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Unique Labor and Employment Law Issues In Hospitality

Welcome Your Guests, Not a Lawsuit

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Agenda

1. Accessibility Under the Americans with Disabilities Act (ADA)
2. Occupational Safety and Health Administration (OSHA)
3. Wage & Hour Issues
4. Labor Management Relations

Background On Accessibility Obligations

Title III of the ADA

WHO IS COVERED?

- Governs **places of public accommodation**
  - Own, operate, control, lessor/lessee
  - Joint and several liability
- Places of public accommodation include:
  - **inns, hotels, motels, or other places of lodging;**
  - **restaurants, bars, or other establishment serving food or drink;**
  - a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
  - an auditorium, convention center, lecture hall, or other place of public gathering;
  - a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

Title III of the ADA

WHO IS COVERED?

- a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- a terminal, depot, or other station used for specified public transportation;
- a museum, library, gallery, or other place of public display or collection;
- a park, zoo, amusement park, or other place of recreation;
- a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Title III of the ADA

A CIVIL RIGHTS LAW

- Title III guarantees individuals with disabilities the "**full and equal enjoyment** of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation" (42 U.S.C. § 12182(a))
- General Prohibitions
  - Denying participation or the opportunity to participate;
  - Providing unequal benefits;
  - Providing separate benefits
    - Not having an integrated setting; and
  - Discrimination because of a relationship or association with an individual with a disability.

Title III of the ADA

SPECIFIC PROHIBITIONS/OBLIGATIONS

- **Cannot utilize eligibility criteria that screen out** individuals with disabilities;
- Requires **Modification of policies, Practices and Procedures** – unless doing so fundamentally alters goods and services provided;
- Requires provision of **Auxiliary Aids and Services** to the extent necessary to achieve **effective communication;** and
- Requires **Barrier Removal.**

State and Local Laws

- Most states and many localities have human rights/anti-discrimination laws prohibiting discrimination on the basis of disability and requiring accessibility in various public entities

Accessible Technology

Website Accessibility

Title III of the ADA

APPLICATION

- Title III:
  - Prohibits places of public accommodation from discriminating on the basis of disability
  - Requires **"full and equal enjoyment"**
  - Does not explicitly define whether a place of public accommodation must be a physical place or facility, nor does it directly address whether it could be read or interpreted to apply to a non-physical place or facility
- Currently, tension exists regarding whether Title III applies to websites
  - Court decisions on the issue – both generally and specific to websites – have been decided both ways

Title III of the ADA

SCOPE OF COVERAGE: THE CURRENT JUDICIAL LANDSCAPE

- **Strict construction:** holding "Places of Accommodation" are limited to physical places so Title III does not apply
  - Courts in 3rd Cir.; 6th Cir.; and 9th Cir.
- **Spirit of the law:** holding that "Places of Accommodation" are not limited to physical places so Title III does apply
  - Courts in 1st Cir.; 2nd Cir.; and 7th Cir.
- **Nexus:** holding that Title III applies when there is a sufficient connection between the goods and services of traditional "Places of Accommodation" (*e.g.*, a restaurant or hotel) and the alternative consideration (*e.g.*, website)
  - Courts in 9th Cir.

Key Decisions Directly Addressing Title III's Applicability To Websites

- ***Nat'l Federation of the Blind vs. Target Corp.* (N.D. Cal. 2006)**
  - Addressed whether Title III covers only physical "brick and mortar" structures or does it also cover the internet
  - NFB alleged that Target violated Title III, California's Unruh Act, and California's Disabled Persons Act because Target.com – which offered a variety of store-related services – was inaccessible to the blind and thus Plaintiffs were denied full and equal access to Target stores
  - Target asserted that the ADA and California state laws only cover access to physical spaces, such as Target's brick-and-mortar stores, and that Target.com is not a physical space and thus not a "place of public accommodation"
    - Also asserted that Plaintiffs were not denied full and equal access to the Target stores because the services were provided via alternative means

Key Decisions

TARGET

- The Court held that Title III covers websites in situations where a **nexus** exists between the website and a physical place of public accommodation
  - "The statute applies to the services ***of*** a place of public accommodation, not services ***in*** a place of public accommodation"
- Many of the benefits and privileges of Target's website – such as online information about store locations and hours and printable coupons that are redeemed in the stores – were "heavily integrated with the brick-and-mortar stores"
  - Did not rule on whether alternative measures provided by Target (*e.g.*, telephone line, in-store assistance) were effective alternatives
- Regarding the state law claims, the Court found that, since the plaintiffs stated a claim under the ADA and ADA claims are per se claims under the Unruh Act and the DPA, it would not reach Target's challenges to the plaintiffs' state law claims
  - Nevertheless, the Court stated in dicta that part of plaintiffs' claim was "that Target.com is a service of a business establishment, and therefore defendant's argument that a website cannot be a business establishment is unavailing"

Key Decisions

TARGET

- Ultimately resulted in a court-approved class settlement agreement in which Target agreed to:
  - Establish a $6 million fund from which members of the state settlement class could make claims;
  - Take the steps necessary to make its website accessible to the blind by early 2009 and obtain "certification" from NFB;
  - Pay NFB to train all its employees who work on its website; and
  - Pay attorneys' fees and costs

Key Decisions

THE POST-*TARGET* LANDSCAPE

- Increased (threats of) litigation on this issue
- Significant number of settlements and "cooperative agreements" (*e.g.*, via "structured negotiations") between advocacy groups and/or state and/or federal government agencies and major companies regarding website accessibility
- Increased attention from DOJ and other Regulators
- Movement to adopt the World Wide Web Consortium/Website Accessibility Initiative's Web Content Accessibility Guidelines 2.0

Key Decisions

POST-*TARGET* LITIGATION

- ***Ouellette v. Viacom* (D. Mont. Mar. 31, 2011):** the court dismissed claims against Google.com, YouTube.com and MySpace.com on the grounds that, "[n]either a website nor its servers are 'actual, physical places where goods or services are open to the public,' putting them within the ambit of the ADA"
- ***Young v. Facebook, Inc.* (N.D. Cal. May 17, 2011):** the court restated that websites on their own do not constitute places of public accommodation under Title III and, therefore, a "nexus" must exist between a website's services and a physical place of public accommodation for Title III obligations to apply to the website; "**Facebook operates only in cyberspace, and is thus is [sic] not a 'place of public accommodation**;' as construed by the Ninth Circuit. While Facebook's physical headquarters obviously is a physical space, it is not a place where the online services to which Young claims she was denied access are offered to the public"
- ***Earll v. eBay, Inc.* (N.D. Cal. Sept. 7, 2011):** the ADA could not afford a remedy to plaintiff because its definition of "places of public accommodation" is limited to actual physical spaces, plaintiff could assert an independent Unruh Act claim because **"[b]oth the Unruh Act and the [Disabled Persons Act] apply to websites 'as a kind of business establishment and an accommodation, advantage, facility, and privilege of a place of public accommodation, respectively.** No nexus to . . . physical [places] need be shown'"

Key Decisions

POST-*TARGET* LITIGATION

- ***Jancik v. Redbox Automated Retail, LLC* (C.D. Cal. May 2014):** the Court granted Defendant's motion to dismiss and held, among other things, that Redbox did not have to caption its library of web-based videos because a website is not a place of public accommodation under Title III
- ***National Federation of the Blind et al. v. Scribd* (D. Vermont, March 2015):** the Court rejected Defendant's motion to dismiss finding that the language of Title III, the ADA's legislative history (embracing a "liberal approach"), and DOJ's interpretation of the ADA all suggest that it can apply to establishments that offer goods and services to the public even if they do not have a physical location

Netflix Cases: Impact of the Judicial Split

NAT'L ASSOC. OF THE DEAF v. NETFLIX, INC. (D. MASS. JUNE 19, 2012)

- ***Nat'l Assoc. of the Deaf v. Netflix, Inc.* (D. Mass. June 19, 2012)**
  - Alleged that Netflix's failure to provide closed captioning on their "Watch Instantly" streaming video programming website violated ADA
  - The court held that 1st Circuit precedent, Congressional intent, and the plain language of the ADA clearly supported a finding that accessibility obligations are not limited to physical places:
  - "***Carparts*'s reasoning applies with equal force to services purchased over the Internet**, such as video programming offered through the Watch Instantly web site. In a society in which business is increasing conducted online, **excluding businesses that sell services through the Internet from the ADA would 'run afoul of the purposes and would severely frustrated Congress's intent** that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.'"
    - **"The ADA covers services 'of' a public accommodation, not services 'at' or 'in' a public accommodation"** (citing *Target*)

Netflix Cases

NAT'L ASSOC. OF THE DEAF v. NETFLIX, INC. (D. MASS. JUNE 19, 2012)

- Netflix's Watch Instantly website could fall into several categories listed in the ADA:
  - "service establishment": provides customers with the ability to stream video programming over the Internet
  - "place of exhibition or entertainment": displays movies, television programming, and other content
  - "rental establishment": engages customers to pay for the rental of video programming

- Entered into a consent decree (Oct. 9, 2012) in which Netflix agreed to, among other things,:
  - 100% of on-demand streaming content has captions or subtitles
  - Captions available within an average of 15 days (by Sept. 30, 2014) and 7 days (by Sept. 30, 2016) after content's on-demand launch
  - Pay **$755,000 in attorneys' fees and costs**
  - Pay NAD **$40,000 for compliance monitoring**

Netflix Cases

CULLEN V. NETFLIX, INC. (N.D. CAL. JULY 2012; 9th Cir. April 2015)

- ***Cullen v. Netflix, Inc.***
  - Alleged that Netflix's failure to provide closed captioning on their "Watch Instantly" streaming video programming website violated ADA
  - The court held that 9th Cir. precedent controlled, finding that plaintiff could not rely on a violation of the ADA to state *per se* violations of the Unruh Act and the Disabled Persons Act, and granting Netflix's motion to dismiss with leave to amend to state independent causes of action under the Unruh Act and Disabled Persons Act

- "**The Netflix website is not 'an actual physical place' and therefore, under Ninth Circuit law, is not a place of public accommodation.** Because the website is not a place of public accommodation, the ADA does not apply to access to Netflix's streaming library." (citing *Weyer)*
- **On April 1, 2015, the Ninth Circuit held that web-only businesses are not places of public accommodation under Title III.**
  - Explained that the phrase "place of public accommodation" requires, "some connection between the good or service complained of and an actual physical place."

U.S. Department of Justice

- DOJ takes the position that Title III as written applies to the websites of private places of public accommodation:
- DOJ has made its position clear in various forms:
  - amicus briefs
  - guidance publications
  - letters and testimony before Congress
  - settlements agreements
  - ANPRM (and its hearings)

- "Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that **title III covers access to Web sites of public accommodations**. The Department has issued guidance on the ADA as applied to the Web sites of public entities, which includes the availability of standards for Web site accessibility. . . ."
  - Preamble, Final rule, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43465 (published Sept. 15, 2010)

Thomas Perez, Then Assistant Attorney General, Civil Rights Division, U.S. DOJ

- "Let me be clear. **It is and has been the position of the Department of Justice since the late 1990's that Title III of the ADA applies to Web sites.** We intend to issue regulations under our Title III authority in this regard to help companies comply with their obligations to provide equal access."
- "**Companies that do not consider accessibility in their Web site or product development will come to regret that decision**, because we intend to use every tool at our disposal to ensure that people with disabilities have equal access to technology and the worlds that technology opens up."
  - Speaking at Jacobus tenBroek Disability Law Symposium (April 25, 2010)
- "**It is the position of the Department of Justice since the late 1990s that the ADA applies to websites. Companies that do not consider accessibility in their website or product development will come to regret that decision**, because we intend to use every tool at our disposal to ensure that people with disabilities have equal access to technology and the worlds that technology opens up."
  - Speaking at the DOJ Celebration of the 22nd anniversary of the Americans with Disabilities Act (July 26, 2012)

The Rulemaking Process

- July 26, 2010 ANPRM – Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government
  - Contemplating amending Title II and Title III regulations
    - Public hearings held throughout Fall/Winter 2010/2011
    - Public comment period ended January 24, 2011
  - Formalizes intent to adopt standards expressly covering websites owned, operated, and controlled by entities covered by Titles II and III
  - Scope of DOJ's web accessibility standards most likely limited to public accommodations that offer goods and services, either exclusively on the Internet (*e.g.* Amazon.com) or in conjunction with a physical location (*e.g.* Target stores)
  - Proposed staggered compliance deadlines
- **NPRM – currently expected to be published prior to the 25th Anniversary of the ADA (July 26, 2015)**

Key Settlement Agreements With Advocacy Groups and Plaintiffs in Hospitality

- *Judith Smith, Bonnie Lewkowicz and AXIS Dance Company v. Hotels.com L.P.* (2009) (settlement of claims brought under California state law) **Hotels.com** and **Expedia, Inc.** agreed to implement improved accessibility features throughout its website; $200,000 in attorneys' fees)
- **Travelocity** and National Federation of the Blind (Jan. 2011)
  - Website to be made fully accessible over staggered, 14 month, compliance window
- *Shields, et al. v.* ***Walt Disney Parks and Resorts US, Inc.****, et al.*, No. CV 10-05810 (DMG) (FMOx) (C.D. Cal.) (class action, including a "website class," for violations of the ADA, the Unruh Act, and the DPA; on January 25, 2013, the court approved a revised class settlement that includes staggered dates (from December 2012 – December 2015) for achieving WCAG 2.0 (all Level A and certain specified provisions in Level AA) compliance for various sections of www.disneyworld.com, www.disneyland.com, www.disneycruises.com, as well as express compliance exclusions; $1,403,500 million in attorneys' fees (cap had been set at $1,550,00); $15,000 to named plaintiffs)

Key Settlement Agreements With State Governments in Hospitality

- **Ramada Inn/Priceline** and NYSAG (2004)
  - Complaints alleged that the "critical functions" of the websites were difficult to use, in violation of the ADA, NYHRL, and New York Civil Rights Law
  - Agreed to bring their entire websites into compliance with a combination of Section 508 and WCAG 1.0 guidelines (except pages, components, and content displayed directly by third-party using third party's software)
  - Ramada and Priceline paid $40,000 and $37,500 respectively for costs involved with NYSAG investigation
  - Required to report compliance efforts for three years

DOJ Settlement Agreements

- **QuikTrip** (July 19, 2010)
  - Required convenience store retail chain to evaluate its website according to "generally accepted standards for website accessibility, such as the Standards promulgated pursuant Section 508 . . ."
- **McNeese State University** (September 10, 2010)
  - Required to make new and modified webpages accessible.
- **Hilton Worldwide Inc.** (Nov. 9, 2010)
  - Hilton agreed to bring its website into compliance with WCAG 2.0, Level A success criteria

DOJ Settlement Agreements

- ***Nat'l Fed. of the Blind v. Law School Admissions Council ("LSAC")*** **(Apr. 25, 2011) (DOJ later joined)**
  - LSAC agreed to ensure that website users who are blind and utilize screen-reader technology are able to obtain the same information and take part in the same transactions as other guests (*e.g.,* register for LSAT; access practice LSAT materials, and submit online law school applications); and
  - Agreed to provide technology that enables participating law schools to add school-specific inquiries in an accessible manner
- **Wells Fargo & Co.** (May 31, 2011)
  - As part of much broader settlement, agreed to continue its ongoing actions regarding website accessibility
  - No standard given – focused on concepts (*e.g.*, screen-reader features; low vision; testing)

DOJ Settlement Agreements

- **The Price Is Right** (Sept. 20, 2011)
  - Price is Right must redesign two websites associated with the show in accordance with many of the requirements set forth in current version of Section 508
- **Quicken Loans Arena**, Cavaliers Operating Co., LLC (Dec. 13, 2012)
  - As part of a broader settlement, the Cavs agreed that its websites – www.cavs.com and www.theqarena.com – will comply with WCAG 2.0, Level AA success criteria within six (6) months
  - Must develop policy to routinely evaluate/remedy any accessibility problems encountered on its websites
- **Louisiana Tech University** (July 23, 2013)
  - New webpages must comply with WCAG 2.0, Levels A and AA; existing webpages since September 2010 by 2014; older webpages upon request

DOJ Settlement Agreements

- **Newseum** (December 2013)
  - Website must be compliant with WCAG 2.0, Levels A and AA within one year.
  - $15,000 in civil penalties.
- **HRB Tax Group, Inc.** (March 2014) (DOJ joined a litigation commenced by the NFB)
  - H&R Block Web site and Online Tax Preparation Product must be made accessible under WCAG 2.0 A and AA by January 1, 2015, with additional accessibility deadlines over the following years of the decree for the other covered applications and content. Also contained various training, policy, and compliance monitoring obligations.
  - $22,500 in damages for each Plaintiff and $55,000 in civil penalties

DOJ Settlement Agreements

- **Peapod** (November 2014)
  - Website and mobile application must be compliant with WCAG 2.0, Levels A and AA within 5 months and 10 months respectively.
  - Commitment to making third-party content accessible.
- **National Museum of Crime and Punishment** (January 2015)
  - Website must be compliant with WCAG 2.0, Levels A and AA within 120 days.
- **Dekalb, Ill.; Vero Beach, Fla.; Fallon, Nev.; Isle of Palms, SC** (February 2015)
  - Job applications/employment websites must be compliant with WCAG 2.0, Levels A and AA within 90-150 days.
- **edX, Inc.** (April 2015)
  - Must make its massive online open courses platform (website and mobile applications) compliant with WCAG 2.0, Levels A and AA within 18 months.

Looking for Guidance? WCAG 2.0

- While not yet officially part of DOJ's Title III regulations, WCAG 2.0 is currently the dominant website accessibility guideline
- DOJ, DOT, OFCCP, and the Access Board have all utilized WCAG 2.0 as the primary standard for website accessibility
- Advocacy groups also support WCAG 2.0 – public hearings for DOJ's ANPRM re Website Accessibility and Access Board's Section 508 Refresh NPRM, and settlement and/or cooperative agreements
- Sets Forth "the Four Principles of Accessibility": perceivable, operable, understandable, and robust.
  - Each principle has a set of guidelines, which in turn has success criteria
  - Gradations of compliance: level A (must satisfy), AA (should satisfy), and AAA (may satisfy)
- Also suggests specific technical methods to meet and/or test each of these success criteria, which a web developer can utilize to appropriately design the website so that it is accessible to individuals with disabilities

Touch Screen Devices

Touch Screen Devices

BACKGROUND

- Over the past few years, with increasing frequency, businesses have begun to utilize touch screen devices in a variety of contexts. For example:
  - At the point-of-sale ("POS") – *e.g.*, for using debit cards;
  - To check into a hotel;
  - To provide information to patrons;
  - As part of rental kiosks;
  - For purchasing tickets/product; and
  - Parking.

- Concurrently, plaintiffs and advocacy groups have repeatedly brought class action lawsuits alleging that the touch screen devices are inaccessible and violate the ADA and state/local accessibility laws.

Touch Screen Devices

SOURCES OF SPECIFIC ACCESSIBILITY OBLIGATIONS

- **2010 ADA Standards for Accessible Design – ATMs**
  - Clear floor and ground space; reach range; operable parts; speech output; input controls; and display screen orientation
- **Section 508 of Rehabilitation Act (February 2015 NPRM)** – federal agencies (limited application to government contractors seeking to do business with federal agencies)
- **Air Carrier Access Act** – shared-use airport kiosks
  - Technical standards cover nearly all aspects of the operation and use of automated shared-use kiosks, including the display screen and operable parts, inputs and outputs, Braille instructions, clear floor space, privacy, and biometrics (drawing upon aspects of both the existing 2010 ADA Standards for ATMs and aspects of the current version of Section 508's standards for self-contained closed products (such as copiers)).

Touch Screen Devices

SOURCES OF SPECIFIC ACCESSIBILITY OBLIGATIONS

- **California Financial Code § 13082**
  - Creates obligations for the provision of accessible POS touch screen system – both for existing devices and new/modified devices.
  - New/modified – must provide either: (i) a tactile/discernible numerical keypad; or (ii) other technology, such as a radio frequency identification device, or fingerprint biometrics that enables a person with a visual impairment to enter his/her own PIN or any other personal information necessary to process the transaction in a manner that provides the opportunity for the same degree of privacy input and output available to all individuals.
  - Existing – before January 1, 2010, except as provided in paragraph (2), any POS system that includes a video touch screen or any other non-tactile keypad shall also be equipped with a tactually discernible keypad or other technology.
    - At locations equipped with two or less POS machines, only one POS machine shall be required to be equipped with a tactually discernible keypad or other technology on or before January 1, 2010.

Title III of the ADA

- No specific requirements in the 2010 ADA Standards
- Recent litigations have focused on violation of two of Title III's overarching civil rights obligations:
- Specifically, the most recent complaints allege that use of touchscreens is:
  - Denying patrons who are blind **"full and equal enjoyment"**
    - invasion of privacy
    - forcing patrons who are blind to take additional, disadvantageous, steps
  - Failing to meet their obligation to provide **auxiliary aids and services** necessary for patrons who are blind to achieve **effective communication** with employees

Title III of the ADA

- DOJ has aligned itself with the plaintiffs in these cases.
  - Statements of Interest in ongoing private party litigation to assert its position.
- Firmly takes the position that places of public accommodation are not relieved of their obligation to provide accessible POS devices just because patrons who are blind has other methods of payment/obtaining services available for use.

Accessible Touch Screen Device Considerations

- Traditional accessibility considerations:
  - Accessible route;
  - Clear floor space;
  - Operating mechanisms;
    - Reach range;
    - Usability;
  - Screen mounting height;
  - Protruding objects and detectable warnings.
- Accessible technology – auxiliary aids and services – considerations:
  - Input controls – tactilely discernible input;
  - Speech output – audio instructions;
    - Headset jack;
  - Captioning of non-text audio.
- Alternative/Temporary Measures?
  - Employee assistance

DOJ Update

Continued Focus On Hospitality Industry

- **2009:** Investigations into more than 60 hotels in Times Square.
- **2011:** DOJ send surveys to owners of top 50 Zagat-rated restaurants in New York City to ascertain their levels of compliance with the accessibility requirements of the ADA.
- **Since January 2014:**
  - 17 DOJ Settlement Agreements in Hospitality Industry
    - 8 involved dining establishments;
    - 7 involved hotels/casinos/space; and
    - 2 involved other sectors of the industry.

Primary Focus

- **The recent DOJ settlement agreements focused most on the following issues:**
  - **Barrier Removal**
    - Parking
    - Entrances
    - Rooms/Suites
    - Spas/locker rooms/gyms
    - Restrooms
    - Dining Areas
    - Guest Services
    - Pools
  - **Service Animals**
  - **Accessibility Policies/Training**

Service Animals

Service Animals

PROHIBITED ANIMALS

- Under the ADA:
  - Do not have to permit animals which are only pets inside
  - Emotional support animals, which by their definition are not service animals, do not have to be permitted inside
    - Check state/local laws
  - With one possible exception in limited circumstances, animals other than dogs do not have to be permitted inside

Service Animals

DEFINITION

- Service animals are dogs that are individually-trained to do work or perform tasks for the benefit of an individual with a disability (*e.g.*, guide dogs, hearing-ear dogs, psychiatric service dogs) ("Service Animals").
  - One exception.
- Service Animals are permitted to accompany people with disabilities in all public areas of places of public accommodation (where other patrons are allowed to go)
  - *e.g.*, rooms, dining areas, bars/lounges, elevators, restrooms, gyms, entertainment venues, casinos, etc.;
    - Service Animals must be under the control of the owner and are not allowed on furnishings, or to be fed in any public areas.

Service Animals

THE EXCEPTION – MINIATURE HORSES

Service Animals

VERIFICATION

- If it is not readily apparent that a dog is a Service Animal, patrons seeking to bring a Service Animal inside may be asked appropriate qualifying questions:
  - **(i) is the dog required because of a disability (*without asking what the disability is*); and**
  - **(ii) what task/work has the dog been *trained* to perform/do.**
- ***May not*** request that patrons seeking to bring a Service Animal inside provide any type of license or certification papers regarding the status of the animal as a Service Animal or of the patron's disability.
- There is no official license or certification for Service Animals
- There is no standard "uniform" for a Service Animals

Service Animals

VERIFICATION

Service Animals

VERIFICATION

- Patrons seeking to bring a Service Animal inside:
  - Are **responsible for caring for their Service Animal for the entirety of their visit**;
  - Must ensure that the Service Animal is **housebroken** and should the Service Animal need to relieve itself while the patron is visiting, the Service Animal is taken to utilize an appropriate "parking/relief" area; and
    - Personnel must be sure to identify the location of the "parking/relief" areas to the owner of the Service Animal.
  - Must have their Service Animal **under control at all times**
    - no barking at, or biting, employees or other guests; and
    - no damaging property and/or merchandise.

Service Animals

REMOVAL/EXCLUSION OF SERVICE ANIMALS

- **You reserve the right to ask patrons and their Service Animals to exit the premises if**, in your sole discretion, you determine that the Service Animal:
  - **poses a direct threat to the health and safety of others** (*e.g.*, snapping at people; foaming at the mouth); and/or
  - **is not under the control of the patron and is adversely affecting the comfort and enjoyment of other patrons** (*e.g.*, incessant barking at people; running away from the handler); and/or
  - **is not housebroken**; and/or
  - **is causing property damage** (*e.g.*, chewing on furniture or merchandise)
  - and the **behavior has not stopped despite repeated requests.**
- The fact that other patrons may be uncomfortable around, and/or allergic to, Service Animals is not grounds for the exclusion of Service Animals from a store.

Service Animals

REMOVAL/EXCLUSION OF SERVICE ANIMALS

- **If a Service Animal is excluded/removed for any of the aforementioned reasons:**
  - The patron with the disability must be given the option of remaining on the premises without the Service Animal.
    - Do not agree to watch or care for the Service Animal while the patron remains.
  - The reasons for not allowing the Service Animal inside and/or for removing the Service Animal should be contemporaneously documented (*e.g.*, by Security) in a report containing all relevant facts
  - If an employee has any concerns about a dog or Service Animal and believes there are appropriate grounds for its exclusion and/or removal, contact the appropriate supervisor or Manager for assistance.

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Occupational Safety and Health Administration (OSHA)

Most Cited Standards in the Hospitality Industry

- The Hazard Communication (HAZCOM) Standard
- Ergonomics/Musculoskeletal Injuries
- Exit Routes
- Sanitation
- Fire Extinguishers
- Medical Services and First Aid
- Bloodborne Pathogens

The Hazard Communication Standard

- In 2012, OSHA dramatically changed the Hazard Communication (HAZCOM) standard (which had not been changed since 1994) in order to align it with the Globally Harmonized System of Classification and Labeling of Chemicals (GHS) – a project being carried out by the United Nations.
- The goal of the change is to provide a common and coherent approach to classifying chemicals and communicating hazard information on labels and safety data sheets, which currently vary greatly among different countries and even among agencies within the same country.
- A transition period was built into the move from the 1994 version of the standard to the 2012 version. During the transition, employers can comply with the 1994 version of the standard, the 2012 version, or both.

New HAZCOM Compliance Deadlines

Effective Completion Date	Requirement(s)	Who
December 1, 2013	Train employees on the label elements and safety data sheet format	Employers
June 1, 2015 December 1, 2015	Compliance with all modified provisions of the 2012 final rule, except: The Distributor shall not ship containers labeled by the chemical manufacturer or importer unless it is a GHS label	Chemical manufacturers, distributors and employers
June 1, 2016	Update alternative workplace labeling and hazard communication program as necessary, and provide additional employee training for newly identified physical or health injuries	Employers

Enforcement?

- Once June 1st hits, employers must be in compliance with substantially all of the 2012 HAZCOM standard.
- It is critical that employers take action now, if they have not done so already, to move towards full compliance with the new version of the rule.
- Employers should anticipate compliance officers carefully studying training records, safety data sheets, labeling, etc. **And they should anticipate citations**, particularly as OSHA compliance officers have not necessarily received clear guidance on every element of the new rule.

Ergonomics in Hospitality

- Hospitality employees most likely to suffer an ergonomics-related injury:
  - Housekeepers
  - Dishwashers
  - Cooks/other kitchen staff
  - Servers
- Benefits of implementing a well-crafted ergonomics program:
  - Improves efficiency
  - Increases work quality
  - Reduces discomfort or pain for employees
  - Lowers risk of employee injury
  - Allows employees to do their work more easily

Causes of Musculoskeletal Injuries in Hospitality

- Forceful exertions such as lifting and pushing
- Awkward postures
- Repetitive activities
- Staying in the same posture for long periods
- Not allowing muscles to rest while working

Elements of an Effective Ergonomics Program

- Evaluate the job tasks
- Explore new products and systems to make work easier on the body
- Employ engineering controls such as assistive devices to make jobs less likely to cause injury
- Employ administrative controls such as encouraging employees to:
  - stretch before and after work
  - promptly report any unusual aches or pains to supervisors
  - engage in an open dialogue with supervisors and management about ways their jobs can be further improved to reduce the risk of injury

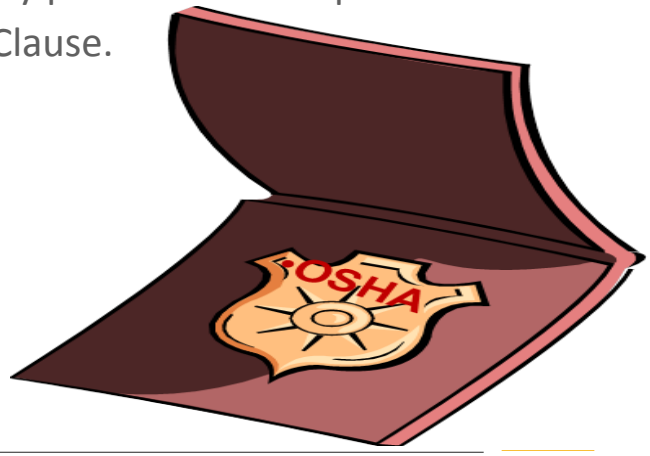
How Can OSHA Allege an Ergonomics Violation When the Agency has No Ergonomics Standard?

- Section 5 of the Occupational Safety and Health Act provides that each employer

> "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees"

The Wal-Mart Trampling Case

- Just a few weeks ago, on March 18th, OSHA won a key victory for its policy favoring expansive use of the General Duty Clause when Wal-Mart Stores Inc. withdrew its longstanding legal challenge of an OSHA citation arising from the tragic trampling death of a store employee during a Black Friday sales event in 2008, and OSHA is publically lauding the move.
- This case has long been considered an important test case to OSHA's policy in the Obama administration to more forcefully employ use of the General Duty Clause to address potential hazards that the agency has yet to address through rulemaking. By accepting this citation, Wal-Mart has opened the doors to more aggressive OSHA inspections, complete with compliance officers who now have every reason to believe that anything they perceive to be a possible hazard can be successfully prosecuted under the General Duty Clause.



Exit Routes – Key Elements an Employer Must Have in Place to Provide Safe Exits

- First, determine whether you have enough exit routes in the workplace. These exit routes must permit prompt evacuation of the workplace during an emergency. The number or required routes varies:
  - Generally, a workplace must have at least 2 exit routes.
  - More than 2 exit routes are required if the number of employees, size of the building, or arrangement of the workplace will not allow employees to evacuate safely with just 2 exits.
  - In limited circumstances, one exit route may be permitted if it allows employees to evacuate safely during an emergency.

Exit Routes – Key Elements an Employer Must Have in Place to Provide Safe Exits

- Employers must ensure that exit routes are free and unobstructed. Exit routes must be free of:
  - Obstructions such as materials, equipment, locked doors, or dead end corridors.
  - Doors with decorations or signs that obscure the visibility of exit route doors.
  - Objects that could impede access to the exit route during construction, repair or alterations to the workplace.
  - Explosive or highly flammable furnishings or decorations.

Exit Routes – Key Elements an Employer Must Have in Place to Provide Safe Exits

- Exit routes and doors must be properly labeled. Employers must:
  - Install “EXIT” signs in plainly legible letters.
  - Mark doors and passages along the exit routes that could be mistaken for an exit door “Not An Exit” or with a sign identifying its use (such as “storage room”)
  - Exit doors must be unlocked from the inside and must be free of devices or alarms that could restrict use of the exit route if the device or alarm fails
  - Arrange exit routes so that if one is blocked by fire or smoke another is available.

Sanitation

- To ensure that employees work in a sanitary environment, employers must:
  - Eliminate slippery conditions, but if that is impossible employers must take other measures to prevent employee slip and fall accidents.
  - Store materials in a manner that does not impede access to each fire-alarm box, fire-call station, fire-fighting equipment, and each exit, including ladders, staircases, scaffolds, and gangways.
  - Ensure that working surfaces are cleared of debris.

Fire Extinguishers – Employee Training

- If fire extinguishers are available for employee use, it is the employer's responsibility to educate employees on the principles and practices of using a fire extinguisher and the hazards associated with fighting small or developing fires. This education must be provided annually and when a new employee is first hired.

Fire Extinguishers – General Requirements and Maintenance

- Employers must determine the appropriate type of fire extinguisher for the work area.
- Over time, normal handling or workplace conditions can impact the structural integrity of the extinguisher and cause it to malfunction or burst. A visual inspection is inadequate to identify deteriorating structural integrity. Accordingly, all portable fire extinguishers are required to be inspected and pressure tested by a qualified individual using the proper equipment and facilities.
- Hydrostatic testing is the method used to pressure test an extinguisher's critical components (cylinder, shell, hose assembly, etc.) for leaks and structural flaws by pressurizing them with a liquid.
- Depending on the type of extinguisher, and assuming there is no reason to think more frequent testing is necessary (*e.g.*, when the equipment has been damaged) the equipment must be hydrostatically tested every 5-12 years.

Medical Services and First Aid

- The employer must ensure the ready availability of medical personnel for advice and consultation on matters of workplace health and safety.
- Adequate first aid supplies must be readily available.

Bloodborne Pathogens

In general, the standard requires employers to:

- Establish an exposure control plan.
- Update the plan annually to reflect changes in tasks, procedures, and positions that affect occupational exposure, and also technological changes that eliminate or reduce occupational exposure.
- Implement the use of universal precautions (treating all human blood and OPIM as if known to be infectious for bloodborne pathogens).
- Identify and use engineering controls.

Bloodborne Pathogens

- Identify and ensure the use of work practice controls.
- Provide personal protective equipment (PPE), such as gloves, gowns, eye protection, and masks.
- Make available hepatitis B vaccinations to all workers with occupational exposure.
- Make available post-exposure evaluation and follow-up to any occupationally exposed worker who experiences an exposure incident.
- Use labels and signs to communicate hazards.
- Provide information and training to workers.
- Maintain worker medical and training records.

Regional Enforcement Issues for Hospitality

- Enforcement of the bloodborne pathogen standard: Des Moines, Iowa and the State of Missouri
- Hotels, casinos, and casino hotels: No particular hazards identified. Emphasis program is in response to a higher than average number of injuries in these workplaces. Applies to OSHA Region IX, which includes:
  - American Samoa
  - Arizona
  - California
  - Guam
  - Hawaii
  - Nevada
  - Northern Mariana Islands

State Plan Requirements for Hospitality

- You may already be aware that the California State Plan requires all employers to have an Injury and Illness Prevention Program (I2P2). This is a comprehensive health and safety program that incorporates significant employee involvement and management commitment to creating a safe and healthy workplace.
- What you may not have heard about yet is a requirement of the Minnesota State Plan called A Workplace Accident and Injury Reduction (AWAIR) program. The AWAIR program requirements are quite similar to those of California's Injury and Illness Prevention Program. Although not all employers are required to have such a program, hotels and casinos doing business in Minnesota must maintain an AWAIR plan. Employers have until June 29, 2015 to comply.

Temporary Employees

- On July 15, 2014, OSHA issued a policy memo to its field offices outlining when a compliance officer visiting a worksite should enlarge the inspection to include temporary agencies providing workers to the site.
- Generally, compliance officers were instructed that whenever a temporary worker was exposed to a violation, the compliance officer should determine whether the temporary agency was aware of the hazards or could have known about them.
- As a result, OSHA inspections involving temporary employee agencies increased 322% in fiscal 2014.
- Only 15% of the inspections resulted in citations being issued to temporary employee agencies.

Whistleblower Claims on the Rise

- New claims have dramatically increased in the vast majority of the 22 different whistleblower statutes that OSHA handles. Complaints of employer retaliation under the OSHA statute alone have risen 70% since 2005.
- But whistleblower investigators rarely find merit to those claims. Of the total number of claims determinations from 2005 to present, only 2% have been resolved on the merits. By comparison, during the same time period, 60% have been dismissed (others have been withdrawn, kicked out, or resolved in some type of settlement).
- Complaints are expected to continuously rise, nonetheless, as employees have become much more familiar with their rights under the various statutes containing whistleblower provisions. Particularly savvy complainants are filing complaints under multiple statutes simultaneously.

Injury and Illness Recordkeeping Requirements

- In the past, the forms have been hard copy documents.
- OSHA has announced, however, that in August of this year it will publish a new rule requiring the vast majority of employers that keep OSHA injury and illness logs to provide injury and illness information to OSHA electronically, on a frequent basis. This will enable OSHA to more quickly identify workplaces with high rates of injuries and illnesses and dispatch compliance officers to those locations to conduct inspections.
- Disturbingly, the electronically submitted injury and illness data will be "scrubbed of identifiers" and then placed on a publicly accessible database so the public will be able to review employers' injury and illness data.

Changes to OSHA's Injury and Illness Reporting Requirements

OSHA's updated reporting rule expands the list of severe injuries that employers must report to OSHA.

As of January 1, 2015, **ALL** employers must report:

- ❑ All work-related fatalities within 8 hours.
- ❑ All work-related inpatient hospitalizations, all amputations and all losses of an eye within 24 hours.

You can report to OSHA by

- ❑ Calling OSHA's free and confidential number at 1-800-321-OSHA (6742).
- ❑ Calling your closest Area Office during normal business hours.
- ❑ Using the new online form that will "soon" be available.

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Wage & Hour Issues

Agenda

1. Gratuities
2. Meal Periods
3. Recordkeeping

Tip Credit Issues

"The Basics"

- Employers may take a tip credit against the hourly wages of "tipped employees" who regularly receive more than $30 per month in tips.
  - For example, do not apply a tip credit against the wages of a back of the house employee who occasionally substitutes for an absent server or host.
- Tips are the employee's property. Employers may not collect or share in any portion of an employee's tips.
- The current maximum tip credit that an employer may claim under the FLSA is $5.12 per hour.
  - Employers must therefore pay a $2.13 cash "subminimum" hourly wage to its tipped employees.
  - Many states set minimum wage rates and maximum tip credit amounts that differ from the FLSA, e.g. Under New York law, the maximum tip credit allowance varies, depending on whether the tipped employee is a food service worker (currently a $3.75 maximum tip credit), a service worker (currently a $3.10 maximum tip credit), or a service worker in a resort hotel (currently a $3.85 maximum tip credit).

Tip Credit Issues

Notice Requirements

- Employers may not take a tip credit without first providing notice to their tipped employees.
- Federal regulations state that the notice, which may be oral or written, must include:
  - The amount of the tip credit being taken.
  - The amount of the subminimum cash wage being paid.
  - That the tip credit cannot exceed the amount of tips actually received by the employee.
  - That all tips received by tipped employee are to be retained by the employee except for those employees participating in a tip pooling arrangement.
  - That the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.
- Be mindful of state-specific tip notice requires.
  - Under New York law, employers are required to provide written notice of the employee's regular hourly pay rate, overtime pay rate, amount of tip credit, and regular payday.

Tip Credit Issues

Notice Best Practices

- Provide written notice, regardless of whether your jurisdiction requires it.
- Require tipped employees to sign in acknowledgement that they received and understand all aspects of the notice.
- Provide a copy of the signed notice to the employees and retain another copy in your records. DO NOT discard the notice.
- Self-audit to ensure that a tip credit is only being applied to wages of tipped employees

Tip Credit Issues

Duties Requirements – The "20% Rule"

- Federal regulations provide that employers may take a tip credit only when tipped employees are engaged in "tip earning activities," or if they perform duties "related to their tip earning work."
- The DOL explains in its Field Operations Handbook ("FOH") that "related" duties are incidental to the employee's regular tip-earning duties.
  - Examples of related duties include cleaning and setting tables, making coffee, and occasionally washing dishes or glasses.
  - Related duties do not include pure janitorial or maintenance work.
- The DOL prescribes limits on the amount of incidental tip-related work an employee may perform in order for the employer to take a tip credit for employees performing incidental work.
- No tip credit may be taken against wages of tipped employees who spend in excess of 20% of their shift performing work incidental to tip-earning duties.

Tip Credit Issues

Duties Requirements – Best Practices

- Instruct and regularly remind supervisors that front of the house should not spend much, if any, time working in a non-tip-earning capacity.
- Delegate significant non-tip-earning work to back of the house staff or dedicated personnel.
- Instruct tipped employees to record both the non-tip-earning tasks and the amount of time they are spending on them.
  - Audit these records to ensure that your tipped employees' time on non-tip-earning tasks does not come close to 20% per shift.
- Make sure that employees employed in dual jobs, e.g. both front and back of the house, are clocked-in under the proper job code and apply the tip credit only when they are clocked-in as a tipped employee.

Tip Credit Issues

Calculating Overtime

- Where an employer takes a tip credit, overtime is based on the full hourly wage, not the subminimum wage paid by the employer.

- Multiply the prevailing federal or state minimum wage (currently $7.25 under federal law) by 1.5, which equals $10.875. Then subtract from that amount the tip credit (currently $5.12 under federal law) to arrive at $5.755, which is then multiplied by the number of overtime hours worked in excess of 40 per week.

- Employers often make the mistake of computing an employee's overtime by multiplying 1.5 by the subminimum wage being earned.

Tip Pooling

"The Basics"

- "**Tip sharing**" – when directly tipped employees share their tips with other workers who provided direct customer service.
- "**Tip pooling**" – when directly tipped employees pool their tips, and those tips are redistributed among directly and indirectly tipped employees.

- Employers are permitted to adopt tip pooling or sharing practices as work place requirements for their tipped employees. Employers must, however, provide notice to all tipped employees.
- Best Practice: provide written notice of the pooling or sharing arrangement and require employees participating in the pool to sign as acknowledgement of receipt of the notice.

Tip Pooling

Requirements

- Employers may only take a tip credit for the amount of tips each tipped employee ultimately receives from the pool or share, as opposed to what any one employee initially received directly from his or her customers.

- Only tipped employees may participate in tip pooling or sharing.

- Non-tipped personnel may not share in tip pools
  - Examples of non-tipped personnel:
    - Employers, managers, shift supervisors and back-of-the-house,
    - Individuals with the power to hire and fire, supervise, control employment conditions or determine wages.
- Employers may never retain any amount of an employee's tips.

Meal Breaks

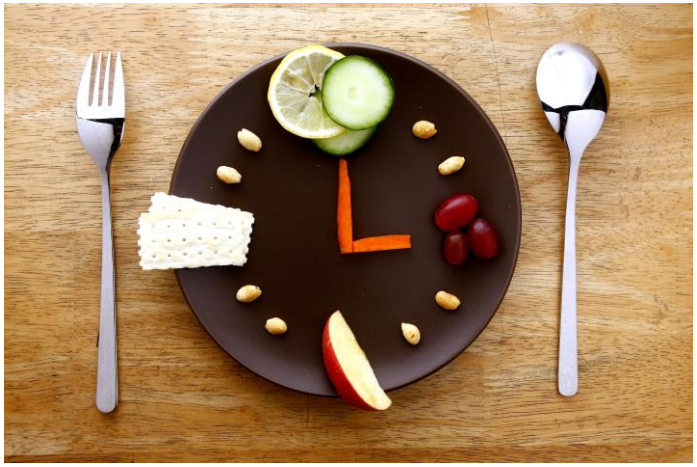
"The Basics"

- Breaks are not required under the FLSA.
- Breaks of less than 20 minutes are compensable under the FLSA.
- Meal breaks of one-half hour or more, where the employee is completely relieved of all duties, are non-compensable under the FLSA.
- Look to state-specific meal break requirements.

Meal Breaks

Best Practices

- Maintain clear clock-in and –out policies for bona fide meal breaks.
  - Do not require employees to remain on premises during breaks.
  - Do not instruct employees that they must remain “on call” during their break periods.
- Instruct supervisors that they are not allowed to ask employees to work during break periods.
- Do not automatically deduct break time.



Recordkeeping

"The Basics"

- Employers are required to maintain accurate and contemporaneous records of the time worked and wages earned by their non-exempt employees.
- Employers must retain the following records for three years:
  - Payroll records
  - CBAs
  - Sales and purchase records
- Employers must retain the following records for two years:
  - Time cards
  - Piecework tickets
  - Wage rate tables
  - Work and time schedules
  - Records of wage additions or deductions

Recordkeeping

Requirements

- Records must be maintained on premises.

- Employers may use any timekeeping method they choose:
  - Time clock
  - Handwritten records maintained by a central timekeeper
  - Electronic records, such as e-mail or spreadsheet
  - Employees maintain their own records which they submit to the employer

Recordkeeping

Best Practices

- Use a time clock.
- Instruct employees that they must review their weekly time and sign in acknowledgement that it is complete and accurate.
- Maintain an organized set of records for the requisite two- or three-year period.
- Do not assume employees always work the exact amount of time every day even if they work the same daily shift.
- Audit your records to ensure accuracy and completeness.

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Labor Management Relations

New Election Rules

The new NLRB election rules took effect on **April 14, 2015**

What The New Rules Mean For Hospitality

- New Rules were adopted by the Board, 3-2, on December 12, 2014 – to be effective April 14, 2015
- Faster elections
- Less time for employers to respond
- With Smaller Units (Specialty Health Care) and Joint Employer unions will be better able to selectively go after small groups

What The New Rules Mean For Hospitality

- These are most significant changes to NLRB election procedures to date
- The Board members who voted in favor said they are needed to “modernize” and “streamline” processes
- The changes are designed to make it easier for unions to win and harder for employers

What The New Rules Mean For Hospitality

- Speed – time frames are shortened – other steps eliminated or pushed back until after an election takes place
- Parties no longer able to litigate issues like unit scope or supervisory status in most cases prior to voting
- Parties no longer will have right to appeal of Regional Director decisions on election issues/questions before vote
- Employers need to raise/identify issues very early – if they do not they will have waived
- **More info to unions earlier (early list of names, shifts, locations, classifications)**
- **Information to unions that they have not been entitled to up until now – employees' email addresses and phone numbers**

What The New Rules Mean For Hospitality

- Key Differences in Process
  - Electronic Filing of the Petition - Unions can fax or efile petitions
  - Union must serve a copy of the petition on the employer at the same time
  - **Employer MUST post initial notice** informing employees that a petition has been filed within 48 hours – until now employers were "asked" but not required to post this notice
  - **Faster hearings within 8 days of the filing of the petition**
  - Hearing can be delayed up to 2 business days based on employer showing of "special circumstances" - Anything more than 2 days requires showing of "extraordinary circumstances."

What The New Rules Mean For Hospitality

- Employer's Must File Statement of Position Prior to Hearing
  - Must be filed by NOON the day before the hearing
  - **SOP needs to identify any issues that the employer**
  - **Identify issues re : Supervisory Status, Commerce/Jurisdiction of the NLRB over the Employer's business, labor organization status, eligibility period, seasonal issues, expanding or contracting unit, professional status, guard issues,**
  - **IF AN ISSUE IS NOT RAISED IN THE SOP IT IS WAIVED**
  - SOP must be served on the petitioner as well as to the Board
  - The NLRB is developing a form/format for the SOP

What The New Rules Mean For Hospitality

- Employers Must Provide NLRB and Petitioner with Employee List Prior to Hearing
  - The list goes to the NLRB and to the Petitioner Union
  - The list must include the name, job title, shift and work location of all employees in the petitioner for unit
  - If the employer contends that other employees, either at other locations or in other classifications should be included in the unit, the list must include their names and info as well
  - Until now there has not been a requirement to provide a list until after an election was agreed to or ordered (the Excelsior List)

What The New Rules Mean For Hospitality

- **Legal Challenges – Status**
  - Two lawsuits pending - brought by employers and industry groups
  - *Chamber of Commerce of the US v. NLRB* – in Washington – includes NRF, NAM
  - *Associated Builders and Contractors of Texas v. NLRB* – includes National Federation of Independent Businesses
- **Theories**
  - The Amended Rules violate Section 8(c), which is the Act's employer free speech provision
  - Claim that Rules Violate Section 9(b) by requiring employers to provide unions with employees home phone numbers, and email addresses
  - Rules Violate Section 9(c) by taking away employer hearing rights described in the Act

What The New Rules Mean For Hospitality

- The Rules are alleged to be Arbitrary and Capricious
- Rules are alleged to violate employers' First Amendment Speech Rights
- Rules are alleged to violate Fifth amendment by denying employers the right to litigate
- TIMING – In both cases, there have been motions for summary judgment by the plaintiffs and cross motions by the NLRB
- All will be fully briefed by 3/30/15
- Effective date of 4/14 – will courts rule by then?

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Specialty Healthcare Presents Unit Proliferation Dilemma

Specialty Healthcare = Micro Bargaining Units

- NLRB found unit of certified nursing assistants e appropriate.
  - Other non-professional service and maintenance employees left out.

- Board will certify *any* proposed unit it deems a "discrete group"
  - Even units covering a single job classification.
  - Board unapologetic in efforts to increase the number of NLRB conducted elections, to advance unionization and collective bargaining.
  - Helps unions collect authorization cards to obtain 30% support
  - Helps unions get their foot in the door.

- Employer's Burden: must show those left out share an "overwhelming community of interest" with the targeted group.

Macy's Extends *Specialty Healthcare* Beyond Healthcare Industry

- Community of interest in unit of cosmetics and fragrance sales employees.
  - "readily identifiable group" as a "primary selling department"

- Community of interest based upon:
  1. Work in the same department;
  2. Directly supervised by the same manager;
  3. Sell cosmetics and/or fragrances (functional integration);
  4. Limited contact with other selling employees;
  5. Same commission-based pay structure and benefits; and
  6. Limited transfer of employees between the fragrance/cosmetics and other store departments.

Take Aways from the Boards Micro-Unit Cases

- "Community of interest" Standard applicable in (nearly) every industry.
- NLRB will not find proposed unit inappropriate just because:
  - They work on different floors,
  - Wear different uniforms,
  - Earn commissions at different rates,
  - Sell different products.
- Board *may* give deference to employer-established lines of demarcation.
- Board's decisions heavily fact dependent.
- Well-developed record is critical.
- New election procedures prevent employers from challenging matters before the election.
- Employers must be prepared.

McDonald's and *Browning-Ferris* - Expanding the reach of the Joint Employer Theory

- The Board is reviewing the relationship between Franchisor and Franchisee in *McDonald's* and between employers and contractors in *Browning-Ferris*.
- On December 19, 2014, the General Counsel issued Consolidated Complaints in Regional Offices nationwide charging that McDonald's and franchisees are joint employers and seeking to hold McDonald's liable for unfair labor practices allegedly committed by its franchisees. Hearings began in New York on March 30, 2015.
- "Our investigation found that McDonald's, USA, LLC, through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of our Act. This finding is further supported by McDonald's, USA, LLC's nationwide response to franchise employee activities while participating in fast food worker protests to improve their wages and working conditions."

www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against

McDonald's and *Browning-Ferris* - Expanding the reach of the Joint Employer Theory

- In *Browning-Ferris* the Board is considering whether to amend its current joint-employer standard. The General Counsel, as well as the SEIU and other interested parties, have filed Amicus Briefs urging the Board to abandon its existing joint-employer standard under which an entity can be a joint employer if it exercises direct or indirect control over working conditions in favor of a much broader standard.
- The current joint-employer standard set out 30 years ago by the Board in *Laerco Transp*. recognizes that two or more business entities are in fact separate, but that they share or codetermine those matters governing the essential terms and conditions of employment. This test follows with the Supreme Court's joint-employer test set out in *Boire v. Greyhound Corp* (1964) (joint-employer status turns on whether the entities "exercised common control over the employees.")

McDonald's and *Browning-Ferris* - Expanding the reach of the Joint Employer Theory

- The Union, the General Counsel and interested third-parties such as the SEIU are urging the Board to adopt a new much more expansive joint-employer standard which would require bargaining with any company that, as a practical matter, determines the terms and conditions of employment.
- The General Counsel filed an Amicus Brief urging the Board to abandon its existing joint-employer standard stating that "[t]he current standard also ignores Congress's intent that the term "employer" be broadly construed in light of economic realities and the Act's underlying goals, and has particularly inhibited meaningful bargaining with respect to contingent workforce and other nontraditional employment arrangements."
- This newly expanded standard would result in a joint-employer finding where a putative employer negotiates the economic terms of a subcontract to include exercising "indirect control" over the contractor's employees by setting the price it is willing to pay and the efficiencies in the services it requires.

McDonald's and *Browning-Ferris* - Expanding the reach of the Joint Employer Theory

- The SEIU's Amicus Brief reveals the potential reach of the Board's decision in healthcare, property services and food service companies.
- *Healthcare Sector* – "The practical reality, though, is that complexity and risk involved in providing quality health care provides a powerful incentive for health organizations to retain significant control over their outsourced employees' terms and conditions of employment in order to ensure quality patient care, uniformity of treatment and protection of their healthcare "brands."" SEIU examples of outsourced functions include laundry, housekeeping and food services, health information technology, call-centers, human resources, patient care services, emergency room management, equipment maintenance, cardiovascular perfusion, diabetes treatment, benefits, skilled nursing, physical and occupational therapists, home health aides and administrative processes and management of non-clinical services.

McDonald's and *Browning-Ferris* - Expanding the reach of the Joint Employer Theory

- *Property Services.* SEIU represents over 200,00 workers in property services including cleaners and security officers. "Contractors in these industries compete for business largely on the basis of price, and labor costs are often the most significant component of that price. …contract relationships are typically fixed-price agreements for relatively short time periods that are subject to termination upon thirty days' notice…no meaningful change [in wages] can be negotiated without the approval of the company that controls the purse strings. That is why in the janitorial and security industries, building owners have the real power…" SEIU Brief
- Property owners also control the start and end times for workers, holidays, approve the hire and removal of workers, qualifications and working conditions.

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Advice for Employers: Analyzing Work Forces & Vulnerabilities

Advice to Employers

- Prepare now
- Ensure you have a lawful no-solicitation policy and it is uniformly applied
- Conduct review of handbook to ensure policies are lawful
  - Unions often challenge handbook policies on their face to stir up support
- Continually campaign
  - Conduct regular trainings
  - Regularly releases messages to employees
- Train managers on avoiding unionization
  - This is especially important in light of rise of micro units – even one bad manager can result in the unionization of a department
  - Training should also include process for reporting union activity and how to lawfully respond to union activity

Advice to Employers

- Know your workforce
  - Implement & follow an open door policy
  - Consider having town halls or other methods for employees to share their concerns with management
- Assess your areas of risk and vulnerability
  - Identify unhappy employee groups
  - Identify groups that could be underpaid
- Prepare in advance for unit determinations
  - Conduct audits of workforce

Warning Signs of Union Activity

- Strangers or former employees hanging around workplace
- Emails about employee-only meetings
- New leaders or vocal speakers emerge
- Heated discussions amongst employees
- Rumor mill especially active
- Observe employees passing out flyers
- Employees take breaks or lunch outside of usual break areas
- Employees stop speaking freely
- Employees challenge managers more frequently
- Employees begin using union terminology like “grievance,” “for cause,” “seniority”
- Union activity at nearby facility
- Employees wearing unions hats, buttons, shirts

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Work Rules, Policies and Employees' Section 7 Rights

The NLRB on Handbooks and Rules

- The National Labor Relations Board Has Placed Great Emphasis on Handbooks, Work Rules and Policies at Union and Non-Union Employers Obama Board Has Been Rules
- The Board and General Counsel Focus on whether rules and policies interfere with employees' Section 7 Rights Under the National Labor Relations Act
- Section 7 protects employees' rights to engage in "protected concerted activities" with respect to their "terms and conditions of employment"
- The Obama Board's expansive view of "protected concerted activities"

The NLRB on Handbooks and Rules

- On March 18, 2015, the Board's General Counsel issued Memorandum GC 15-04 - extensive guidance as to the General Counsel's views concerning polices and rules, in handbooks and otherwise
- This GC Memo is highly relevant to all employers in all industries that are under the jurisdiction of the National Labor Relations Board, regardless of whether they have union represented employees
- The memo is meaningful to all employers and offers important guidance as to what language and policies are likely to be found to interfere with employees' rights under the Act, and what type of language the NLRB will find does not interfere and may be lawfully maintained, so long as it is consistently and non-discriminatorily applied and enforced

The NLRB on Handbooks and Rules

- The Board's legal standard for deciding whether an employer policy unlawfully interferes with employees' rights under the Act is **generally whether "employees would reasonably construe the rules to prohibit Section 7 activity"**
- That is action of a concerted nature intended to address issues with respect to employees' terms and conditions of employment
- This General Counsel and Board consistently give these terms broad interpretations and have found many employer policies and procedures, in handbooks and elsewhere, that appear neutral and appropriate on their face, to violate the Act and interfere with employee rights
- Many of these cases have involved non-union workplaces where there is not a union present and there is no union activity in progress

Confidentiality

- Employer handbook rules regarding confidentiality: **"Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as nonemployees such as union representatives"**
- However, "broad prohibitions on disclosing 'confidential' information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information"
- "An otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity"

Employee Conduct Toward Supervisors

- **"Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees"**
- The Memorandum offers an overview of decisional law, with particular attention to cases involving rules that prohibit employees "from engaging in 'disrespectful,' 'negative,' 'inappropriate,' or 'rude' conduct towards the employer or management, absent sufficient clarification or context."
- Employee criticism of the employer "will not lose the Act's protection simply because the criticism is false or defamatory"

Conduct Toward Fellow Employees

- Employees have the right "to argue and debate with each other about unions, management, and their terms and conditions of employment"
- Such conduct will not lose their protection under the Act, **"even if it includes 'intemperate, abusive and inaccurate statements**"
- Harassment Policies: **"although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7 protected subjects"**

Policies Concerning Interaction With Media And Other Third Parties

- Provisions that seek to regulate and restrict employee contact with and communications to the media relating to their employment may be unlawful
- The General Counsel notes that **"(A)nother right employees have under Section 7 is the right to communicate with the new media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment"**
- Rules **"that reasonably would be read to restrict such communications are unlawful"**
- **"Employers may lawfully control who makes official statements for the company," and that any such rules must be drafted so as "to ensure that their rules would not reasonably be read to ban employees from speaking to the media or third parties on their own (or other employees'") behalf**

Employee Use of Company Logos and Trademarks

- Employer policies, whether contained in employee handbooks or elsewhere, that broadly prohibit employees from using logos, copyrights and trademarks may unlawfully interfere with employees' Section 7 rights
- While the General Counsel acknowledges that "copyright holders have a clear interest in protecting their intellectual property," the Board has found, with the approval of such courts as the Fourth Circuit Court of Appeals, that "handbook rules cannot prohibit employees' fair protected use of that property"
- It is the General Counsel's position that "employees have a right to use the name and logo on picket signs' leaflets, and other protected materials," and that "employers' proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity"

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Employee Photography and Recording in the Workplace

- Many handbooks and policies prohibit or seek to restrict employees from taking photographs or making recordings in the workplace and on employer policy
- The Memorandum points out that **"employees have Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures make recordings"**
- The Memorandum further notes that such policies will be found to be overbroad **"where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time"**

Leaving Work

- The Memorandum notes that **"one of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike"**
- Therefore **"rules that regulate when an employee can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts"**
- Not all rules concerning absences and leaving the workstations are unlawful. A rule would be lawful if "such a rule makes no mention of 'strikes,' 'walkouts,' 'disruptions' or the like" since employees should "reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity"

Conflict of Interest Rules

- Under Section 7 of the Act, employees have the right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests
- Examples of such activities that could arguably be in violation of broad conflict of interest policies as protests outside the employer's business, organizing a boycott of the employer's products and services and solicitation of support for a union while on non-work time
- The Memorandum notes that when a conflict of interest policy "includes examples of otherwise clarifies that it limited to legitimate business interests (note: as that term is defined by the General Counsel and the Board) employees will reasonably understand the rule to prohibit only unprotected activity"

Be In The Know

EPSTEIN BECKER GREEN **labor and employment**

ACT NOW ADVISORY

Massachusetts Now Requires Employers to Provide Domestic Violence Leave

By Barry A. Guryan and Kate B. Rhodes

Massachusetts has enacted a law requiring employers with 50 or m grant employees "domestic violence leave." The law, entitled "An [D]omestic [V]iolence," was approved by Governor Deval Patrick or and took effect immediately.

Under this new law, employers with 50 or more employees must p with up to 15 days of paid or unpaid leave in any 12-month period if:

- the employee, or a family member of the employee, is a behavior";
- the employee is not the perpetrator of the abusive beh employee's abused family member; and
- the employee is using the leave from work to do any of the follo
  - seek or obtain medical attention, counseling, victim assistance;

EPSTEIN BECKER GREEN **Take 5** VIEWS YOU CAN USE

LABOR AND EMPLOYMENT

September 18, 2014

The July 2014 issue of *Take 5*, "Five Labor and Employment Issues Faced by Health Care Employers," was written by **Michael F. McGahan,** a Member of the Firm, and Associates **D. Martin Stanberry** and **Daniel J. Green.**

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As the Affordable Care Act and the challenges of reimbursement and funding for health care services drive changes in the health care delivery system and employment in the industry, new issues in labor and employment law are arising. This month's *Take 5* addresses five of these new and important issues as they impact employers in the health care industry.

1. **NLRB's Proposed Changes to Its Union Election Rules and Approval of Micro-Bargaining Units Increase Health Care Facilities' Risk of Union**

EPSTEIN BECKER GREEN **immigration**

CLIENT ALERT

September 2014 Immigration Alert

Sixth Circuit Expands the Liability of Health Care Employers for Sponsorship Costs

USCIS Expands H-1B Eligibility for Nurses

Obama Administration Warns ACA Sign-Ups to Provide Proof of Legal Status

nia Supreme Court Expands Rights of Immigrants Working in that State

sues Technical Assistance Regarding Employer's Receipt of Excess entation During the Form I-9 Process

ettles Immigration-Related Discrimination Claims Against Staffing Agency

do Employers Must Use New Affirmation Form Starting October 1, 2014

Valley Man Receives 10-Month Sentence for H-1B Fraud

sues October 2014 Visa Bulletin

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Circuit Expands the Liability of Health Care Employers for Sponsorship

st 20, 2014, the U.S. Court of Appeals for the Sixth Circuit issued its decision in *Kutty v. U.S. ent of Labor*, No. 11-6120 (6th Cir. 2014) ("*Kutty*"). In *Kutty*, several foreign physicians sued the

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Unique Labor and Employment Law Issues In Hospitality

Welcome Your Guests, Not a Lawsuit

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