

Industry Spotlights Webinar Series: Legal Issues Hospitality Employers Should Be Considering This Year

April 25, 2018

Agenda

1. Employer Training in the Wake of #MeToo
2. Expanding Sex Discrimination Protection to LGBT Employees in the Hospitality Industry
3. Due Diligence on Labor and Employment Issues in Transactions Involving Employers in Hospitality
4. The DOL's New 'PAID' Program

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Employer Training in the Wake of #MeToo

Presented by



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Effective Training as an Anti-Harassment Tool

The hospitality industry faces the greatest number of sexual harassment charges, on average, according to EEOC data.

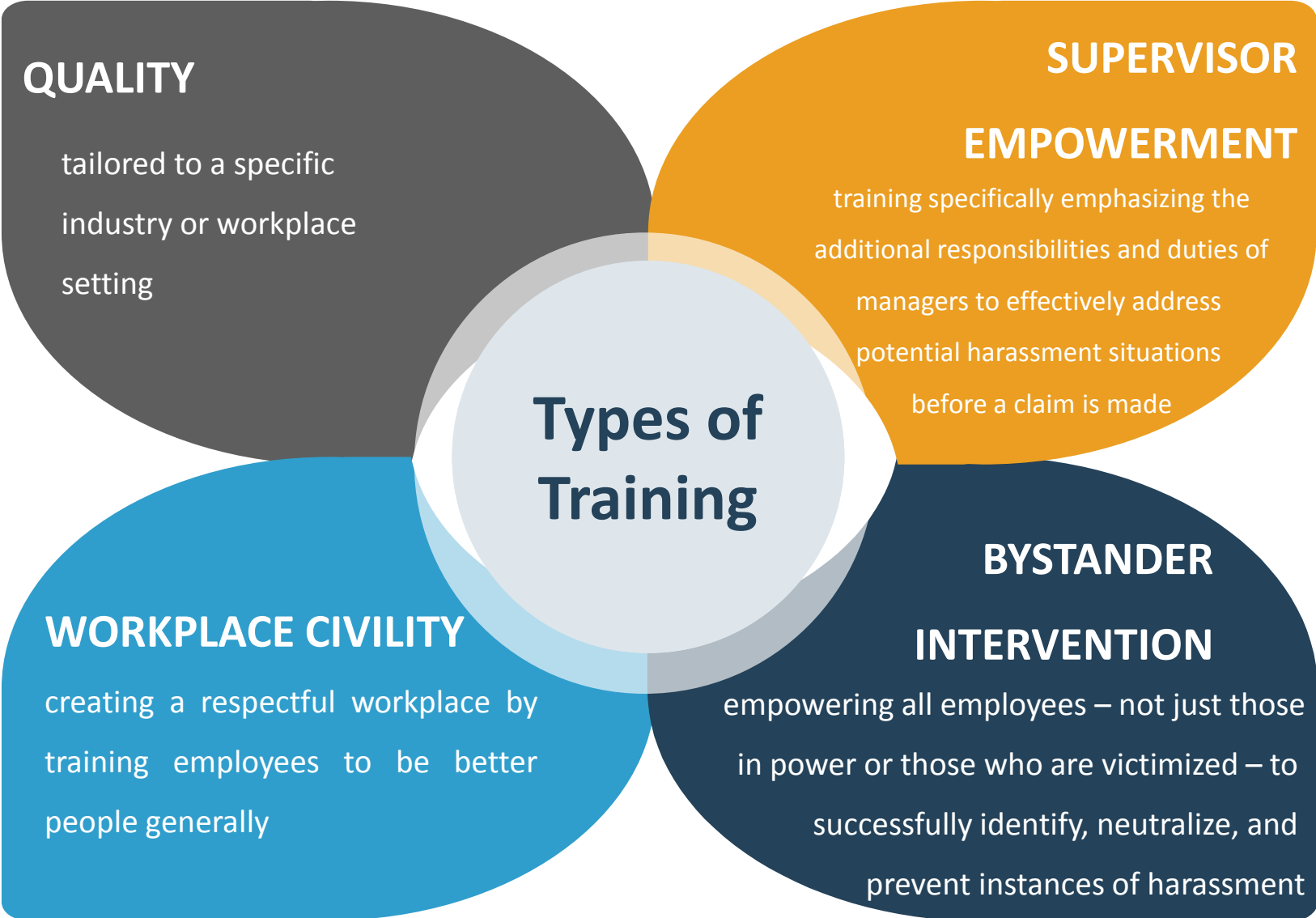


Likely due to:

- Non-traditional workplace environment
 - Different practical understanding of personal-space
 - Focus on customer service at all hours
- Employee training, if executed correctly, is an effective tool for promoting better workplaces in the hospitality industry and preventing situations that may lead to harassment claims.

Training should be specifically tailored – both in form and in content – based on the individuals being trained and the subject matter of the training.

Types of Recommended Training for Employers in the Hospitality Industry



Quality Training



In June 2016, the EEOC's Select Task Force on the Study of Harassment issued its findings and conclusions about workplace harassment based on data collected from sociologists, industrial-organizational psychologists, investigators, trainers, lawyers, employers, advocates, etc.



The task force concluded that training tailored to the nuances of an individual's workplace and industry-specific considerations would be most effective.



Training should be holistically focused on creating a respectful and safe workplace for all employees instead of just trying to reduce an employer's liability.

- A respectful and safe workplace will inherently lead to a reduction in the employer's liability, while also improving employee morale.

Supervisor Empowerment Training



Supervisors are at great risk for becoming the target of harassment claims by employees due to their proximity and frequent contact with subordinates and the power-differential between the two groups.



Harassment training for supervisors should include:

- 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.



If trained properly, supervisors and managers are in a unique position to act as successful intermediaries between upper management and employees.



Workplace Civility Training

1

This type of training is focused on creating a respectful work environment and culture overall. A universal approach to creating better employees by “creating” better people.

2

What is a respectful workplace?

- A working environment where employees feel that they are valued, their accomplishments are recognized and acknowledged, and expectations and guidelines are transparent, such that employees are able to work harmoniously and focus on their job performance.
- A “drama-free” zone.

3

Benefits of civility training:

- Studies show it can lead to heightened moral and teamwork, lower absenteeism and employee turnover, fewer workplace injuries, and improved productivity for employees at every level.

Bystander Intervention Training



This training method is focused on getting onlookers involved with addressing or ending harassment on the workplace.

“See something, say something” approach.



Initially implemented on college campuses, it is believed that this type of training may help to minimize the occurrence of workplace harassment by creating a more accountable environment.



Also serves to empower all employees:

- To stop harassment as it is occurring;
- To engage employees that are engaging in harassing behavior in a productive manner to end the harassment; and
- To effectively and sensitively communicate with employees who have been a target or victim of harassment in the past.

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Expanding Sex Discrimination Protection to LGBT Employees in the Hospitality Industry

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Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (“Title VII”)

Landmark Cases

Two federal cases, *Price Waterhouse v. Hopkins* (1989) and *Oncale v. Sundower* (1998) had the effect of creating periphery protections for LGBT workers

Title VII prohibits employment discrimination based on race, color, religion, sex and national origin


Title VII does **NOT** expressly cover sexual orientation or gender identity

Title VII does, however, protect against gender stereotypes and does protect same sex bullying or same-sex sexual harassment

EEOC Interpretation of Title VII

Expanding protections to include LGBT Rights

EEOC asserts:



Sexual orientation discrimination is, by definition, discrimination “because of ... sex,” in violation of Title VII.

Sexual orientation discrimination constitutes associational discrimination that violates Title VII.

Sexual orientation discrimination necessarily involves sex stereotyping, in violation of Title VII.

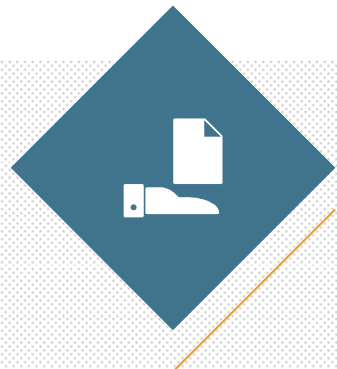
The Circuit Split

Eleventh, Eighth, Seventh, Sixth, Second, and First Circuits




In February 2018, the Second Circuit held in *Zarda v. Altitude Express, Inc.*, that **sexual orientation discrimination constitutes a form of discrimination “because of . . . Sex,”** in violation of **Title VII** of the Civil Rights Act.

In March 2018, The Sixth Circuit, in *EEOC v. R.G. & G.R. Harris Funeral homes*, held that **discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.** This court also rejected the employers argument that enforcement of Title VII would substantially burden their religious exercise. They did not address discrimination based on sexual orientation in this case.



The Supreme Court remains silent on the issue. In 2017, the Supreme Court denied Certiorari in *Evans v. Georgia Regional Hospital*, but will hear *Masterpiece Cakeshop v. Colorado Civil Rights Commission* this year, which may clarify the ambiguous balance between religious beliefs and discriminatory practices.

Best Practices for Hospitality Employers

- 
- Implement inclusion policies and procedures for employees
 - Consider updating harassment, discrimination, and Equal Opportunity policies to include “gender identity or expression” among protected categories
 - Do not prohibit a transgender or gender non-conforming employee from using the restroom of their choosing
 - If possible, provide gender neutral single occupancy restrooms for employees who desire additional privacy
 - Use chosen names, pronouns, and titles
 - Update personnel and administrative records at the employee’s request
 - Provide employees with a gender- neutral dress codes, uniforms, and grooming standards
 - Provide all employees with training on gender identity issues; human resources personnel should receive additional training to support transitioning employees

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Due Diligence on Labor and Employment Issues In Transactions Involving Employers In Hospitality

Presented by



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Importance of Due Diligence

- Labor and Employment issues today carry potential for large post-closing claims.



- Wage Hour Class Actions:
- Harassment Claims
- Unions
- Discrimination Complaints
- Joint or Successor Liability
- ERISA Withdrawal Liability

Types of Transactions

Basically any type of transaction that results in a party becoming the employer of the other party's employees:

Change of Ownership



Change of managing agent



Joint Ventures



Areas of Concern

- Statutory compliance
 - Fair Labor Standards Act (FLSA)
 - State Wage/hour laws
 - Occupational Safety and Health Act (OSHA)
 - Family and Medical Leave Act (FMLA)
 - Equal Employment Opportunity (EEO)
 - State and Local Human Rights Laws
 - Employment Retirement Income Security Act (ERISA)
 - Immigration Compliance

Areas of Concern

- State and Local Labor Laws
 - Tip Sharing
 - Paid Sick Time
 - Paid Family Leave
 - Scheduling and Call In Restrictions
- Labor Relations
- Employment Litigation, Both Pending and Threatened
- Handbooks and Policies
- Anti-Harassment Policies
 - Claims
 - Complaints
 - Investigations

Labor Relations Issues: Two Focuses

Threats of
Organizing in a Non
Union Workforce



Dealing with an
Already Organized
Workforce

Non Union Workforce: Looking at the Risk of Union Organizing



Change of ownership, management, or corporate structure creates uncertainty for existing work force may lead to interest in Unions



Evidence of Union Organizing

- Petitions filed with NLRB
 - Card signing campaigns
 - Social Media campaigns
-



Vulnerability to Union Organizing

- Are Wages and benefits competitive?
- Employee Complaints
- Compliance with statutory requirements?
- Union organizing in the neighborhood?

Unionized Workforce

What to look for

Extent of Union Organization

All employees organized?

- Same Union?
- Same Collective Bargaining Agreement (CBA)?

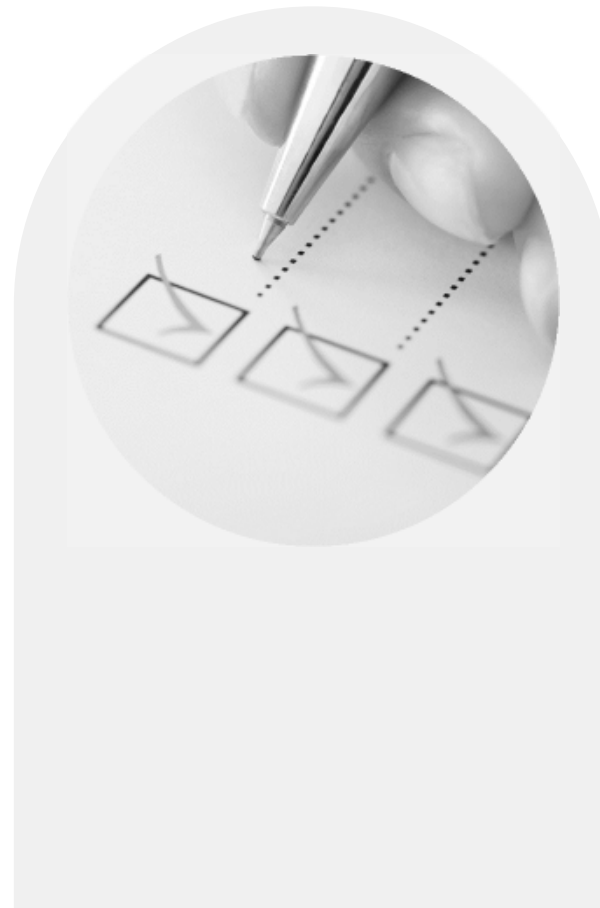
Some employees not organized?

- Employees satisfied with wages, benefits, etc. ?
- Communications with employer about wages, benefits, working conditions?
- Existing unions represent these classifications in other workplaces?
- Comparison with union employees?

Union Workforce: What to Look For

What is in the CBA(s)?

- 01 Wages and Future Increases
- 02 Paid Time off
- 03 Benefits:
 - Contributions to Pensions and Welfare Funds (and Future Increases)
 - Expiration Date – When will Bargaining next be required



- 04 Membership in Multi-Employer Bargaining Group?
 - Time to get out?
- 05 Successorship clauses
- 06 Neutrality Clauses
- 07 Management Rights Clause
- 08 No Strike Clause

Union Workforce: What to Look For

What's not in the CBA?

- List of Pending Grievances
- List of Arbitrator's Awards
- List of Side Letters and Grievance Settlements

Multi-Employer Plans, Financial Status

- Health and Welfare Plans
 - ACA Compliance?
 - Costs, and Projected Increases

Union Workforce: What to Look For

Pension Plans

- **Multi-Employer Pension Plans**
 - Funding Status
 - Potential Withdrawal Liability if Pension Fund is underfunded
 - What is Withdrawal Liability?
 - When is it incurred?
- **Single Employer Pension Plans**
 - Funding requirements

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The DOL's New 'PAID' Program

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Agenda

1

- **PAID Program:** *What Is It and How Does It Work?*

2

- **Participation Requirements and Conditions:** *“All employers covered by the FLSA” Has Limitations*

3

- **Risks:** *Why Employers May Want to Think Twice Before Participating*

4

- **Looking Ahead:** *Evaluating Effectiveness and Possible Next Developments*

PAID Program

What Is It?

Payroll Audit Independent Determination (“PAID”) Program – Nationwide pilot program initiated by the U.S. Department of Labor’s Wage and Hour Division (WHD)

Allows 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.

- employees receive 100 percent of the back wages paid to them, without having to pay any litigation expenses or attorneys’ fees.
- employers avoid liquidated damages or civil monetary penalties, and obtain release of employees’ rights to privately sue the employer for the unpaid wages.

Primary goals:

1. Resolve claims for unpaid minimum wage and overtime under the FLSA expeditiously and without litigation.
2. Improve employers’ compliance with overtime and minimum wage obligations under the FLSA.
3. Ensure that more employees receive the back wages they are owed.

PAID Program

How Does It Work?



- 1 Participating employers conduct a self-audit of their compensation practices to identify potential violations – if any potential violations, gather information regarding affected employees, relevant timeframes (up to 2 years) and amount of back wages owed.
- 2 Report information to the WHD, with certifications by employer:
 - It reviewed the WHD’s compliance assistance materials;
 - It is not litigating or being investigated for the compensation practices at issue; and
 - It will adjust its practices to avoid the same potential violations in the future.
- 3 WHD evaluates the information
 - May request additional information from the employer that it considers necessary to assess the back wages due for the identified violations.
 - Issues a summary of unpaid wages to the employer with forms describing the settlement terms (“Claim Releases”) for each employee.
- 4 Employer must issue prompt payment of the back wages to each of the employees who signs the Claims Release.

Participation

Requirements and Conditions

Employers

“All employers covered by the FLSA”
except employers that are:

- Already under investigation by the WHD.
- Engaged in active or potential litigation.

To participate, employer must be prepared to certify:

- Covered by the FLSA.
- Employees covered in the proposed PAID self-audit are not subject to prevailing wage requirements.
- Neither WHD nor any court has found within the last 5 years that it has violated the FLSA by engaging in the same compensation practices at issue in the proposed self-audit.
- Has not previously participated in the PAID Program to resolve potential FLSA minimum wage or overtime violations resulting from the compensation practices at issue.

Employees

Must sign Claims Release to received back payment of wages and overtime.

Risks

Avoid Being the “Test Case”



Voluntary Self-Audit or Agency Review? WHD may request “additional information” to assess back wages, and the program imposes no limit on the scope of the WHD’s evaluation. Additionally, an employer that does not know it is already under investigation may unwittingly disclose violations to the WHD without being able to rely on the protections of the Program, thus facing significant civil penalties



Becoming a Target: 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.



Limited Protections for Employer: Because WHD may not supervise payments or provide releases for state law violations, Claim Releases are narrowly tailored to the specific violation and time period covered by the assessment and do not cover state or local wage and hour claims that may also exist. (**Employer may separately settle claims as allowed under state law.*)




Potential Public Disclosure: Self-audits under the PAID program are subject to the same FOIA requirements and defenses as any WHD investigation or audit.

Looking Ahead

Evaluating Effectiveness and Possible Next Developments

Six-month pilot program



WHD to evaluate effectiveness and determine whether to modify or make the program permanent

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Questions?

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