available to assist with any questions you may have.