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Five Key Issues Facing Employers in the Hospitality Industry

Hospitality employers, like employers in many other service-related industries, are challenged by having to persistently focus on staying competitive and increasing profits in oversaturated markets. However, focusing on these critical goals has become increasingly difficult for hospitality employers because of expanding labor and employment laws that demand employers' attention.

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Despite the distraction that labor and employment law compliance causes, hospitality employers must remain vigilant to avoid even the most minor of violations that can result in costly lawsuits or government investigations and enforcement actions.

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

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1. "Prepping" for the DOL's New White-Collar Exemption Rule

By Jeffrey H. Ruzal

On May 18, 2016, the U.S. Department of Labor ("DOL") announced the publication of a final rule that amends the "white collar" overtime exemptions to significantly increase the number of employees eligible for overtime pay. The final rule will go into effect on December 1, 2016.

The final rule provides for the following changes to the executive, administrative, and professional exemptions:

- The salary threshold for the executive, administrative, and professional exemptions will increase from $23,660 ($455 per week) to $47,476 ($913 per week).

- The total annual compensation requirement for "highly compensated employees" subject to a minimal duties test will increase from the current level of $100,000 to $134,004.

- The salary threshold for the executive, administrative, professional, and highly compensated employee exemptions will be automatically updated every three years to maintain the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage census region.

- The salary basis test will be amended to allow employers to use non-discretionary bonuses and incentive payments, such as commissions, to satisfy up to 10 percent of the salary threshold.

While it is certainly good news that the DOL has not changed the primary duties requirements for the various exemptions, the significant increase to the salary threshold is expected to extend the right to overtime pay to an estimated 4.2 million workers who are currently exempt. This change will not only affect labor costs but require employers to rethink the current structures and efficiencies of their workforces, including assessing how the reclassification of workers from exempt to non-exempt will affect their fundamental business models. In addition, to the extent exempt employees are reclassified as non-exempt, employers will have to consider implementing policies and procedures to both comply with overtime laws and control overtime worked, such as prohibiting all forms of off-the-clock work and instituting and maintaining accurate record-keeping.

Resistance to the final rule should be expected. The DOL received nearly 300,000 comments to its Notice of Proposed Rulemaking, many of which came from employers and advocacy groups providing thoughtful commentary on the practical issues and repercussions in implementing such a significant increase to the salary threshold.

Because of the severity of the final rule, a Congressional challenge may be in the offing. Subject to the Congressional Review Act, the final rule will be subject to scrutiny by the next Congress to be seated in 2017.

What Hospitality Employers Should Do Now

With the benefit of more than six months until the final rule takes effect, hospitality employers should do the following:

- Audit your workforce to identify employees currently treated as exempt who will not meet the new salary threshold.

- Closely examine your workforce to determine whether any of your currently exempt employees fail to meet the salary threshold of the new rule.

- Take advantage of this time to also review your exempt employees' primary duties, even though the duties test has not been changed by the new rule. Some job positions in hospitality that have been susceptible to failing the primary duties requirements include entry-level managers, catering managers, executive chefs, and sous chefs. There is no time like the present to conduct a comprehensive self-audit to ensure full compliance.

- When auditing the exempt status of your workers, determine whether to increase their salaries or convert them to non-exempt. If an employee's salary need only be increased slightly to satisfy the new rule, it may be an easy decision to simply provide the employee with that salary increase. But if you would have to provide a substantial salary increase to meet the new threshold, it may be easier to reclassify the employee as non-exempt.

- Keep in mind that converting employees from exempt to non-exempt implicates a number of other issues that you would be wise to deliberate carefully, such as estimating how much overtime an individual is expected to work in order to determine what an employee's new hourly rate will be and ensuring compliance with the overtime laws.

2. Workforce Management Issues in Mergers and Acquisitions

By Evan J. Spelfogel

With the financial crisis and recession behind us, mergers and acquisitions have picked up dramatically over the past several years. In 2015, more than 25,000 M&A deals were announced in the United States, valued at trillions of dollars, primarily involving companies in the hospitality, health care, pharmaceuticals, energy, and technology industries. This year and next, most financial experts foresee an increasing number of these transactions taking place.

In an M&A transaction, the buyer must determine whether it will acquire only the assets of the target company or acquire both the assets and liabilities of that company. Based on that determination, the transaction can be structured as an asset acquisition or a stock acquisition. In a stock transaction (including the typical merger), there is no technical change other than pure ownership. The new owner merely steps into the shoes of the selling shareholders and inherits all assets and liabilities of the business.

In an asset deal, however, a new owner may accept or reject specific assets and liabilities. While this structure typically leaves the buyer free to terminate many of the seller's employees and bring in its own management team, there are circumstances under which an asset purchaser may nevertheless be liable if care is not taken.

Buyers and sellers alike should carefully consider the labor and employment implications of a proposed transaction and not merely focus on business and financial issues. Otherwise, the parties may walk into multimillion dollar class and collective action lawsuits, incur serious benefit plan obligations, and create unnecessary employee morale issues.

Some of the more serious issues facing hospitality entities might include employee misclassification (as independent contractors or as exempt white-collar employees not entitled to overtime pay), non-compete and trade secret agreements, union collective bargaining agreements, immigration matters, discrimination in employee layoff and retention, individual employment agreement issues, executive compensation plans, and federal and state facility closing and mass layoff laws.

When an M&A transaction is contemplated, in-house counsel and outside corporate counsel must consider all employment and labor implications of the transaction early in the planning process. As part of their due diligence, counsel for the buyer should solicit and acquire copies of, among other things, all of the target company's individual employment contracts, executive compensation plans, employee handbooks and personnel manuals, union collective bargaining agreements, benefit plan documents, and information with respect to all of the target's pending federal, state and local governmental employment lawsuits, administrative proceedings, and other matters.

From a hotel buyer's perspective, all of the employment and labor implications should be considered quite early in the transaction process, while the buyer still has the opportunity to withdraw from the transaction. A buyer must decide whether it is willing to assume the target business's labor and employment-related liabilities and union obligations (if any), and how these considerations might impact the purchase price. To accomplish its objectives, the buyer will have to carefully negotiate with the seller and then draft the necessary purchase agreement language to identify the significant assets.

Whether to buy a unionized hotel or restaurant will depend upon the strength and weaknesses of the unions involved, language in the collective bargaining agreements, and collateral obligations that might arise under any currently outstanding orders or from

pending proceedings before the National Labor Relations Board ("NLRB" or "Board"). Further, in some locations, with respect to certain industries (e.g., the building service and maintenance industry in New York), local governments have enacted laws, rules, and regulations requiring an acquiring company to continue to employ the seller's employees for 60 or 90 days. Pursuant to those laws, prospective buyers might not legally be able to bring in their own workforce to take over the acquired operations for many months, if at all.

The Employee Retirement Income Security Act ("ERISA") creates significant potential liability upon an acquiring company with respect to multi-employer pension plans that have been created and maintained pursuant to the Taft-Hartley Act. For example, upon a hotel or restaurant shutdown or mass layoff, ERISA imposes upon buyers in some circumstances the obligation to absorb a withdrawal liability that normally would attach to a seller. Buyer's counsel in these cases must carefully consider whether the buyer wishes to assume such liability and whether to insist upon a reduction in the purchase price to cover the potential cost of that liability. And, counsel for the seller, of course, will want to insure that any such liability is shifted to the buyer. In a stock transaction on the other hand, aside from the change in ownership, there is no legally cognizable change in the business. Thus, a withdrawal liability will not be triggered (although the new stock owner will inherit ongoing pension fund obligations). Once the decision has been made with respect to whether the transaction will be a stock or an asset transaction, labor and employment law counsel for both seller and buyer must pay careful attention to the drafting of the purchase agreement, its representations and warranties, indemnities, disclosures, and related matters.

Additionally, employers intending to downsize a workforce after an acquisition must pay particular attention to obtaining a census of employees to avoid allegations of selective discrimination in the process. Once the dust settles after an acquisition has been implemented, housekeeping and front-desk employees, managers, and others may find themselves facing a brave new world. The consequences of a restructuring often are unintended as to employee morale and employment policies. Employees treated with dignity are less likely to become class action plaintiffs than those quickly shown the door. In any subsequent litigation, jurors tend to be less sympathetic to employers that fail to consider the impact of the transaction upon employees and their families. Many of these issues should be dealt with upfront early during the sale and acquisition process.

As the U.S. economy rebounds and corporations pick up the pace of restructuring, acquisitions and mergers, it is essential that complex and subtle labor and employment implications of these transactions be considered and dealt with at an early stage, so as to avoid or limit potential liabilities.

What Hospitality Employers Should Do Now

As part of the due diligence process in any acquisition or merger, hospitality employers should do the following:

- Have your employment counsel request from the company to be acquired or merged with:

    - all individual employment and union collective bargaining agreements, confidentiality and non-compete agreements, employee handbooks and personnel manuals, executive compensation plans, and benefit fund documents, including summary plan descriptions;

    - all files pertaining to any currently open or pending federal, state, and local governmental employment lawsuits and administrative proceedings, as well as to recently closed matters;

    - a complete census of current employees, their job titles, compensation levels, and, to the extent available in company records or by visual observation, their ethnicities, ages, disabilities, and other legally protected characteristics; and

    - information regarding the economic valuation of different properties, facilities, and related assets in order to target asking prices if a decision were to be made to dispose of any.

- Assemble a team of legal and human resource professionals to focus on the details of the acquisition or merger.

- Consult with outside labor and employment law counsel with respect to any or all of the above matters.

3. OSHA's New Electronic Recordkeeping Rule: New Burdens for the Hospitality Industry

By Valerie Butera

On May 12, 2016, the Occupational Safety and Health Administration ("OSHA") published its long-awaited electronic recordkeeping rule ("final rule"). The final rule creates numerous new recordkeeping obligations and additional administrative burdens for hospitality and other employers. Many employers will now be required to submit injury and illness information to OSHA electronically. OSHA will then attempt to remove identifying information from the records and publish them on a searchable database on its website. The final rule also includes several new anti-retaliation provisions that provide new protections for employees reporting work-related injuries and illnesses.

The Basics

The final rule requires certain employers to electronically submit to OSHA the injury and illness information that they are already required to keep under existing regulations. Specifically, establishments with 250 or more employees that are currently required to

keep injury and illness records must electronically submit information from OSHA Forms 300 (Log of Work-Related Injuries and Illnesses), 300A (Summary of Work-Related Injuries and Illnesses), and 301 (Injury and Incident Report). Establishments with 20 or more employees but fewer than 250 that conduct work in industries that OSHA considers highly hazardous must electronically submit information from Form 300A annually.

Importantly, hospitality is included in the list of industries that OSHA deemed highly hazardous. Entities within the hospitality industry subject to the requirements of the final rule include a laundry list of facilities, such as hotels, motels, casino hotels, hotel management services, health spas that offer accommodations, and tourist and motor lodges, just to name a few.

The final rule will be phased in. New anti-retaliation protections included in the final rule will become effective by August 10, 2016. All establishments required to submit electronic records must submit their annual Form 300A to OSHA by July 1, 2017. On July 1, 2018, establishments with 250 or more employees must submit Forms 300A, 300, and 301. Establishments deemed highly hazardous with 20–249 employees will continue to submit only Form 300A. Beginning in 2019, the submission deadline will change from July 1 to March 2. OSHA State Plans must adopt rules that are substantially identical to the final rule within six months of its publication.

Hospitality Employers' Obligations to Employees

Hospitality employers must involve their employees in the injury and illness recordkeeping process by informing them of how to report a work-related injury or illness within the establishment and the procedure used by the employer to report such incidents to OSHA. Employers must establish "a reasonable procedure" for employees to report work-related injuries and illnesses promptly and accurately—that is, the procedure cannot have the effect of discouraging employees from reporting a workplace injury or illness. Accordingly, an employer must also inform employees that (1) they have a right to report work-related injuries and illnesses, (2) they will not be discharged or in any manner discriminated against for reporting work-related injuries and illnesses, and (3) the employer is legally prohibited from discharging employees or discriminating against them in any way for reporting a work-related injury or illness.

Hospitality Employers' New Challenges and Concerns

The final rule presents numerous challenges and concerns for hospitality employers. First, OSHA has stated that it will use the information that it collects as employers comply with the rule to identify new bad actors—if an employer has a higher-than-average injury and illness rate, the chances of its establishment being visited by compliance officers will dramatically increase.

Second, although hospitality employers are required to submit the recordkeeping forms to OSHA on a secure web-based application, if the application is hacked, the personal

information of countless employees could be exposed before OSHA has the opportunity to remove such information from the records. Once the forms are received by OSHA, the agency will "scrub" any personal identifiers from them and place them on a publicly available searchable database on OSHA's website. This step also opens the door to an inadvertent disclosure of private employee information.

Third, the public exposure of work-related injury and illness information gives OSHA another avenue with which to continue its campaign of shaming employers that it believes are bad actors before they are able to defend themselves, as the press will have access to this information.

Fourth, the public dissemination of work-related injury and illness information will aid unions in targeting businesses for unionization—that is, unions will have unfettered access to the lists of businesses that have higher injury and illness rates and may, therefore, find employees more interested in becoming unionized.

Last, the final rule gives OSHA a new weapon against employers—broad discretion to issue citations if the agency considers any part of an employer's procedures for reporting a work-related injury and illness to be "unreasonable."

What Hospitality Employers Should Do Now

- Train employees on the requirements of the final rule and when they go into effect.

- Ensure that employees understand that they will not be retaliated against for reporting work-related injuries and illnesses and are, in fact, encouraged to report them.

- Retrain the employee(s) responsible for injury and illness recordkeeping on the basics of recordkeeping and provide thorough training on the final rule with an emphasis on protecting personally identifiable information to the maximum extent possible while remaining in compliance with the new regulatory requirements.

4. Navigating Federal and State Laws for Transgender Workers' Restroom Access[1]

By Jeffrey M. Landes and Kristopher D. Reichardt

Complying with employment law has become increasingly difficult given that various states and municipalities have passed legislation that seemingly contradicts federal guidance. One state law that has been in the spotlight is North Carolina's House Bill 2, the "Public Facilities Privacy and Security Act" ("HB2"), which was passed in an emergency legislative session on March 23, 2016, to overturn a local ordinance that was set to extend anti-discrimination protections to lesbian, gay, bisexual, and transgender ("LGBT") individuals and would have allowed transgender individuals to use the restroom facilities that corresponded with their gender identity.

There are a number of legal challenges to these laws. Notably, the Department of Justice ("DOJ") has filed a complaint, in *United States v. State of North Carolina et al*., against the state of North Carolina, the University of North Carolina (the largest employer in the state), and the North Carolina Department of Public Safety ("DPS"), alleging that they are discriminating against transgender individuals in violation of federal law as a result of the state's compliance with, and implementation of, HB2.

Separately, Lambda Legal, the American Civil Liberties Union, the American Civil Liberties Union of North Carolina, and Equality North Carolina have jointly filed a lawsuit against North Carolina's governor (*Carcano v. McCrory)*, challenging HB2 in a North Carolina federal court. The complaint, brought by a student, employee, and professor at three separate North Carolina state colleges, alleges that HB2 is unconstitutional because it violates the Equal Protection and Due Process clauses of the Fourteenth Amendment by discriminating on the basis of sex and sexual orientation and invading the privacy of transgender people. The complaint also alleges that the law violates Title IX by discriminating against students and school employees on the basis of sex. The *Carcano* complaint alleges that "[e]mployers subject to Title VII also will violate the U.S. Equal Employment Opportunity Commission's [EEOC's] decree that discriminating against transgender people with respect to restroom use is impermissible sex discrimination."

Following the news of these two lawsuits, Governor McCrory issued an executive order affirming the right of private-sector employers to establish their own restroom and locker-room policies. While this executive order alleviates the tension between state and

[1] While this article focuses on restroom facilities access for transgendered workers, please note that in the hospitality industry, these issues are also relevant with regard to the appropriate use of restroom facilities for customers.

federal law for private employers, public employers and employers that have restroom facilities for customers still face differing standards under state and federal law.

Indeed, the EEOC has offered specific guidance ("EEOC Guidance") on restroom facility access rights for transgender employees that is contrary to the laws of North Carolina and other jurisdictions. The EEOC Guidance specifically refers to two cases addressing discrimination on the basis of gender identity, both of which offer direction for employers:

- In *Macy v. Dep't of Justice* (Apr. 12, 2012), the EEOC ruled that discrimination based on transgender status is sex discrimination in violation of Title VII.

- In *Lusardi v. Dep't of the Army* (Mar. 27, 2015), the EEOC held that denying an employee equal access to a common restroom corresponding to the employee's gender identity is discrimination on the basis of sex.

The EEOC Guidance states that an employer cannot condition the right to use the restroom corresponding with the employee's gender identity on the employee undergoing or providing proof of surgery or any other medical procedure, and an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead. *See* EEOC Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964. Notably, the fact sheet states that contrary state law is not a defense under Title VII (citing to 42 U.S.C. § 2000e-7).

In addition to those protections promulgated by the EEOC, OSHA also recently issued guidance indicating that restroom access is a health and safety matter. Under OSHA's sanitation standard, 29 C.F.R. § 1910.141, employers are required to allow employees prompt access to sanitary facilities. This standard is "intended to protect employees from the health effects created when toilets are not available."

The OSHA standards, which laws such as HB2 appear to directly conflict, hold that employees should not be required to use a segregated facility apart from other employees because of their gender identity or transgender status. OSHA guidance also has several "model practices" that "all employees should be permitted to use the facilities that correspond with their gender identity." OSHA advises that the best policies also provide additional options, which employees may choose, but are not required, to use. These include the following:

- Single-occupancy gender-neutral (unisex) facilities

- Use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls

The District of Columbia Office of Human Rights issued guidance in early June addressing restroom usage for transgender and cisgender employees. Washington, DC, enacted a law requiring that all single-stall restrooms be gender neutral. Even though this option is available to all employees, the DC guidance reiterates the position of the EEOC and OSHA that employers may not direct transgender employees to use only single-stall restrooms.

What Hospitality Employers Should Do Now

- Comply with federal law even though it may contradict some state and municipal laws and until there is resolution in either *United States v. State of North Carolina et al*. or *Carcano v. McCrory*.
- Consider creating policies or practices regarding transgender employees' use of restroom facilities (including following OSHA's guidance providing numerous restroom options, such as single-occupancy gender-neutral (unisex) facilities), and the use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.
- Conduct training for human resources and line managers so that they are aware that they may not require transgender workers to use a particular restroom.

5. Things to Come at the NLRB: The General Counsel's Plans

By Steven M. Swirsky, Peter M. Panken, and Kate B. Rhodes

On March 26, the General Counsel ("GC") of the NLRB signaled that he will be asking the Board to overturn or modify many precedents that negatively impact unions when it comes to organizing and collective bargaining. In Memorandum GC 16-01 ("GC Memo"), the GC directed the Regional Directors in the Board's offices across the country, who are charged with investigating unfair labor practice ("ULP") charges and deciding which cases to take to trial, to forward all charges involving issues identified in the GC Memo to the GC's Division of Advice ("Advice"). It is clear that Advice will instruct the Regional Directors to issue complaints and to follow legal theories advanced by Advice as part of this coordinated effort. The areas identified in the GC Memo include the following:

Cases That Favor Union Organizing and Employee Rights in Non-Union Companies

- Increased Employee Access to Employer Email Systems

Regional Directors are now required to refer any case involving the application of *Purple Communications*, 316 NLRB No. 126 (2014), absent a showing by the employer of "special circumstances" that justify specific limitations. In *Purple Communications*, the NLRB adopted a presumption that employees with work-related access to an employer's email system can use the employer's e-mail to discuss their terms and

conditions of employment or union organizing while on non-working time. The GC indicates an interest in expanding access to systems other than email, limiting employer claims of special circumstances justifying restrictions on the use of employer email systems, and curtailing employers' rights to review employees' workplace email use on the grounds that such monitoring constitutes illegal surveillance of employee concerted activities protected by Section 7 of the National Labor Relations Act ("NLRA").

- Expansion of *Weingarten* Rights

The GC also seeks to review cases involving the applicability of *Weingarten* principles (the right of an employee to have a representative or witness at investigatory interviews that can potentially result in disciplinary action) to non-union workplaces. The NLRB previously held, in *IBM Corp.*, 341 NLRB 1288 (2004), that an employee in a non-union workplace does not have a statutory right to be represented by a coworker in a disciplinary interview.

- Broader Union Protection During Organizing Campaigns

Regional Directors must now refer to Advice all cases where remedies for ULP activity could include enhanced access to employer electronic communications systems and non-work areas and providing unions with "equal time" to meet with employees on company premises to respond to so-called captive audience speeches by employers to assembled workers during organizing campaigns.

- Review of English-Only Rules

The GC will now more closely scrutinize cases addressing whether English-only rules violate Section 8(a)(1) of the NLRA by limiting employee rights to communicate with coworkers concerning terms and conditions of employment.

- Redefining On-Demand Workers and Contractors as "Employees"

The GC's interest in the employment status of workers in the on-demand, or gig, economy and independent contractors is another effort to expand the scope of the NLRA to individuals traditionally not considered employees.

- Limitations on Employer Speech

Regional Directors must now refer to Advice all cases involving the application of *Tricast Inc.*, 274 NLRB 377 (1985), which held that an employer does not violate the law by informing employees that unionization will alter the relationship between employees and management.

The GC also now requires a review of cases involving plant closure threats to a small number of employees in a large workforce. In *Springs Industries*, 332 NLRB 40 (2000), the NLRB held that a threat made to only one or two individuals is not presumed to have been widely disseminated and thus will not be presumed to have been learned of by all employees in the unit. The GC will likely ask the Board to abandon this rule.

The General Counsel Is Seeking to Dilute Employer Defenses to Strikes

Regional Directors have been directed to refer to Advice any case involving "an allegation that an employer's permanent replacements of economic strikers had an unlawful motive" and is likely looking to curtail employers' ability to protect itself from the impact of an economic strike. Notably, in a May 31 decision, the Board agreed with the GC's argument that the right of employers to hire permanent replacements in an economic strike should be narrowed.

It has always been a principle of NLRA law that employees are protected from discrimination when they strike, but the NLRA does not handcuff an employer's ability to function or continue production with newly hired strike replacements where employers exercise their right to permanently replace economic strikers. In *Hot Shoppes*, 146 NLRB 802 (1964), the NLRB held that it was not a ULP for an employer faced with an imminent strike threat to hire permanent replacements and to refuse to oust the replacements when strikers offered to come back to work, absent evidence of an independent unlawful motive. The GC is likely seeking to increase the use of the "unlawful motive" theory to challenge employer decisions to hire permanent replacements for economic strikers.

Whether these initiatives to overrule prior precedent will continue to succeed will play out in NLRB decisions depending largely on the appointments to the NLRB by the next President of the United States.

What Hospitality Employers Should Do Now

In addition to generally being mindful of the principles above, hospitality employers should do the following:

- Evaluate whether policies limiting the use of company email by employees violate the ruling in *Purple Communications,* and revise such policies, as necessary, to conform to the ruling.

- Review whether English-only rules limit employee rights to communicate with coworkers concerning the terms and conditions of employment. If such rules limit employee rights, then consider whether revising those rules to apply only to limited locations (like public areas) is appropriate.

- Vet any statements to be given to employees regarding whether unionization will alter the relationship between employees and management.

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