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Labor & Employment Hospitality

Quarterly Update

Five key labor and employment issues hospitality employers need to be aware of this quarter

In this Issue

1. 2010 Election Creates Waves for Labor and Employment Legislation

In the wake of the historic 2010 elections, the legislative outlook for labor and employment issues will be very different in 2011. Divided control of Congress means that the more controversial elements of the Democratic Party's legislative agenda will have little chance of passing. That is generally good news for hospitality employers. However, the split control of Congress also means that employers are not likely to see the most ambitious elements of their legislative wish list enacted anytime soon. The Republican legislative agenda for 2011 is still being formulated, but it is expected to primarily focus on measures to promote job creation and reduce burdens on employers. Because the Senate will continue to be controlled by Democrats, any legislation will need significant bipartisan support to have a chance of becoming law.

In 2010, there are dozens of labor and employment bills pending in Congress that if enacted would have added costly new mandates for hospitality employers. Fortunately, most of those bills did not come up for a vote in either the House or the Senate. In the traditional labor arena, the Employee Free Choice Act (EFCA) was not voted on in either chamber. In wage and hour law, the Paycheck Fairness Act passed the House in 2009, but failed on a procedural vote in the Senate in November 2010. There were a variety of legislative proposals regarding family and medical leave that did not pass, including providing additional reasons for protected leave, permitting employees to alter their work schedule and various requirements for employers to provide paid time off. Many of these bills will likely be reintroduced in 2011, but the divided control of Congress virtually ensures they will not pass in their current form.

Although the legislative landscape may now look a little safer for employers, the same cannot be said for the regulatory landscape. The elections are likely to have little or no effect on most of the ongoing rulemaking and enforcement efforts of federal agencies. Many of those agencies have been engaged in ambitious regulatory efforts for the past two years. Those efforts are likely to continue unabated and will perhaps even increase. Indeed, the recognition that Congress will not enact the President's labor and employment agenda means there may be an increased expectation that the regulatory agencies implement these policies themselves.

The Republican-controlled House is expected to engage in thorough oversight of the Executive Branch, and while that may result in slowing down some specific agency rulemaking efforts, the agencies can generally be expected to proceed full steam ahead with their agenda. There are a number of rulemaking efforts at various agencies that are already underway (or soon will be) that hospitality employers should keep an eye on. In particular, the Department of Labor (DOL) has announced, but not yet released, draft regulatory proposals relating to Fair Labor Standards Act (FLSA) record-keeping requirements, the Family and Medical Leave Act (FMLA), and a comprehensive overhaul of the H-2B temporary worker program. In addition, the DOL has already taken public comment on a proposal concerning the non-displacement of employees performing work covered by the Service Contract Act and on a narrow proposal to increase wages paid to H-2B workers.

In 2011, a divided Congress means a reduced threat of additional legislative mandates, but hospitality employers should continue to be mindful of ongoing regulatory and enforcement initiatives in Washington.

2. The Inhospitable NLRB: How the Board may Interfere With Your Ability to Control Your Public Image in 2011

The National Labor Relations Board (NLRB) will soon be issuing decisions in cases which will seriously impact all employers. A number of those decisions will affect the hospitality industry in particular because they deal with an employer's ability to foster and control its public image — a matter critical to success in the hospitality business. These decisions will apply to union and non-union employers alike. The underlying issues in some of these cases involve matters at the core of a hospitality employer's ability to manage and maintain its image, such as the employer's right to require particular employee appearance standards, the right to require certain standards regarding employee interaction with customers and the ability of an employer to control access to premises by unions and off-duty employees for organizing and demonstrations.

Because a majority of NLRB Members are former union attorneys (Chairman Wilma Liebman and Members Craig Becker and Mark Pierce), it can be expected that the NLRB will issue decisions intended to give unions greater leverage in organizing and dealing with employers. Obviously, the ability to negatively influence an employer's public image would give unions considerable leverage. The union-friendly majority, however, may be short lived because the terms of both Chairman Liebman and Member Becker expire in 2011. Nevertheless, in the time leading up to the expiration of their terms, we can expect a concerted effort by the majority to issue as many decisions as possible.

With regard to an employer's image being promoted by employee appearance standards, the NLRB has long held that although employees generally have a right to wear union insignias and other apparel to make known their concerns and grievances, there are "special circumstances" which allow an employer to prohibit or limit the wearing of such apparel or insignia by employees. Specifically, in cases involving the hospitality industry, the NLRB has found that a "public image that the employer has established, as part of its business plan, through appearance rules for its employees" to be such a

special circumstance. However, Chairman Liebman has expressed opposition to the special circumstance exception in her dissenting opinion. Undoubtedly, Chairman Liebman and her union-friendly colleagues will attempt to limit, if not eviscerate, the special circumstance exception in upcoming decisions.

More importantly, some of the expected decisions regard the employer's ability to prohibit conduct by employees that could adversely impact an employer's image with its customers. Under current NLRB law, an employer may have rules such as those that prohibit employees from "[b]eing uncooperative with … guests … or otherwise engaging in conduct that does not support the … Hotel's goals and objectives" and which prohibit "[u]nlawful or improper conduct off the hotel's premises or during non-working hours which affects … the hotel's reputation or good will in the community." Chairman Liebman, again in dissenting opinions — but which now would be supported by a majority — has argued that such rules are invalid because they are not sufficiently specific and could be interpreted to impermissibly limit employee rights.

Similarly, the Board has already taken a greater interest in social media policies. The Board recently issued an unfair labor practice complaint alleging that American Medical Response, Inc. (AMR) unlawfully terminated a union-represented employee who posted negative remarks about her supervisor on her personal Facebook page. The Board is putting employers on notice that it will closely examine employer handbooks and particularly their social media policies to determine whether they discourage employees from discussing their work environment with other employees, or from communicating their views on unionization. (Click *here* to read the Management Alert on this issue and its impact on employers).

Perhaps the most important issues pending at the NLRB that would affect public perception of an employer's image, however, are those involving the rights of union organizers and/or off-duty employees to access employer premises for organizing and demonstration purposes. A decision is pending in a case where the NLRB held oral arguments three years ago involving the issue of whether employees of a lessee restaurant can distribute handbills on the property of the lessor hotel. Also, the NLRB has recently announced it is going to revisit the issue of whether an employer can prohibit union access to its property if the employer allows other non-employees and organizations on its premises for non-business related purposes (e.g., Salvation Army).

No one can predict when the NLRB will issue decisions regarding the above issues, but the current union-friendly majority will certainly strive to issue them while it still has the power to do so. In the meantime, union and non-union hospitality employers need to be mindful of the new Board's attitudes as they develop, review, revise and enforce policies designed to foster and control their public image.

Editor's note: Seyfarth's Labor and Employee Relations Practice issues a Weekly Labor Alert containing the latest intelligence from the NLRB. If you are not already receiving these alerts and would like to, please contact *laboralerts@seyfarth.com*.

3. Avoiding the Legal Pitfalls of Social Media in the Workplace

The explosion of social media is undeniable — Facebook, Twitter, LinkedIn and Flickr to name just a few of the most well-known. Facebook alone has over 500 million active users, making 60 million status updates each day, spending an average of 55 minutes per day on the site and creating an average of 70 pieces of content each month. Twitter has over 106 million users and LinkedIn over 74 million users. According to a recent study, 80% of Fortune 500 companies use some form of social media, but only 29% had some form of a written social media policy.

Explosions in the physical world can be productive (e.g., a controlled explosion to help build a tunnel). They can also be extremely destructive (e.g., a gas leak explosion destroying a house). Just as with physical explosions, the explosion of social media can be a benefit for companies, helping them further reach clients and customers, but it can also be fraught with peril. Understanding the risks and putting controls in place is imperative for today's employers.

Potential Employees

Social media can provide a cost-effective means for reaching potential candidates, allowing an employer to fill vacancies faster.

It can also be an enticing means to screen job applicants. According to a Career Builder survey in 2009, 45% of employers use social media sites to screen job applicants. This can be both beneficial and detrimental to the employer. Hiring an employee is an important decision and it is far easier (and less costly) to avoid a bad hire than to get rid of one. Reviewing social media may reveal valuable negative (or positive) information about a candidate that you might not get anywhere else.

However, by using social media to screen an applicant, an employer may also be walking into a minefield. A simple review of an individual's Facebook page may reveal information such as the applicant's age, race, national origin, religion, disabilities, sexual orientation, political affiliation, and smoking/tobacco use — all things that an employer would not ask on an employment application because they cannot be considered under federal law and/or some state laws in making a hiring decision. If such information is gathered and reviewed by the decision-maker, an applicant who was not selected for an interview could try to claim that the decision was based on the protected characteristic revealed in the social media review. Likewise, if a social media review is done inconsistently with applicants, including those who have been interviewed, the inconsistency could also lead to a claim of discriminatory treatment.

To ameliorate these risks, employers should: (1) develop guidelines identifying the type of information to be sought via social media and how it relates to qualifications for the position in question; (2) develop protocols as to when search engines, networking sites or other internet resources will be used and procedures for verifying information obtained; (3) run consistent searches on all candidates for a given position, regardless of protected class status, (4) consider advising the candidate of any adverse results and giving him/her the opportunity to respond to or correct the information; (5) if search results are used to disqualify a candidate, record what results were used and why they were disqualifying; (6) have someone who will not be involved in the decision-making process perform the searches, redact out protected category information and provide the redacted information to the decision-makers; and (7) retain the search results used in the hiring process with other application and/or hiring documentation.

Current Employees

Employee use of social media in the workplace can have many positive effects for an employer. As the old adage goes, a happy employee is a good employee. Employees who engage in social media with each other may build bonds together and create stronger, more satisfying working relationships. Social media also gives the employer another way to communicate with its employees (e.g., newsletter-type communications and employee feedback/criticisms).

Social media can also be abused by employees. A 2010 study suggested that about 24% of employees use social networking while on their company-provided internet. Clearly, lost productivity due to time spent on social media is a challenge for employers. But lost productivity is only the tip of the iceberg. Social media provides employees with another avenue and increased opportunity to engage in harassing or discriminatory behavior. It creates the risk of defamation, be it a supervisor defaming a subordinate or an employee defaming the employer's competitor. The company's confidential, proprietary and/or trade secret information may be intentionally or inadvertently disclosed. An employee seeking to bolster or defend the employer's products or services, even with good intention, may violate the Federal Trade Commission's "endorsement" guidelines. An employee's statements, postings, or videos on a social media site may simply embarrass the employer or otherwise damage its reputation.

Addressing these risks is a matter of establishing a social media policy, training employees and supervisors and enforcing it.

An employer crafting a social media policy may consider addressing the following:

- Acknowledge that the company provides employees internet access, which is a useful business tool, and that employees must use it properly.

- Prohibit use of social media during working time or while using company provided equipment/systems unless directly related to or necessary to perform the job (if a complete ban during working time is not realistic, consider lesser restrictions). [Warning: It is possible that an employee's use of social media, even on company provided equipment, may ultimately be determined by the Obama NLRB to constitute a solicitation that must be permitted on "working time" (e.g., paid breaks and down-time). Employers should consult carefully with counsel as to how best to word such a limitation in light of the uncertainties in this area and the employer's tolerance for risk.]

- Acknowledge that social media may be a personal activity which the company only seeks to regulate it when it impacts the company, co-workers, clients or third parties who deal with the company and that the company expects employees to act professionally and responsibly when engaging in social media.

- Inform employees that they must take care to follow the company's conduct standards and its policies, including, but not limited to its policies against workplace harassment, discrimination and retaliation.

- Inform employees that they should not defame anyone.

- Direct employees that if their blog, message, comment or post relates to the company or their jobs in any way, they should prominently disclose the employment relationship with the company and post a disclaimer stating that they are expressing their personal opinions that have not been reviewed by, are not endorsed by and do not represent the opinion or viewpoints of the company.

- Inform employees that they may not disseminate any confidential or proprietary information about the company, its personnel or its clients/customers.

- Direct employees to respect copyright laws.

- Direct employees to respect financial disclosure/securities laws and agreements with the company.

- Inform employees that they should have no expectation of privacy in social media activities done at work, on work time, or using company equipment or systems.

- Prohibit use of company email addresses for use with social media (unless directly related to and necessary for the job) [Note: This is another policy which could be subject to scrutiny by the Obama NLRB.]

- Inform employees that failure to abide by the social media policy or the company's conduct standards and policies while online may subject them to discipline up to and including termination.

Monitoring social media information on current employees can be an effective means of identifying compliance (or lack thereof) with the company's social media policy, conduct standards and other policies. However, employers must be careful when monitoring compliance with and enforcing its social media policy.

Employers should be consistent in their monitoring and enforcement efforts, lest they run afoul of anti-discrimination and anti-retaliation statutes. Employers should also consider the possibility that the information is incorrect.

Be mindful that monitoring employee social media activities may create claims for invasion of privacy or violation of the Stored Communications Act (which protects intrusion on stored communications such as emails). As a general rule of thumb, where an employee's personal web page/blog/Facebook page is accessible to the general public, there should be no problem with the company reviewing the web posting, but be careful not to overreach. When a web page is password or otherwise protected or not otherwise accessible by the general public, be careful.

Additionally, employers must be mindful that some states (such as California) protect employees from discipline for engaging in off-duty, lawful conduct. Additionally, an employee's social media posting may considered protected activity under a whistleblower statute or under the National Labor Relations Act (NLRA) for which the employee cannot be disciplined lawfully (and even with respect to employees who are not in a union setting). In short, when monitoring and enforcing compliance with the company's social media policy, an employer must be mindful that it does not have carte blanche. Any employer wishing to implement a social media policy should have it reviewed carefully by counsel to insure its compliance with federal and state laws.

Social media can be a valuable tool for enhancing a company's business and creating a positive work environment, but it can also be a source of problems. Having a social media policy, training employees on it, and monitoring and enforcing it can enhance the positives and reduce the risks that accompany employee use of social media.

4. Hospitality Employers, Hold on to Your Seats, for you now Will be Liable if you do not Provide Them to your Employees in Accordance With California Wage Orders

The California Wage Orders not only require the payment of minimum wage and overtime pay, they also regulate a large number of working conditions within the hospitality industry. For example, Wage Order No. 5, applying to the "public housekeeping industry," requires that employers provide "suitable seats" for employees where the work "reasonably permits" the use of seats. When employees are not engaged in the active duties of their employment and the nature of the work

requires standing, an adequate number of suitable seats must be placed in a reasonable proximity to the work area and employees must be permitted to use such seats when it does not interfere with the performance of their duties. The "public housekeeping industry" is defined broadly to include any employer providing meals, housing or maintenance services, including (but not limited to) such businesses as hotels, restaurants, taverns, bars, nightclubs and catering services. A similar seat rule and other working conditions appear in Wage Order No. 10, which covers the amusement and recreation industry (e.g., golf courses, tennis courts, swimming pools, bowling alleys, amusement parks athletic fields, racetracks, etc.).

These Wage Orders generally impose civil penalties for violations, but only to "underpaid" employees. Thus, these Wage Orders do not impose a civil penalty for failing to provide suitable seating. Until recently, no appellate court had held that employees allegedly denied suitable seating could seek a monetary remedy.

On November 12, 2010 in *Bright v. 99¢ Only Stores*, the California Court of Appeal held that employees denied suitable seating in the retail industry under Wage Order No. 7 can seek civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA). In *Bright*, the trial court had dismissed the claim of a retail store cashier seeking civil penalties for being denied seating while she was working. The Court of Appeal reversed and reinstated the claim.

The logic of the court's reasoning was as follows:

1. PAGA permits aggrieved employees to sue for civil penalties (of $100 or $200 per employee per pay period) for virtually any violation of the Labor Code and creates a civil penalty for violations of the Labor Code for which a civil penalty is not already specifically provided.
2. Labor Code Section 1198 makes it unlawful to employ employees under conditions of labor prohibited by a Wage Order.
3. Wage Order No. 7, in its suitable seats provision, has created a condition of labor that the Labor Code has been incorporated through Section 1198.
4. Because the Labor Code essentially requires suitable seats for employees, without specifically providing for a civil penalty, PAGA supplies a civil penalty and empowers aggrieved employees to sue to recover that penalty.

The *Bright* court rejected the employer's two arguments in support of dismissal. First, the employer argued that Section 1198, in addressing employment under "conditions of labor prohibited by the order," does not incorporate the "suitable seats" provision, in which the language is not prohibitory, but rather affirmatively requires suitable seats. The court noted that other language in Section 1198 states that the "standard conditions of labor" appearing in the Wage Orders "will be the standard conditions of labor," and rejected the employer's semantic argument as not in keeping with the remedial purpose of the Labor Code.

Second, the employer argued that the Wage Order's provision of a civil penalty only for pay violations indicated an intent to create no penalty at all for seating violations. In rejecting this argument, the court concluded that the Wage Order's civil penalties for pay violations were "not meant to be the exclusive remedy for every violation" of the Wage Order.

What The Bright Decision Means for Hospitality Employers

Although the *Bright* decision was directly related to the retail industry, its holding is equally applicable to the Wage Orders covering the public housekeeping industry and the amusement and recreation industry. Because many hospitality employers, for valid ergonomic and business reasons, require employees to stand while working, the *Bright* decision has broad ramifications. Depending upon the employer, hotel front desk clerks, concierges, hotel and restaurant cashiers or hosts, kitchen coordinators, prep cooks, golf starters and other employees whose work reasonably permits the use of seats are now entitled to seats under these Wage Orders. Even when portions of the work cannot be done seated, seats must be made available close to their work areas for use when being seated does not interfere with their job. This would also easily include positions such as bellmen, parking valets, coat check personnel, lifeguards, etc. Employers who fail to provide such seating are now at risk of being liable for civil penalties under PAGA.

Furthermore, as the *Bright* court itself observed in a footnote, there are many additional Wage Order provisions similar to the "suitable seats" requirement (addressing such items as recordkeeping, uniforms and tools, meal and rest breaks, suitable changing rooms and resting facilities) that the plaintiffs' bar will contend can also serve as the basis for PAGA claims. Hospitality employers with California operations are advised to consult with labor and employment counsel to insure that they are in full compliance with applicable Wage Orders, as well as in compliance with the other California Labor Codes.

5. Am I Required to Provide Health Insurance to Employees as of 2014? Basic Controlled Group Questions, Answers and Examples for Hospitality Employers

Beginning January 1, 2014, the Patient Protection and Affordable Care Act (PPACA) will require employers with at least 50 full-time equivalent employees to offer health insurance. Many hospitality employers are having difficulty determining whether they fit into this bucket (click *here* for a more extensive description of the PPACA). Employers conceptually understand that a full-time employee under the PPACA works at least 30 hours per week, a part-time employee works less than 30 hours per week and full-time equivalent employees are calculated by aggregating part-time employee hours in a month and dividing by 120. Another important concept is that contract personnel may be counted as employees if they exert too much control over their work. Future regulations specific to PPACA may also clarify these issues.

What many employers are struggling over, however, is the concept of controlled group status — the concept that certain commonly owned or controlled enterprises, regardless of whether they are separately incorporated or not incorporated at all, are counted as one for determining whether an employer meets the fifty full-time equivalent employee threshold. Many employers, especially hotel and restaurant franchisees, operate several small hotels or restaurants under separately incorporated companies, which may or may not be owned by the same individuals. While controlled group concepts have long applied to certain pension plan issues, the idea that separate businesses can be treated as one is foreign to many.

The following are commonly asked questions regarding controlled group status that should help you begin to understand if controlled group status impacts you.

Q1. What is a controlled group?

A. A controlled group is a group of commonly owned and controlled (either incorporated or not) trades or businesses, that under Treasury regulations are treated as one entity for certain purposes, namely relating to pensions and other employee benefits (e.g., withdrawal liability, non-discrimination testing limits on retirement benefits, etc.). A controlled group will begin to include trades or businesses with at least fifty full-time equivalent employees and will be required to offer health insurance or else face penalties effective January 1, 2014.

Q2. When are trades or businesses sufficiently commonly controlled and owned to constitute a controlled group?

A. There are three basic types of controlled groups: (1) parent-subsidiary groups; (2) brother-sister groups; and (3) combined groups. An organization may be a member of more than one controlled group and/or type of controlled group.

[Note: Affiliated service group rules provide another alternative for the aggregation of organizations for purposes of finding all employees as employed by a single employer for benefit purposes. Under the current affiliated service group rules, however, it is difficult for us to see how hospitality-related enterprises owned by the same individuals might end up subject to these rules, but every combination of businesses is different and an employer wishing to determine controlled group status should have counsel confirm that this alternative is indeed inapplicable to its situation.]

Q3. When is a parent and its subsidiary companies considered to be a controlled group?

A. A parent-subsidiary controlled group exists if one organization (a holding company, for example) owns a controlling interest in another organization which is at least 80% of the total combined voting power of all classes of stock entitled to vote, or at least 80% of the total value of shares of all classes of stock of the corporation or of the profits or capital interest or actuarial interest as applicable to the organization(s). The determination of "controlling interest" is subject to constructive ownership rules and exclusions.

Example (assumes one class of stock): On January 1, 2014, ABC Hospitality Inc. employs ten full-time equivalent employees in Illinois. It has an 80% ownership interest in the Bates Motel, Inc., which employs 30 full-time equivalent employees in Delaware. ABC Hospitality also owns 95% of the Empire Hotel, which employs 10 full-time employee equivalents in New York. ABC Hospitality, the Bates Motel and the Empire Hotel will be considered to be a controlled group and, as they jointly employ 50 or more full-time equivalent employees, will be required to offer their full-time employees health insurance.

Q4. When is a brother-sister group considered to be a controlled group?

A. A brother-sister controlled group exists with two or more organizations conducting trades or business if (1) the same five or fewer persons who are individuals, estates or trusts directly or indirectly own a controlling interest in each organization; and (2) taking into account the ownership of each such person (but only to the extent such ownership is identical with respect to each organization), such persons are in "effective control" of each organization. The test for determining "controlling interest" is the

same 80% test for determining whether a parent-subsidiary controlled group exists (see Q3 above). The "effective control" requirement is met if the individuals:

(1) In the case of a corporation: own stock possessing more than 50% of the total combined voting power of all classes of stock entitled to vote, or more than 50% of the total value of shares of all classes of stock of the corporation;

(2) In the case of a trust or estate: individuals own an aggregate actuarial interest of more than 50% of the trust or estate;

(3) In the case of a partnership: individuals own an aggregate of more than 50% of the profits or capital interest of the partnership; or

(4) In the case of a sole proprietorship: one of the individuals owns the sole proprietorship.

The ownership determination is subject to constructive ownership rules and exclusions.

Example (assumes one class of stock): On January 1, 2014, ABC Hospitality Inc. employs 10 full-time equivalent employees in Illinois. John and Mary each own 50% of the stock. John and Mary each own 40% of the shares of the Bates Motel, Inc., which employs 30 full-time equivalent employees in Delaware. John owns a 50% interest and Mary owns a 45% interest in the Empire Hotel partnership that owns the Empire Hotel, which employs 10 full-time equivalent employees in New York. ABC Hospitality, the Bates Motel, and the Empire Hotel will be considered to be a controlled group based on brother-sister rules because John and Mary together own at least 80% of each of the companies and, taking into account each concurrent ownership in that entity, together they are in "effective control" of the entities. Since the group jointly employs fifty or more full-time equivalent employees, it will be required to offer their full-time employees health insurance.

Q5. When is a combined group considered to be a controlled group?

A. A "combined group" controlled group connotes any group of three or more organizations if:

(1) Each organization is a member of a parent-subsidiary or brother-sister controlled group; and

(2) At least one such organization is the common parent organization of a parent-subsidiary group and is also a member of a brother-sister group.

Example (assumes one class of stock): On January 1, 2014, ABC Restaurants, Inc. employs 10 full-time equivalent employees in Illinois. John and Mary each own 50% of the stock. John and Mark each own 40% of the shares of Mr. Cluckers, Inc., which employs 30 full-time equivalent employees in Delaware. ABC Hospitality also owns 95% of the Empire Eats, which employs 10 full-time equivalent employees in New York. ABC Restaurants, Mr. Cluckers and Empire Eats will be considered to be a controlled group (based on a combination of parent-subsidiary and brother-sister rules) and, as they jointly employ fifty or more full-time equivalent employees, will be required to offer their full-time employees health insurance.

Q6. Are there special rules when families or trusts are involved in the ownership structure?

A. Yes. There are special attribution rules applicable when certain related parties are involved. Such rules apply with parents and children, spouses, trust holdings, and, in certain cases, when interests are owned by corporations or partnerships in which an individual has an interest.

Q7. What is the basic rule regarding husbands and wives?

A. An individual is treated as owning the interests owned by his/her spouse (directly or indirectly unless the spouses are legally separated under a decree of divorce or separate maintenance).

Exception: A spouse's interest is not attributed if **all** of the following four circumstances are met, that is, in the conjunctive:

(1) The attributee spouse does not, during the taxable year, own any direct interest in the attributor spouse's business; *and*

(2) The attributee spouse is not a member of the Board of Directors, a fiduciary, an employee of the attributor spouse's business and does not participate in the management of the business during the taxable year; *and*

(3) Not more than 50% of the attributor spouse's business was derived from royalties, rents, dividends, interest and annuities during the year; *and* finally

(4) During the taxable year, the spouse's interest is not subject to conditions which substantially limit or restrict the spouse's right to dispose of his/her interest and which run in favor of the individual or the individual's children who have not attained the age of 21 years.

Example 1: Fred owns 100% of a sole proprietorship, the Apple Restaurant (30 full-time equivalent employees), and his wife Wilma owns 100% of a sole proprietorship, the Bedrock Restaurant (30 full-time equivalent employees). Fred and Wilma each own 50% of a third corporation, the Cherry Valley Restaurant (30 full-time equivalent employees). Under the attribution rules, Fred's interest in the Cherry Valley Restaurant is attributed to Wilma and vice versa. Thus, there are two controlled groups: (1) Fred's Apple Restaurant and the jointly owned Cherry Valley Restaurant, which in total employ 50 full-time equivalent employees or more and thus must offer insurance; and (2) Wilma's Bedrock Restaurant and the jointly owned Cherry Valley Restaurant, which in total employ 50 full-time equivalent employees or more and thus must offer insurance.

Example 2: Hank owns 100% of the Always Open Hotel and his wife Winona owns 100% of the Bread and Breakfast Hotel. Hank has no ownership in Winona's hotel, is not a member of the Board, is not a fiduciary or employee and does not participate in management. Winona's business is an operating company and not a passive investment company. Finally, Winona is not subject to conditions which limit her right to dispose of her interest in her hotel in a manner which runs in favor of Hank or Hank's children under the age of 21. There is no attribution of ownership from Winona to Hank and therefore no controlled group.

Q8. What are the basic rules regarding parents and children?

A. An individual is treated as owning the interests owned by his/her children who have not attained the age of 21, and the child under 21 is treated as owning the interest owned directly or indirectly by or for his/her parents.

If the child is 21 or older, however, an individual is only treated as owning the interests owned by his/her children if the individual is in effective control of the entity (i.e., owns more than 50% of the total combined voting power or value of the interests in the entity, directly and through attribution, as explained above). In this case, the individual is also treated as owning the interests owned by his/her parents, grandparents, and grandchildren — provided that the individual is in effective control of the entity. In other words, the attribution rules for parents and children (and grandparents and grandchildren) can run both ways when the persons are 21 and older.

Example 1: Ron owns 40% of Hotel California and 80% of the No-Tell Motel. Ron's minor daughter owns 50% of Hotel California. Ron is treated as owning his daughter's interest and is therefore treated as owning 90% of Hotel California. Under

the brother-sister controlled group rules, Hotel California and the No-Tell Motel are part of a controlled group.

Example 2: Hannah owns 40% of the Ambassador Hotel and 80% of the Motor Inn. Hannah's adult daughter owns 51% of the Ambassador Hotel, and 81% of the Empire Hotel. Hannah is not treated as owning her daughter's interest in the Ambassador Hotel. However, Hannah's adult daughter is in effective control of the Ambassador Hotel and, therefore is treated as owning 91% of the Ambassador Hotel. Given that the daughter Hannah also owns 81% of the Empire Hotel, under brother-sister controlled group rules, the Ambassador Hotel and the Empire Hotel are part of a controlled group.

Q9. What are the basic rules regarding trusts?

A. An interest in an estate or trust is only treated as owned by a beneficiary if the beneficiary has an actuarial interest of 5% or more of such entity and the interest owned by the entity. The individual's interest is proportionate to his/her actuarial interest.

Exceptions: Attribution from an estate or trust is more complicated than attribution between spouses or parents and children. However, there are three main exceptions:

(1) A beneficiary with less than a 5% actuarial interest is not treated as owning anything owned by the estate or trust;

(2) If the trust is a grantor trust, such as are certain trusts used for estate planning purposes, then the grantor is treated as owning the interests owned by the trust, not the beneficiaries; and

(3) If under an estate or trust, an interest in a business is specifically for the benefit of certain beneficiaries, the other beneficiaries, regardless of whether they own an actuarial interest of 5% or more of the estate or trust, are not treated as owning an interest in that business.

Example: John and Mary are equal beneficiaries of Trust Costello (which is not a grantor trust). Trust Costello owns a 30% interest in Hotel Abbott. John owns the remaining 70% of Hotel Abbott and also owns 81% of the Jester Hotel. John and Mary are each treated as owning a 15% interest in Hotel Abbott as a result of Trust Costello. Since John is treated as owning a total of 85% of Hotel Abbott when his trust interest is combined with his direct ownership interest, Hotel Abbott and Jester Hotel are part of a bother-sister controlled group.

Q10. Are there rules which would cause attribution to me of interests owned by a corporation or partnership in which I have an interest?

A. Yes. The general rule is that an interest owned directly or indirectly by a corporation is treated as being owned by any shareholder who owns (directly and in some circumstances by attribution) 5% or more in value of the stock of the corporation. The shareholder would be treated as owning a proportionate share of the interest owned by the corporation.

Example: Adam owns an 81% interest in Royal Hotel, Inc. and a 50% interest in Mom's Fine Cooking, Inc. Royal Hotel, Inc. owns the other 50% interest in Mom's Fine Cooking, Inc. Since Adam owns more than a 5% interest in Royal Hotel, Inc., Royal Hotel's interest in Mom's Fine Cooking is attributed to Adam in the same proportion as his ownership interest in the Royal Hotel (81% x 50% = 40.5%). After attribution, Adam owns an 81% interest in Royal Hotel, Inc. and a 90.5% interest (50% directly and 40.5% by attribution) of Mom's Fine Cooking, Inc. Therefore, Royal Hotel, Inc. and Mom's Fine Cooking, Inc. form a brother-sister controlled group.

Similar attribution rules apply to interests owned by partnerships.

Q11. Is this all I need to know about controlled group status to figure out if my companies are subject to this?

A. Unfortunately, no. While this is a good start to obtaining a basic understanding, these Q&A's are simplified answers that

assume various exceptions do not apply. Moreover, in many circumstances ownership interests are far more complicated and involve mixes of family and non-family, trusts, parent-subsidiary corporations and brother-sister enterprises.

Q12. How then do I find out if, because of controlled group rules, my hotel or restaurant will be required to provide health insurance?

A. The easiest way is to get a legal opinion from one of our Seyfarth benefits or tax attorneys who are familiar with these rules. It may be that with some advance planning and taking into account business successorship plans and estate tax issues, changes can be made to avoid controlled group issues, or at least limit their impact. The time to do this is now, **before** January, 2014 rolls around.

Recent Hospitality Publications and Speeches by Seyfarth Lawyers

Minh Vu of our Washington D.C. office wrote an article for the December 1, 2010 issued *Casino Journal* entitled "Americans with Disabilities Act." The piece focused on the new ADA regulations published this year by the Department of Justice. Click *here* to read the article.

Chuck Walters of our Washington D.C. office was interviewed for the November 2010 issue of *Hospitality Law* on employer obligations to pay employees for preliminary and postliminary work under the FLSA. The interview centered on the *Daprizio v. Harrah's Las Vegas, Inc.* (D. Nev. 2010) class action case which found that Harrah's violated the FLSA by not paying employees for their 10-15 minute meeting at the start of every shift.

Minh Vu briefed the general counsels of the country's top hotel chains on the revised Title III regulations of the Americans with Disabilities Act (ADA) at the American Hotel & Lodging Association (AHLA) General Counsel's Meeting on November 19, 2010.

Alex Passantino and *Leon Sequeira* of our Washington D.C. office spoke to a joint meeting of the American Hotel & Lodging Association's (AHLA) Labor Relations Council and Human Resources Committee in mid-November 2010 regarding Department of Labor audits.

On November 18, 2010 *Peter Chatilovicz*, *Mike Viccora*, *Alex Passantino* and *Jack Toner* of our Washington D.C. office presented a breakfast briefing entitled, "What Hotels Need to know About the Obama Labor Agenda."

On November 10-11, 2010 *Ron Kramer* of our Chicago Labor and Employment Department and *David Weiner* of our Chicago Employee Benefits Department spoke at a national hotel chain's annual conference on the impact of health care reform on the hospitality industry.

On October 26-27, 2010 *Minh Vu* of our Washington D.C. office and *Kristina Launey* of our Sacramento office spoke at a national hotel chain's Owner's Conference on Title III of the Americans with Disabilities Act (ADA). Minh and Kristina presented six workshops to nearly 900 attendees.

Alex Passantino spoke in late October 2010 at a national hotel chain's Investors Conference in Las Vegas on wage and hour issues in the hotel industry. Alex spoke in five sessions, each with over 150 attendees.

Editor's note: If you are interested in requesting materials on these topics, email your Seyfarth attorney or *events@seyfarth.com.*

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