LABOR AND EMPLOYMENT

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HOSPITALITY

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Five Evolving Issues Confronting Employers in the Hospitality Industry

For the latest employment, labor, and workforce management news and insights concerning the hospitality industry, please visit and subscribe to *Epstein Becker Green's Hospitality Labor and Employment Law blog*.

As the hospitality industry continues to grow and expand, one common goal is to provide all-inclusive experiences for visitors and patrons. Unfortunately, given the breadth of the goods and services offered to the public and the workforce employed to supply these experiences, the hospitality industry is also providing plaintiffs' attorneys and government regulators with their own all-inclusive experience to pursue a full panoply of labor and employment and civil rights claims.

More specifically, hospitality employers face unique challenges in having to comply with both overarching and targeted labor and employment and civil rights laws and regulations that greatly impact their workplace and public facilities. Companies are constantly called upon to change and improve not only the way business is done, but also how facilities and online resources are designed and how employees are paid. Even minor violations can result in costly lawsuits and/or government investigations and related unwanted publicity.

This issue of Epstein Becker Green's *Take 5* addresses several of the key evolving issues confronting employers in the hospitality industry in their roles as both employers and places of public accommodation:

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1. The U.S. DOL's Aggressive Moves to Expand FLSA Coverage

By: Jeffrey H. Ruzal

The U.S. Department of Labor ("DOL") has made a big splash this summer with not one, but two major announcements that will expand worker coverage under the Fair Labor Standards Act ("FLSA") and, no doubt, cause employers to reconsider the configuration and costs of their current workforce. On July 6, 2015, the DOL published a Notice of Proposed Rulemaking that, when finalized, would immediately extend overtime protection to almost five million white collar workers who are currently not entitled to overtime pay because they are exempt from the FLSA.

Shortly thereafter, on July 15, the DOL's Wage and Hour Division Administrator David Weil issued Administrator's Interpretation No. 2015-1 ("Interpretation") advocating the DOL's position that most workers are employees covered by the FLSA and that many employers throughout the country are improperly misclassifying workers as independent contractors.

"White Collar" Exemptions Narrowed

In 2014, President Obama directed the DOL to enhance the FLSA's so-called "white collar" exemptions, which currently exempt from overtime full-time salaried executive, administrative, and professional employees who earn at least $455 per week, or $23,660 per year. The DOL's proposed rule would require these employees to earn more than double that salary threshold—i.e., $970 per week, or $50,440 per year—in order to be considered exempt employees under the FLSA. In addition, the highly compensated employee exemption, which can be relied on to relax the duties requirements under the "white collar" exemptions, would increase from $100,000 to $122,148. Notably, the foregoing salary requirements would further increase annually to adjust for inflation.

The proposed rule does not, however, set forth any enhancements or modifications to the duties requirements under the "white collar" exemptions. Under the current federal regulations, exempt work must constitute the employee's "primary duty." That is a qualitative analysis, not a quantitative one. However, the proposed rule invites comments regarding the amount of time that employees should be engaged in executive, administrative, or professional work to qualify for the exemption. Moreover, the DOL specifically requested comments relating to California's requirement that exempt duties be performed more than 50 percent of the time—a quantitative analysis. Thus, the DOL has suggested the possibility of another significant change to "white collar" exemptions.

The deadline for comments to the proposed rule has passed; the DOL will review the comments that it received, respond where appropriate, and issue its final regulations. The regulations will not be subject to Congressional approval. It is important to note that when the "white collar" exemptions were last revised in 2004, the DOL received more than 100,000 comments and spent nearly a full year responding to those comments before finalizing the regulations. Accordingly, we should not expect the final rule until 2016.

Extinction of the Independent Contractor

Addressing the DOL's argument that most workers are employees and not independent contractors, the Interpretation concludes that most workers are employees because, among other reasons, they are not truly in business for themselves.

The Interpretation is based, albeit quite loosely, on the well-known and relied-upon six-factor "economic realities" test that the DOL and courts consider when determining whether there exists a bona fide employment relationship. The DOL was careful, however, to emphasize only certain aspects of the test that tend to support employee status. The DOL addressed the following aspects of the economic realities test:

- *The Work Must Not Be an Integral Part of the Employer's Business*

  The Interpretation states that job duties are likely to be an "integral part" of an employer's business if they relate to the employer's actual products or services. In most instances, the DOL argues, workers are performing work that is directly related, indeed integral, to the employer's underlying business. However, a true independent contractor's work is unlikely to be integral to the employer's business.

- *There Must Be a Real Opportunity for Profit or Loss*

  The Interpretation emphasizes that the opportunity for profit or loss reflects independent contractor status only when it is dependent on the worker's managerial skill. However, the DOL opines that the fact that a worker can increase his or her earnings by working longer hours for the putative employer is not evidence that the worker is an independent contractor.

- *The Worker's Investment Must Be Significant*

  The Interpretation states that the worker's investment must be significant when compared to the investment of the employer in order for the worker to be considered an independent contractor.

- *The Work Performed Requires Special Business Skills*

  The Interpretation argues that a worker's skills as an independent business, not his or her technical skills, support independent contractor status. The DOL further states that technically skilled workers who are economically dependent on a putative employer are not operating as independent contractors.

- *The Relationship Is Finite*

  The DOL states that the relationship between the worker and putative employer should be finite and that the finite nature of the relationship should be the result of the worker's own business initiative—i.e., the worker's decision, not the putative employer's—in order for the worker to qualify as an independent contractor.

- *The Amount of Employer Control Is Limited*

  The Interpretation emphasizes that an independent contractor must control meaningful aspects of the work, demonstrating that the worker is conducting his or her own business.

In light of the DOL's recent aggressive agenda to expand worker coverage under the FLSA, it is important for employers to carefully audit their contractor and exempt employee populations, identify high risk areas, and consider whether to reclassify or pursue other remediation measures, such as utilizing contractors who are employees of third-party vendors or augmenting the job duties of borderline exempt positions.

2. The NLRB's New Test for Determining Joint-Employer Status and Its Impact on Hospitality Employers

By: Steven M. Swirsky

One of the principal threats facing employers in the hospitality industry in recent years has been the campaign led by the Service Employees International Union ("SEIU"), known as the "Fight for 15," to organize workers in the fast food and casual dining industries and to push for a minimum wage of $15.00 per hour for employees in these fields. As the "Fight for 15" website makes clear, the SEIU's underlying goal is not just to push for higher wages and benefits, but also to organize these workers and to become their collective bargaining representative.

The "Fight for 15" Campaign

A major element of the campaign has been to make the case that (in regard to franchised restaurants and dining establishments) there cannot be meaningful bargaining with a franchisee. The SEIU claims that, because the franchisor dictates many of the operational and economic terms that affect employees, the franchisor must also be at the table and be held accountable as the joint employer of its franchisees' employees. Unions are making the same argument in the hotel and lodging industries against hospitality employers that operate under franchise.

The *McDonald's* Cases—A Call for a New Test for Joint-Employer Status

In numerous unfair labor practice ("ULP") charges filed by the SEIU against McDonald's USA, LLC ("McDonald's"), and franchisees across the nation alleging improper interference with the SEIU's organizing efforts, the union also alleged that McDonald's and its franchisees are joint employers for purposes of the National Labor Relations Act ("NLRA").

The General Counsel of the National Labor Relations Board ("NLRB" or "Board") agreed with that assertion and issued a series of complaints. In his complaints, the Board's General Counsel asserted that he would be able to prove a joint employment relationship not only under the new looser test that he was advocating that the Board adopt, but under the existing standard as well.

Browning-Ferris Industries—The NLRB Adopts a New Test for Finding Joint-Employer Status

On August 26, 2015, the Board issued its long-awaited decision in *Browning-Ferris Industries* in which, as many had predicted, it discarded its long-standing test and adopted a new, far looser standard that is likely to make it far easier for unions, employees, and the NLRB to establish that a franchisor is a joint employer of its franchisee's employees. *Browning-Ferris* jettisons the long-standing requirement that, not only must a party have the means to influence the terms and conditions of employment of the other employer's employees, but the party must also have exercised that right in a meaningful way.

Under the new standard enunciated by the majority, "[t]he Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." If the decision is upheld and followed, no longer will the Board need to find that an employer retains and exercises direct control over another employer's employees for the Board to determine that the employer is liable as a joint employer of those employees.

So what exactly is changed? Previously, an employer had to *exercise* direct and immediate control over the terms and conditions of employment to be found to be a joint employer. Under the new standard, what matters is whether the purported joint employer *possesses* the authority to control the terms and conditions of employment, either directly or indirectly. In other words, the ability to exercise control, regardless of whether the company has, in fact, exercised such authority, is the focus of the Board's inquiry. As the Board puts it, "*[r]eserved authority* to control terms and conditions of employment, *even if not exercised*, is clearly relevant to the joint-employment inquiry" (emphasis added).

Why This Matters for Hospitality Employers

While the full import of *Browning-Ferris* may unfold over years of administrative litigation and court review, we know that the obvious (and intended) effect of the decision is to permit the Board to find joint-employer status where it did not previously exist. Notwithstanding the arrangements that employers and contractors have made in years past to guard against joint-employer exposure, unions will be at the ready with ULP charges and representation petitions as vehicles for the Board to apply its new standard and examine or reexamine relationships forged before the pronouncements of *Browning-Ferris*. Thus, employers should anticipate a role in newly filed proceedings alleging joint-employer status—even as they contemplate reforming or redefining terms by which they engage with contractors and other providers of services supportive of their business.

Especially troubling is the fact that the Board, in its zeal to create new applications for its joint-employer criteria, intends to ignore existing facts showing no actual exercise of control by one employer over the employee relations of another, and instead look for control that potentially could be exercised in an ordinary arm's length business relationship. Given these circumstances, even those employers that do not exercise *any* direct or indirect control over the employees of its contractors should review carefully the terms of such arrangements, keeping in mind the Board's stated intention of expanding joint-employer status.

What to Do Now

It is not an exaggeration to say that while the new standard will impact employers in almost every industry, hospitality employers, who rely on a variety of contactors for a range of services—from food service operations and valet services to room cleaning and many others—are particularly at risk. As a first step, hospitality employers will want to closely examine their relationships with those who provide them with temporaries and other contingent workers, as well as their contracts and relationships with those other businesses that provide integral services and support, to assess whether there is a vulnerability to findings of joint-employer status.

3. At the 25th Anniversary of the ADA, How to Avoid Getting Bitten by Service Animal Complaints

By: Joshua A. Stein

July 26, 2015, marked the 25th anniversary of the Americans with Disabilities Act ("ADA"). Unfortunately for those who own, operate, lease, or control places of hospitality and/or lodging (e.g., a hotel, restaurant/bar, cruise line, or casino), the ADA's anniversary has not only been marked with celebrations, but also a stark increase in government investigations and enforcement actions, advocacy group initiatives, and private plaintiff litigations. One topic that has gained renewed attention as part of this swell of activity is service animals.

As discussed below, the ADA's coverage of service animals is fairly straight forward in the abstract and has not significantly changed since the adoption of revised regulations in 2010. Therefore, many wonder why service animals remain such a common source of complaints of discrimination. While one cannot say for sure, there are several factors that may all contribute to service animals remaining a considerable source of liability.

First, service animals are synonymous with access and, therefore, when a potential visitor is told that he or she cannot bring an animal into a place of hospitality and/or lodging, it is perceived as a denial of access that, if on the basis of someone's disability, could be considered blatant discrimination.

Second, service animal issues are often emotionally charged. This is not only because such exchanges can be interpreted as a denial of access but also because people often have strong attachments to their animals and take great offense to any suggestion that an animal should not be allowed to accompany the guest wherever he or she wishes to go, even if the law does not require it.

Finally, because service animal issues involve access, any disputes regarding whether an animal can enter a place of hospitality and/or lodging ordinarily occurs in public at the entrance to the location. This means that these disputes will involve front-line employees who may struggle with some of the nuances involved in determining whether or not to allow an animal into a location and also draw unwanted attention for all parties involved.

General Background

Under Title III of the ADA ("Title III"), a place of hospitality and/or lodging does not have to permit animals that are only pets inside. However, service animals must be permitted to accompany people with disabilities in all public areas of the place of hospitality and/or lodging, where other visitors are allowed to go. "Service animals" are defined as dogs that are individually trained to do work or perform tasks for the benefit of an individual with a disability.[1] While the most commonly recognized type of service animal is a guide dog, many others exist, such as hearing dogs and psychiatric service dogs.[2]

[1] Under Title III, in certain circumstances, miniature horses can also be considered service animals.

[2] While a service animal in training is not considered a service animal under Title III, some state and local laws do extend coverage to dogs that are training to be a service animal.

If it is not readily apparent that a dog is a service animal, a visitor seeking to bring a service animal into a place of hospitality and/or lodging may be asked by staff the appropriate qualifying questions: “Is the dog required because of a disability?”[3] and “What task/work has the dog been trained to perform/do?”

Regardless of the answers, a place of hospitality and/or lodging may not request that the visitor provide any sort of license or certification papers corroborating the dog’s status as a service animal. Indeed, there is no official license, certification, or “uniform” for service animals (and such “credentials” can be readily purchased on the Internet without any verification that the dog is truly a service animal).

Obligations of the Service Animal Handler

Once a place of hospitality and/or lodging allows a service animal onto the premises, the individual with the disability then bears a variety of burdens in order for the service animal to remain, as he or she is responsible for caring for the service animal for the entirety of his or her stay. The individual must ensure that the service animal:

- is housebroken (taking the service animal to the designated “parking/relief area” when the dog needs to relieve itself);

- is under control at all times and not adversely affecting the comfort and enjoyment of other visitors (e.g., not incessantly barking at others or running away from the handler);[4]

- does not pose a threat to the health or safety of others (e.g., properly vaccinated and not biting people); and

- does not cause property damage.

To the extent it is reasonable, when a service animal is exhibiting any behaviors contrary to these requirements, the place of hospitality and/or lodging should warn its handler that, unless the behavior stops, the service animal must vacate the premises. (Of course, certain circumstances—such as biting someone—would be grounds for the instantaneous removal of the service animal.) When removing a service animal from the premises, the visitor with the disability must be given the option of remaining at the place of hospitality and/or lodging.

Additionally, the reasons for removing the service animal from the premises should be contemporaneously documented (e.g., by security or customer relations) in a report that includes:

- the time,

- the date,

- the name of the service animal handler (if available),

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[3] Staff cannot ask what the disability is.

[4] That said, the fact that another visitor might be afraid of, or allergic to, dogs is not appropriate grounds for the exclusion of a service animal.

- the type of animal,
- the nature of the task/work that the animal purportedly performs,
- details about the nature of the threat posed and/or inappropriate behavior demonstrated,
- the name of any employees involved in the situation, and
- specifics of any conversations with the handler about the issue.

This documentation should be provided to the appropriate members of management and/or the legal department.[5]

Emotional Support Animals

There is one more nuanced issue that can create a greater risk of exposure in this context—distinguishing between psychiatric service animals and emotional support animals.

As noted above, Title III only covers service animals, which include psychiatric service animals trained to perform tasks or do work for an individual with a disability (e.g., guide a disoriented handler, get help at the onset of an episode, or remind the handler to take medication). An emotional support animal is not trained. Instead, individuals with certain disabilities (e.g., anxiety or depression) are instructed by their treating health care provider that the company of the dog (or actively petting or holding the dog) may alleviate symptoms of their condition. In essence, the person with the disability is trained to utilize the emotional support animal and, therefore, the emotional support animal is not a service animal and thus not protected by Title III.[6]

Of course, given the limited inquiries that places of hospitality and/or lodging are permitted to make of the dog's handler when he or she seeks to bring a dog onto the premises, ascertaining whether a dog is a service animal (to be granted access under Title III) or an emotional support animal (which can be denied access) is, admittedly, easier said than done. This is particularly the case when an individual might be less than truthful about their dog or begins to rapidly escalate the encounter into a heated confrontation.[7] Thus, rather than risk a front-line employee making a mistake that results in an improper denial of access, many places of hospitality and/or lodging have taken to allowing most dogs onto the premises with the understanding that, if the dog is not truly a service animal, it will likely run afoul of the various conduct/behavior requirements and quickly create a clear reason for its lawful exclusion.

DOJ's FAQ

In light of the number of ongoing complaints that still persist regarding issues relating to service animals, the U.S. Department of Justice recently issued a new guidance document, "Frequently

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[5] Similar documentation should be maintained when (i) an animal is denied access to the place of hospitality and/or lodging, and (ii) a service animal has damaged property and/or injured someone.

[6] Some state and local governments have laws that more broadly allow owners to take emotional support animals in public places.

[7] These circumstances are not helped by confusion caused by the fact that some other laws addressing accessibility/disability do contemplate allowing an emotional support animal where pets are ordinarily banned (e.g., the Fair Housing Act and Title I of the ADA).

Asked Questions about Service Animals and the ADA," as part of its many activities surrounding the ADA's 25th anniversary. While the majority of the guidance simply discusses well-tread issues in a user-friendly question and answer format, it does address the following points, which are of particular interest to places of hospitality and/or lodging:

- Service animals must be allowed to accompany their handlers to and through self-service food lines. (However, the ADA does not override any applicable public health rules that might prohibit a dog in a specific area.).

- Places of hospitality are not required to allow an animal to sit or be fed at the table with its handler. Similarly, the place of hospitality need not provide food and drink for the service animal.

- Individuals using service animals cannot be restricted to "pet friendly" rooms in a place of lodging; they must be permitted to reserve any available room.

- Places of lodging cannot charge guests for cleaning the hair or dander shed by a service animal (but can charge for property damage).

- Guests of places of lodging cannot leave their service animal alone in their room.

4. The Cadillac Tax: What Hospitality Employers Need to Know

By: Brandon C. Ge and Adam C. Solander

As one of the last pieces of the Affordable Care Act ("ACA") to be implemented, the so-called Cadillac Tax has taken the spotlight. Scheduled to become effective in 2018, the Cadillac Tax imposes a 40 percent excise tax on a health plan's excess benefits over specified thresholds—$10,200 for individual coverage and $27,500 for family coverage, with adjustments for certain high-risk professions, retirees, and workforces with particular age and gender characteristics.

The Cadillac Tax was passed to generate revenue and decelerate rising health care costs by encouraging employers with lavish health plans to restructure their benefits. The theory was that by pressuring employers with extravagant health plans to reduce their health benefits, their employees would spend less on health care and reduce the country's overall health care spending. When passed, proponents argued that the tax would affect only a small number of benefit-rich health plans.

In reality, the Cadillac Tax will likely affect a much larger universe of employers. According to a November 2014 study conducted by the American Health Policy Institute, in 2018, the tax will directly affect approximately 17 percent of all American employers, including 38 percent of large employers. A September 2014 Towers Watson study revealed that approximately 50 percent of employers with 5,000 or more employees will trigger the Cadillac Tax in 2018, which will rise to 82 percent by 2023. The significant increase in affected employers over time is due, in large part, to rapidly accelerating health care costs. Cadillac Tax thresholds are indexed for inflation based on increases in the Consumer Price Index, which lags far behind health care inflation.

In addition, estimates of tax liability are significant. For example, one employer surveyed in the American Health Policy Institute study estimated that it would be on the hook for $378 million in Cadillac Tax liability from 2018 to 2023.

The Cadillac Tax's Effects on the Hospitality Industry

There has historically been a strong union presence in the hospitality industry, particularly hoteliers. The result is a significant number of collectively bargained plans among hospitality employers. Many experts believe that such plans will be among those hardest hit by the Cadillac Tax since they typically impose lower cost sharing and offer more generous health benefits than other employer-sponsored plans.

According to a Health Affairs report, the difference between collectively bargained plans and employer-sponsored plans is substantial. The report found that employee contributions for single coverage in collectively bargained plans average $21 for single coverage and $69 for family coverage per month. Meanwhile, the average employer-sponsored plan costs $83 for single coverage and $380 for family coverage per month. Collectively bargained plans will therefore be especially susceptible to Cadillac Tax liability. And while certain unionized high-risk occupations (such as law enforcement, mining, and construction) will have some flexibility in terms of the dollar threshold, this is likely to have a negligible effect on hospitality employers.

Action Items

Although the Cadillac Tax is still more than two years away from taking effect, unionized hospitality employers need to consider the implications of the Cadillac Tax in negotiations for collectively bargained plans under contracts extending past January 1, 2018. Ideally, employers should look to add a provision that allows them to make any necessary changes to the health plan to eliminate Cadillac Tax liability. Another alternative that may be more amenable to unions is to include a reopener provision that would reopen contract talks on health benefits at some point before 2018.

Hospitality employers should also consider offering their input on key Cadillac Tax issues to potentially guide regulatory implementation in their favor. The Department of the Treasury and Internal Revenue Service (collectively, "Treasury") have thus far issued two notices proposing various approaches to implementing the Cadillac Tax:

- The first notice, Notice 2015-16, addressed some of the core issues, such as what types of coverage are taken into account when calculating liability, how to calculate the cost of coverage, and what adjustments to the annual dollar thresholds will be permitted.

- The second notice, Notice 2015-52, was published in July 2015 and supplements the first notice by addressing such issues as who is liable for the Cadillac Tax (given that several entities may be involved in administering benefits for a particular workforce), how the tax will be allocated, and how the tax will be paid.

Comments on Notice 2015-52 are due by October 1, 2015, and the Treasury is continuing to entertain comments on the first notice as well. After considering public comments, the Treasury will issue proposed regulations, after which employers will have another opportunity to comment.

Unfortunately, the Treasury will not have unfettered authority in drafting regulations. Some of the core Cadillac Tax issues are statutorily defined, including the annual dollar thresholds and the link between these thresholds and increases in the Consumer Price Index. A legislative fix seems unlikely given the significant revenues that the Cadillac Tax is expected to generate for the government. And it is unclear how far the Treasury will extend its regulatory authority to resolve those issues in favor of employers.

Nonetheless, there are proactive ways to address the statutorily prescribed provisions, such as the provision of transition relief that would allow employers more time to determine the impact of the tax and restructure their benefits accordingly.

5. OSHA's Revised Hazard Communication Standard

By: Valerie Butera

The Occupational Safety and Health Administration's ("OSHA's") Hazard Communication ("HAZCOM") standard was the most frequently cited OSHA standard in the hospitality industry last year. The HAZCOM standard has always been a challenge for hospitality employers, but, thanks to a major overhaul, it has become even more troubling.

In 2012, OSHA revised the HAZCOM standard (which had been unchanged since 1994) in order to align it with the Globally Harmonized System of Classification and Labeling of Chemicals ("GHS")—a United Nations project aimed at providing a common and coherent approach to classifying chemicals and communicating hazard information on labels and safety data sheets ("SDSs"). Before the GHS project, the information required on warning labels and SDSs varied greatly among different countries and even among different agencies within the same country, causing a great deal of confusion for the regulated community. The deadline for compliance with nearly every aspect of the revised HAZCOM standard was December 1, 2015.

The New Inspection Guidelines

OSHA recently released new inspection guidelines for OSHA inspections reflecting the changes in the revised HAZCOM standard. The new guidelines became effective on July 9, 2015.

The Significance of the Written HAZCOM Program

Perhaps the most notable element of the new HAZCOM inspection guidelines is a tremendous focus on the employer's written HAZCOM program and related HAZCOM documentation. Inspectors are directed to begin HAZCOM inspections with a review of the employer's written HAZCOM program to determine whether it meets all of the requirements for the revised standard. Specifically, the revised standard requires that the written program contain details about labels and other forms of warnings, SDSs, and training programs. The written program must include a chemical inventory, which includes a product identifier for each chemical known to be present in the workplace that aligns with the SDS and label. The inventory must include all chemicals present (even if the chemicals are stored and not in use). The program must detail the methods that the employer will use to inform employees of the hazards that they may encounter in both routine and non-routine tasks in their work areas.

If contractors are working at the workplace, the written program must include methods to ensure that all other employers working at the same workplace have immediate on-site access to SDSs for each hazardous chemical that they may be exposed to, methods to inform other employers about any necessary precautionary measures to protect employees, and how to inform other employers about the labeling system used.

The written program must be made available to employees, employee representatives, National Institute for Occupational Safety and Health ("NIOSH") and OSHA representatives upon request, and this fact must be included in the written program. And the guidelines require employers to designate specific individuals responsible for certain tasks required by the standard, including the designation of the person(s) responsible for workplace labeling, obtaining and maintaining the SDSs, and conducting HAZCOM training. Once the employer's written program has been scrutinized, compliance officers must confirm that the employer's practices match the written information provided in the program.

HAZCOM Citations for Substances That the Employer May Not Realize Are Hazardous

OSHA has determined that the agency's own standard providing the permissible exposure limits to certain substances is outdated and fails to protect employees from hazards related to those substances. Rather than updating the standard, OSHA has found a creative way to use the HAZCOM standard to permit compliance officers to issue HAZCOM citations, even when the employer is in compliance with OSHA's permissible exposure limits.

Compliance officers are to investigate substances found in the workplace and determine whether they should be deemed hazardous (and thus subject to regulation under the HAZCOM standard). These officers will be carefully scrutinizing any substance:

- for which OSHA has established permissible exposure limits;

- for which the American Conference of Governmental Industrial Hygienists has a Threshold Limit Value in the latest edition of its annual list and documentation for Threshold Limit Values; and

- that the National Toxicology Program has found to be a suspect or confirmed carcinogen or that OSHA regulates as a carcinogen.

Some Things Have Remained Unchanged

Although much has changed under the revised HAZCOM standard, some critical elements remain the same. Employers have always been required to provide immediate access to SDSs (previously known as "material safety data sheets" or "MSDSs") and that requirement is still in place. And frequent, effective training remains a significant priority under the revised standard. Employers must make sure not only that employees have been trained on the hazards related to every hazardous substance in the workplace but also that the training has been provided in such a way that every employee understands it. When new hazardous chemicals are brought into the workplace, additional training must also be provided.

OSHA has always targeted the hospitality industry for HAZCOM enforcement, and there is no indication that this will change under the revised standard. Accordingly, hospitality employers must be particularly vigilant to ensure that they are in compliance with *all* elements of the revised HAZCOM standard. A few critical actions will go a long way in reducing or possibly eliminating the chance of receiving a HAZCOM citation. Employers should do the following:

- Review all of the chemicals that OSHA and the American Conference of Governmental Hygienists have deemed hazardous, and make sure that those substances are included in the chemical inventory in the written HAZCOM program and in compliance with every other HAZCOM requirement.

- Critically review the written HAZCOM program from start to finish, ensuring that new requirements have been satisfied and that individuals designated with particular HAZCOM responsibilities fully understand the entire program and are especially knowledgeable about the areas for which they are responsible.

- Make certain that employees have ready access to SDSs.

- Ensure that employees are trained on the hazards of the substances that they work with, and quiz employees after they have been trained to confirm that that they understood the training.

- Be mindful of all of the potentially hazardous substances in the workplace, and make certain that those hazards have been effectively conveyed to employees.

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For additional information about the issues discussed above, please contact the Epstein Becker Green attorney who regularly handles your legal matters or an author of this *Take 5:*

Jeffrey H. Ruzal
New York
212/351-3762
jruzal@ebglaw.com

Steven M. Swirsky
New York
212/351-4640
sswirsky@ebglaw.com

Joshua A. Stein
New York
212/351-4660
jstein@ebglaw.com

Brandon C. Ge
Washington, DC
202/861-1841
bge@ebglaw.com

Adam C. Solander
Washington, DC
202/861-1884
asolander@ebglaw.com

Valerie Butera
Washington, DC
202/861-5325
vbutera@ebglaw.com