Hospitality Industry Employment Law Q&As

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INDUSTRY OVERVIEW

Question 1: What is the hospitality industry and who are its employers?

The hospitality industry comprises a wide variety of businesses with one common goal–providing lodging and related services to the traveling public. The industry is diverse, including major chain hotels, independent hotels, management companies, real estate investment trusts (REIT), bed and breakfasts, inns, restaurants, casinos, and cruise lines. The industry faces special employment-related challenges. Employees work long hours, side-by-side, often in operations continuing 24/7. Hospitality employers face shortages of skilled workers; multitudes of local, state, and federal laws and regulations; and high turnover, yet they must still provide excellent guest service.

CONSEQUENCES FOR LEGAL VIOLATIONS

Question 2: What risks do hospitality employers face when they engage in improper payroll practices?

The last few years have seen an explosion in the number of private lawsuits against employers for wage and hour violations and increased scrutiny by the U.S. Department of Labor (DOL) and various other state enforcement agencies. According to some sources, there has been a 400% increase in private wage and hour lawsuits since 1995. The hospitality industry is not immune to these challenges. In fact, the DOL's Wage and Hour Division (WHD) considers hospitality workers and other low-wage workers to be particularly vulnerable. Over the past two years, the WHD has targeted hospitality employers across the country. Investigators often arrive unannounced and demand immediate access to payroll records and employees, who they interview to determine whether employees are properly classified for overtime purposes and properly paid all wages due. In addition to the disruption to business, the liability that hospitality employers have faced is not insignificant. In fiscal year 2017, the WHD recovered more than $270 million in back wages for over 240,000 employees, including recovering $86.1 million in low-wage industries for 97,000 workers. Over the last five years, the WHD has collected over $1.2 billion in back wages. See U.S. Dep't of Labor, Wage and Hour Division, Data.

WAGE AND HOUR EXEMPTION MISCLASSIFICATION

Question 3: What do hospitality employers need to know about classifying employees as exempt from wage and hour requirements?

A common violation for any employer is misclassifying employees as exempt from the minimum wage, overtime, and recordkeeping requirements of the Fair Labor Standard Act (FLSA) (29 U.S.C. §§ 201–219). Federal law (and most state laws) presumes that all employees are nonexempt unless the employer can prove on a case-by-case

basis that a particular employee qualifies for one of the precise exemptions. Under this presumption, employers are required to pay at least the applicable minimum wage for all hours worked, pay overtime of 1.5 times an employee's regular rate of pay for all hours worked over 40 in each workweek, and maintain an accurate record of the employee's hours worked. Some states have stricter requirements, such as daily overtime—overtime pay for hours worked over 8, 10, or 12 in one day. When calculating overtime pay due, it is crucially important that the employer comply with the stricter of the state or federal overtime requirements. If an employee is exempt, however, the employer is neither required to pay overtime nor maintain a record of the employee's hours worked.

There are numerous exemptions under the FLSA and some state laws. The most common are the so-called white collar exemptions from the FLSA's minimum wage, overtime, and timekeeping provisions (29 U.S.C. § 213(a)(1), but the detailed and elaborate regulations actually defining them are compiled at 29 C.F.R. Part 541). These exemptions apply to individuals employed in a bona fide executive, administrative, or professional capacity, to certain computer employees, or to outside salespersons. Whether these exemptions apply to a particular person depends in part upon what kind of work the employee actually performs. Exempt employees must also be paid on a salary basis, which means that the employee regularly receives each pay period a fixed, predetermined amount of money for every workweek in which the employee performed any work, without regard to the number of days or hours worked.

Certain employees who have traditionally been classified as exempt in the hospitality industry are often under strict scrutiny by the WHD. For example, the WHD looks carefully at sous chefs and mid-level culinary positions who may not have direct management responsibility. The WHD has also challenged the exempt status of certain sales managers who, despite their titles, may not actually manage any other employees and whose duties may not qualify for an administrative exemption. Another area of concern is assistant managers in all departments. The exempt status of such assistant managers is often questioned, especially if the assistant manager does not exercise significant management authority.

The determination of whether an employee is properly classified as exempt is an important decision and one that requires an examination of the employee's actual duties against the somewhat complicated exemption tests under the law. The employer must decide whether it can prove that every requirement is met as to each employee who is treated as exempt. Be careful about exemption decisions that may have been made simply based upon job titles, position descriptions, or general industry practice. Thoroughly review the exemption's requirements in light of a candid assessment of each employee's day-to-day duties and responsibilities. The U.S. Labor Department and the courts apply these exemptions very narrowly. If an exemption is challenged, it is the employer's burden to prove that every element of a claimed exemption applies to the employee for whom it is asserted.

For more information on exemptions from the FLSA, see the guidance in the Wage and Hour—FLSA Requirements and Exemptions subtopic. For information on exemptions from state wage and hour requirements, see the column entitled "Exempt vs. Non-exempt" in Wage and Hour State Practice Notes Chart. For guidance on conducting an exemption classification audit on an employer's workforce, see Exempt/Non-Exempt Employee Classification Audits: Key Considerations and Wage and Hour Self-Audits Checklist.

RECORDKEEPING

Question 4: What records must a hospitality employer keep regarding employees' wages and hours?

Employers must maintain an accurate record of hours worked by all nonexempt employees. Federal law (and most state laws) puts the burden of maintaining time records for nonexempt employees on the employer. The law does not prescribe the form of the time record—whether it is a timecard punch, handwritten, or electronic record. Time records should reflect the actual times the employee begins work and ends work for every shift.

DOL investigators frequently target hospitality employers for audits, and employers must grant them access to employee records when they do. Thus, it is important for hospitality employers to keep complete and up-to-date records. Wage and hour records for nonexempt employees must contain the following information:

- Personal information, including the employee's name, home address, occupation, sex, and birth date (if under 19 years of age)
- The hour and day when the workweek begins
- Total hours worked each workday and each workweek
- The total daily or weekly straight-time earnings
- The regular hourly pay rate for any workweek or work period when overtime is worked
- The total overtime pay for the workweek or work period
- Any deductions from or additions to wages
- Total wages paid each pay period
- The date of payment and pay period covered

29 C.F.R. § 516.2.

A common problem in defending misclassification cases (such as the situations referenced above in Question 3) is the absence of accurate time records for employees who are improperly classified as exempt. Since it is the employer's burden to maintain these records accurately, an employer with missing time records is often unable to accurately demonstrate actual hours worked.

Employers must retain records for as long as statutorily required. The FLSA requires employers to keep the following records for three years:

- Individual employment contracts
- Collective bargaining agreements
- Records on employees' wages and hours
- Records showing the employees' sales and purchases

29 C.F.R. § 516.5.

Employers must keep the following records for two years:

- Basic employment and earnings records
- Wage-rate records
- Order, billing, and shipping records
- Records on deductions from or additions to wages paid

29 C.F.R. § 516.6.

Some states may have stricter requirements.

For more information on wage and hour recordkeeping requirements under the FLSA, see Records Maintenance and Retention Requirements under the FLSA. For state wage and hour recordkeeping requirements, see the column entitled "Wage and Hour Requirements" in Wage and Hour State Practice Notes Chart.

EMPLOYING MINORS

Question 5: Can a hospitality employer employ minors? What are the risks and limitations?

One of the reasons the WHD believes that hospitality employers are particularly vulnerable to wage and hour violations is based on the number of young workers in the industry. The WHD assumes that if your employees are young, they will likely not complain about employment law violations, such as being paid improperly. Whether that assumption is true or not, hospitality employers should strictly comply with the child labor provisions of both federal and state law.

Under federal law, 14- and 15-year-olds have strict time restrictions on hours they may work. If not contrary to state or local laws, 16- and 17-year-olds may be employed during any hours. No one under age 18 may be employed in a hazardous occupation. Under federal law, there are numerous jobs falling within 17 Hazardous Occupation Orders issued by the U.S. Secretary of Labor. These jobs include certain duties common to some hospitality employers such as operating power-driven meat slicers and bakery machines, work related to power-driven hoisting devices, and operating scrap paper balers and paper-box compactors. Employees under age 17 may not drive vehicles on public roads (regardless of whether the employee possesses a valid driver's license), and even 17-year-olds may do so only under restricted circumstances. See U.S. Dep't of Labor, Wage and Hour Division, Fact Sheet 43.

Employers should identify every employee who is 16 or 17, verify his or her age, determine his or her exact duties, and then evaluate whether the minor's duties include hazardous work that requires an age-18 minimum. Employers should also identify every employee who is 14 or 15, verify his or her age, determine his or her exact duties and hours and times of work, and then evaluate (1) whether the minor's duties consist only of permissible kinds of work and (2) whether the minor's work hours comply with the federal and state limitations upon a minor's hours worked and times-of-day worked.

Violations of federal child labor laws carry penalties of up to $10,000 per violation and violators may also be prosecuted criminally. See 29 C.F.R. §§ 579.2–579.9.

For more information on federal child labor work restrictions, see Child Labor Restrictions under the FLSA. For information on state child labor work restrictions, see the "Minimum Wage" links in the column entitled "Wage and Hour Requirements" in Wage and Hour State Practice Notes Chart.

COMPENSABLE TIME

Question 6: How do you know what time is compensable? Are employers required to provide and pay for breaks?

Employees are entitled to compensation for all hours worked. Any time worked but not compensated is a potential wage and hour violation. Common violations include failure to properly compensate employees for pre- and post-shift meetings, on-call time, and training time. Another challenge for hospitality employers is how to capture time worked when an employee is off property; responding to emails; performing work at home or off-site; traveling to and from events; or attending trainings, tastings, etc. Generally, if the employer controls or requires the activity and the employee pursues the activity necessarily and primarily for the benefit of the employer's business—it constitutes hours worked.

Policies that limit or prohibit overtime work present challenges as well. If an employer permits an employee to work, the work must be counted as hours worked, even if it is not requested or approved. For example, an employer usually must pay for time an employee continues working beyond the end of his or her shift. The WHD's view is that an employer should either pay for this sort of work or treat it as a disciplinary matter and prevent the employee from doing the work in the first place.

Other activities that are not actual worktime may still be compensable, depending on the situation. As an illustration, while the FLSA does not require rest periods, those of short duration (say, 10 to 20 minutes) usually count as hours worked. On the other hand, time employees spend in meal periods generally do not count as worktime (and thus need not be paid), so long as the employees are relieved from duty and are not interrupted. If the employees are not relieved from duty, or if their meal period is interrupted by work, difficult questions can arise as to whether and to what extent the employer should count the time as compensable.

Relatedly, while meal and break periods are not required under federal law, most collective bargaining agreements and many state laws and regulations require meal and break periods after employees work for a certain time period. Many state laws, however, allow for meal and rest break waivers and on-duty meal periods for employees who cannot be given uninterrupted breaks—such as night auditors, security personnel, and other essential hotel staff. Check state and local laws for the requirements of those waivers.

Federal law also generally obligates covered employers to permit reasonable break time for an employee to express breast milk for her nursing child whenever she needs to do so, with limited exceptions. Management must make a place available for this purpose (other than a bathroom) that is shielded from view and is free from intrusion from coworkers and the public. Under federal law, the employer must provide such a place for a year after the child's birth, although many states allow for this benefit for longer periods.

For more information on the compensability of worktime under federal law, see the practice notes in the Wage and Hour—Compensation subtopic. For information on compensable time under state laws, see the column entitled "Compensable Time" in Wage and Hour State Practice Notes Chart.

TIP CREDITS, TIP POOLING, AND RELATED ISSUES

Question 7: How should hospitality employers pay tipped employees?

For nonexempt employees in the hospitality industry, special minimum wage rules apply with respect to tipped employees. Although the current FLSA minimum wage is $7.25 per hour, the FLSA provides for a tip credit towards the minimum wage for employees working in occupations in which they customarily and regularly receive more than $30 a month in tips. 29 U.S.C. § 203(m), 203(t). These positions typically include bell staff, valet parking attendants, servers, and bartenders.

An employer's cash-wage obligation to tipped employees is currently fixed at not less than $2.13 an hour. Therefore, the current maximum tip credit is $7.25 - $2.13 = $5.12 per hour. There are a number of states that have adopted alternative minimum wages and also tipped employee minimum wages. Other states prohibit or limit the use of a tip credit. Check state laws before advising a hospitality employer on tip credit issues.

If the total of the employee's tips plus the employer's contribution of $2.13 an hour does not come to at least the minimum wage, the employer must pay the difference. It is the employer's responsibility to establish that the employee received enough in tips to cover the tip credit taken. An employer's payroll department should perform this audit every workweek.

Employers must provide proper notice to the affected employees of the FLSA's tip-credit provisions. Employees must be allowed to retain the tips they receive, except for amounts they contribute to a valid tip pool in which other employees share (so long as those participants also customarily and regularly receive tips). Tip pools have special rules that must be followed and there has been recent litigation around the country about the validity of certain tip pools.

In early 2018, Congress amended the FLSA to prohibit an employer from keeping tips received by its employees for any purpose, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether the employer takes a tip credit. 29 U.S.C. § 203(m)(2)(B); 115 P.L. 141, § 1201(a). Tips, essentially, now are deemed the property of the employee based on federal law. We continue to await guidance from the DOL to address several issues raised by the amendments.

Mandatory "tip sharing" arrangements are affected by these changes. Employers **not** relying on the tip credit should work with legal counsel to determine whether practices that had been lawful might violate the FLSA statutory language. Employers relying on the federal tip credit should ensure its practices do not violate the new language, which would trigger heightened penalties. Civil money penalties can apply (no repeated or willful showing required) to direct violations or, arguably, certain indirect violations (e.g., a uniform deduction that brings an employee below the minimum wage). See 29 U.S.C. § 216(e)(2); 115 P.L. 141, § 1201(b). Moreover, to the extent that an employer relied upon the tip credit, the employer will owe the equivalent of the credit taken for that employee. 29 U.S.C. § 216(b), (c); 115 P.L. 141, § 1201(b).

Only true tips support the tip credit. Be careful about euphemisms like gratuity. Typically, the customer decides in his or her discretion whether, in what amount, and for whom to leave a tip. Service charges or other mandatory amounts added to a bill are not tips (but might count as wages for other purposes).

For more information on compensating tipped employees under federal law, see Paying Tipped Employees. For information on state laws concerning tipped employees, see Tip Credit and Tip Pooling State Law Survey and the "Tip Credits" links in the column entitled "Wage and Hour Requirements" in Wage and Hour State Practice Notes Chart.

EMPLOYEE ROOM AND BOARD

Question 8: Can an employer count room and board as part of an employee's pay?

Many hospitality employers provide room and board to certain employees as part of their compensation package. A wage for FLSA purposes may include the reasonable cost of board, lodging, or other facilities that an employer provides. Reasonable cost cannot be more than the employer's actual cost or the fair value (as determined by the DOL), whichever is less. See 29 U.S.C. § 203(m); 29 C.F.R. Part 531.

Employers must meet the following requirements to count employee board, lodging, or other facilities as wages:

- The things that the employer furnishes must be primarily for the employee's benefit.
- They must be customarily furnished to employees.
- The employee's acceptance of them must be voluntary and uncoerced (though courts have sometimes disagreed on whether the employee must be given a choice to accept or reject noncash wages).
- The employee must receive the benefits of the things counted as a wage.
- No part of the wage may include a profit to the employer or to anyone affiliated with the employer.

Id.

Examples of items that might be considered board, lodging, or other facilities that count as wages include meals, housing, child-care services, transportation for normal commuting between home and work, and tuition payments for training that is for the employee's own, personal benefit.

Remember, since the payment or provision of services is a wage, it must be included in the regular rate of pay for overtime purposes.

For information on state laws concerning credits for board, lodging, or other facilities, see the "Tip Credits" links in the column entitled "Wage and Hour Requirements" in Wage and Hour State Practice Notes Chart.

OVERTIME FOR EMPLOYEES WITH MULTIPLE POSITIONS

Question 9: How does an employer calculate overtime pay for an employee working in different positions during a workweek?

Hospitality employees often pick up shifts and work in different positions during a workweek at a different hourly rate (of not less than the minimum wage). Probably the most common way to compute overtime of such employees is by using the "weighted average regular rate." To compute this rate, the employer adds together all of the employee's straight-time hourly pay for all time worked, divides that total by all the employee's hours worked to determine the weighted average regular rate for both straight-time and overtime hours, and then computes overtime premium pay at one-half of that rate multiplied by the employee's overtime hours.

An alternative that employers can use under specified conditions is the "rate in effect" method. This method calls for paying an employee for overtime hours worked 1.5 times the non-overtime hourly rate established for the specific type of work the employee performs during the overtime hours. Among the requirements for this option are that (1) the kinds of work for which the different rates are paid must themselves be different; (2) there must be an advance agreement or understanding with the employee that the rate-in-effect method will be used; and (3) the different rates must be bona fide ones, meaning they are not less than the minimum wage and are the actual rates paid for the work the employee performs in non-overtime hours. See 29 C.F.R. §§ 778.415–778.421.

For more information on calculating regular and overtime rates of pay for nonexempt employees, see Overtime Requirements for Hourly Non-Exempt Employees under the FLSA.

INDEPENDENT CONTRACTORS AND INTERNS

Question 10: What issues should hospitality employers consider regarding independent contractors and interns?

It is common practice in the hospitality industry to use contractors to supplement the workforce. Housekeeping, landscape, and stewarding departments are commonly supplemented with contract workers. Scrutiny of an employer's use of independent contractors can come from various government agencies, such as state unemployment commissions and the Internal Revenue Service. The DOL is also carefully scrutinizing hospitality employers' use of independent contractors, contract labor, and unpaid interns.

Whether someone is really an independent contractor depends on such factors as:

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.
- The nature and degree of control by the principal.
- The alleged contractor's opportunities for profit and loss.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation.

See DOL Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA).

For more guidance on determining whether someone is an independent contractor, see Independent Contractor Tests and Risks of Worker Misclassification, and Independent Contractor Classification and Practices Audits and Reclassifying Employees and Independent Contractors. For information on state laws concerning independent contractors, see Independent Contractors State Practice Notes Chart. For tools to assist in evaluating workers' classifications, see Independent Contractor Status Maintenance Checklist and Independent Contractor Red Flag Checklist.

Interns and trainees also present a risk for hospitality employers. The primary issue employers face with respect to interns is whether an intern is entitled to either minimum wage or overtime compensation. The U.S. Supreme Court has said that people who voluntarily work for their own advantage on the premises of another in order to learn a skill or trade, and who do so without any expectation of compensation for the work, are not necessarily employees for wage and hour purposes. Therefore, it is at least possible that people functioning as students or interns or holding some other similar status will not be deemed to be employees.

Several criteria are considered in deciding this question, but generally the nonemployee status of a trainee or student is likely to be challenged if (1) the person is doing work similar to that which the business would receive from an employee; (2) on balance, the relationship is more for the business's benefit than the learner's; or (3) the person is being paid. Accordingly, never treat trainees or students as nonemployees without carefully analyzing their status in advance, and ensure that the employer can provide the intern with an educational experience that is similar to training that he or she would receive in an educational environment.

For more guidance on classifying interns, see the section entitled "Trainees and Interns" in Employer and Employer and Employee Coverage under the FLSA — Which Employees Does the FLSA Cover?. For information on how to draft an internship agreement and a sample annotated agreement, see Internship Agreements: Major Drafting and Legal Issues and Internship Agreement. For information on state laws concerning interns and volunteers, see the "Wage and Hour Requirements" column of Wage and Hour State Practice Notes Chart.

EEO LAWS – EMPLOYER COVERAGE

Question 11: Which equal employment opportunity (EEO) laws apply to hospitality employers and when are smaller employers covered?

Most employers are covered by federal discrimination laws, although some smaller companies may be excluded. Title VII of the Civil Rights Act of 1964 (Title VII) protects employees from discrimination based on race, color, national origin, sex (including pregnancy), and religion. All aspects of the employment relationship must be conducted in a nondiscriminatory fashion, including hiring, compensation, promotion, discharge, and the allocation of nonmonetary opportunities and benefits.

Title VII defines an employer as an entity engaged in a business affecting commerce, which has 15 or more employees for each working day, in each of 20 or more weeks in the current or preceding calendar year. Since virtually all business enterprises are considered to affect commerce, the key standards in this definition are the 15-employee and 20-week period requirements. When evaluating the 20-week requirement, the current year is the calendar year in which the alleged discrimination occurred, while the preceding year is the year prior to the current year. The 20-week period need not be consecutive weeks. For purposes of the 15-employee requirement, courts generally look to whether the employer had the right to control the work of a particular individual. If so, that individual, whether part-time or full-time, is deemed to be an employee for purposes of Title VII coverage. Courts generally have not included independent contractors, volunteers, or corporate directors as employees for meeting the 15-employee threshold. For more information on Title VII, see Title VII Compliance Issues.

Two federal statutes deal with disability discrimination: the Americans with Disabilities Act (ADA) and Section 503 of the Rehabilitation Act of 1973. The statutes are similar in many respects, but there are important differences. The ADA applies to all private, state, and local government employers with 15 or more employees. Section 503 applies only to federal contractors. Also, unlike the ADA, the Rehabilitation Act imposes affirmative action obligations on all covered contractors. For more information on the ADA, see Americans with Disabilities Act: Employer Requirements and Reasonable Accommodations.

The Age Discrimination in Employment Act (ADEA) protects employees 40 years old or older from discrimination based on age. Its definition of covered employer is identical to Title VII except that the ADEA has a 20-employee requirement, rather than Title VII's 15-employee requirement. For more information on the ADEA, see Age Discrimination in Employment Act (ADEA): Key Considerations.

For guidance on the employer coverage requirements of other federal discrimination laws, see the practice notes in the Discrimination and Retaliation—EEO Laws and Protections subtopic.

Additional obligations arise for hospitality employers that are also federal contractors, such as hotels that do large amounts of business for or that have open purchase orders with federal government agencies. Executive Order 11246 applies to federal contractors with government contracts in excess of $10,000 in any 12-month period, and prohibits discrimination on the basis of race, religion, sex, color, and national origin. While the Order's prohibition against discrimination does not differ from Title VII, the laws are enforced by different agencies. The DOL's Office of Federal Contract Compliance Program (OFCCP) enforces Executive Order 11246, while the Equal Employment Opportunity Commission (EEOC) enforces Title VII. Additionally, Executive Order 11246 requires that employers with federal contracts valued over $50,000 and who employ more than 50 employees must adopt and update annually a written affirmative action plan. For more information on employer coverage under federal contractor nondiscrimination laws, see Federal Public Sector Employees Labor and Employment Laws Coverage Chart, Screening and Hiring Requirements for Government Contractors — Sources of Federal Contractors' Additional Non-Discrimination Requirements, and Affirmative Action Plans: OFCCP Compliance.

Employers must also assess whether they are covered by state discrimination laws. Note that small employers that are below the employee threshold for coverage under Title VII, the ADA, and the ADEA may nevertheless be covered by analogous state laws. Therefore, be sure to research the laws in your jurisdiction. For information on employer coverage under state EEO laws, see the practice notes in the Discrimination, Harassment, and Retaliation State Practice Notes Chart.

EEO LAWS – PROTECTED CLASSES

Question 12: What hospitality employees are protected by EEO laws?

The federal anti-discrimination laws protect against discrimination on the basis of race, color, national origin, sex, religion, pregnancy, childbirth and related medical conditions, disability, age, citizenship status, genetic information, and military service obligations. These protections apply across all industries, including hospitality. For information on the protected classes under federal discrimination laws, see Protected Classes Chart (Key Federal Anti-discrimination Employment Laws).

Note that recently, the EEOC has taken the position (and several federal courts have agreed) that sexual orientation and transgender status are also categories entitled to protection under the anti-discrimination laws. For more information, see LGBTQ Protections and Best Practices under Title VII.

Additionally, states and localities often expand the categories protected under discrimination statutes. Thus, when advising a client on establishing an EEO and anti-harassment policy, or any other issues related to discrimination in the workplace, it is critical that you review state and local anti-discrimination laws and regulations. For information on protected classes under state EEO laws, see the practice notes in the Discrimination, Harassment, and Retaliation State Practice Notes Chart.

WORKPLACE HARASSMENT

Question 13: What do hospitality employers need to do to prevent against harassment in the workplace?

It was not until 1986 that the U.S. Supreme Court first held that Title VII's prohibition of sex discrimination included sexual harassment. The Supreme Court identified two types of sexual harassment: quid pro quo and hostile working environment. Since then, the EEOC and the lower courts have wrestled with (1) defining what behavior will be considered sexual harassment, (2) identifying who can be liable for harassment and under what circumstances, and (3) determining the potential scope of liability. For information on Title VII's prohibition against sexual harassment, see Harassment Claim Prevention and Defense. For information on state anti-harassment laws, see the practice notes in the Discrimination, Harassment, and Retaliation State Practice Notes Chart.

In its Strategic Enforcement Plan for 2017 through 2021, the EEOC cites harassment in the workplace as one of the most frequent complaints raised before the EEOC. According to the EEOC, "[o]ver 30 percent of all charges filed with the EEOC [in FY 2016] allege harassment." In addition, the EEOC prioritizes eliminating harassment against vulnerable workers, such as immigrant and migrant workers and young workers—individuals who do not always know their rights or how to assert them. Since the hospitality industry employs many foreign workers and younger workers, harassment prevention must be a priority.

Every hospitality employer should adopt, communicate, and enforce a written anti-harassment policy. The policy should:

- Define harassment
- Prohibit any level of harassment
- State that supervisors are covered by the policy
- Outline responsibilities for reporting and investigating complaints under the policy
- Provide that violators will be disciplined
- Protect the confidentiality of the complaint (within the bounds of a thorough investigation)
- Provide several avenues of complaint –and–
- Ensure no retaliation for reporting concerns under the policy

It is vitally important that employers train human resources personnel and management on this policy. In fact, a number of states require annual harassment training. Recently, some states have also passed or are considering legislation prohibiting employers from including sexual harassment claims in mandatory arbitration agreements and from including nondisclosure or confidentiality clauses in settlements of sexual harassment claims. The Tax Cuts and Jobs Act of 2017 also eliminated business deductions for sexual harassment settlements that include such clauses.

For additional guidance on drafting anti-harassment policies, see Anti-harassment Policies: Key Drafting Tips. For annotated non-jurisdictional anti-harassment policies, see Anti-harassment Policy and Anti-harassment Policy (with Acknowledgment).

EMPLOYEES WITH DISABILITIES

Question 14: What is a hospitality employer's obligation under the Americans with Disabilities Act?

The Americans with Disabilities Act (ADA) prohibits employers with 15 or more employees from discriminating on the basis of disability. The limited exemptions from coverage are confined to such entities as Native American tribes and private clubs. The ADA prohibits an employer from discriminating against disabled individuals in regard to the terms or conditions of employment if the individual is qualified to perform the essential functions of the job with or without reasonable accommodation. The accommodation cannot be an undue hardship on the employer or create a direct threat of harm to the employee or others.

Congress passed the Americans with Disabilities Amendments Act (ADAAA) in 2008. The ADAAA's main goal was to ensure that the determination of whether an individual had a disability should not be the primary focus of a lawsuit; instead, it should be whether the employer complied with its obligations under the law. The EEOC's regulations confirm this focus by retaining a broad definition of disability.

The ADA also has specific restrictions on when employers may make pre-employment inquiries about the existence, nature, or severity of an applicant's disabilities. An employer may only make such inquiries after a conditional offer of employment has been made and before an individual starts work.

After employment commences, an employer is also restricted in requiring employees to undergo physical examinations, including medical inquiries, unless the inquiry is job-related and consistent with business necessity. A physician examination/inquiry is job-related and consistent with business necessity when the employee:

- Is having difficulty performing his or her job effectively
- Becomes disabled –or–
- Requests an accommodation because of a disability

Also, all medical information about an employee must be kept strictly confidential and stored in a medical file kept separate from an employee's personnel file.

For more information on the ADA, see Americans with Disabilities Act: Employer Requirements and Reasonable Accommodations, Accommodating a Disability under the Americans with Disabilities Act Checklist, and ADAAA Definition of Disability Chart. For information on state disability laws, see the practice notes in the Discrimination, Harassment, and Retaliation State Practice Notes Chart.

ACCOMMODATIONS FOR MEDICAL CONDITIONS

Question 15: What must a hospitality employer do to accommodate an employee's medical condition?

Employers must understand their accommodation obligations. Under the ADA, a reasonable accommodation is a change in the work environment or in the way a job is customarily done, or in the pre-employment process that gives a disabled individual equal employment opportunities. Employers must accommodate a disabled employee when the employee or his representative (e.g., a physician) tells the employer that he or she needs an adjustment or change at work because of his or her impairment.

Applicants or employees do not have to mention the ADA or use the phrase reasonable accommodation. They simply must connect the requested change to the employee's impairments. After an employee requests an accommodation, the employer must engage in an interactive process to determine the appropriate accommodation that the disabled individual needs. There are four steps in the interactive process:

(1) Identify the job's essential functions.

(2) Consult with the employee and/or employee's physician to determine the specific limitations at issue.

(3) Consult with the employee and identify potential accommodations and assess each accommodation's effectiveness.

(4) Select the accommodation that best serves the need of the employer and the employee.

To determine how to accommodate an employee, the employer must determine the essential functions of the job. A function is essential to a job if it is a major or an important part of the job, as opposed to being secondary or merely desirable. An employer's job descriptions and the actual day-to-day functions of the job will be used to determine which functions are essential.

While it is impossible to list all possible accommodations an employer may need to consider, the following are some common forms of accommodation.

Unpaid Leave

Employers must provide unpaid leave and hold an employee's position during the leave unless doing so is an undue hardship. The employer may have an obligation to provide the employee leave under the Family and Medical Leave Act (FMLA), which grants eligible employees the leave regardless of whether it is an undue hardship. Under the ADA, additional job protected leave, after FMLA leave expires or before an employee becomes eligible for FMLA leave, may be a reasonable accommodation in some circumstances. For example, a golf course maintenance employee's request for additional leave for a disability that would extend through the off season may be a reasonable accommodation. The same request for extension during the middle of a resort's busy season, however, may be an undue hardship.

Modified Work Schedule

Accommodations relating to attendance or punctuality involve an intertwining of the notions of essential function and reasonable accommodation. The courts have identified three issues used in cases dealing with requests for modified schedules:

(1) Whether a fixed schedule is an essential function of the job

(2) If it is, whether there is a reasonable accommodation –and–

(3) Whether a modified schedule would enable the employee to perform the essential functions of the job

Punctuality and regular attendance generally are considered an essential function of most positions because maintaining adequate staffing is critical to meeting guest service needs. However, modifying a shift start time or end time may be a reasonable accommodation in certain circumstances, so long as adequate coverage can be maintained.

Reduced Work Schedule

Generally, an employer is obligated to allow an employee to work part-time as a reasonable accommodation when the part-time schedule is not indefinite. For example, if an employee returning to work after having exhausted FMLA leave needs to work part-time for four weeks, an employer must allow it unless doing so is an undue hardship. If a hotel is unable to provide adequate coverage for those missed hours, however, a reduced schedule may be an undue hardship.

Shift Changes

An employee may also request a shift change as an accommodation. If the shift is not an essential function and a position is available on the requested shift, the accommodation may be required.

Modified Work Areas

Reconfiguring a work area, modifying a housekeeper's cart, and providing a special keyboard at the front desk are just a few examples of modified work areas as an accommodation. The fact that an accommodation may cost an employer money is not the deciding factor as to whether it will be an undue hardship. Under the ADA, it is expected that an employer may have to spend its funds to accommodate a disabled applicant or employee.

These are just a few of the examples of possible accommodations a hospitality employer may have to consider. Remember, disabilities come in many forms, both physical and mental. Employers must handle all requests for accommodation in a reasonable time period and confidentially. The employer must be prepared to demonstrate

that it engaged in a good faith, interactive process to discuss the accommodation request and must be prepared to defend any decision to not offer an accommodation.

For more information on the interactive process and reasonable accommodations, see Americans with Disabilities Act: Employer Requirements and Reasonable Accommodations, Accommodating a Disability under the Americans with Disabilities Act Checklist, and Disability and Reasonable Accommodation Policies: Key Drafting Tips. For information on state interactive process and reasonable accommodations requirements, see the practice notes in the Discrimination, Harassment, and Retaliation State Practice Notes Chart.

TRANSGENDER EMPLOYEES

Question 16: Does a hospitality employer have an obligation to accommodate a transgender employee?

The EEOC has taken the position that while Title VII does not specifically mention transgender as a protected status, the broad prohibition against sex discrimination includes discrimination against transgender individuals, as well as others in the lesbian, gay, bisexual, and transgender (LGBT) community. Some common issues arising in hospitality workplaces are the use of restroom and locker room facilities and appearance policies.

One reasonable alternative to address the issue of restrooms and locker rooms is to offer all employees a gender-neutral or single-occupancy restroom or changing area. But remember, the EEOC has said that mandating transitioning employees to use the unisex facility may be a discriminatory practice. Employer should also allow transgender employees to comply with the uniform and appearance standards of the gender with which they identify. However, the employer may require strict compliance with the standard, so long as it does so with all employees.

A key to managing this emerging issue is to train managers and supervisors on how to handle the issue if it arises—in a sensitive and confidential manner. Open communication with the transgender employee is important; talk to the employee about how he or she wants to address sensitive issues such as coworkers' concerns that may be raised, adherence to appearance standards, and any other issues that may arise.

For more information, see LGBTQ Protections and Best Practices under Title VII. For information on LGBTQ protections under state EEO laws, see the practice notes in the Discrimination, Harassment, and Retaliation State Practice Notes Chart.

DRESS AND APPEARANCE POLICIES

Question 17: What are the legal limitations on dress and appearance policies for hospitality employees?

Many hospitality employers impose strict guidelines on employee appearance, dress, and grooming—and for legitimate reasons. These rules protect the property's image, promote a productive work environment, comply with health and safety standards, and even prevent claims of unlawful harassment. Although employers are well within their rights to set limits and restrictions on employee dress and appearance, employers should be cautious of some potential pitfalls with such policies, including claims for gender, religion, national origin, race, and disability discrimination. Advise employers to carefully consider employee complaints that the policy interferes with their rights or is being more strictly enforced against one gender than the other. As with most policies, consistent enforcement of the policy is key. As long as the dress code is based on business needs and is applied uniformly, it will generally be legally acceptable.

A common challenge to dress and grooming standards relates to requests for accommodations for certain religious beliefs. Employers must consider how to respond if an employee asserts a right to particular clothing, tattoo, jewelry, or hairstyle on religious grounds. Title VII and many state laws are clear: employers cannot treat employees or applicants more or less favorably because of religious beliefs or practices. They must accommodate employees' sincerely held religious practices, unless doing so would impose an undue hardship. According to the EEOC, employers may need to modify grooming requirements as a religious accommodation. Employers may not place more restrictions on religious expression than on other forms of expression that have comparable effect on the workplace. For example, if a ball cap or flamboyant hairstyle does not pose an undue hardship, neither does a turban or a head scarf that is based upon sincerely held religious convictions. However, an employer is not required to accommodate religious beliefs or practices if doing so would impose an undue hardship on legitimate business interests.

The standard for demonstrating an undue hardship is not high, but employers must be prepared to show that they considered the request for accommodation as opposed to simply dismissing it out of hand. Fear that other employees may be upset by or uncomfortable with a religious expression is not likely an undue hardship. On the other hand, an employer may establish an undue hardship by showing that the accommodation diminishes efficiency on the job or impairs safety. For additional guidance on religious accommodations, see Religious Accommodation Requirements. For information on religious accommodations under state EEO laws, see the practice notes in the Discrimination, Harassment, and Retaliation State Practice Notes Chart.

When advising a hospitality employer on drafting an appearance policy, first identify the purpose behind the policy. The goal should be to set forth the expectations clearly and unambiguously while preserving the flexibility to make decisions. A well drafted appearance policy should address all aspects of employee dress, appearance, and grooming and should clearly explain that the company's professional atmosphere is maintained, in part, by the image it presents to its customers, visitors, and vendors.

A common issue facing hospitality employers is how to deal with tattoos, body piercings, body art, gauges, and other forms of self-expression that have become commonplace in modern society. One option is to completely prohibit visible tattoos and multiple body or facial piercings. A number of employers have found this strict provision too limiting, however, and have adopted less stringent policies. Even employers that permit body piercings or tattoos may still find it necessary to set some limits. An employer's policy should clearly spell out what is permitted. For example, if the policy permits tattoos, the policy can prohibit the display of sexually graphic, violent, or otherwise offensive tattoos, or require that employees limit the number of visible tattoos.

No matter how employers deal with these issues, dress and appearance policies should be clearly stated in writing and readily available to all employees. While employers still retain wide latitude, practical, social, and legal factors require careful preparation of policies related to dress and appearance as well as consideration of such requests for accommodation that might have been readily (and safely) dismissed several years ago.

For a sample dress and appearance policy, see Dress Code and Grooming Policy (with Acknowledgment).

HEALTH AND SAFETY ISSUES

Question 18: What are the common health and safety concerns for hospitality employers?

The Occupational Safety and Health Administration (OSHA) has focused on a handful of areas in the hospitality industry: workplace violence, blood-borne pathogens, chemical exposure, and electrical hazards. Unfortunately, the industry has a higher Total Case Rate (TCR) and Days Away, Restricted, and Transfer (DART) case rate when compared to all private industries. In light of OSHA's increasing attention on workplace violence and blood-borne

pathogens, and a recent increase in penalty amounts, OSHA's scrutiny on the hospitality industry punctuates the need for employers to remain focused on a multitude of operational hazards.

Hospitality employers must be prepared, in advance, for an OSHA inspection. Like any other employer in the country, hospitality entities are far more likely to be inspected after an employee complaint, agency referral, or reportable incident. Some events will automatically trigger a reporting obligation to OSHA (e.g., the hospitalization of an employee, an amputation, the loss of an eye, or a fatality). Any of these will likely lead to an OSHA inspection.

If OSHA conducts an inspection visit, the inspector will look for hazards typical to hospitality industry workplaces. High priorities will be ergonomic risks associated with the duties of housekeeping staff, chemical exposure injuries, exposure to blood-borne pathogens, cuts and amputations by kitchen equipment, and youth worker safety.

It is especially important to avoid an OSHA violation since OSHA recently increased the penalty amounts for citations classified as serious and other-than-serious, as well as citations for violations of posting requirements, to $12,675 per violation—a sizeable increase from the previous penalty amount of $7,000. Similarly, citations for violations classified as willful or repeat were increased to $126,749 per violation, and situations where there is a failure to abate now carry a penalty of $12,675 per day beyond the abatement date. These last two categories were recently increased from $70,000.

For additional information on OSHA inspections and penalties, see OSH Act Requirements, Inspections, Citations, and Defenses and OSHA Inspections Checklist (Employer Preparation and Response). For information on state health and safety laws, see OSH Act Compliance, Employee Health, and Workplace Security State Practice Notes Chart and Occupational Safety and Health Plan State Law Survey.

REGULATORY TRENDS

Question 19: What are the major legal and regulatory trends affecting hospitality employers?

Hospitality employers can expect to confront growing challenges of operating within confines of federal, state, and local laws. Looking ahead, hospitality employers should have the following employment law trends on their radar.

Paid Leave

States and local jurisdictions are introducing new and expanded paid leave laws. Most notably, lawmakers across the country are enacting paid sick leave laws at a rapid pace. For a survey of state and local paid sick leave laws, see Paid Sick Leave State and Local Law Survey (Private Employers).

Other leave laws range in coverage from providing leave for an employee's or family member's illness to pregnancy, to school visitation, to name a few—see Attendance, Leaves, and Disabilities State Practice Notes Chart.

Minimum Wage

There are now at least 29 states (and multiple local jurisdictions) with minimum wage rates above the federal $7.25 minimum wage, which has not changed since 2009. As the "Fight for $15" movement seeking a $15 minimum wage continues, hospitality employers should expect further increases in the next few years. For a survey of state minimum wages, see Minimum Wage State Law Survey.

Predictive Scheduling

Predictive scheduling has recently gained momentum among lawmakers nationwide, with such laws recently enacted in San Francisco, Seattle, and New York City. Generally, these laws require employers (mostly in the retail, food service, and hospitality industries) to provide employees with advanced notice of their work schedule and any changes to the schedule. For information on state predictive scheduling laws, see the links entitled “On-Call Time” in the “Compensable Time” column of Wage and Hour State Practice Notes Chart.

Ban-the-Box

Ban-the-box laws typically prohibit inquiries about an applicant’s criminal history on an employment application or limit inquires until certain stages of the interview process. They are designed to prevent employers from screening out applicants with criminal histories without first considering their job qualifications. This trend is particularly problematic for hospitality employers whose employees often have unsupervised access to guests, including children, and guests’ possessions. For a survey of state and local ban-the-box laws, see Ban the Box State and Local Law Survey.

Pay Equity

State and local jurisdictions continue to seek strategies to eliminate pay discrimination. These measures include restrictions on inquiries into an applicant’s salary history, pay transparency laws (limiting an employer’s ability to prohibit or restrict discussions about pay), and laws requiring employers to justify pay differentials between the sexes.

For more information on state laws governing salary history inquiries, see the links entitled “Salary History” in the “Pre-employment Inquiries and Testing” column of Screening and Hiring State Practice Notes Chart. For more information on state equal pay laws, see the links entitled “Equal Pay Laws” in the “Wage and Hour Retaliation and Discrimination Laws” column of Wage and Hour State Practice Notes Chart.

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Andria Lure Ryan is a partner in the Atlanta office of Fisher & Phillips LLP, and she serves as the chair of the firm's Hospitality Industry Practice Group. She represents numerous hotel, resort, restaurant and related employers throughout the United States in various phases of labor and employment law. She is an advocate for the hospitality industry and is active in national, state and local hospitality associations. Her practice philosophy is that a lawsuit that was never filed is a better win for a client than a defense verdict after a long and costly trial. She provides thoughtful advice and counsel designed to anticipate and prevent employee claims and lawsuits, government investigations and union organizing activity. She frequently speaks to business association and human resources groups on topics related to all areas of employment law such as hiring and firing practices, disability accommodation, workplace harassment and discrimination, immigration, employee leaves, workplace investigations and wage and hour issues.

She has been honored by the Colorado, South Carolina and Washington Hospitality Associations for her contributions to those organizations. Andria is "AV" Peer Review Rated by Martindale-Hubbell.