EMPLOYMENT, LABOR & WORKFORCE MANAGEMENT
EPSTEIN BECKER GREEN
VIEWS YOU CAN USE TAKE 5 HOSPITALITY

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A Full Menu of Potential Legal Issues for Hospitality Owner/Operators

Legal compliance is a challenging endeavor, especially in the hospitality industry, where owner/operators must focus on meeting their business objectives, staying competitive, and growing in their respective markets. In recent years, legal compliance has become even more difficult for owner/operators in states and localities that have expanded employee-protective laws beyond their federal counterpart.

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Despite the disruption that legal compliance causes to business priorities, owner/operators must take care to ensure compliance to avoid costly and time-consuming government investigations and enforcement actions, as well as private lawsuits.

This edition of Epstein Becker Green's *Take 5* addresses important and evolving issues confronting employers in the hospitality industry:

1. **Avoiding "Perfectly Clear" Successor Status When Acquiring a Property with a Union Workforce Now Requires Greater Vigilance**
2. **Restaurant Manager Misclassification Complaints Highlight Important Defense Strategies for Hospitality Owner/Operators**
3. **Managing the Rise in Hospitality Data Breaches**
4. **Buyer Beware: Purchasing Assets from a Unionized Employer May Come with a Nasty Withdrawal Liability Surprise**
5. **Are Protections for Part-Time Employees the New Trend in Employment Law?**

1. Avoiding "Perfectly Clear" Successor Status When Acquiring a Property with a Union Workforce Now Requires Greater Vigilance

By Michael F. McGahan and Shira M. Blank

The past year has seen increasing numbers of mergers and property acquisitions in the hotel industry. A purchaser looking to acquire a hotel property with a unionized workforce must be aware of rulings by the National Labor Relations Board ("Board") on successorship in a sale. Essentially, an asset purchaser will be found to be a successor employer with an obligation to recognize and bargain with the union if (i) it continues the seller's business in substantially unchanged form and (ii) a majority of its workforce at the new location consists of former union-represented employees of the seller.[1]

Generally, a purchaser may retain the right to set the initial terms and conditions of employment. While a successor employer has the right to set materially different terms and conditions of employment and decline to adopt the existing collective bargaining agreement ("CBA"),[2] a "perfectly clear" successor does not. The Board considers a new employer to be a "perfectly clear" successor if it "either actively, or by tacit inference, misled employees into believing that they would all be retained without change in their wages, hours or conditions of employment, or . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."[3]

Satisfying the Threshold of Becoming a "Perfectly Clear" Successor

In *Nexeo Solutions, LLC*, 364 NLRB No. 44 (July 18, 2016), the Board established how language in all documents and communications must be carefully crafted to avoid being a "perfectly clear" successor and thereby forfeiting the right to set the initial terms and conditions of employment.

Nexeo sets a new standard for how early a "first comment" can occur, which may result in the purchaser becoming a "perfectly clear" successor. This "first comment" includes not only the purchaser's but also the *seller's* communications with its employees. In *Nexeo*, the Board based its decision that the purchaser was a "perfectly clear" successor on the following factors:

- The purchase agreement contained a provision stating that the transaction "shall not result in the severance of any employee," and that Nexeo would provide employees with equally favorable salaries and wages and "substantially comparable" employee benefits.

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[1] *NLRB v. Burns Security Service*, 406 U.S. 272 (1972).
[2] *Id.* at 294-95.
[3] *Spruce Up*, 209 NLRB 194 (1974).

- Weeks after the purchase, the seller communicated Nexeo's alleged intent to retain the employees but did not make clear that employment would be conditioned on the acceptance of new terms set by Nexeo.

- Nexeo had, in fact, approved the announcement, acting through a consultant and under a provision in the purchase agreement that required its consultant to approve communications by the seller about the sale.

Nexeo argued that it could not be a "perfectly clear" successor because it communicated to the employees that it expressly rejected the CBA, would no longer participate in the union pension plan, and would provide different health benefits. The Board majority rejected this position, finding that Nexeo's communications were too late because they were made some three months after the seller's communications.

The Board majority also rejected Nexeo's contention that the company was not responsible for any of the seller's communications with employees. Nexeo had the right to control—and had, in fact, exercised control over—the seller's communications and, by failing to repudiate the communications, had ratified them.

The Board also referenced earlier decisions that found terms such as "substantially equivalent" and "comparable" to be not specific enough to inform employees of the nature of the change in employment terms.[4]

What Asset Purchasers Should Do When Considering an Acquisition of a Property with a Union Workforce

Purchasers seeking to maintain the right to set initial terms and conditions of employment should be aware of the following:

- A purchaser's intention to set its own terms and conditions must be dealt with early in the acquisition process.

- The "first comment" to employees may be construed to be in either the purchase agreement or the first announcement of the purchase.

- A purchaser must make clear, from the first communication with employees concerning the potential for continued employment, that the offer of employment includes new terms and conditions that must be accepted in order to continue employment.

- All communications to the employees and the purchase agreement should avoid using:

[4] *See Elf Altochem North America*, 339 NLRB 796 (2003).

    - language that could infer that the purchaser intends to honor the existing terms and conditions, and

    - vague terms such as “substantially equivalent” or “comparable.”

- If a seller communicates to its employees about continued employment in statements that infer that the purchaser will recognize a CBA or continue the existing terms and conditions of employment—or even if the seller does not mention the terms and conditions of employment—the purchaser must immediately disavow those statements and communicate a correct version to the seller’s employees.

2. Restaurant Manager Misclassification Complaints Highlight Important Defense Strategies for Hospitality Owner/Operators

By Adriana S. Kosovych

Recent lawsuits filed by restaurant managers claiming they are entitled to overtime pay suggest that exempt employee misclassification may reemerge as a leading hot topic in wage and hour lawsuits directed at hospitality owner/operators. Three recent collective and class actions illustrate this apparent trend and, more importantly, highlight key defense strategies that owner/operators may use if faced with an exempt misclassification lawsuit.

Defense Strategy #1: Analyze the complaint for gaps in the pleading that could support a motion to dismiss or, alternatively, a motion to strike the collective and class action allegations

In *Stirewalt et al. v. Hooters of America, LLC et al.*, No. 17-CV-0307 (N.D. Ala. Feb. 27, 2017), three assistant managers in certain Birmingham, Alabama, Hooters restaurants asserted claims for unpaid overtime under the Fair Labor Standards Act (“FLSA”), alleging that Hooters misclassified them as exempt from overtime. The plaintiffs alleged that they were not bona fide managers because they did not exercise any managerial or supervisory authority that would qualify them for coverage pursuant to the executive exemption, such as the ability to hire, fire, set work schedules, or discipline employees. Nor could they independently control merchandise, price products, or decide how to display them. Instead, plaintiffs claimed, they were often required to perform non-exempt tasks, such as running the cash register, stocking merchandise, and working in the kitchen.

The lawsuit purports to represent a putative collective action comprised of all Hooters assistant managers, but it proffers no facts establishing that there were other similarly situated assistant managers. In fact, the complaint fails to ascribe a geographic scope to the universe of the putative collective action. Where collective or class action allegations lack such factual specificity—particularly with respect to the existence of similarly situated collective or class action members—hospitality owner/operators should consider a motion to dismiss for failure to plead or, alternatively, a motion to strike the collective and class action allegations.

Defense Strategy #2: Determine whether an existing action precludes a similar, subsequently filed lawsuit

In *Clendenen v. Steak N Shake Operations, Inc.*, No. 17-CV-1045 (C.D. Ill. Jan. 30, 2017), the plaintiff manager alleges that Steak N Shake misclassified her as exempt from overtime under the executive and administrative exemptions under the FLSA and Illinois law. In its motion to dismiss, Steak N Shake invoked a procedural defense commonly referred to as the "first filed" rule. The first-filed rule may preclude a lawsuit in favor of an earlier filed action where there is a substantial degree of similarity between the two cases, the balance of convenience favors preclusion of the subsequent lawsuit, and there is an absence of special circumstances that would obviate priority to the first-filed lawsuit. In *Clendenen*, the defendant argued that the action was duplicative because a previously filed pending collective action brought against Steak N Shake managers in another federal district, *Drake v. Steak N Shake Operations, Inc.*, No. 14-CV-1535 (E.D. Mo.), involved substantially the same facts, the same parties, and the same central issue—namely, whether Steak N Shake restaurant managers are exempt. In opposition, the plaintiff argued that there is no overlap between the two cases. Before Clendenen filed her lawsuit, the district judge in *Drake* ruled that only managers in one of Steak N Shake's seven "Group Markets" (St. Louis) could participate in that FLSA collective action. In *Clendenen*, on the other hand, the St. Louis Group Market was expressly excluded from the FLSA class definition in the complaint, and Clendenen (and her purported putative classes) neither fell within the St. Louis Group Market nor received the FLSA collective action notice in *Drake*. It will be up to the district court to determine whether the plaintiff's arguments present sufficient disparities between the two cases to reject the application of the first-filed rule.

Defense Strategy #3: Identify potentially preclusive arbitration agreements or class action waivers

In *Patel v. Jack in the Box, Inc.*, No. 16-CV-2561 (S.D. Cal. Oct. 13, 2016), the defendant successfully compelled arbitration, and the complaint was dismissed pursuant to the parties' Dispute Resolution Agreement ("DRA"). The plaintiff manager had alleged that, during his employment, he spent the majority of his day performing non-exempt tasks, such as counting inventory, taking customer orders, working the drive-through, and preparing food. The arbitration agreement also included a class action waiver precluding the plaintiff from asserting his claims on behalf of other purportedly similarly situated restaurant managers.

Like Steak N Shake in *Clendenen*, defendant Jack in the Box relied on a procedural defense to stymie the litigation. Under the DRA, the plaintiff had expressly agreed that FLSA claims and other disputes pertaining to wages and overtime under federal, state or local law would be arbitrated. The district court agreed with Jack in the Box that the arbitration agreement was enforceable and covered the claims asserted in Patel's complaint.

Hospitality owner/operators should take advantage of arbitration agreements and class action waivers to circumvent costly class and collective action litigation wherever possible. Owner/operators should be mindful, however, of the current circuit split regarding the enforceability of class action waivers in arbitration agreements in the context of the National Labor Relations Act. The Supreme Court of the United States recently granted certiorari to decide this issue.

The defendants' early challenges to the plaintiffs' lawsuits in *Clendenen*, *Stirewalt,* and *Patel* serve as an important reminder that owner/operators in the hospitality industry should evaluate pleading deficiencies and available procedural defenses that could potentially support an early dismissal of the litigation.

3. Managing the Rise in Hospitality Data Breaches

By Daniel J. Green and Donald S. Krueger

Data breaches for employers in the hospitality industry continue to grow at an alarming rate. According to a 2014 whitepaper, "resorts and hotels are becoming increasingly more appealing to hackers because of the volume of information residing on their systems, including credit card data, confidential information for loyalty programs [and] employee data." More recently, a 2016 analysis by Verizon noted that "we see industries such as Accommodation and Retail accounting for a more significant percentage" of security incidents resulting in actual data loss. Studies conducted by Experian and the Association of Corporate Counsel have found that employee error is the number one cause of data security incidents.

The risk to hospitality employers that do not take appropriate steps to protect their data, as well as their employees and customers' information, is significant. Traditionally, employers that failed to appropriately secure credit card and other sensitive information and then suffered a data breach have been sued by customers and employees whose data was compromised by the breach. Credit card companies and financial institutions have begun to file data breach lawsuits to recoup their losses, including the cost of refunding consumers for fraudulent purchases. This new development means that there is a highly sophisticated, motivated, and well-funded class of data breach plaintiffs who can allege that they suffered significant money damages.

The Federal Trade Commission has issued guidelines to help employers protect against data breaches. Plaintiffs' counsels have cited the failure to abide by these guidelines as evidence that an employer is not using an appropriate standard of care. In addition, the failure to follow data security standards, such as the Payment Card Data Security Standard (known as "PCI DSS"), has been used as evidence of negligence.[5]

Hospitality employers' failure to update their equipment and/or software, such as credit card readers, has also been cited as a factor in negligence actions. Moreover, the recent WikiLeaks release exposed security flaws in Apple and Android devices that, in many cases, have been fixed by more recent security patches and updates to software. Yet, there is a constant arms race between hackers and security systems and, in a few years, or even a few months, employers will likely be expected to adopt new security measures to combat evolving threats. In the employment context, the Internal Revenue Service recently warned hospitality industry employers to alert their employees to Form W-2 (or CEO) email phishing, a data breach scam in which someone posing as a high-level executive seeks to surreptitiously obtain personal information.

When a security breach is detected, employers face significant liability for failing to immediately report the breach to affected parties. Many states, including New York and California, require prompt notification in the event of a data breach.[6] Moreover, employers that delay notifying the victims of a data breach may face damages for losses that could have been prevented by timely notification.

What Hospitality Employers Should Do Now

Employers in the hospitality industry should do the following:

- Adopt appropriate policies to prevent data breaches, and take special care to protect devices with access to point-of-sale information.
- Be aware that drafting policies is effective only if employees are adequately trained to follow those policies.
- Never assume that employees already know or follow data security best practices (a recent study found that millennials are more likely to be cavalier toward data security and not take appropriate precautions).
- If you have a high employee turnover, consider conducting frequent trainings to ensure that recent hires are aware of applicable security policies.
- In addition to taking steps to prevent security breaches, develop a security breach rapid response plan and team that includes a procedure for alerting impacted customers, employees, and financial institutions.

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[5] The New York Attorney General's office recently published a press release outlining best practices that New York organizations should follow to protect against data breaches.

[6] *See e.g.,* California Civil Code § 179.80; Code of Virginia § 18.2-186.6; New York General Business Law § 899-aa; Mich. Comp. Law § 445.72; N.J. Stat. §§ 56:8-163.

4. Buyer Beware: Purchasing Assets from a Unionized Employer May Come with a Nasty Withdrawal Liability Surprise

By Mark M. Trapp

Asset purchases are commonplace in the hospitality industry, where ownership in restaurants, hotels, and country and leisure clubs regularly changes hands via asset purchases. Asset purchases are often favored by an acquiring party as a means to acquire assets, but not the corresponding liabilities, which allows for greater fluidity in the market and enables the owner/operator to keep pace with the industry's ever-changing demands and trends. For example, in the hotel industry, owner/operators need the financial and operational flexibility to meet the demands of travelers and tourists, and to ensure a vibrant marketplace, which, in turn, encourages other employers to enter, or remain or expand in, the industry.

The benefits of asset purchases, however, come with certain potential legal issues. In recent years, courts have expanded an exception to the common law doctrine of successor liability to such an extent that it now threatens to swallow the general rule that a purchaser of assets is not liable for the debts or liabilities of the seller. While originally limited to states within the jurisdiction of the U.S. Court of Appeals for the Seventh Circuit (which includes Illinois, Indiana, and Wisconsin), the Ninth Circuit (which includes Arizona, Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) has adopted the successor liability doctrine in the context of withdrawal liability claims. In the time since, the Seventh Circuit has loosened the notice component of the doctrine to such a degree that a mere general awareness that a seller of assets has or had a unionized workforce may suffice to make the purchaser liable for any unpaid withdrawal liability of the seller.

For example, last summer, the Seventh Circuit again relied on its so-called "looser approach" in finding an asset purchaser potentially liable for the seller's withdrawal liability in *Board of Trustees of the Automobile Mechanics' Local No. 701 Union and Industry Pension Fund v. Full Circle Group, Inc*., 826 F.3d 994 (7th Cir. 2016). The Seventh Circuit described successor liability as encompassing only two elements: (i) notice of the potential liability prior to the purchase and (ii) substantial continuity in the operation of the business before and after the sale. Of particular concern, the Seventh Circuit articulated a broad concept of notice:

> [The purchaser] may never have heard of withdrawal liability or known that the union pension fund was underfunded … but knowing that he was dealing with a union pension fund he was on notice that there was a possibility of such liability. A lack of familiarity with the concept of withdrawal liability cannot be an excuse; he had lawyers to advise him on [his company's] legal obligations. Further evidence of notice is the fact

> known if not to him then (again) to his advisers that *most* union pension funds are underfunded[.][7]

Thus, even though there was no evidence that the purchaser was aware of the seller's withdrawal liability, the Seventh Circuit assumed the purchaser had knowledge of the seller's unionized workforce. From this assumed knowledge, the Seventh Circuit reasoned that the purchaser should have been alerted to the possibility that the seller contributed to a multiemployer pension fund as part of its contract with the union and, because most such funds are underfunded, the potential for withdrawal liability. Because this sufficed to establish notice, the Seventh Circuit remanded the case to the district court for a trial on the issue of the purchaser's liability as a successor.

More recently, relying on the Seventh Circuit's *Full Circle* decision, a district court in that circuit granted summary judgment in favor of a pension fund seeking to impose successor liability against a purchaser of assets. In *Central States, Southeast and Southwest Areas Pension Fund v. Sidney Insulation, Inc.*, 2017 U.S. Dist. LEXIS 8706, at *16 (N.D. Ill. Jan. 23, 2017), the court asserted that "our Court of Appeals imposes withdrawal liability on a successor who is aware that the predecessor's workers are unionized yet is ignorant of the fact or concept of withdrawal liability[.]" Because the asset purchaser "must have known" that the seller's workers were unionized, the purchaser thus had "implied knowledge" of the potential for withdrawal liability and, therefore, had adequate notice sufficient for the court to impose successor liability on the purchaser.

These and similar cases are troubling for potential asset purchasers and suggest that further expansion of the successor liability doctrine is not out of the question. For example, a court could require an asset purchaser to affirmatively inquire as to the seller's potential withdrawal liability and, in the absence of such an inquiry, find that the purchaser had implicit notice. Under such a standard, notice could be based on a failure of due diligence rather than actual knowledge.[8]

In light of the significant risk of withdrawal liability, asset purchasers should take affirmative steps to protect themselves against the potential risk of unintentionally assuming a seller's withdrawal liability. Potential protections include escrow set-asides

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[7] *Board of Trustees of the Automobile Mechanics' Local No. 701 Union and Industry Pension Fund v. Full Circle Group, Inc.*, 826 F.3d 994, 997 (7th Cir. 2016)(emphasis in original).

[8] For now, asset purchasers can take limited comfort in *Heavenly Hana, LLC v. Hotel Union & Hotel Industry of Hawaii Pension Plan*, 2016 U.S. Dist. LEXIS 16466, at *37 (N.D. Cal. Feb. 10, 2016), in which the California district court stated "no court – anywhere – has ever held that a subsequent employer can be held liable for a predecessor's ERISA obligations that it merely should have known about, unless the employer actually knew at least the factual basis for the liability." Nevertheless, *Heavenly Hana* predated both *Full Circle* and *Sidney Insulation*, and the clear trend for successor liability in the context of withdrawal liability is towards expansion, both in the number of courts adopting the doctrine and, especially, of the notice sufficient to support a finding of successorship.

of an amount sufficient to pay any assessed withdrawal liability, indemnification provisions, and personal guarantees.

Unfortunately, for potential asset sellers and the hospitality industry as a whole, only one thing is certain: as noted by the Seventh Circuit in *Full Circle*, "if no assets are bought, no liabilities are assumed." Perhaps Congress should consider the impact of successor liability on the marketability of unionized companies and take steps to rein in the very troubling expansion of the doctrine. Until then, given the significant risks, potential asset purchasers would be well advised to seek the advice of competent counsel to guide them through any contemplated asset purchase.

5. Are Protections for Part-Time Employees the New Trend in Employment Law?

By Matthew A. Goodin

According to the U.S. Department of Labor, two out of every five employees in the hospitality industry work part time, which is more than double the ratio for most other industries. Part-time employees are a boon for owner/operators because they provide the flexibility in a workforce that caters to a fluctuating demand. For example, part-time workers can work full shifts during busy periods and fewer shifts during slower ones. To be sure, this is a significant benefit to owner/operators; however, many part-time employees would prefer to work a regular, fuller workweek as unpredictable scheduling can make it difficult for part-time employees to earn a steady, reliable income.

Part-time employee protection laws may be the next multistate trend for hospitality owner/operators. Several cities, including San Francisco, have recently enacted laws designed to protect part-time employees from unpredictable scheduling, often referred to as "predictive-scheduling legislation." As we have seen in the past with paid sick-leave laws, employee-friendly legal trends oftentimes start locally. San Francisco was the first city to enact a paid sick-leave law, and now at least five states and 10 cities nationwide have enacted such legislation.

San Francisco's "Retail Workers Bill of Rights"

San Francisco was the first city to enact predictive-scheduling legislation. (An overview of this legislation is available online.) In effect, since October 2015, the law applies to "formula retail establishments," defined as companies with at least 40 retail establishments worldwide and 20 or more employees in San Francisco that have a standardized array of merchandise, décor, or color scheme; uniform apparel; or standardized signage or trade appearance.

The law requires covered employers to offer extra work hours to existing qualified part-time employees before hiring new employees or using contractors or staffing agencies to perform the needed work. Covered employers must also provide new employees with a good-faith written estimate of the employee's expected minimum number of scheduled hours per shift and the days and hours of those shifts. In addition, an employer must post schedules two weeks in advance and is required to pay a penalty to employees if the employer changes their schedule with less than seven days' notice. Employers must also treat part-time employees and full-time employees equally with respect to starting wages, availability of paid and unpaid time off, and eligibility for promotions. Finally, if a covered retail establishment is sold, the successor employer must retain (for at least 90 days) all eligible employees who worked for the former employer for at least six months preceding the sale.

San Jose and Seattle Have Enacted Similar Laws

In November 2016, San Jose voters approved a predictive-scheduling law that went into effect on March 13, 2017. Unlike San Francisco's law, San Jose's law does not target only "chain" or franchise retail establishments. Rather, the law applies to employers with more than 35 employees and that are subject to San Jose's business tax. For chain or franchise businesses, every employee counts towards this threshold, regardless of whether he or she works in San Jose.

Similar to San Francisco's law, Seattle's Secure Scheduling Ordinance applies only to large retailers with 500 or more employees worldwide and to full-service restaurants with both 500 or more employees and 40 or more locations worldwide. Further, Seattle's ordinance requires employers to (i) provide new employees with a good-faith estimate of the number of hours they can expect to work, (ii) post work schedules 14 days in advance, and (iii) offer additional hours to existing part-time workers before hiring new employees. But, unlike San Francisco's law, Seattle's ordinance also allows employees to request schedule preferences for things like caring for an ill family member, working another job, or attending school, and requires employers to engage in a good-faith "interactive process" to discuss such requests. Subject to some exceptions, an employee is also entitled to receive premium pay if he or she is (i) assigned extra hours after a schedule is posted, (ii) sent home early on a scheduled shift, or (iii) "on call" but not called into work.

Both the San Jose law and the Seattle ordinance require covered employers to offer extra hours to existing qualified part-time employees before hiring new employees, subcontractors, or temporary workers. San Jose's law requires employers to use a "transparent and non-discriminatory" process to distribute hours among existing employees.

But perhaps the most onerous requirement for employers under these laws involves record-keeping and retention. Under both the San Jose law and the Seattle ordinance, an employer must retain for several years (four years under San Jose's law and three years under Seattle's ordinance) records for new hires that document the employer's effort to first offer the additional work to existing part-time employees, along with work schedules and requests for scheduling changes. Failure to comply creates a presumption that the employer has violated the law. Both laws contain an anti-retaliation provision and a notice-posting requirement and allow aggrieved employees to bring a private lawsuit.

These laws are very likely only the beginning. New York City Mayor Bill de Blasio has announced his support of a group of bills, referred to as the "Fair Workweek" legislation, which are currently before the New York City Council. These bills are primarily aimed at the fast-food industry but contain components similar to the laws described above. Predictive-scheduling laws are also being considered in various states in addition to California, including Connecticut, Illinois, Indiana, Maryland, Michigan, Minnesota, and Oregon.

What Hospitality Employers Should Do Now

- If you are located in a jurisdiction that already enacted a predictive-scheduling law, review your scheduling, on-call, and hiring practices as well as document retention policies and service contracts to ensure that they are in compliance with the law. If necessary, work with legal counsel to determine the appropriate revisions to such practices, policies, and contracts to bring them into compliance.

- If you are in a jurisdiction that is considering predictive-scheduling legislation, contact your local Chamber of Commerce to see how you can get involved. Bear in mind that lawmakers have generally been open to employers' concerns regarding predictive-scheduling and other similar laws and have shown a willingness to incorporate changes that make the laws less onerous for employers.

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