



## **Outsourcing In The Hotel Industry – Beware Of The Pitfalls**

Insights

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In recent years, a number of hotels both in the United States and abroad have increasingly outsourced certain departments. Housekeeping, valet parking, and some or all aspects of food service are frequently selected as functions to be transitioned. There are certain advantages to outsourcing: you can eliminate hiring and recruiting expenses, achieve cost savings associated with wage and benefit levels, and enjoy greater staffing flexibility during seasonal periods.

There are, however, potential downsides to consider: it may be more difficult to maintain customer service standards, for example, and your organization's culture might be jeopardized. Also, outsourcing functions held by unionized staff may lead to labor headaches, given collective bargaining agreement limitations and your bargaining obligations under the National Labor Relations Act (NLRA). Not to mention the risk that your hotel could be considered a joint employer of the outsourcing company (a topic discussed in more depth [here](#) and [here](#)).

Although a discussion of these specific topics and a comprehensive list of all the pros and cons of outsourcing is beyond the scope of this article, there are three recent legal challenges that are ripe for analysis, each involving non-union employers that attempted to outsource some aspect of hotel operations.

### **High-Profile Outsourcing Leads To High-Profile Protests And High-Dollar Payout**

In August 2009, Hyatt Hotels Corp. terminated 98 housekeepers and replaced them with employees from an outside staffing organization. According to a report by BNA, the new contracted housekeepers were to be paid only half of the wages earned by the fired housekeepers. The company said it made the replacements based upon “unprecedented economic challenges” that three of its Boston hotels were facing due to a “precipitous drop in revenues.” The terminations would end up costing the company dearly, however.

That's because the terminations resulted in several significant responses from outside parties. First, Massachusetts Governor Deval Patrick directed all state employees to stop doing official business with Hyatt Hotels until the company rehired the workers. Soon thereafter, hundreds of Hyatt workers in Chicago and San Francisco protested the mass terminations, many of whom wore buttons reading “Bring back the Boston 100.” Nearly 300 people were arrested during nonviolent sit-ins organized by the UNITE HERE union (which, not coincidentally, was involved in contentious negotiations with Hyatt for new collective bargaining agreements in Chicago and San Francisco).

As reported by BNA, although Hyatt disavowed any connection to the protests, it soon announced the 98 terminated housekeepers would be offered new full time jobs with a staffing organization and provided healthcare coverage for six additional months. Furthermore, as an alternative to a job at the staffing organization, the company promised any former housekeeper would be offered career services and training, and given “financial support equal to their Hyatt rate of pay through March 2010 or until they secure permanent jobs, whichever comes first.”

In order to quell the mounting legal challenges, Hyatt agreed to a one million dollar settlement with the housekeepers in 2014. In addition, the settlement gave the former housekeepers “priority in the application process for a housekeeping position at specified future Hyatt-managed hotels within Boston and Cambridge.” Although hotels without simultaneous high-profile union negotiations would be less likely to encounter similar problems, this scenario is a reminder that outsourcing staff could still lead to costly legal claims.

### **Outsourcing Illegally Thwarted Union Organizing, Court Concludes**

As of December 2011, the Hyatt Regency hotel on Long Island was one of the poorest performing Hyatt-branded properties in the country, garnering some of the lowest guest satisfaction scores. Hyatt hired Remington Hotels, a hospitality services management company, to manage the property and improve performance. One of Remington’s first actions was to terminate the hotel’s contract with Hospitality Staffing Services (HSS), the staffing company used to outsource the hotel’s housekeeping duties. Unfortunately, the guestroom component score (the primary indicator of housekeeping effectiveness, measured against an average benchmark of 50) continued to decline even after the switch, falling to 20.4 by the following March. Two months later, it had further slipped to 8.3. By June, it hit rock bottom with a 1.1 score.

Meanwhile, a union organizing drive began to take shape among the housekeeping workers. A known union activist began visiting the hotel in April 2012 and union activity commenced shortly thereafter. Several workers claimed Remington managers questioned workers about the union activity and asked who was present at worker meetings.

By the end of the summer, Remington went back to the drawing board and rehired HSS to outsource housekeeping functions, claiming that the declining scores justified a return to the previous system. By late August when the outsourcing arrangement was implemented, *all* of Remington’s housekeeping employees (with the only exceptions resulting from HSS’s normal pre-employment screening requirements) continued performing the same work at the same location with the same supervisors. One employee claims that when she asked a supervisor why Remington chose to re-outsource the hotel’s housekeeping department to HSS, the answer was, “because of the union.”

The plot took another twist a few weeks later when HSS announced it would terminate the staffing agreement effective mid-October. Although it had the right to enforce a penalty clause that would have required Remington to pay the equivalent of six months’ pay for each HSS employee that Remington decided to re-employ at the hotel, HSS notified Remington it wouldn’t enforce the clause

and that the hotel was welcome to retain the entire housekeeping workforce if it liked. Nevertheless, the day the contract ended, Remington terminated the employment of each and every housekeeping employee and replaced all of them. The company claimed that it couldn't be sure HSS wouldn't try to recruit the staff to work elsewhere and wanted to be sure they had an intact workforce at the ready.

The National Labor Relations Board (NLRB) was called upon to settle the dispute between the workers and Remington. The Board decided the company's choice to re-outsource the work to HSS was motivated at least in part by anti-union animus, given that its own employees were involved in a union organizing drive at the time. The case wound up at a federal court of appeals, which fully upheld the NLRB's conclusion that the outsourcing was done in an effort to restrain or coerce employees in the exercise of their rights guaranteed by Section 8(A)(1) of the NLRA. The Board also concluded Remington violated the law when it terminated all of the workers once the HSS contract ended.

This case serves as a good reminder that a hotel needs to be prepared to demonstrate proper business justifications when it comes to outsourcing, and proceed with caution (and the advice of your labor attorney) when unions are involved.

### **EEOC Claims Outsourcing Masked Discriminatory Terminations**

Currently a third scenario highlighting the potential pitfalls of outsourcing is ongoing in a Florida federal court. In April 2017, the Equal Employment Opportunity Commission (EEOC) filed a lawsuit against a Miami Beach hotel, alleging it violated federal law by firing black Haitian dishwashers because of their race, color, and national origin.

The EEOC's complaint alleges the hotel terminated all of its black Haitian stewards and dishwashers and replaced them with light-skinned Hispanics. The agency contends the hotel outsourced the positions without providing the black Haitian employees an opportunity to apply for the jobs with the staffing agency before their termination. Some of the terminated employees allege they saw their replacements performing their job duties as they were being escorted from the hotel by security personnel following their termination meetings.

The EEOC claims this was not the first time the hotel treated black Haitian employees poorly. The complaint alleges that hotel management told them not to speak Creole, even among themselves, while Hispanic employees were allowed to speak Spanish. The EEOC also claims the hotel asked black Haitian dishwashers to carry heavy items and perform other difficult tasks, but the Hispanics were spared these tough assignments. Further, the EEOC said managers and chefs called the black Haitian dishwashers disparaging names, including "f-----g Haitians," and referred to them as "slaves."

"Employers should not be able to avoid liability by using a staffing agency to discriminate when it cannot lawfully do so on its own," said the EEOC regional attorney when the agency filed the lawsuit. "Consistent with the agency's strategic enforcement goals, the EEOC will be vigilant in ensuring employment discrimination is not hidden behind increasingly complex business relationships, including the outsourcing concept."

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The hotel denies its decision was discriminatory. An employer representative told Law360 that the decision to outsource was made more than two years ago for economic reasons, in order to manage the wide seasonal fluctuations in the Florida market.

At this point the lawsuit contains nothing more than mere allegations that have not yet been analyzed by the court. Whether or not the hotel is ultimately found liable, however, it is clear the outsourcing decision adds another significant wrinkle to the defense of what would otherwise be a straight-forward discrimination case.

### **What Should You Do Before Making An Outsourcing Decision?**

Any outsourcing decision will require careful consideration of a number of business and legal issues. Based on the recent challenges discussed above, there are several action items you should consider:

#### **1. Deal Promptly And Decisively With Performance Or Discipline Issues**

Do not let poor performance or behavior problems remain unaddressed. When you begin to explore the possibility of outsourcing, you might delay action on employee issues, perhaps even subconsciously, assuming the issues will go away or will become the responsibility of the contractor. But leaving such problems unaddressed could come back to haunt you.

#### **2. Investigate Harassment And Discrimination Claims And Respond Appropriately**

As with performance and discipline issues, employers considering outsourcing might not respond to harassment and discrimination complaints in the usual manner, giving them less attention or slowing the investigation. Don't make this mistake. If big changes such as outsourcing are on the horizon, it may be appropriate to bring aboard a third-party independent investigator to look into the allegations. Make sure the investigator is not informed of the possible outsourcing so the final report cannot be challenged as having been influenced by the impending personnel changes.

#### **3. Look For Early Warning Signs Of Union Organizing Activity**

Any company wishing to remain union-free should, among other things, conduct periodic supervisory training on how to recognize the early warning signs of union organizing activity. Include regular, periodic follow-ups so you can take action to educate employees in the event you detect organizing. If you are deciding whether to outsource a department, knowing whether there is union activity will enable you to make a more informed decision.

#### **4. Ensure Your Outsourcing Supplier Is Reputable And Kept At Arm's Length**

Using a reputable outsourcing company can greatly reduce the risk of problems. Check out the company to ensure it is well-capitalized and that it offers competitive wages and benefits. Consider requiring the outsourcing company to interview and offer jobs to all of your incumbent employees.

In the right situation, you could reap substantial benefits from outsourcing. However, if you decide to go this route, taking the steps outlined above can certainly reduce your legal risks.

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