HOSPITALITY LAW

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Helping the Lodging Industry Face Today's Legal Challenges

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Expect increased government enforcement of employment laws

Hospitality industry must adapt to recent employment legislation

By Charles F. Walters and Paul H. Kehoe

After a full year in office, the Obama administration has moved away from the compliance assistance model prominent during the prior administration and has rededicated government agencies to enforcing federal employment laws. This pronounced shift in focus will require increased employer awareness and vigilance in 2010 and beyond.

In 2009, the Equal Employment Opportunity Commission reported a 15 percent increase in discrimination charges filed during FY 2008 — a trend that is expected to accelerate in 2010. This significant increase in discrimination charges may be the consequence of numerous factors, including economic conditions, increased diversity, and the EEOC's focus on systemic litigation, which are expected to continue in 2010.

The government's compliance assistance has also given way to enforcement at the U.S. Department of Labor, which is expected to continue hiring attorneys, increase enforcement of the recently amended Family and Medical Leave Act, and carefully scrutinize employers' use of purported independent contractors. The DOL's Wage and Hour Division will hire 250 new investigators and expects to make "wage theft" (which includes failure to pay minimum wage and required overtime, requiring "off the clock" work, and misclassification of employees as independent contractors) a primary focus. The Office of Federal Contact Compliance Programs will hire 50 new employees to investigate systemic compensation discrimination. And the Occupational Safety and Health Administration has hired additional inspectors with a renewed emphasis on recordkeeping and enforcement.

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Court questions whether sushi chefs are properly tipped employees

Issues of fact preclude dismissal of wage and hour complaint

By Carolyn D. Richmond & Eli Z. Freedberg

In *Ash v. Sambodromo, LLC*, No. 09-20406, (S.D. Fla. 11/17/09), Lorna Ash, a former server and host at a Sushi Samba restaurant in Florida, sued the restaurant for violating the Fair Labor Standards Act. The restaurant moved for summary judgment on five grounds. In ruling against Sushi Samba on all but the retaliation issue, the court once again highlights why tip cases have become such an albatross for restaurant owners: They require a very fact-specific analysis.

Ash alleged that Sushi Samba was obligated to pay her the full minimum wage for the side work that she performed at the beginning and end of each shift. This side work, which Ash said took between 10 and 45 minutes, included putting trays together, moving chairs, cleaning up the bar and stocking utensils. The court disagreed with Ash and held that an employer may pay the tipped minimum wage, rather than regular minimum wage, for time that an employee works in a tip-producing activity, or for work that is incidental to an employee's tip producing activities provided that this work does not exceed 20 percent of the employee's overall duties. However, whether the restaurant could take the tip credit still depended on several other issues.

Ash claimed that Sushi Samba forfeited the right to pay her the tipped minimum wage because it allowed non-customarily tipped employees, namely sushi chefs, to receive tips. The court found that an employer is only entitled to claim the tip credit if it is claimed for qualified tipped employees, the employees are provided with proper notice of Section 203 (m) of the FLSA, and the tips received by the employees are retained by them and other customarily tipped employees by way of a tip-pooling arrangement. In other words, if a nonqualified employee is

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Employers who do not adapt to this new legal environment will face even greater challenges in these already tough economic times.
— Charles Walters and Paul Kehoe, attorneys

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U.S. Immigration and Customs Enforcement announced a substantial increase in inspections, stating in November that Notices of Inspection were issued to 1,000 employers who can expect to have their I-9 Forms audited by ICE.

Finally, while the Obama administration intends to address comprehensive immigration reform in 2010, it has in the interim suspended modifications to the H-2A and H-2B guest worker programs.

Legislative developments

The Lilly Ledbetter Fair Pay Act changed the statute of limitations under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act, by restarting the statute of limitations clock each time an allegedly aggrieved employee receives a paycheck. The breadth of the Fair Pay Act has likely changed the statutes of limitations for any challenged employment decision impacting compensation. As a result, employers should, at a minimum, create appropriate documentation supporting compensation decisions and retain these documents for as long as the employer can be sued by an employee regarding that compensation decision.

The ADA Amendments Act broadly expanded the definition of "disability" to protect employees and applicants with substantially limiting physical or mental impairments. "Substantially limits" now means something less than the "significantly restricts" standard formerly used by courts and the EEOC. The ADAAA also provides that "mitigating measures," such as medication, prosthetics and hearing aids, cannot be taken into consideration in determining whether an individual is disabled, except for ordinary eyeglasses and contact lenses. Although the final ADAAA regulations likely will not be implemented until mid-2010, it is already clear that millions of workers with conditions that formerly did not constitute a disability under the ADA will now be protected under the ADAAA.

As part of the FY 2010 National Defense Authorization Act, FMLA was amended to expand exigency and military caregiver leave. The FMLA now allows for Qualified Exigency Leave for employees who are the parent, child or spouse of active duty service members who are deployed overseas. The Military Caregiver portion of the law was clarified to allow for leave to care for an employee's qualifying family member who is undergoing medical treatment, recuperation or therapy for a serious illness or injury that occurred anytime during the five years preceding the date of treatment.

The Genetic Information Nondiscrimination Act, which took effect Nov. 21, 2009, makes it unlawful for employers or health insurers to discriminate based on a person's genetic information or test results. GINA grants an exemption for voluntary wellness programs, but the EEOC may well define "voluntary" so narrowly as to effectively eliminate the exemption. Although final GINA regulations have not been issued, employers should audit their health data-collection policies to ensure compliance not only with GINA, but also with HIPAA and all applicable state laws regarding treatment of health data.

In all, the employment law regulatory and legislative landscape has already changed dramatically, and it will undoubtedly change even more in 2010 and beyond as Congress, the White House, and recently enlarged and empowered government agencies push for increased employee rights and protections. Employers who do not adapt to this new legal environment will face even greater challenges in these already tough economic times.

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Be proactive about policies

Hospitality employers need to be proactive to protect themselves during this time of change. Charles Walters and Paul Kehoe of Seyfarth Shaw recommend that employers:

- Review I-9 policies and internal records to ensure compliance with federal employment verification laws.
- Audit wage and hour practices and make changes accordingly.
- Ensure you fully understand the Americans with Disabilities Act's interactive reasonable accommodation process, document compliance, and ensure reasonable accommodations are made for individuals who may be deemed disabled under the new statute.
- Modify Family Medical Leave Act policies and forms to reflect changes, and use the new FMLA workplace poster once it is issued.
- Review and revise nondiscrimination policies to include protections for employee genetic information. ■