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HOSPITALITY

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An Assortment of Legal Issues Hospitality Employers Should Be Considering This Year

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The first quarter of 2018 has already stirred up an array of legal matters that employers in the hospitality industry should be conscious of, both in their day-to-day operations and long-term planning. In February alone, the U.S. House of Representatives passed legislation to curb lawsuits focused on the inaccessibility of brick-and-mortar business establishments and a federal appeals court ruled that discrimination based on sexual orientation violates Title VII of the Civil Rights Act of 1964 ("Title VII"). Earlier this month, the U.S. Department of Labor announced a pilot program that will allow employers to avoid potential penalties for overtime and minimum wage violations. In addition, the #MeToo movement continues to be top of mind across all industries, and hospitality employers should be vigilant in their training and employee awareness efforts. Due diligence in change-of-ownership transactions should include labor relations issues, especially with unionized employees.

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

1. Will Congress Slam the Breaks on ADA "Drive By" Lawsuits?

By Joshua A. Stein

In any given week, dozens of lawsuits are filed in federal courts across the United States alleging that businesses violate Title III of the Americans with Disabilities Act ("ADA"), which governs the accessibility of places of public accommodation. While many of these lawsuits now focus on website accessibility, a significant number of them continue to focus on the alleged inaccessibility of brick-and-mortar business establishments, particularly restaurants and hotels. These "drive by" ADA lawsuits often focus on the inaccessibility of architectural elements that can be easily assessed by "testers" without even frequenting the establishment in question—e.g., parking spaces, sidewalks, entrances, public restrooms, host/check-in stations, and pools—sometimes even relying on online images. Moreover, the allegations asserted are often highly technical in nature—living and dying by a matter of centimeters—known only to those who specialize in accessibility. Notably, the vast majority of these claims are brought by a relatively small community of serial plaintiffs and plaintiffs' counsel for whom achieving compliance is secondary to quickly obtaining a settlement payment and attorneys' fees.

On February 15, 2018, in an effort to curb such drive-by ADA lawsuits, the U.S. House of Representatives passed legislation—the ADA Education and Reform Act (H.R. 620) ("ADAERA")—that would require that would-be plaintiffs first provide written notice of alleged architectural barriers and a period to cure before being able to commence a Title III litigation in federal court. Under ADAERA, before plaintiffs could file a Title III claim alleging architectural barriers in federal court, they would first have to provide written notice of the existence of barriers to accessibility (containing sufficient specificity, and citations to the relevant sections of the ADA, to allow the barriers to be identified by the business). The business would then have 60 days from receipt of the notice to provide a plan for the remediation of the existing barriers and an additional 120 days to eliminate the barriers or make substantial progress in doing so. If the business does not respond to the initial letter within 60 days or does not make substantial progress in eliminating the barriers within the following 120 days, then the plaintiff can commence a federal Title III litigation. ADAERA also seeks to create a model program for the use of alternative dispute resolution mechanisms in the resolution of federal Title III claims (e.g., a mediation program that stays discovery while the mediation proceeds). Of course, before it can become law, ADAERA still needs to be passed by the Senate (given the Senate's current composition, there is no guarantee that it will pass) and then signed by President Trump.

It should come as no surprise that ADAERA has been met with a wide range of reactions. Proponents of the bill argue that ADAERA would preserve the intended purpose of Title III—removing barriers to accessibility—but eliminate the existing incentives for plaintiffs' counsel to flood the courts with lawsuits premised on minute technical architectural violations with the primary goal of churning up and quickly collecting fees via a settlement. Opponents argue that, as the ADA has been law for more than 25 years, businesses that are not currently in compliance with Title III should not get the benefit of notice and additional time to comply with the long-established law. They fear that ADAERA would encourage businesses to ignore their Title III obligations until receiving a notice of deficiency.

Even if ADAERA, as currently constituted, ultimately becomes law, it could very well have unintended consequences that could create even less desirable circumstances for businesses. First, ADAERA would not prevent plaintiffs from bringing similar cases in state court under state and local accessibility laws, which often are even broader and more liberally interpreted than their federal counterpart. Indeed, plaintiffs often already include such claims as part of their federal actions because, unlike under the ADA, many state and local accessibility statutes allow plaintiffs to seek the recovery of damages and/or civil penalties. Second, as ADAERA does not impose notice requirements for claims under Title III relating to businesses' obligations to (i) make reasonable modifications to their policies, practices, and procedures, or (ii) provide auxiliary aids and services to enable effective communication, plaintiffs might simply turn their focus to a different type of federal Title III claim. In both of these instances, the result could very well be more protracted litigations under less favorable conditions (e.g., a less efficient forum or less clarity regarding requirements for compliance).

While ADAERA still has a way to go before becoming law, this is the furthest a legislative effort to reform Title III to prevent the rampant proliferation of drive-by filings has progressed, and it is worth tracking.

UPDATE: On March 28, 2018, forty-three Democratic senators united to protest the proposed H.R. 620. The filibuster-proof bloc sent a letter to Majority Leader Mitch McConnell warning that the proposal "will never receive a vote in the United States Senate during the 115th Congress." The letter also points out the H.R. 620, as contemplated, would do nothing to curb plaintiffs from pursuing damages claims under state/local laws. The senators instead favor investing in greater education about Title III's requirements and the development of a mediation program.

2. Expanding Sex Discrimination Protection to LGBT Employees in the Hospitality Industry

By Amanda M. Gómez and Kate B. Rhodes

In a move that could have broad national effects on the rights of lesbian, gay, bisexual, and transgender ("LGBT") employees in the workplace, the U.S. Court of Appeals for the Second Circuit recently ruled that discrimination based on sexual orientation violates Title VII, deciding in favor of the estate of a deceased skydiving instructor who was allegedly fired after telling a client that he was gay.

On February 26, 2018, the Second Circuit, in *Zarda v. Altitude Express,* became the second federal appeals court to rule that Title VII encompasses sexual orientation discrimination, joining the Seventh Circuit in its decision in *Hively v. Ivy Tech Community College* from last year. This issue has divided courts for years, and even caused a split between the Equal Employment Opportunity Commission ("EEOC") and the U.S. Department of Justice, with the former arguing in favor of including sexual orientation under Title VII's protections and the latter arguing against it. The Second Circuit's decision furthers a circuit split, which occurred when the Eleventh Circuit held that sexual orientation discrimination is not actionable under Title VII.

As places of public accommodation, hospitality employers are no strangers to discrimination claims based on sexual orientation. On February 23, 2018, for example, in *Cervelli and Bufford v. Aloha Bed & Breakfast*, a Hawaii state appeals court found that a Honolulu bed-and-breakfast operated in a private home cannot claim a religious right to refuse to rent a room to a lesbian couple on the basis of their sexuality. The U.S. Supreme Court is poised to review a similar issue in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, which involves a dispute over whether the Christian owner of a bakeshop in Colorado had a legal right to refuse to bake a cake for a same-sex wedding.

The Second Circuit's decision, however, should prompt employers to look toward their employee base as well as their patrons as the reach of Title VII's protection expands. Chief Judge Robert A. Katzmann delivered the majority opinion in *Zarda* and concluded the following:

> Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor. Sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account.

In so holding, the majority adopted each of the theories advanced by the EEOC. Applying the "comparative test" to determine whether an employment practice constitutes sex discrimination, the Second Circuit considered the example in the Seventh Circuit's *Hively* decision. In *Hively*, the court compared a lesbian woman to a heterosexual man and rejected the framing urged by the Department of Justice, which would compare a woman attracted to people of the same sex with a man attracted to people of the same sex. Finding that sexual orientation acts as a proxy for sex, the majority concluded that a lesbian treated differently than a heterosexual man due to her sexual orientation would not have been subject to an adverse action "but for" her sex.

The majority opinion also concluded that sexual orientation discrimination constitutes actionable gender stereotyping, held to be unlawful under the Supreme Court decision in *Price Waterhouse v. Hopkins*, and associational discrimination, borrowing principles from another Supreme Court decision, *Loving v. Virginia*.

In his dissent, Judge Gerard E. Lynch argued that Congress did not intend to cover sexual orientation discrimination when drafting Title VII. The majority acknowledged this fact, but also recognized that the legal framework for evaluating Title VII claims has changed dramatically over time.

What Hospitality Employers Should Do Now

Like all employers operating within the Second Circuit—comprising New York State, Connecticut, and Vermont—hospitality employers already should have in place policies prohibiting sexual orientation discrimination because those states' laws expressly prohibit such conduct. But this decision provides a roadmap for the potential adoption by other circuits around the country and suggests that the Supreme Court may settle the current circuit split. Thus, hospitality employers are encouraged to adopt nationwide policies prohibiting sexual orientation discrimination to the extent they have not done so, and incorporate these issues into their training programs.

Hospitality employers also should consider amending their nondiscrimination policies to cover gender identity. The Second Circuit's sex stereotype theory, which prohibits employers from discriminating against employees who fail to adhere to gender stereotypes, indicates that gender identity discrimination may be viewed as a form of sex discrimination, such that it is worthy of protection under an employer's nondiscrimination policies. In fact, less than two weeks after the Second Circuit's decision, the Sixth Circuit ruled in *EEOC v. R.G. &. G.R. Harris Funeral Homes* that discrimination against a worker based on gender identity or because the worker is transitioning is sex discrimination that violates existing federal law.

Taking a proactive approach to developing nondiscrimination policies that cover both sexual orientation and gender identity will not only help employers achieve compliance with the law articulated by these new court decisions but also may enhance recruitment efforts. Further, cities and states with strong protections for LGBT individuals are increasingly seen as particularly desirable for businesses seeking to expand and/or relocate their operations.

3. Effective Compliance Training in the Hospitality Industry in the Wake of #MeToo

By Andrea K. Douglas and Katrina J. Walasik

While the #MeToo movement rose to the national spotlight following revelations of sexual harassment in the entertainment industry, an EEOC report states, "Sexual harassment is a serious problem for women working in the hospitality industry, due in part to the unusual hours and conditions of work, the interactions of persons in the delivery service, and traditional personnel practices in the industry." In fact, EEOC data indicates more charges of sexual harassment come from the hospitality industry than any other industry. Now more than ever, it is important for employers in this industry to consider how to use training as a tool to empower supervisors and managers to prevent and correct harassment as part of a comprehensive antidiscrimination compliance program.

Effective Training as an Anti-Harassment Tool

The EEOC recently concluded that much of the anti-harassment training completed in the past 30 years has been an ineffective prevention tool because the training was focused on avoidance of liability rather than creating respectful workplaces. In some circumstances, these types of programs did little to change behaviors and reinforced gender stereotypes. Thus, rather than providing training for the sake of training, employers should now focus on providing the right kind of training:

Quality Training

The EEOC's Select Task Force on the Study of Harassment found that the most effective training is tailored to an employee's workplace. Thus, training for individuals employed in the hospitality industry would not be the same as training provided to another industry (e.g., training provided to employees working in a restaurant would be different from the training provided to employees working in an accounting firm due to the different working environment). Additionally, the differences in work environments from industry to industry can significantly impact how, where, and in what capacity employees interact with one another. For example, the lack of individualized offices and work spaces in a restaurant or retail setting can blur boundaries regarding personal space for employees. So, tailoring training to specific industries affords an opportunity for training that is individualized to specific, applicable scenarios and, therefore, valuable to employees and managers. The task force also recommends that training be provided in person in an interactive format, rather than online.

Supervisor Empowerment Training

Because supervisors and managers have additional responsibilities with respect to harassment, the EEOC's Select Task Force on the Study of Harassment found that these employees should have additional, separate training on how to identify and respond effectively to harassment even before such harassment rises to the legally actionable level.

Effective harassment training for supervisors should therefore include the following:

- information about how to prevent and correct harassment, including identification of the risk factors for harassment and clear instructions on how to report harassment;
- a categorical statement that retaliation is prohibited; and
- clear explanations of the consequences for failing to fulfill their managerial duties related to harassment and retaliation.

Workplace Civility Training

Characterizing workplace incivility as a "gateway drug" to workplace harassment, the EEOC's Select Task Force also suggested that employers consider implementing other kinds of training programs as part of a holistic harassment prevention effort. For example, employers might consider implementing workplace civility training as part of a harassment prevention effort. Workplace civility training initiatives are aimed at creating a civil workplace for everyone by teaching employees to increase their awareness of respectful behavior.

Bystander Intervention Training

The goal of bystander intervention training is to empower everyone in the workplace—not just the victims—to stop harassment. The EEOC cited the success of bystander intervention training programs on college campuses and suggested that employers might use such training to teach employees how to disrupt harassment in progress, talk to harassers about their actions, and talk to targets of harassment.

An Ounce of Prevention Is Worth a Pound of Cure

In light of the #MeToo movement, employers in the hospitality industry need to be especially cautious about increasing their awareness and sensitivity to workplace harassment.

Employers should be vigilant about fostering and sustaining a work environment that is free from harassment, which can be efficiently achieved through proper and consistent in-person training for all employees in an interactive format.

4. Transactional Due Diligence Should Include Labor Relations Issues

By Michael F. McGahan

Before entering into a change-of-ownership transaction, joint venture, or similar transaction involving hospitality employers, the parties frequently perform thorough due diligence on financial and regulatory matters. Because employers in the hospitality industry typically employ large workforces, a due diligence review should include an examination of labor relations issues. A thorough and coordinated review of such issues can help limit the risk of post-transaction labor surprises that could have significant financial and operational implications for hospitality employers—even those currently without any unionized employees.

Looking Beneath the Surface to Anticipate Potential Post-Transaction Labor Issues in Nonunion Workforces

The time before and during a change of ownership, management, or corporate structure can be a period of great uncertainty for employees in the hospitality industry. Employees may worry not only about whether their compensation, benefits, and work environment will change but also about whether they will still have a job once the change of ownership is completed. The hospitality industry continues to be a target for union organizing, and this period of uncertainty can be ripe for union organizing activities in a nonunion workforce, or cause interest in an expansion of union representation where part of a workforce is already represented.

To begin with, the due diligence effort must address whether there are any ongoing attempts to organize the workforce, such as National Labor Relations Board representation proceedings, direct demands for recognition from unions, or evidence of organizing or card-signing campaigns. The parties to the transaction conduct an audit to identify vulnerabilities to union organizing efforts, analyze whether the seller is paying competitive wages and benefits, and examine records of employee complaints about workplace issues. In addition, the review should confirm proper compliance with the many laws governing employment (such as wage and hour laws; the Family and Medical Leave Act; laws prohibiting discrimination and harassment; and similar laws on federal, state, and, increasingly, local leave requirements), because unions could leverage an employer's poor compliance with those laws as a basis for organizing activities.

What to Look for When the Workforce Is Already Organized

When the workforce is represented, either in whole or in part, by a union, the due diligence review should start with the collective bargaining agreements ("CBAs"). The CBAs will disclose not just current wages and benefits but also scheduled increases in wages and employer contributions to pension and health care funds. Identifying the expiration date of CBAs will reveal trigger dates for a new round of bargaining. The CBAs may include applicable successorship language that could require the acquiring entity to recognize the union and honor existing CBAs, or purport to require that the union be recognized by, and the CBAs applied to, any new or acquired facilities. It is also important to identify “neutrality” clauses, which require that the employer not oppose any union organizing efforts in unrepresented job classes or at other locations owned or operated by the employer.

When a CBA indicates that participation in multiemployer pension or health funds is required, the parties should expand their due diligence review to include the financial health of the plans and the benefits provided. A critical examination of multiemployer pension plans under the Pension Protection Act and the Multiemployer Pension Reform Act is particularly important—severely underfunded pension plans will likely have adopted rehabilitation plans that require hefty increases in employer contributions each year. They also carry the potential for massive withdrawal liability under the Employee Retirement Income Security Act of 1974 (otherwise known as “ERISA”) if an employer ceases contributions to the fund or the fund suffers a “mass withdrawal” of employers. Parties also should determine whether a withdrawal has already occurred and withdrawal liability incurred, or whether the transaction itself will trigger withdrawal liability. Several recent federal court decisions have imposed withdrawal liabilities on successor employers in asset purchase agreements.[1]

Employee health plans, particularly multiemployer health plans, can have potential hidden liabilities for an acquiring or partnering entity. Not only should these plans be carefully evaluated for compliance with the many mandates of the Affordable Care Act, but also past increases in employer contributions or costs should be reviewed as part of projecting future increases in costs for providing health care coverage.

Both the interactions and working relationship between the entity and the unions representing the employees need to be carefully reviewed. A review of past and pending unfair labor practice charges, grievances, and arbitration proceedings should be made to evaluate the risk of adverse decisions. Pending grievances and arbitrations have the potential for new interpretations of existing CBA clauses and practices that may carry with them increases in operating costs. Further, liability for prior unfair labor practices can be imposed on successor employers.

Conclusion

Labor relations issues and terms of CBAs can have long-standing effects on future operations and significant financial implications both in the present and well into the future. An investment in labor relations diligence before entering into a transaction may prevent costly surprises after the transaction is completed.

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[1] *See, e.g., Resilient Floor Covering Trust Fund v. Michael’s Floor Covering, Inc.*, Case No. 12-17675 (9th Cir. Sept. 11, 2015).

5. Voluntary PAID Program Permits Employers to Escape Potential High Penalties for Self-Reported FLSA Violations—but at What Risk?

By Jeffrey H. Ruzal and Adriana S. Kosovych

Earlier this month, the U.S. Department of Labor's Wage and Hour Division ("WHD") announced the Payroll Audit Independent Determination ("PAID") program*,* a nationwide pilot program that will allow employers to avoid potential penalties for overtime and minimum wage violations under the Fair Labor Standards Act ("FLSA") by voluntarily reporting those infractions to the WHD within a structured framework—with some important limitations and conditions. First, while all employers covered by the FLSA may use the PAID program, and the types of potential violations the program covers run the gamut, an employer *may not* initiate the process to resolve any issue for which it is already under investigation by the WHD or engaged in active or potential litigation. Second, once an employer initiates the process and reports one or more violations through the PAID program, the WHD takes over, effectively turning what began as a voluntary "self-audit" into an agency review, assessment, and determination of the back wages due for the identified violation(s).

The primary goals of the PAID program are twofold: *first*, to resolve such claims expeditiously, without litigation, to improve employers' compliance with overtime and minimum wage obligations under the FLSA, and *second*, to ensure that more employees receive the back wages they are owed, and sooner.

The PAID program is ostensibly straightforward. Participating employers conduct a self-audit of their compensation practices, and if the self-audit reveals any noncompliance practices—or if an employer believes that its practices are lawful but desires to proactively resolve any potential claims—the employer then identifies potential violations, affected employees, relevant timeframes, and the amount of back wages owed. The employer then reports that information to the WHD, certifying that it (i) reviewed the WHD's compliance assistance materials (which will be published on the WHD's website), (ii) is not litigating or being investigated for the compensation practices at issue, and (iii) will adjust its practices to avoid the same potential violations in the future. The WHD will then evaluate the information and may even request from the employer additional information that it considers necessary to assess the back wages due for the identified violations. After reviewing the employer's self-assessment (and presumably undertaking its own assessment based on the materials provided by the employer), the WHD will issue a summary of unpaid wages to the employer, as well as forms describing the settlement terms ("Claim Releases") for each employee, which the employee must sign to receive payment. It is then the employer's responsibility to issue prompt payment of the back wages to each of the employees.

Notwithstanding the apparent simplicity of the PAID program, the WHD's frequently asked questions leave several important questions unanswered, including the following:

Is additional Information required or the scope of the evaluation limited? The WHD guidance does not specify what type of additional information the agency may deem necessary to assess back wages, nor does it limit the scope of the WHD evaluation.

Without any such limitation, an employer voluntarily participating in the PAID program may risk exposure to a more comprehensive investigation by the WHD. Further, the guidance specifically states that the WHD does not waive its right to conduct any future investigations of an employer that has chosen to participate in the program, which could include directed investigations. Therefore, employers should consider conducting an internal investigation of its wage and hour practices with the assistance of counsel prior to participating in the PAID program.

Which claims will Claims Releases apply to? The Claim Releases issued by the WHD to the affected employees are narrowly tailored to the specific violation and time period covered by the assessment. Notably, the WHD's guidance does not specify whether the releases will apply to only FLSA claims or, more broadly, any state or local wage and hour claims that may also exist. If the program releases an employer only from FLSA claims, an employee who signs and accepts payment through the PAID program could potentially bring suit against that employer by relying on more protective state or local wage and hour laws, some of which also carry longer statutes of limitations. In this regard, the employer still faces costly litigation and potential liability, regardless of its proactive efforts to remedy any issues with its pay practices.

Is the employer being investigated? An employer may not necessarily know that it is already under investigation—for example, if the WHD has opened a file but has not yet assigned an investigator or sent notice of the investigation to the employer. Under these circumstances, an employer initiating the self-audit and reporting process under the auspices of the PAID program may unwittingly disclose violations to the WHD without being able to rely on the protections of the program, thus facing significant civil penalties.

According to the WHD's announcement, the PAID program is a "win win" for employers and employees: employees will receive 100 percent of the back wages paid to them, without having to pay any litigation expenses or attorneys' fees, while employers will avoid costly liquidated damages or civil monetary penalties that otherwise would be imposed. Given the number of open questions and uncertainty over the risks and benefits of the program, it is unclear how the successful the PAID program will be—including whether employers and employees will participate. Currently, the PAID program is set to last six months. At the end of the six-month pilot period, WHD will evaluate the program's effectiveness and determine whether to modify it, and whether to make the program permanent. For all the reasons discussed above, employers should be wary of the uncertainties surrounding the PAID program and may not want to subject themselves as a test case in this pilot program.

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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 any of the authors of this *Take 5:*

Andrea K. Douglas
Los Angeles
310-557-9527
adouglas@ebglaw.com

Amanda M. Gómez
New York
212-351-4711
amgomez@ebglaw.com

Adriana S. Kosovych
New York
212-351-4527
akosovych@ebglaw.com

Michael F. McGahan
New York
212-351-3768
mmcgahan@ebglaw.com

Kate B. Rhodes
New York
212-351-3792
krhodes@ebglaw.com

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

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

Katrina J. Walasik
Los Angeles
310-557-9577
kwalasik@ebglaw.com

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