SEYFARTH SHAW LLP
ATTORNEYS

Labor & Employment Hospitality Quarterly Update

Five Key Labor And Employment Issues Hospitality Employers Need To Be Aware Of

In this Issue

First Circuit Upholds Massachusetts Mandatory Treble Damages Law, Affirms Class Certification, and Interprets Tip Pooling Law

By: *Ariel D. Cudkowicz* and *Jessica M. Schauer*

On Friday November 9, 2012, the First Circuit Court of Appeals issued a decision interpreting two key Massachusetts wage and hour statutes, Mass. Gen. Laws ch. 149 § 152A (the "Tip Statute"), which regulates gratuities, service charges, and tip pools, and Mass. Gen. Laws ch. 149 § 150, which provides for mandatory treble damages for wage violations.

The plaintiffs in *Matamoros v. Starbucks Corporation* are baristas who claim that Starbucks violated the Massachusetts Tip Statute by allowing shift supervisors to receive a share of tips deposited by customers in tip jars located at the store's cash registers. Under the Tip Statute, only wait staff and other service employees who have "no managerial responsibility" are permitted to share in tip pools.

The district court held that although shift supervisors spend the majority of their time serving customers, they possess managerial responsibility for purposes of the statute because they also perform duties such as directing employees to workstations, opening and closing the store, opening the store's safe, and handling

and accounting for cash. The First Circuit affirmed, rejecting Starbucks' attempt to distinguish the shift supervisors' relatively minor supervisory duties from "management" and holding that even extraordinarily limited managerial responsibility prevents an employee from participating in a tip pool. The Court based its decision on the language of the statute, stating that "'[n]o' means 'no,' and we interpret that easily understood word in its ordinary sense: "not any."

The First Circuit also affirmed the district court's grant of class certification, refusing to accept the defendant's argument that a fundamental conflict existed within the class. Starbucks asserted that 450 of the approximately 11,000 baristas included in the class had been promoted to the shift supervisor position and would be financially disadvantaged by a decision striking down the company's current tip-sharing policy. The Court held, however, that this conflict was not "so substantial as to overbalance the common interests of the class members as a whole" and was cured by the fact that "barista[s]-turned-shift supervisor" retained the right to opt out of the class.

Finally – and most importantly for Massachusetts employers in general – the Court upheld the Commonwealth's mandatory treble damages provision. Prior to 2008, the Massachusetts Supreme Judicial Court ("SJC") held that because treble damages are punitive in nature, they could only be assessed for wage violations if the employer's actions were "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." The legislature subsequently amended the statute, making the treble damages mandatory and labeling them "liquidated damages." Starbucks argued that the mandatory nature of the multiple damages violated due process. The First Circuit held that treble damages do not create the kind of due process concerns that are implicated by jury-awarded punitive damages. The Court then went on to state that the legislature had characterized the damages as liquidated damages, which are not punitive in nature. Courts in other contexts (such as the Fair Labor Standards Act) have held that liquidated damages act as a stand-in for interest and other incidental damages.

The First Circuit's decision, particularly as it concerns the treble damages law, strikes a blow to Massachusetts employers. There are no exceptions to the Massachusetts treble damages provision – it applies to virtually all wage violations, regardless of the employer's good faith, and thus creates the potential for massive liability for even minor wage payment errors. The *Matamoros* decision closes off one avenue by which employers might have attempted to escape the effect of this draconian provision. However, the First Circuit's decision may not be the end of the story. First, Starbucks may seek rehearing or Supreme Court review. Second, since the First Circuit based its decision solely on federal constitutional law, employers may still be able to attempt to invalidate the provision based on state due process principles. The SJC's decision in *Goodrow v. Lane Bryant*, which held the pre-2008 treble damages provision to be punitive in nature, provides some language that may support a challenge to the current version of the law, but it remains to be seen whether state courts will in fact take a different view from the First Circuit.

Battle "Grande" Brewing: Second Circuit Certifies Questions over Tip Pooling Statute to the New York Court of Appeals

By: *John W. Egan* and *Robert Whitman*

Tip pools and tip sharing are hot topics in New York for hospitality industry employers. The Second Circuit recently certified questions to the New York Court of Appeals seeking to clarify the New York Labor Law's prohibition against participation by an employer's "agents" in tip pools and sharing arrangements. The court's certification order came in two consolidated class actions involving Starbucks' "baristas." These cases address whether Starbucks employees with certain supervisory responsibilities may participate in Starbucks' tip pools.

Barenboim v. Starbucks Corp.: Baristas Seeking to Exclude Shift Supervisors from Tip Pools

In *Barenboim v. Starbucks Corp.*, the issue before the district court was whether shift supervisors are entitled to share in the gratuities deposited in tip jars with baristas. The plaintiffs argued that the shift supervisors, by assigning them to positions during their shifts, administering break periods, directing the flow of customers, and providing feedback on their performance, are supervisory agents of the employer and thus ineligible to participate in tip pooling under Section 196-d of the Labor Law.

The district court rejected this argument and granted summary judgment in favor of Starbucks. It concluded that shift supervisors, although exercising *limited* supervisory functions, did not have the broad managerial authority or power to control employees that would be required to render them "agents" of the employer under Section 196-d. Thus, the district court affirmed Starbucks' policy of distributing tip jar proceeds to shift supervisors as well as baristas.

Winans v. Starbucks Corp.: Assistant Store Managers Seeking to Participate in Tip Pools

The second case, *Winans v. Starbucks Corp.*, presented a similar issue in inverse form: a putative class of assistant store managers ("ASMs") claimed that they are *not* agents of the employer and thus *are* entitled to participate in the stores' tip pools. Further, they argued that Starbucks was mandated by the Labor Law to include them in these pools.

ASMs work with the store managers to make hiring and termination decisions, assign shifts to baristas and shift supervisors, evaluate employee performance, recommend corrective action, and process payroll. Despite these managerial responsibilities, the plaintiff in *Winans* argued that ultimate managerial control is held by the store managers alone. The ASMs spend a majority of their shift, the plaintiffs argued, serving and assisting customers rather than supervising employees and performing managerial tasks.

As with *Barenboim*, the district court in *Winans* granted summary judgment for Starbucks. The court held that although there was a genuine issue of material fact as to whether ASMs are eligible for tip pooling under Section 196-d, they are not necessarily entitled to these gratuities. In other words, even if, despite their managerial responsibilities, ASMs are not "agents" of the employer, Section 196-d does not compel Starbucks to include these employees in its tip pools. Thus, the district court upheld Starbucks' policy of not including ASMs in tip pools without deciding whether they are eligible under Section 196-d.

Is the New York State Hospitality Wage Order a Reasonable Interpretation of Section 196-d?

In the consolidated appeal, the Second Circuit also considered the parties' arguments with respect to the recently revised Hospitality Wage Order issued by the New York State Department of Labor. The Wage Order specifically provides that an employer may require that food service workers participate in a tip pool, and may set the percentage to be distributed to each occupation from the pool. *See* N.Y. Comp. Codes R. & Regs. Tit. 12, § 146-2.16(b) (2011). The Wage Order states that only food service workers who are *primarily* engaged in serving food or beverages to customers may participate in these pools. *Id.* § 146-3.4(a).

Starbucks argued to the Second Circuit that, under the Wage Order, shift supervisors are not precluded from participating in tip pools by their supervisory functions, since they are *primarily* engaged in customer service. The plaintiff in *Barenboim* responded by arguing that the Wage Order is an unreasonable interpretation of Section 196-d and is *ultra vires*.

Questions Certified to the New York Court of Appeals

The Second Circuit deferred decision on these issues, and certified the following questions to the New York Court of Appeals (the State's highest court):

1. "What factors determine whether an employee is an 'agent' of his employer for purposes of N.Y. Lab. Law § 196-d and, thus, ineligible to receive distributions from an employer-mandated tip pool?"

2. "To the extent that the meaning of 'employer or his agent' in § 196-d is ambiguous, does the Department of Labor's New York State Hospitality Wage Order constitute a reasonable interpretation of the statute that should govern disposition of these cases?"

3. "Does [the Labor Law] permit an employer to exclude an otherwise eligible tip-earning employee under § 196-d from receiving distributions from an employer-mandated tip pool?"

Although the Court of Appeals has discretion whether to accept certified cases from the Second Circuit, it will almost certainly do so and decide the presented questions. Hospitality employers in New York should be on the lookout for the court's decision, which is likely to have a significant impact on their tip-pooling and tip-sharing policies and practices.

Not So Fast Food: Labor's Latest Recipe for Organizing

By: *Bradford L. Livingston*

In November, a community organizing group called New York Communities for Change, with significant assistance from other community organizations and organized labor, announced a multi-million dollar campaign to organize employees in New York City fast food restaurants. With sponsorship from the Service Employees International Union (SEIU), the campaign is expected to expand over time to other cities and ultimately across the country. In addition to publicizing its new campaign, the organizers led work stoppages, consumer hand-billing, and patrolling outside of different fast food outlets in the New York City area.

The fast food industry is a difficult target for organized labor. First, many individual locations are actually owned and operated by franchisees who set their own terms and conditions of employment. Indeed, most franchisors have taken great pains to ensure that they are not the employers of their franchisees' employees, and thus may have little control over their franchisees' labor and employment decisions. Second, many fast food restaurants experience relatively high turnover among the part-time employees who typically work there. With fluctuating work schedules among a changing workforce, unions usually struggle to obtain enough authorization cards to guarantee a reasonable opportunity to win an NLRB election. And the relatively small number of employees that are employed at a typical fast food restaurant has led to a risk-reward analysis for unions: they must expend significant effort to obtain dues from a small number of individuals. Labor has now decided that the effort is worth it.

The organizing efforts in the fast food industry will likely be similar to approaches taken by organized labor in other low wage industries such as janitors and hotel housekeepers – where in addition to strikes, leafleting, other local job actions, and unfair labor practice charges – unions use corporate campaign tactics to attack a well-known corporate parent whose logo adorns the various fast food outlets. So whether these attacks focus on economics (corporate profits versus low employee wages), the safety and health of workers (dangerous working conditions), or product safety (food quality, food safety, or nutritional value), the object will be to force the franchisors (and ultimately their franchisees) to accede to labor's demands.

In a corporate campaign, unions often push for employer "neutrality," where the employer agrees to be silent and not exercise its right guaranteed by Section 8(c) of the National Labor Relations Act to express its opinion about whether employees should organize. Similarly, corporate campaigns often seek agreement on a card-check process, where the mere signing of union authorization cards is used to establish majority support for a union. Because employees often sign

authorization cards simply to get an organizer or co-worker off their backs (and not because they really want a union), unions can more easily obtain a majority and represent the workforce while avoiding a secret ballot NLRB election that might express the employees' genuine desires.

As the new organizing campaign progresses, key issues will include: what is an appropriate bargaining unit (whether at a single restaurant or at multiple outlets in the same geographic area, whether by a single franchisor or possibly by multiple franchisees, and whether at a single or across different brands that the same franchisor operates); who is a supervisor and who is an employee eligible to organize under Section 2(3) of the NLRA (shift managers, team leaders, etc.); and what employees share a "community of interests" in a single bargaining unit at any restaurant (recent NLRB decisions have sparked an outcry over the proliferation of small bargaining units within a workforce, so we may expect issues concerning wait-staff, counter help, cooks, bus help and any other discrete functions).

Consumers have countless options when it comes to fast food dining, and competition among the restaurant brands has promoted special offers, "dollar menus," and other efforts to keep prices down in an effort to increase traffic and sales. To the extent that unions are successful in organizing employees and obtaining more wages and benefits for employees, the cost will likely either be absorbed by consumers or in a smaller number of employees working harder.

Because this campaign has just begun, we have yet to see what recipes organized labor has cooked up to achieve its goals, but with strikes, hand-billing and other disruptions outside these restaurants, we may soon be calling this not so fast food.

What Happens in California . . . Long Beach Voters Approve Minimum Wage and Benefit Resolution Specific to Hotel Workers

By: *Ronald Kramer*

While most of us were watching the presidential election results closely last month for what hospitality employers can expect to see from a labor perspective in the next four years, perhaps a referendum in Long Beach, California, may better predict what might lie ahead. On November 6th more than 60% of the city's voters voted for Measure N, a special living wage ordinance applicable *only* to large hotels.

The referendum was sponsored by the Long Beach Coalition for Good Jobs and a Healthy Community, an organization allegedly consisting of community, labor, religious and student leaders and groups. UNITE HERE Local 11, a key player in the Coalition, heavily backed the ordinance as well. Local 11 had been attempting to organize hotels in Long Beach for years, with little success. Long Beach reportedly has 16 or 17 hotels with more than 100 rooms, only two of which are unionized. But there is more than one way to skin a cat.

The new ordinance places three requirements on hotels with more than 100 rooms. First, hotels must pay employees at least $13 an hour. Tips, gratuities, commissions and service charges are not counted as part of the minimum wage. The minimum wage is to increase annually by the greater of two percent or the cost of living.

Second, all service charges must now be paid in their entirety to the hotel workers performing the services for whom the service charges were collected. Third, hotel workers are to receive at least five compensated sick days off per calendar year, without being obligated to provide any certification of illness. Employees earn sick leave on a monthly basis, and any sick leave accrued but not used at the end of the year is to be paid out to the employees.

The only exception to these requirements is for unionized hotels. Any provision of the new ordinance may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in the agreement in clear and unambiguous terms. Unilateral implementation of contract terms shall not constitute a waiver of the provision of the ordinance. Employees are entitled to bring suit to enforce the ordinance, and are entitled to attorneys' fees if successful. Employers are prohibited from discriminating against employees for exercising their rights under the ordinance.

This is the third California municipality to adopt a minimum wage law specifically for hotel workers. Emeryville adopted an ordinance via referendum back in 2005 requiring hotels with more than 50 rooms to: (i) pay a minimum wage of $9 per hour and a minimum average compensation for all employees of $11 per hour, to be adjusted annually for inflation; (ii) provide for paid jury duty; (iii) pay overtime for housekeepers if they clean over a certain amount of square footage of floor space; and (iv) in the event of a sale, retain the predecessor employees for at least ninety days. In 2007, Los Angeles also adopted an ordinance requiring hotels with fifty or more rooms within the Airport Hospitality Enhancement Zone (Century Boulevard) near LAX to provide, unless waived by a union contract: (i) a minimum wage effective July 1, 2007, of $10.64 per hour without health insurance, or $9.39 with health benefits, adjusted annually in January for inflation; (ii) twelve compensated days off per year for sick, vacation or personal leave, plus ten uncompensated days off for sick or family illness leave.

Is this a trend or a fluke? Is it legal, given it appears to favor unionized employers at the expense of non-unionized employers and it specifically targets one industry, or is it simply a governmental entity lawfully setting minimum employment standards? Is this really good long-term for employees and the communities at issue, given competing hotels just outside of these jurisdictions are now at a distinct competitive advantage?

These are all valid questions, for which there should be a healthy debate. But there is one more question that needs to be asked: How long will it be before other communities outside of California are pressured to adopt similar hospitality-specific minimum wage legislation? Many communities have adopted general minimum wage ordinances, with Albuquerque, N.M., approving one just last month. As reported earlier, *click here*, Providence, Rhode Island adopted and successfully defended a hotel-specific successorship ordinance. As reported elsewhere in this newsletter, fast food workers in New York City, supported by the SEIU and community organizers, walked out in support of $15 minimum wages. Similarly, last month Chicago food and retail workers launched the Chicago Food and Retail Union and held a rally on Chicago's Michigan Avenue to kick off a union organizing campaign -- Fight for $15 -- to demand that local employers boost their wages to a minimum of $15 an hour.

Long Beach will not be the last community to adopt a hospitality-specific wage ordinance. Hospitality employers should expect to see more activity by unions and community organizers to, through a variety of activities, pressure local communities to adopt minimum wage ordinances, including those specific to industries such as hospitality.

Navigating Electronic I-9s

By: *Jason E. Burritt*

When hiring a new employee, an employer must coordinate a myriad of onboarding tasks, such as payroll, benefits, and ID card. The process seems to involve an endless sea of paperwork. Often lost in the shuffle, the Form I-9 process may represent the most critical -- and potentially damaging -- of these onboarding tasks.

Completing Form I-9 seems like a matter of simple data entry: name, address, date of birth, document number, document expiration, sign and date. However, the I-9 presents numerous pitfalls for employers and, in light of recent enforcement activity, the proper completion of the form is critical to risk management efforts. In addition, with a new I-9 form likely to be released early in 2013, now is the time to analyze and improve I-9 processes.

Because of the high risk of fines for even seemingly minor I-9 errors, many employers turn to electronic I-9 software programs to minimize the risk of errors and to maximize compliance with I-9 -- and E-Verify -- laws, rules, and regulations. A proper software system combined with a comprehensive compliance program greatly reduces the risk of I-9 related sanctions.

A. "Idiot Proof"

The best electronic I-9 software programs contain quality control mechanisms making it difficult for an employee to improperly complete Section 1 of the form. For example, some programs prevent the employee from signing the form if data is missing or does not conform to built-in data checks, which require, for instance, that a social security number contain 9 digits and that an address be a physical address rather than a P.O. Box. The same is true in Section 2: the best electronic programs prevent overdocumentation, require the employer to complete all relevant fields, require

document numbers to conform to a defined format, and integrate with onboarding and other HR systems to ensure completion -- and reverification -- of forms on time. All of these quality control mechanisms can help employers avoid fines in the event of an ICE inspection.

B. Easier to Locate I-9s

Employers who have undergone an ICE inspection know that it is difficult to gather the required documents within the provided timeframe. An electronic program allows employers to avoid digging through cardboard boxes in the office basement, trying to locate I-9s from another location, or sorting through employee files in an attempt to gather all of the required I-9s.

In some electronic I-9 systems, employers may access the I-9s from anywhere in the world, sorted by location, and even batch printed for presentation to ICE. Most electronic systems also allow for the storage of related identification and employment authorization documents, attestation documents for states such as Colorado, and E-Verify documents together with the I-9.

C. Built-in Tickler Systems

Most electronic I-9 systems track employment authorization expiration dates and notify employers well in advance of the needed reverification date. This allows the employer to reach out to the employee 90, 60, and 30 days in advance (or at other defined dates) to help ensure that there is no gap in employment authorization (or documentation thereof). Because a failure to reverify work authorization is amongst the most serious of I-9 violations, such tickler systems are key, particularly for employers who hire large numbers of nonimmigrant visa holders whose employment authorizations expire and require extension or renewal.

D. Seamless Integration with E-Verify

Most electronic I-9 systems are provided by E-Verify Web Services Designated Agents, which means that the vendor can take information from the I-9s that their clients complete and send the information to the E-Verify system without the need to separately log in to the government website.

The most comprehensive I-9 systems allow employers to customize their E-Verify configuration so that E-Verify queries are completed only on I-9s from designated hiring sites. These systems also automatically update when an E-Verify query status changes (from "tentative nonconfirmation" to "employment authorized," for example) and may even be set up to send e-mail notifications to the responsible employer representatives when an E-Verify query requires action.

E. Data Security

Despite concerns about the privacy of electronically-stored personal information, if an electronic system employs proper data security measures, the sensitive data located on I-9 forms may actually be more secure than when using paper I-9s. Paper I-9s are often more likely to be misplaced, inadvertently destroyed, or viewed by unauthorized personnel than electronic I-9s. As noted below, however, a system that does not utilize proper data security measures may leave an employer, and its employees, more vulnerable than ever.

To help navigate the endless sea of paperwork when hiring a new employee, an employer should consider moving to an electronic I-9 system. These systems provide numerous efficiencies, safeguards, and maintenance benefits to simplify the process and mitigate risk. However, as with any purchase, buyer beware, as many commercially available systems also contain latent problems, which may lead to increased exposure. So, prudent employers will comparison shop and carefully review software systems prior to settling on the system that fits their culture and needs. If an employer decides to take the plunge, it must carefully and methodically review the system and related compliance program to ensure safe sailing.

Hospitality Team Updates

On November 9, *Minh Vu*, of our Washington, D.C. office, presented "Recent Developments under the Americans with Disabilities Act" at the 2012 Georgetown University Law Center Hotel & Lodging Legal Summit.

On November 11, Minh Vu, of our Washington, D.C. office, presented "ADA in Your Hotel and Your Workforce" at the 2012 International Hotel, Motel & Restaurant Show.

On November 15, Seyfarth attorneys presented a webinar titled, "The Election Results Are In: What The Hospitality Industry Should Expect In The Next Four Years" to the firm's hospitality clients. If you are interested in obtaining a copy of the presentation, please email events@seyfarth.com.

On December 5, Minh Vu, of our Washington, D.C. office, spoke on a panel titled, "Law and Order: Special Hospitality Unit" at the International Society of Hotel Association Executives Winter Conference.