



LABOR AND EMPLOYMENT ISSUES, TRENDS AND DEVELOPMENTS THAT HOSPITALITY EMPLOYERS SHOULD BE AWARE OF

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Presented by

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HR TOPICS

- Wage & Hour Trends & Developments, Including an Update on the New DOL Regulations & What They Mean for Hospitality Employers.
- How Hospitality Employers Can Minimize Their Risk of Employment Claims.
- An Update on Discrimination, Harassment & Retaliation Law & Practical Takeaways for Hospitality Employers

Applicable Wage and Hour Laws

- Federal and State laws governing payment of overtime and hours worked:
 - Fair Labor Standards Act (“FLSA”)
 - Portal-to-Portal Act
 - State law counterparts
- Other state wage and hour laws:
 - Minimum Wage by state (Illinois, New York, etc.) and by municipality (Chicago, New York, Washington, D.C., Seattle, etc.)
- Illinois Wage Payment and Collection Act (“IWPCA”), Illinois Minimum Wage Law (“IMWL”) and Chicago Minimum Wage Ordinance

Minimum Wage

- Federal: \$7.25 per hour
- Illinois: \$8.25 per hour
- Chicago: \$10.50 per hour for non-tipped employees and \$5.95 for tipped employees effective July 1, 2016.
- Additional minimum wage increases will go into effect in Chicago on July 1 in 2017, 2018, 2019 and 2020.

Overtime Basics

- All non-exempt employees must be paid overtime at a rate of one and one-half times their regular rate of pay for all hours worked over 40 in a workweek
- Breakdown:
 - Non-exempt employees
 - Regular Rate of Pay
 - Hours Worked
 - Workweek

Hours Worked

- Generally, “hours worked” includes all time an employee must be on duty, or on the Company’s premises or at any other prescribed place of work, from the beginning of the first principal activity of the work day to the end of the last principal activity of the work day
- Also included in “hours worked” is any additional time that you are allowed to work (i.e., suffered or permitted), even if not approved (i.e., overtime)

Overtime Exemptions

- **“White Collar” Exemptions** – FLSA provides exemptions from overtime pay for employees who are employed in the following capacities:
 - Executive
 - Administrative
 - Learned professional
 - Computer professional
 - Outside Sales
 - Commissioned employees of a retail or service establishment

Tipped Employees

- What is a “tipped employee?”
 - Under Federal and Illinois law, employees can be subjected to the tip credit only if they “customarily and regularly” receive tips.
 - Generally speaking, servers, bussers, and service bartenders are typically employees to whom the tip credit can be applied.
 - Generally speaking, dishwashers, cooks, chefs, and janitors are employees who do not customarily and regularly receive tips.

Tipped Employees (cont.)

- Determining which employees in your operation can be subject to the tip credit is a detailed and fact-specific process.
- If you have questions regarding whether a particular employee can be subjected to the tip credit, it would be prudent to consult with your labor and employment attorney who can assist with the determination.

Tipped Employees (cont.)

- Employers who take a tip credit must provide notice to tipped employees:
 - (1) Before they take any tip credit; and
 - (2) Any time a tipped employee's hourly rate of pay changes.
- Therefore, an Employer is required by law to provide this notice to tipped employees at the inception of employment and when their hourly rate of pay changes.

Tip Pooling

- Tip pooling is lawful under Federal and Illinois law.
- Only employees who customarily and regularly receive tips can participate in the pool.
- Employers may not retain any portion of the employees' tips for any purpose other than distributing the tips into the tip pool.

THE NEW RULES

- In May, the USDOL released a final rule revising the overtime exemption regulations (not the FLSA itself), which is set to take effect **December 1, 2016. However, stay tuned as the U.S. House of Representatives voted on September 28, 2016 in favor of a bill to delay by an additional 6 months the effective date of this USDOL rule (so until June 1, 2017).**
- These changes apply to employees who are currently classified as overtime exempt under the white collar or highly compensated exemptions.

THE NEW RULES (cont.)

- This may include: mid-to-low level managers/supervisors, employees in finance, marketing, or other administrative departments, technical service employees, IT specialists and employees performing work involving computers and/or software.
- In the hospitality industry, many frontline, entry level managers and assistant managers will presumably be affected by the new USDOL rule.

Minimum Weekly Salary Increases

Salary for Executive, Administrative, Professional and Computer Exemptions will increase as follows:

- Effective December 1, 2016, the minimum weekly salary will be **\$913/week** (**\$46,476/year**), which is an increase from the current **\$455/week** (**\$23,660/year**) requirement.
- Being paid on a “salary basis” means an employee regularly receives a guaranteed minimum salary.
- Under the new rules, up to **10%** of the minimum salary can be met by non-discretionary bonuses, incentive pay or commissions, if made at least on a quarterly basis (this is a change from the current regulations).

Highly-Compensated Employees

- The Highly-Compensated salary threshold increases to **\$134,004** (from \$100,000).
- Requires payment on a salary basis of at least **\$913/week**.
- Allows the salary to be met by the following additional payments: non-discretionary bonuses, commissions and end-of-year catch-up payment.
- **Note:** This exemption is not recognized in all states.

Further Increases

- The minimum salary level will automatically increase every **three years**.
- The **White Collar** exemption increases are pegged to the 40th percentile of the lowest-wage region in the BLS data set (historically the South or Midwest).
- For example, on January 1, 2020, the salary level will increase to an estimated **\$984/week** (an annualized level of \$51,168).
- The **Highly Compensated** exemption level will automatically update to maintain the threshold equal to the 90th percentile of annual earnings of full-time salaried works nationally.

RESPONDING TO THE NEW RULES

Preparations & Considerations

- Employers should work with human resources, department heads, etc. to understand the impact of the new rules and to conduct necessary reviews.
- Prepare the FY17 budget for increases and plan for a financial impact with the annual increases.

Options to Consider

- Raise minimum salaries for impacted exempt employees.
- Re-classify affected employees as non-exempt:
 - **Hourly:** Pay a straight hourly rate for hours worked up to 40 and 1.5 times regular rate of pay for hours worked in excess of 40
 - **Salary + Overtime:** Salary for hours worked up to 40; 1.5 times regular rate of pay for hours worked in excess of 40
 - **Fluctuating Workweek:** Agreement with employee to pay salary for all straight-time hours worked (no matter how many hours are actually worked); $\frac{1}{2}$ time of salary divided by hours worked for OT hours OR divided by 40 for OT hours. (State laws may vary)

Options to Consider (cont.)

- Factor that needs to be considered in weighing these options is that most hotel operations operate around the clock so converting assistant managers and frontline supervisors/managers (or other exempt employees) to non-exempt employees could, if not effectively dealt with in an operational way, have a significant impact on labor costs for the hotel.
- Hotels may need to think about reorganizing their staff and/or changing schedules to limit the amount of overtime that employees will work.
- Consolidation of exempt jobs may also be a solution in certain instances.

Trends

Overview

- Unpaid overtime
 - Misclassification of employees as exempt and as independent contractors
 - Missed lunches and meal breaks
 - Employees performing work off-the-clock
- Applying the wrong overtime premium rate
- Arbitrations and Class Action Waivers

Litigation Statistics

- Wage and hour class actions are the most filed employment law claims
- 8,066 in 2014 to 8,954 in 2015 (11% increase)
 - 450% increase since 2000
 - Highest number of these cases are in California, New York, Florida and Texas
- More than 50% of cases settle for under \$2.5 million and have less than \$1,000 class members*
- Average settlement per class member has decreased from \$1,475 in 2011 (peak) to \$253 through Q1 of 2015*

*Source: NERA Economic Consulting, "Trends in Wage Hour Settlements," July 15, 2015.

Why Have FLSA Cases Exploded?

- The new frontier of employment law
- Violations are very common and easy to identify
- More plaintiff's attorneys litigating these cases
- More media attention regarding pay disparities (think "fight for fifteen" and "wage theft")
- Small errors can have huge consequences

Unpaid Overtime: Misclassification

- Misclassification of employees as exempt or independent contractors (non-employees)
- Exemption issues
 - Mostly executive and administrative exemptions
 - Managers in training and assistant managers
- Independent contractors
 - The “gig” economy
 - Uber settlement in CA and MA for \$84 million and another class action filed a month later (in Illinois)
 - Unpaid Interns and the “Black Swan Case”
 - More plaintiff’s attorneys litigating these cases

Unpaid Overtime: Missed or Interrupted Breaks

- In 2015, Walgreen's Co. settled an overtime claim alleging missed meal breaks for \$23 million for 40,000 class members.
- Auto-deduct policies or practices.

Unpaid Overtime: Off-the-Clock

- Quickly becoming the most common allegation in an unpaid overtime claim
- Encompasses many possibilities.
 - pre-shift and post-shift work
 - use of mobile devices
 - telecommuting
 - mandatory training

Calculating the Wrong Overtime Rate

- The overtime premium rate is based on the employee's "regular rate of pay"
- Regular rate of pay includes:
 - base hourly or piece rate or salary
 - commissions and non-discretionary bonuses
 - hour differentials
- Regular rate of pay excludes:
 - discretionary bonuses
 - reimbursements and per diems
 - holiday, sick and vacation pay

Arbitrations and Class Action Waivers

- Increase in the last three years in employers using them to thwart class action claims
- Advantages of Arbitration Agreements
 - Preserve confidentiality
 - Discourage employees and attorneys from filing
 - Gives employers more control
- Disadvantages of Arbitration Agreements
 - Arbitrators may not be as experienced in handling wage and hour cases
 - Very limited appeal right
 - Cost

Arbitrations and Class Action Waivers (cont.)

- Enforceability of class action waivers depends on the federal circuit
 - 7th Circuit – not enforceable
- Be careful what you wish for! An employer could face dozens of arbitration demands (or more)

DISCIPLINE AND EFFECTIVE DOCUMENTATION

Discipline – Best Practices

- Any time discipline occurs, complete the following steps before administering the discipline:
 - Identify the specific policy or rule that was violated.
 - Was the employee aware of the policy or rule?
 - Conduct a thorough investigation, if necessary.
 - Are there prior disciplinary history or performance issues with this employee?
 - Has the Company attempted to counsel the employee?
 - Nature of the violation.
 - Consider how the Company has treated other individuals for similar violations or misconduct.
 - Determine the appropriate level of discipline.

Discipline and Discharge - Disciplinary Meeting

1. Describe the situation and review previous counselings.
2. Ask the employee why he or she thinks the incident occurred.
3. Listen and respond with empathy.
4. Indicate what action you must take and why.
5. Agree on specific action that must be taken going forward and set a check-up date.
6. Indicate your confidence in the employee.
7. Follow-up with the employee.

Discipline and Discharge - Termination Meeting

- Typically speaking, two supervisors or management members should participate in the meeting, if possible.
- Establish the reason for the discharge.
- Give the employee an opportunity to explain his or her conduct.
- Conduct the meeting with respect and dignity.
- Complete any necessary termination paperwork and administrative tasks.

Effective Documentation

- Memorializes the incident or incidents at issue.
- Aids in more effective communication with the employee.
- Provides a greater likelihood of rehabilitating the employee.
- Leads to smoother, more defensible discharges.
- Provides better exhibits for the Company's attorneys and could, depending on the circumstances, mean the difference between winning and losing a lawsuit.

Effective Documentation (cont.)

- Generally: You want to tell a story to the reader of what happened without making assumptions or judgments. Let the reader make the judgment.
- Specifically: Documentation should include the where, when, what, who, how and why of the story. You should only include the facts and objective standards necessary to tell the story.
- Do not include statements that may have a gender, race, religion, age or other protected characteristic connotation.

Effective Documentation (cont.)

What is wrong with these statements?

- The fact that Sue cannot work on Sunday afternoons due to religious commitments causes scheduling difficulties.
- Taco is never on time. [Taco's actual name is Jose, but he calls himself Taco, as do other co-workers. Jose is Hispanic.]
- Mike is really slowing down. Mike simply cannot keep up with the other servers. [Mike is over 40; many of the other servers are under 40.]
- Because of Kelly's responsibility to care for her mother, she has not demonstrated a commitment to the Hotel.

PREVENTING DISCRIMINATION AND HARASSMENT

Sources of Discrimination and Harassment Prohibitions

- **Examples of Federal Employment Laws**
 - Title VII
 - Americans with Disabilities Act
 - Age Discrimination in Employment Act

Sources of Discrimination and Harassment Prohibitions (cont.)

- **Illinois Human Rights Act (IHRA)**
 - Sexual Orientation is a protected characteristic.
 - Means “actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth.” The phrase “gender-related identity” was specifically intended to cover “transgendered” individuals.
- **State common law claims**
 - Battery
 - Assault
 - False Imprisonment

Discrimination Basics

- Unlawful discrimination occurs when an employer makes an employment decision **because of** the employee's protected characteristic. An "employment decision" could be: hiring, firing, promotion, compensation, benefits, etc.
- Protected characteristics include: sex, sexual orientation, race, religion, national origin, citizenship, age, disability, color, ancestry, sexual orientation, marital status, veteran status and others as protected by federal, state or local law.

Harassment Basics

There are two types of unlawful harassment:

- Quid Pro Quo Harassment
 - “This for That”
 - Supervisor and Subordinate
- Hostile Work Environment Harassment
 - This type of harassment can be created by anyone in the work place, a supervisor, a co-worker, a subordinate, a visitor, a client, etc.

Unlawful Hostile Work Environment Harassment

- Unlawful hostile work environment harassment is any severe or pervasive conduct based on a person's gender, race, religion, national origin, disability or any other protected characteristic, that interferes with a person's ability to do their job and is unwelcome and offensive to the reasonable person and to the person against whom the act(s) are committed.

Key Elements of Harassment

1. Based on a protected characteristic;
2. Unwelcome;
3. Offensive to the “victim” and the “reasonable person”; and
4. Is so severe or pervasive as to interfere with the “victim’s” ability to perform his or her job.

1. Based on a Protected Characteristic

- Sex
- Race
- Religion
- National Origin
- Age
- Disability
- Color
- Ancestry
- Sexual Orientation
- Marital Status
- And others

2. Unwelcome

- Only behavior that is unwelcome is unlawful.
- “Unwelcome” and “Voluntary” are not the same.
- CONSENSUAL dating, joking, etc., is “welcome.” However, it is often difficult to determine whether the other person “welcomes” this type of behavior.
- If someone tells you to stop, or indicates either through words or actions that he or she is offended by your behavior, you should assume that it is unwelcome and stop immediately.

3. Offensive

- Victim and Reasonable Person Standards
 - Think: “Perception” not “Intention.”
 - The harasser’s intent is not relevant.
- Guidelines to live by:
 - If you don’t want it seen on the front page of the local paper, don’t do it.
 - If you don’t want your spouse, little sister, mother, little brother, grandfather, etc., to know about it, don’t do or say it.
 - If people are treated with respect, there shouldn’t be any problems.

4. Severe or Pervasive Conduct

Totality of the circumstances:

- The frequency of the conduct;
- Whether the conduct was physical or verbal;
- Whether the conduct was humiliating or embarrassing;
- Whether the conduct unreasonably interfered with work performance;
- What were the complainant's actions and reactions; and
- Whether there is unequal power between the parties.

Sexual Harassment

- Not limited to persons of the opposite sex:
 - Same Sex
 - Both Sexes
 - E.g., male-on-male harassment, both males are heterosexual

Unlawful Versus Inappropriate

- Just because behavior does not reach the level of “unlawful” harassment does not mean that it should be tolerated in the workplace.
- Be aware of the “line” and “danger zones” -- gray areas of conduct that are not unlawful harassment, but come close to and often become unlawful harassment.
- Prudent employers should not tolerate any inappropriate or unprofessional behavior -- even if it does not rise to the level of unlawful harassment.

Social Media

- Beware – the law governing harassment expands beyond the four walls of the Hotel, and outside of work hours.
- E.g., harassment can occur via text messages and communication on Facebook, Instagram, Twitter and other social media sites.

When Is An Employer Liable?

- Under Illinois law, there is strict liability for an employer for harassment by any manager or supervisor. Under Federal law, in the harassment setting, employers can avail themselves of an affirmative defense in certain circumstances.
- An employer is liable for harassment committed by a **co-worker or non-employee** when it knew or should have known about the harassment, and the employer fails to:
 - Promptly investigate the harassment; and
 - Take effective remedial action.

Individual Liability

- Supervisors/Managers may be liable for harassment under Illinois law.
- In some cases, individuals may be liable for common law tort claims, such as assault, battery, and intentional infliction of emotional distress in addition to harassment liability.

What is at stake here?

- Back pay;
- Compensatory and punitive damages;
- Reinstatement or, in the alternative, front pay;
- Plaintiff's attorneys' fees and costs (i.e., the Company may be ordered to pay Plaintiff's attorneys' fees in addition to its own defense fees if the court or jury renders a verdict against the Company).

Common Mistakes by Management in Harassment Cases

- **Not** reporting a complaint of harassment immediately or promptly.
- **Not** reporting a complaint of harassment to a common source.
- Minimizing the severity of the situation when a complaint is received, e.g., “oh come on now, aren’t you being a little too sensitive.”
- Not taking action until or unless a complaint is made, even though managers were aware that the behavior was taking place.

Common Mistakes by Management in Harassment Cases (cont.)

- Failure to conduct a thorough investigation of the complaint.
- Failing to consult with the General Manager, Human Resources or counsel.

THANK YOU!

Do you have questions?