Top 5 Legal Trends For Hospitality Employers

Insights
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There is much to be learned from 2013. Below are five legal topics that made headlines last year, and should provide valuable guidance for managing labor and employment law issues in 2014.

The Rising Minimum Wage
Hospitality employers should be prepared for minimum-wage increases and take note of whether these increases affect their tipped workers' wages. Thirteen state legislatures have voted to raise the minimum wage, many of which are in effect now. For some states, like Massachusetts and California, employers have until July 1st to make adjustments to their pay plans. President Obama recently proposed that Congress vote to increase the federal minimum wage from $7.25 per hour to $10.10 and thereafter to link it to increases in the Consumer Price Index.

According to a recent litigation-trends survey (www.nortonrosefulbright.com), employers faced more wage-hour lawsuits than any other area of employment law. The popularity of wage-hour class actions among plaintiffs' lawyers remains a real concern for employers. Also, one of the U.S. Labor Department's (DOL) continuing enforcement initiatives is to target the hospitality industry, which they view as presenting a "high risk" for non-compliance. Last year the DOL announced five-figure settlements paid out by hotel and motel employers for failing to pay required overtime premiums.

Given the present legal climate, and the continually changing legal standards, it makes good sense to conduct your own audit to make sure that your internal procedures contain the necessary safeguards with regard to minimum wage, overtime payments, and other Fair Labor Standards Act (FLSA) compliance.

Hiring Interns
Last year, a New York federal court held that an employer's unpaid interns should have been classified as employees, and were thus entitled to minimum wage and overtime requirements under the FLSA. Not surprisingly, more former interns are bringing lawsuits in the wake of this ruling seeking backpay.

Before you consider utilizing interns, whether paid or unpaid, consider the federal guidelines from the DOL. The Wage and Hour Division of the DOL issued a six-factor test to determine if a person who participates in "for-profit" sector internships may do so without compensation.

These criteria examine whether the internship experience is geared to providing a more educational environment that primarily benefits the intern's academic pursuits, or if the intern is used as a substitute for regular paid workers. If considered a mere substitute for paid workers, the DOL requires employers to pay no less than the federal minimum wage and overtime.

Companies often bring interns into the workplace with the thought that internship programs have a mutual benefit to them and the intern. The idea is that interns gain valuable experience in the industry in which they hope to work and thereby become more marketable. The employer sees the benefit in that it can obtain needed labor, at little or no cost, without having to comply with onerous employment laws and regulations, such as wage and hour laws, workers' compensation, and the payment and reporting of payroll taxes.

Cases from last year also indicate that employers could have exposure to harassment or discrimination lawsuits under federal law. The bottom line is that an internship program can be a risky proposition if not implemented properly. Our advice to hospitality employers is to seek legal counsel *before* setting up an internship program.

Class-Action Waivers In Arbitration Agreements

Following the U.S. Supreme Court's landmark decision in *AT&T Mobility v. Concepcion,* employers defending class actions have succeeded in preventing class claims. Concepcion marked the beginning of a new wave of Supreme Court decisions which have significantly reduced the ability of individuals to pursue collective or class actions. In Concepcion, the Supreme Court upheld the enforceability of class-action waivers in arbitration agreements. In addition, through this case, the Supreme Court significantly limited the power of state courts to use state statutes and public policy considerations to both invalidate class-action waivers and challenge arbitration agreements.

Last year, the Supreme Court continued its support of enforcing arbitration agreements in *American Express v. Italian Colors*. Although having class claims reduced to individual ones does not necessarily eliminate the problem of litigation costs, it may go far in limiting the soaring exposure that typically arises from class-action litigation.

Arbitration agreements can provide valuable benefits for employers defending class-based claims. But hospitality employers should evaluate the potential impact of seeking to enforce arbitration versus fighting multiple claims individually.

This includes consideration of the merits of the employees' claims, the amount of possible liability (globally and individually), the potential costs of facing numerous individual actions, the cost of arbitration, and the likelihood of achieving a broad-based resolution at a discounted value. Nonetheless, an arbitration agreement can serve as a powerful tool for protecting your company from expensive class litigation.

Social Media And Employee Protected Speech

Social media is a useful tool for any company seeking to attract new business, advertise a property's amenities, and receive feedback from guests. But social media and the policies that govern them are not immune from regulation.

A "trending topic" in the labor and employment legal community has been the National Labor Relations Board's (NLRB) aggressive approach to protecting employee speech in social media. This protection extends even to non-unionized employees. While limiting what your employees say or "tweet" about the company may help your business from a public relations standpoint, it can also create new legal woes.

Several NLRB decisions have caused employers to reexamine their policies to ensure that they are not too restrictive toward employees complaining about working conditions on social media. Thus, it's important to carefully craft any social-media policy to make sure employees understand that their "protected" behavior is not prohibited.

One case is illustrative of this issue. After work, an employee posted a comment on her Facebook page complaining about a coworker and asking other people to chime in about their feelings toward this coworker. Four other employees commented under the status and berated the coworker. The employer found out about this incident and immediately fired the employee who posted the comment, and the four other employees who commented, stating that their remarks violated the company's anti-bully and harassment policy.

Upon review by the NLRB, the Board determined that the terminated employees were engaging in protected and concerted activity on Facebook. Despite the company's anti-harassment policy, the NLRB held that employees could speak about their coworker on Facebook because they were discussing working conditions.

Before accessing an employee's social-media account, always consult legal counsel. Some states have limited the type of social-media content employers can access. For example, employee privacy in online accounts was deemed so important by the California legislature that it passed a law prohibiting supervisors and managers from requesting user names and passwords from employees. Although specific to California, all employers should be cautious before accessing employee social media.

Background Checks

Guest safety is a paramount concern for hospitality employers and it's common for employers to conduct background checks to ensure that their employees do not have a criminal history. Indeed, certain employees may have access to guest credit card numbers, personal belongings, and other confidential information. While screening new hires through background checks may seem like the best way to limit your liability and protect your guests, blanket disqualifications may be viewed as an indirect form of race discrimination.

A 2011 Equal Employment Opportunity Commission (EEOC) study found that the use of criminal-background checks has a disparate impact on African Americans and Hispanics. As a result of the study, the EEOC issued enforcement guidance on April 25, 2012, related to the use of arrest and conviction records by employers in making hiring decisions.

The EEOC is now recommending that employers go through an extensive individualized screening process to ensure that the criminal-background information is job related and consistent with business necessity. For example, the EEOC suggests employers allow applicants to explain why their conviction should not preclude them from employment and further suggests that any adverse employment decision based on criminal-background checks be sufficiently tied to the job duties of the employee.

In a victory for employers, federal courts recently dismissed three EEOC cases against employers based on the theory that general-background checks in hiring create a race bias. Nonetheless, hospitality employers should proceed with caution in conducting background checks and avoid implementing a blanket policy that rejects applicants with criminal backgrounds.

Conclusion

To ensure that 2014 is a successful year, it is important for hospitality employers to take note of these recent trends. Whether ensuring wage-hour compliance, implementing a new internship program, or conducting a background check, employers must always be aware of the legal pitfalls.

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