

## Recipe Changing For NYC Restaurant Wage Suits

By **Joyce Hanson**

Law360 (August 19, 2024, 2:57 PM EDT) -- Labor lawyer Lou Pechman likes to order the prime sirloin, rare, when he dines at Sparks Steak House in Manhattan. While there, he also enjoys catching up with waiters he represented when he sued the restaurant for wage theft.







Pechman Law Group PLLC's Lou Pechman visits Sparks Steak House, whose waiters were the recipients of a \$3.15 million wage and tipping settlement Pechman won in 2009. (Joyce Hanson | Law360)

One recent evening at the steakhouse, a waiter dressed in a classic uniform of white collared shirt, black vest and tie arrived at Pechman's table to take his order off one of the restaurant's enormous menus. A prime sirloin steak costs \$69.95. But instead of rushing to put in the order, the waiter chatted with Pechman about the \$3.15 million wage and tipping class action settlement the lawyer won in 2009 for Sparks servers.

Another waiter dropped by to say hello, and the three reminisced about how the settlement was a life-changing event for Sparks workers and became a model for other wage theft suits in New York City. The workers in the Sparks class of 201 members received an average payout of \$10,622 after a Manhattan federal judge ruled that the business had stiffed waiters on their tips for eight years.

From the Sparks win, Pechman took on seemingly all of New York's restaurant industry in litigation. He estimates that he has filed approximately 200 wage theft suits against restaurants all over the city under state and federal laws. A secret to his success is his website, WaiterPay, which tells restaurant workers in English and Spanish about their minimum wage, overtime and tipping rights.

In his glory days in the early 2000s, Pechman went after Sparks as well as popular Manhattan restaurants like Mr. Chow and Bobby Van's and was rewarded with million-dollar and high-six-figure settlements. Neither of the latter two restaurants' owners or managers were

willing to speak with Law360 about the suits. A Sparks manager who gave his name as Gene would only say that owner Michael Cetta wouldn't be willing to talk. "It's settled, and that's it," Gene said.

But while WaiterPay.com still gains clients for Pechman's firm, Pechman Law Group PLLC, he said he has seen an evolution in wage-and-tipping suits — with settlements now less lucrative for the plaintiffs bar.

Major restaurant cases have "dried up," he said, because big Manhattan hot spots and celebrity chefs have already been sued. Today, they rely on their attorneys, human resources departments, trade groups, payroll providers and policy handbooks to keep them out of legal trouble. It's just the smaller mom-and-pop eateries that get sued now, according to Pechman.

"There's an awareness that wasn't there before," he said. "There are still plenty of cases and filings, but for some of these restaurant groups, they're training [and] they're making sure all hours are accounted for. When a lawsuit exposing wage theft violations occurs, competent attorneys will get the place in order and follow up to make sure the restaurant stays in compliance."

### **A Tangle of Rules and Regs**

Wage and tipping rules in New York are increasingly complex because they involve a mix of state and federal laws and regulations that keep getting updated. And restaurant lawyers say the rules have become increasingly specific and arcane.

The Fair Labor Standards Act allows employers to pay tipped workers a "subminimum" wage of \$2.13 per hour as long as the tips they receive bring their wages up to the federal minimum wage of \$7.25 an hour. The difference between that subminimum and minimum wage is known as the "tip credit," meaning an amount of wages the employer doesn't pay directly to workers but instead relies on customer tips to offset.

New York state law also allows restaurants to take advantage of a tip credit and pay a subminimum wage. In the Big Apple, the 2024 minimum wage is \$16 while the cash wage for tipped food service workers is \$10.65 and the tip credit is \$5.35.

Another level of complication for employers who take the tip credit are rules requiring them to comply with New York's "80/20" rule as well as the FLSA's new "**80/20/30**" rule, which took effect in December 2021 and is **being challenged in court**.

The New York law prohibits a restaurant from taking the tip credit for employees who work more than 20% or two hours of their shift in a nontipped job capacity for tasks such as rolling silverware and general cleaning, and the federal law adds on a 30-minute rule that disallows the tip credit if an employee spends more than half an hour continuously on work that doesn't produce tips.

Ellenoff Grossman & Schole LLP labor and employment head Amanda Fugazy, who advises the New York State Restaurant Association and helps it train owners, notes that not only does the state raise wages every year, but also compliance requirements under the law have exploded in number since 2000.

"Big restaurant groups need their lawyer on the hotline, 24-7. Frequently, there are problems after the fact when a payroll company messes up," Fugazy said. "And for mom-and-pops, forget it."

### **Blockbuster Suits Few and Far**

Lawyers representing both sides in wage and tipping suits agree that blockbuster settlements like the one they saw in the Sparks case have tapered off. They say big restaurants now understand the financial consequences of getting sued and keep a closer eye on compliance with wage and tipping regulations.

Plaintiffs bar lawyer D. Maimon Kirschenbaum of Joseph & Kirschenbaum LLP got to know Pechman when they worked together on a case against upscale Greek restaurant Milos, where they won a settlement of nearly \$2 million in 2011. Kirschenbaum's firm along with Outten & Golden LLP also went after celebrity chef Mario Batali's former New York restaurant group and reached a **\$5.25 million class action settlement** in 2012. Milos and Batali's former restaurant group did not respond to requests for comment.

All told, Kirschenbaum said, he has litigated 200 New York restaurant wage and tipping cases since graduating from law school in 2005.

Before then, he said, this area of the law was not well-developed when he, Pechman and Justin Swartz of Outten & Golden started bringing what Kirschenbaum called "the big cases."

"We were working on these cases that were defining this body of law," he said. "The idea of bringing class actions against a New York City restaurant wasn't something that most people would have thought was worth it."

Kirschenbaum credits his initial success to finding clients online in the early days of the internet. He paid about \$200 to place an ad on a now-defunct website called shamelessrestaurants.com — "like a venting blog for pissed-off waiters" — and another blog called Waiter Rant, which became a bestselling book.

But since then, he said, big restaurant companies have hired savvy lawyers such as Fugazy and Carolyn Richmond, the hospitality practice group chair at Fox Rothschild LLP who also serves as chief labor counsel to the New York City Hospitality Alliance. It's the smaller, independently owned restaurants that struggle to keep up with wage-and-tipping regulations, Kirschenbaum said.

"The mega restaurants that are hiring people like Carolyn have a team of lawyers that are good," Kirschenbaum said. "The less buttoned-up employers are now the ones most likely to break the law. Since this is New York, you could have a mom-and-pop shop pulling in \$10 million a year, and that's where you see the violations."

Richmond, meanwhile, confirmed that big businesses can afford to hire payroll administrators and expert hospitality lawyers, and they have all started to pay closer attention to federal and state law requirements for proper wage payment as well as tip credit rules.

But outside the biggest operators, restaurants with smaller budgets can't pay for HR personnel and experienced legal counsel, she said.

"As these suits happened and as people became aware of wage orders that were redone in New York, the plaintiffs bar became super active," she said. "The city and state did not promote teaching small businesses about any of this, and many learned literally trial by fire. They would get sued and have six- or seven-figure settlements."

### **Most Settle Quietly**

Beyond restaurants' greater awareness of laws, attorneys say the number of wage and tipping lawsuits is dropping because arbitration and mediation have led to a general reduction of employment suits in federal court.

Pechman noted that many restaurants have instituted arbitration agreements with class action waivers.

Rebecca Price, director of the alternative dispute resolution program in the U.S. District Court for the Southern District of New York, pointed out that most Fair Labor Standards Act cases that get into the court system, including wage and tipping cases, settle through the SDNY's mediation program under the broader ADR umbrella.

Price said that starting in 2016 — not long after Pechman and Kirschenbaum began winning big settlements — SDNY cases filed under the FLSA and assigned to certain court judges began to automatically be referred to mediation. The program became so popular that judges themselves started to refer the cases to mediation, she said.

As many as 400 or more FLSA suits go to mediation every year in the Southern District, according to Price. Approximately 66% of the cases have settled in mediation, and if parties cannot reach a settlement through a mediator, the likely next step would be continued discovery in litigation, she said.

"Parties can get resolution of the claims earlier than if they go to trial," Price said. "If it's a negotiated resolution, everybody hopefully can agree to a collectible amount that the employer has to pay the other side. Whereas in a trial, there may be a judgment entered that is very large, but if you can't collect it, it's not so useful."

### **Owners Hungry for Help**

Restaurateur Tom Bifulco, who owns the popular Manhattan Theater District restaurant Amarone Scarlatto, said he can't imagine running his business without legal help.

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Tom Bifulco

Owner, Amarone Scarlatto

"If you want to operate a restaurant in New York, you need to have great food and a great lawyer," Bifulco said. "The employment regulations that restaurants have to deal with are complicated and unforgiving."

These complicated and ever-changing restaurant laws cause well-intentioned small-business owners to violate the rules and potentially face major statutory damages, according to Richmond's colleague at the NYC Hospitality Alliance, Executive Director Andrew Rigie.

Rigie pointed to the 80/20 rules under state and federal law, which the Alliance wants to reform. Historically, he said, people who work in restaurants gain experience doing different jobs and are able to grow through the ranks. For instance, a chef at a small restaurant might invite a tipped busser into the kitchen to learn about nontipped food prep work. But because that nontipped work would take more than 20% of a shift, the busser can't get that opportunity anymore, Rigie said.

"If a small-business owner or an immigrant-owned restaurant owner doesn't know that complex law, they could think they're helping their employee," he said.

Robin Wertheimer, an attorney with a solo practice who also owns and runs Viennese restaurant Werkstatt in Brooklyn with her chef husband, Thomas Ferlesch, said she struggles to keep up with regulations — even though she's a lawyer with a degree from Yeshiva University's Benjamin N. Cardozo School of Law and a member of the NYC Hospitality Alliance.

The couple opened the restaurant in 2015, and have always relied on their accountant and payroll company to give them periodic updates on legal issues. They count themselves lucky that they've never been sued.

But it is ultimately Wertheimer and Ferlesch who are liable for any legal claims against their business.

"As a lawyer who has trained for three years to do research and trained in analytical thinking and finding answers, I can tell you it is no mean trick trying to find the right information," Wertheimer said. "I have restaurant-owning friends who ask me, 'What can you tell me about this new law? You're a lawyer,' to which I say, 'I can't, because I have to look it up for myself.'"

Another attorney practicing in this niche space at the plaintiffs bar is Lipsky Lowe LLP co-founding partner Douglas Lipsky, who agrees that large restaurant groups are better able to pay lawyers like Richmond for advice on how to comply with wage and tipping laws before they get sued.

"The independent restaurants and small groups are less willing to invest and either just turn a blind eye to what the law says, or try to figure it out on their own and oftentimes trip something up," he said.

In his own practice, Lipsky said, he has moved away from suing the larger restaurant groups and is taking on more cases related to workers' wage and tipping claims against smaller groups and independent restaurants.

While settlements these days are less likely to range in the millions of dollars, Lipsky said, he is still satisfied to be practicing wage and tipping law at the plaintiffs bar. He used to represent employers in the first 10 years of his practice, but in the past 10 years he finds it's more rewarding to fight for workers.

One day, Lipsky had an appointment at his office with one of his clients and saw that the man had arrived with his entire family so they could see him pick up his check, which was in the mid-six figures.

"He had never seen a check with his name on it for that much money and he wanted his whole family to witness it," Lipsky recalled. "Someone who has been making around the minimum wage and all of a sudden sees a check for that amount? Absolutely. It's life-changing."

--Editing by Orlando Lorenzo.