Take Five Newsletter: Prepping for Full Compliance! Five Important Legal Compliance Issues Impacting the Hospitality Industry

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Hospitality Employers May Soon Face a Compliance Challenge: The New Proposed DOL Salary Threshold for "White Collar" Exemptions

The Department of Labor ("DOL") has proposed a new rule that would increase the salary threshold for most "white collar" exemptions under the Fair Labor Standards Act ("FLSA") from $23,600 per year ($455 per week) to $35,308 per year ($679 per week). If adopted, as expected, the rule would go into effect on January 1, 2020.

Many hospitality employers employ "white collar" exempt employees who earn more than $23,600 but less than $35,308 per year, and they will face the important and challenging decision of whether to increase some employees' salaries or convert them to non-exempt status. This decision will directly impact not only employees but also employers' budgets and compensation structures. Employers should act now to plan ahead for the adoption of the new rule:

1. Identify employees currently treated as FLSA exempt who are paid less than $35,308 per year, as those are the persons for whom this decision will need to be made.

2. Confirm that each employee meets the "duties test" for the exemption, as that would not change under the new rule.

3. Decide whether to increase each identified employee's salary to the $35,308 threshold or to convert the employee to non-exempt.

4. If converting an employee from exempt to non-exempt, determine what the employee's new hourly rate will be.

5. Prepare to implement changes by January 1, 2020, including coordination with the payroll department or vendor.

States Target Restaurants for Anti-Harassment Training Legislation

Harassment prevention in the workplace continues to be top of mind for employers in all industries—particularly in New York and California, which now statutorily require harassment training. Restaurant employers are the current target of proposed legislation in certain states that would require the adoption of sexual harassment policies and periodic mandatory harassment training for their workforce.

In January, the New Jersey Legislature introduced a bill (A4831) that would require restaurants employing 15+ employees to provide, at hire and throughout the employment relationship, interactive sexual harassment training tailored to the restaurant industry, including practical examples and instruction on how to file a sexual harassment complaint. Illinois' proposed (and broader) Restaurant Anti-Harassment Act similarly would require sexual harassment training for all restaurant employees covering a range of topics, within 90 days of enactment or at hire, and every two years thereafter. Both bills call for separate training for employees and management, each with its own set of requirements. Anything other than strict compliance would carry significant fines for violations, and in New Jersey, even strict compliance would not help the employer avoid sexual harassment liability.

Restaurant employers should be proactive in preparing for the enactment of this and any other legislation.

DOL Formally Withdraws and Replaces 80/20 Guidance

In 1988, the DOL amended an internal agency handbook to include an interpretation barring employers from taking a tip credit for activities that do not generate tips (tasks such as rolling silverware or cleaning tables, known in the restaurant industry as "side work") if an employee spends more than 20 percent of his or her working time on those activities. In November 2018, the DOL (re)issued an opinion letter rejecting that interpretation. On February 15, 2019, the DOL followed up on the opinion letter by withdrawing the 1988 handbook interpretation and replacing it with a new standard that does not tie the availability of the tip credit to the amount of side work performed. Under the new guidance, the tip credit is available so long as the employee performs side work contemporaneously with, or within a reasonable time of, tip-generating activities. State law, of course, may vary.

Don't Be Caught Off Guard This Summer by Your Internship Program

With summer right around the corner, internship season is about to kick off. Internship programs can help employers source and develop talent, but they do not come without their pitfalls. For many years, the DOL used the "six-factor test" when determining whether an employee was legally considered an unpaid intern, such that the intern would not be subject to the wage and hour requirements of the FLSA. This changed at the beginning of 2018, when the DOL adopted the "primary beneficiary test" in a move allowing increased flexibility for employers and greater opportunity for unpaid interns to gain valuable industry experience. Employers that fail to follow the requirements to ensure that an intern is properly treated as an unpaid intern, rather than an employee who is entitled to minimum wages and overtime, could face costly wage and hour litigation. Access a recent webinar on what employers need to know to create a legally compliant unpaid internship program and to learn more about practical considerations for both paid and unpaid internship programs.

Are You a Joint Employer? That May Change Under the DOL's Proposed New Test

As announced in an April 1, 2019, Notice of Proposed Rulemaking, the DOL has proposed to substantially revise the standard for determining joint-employer status conferring joint and several liability upon the primary employer and any other joint employers for all wages due to employees under the FLSA. Unlike the current regulations—under which two or more entirely independent entities may be found to jointly employ an employee who performs work in a workweek that simultaneously benefits both of them if they are "not completely disassociated" with respect to that individual's employment—the proposed new rule would determine joint-employer status by a four-part test assessing whether the potential joint employer actually exercises the power to (1) hire or fire, (2) supervise and control work schedules or conditions of employment, (3) determine the rate and method of payment, and (4) maintain employment records. While additional factors may be considered, the proposed rule explains that an employee's "economic dependence" on the employer would not be relevant under the new standard, nor would certain business models and practices and contractual agreements be pertinent.

The DOL's proposal coincides with similar rulemaking activity by the National Labor Relations Board ("NLRB") in September 2018. Under the NLRB's proposal, two employers would be considered joint employers only when the putative joint employer possesses and exercises "substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine." The period for comments on the NLRB's proposed rule closed on January 28, 2019, and it is anticipated that the rule will be formally adopted later this year. The comment period in the DOL's proposed rule is set to close on June 10, 2019. Hospitality owners/operators should stay tuned for further developments on both fronts, as joint-employer status is often a point of dispute when an employee lodges claims against one or more putative employers.

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