

NATION'S Restaurant News®

THE NEWSWEEKLY OF THE FOODSERVICE INDUSTRY

PERIODICALS

Vol. 38, No. 15

PUBLISHED EVERY MONDAY • A LEBHAR-FRIEDMAN® PUBLICATION • \$5 PER ISSUE • <http://www.nrn.com>

APRIL 12, 2004

Maine's Republican senators, Olympia Snowe, right, and Susan Collins joined in a proposal to increase the cap from 66,000 to 106,000 visas for 2004.



KARIN COOPER

U.S. to foreign workers: Stay home for summer

Restaurants, resorts to suffer as visas reach limit

By Dina Berta

Finding employees for hard-to-fill summertime positions just got harder for restaurant and resort operators nationwide after the federal government announced that a temporary foreign workers visa program had reached its limit and that no more visas

would be issued until the fall.

The H-2B visa program reached its maximum of 66,000 visas for the fiscal year that runs from Oct. 1 to Sept. 30. This is the first time the cap has been reached since it was established

(See **UNITED**, page 6)

AFC shapes up accounting, resumes franchise deals

But company still faces SEC investigation, shareholder lawsuits

By Susan Spielberg

ATLANTA — AFC Enterprises, after nine months of repeated delays in completing its Form 10-K for fiscal 2002, overcame a major hurdle by filing in March its 10-K for fiscal 2003 with the U.S. Securities and Exchange Commission.

With the filing complete, the company is able to move forward with the franchise development it was forced to suspend last year, while it rehabilitated a flawed accounting system and restated its results from 2000, 2001 and the first three quarters of 2002. The company is taking the regulatory steps that will allow it to resume signing new franchise development agreements for its Popeyes Chicken & Biscuits, Church's Chicken and Cinnabon chains.

AFC expects to file its



CEO Frank Belatti said efforts to restate results have not interfered with the company's restaurant operations.

named a new chief accounting officer and strengthened its accounting procedures — has put the bulk of its auditing nightmare behind it, the company is not out of the woods yet.

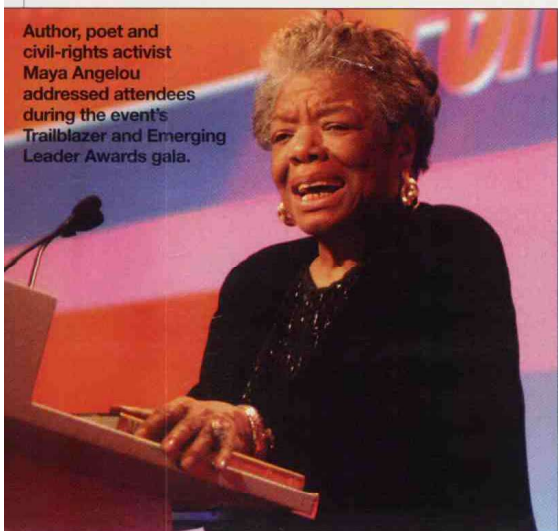
The SEC launched an investigation into AFC's announcement in March 2003 that it would restate its financial results. The agency also is looking into whether the company was in compliance in November 2002 with Regulation FD, which mandates the fair dissemination of corporate news to all investors.

(See **AFC**, page 95)

quarterly statements for 2003 shortly and then will apply to have its delisted stock reinstated on the Nasdaq stock market.

But while AFC — which replaced its chief financial officer,

Author, poet and civil-rights activist Maya Angelou addressed attendees during the event's Trailblazer and Emerging Leader Awards gala.



TRENT ALBERT

SPECIAL REPORT

WFF leadership confab focuses on assisting achievement of female execs

See page 70

Service staffs steamed over proposed Calif. tip-share law

Bill would allow operators to enforce the pooling of gratuities

By Alan J. Liddle

SACRAMENTO, CALIF. — A proposed California law that would let restaurateurs force servers to share tips with kitchen employees is being questioned by some operators and has one prominent attorney predicting that

passage of the measure would lead to a court battle.

To no one's surprise, the proposal is not universally popular among restaurants' wait staffs.

Senate Bill 1511, by Dede Alpert, D-San Diego, which was

proposed by the California Restaurant Association, would permit restaurant operators to

"establish a mandatory policy whereby tips are pooled among all employees except for owners, (See **SERVICE**, page 99)

Ground Round franchisees seeking control of chain

Parent company plans for sale of assets

By Sarah E. Lockyer

BRAINTREE, MASS. — The Ground Round franchisees left to fend for themselves after their parent company abruptly closed 59 company-owned units in mid-February are working actively to ensure that they have a greater stake in running the chain in the future.

As American Hospitality Concepts Inc. prepares for a public auction of assets after having filed for Chapter 11 bankruptcy protection nearly two months ago, the restaurateurs who continue to operate the chain's 73 franchised units are reviewing potential franchisors and even looking to make a bid on the chain's franchise assets.

"We want to control our own [livelihoods]," said Michael A. Ludwig, president of the chain's independent Ground Round



Owners Council and manager of a franchised unit in Hadley, Mass. "We have tried to protect the trademark, and we want some sort of say in our destiny. Everything we have done in the last two months has been toward that goal."

The furious activity both in and out of the courts is expected (See **GROUND**, page 97)

NEWS

Service staffs steamed over Calif. tip-share law

(Continued from page 1)
managers or supervisors."

"We believe the bill is about fairness to all employees," CRA chief executive John D. Dunlap III said shortly after the measure was introduced in the Legislature.

The CRA-championed measure, however, appears to be in conflict with the U.S. Department of Labor's interpretation of provisions of the federal Fair Labor Standards Act, or FLSA.

The DOL has held for years that employer-mandated tip pools may benefit only workers who "customarily and regularly receive tips," such as servers, busboys and bartenders. An FLSA fact sheet for employers produced by the DOL states: "Tipped employees may not be required to share their tips with employees who have not customarily and regularly participated in tip-pooling arrangements, such as dishwashers, cooks, chefs and janitors."

Many restaurant wait staffers share gratuities with kitchen co-workers, but they do so, at least ostensibly, on a voluntary basis.

The DOL also interprets the FLSA to hold that "tipped employees cannot be required to contribute a greater percentage of their tips than is customary and reasonable." The federal agency in the past has used a working definition that sets a "reasonable" amount as being no higher than 15 percent of total tips. The labor agency lost a court case challenging that definition in the U.S. Sixth Circuit Court of Appeals, but except in the region where that court has jurisdiction, the DOL has not backed down from its 15-percent guideline, foodservice law authorities indicated.

If enacted in California as now written, the Alpert bill — by forcing servers to share tips with back-of-the-house co-workers — would contradict the federal Department

of Labor's interpretation of the Fair Labor Standards Act. And if the final wording of the California bill did not limit mandatory tip pool contributions to 15 percent or less of servers' total tips, the measure also might conflict with that interpretation.

Peter Kilgore, senior vice president and general counsel for the National Restaurant Association in Washington, D.C., said he believes that DOL attorneys would not sit idle if the California proposal becomes law.

"I think they would challenge it [in court]," Kilgore said. "And without question," he added, that challenge would "be on the basis of pre-emption."

When state and federal labor laws conflict, the courts often rule that the law most beneficial to employees pre-empts the other, Kilgore said. In the case of Alpert's proposed law and the Department of Labor's interpretation of the Fair Labor Standards Act, a ruling could get complicated because the benefit "cuts both ways," he indicated.

Kilgore observed that Alpert's measure would be of most benefit to back-of-the-house employees, while the DOL's take on the FLSA best would serve front-of-the-house workers who already receive gratuities.

Kilgore stopped short of predicting which side might prevail in a court battle. But he indicated that the NRA shares a belief with California Restaurant Association executives that the work of back-of-the-house employees "has an impact" on the dining experiences that inspire guests to leave tips. Because of that, the two trade groups contend, kitchen employees should be beneficiaries of employer-mandated tip pools.

The NRA counsel added that DOL arguments to the contrary are "shortsighted" and in keeping with the position of "bureaucrats who don't understand the restaurant industry."

Adding to the complexity of the situation is the fact that the Fair Labor Standards Act does not apply to all employees.

going to view it as a cut in pay," and that perception could contribute to "friction" between the front- and the back-of-the-house, he added.

Emeryville, Calif.-based Chevys operates dozens of Chevys Fresh Mex dinnerhouses and a handful of Fuzio Universal Pasta outlets in its home state.

Echoing the sentiment of other foodservice executives contacted for comment, Maccaroni suggested that the Alpert bill might be a poor substitute for other actions that could help foster more equitable pay scales among restaurant

workers. "Why don't we have a tip credit in this state?" he asked, citing a factor that many owners blame for their inability to pay higher wages to kitchen workers.

California, with a minimum hourly wage of \$6.75, is one of just seven states in which servers' tip incomes cannot be credited toward employers' minimum-wage obligations. That means higher proportions of payrolls in California must be allocated to service workers than are allocated to those in the 43 states that do allow tip credits.

The CRA knows well that its members crave a tip credit, and the association has lobbied hard for decades for such a change in state law. Short of achieving that goal, CRA officials maintain, the Alpert bill could bring some relief to California restaurateurs who have been pummeled in recent years by rising utility, labor and insurance costs, among others, and now face challenges in terms of retaining back-of-the-house employees.

According to CRA chief Dunlap, a recent survey of members found that at restaurants where voluntary tip pooling takes

place, servers on average receive \$13.25 an hour in gratuities. Bartenders, the survey indicated, take in \$10 an hour in gratuities, while kitchen and other non-table-service workers average 43 cents to 63 cents an hour in tips.

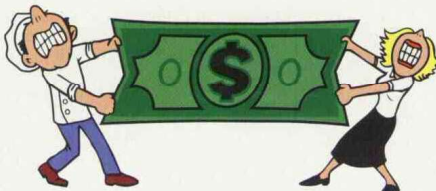
Dunlap said that while state law includes no express prohibition of mandatory tip pooling, past court cases and regulatory actions have made many operators hesitant to use the tactic. By permitting operators to increase overall compensation to kitchen staffs through mandated tip pooling, SB 1511 could provide restaurateurs with a "recruiting and retention tool," he observed.

Dunlap's senior legislative director, Kabateck, put it another way. "With no tip credit in California and finite labor dollars," he said, "this [legislation] is a creative way for operators to incentivize everyone on their team."

Paul C. Paz, a veteran waiter, service consultant and operator of the WaitersWorld.com Web site, lives and works in Oregon but says the proposed California law to permit a mandatory tip-pooling law could "have a national impact."

Citing the historic nature of server-owner relationships, Paz noted, "is the age-old debate about [the propriety of] the restaurateur's laying claim to tip income." Whether the practice takes the form of a tip credit that offsets minimum-wage obligations or is a tip pool that permits an operator to increase some workers' compensation without paying out more money, "it's a labor cost advantage that no other industry enjoys," he said.

"If consumers wanted employers to benefit from these gratuities and tips," Paz argued, "they would have been handing them to managers and owners instead of waiters."



Though several tests may come into play to make a determination, in general, businesses that generate less than \$500,000 in annual sales do not fall under the FLSA. That means that the Alpert bill, if enacted, might apply to some California restaurateurs, but not all, even if the courts subsequently rule that the DOL's interpretation of the Fair Labor Standards Act pre-empts the state rule.

California Restaurant Association officials have indicated that they will ask Alpert to modify her bill, if necessary, to move it through the Legislature and the courts.

"The CRA is working with the author to ensure that the intent of the bill is executed in a fair and reasonable manner and that it legally complies with federal guidelines," CRA senior legislative director John Kabateck said.

Regardless of the legislative and legal battles over the Alpert bill, not all restaurateurs are sold on the concept.

"The more I think about it, the more I fail to see the merit of it; it will just create angst," Chevys Inc. chief executive Ron Maccaroni said of the Alpert bill. "Servers are

NRA Feb. index: 70% of operators report stronger same-store sales

(Continued from page 4)

Guest traffic also strengthened in February. Sixty-one percent of restaurant operators said customer traffic had increased between February 2003 and February 2004. Forty-four percent said traffic had increased year over year in January.

Conversely, only 20 percent of survey respondents said guest traffic had fallen in February, which was down from the 35 percent who reported a year-over-year decline in traffic in January.

"A rebound in guest traffic following the relatively quiet holiday

season has been the primary driver of increasing same-store sales growth," said Skip Carpenter, an analyst with Thomas Weisel Partners, who noted that price hikes have not hurt consumer demand.

"In reaction to increasing cost pressures, numerous restaurant players have implemented higher menu prices with no negative backlash at the consumer level," Carpenter stated.

The analyst noted that accelerating guest traffic growth reflects easy comparisons over last year, when results were hurt by

unfavorable weather conditions and the repercussions of the buildup to war in Iraq.

However, Carpenter said he believes the better results also indicate that fundamentals in the restaurant industry are improving. "Consumers are becoming increasingly optimistic about the economic recovery under way and electing to spend discretionary income outside the home," he said.

The NRA's Restaurant Performance Index is a composite of several variables that gauge the health of the industry. The statistical tool consists of a Current

Situation Index, which measures trends in sales, traffic, labor and capital expenditures, and an Expectations Index, which aims to reflect operators' attitudes about future prospects. It is based on survey responses from about 500 restaurant operators.

The February RPI also indicated that restaurant operators increasingly are optimistic about the future. Optimism reached a record high last month, with 72 percent of respondents predicting higher sales in six months, compared with the results from the same period in 2003. In the previ-

ous monthly survey, 68 percent said they expected to see such an improvement.

Meanwhile, only 5 percent of operators expect sales volumes in six months to be lower than they were the year before.

Also at a record high in the February index was the percentage of operators who said they plan to make a capital expenditure in the next six months. According to the survey, 71 percent plan to spend on equipment, expansion or remodeling in the next six months, up from 67 percent who in January said they planned on such expenditures.

Copyright of Nation's Restaurant News is the property of Lebhar - Friedman Inc. and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.