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Labor & Employment Hospitality Quarterly Update

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

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Brinker Provides Needed Meal Period Guidance and Class Action Relief to California Hospitality Employers

By: *Brandon R. McKelvey*

As any hospitality employer with operations in California should be aware, on April 12, 2012, the California Supreme Court issued a unanimous opinion in its "meal and rest" case, *Brinker Restaurant Corp. v. Superior Court*. That case had been pending since 2008, when the Court agreed to decide whether employers must ensure that employees take meal breaks, or need only make the breaks available to the employees. The Court was also to address the required timing of meal and rest breaks and the kind of evidence a plaintiff needs in order to justify class actions for alleged denials of meal break, rest breaks, and pay for work done off-the-clock. Although four years in the making, *Brinker* provides some clear guidance as to what the rules are in California as to meal and rest breaks, and is already being applied by courts to deny motions for class certification on meal and rest break issues.

The *Brinker* Decision

The Court's decision was largely favorable to employers in its interpretation of the requirements of the California Labor Code and Wage Orders:

- **Meal breaks.** Employers must "provide" their non-exempt employees with 30-minute meal breaks in the sense of relieving the employees of all duty, but need not ensure that they actually cease to work during those breaks. This was a critical finding, for the plaintiffs had argued that employers had an affirmative legal responsibility to ensure that workers do no work during meal periods. An employer need not police meal breaks to ensure that employees are not performing work. If an employee does work during the meal break and the employer knew or has reason to know about it, then the employer would be liable only for straight pay, not the one hour of premium pay owed for a meal-break violation. A concurring opinion emphasizes the employer's duty to document the availability of meal breaks: if "an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided."

- **Meal break timing.** Employers properly time meal breaks by providing the first break no later than the end of the fifth hour of work, and the second break no later than the end of the tenth hour of work. (The court rejected the plaintiff's proposed "rolling five-hour rule," by which a violation would occur if more than five consecutive hours of work occur without a meal break.)

- **Rest breaks.** Non-exempt employees are entitled to a single 10-minute rest break for a shift from 3.5 to 6.0 hours in length, two 10-minute rest breaks for a shift of more than 6.0 and up to 10.0 hours, and three 10-minute rest breaks for a shift of more than 10.0 hours and up to 14.0 hours. Employers must permit rest breaks for any employee who works "a majority" of the four-hour period, so that an employee who works a shift longer than 6.0 hours is entitled to a second rest break.

- **Rest break timing.** Rest breaks ordinarily should be permitted in the middle of each four-hour work period, unless practical considerations render that approach infeasible, but need not be provided before a meal break. The court did not say what practical considerations might suffice.

With *Brinker,* hospitality employers have clear, rational guidance as to what the law requires.

In addressing the issue of class certification, the Court in *Brinker* also applied a pragmatic approach in addressing class certification as to several claims:

- A meal break claim should not have been certified here based on the so-called "rolling five-hour rule," which was legally erroneous.

- The claim for off-the-clock work during meal periods should not have been certified, because the employer's formal policy disavowed off-the-clock work, and because there was no common proof of a uniform policy or practice of off-the-clock work, just anecdotal testimony from a few witnesses.

- A claim for missed rest breaks could be certified on the facts alleged, on the theory that the employer's facially invalid policy failed to authorize a second rest break for shifts that were greater than 6.0 hours and less than 8.0 hours; the employer's defense that employees waived a rest break does not arise if the employer failed to authorize the rest break in the first place.

The First Post-Brinker Decision

On Friday, May 11, 2012, a California trial court judge in Los Angeles denied class certification in a proposed meal and rest period class action based on *Brinker.* This was the first court to deny class certification in a proposed wage-hour class action following *Brinker.* The ruling may be a good sign for employers as to how courts will interpret *Brinker* with regard to class certification.

In *Benton v. Telecom Network Specialists*, the plaintiffs alleged that a proposed class of engineers working on cellular telephone sites throughout California were misclassified as independent contractors and not provided with meal and rest periods. Plaintiffs sued Telecom Network Specialists ("TNS"), and a variety of staffing agencies who provided engineers to TNS were also named in the suit. [Disclaimer: Seyfarth Shaw represents one of the staffing agencies named in the suit and opposed class certification along with attorneys for TNS.]

The court relied heavily on *Brinker* in ruling that class treatment for meal and rest breaks was inappropriate based on a lack of uniform evidence concerning policies and the diverse workplace situations of the workers. The court noted that plaintiffs' 43 declarations only established that workplace conditions were similar for 6% of the putative class, while other declarations proffered by the defendants showed workplace situations varied drastically. Even if the plaintiffs' 43 declarations were accepted on face value, the court said that would just mean there were 43 putative class members down with "716 left to go on the issue of liability." The court found this unacceptable, saying, "[a] civil defendant…enjoys the right to due process on the issue of civil liability."

The court further explained that, "There is no single way to determine whether [the defendant] is liable to the class for failure to provide breaks. Some workers did not get breaks. Other workers were on their own and at complete liberty to take breaks as they pleased, with no time or management pressure." The court indicated that it would take "hundreds of witnesses" to sort this out and determine whether there was or was not liability for improper breaks. The court went on to say, "This is not a practical trial. It is unworkable. The proposal to analyze these disputes as a class matter does not make common sense."

What *Brinker* and *Benton* Mean for Hospitality Employers

Brinker provides hospitality employers with helpful guidance as to what the rest and meal break rules in California are. Hospitality employers should be able to tailor their meal and break policies to comply with *Brinker*, and reduce the risk of expensive class action litigation. When litigation does occur, *Brinker's* guidance on class certification will make it more difficult for plaintiffs to achieve class certification where, as is often the case in large or multi-location operations, there is great diversity in break or meal practices. As demonstrated by the recent ruling in *Benton*, where workplace practices vary from one employer facility to another, particularly with respect to how employees arrange and take their breaks, an employer can argue class certification is not appropriate after *Brinker*. Although courts may interpret *Brinker* differently, the ruling in *Benton* indicates there is a compelling argument that class certification is inappropriate where employees have the freedom to take breaks and workplace situations vary from location to location.

The EEOC Enforcement Guidance on the Use of Criminal History in Employment: What Every Hospitality Employer Should Know

By: *Pamela Devata*, *Natascha B. Riesco* & *Kendra Paul*

While criminal background information can be a crucial tool in making employment decisions, an increase in state and federal regulation, legislation, and litigation has progressively curtailed employers' ability to use this information in making employment decisions. On April 25, 2012, the U.S. Equal Employment Opportunity Commission ("EEOC") issued its *Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (the "Guidance"), which places further limits on the use of this tool. See the EEOC's press release *here*.

The Background On The EEOC's Guidance

The EEOC's new Guidance consolidates and supersedes the EEOC's prior policy statements concerning employers' use of criminal history information. The EEOC cited studies which reveal that people of certain races, colors, and national origins are arrested more frequently than others, and other studies finding that criminal history information is often incomplete and inaccurate. Although the Guidance does not prohibit the use of criminal background checks in employment, it makes clear that employers may run afoul of Title VII based on their use of this tool if their policies have a disparate impact on employees in protected categories or if they discriminate between individuals with similar criminal backgrounds, absent a valid business justification.

The EEOC's Guidance clearly signals that this is and will continue to be a hot topic for the EEOC. Although the Guidance is merely that - "guidance" - in the sense that it is not binding and it is unclear whether it will be adopted by courts, its importance cannot be understated. It makes clear that the EEOC will step up its number of investigations and enforcement actions in this area, which can translate into significant costs for employers. Indeed, at the public meeting, one of the EEOC Commissioners stated that the EEOC was currently investigating hundreds of cases where employers illegally (allegedly, according to the EEOC) used criminal history information in employment decisions. An EEOC investigation alone, even if it does not result in a lawsuit, can exhaust an employer's time, energy, and finances. Failure to conform to the Guidance can also lead to expensive enforcement actions and subsequent litigation. In fact, the EEOC has already filed several high profile lawsuits against companies it believes use criminal history information in a manner that creates a disparate impact based on race, color, or national origin and just recently entered into a $3.13 million conciliation agreement based on an employer's alleged use of criminal background information in a way that disparately impacts certain groups. It is critical for employers to understand the Guidance and to reassess and revaluate their practices to avoid legal challenges in this area.

The New EEOC Guidance

The following are the key highlights of the new Guidance:

- **Only Ask About Convictions If They Are Job Related**. The EEOC recommends, as a best practice, that employers should not ask about convictions on applications. According to the EEOC, any inquiries about convictions should be limited only to those that are job-related. Employers, particularly those who ask about convictions in a blanket fashion or with minimal exclusions required by state or local laws, are well advised to review their job applications and pre-employment inquiries. The EEOC has made clear that blanket policies that exclude certain candidates based on any criminal record are unlawful. The critical analysis will also be to assess what particular convictions are job related to any specific positions.

- **Do Not Consider Arrest Records**. The new Guidance leaves no room for ambiguity that, according to the EEOC, the use of arrest records "is not job related and consistent with business necessity." Employers may, however, make a decision based on the conduct underlying the arrest, if such conduct makes an individual unfit for a position.

- **Always Assess Key Factors When Evaluating Criminal History Information.** Bright line policies relating to the use of criminal history information are unlawful. The Guidance does not contain any specific rules concerning how far back an employer may consider criminal history information, nor does it limit or specify the particular offenses that can be considered. The Guidance did elaborate on the factors set forth in its previous Guidance and added some additional factors to be considered. In evaluating whether a candidate should be excluded based on their criminal backgrounds, employers must almost always evaluate the following factors:

    - The nature and gravity of the offense or offenses (which the EEOC explains may be evaluating the harm caused, the legal elements of the crime, and the classification, i.e., misdemeanor or felony);

    - The time that has passed since the conviction and/or completion of the sentence (which the EEOC explains as looking at particular facts and circumstances and evaluating studies of recidivism); and

    - The nature of the job held or sought (which the EEOC explains requires more than examining just the job title, but also specific duties, essential functions, and environment).

- **Individualized Assessment.** The EEOC strongly recommends that employers conduct an "individualized assessment" to avoid Title VII liability. Although the Guidance states that "Title VII does not necessarily require an individualized assessment in all circumstances," it strongly suggests that employers who fail to do so may be challenged. In making this "individualized assessment," the EEOC behooves employers to consider a number of elements, which include:

    - The facts or circumstances surrounding the offense or conduct;

- The number of offenses for which the individual was convicted;
- Age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local program.

This is perhaps the most concerning area of the new Guidance because employers will have to spend significant time and resources evaluating criminal history information based on this long list of elements. The Guidance, however, does state that if the applicant does not respond to the employer's attempt to gather data, the employer may make the personnel determination without the additional information.

The Guidance suggests that employers may only circumvent this individualized assessment and lawfully screen out an applicant without further inquiry if particular criminal offenses have a "demonstrably tight nexus to the position in question." For example, in her opening statements at the public meeting, one of the EEOC's Commissioners stated that "a day care center need not ask an applicant to 'explain' a conviction of violence against a child, nor does a pharmacy have to bend over backward to justify why it excludes convicted drug dealers from working in the pharmacy lab." The Guidance, however, suggests these instances are the exception to the general rule where an individualized assessment must be conducted. Accordingly, hospitality employers must carefully consider what, if any, any criminal offenses have a "demonstrably tight nexus" to certain positions within their business.

- **Impact of Other Federal and State Laws.** The new Guidance acknowledges that if "federal laws and regulations" disqualify convicted individuals from certain occupations, compliance with these laws and regulations serve as a defense. By contrast, however, the EEOC opined that compliance with state and local laws and regulations will ***not*** shield employers from Title VII liability because Title VII pre-empts state and local laws.
- **Best Practices For Employers.** There is no question that the EEOC will be enforcing Title VII with this new Guidance in mind, such that employers are well advised to consider adjusting their use of criminal history information accordingly. The Guidance itself sets forth "best practices" for employers:
    - Eliminate policies or practices that exclude people from employment based on any criminal record.
    - Train managers, hiring officials, and decision-makers about Title VII and its prohibition on employment discrimination.
    - Develop a narrowly tailored written policy and procedures for screening for criminal history information. The policy should: (i) identify essential job requirements and the actual circumstances under which the jobs are performed; (ii) determine the specific offenses that may demonstrate unfitness for performing such jobs (i.e., identify the criminal offenses based on all available evidence); (iii) determine the duration of exclusions for criminal conduct based on all available evidence (i.e., include an individualized assessment); (iv) record the justification for the policy and procedures; and (v) note and keep a record of consultations and research considered in crafting the policy and procedures.
    - Train managers, hiring officials, and decision-makers on how to implement the policy and procedures consistent with Title VII.
    - When asking questions about criminal history information, limit inquiries to records for which exclusion would

be job related for the position in question and consistent with business necessity.

- Keep information about applicants' and employees' criminal history information confidential and only use it for the purpose for which it was intended.

Because the Guidance is aimed at employers and EEOC staff, the concepts in the Guidance will impact how much attention the use of criminal background checks in the hiring process is getting in investigations, as well as EEOC litigation, especially the EEOC's high profile litigation alleging systemic violations under Title VII against African-American and Hispanic applicants. Hospitality employers are well advised to partner with in-house and outside counsel to reevaluate their background screening and application processes and consider adjusting their use of criminal history in accordance with the Guidance.

Justice Department Issues New Technical Guidance for Pools and Spas

By: *Minh Vu*

In yet another installment of the pool lift saga that has gripped the lodging industry and other businesses with pools and spas these past five months, the Justice Department (DOJ) issued a new Q&A on May 24 that purports to clarify the obligation of hotels and other public accommodations to provide accessible entries into swimming pools and spas. This Q&A follows an announcement DOJ made the previous week extending the deadline for existing pools and spas to become compliant with new accessible entry requirements to January 31, 2013.

Enforcement Exemption for pre-March 15, 2012 Portable Lifts

The "news" from the Q&A is that DOJ will exercise its "prosecutorial discretion" to not enforce the fixed lift requirement against a business that already purchased a compliant portable pool lift prior to March 15, 2012, as long as the lift is ready for use next to the pool or spa whenever the facilities are open. Interestingly, the Q&A seems to suggest that DOJ will not require the owners of these pre-March 15, 2012 portable lifts to affix their lifts to the pool deck or apron even if it is or later becomes readily achievable to do so.

While many businesses will welcome this surprising exercise of prosecutorial discretion by the DOJ, private plaintiffs still have an independent right to enforce the ADA through lawsuits. Furthermore, many states, including California, consider violations of the ADA to be violations of their own non-discrimination statutes. Thus, it is unclear whether DOJ refraining from enforcing the requirement against pre-March 15, 2012 portable lift owners has any impact on the ability of private plaintiffs to enforce the new "fixed" lift requirement through a lawsuit.

Defining the Term "Fixed" Lift

The Q&A defines a "fixed" lift as one that is "attached to the pool deck or apron in some way." It states that "[a] non-fixed lift means that [the lift] is not attached in any way." The Q&A further states that "a portable lift that is attached to the pool deck would be considered a fixed lift," and notes that some manufacturers have come out with kits that allow their portable lifts to be attached to the deck.

Lifts Must be Fixed Unless Not Readily Achievable

The Q&A says that if it is not readily achievable to provide a fixed lift, a business can provide a portable lift but must affix it when it becomes readily achievable to so. The problem with this ongoing obligation is that some portable lifts cannot just be "attached" to the pool deck at some later date because of their design, so any business considering the purchase of a portable lift as an interim measure should consider this issue carefully.

What is "Readily Achievable"? DOJ reiterates in the Q&A that the "readily achievable" analysis is "flexible" and does not require actions that are "too expensive or too difficult." We still have no idea what that means for any particular business because the Q&A provides no concrete examples. The Q&A does state that the resources of a franchisor should not be considered in determining if installing a fixed lift is "readily achievable" for a franchisee. Those involved with franchising would consider this to be a statement of the obvious but it is nonetheless helpful because some litigants and even DOJ want to ignore the fact that franchisees and franchisors are independent parties whose only connection is a franchise licensing agreement.

Lift Must Be Out In Position for Use When the Facilities Are Open

The Q&A states repeatedly that the lift must always be out ready to be used when the pool or spa is open. This has caused much dismay among hotel owners and operators who fear that children and others will misuse the lift and become injured, particularly at unattended pools. The Q&A addresses this concern directly by stating that legitimate safety considerations are a part of the "readily achievable" analysis but that they cannot be based on "speculation." This seems to leave open the possibility that if a hotel has experience with children or others playing with or misusing lifts in an unsafe manner, that hotel might have a basis for putting the lift away and only bringing it out upon request. We can't see DOJ telling a judge that a pool lift must be left out at an unattended pool after a child suffers a serious injury jumping off that pool lift. It is unfortunate, however, that this implies that a serious incident would have to occur before the hotel would have the basis to prevent future accidents.

Pool Lifts Cannot be Shared Among Pools or Spas

The Q&A states that a pool lift cannot serve more than one pool or spa, citing safety concerns. If further states that if it is not readily achievable for a business to have a lift at both a pool and a spa, the business does not have to close the facility that does not have the lift. The business will have to purchase a lift for that second body of water when it becomes readily achievable to do so.

Final Note

DOJ says it will be providing more technical assistance to help businesses comply but we suspect that the Q&A represents the final state of this Administration's evolution on this issue. Although the pool lift requirement still imposes a significant burden on many businesses, we have come a long way from March 9, 2012, when Assistant Attorney General Perez told the hotel industry that there would be no extension of the March 15, 2012 compliance deadline and no change to the fixed lift requirement.

How Much Pro-Union Flair Can a Starbucks Employee Wear? The Second Circuit Holds It Is Up to Starbucks to Decide

By: *Rupa Shah*

On May 10, 2012, the United States Court of Appeals for the Second Circuit refused to enforce a National Labor Relations Board ("NLRB") decision which held that a Starbucks Corporation policy limiting employees to only one pro-union button on their work uniforms uses an unfair labor practice.

This dispute stemmed from unionization efforts by the Industrial Workers of the World ("IWW"). From 2004 to 2007, the IWW engaged in well-publicized attempts to organize employees at Starbucks stores in Manhattan, New York. These efforts included Starbucks employees wearing one-inch pins with the initials IWW in white letters against a red background. In some instances, employees wore eight pins, in addition to buttons and pins issued by Starbucks.

Following an informal agreement between Starbucks and the NLRB in March 2006, Starbucks implemented a policy regulating, among other things, buttons or pins worn by employees. The policy permitted employees to wear any number of buttons or pins issued by Starbucks and one pro-union button or pin on their work uniforms. In accordance with this policy, Starbucks requested that several employees remove additional pro-union buttons or pins before being allowed to work.

The NLRB found Starbucks' "one button" policy unlawful and in violation of the National Labor Relations Act. In particular, the NLRB determined that allowing employees to wear multiple union buttons did not seriously harm Starbucks' legitimate interest in its employee image. On the flip side, Starbucks argued that the NLRB ruling allowing employees to wear an unlimited number of union buttons converted the employees into "personal message boards" for the union.

Disagreeing with the NLRB, the Second Circuit noted, "the Board has gone too far in invalidating Starbucks's one button limitation." Relying on the NLRB's own precedent in *Starwood Hotels & Resorts Worldwide, Inc.*, the Second Circuit held that Starbucks was entitled to avoid the distraction associated with an unlimited number of pro-union buttons being displayed on employee uniforms. Allowing employees to wear unlimited union buttons would risk serious dilution of the information contained on the other buttons that Starbucks uses to promote its own products. The Second Circuit determined that the Starbucks policy allowed employees to display pro-union sentiment and maintained Starbucks' interest in preserving its image as conveyed by the messages on the buttons.

This decision is good news for hospitality employers with strict uniform policies that are designed to advance their public image. The Second Circuit, however, is not the NLRB. Thus, hospitality employers should consult carefully with counsel on the pros and cons of applying and enforcing a policy limiting the number of pins that employees may wear.

Increased OSHA Enforcement: A Real Concern For Hospitality Industry

By: *Jim Curtis*

The hospitality industry has never been considered a high hazard industry. Nonetheless, the industry has been receiving increased scrutiny under the current administration, which has led to significant Occupational Safety & Health Administration (OSHA) citations and penalties that are taking many hospitality employers by surprise. Accordingly, hospitality employers are well advised to take a second look at their safety policies and procedures so they do not become the next target of an OSHA enforcement case.

OSHA has become especially aggressive in areas that until now had seen little enforcement activity. Two areas of renewed activity involve workplace violence and whistleblowers. OSHA has issued a new workplace violence policy and has recently backed that up by issuing several "general duty" clause citations alleging that acts of violence (even murder) by clients or members of the public were "recognized hazards" and therefore preventable. Because hospitality employers are in the business of dealing with the public, it is important to recognize that there is a real potential for confrontations and workplace violence. Employers should have plans in place to anticipate and, if possible, avoid such confrontations and should be training employees on how to handle such situations to protect themselves and others from harm. Employers who fail to implement and enforce such policies run the risk of significant OSHA citations.

Similarly, OSHA has taken aggressive steps to protect from retaliation employees who raise safety concerns or report any workplace injuries. OSHA considers any employee who has raised safety concerns or reported a workplace injury to have engaged in "protected activity." Accordingly, employers must view any such employee as a potential "whistleblower." Before terminating an employee or taking other disciplinary action against an employee for any reason, employers should be asking themselves whether the employee has previously raised safety complaints or reported workplace injuries. If so, the

employer should ensure that there is no connection between the discipline and the safety issue, and ensure that they have a well documented non-retaliatory basis for taking the disciplinary action before terminating the employee.

Finally, OSHA has greatly increased the use of "repeat" citations to drive up the penalties for routine workplace hazards, such as temporarily blocked exits and unsafe stacking of materials on storage racking. There are numerous recent examples of six figure citations for such conditions without there even having been an accident or injury. Accordingly, it is very important for employers to know their OSHA history and ensure that any hazardous conditions that were previously cited by OSHA are routinely checked by management to ensure that the hazardous condition does not re-appear at a later date. This is especially true for employers with numerous facilities throughout the country. OSHA can and will issue "repeat" citations and six figure penalties to a facility in one part of the country based upon a previous OSHA citation issued to a facility in another part of the country, irrespective of whether local management was even aware of the previous OSHA citation.

Hospitality Team Updates

Jim Curtis of our Chicago office will present a webinar on hot OSHA issues faced by the hospitality industry on July 18 at 12pm Central. The presentation will discuss enforcement trends as well as policies and practices that may expose businesses to risks that may be avoided. An invitation for the webinar will be sent to you shortly.

Minh Vu of our Washington, D.C. office testified on behalf of the American Hotel & Lodging Association (AH&LA) in support of reasonable pool and spa entry requirements for travelers with disabilities. In testifying before the House Judiciary Subcommittee on Constitution, Minh called on the DOJ to work for sensible measures that provide access while protecting children from harm. Minh's testimony was critical for many hospitality employers, as the new regulations will affect hundreds of thousands of pools and spas owned or operated by businesses and state and local governments. You can view her testimony by *clicking here* (Minh starts at the 1 hour/3 minute mark) and read her written testimony by *clicking here*. Minh and her team also wrote a One Minute Memo regarding the new rule, which can be viewed by *clicking here*.

We want to hear from you! Do you want to know more about these or any other topics? Want to see something reported on? Have an idea for an article or webinar? Looking for a speaker for your group? Please feel free to contact your Seyfarth attorney.