

2015 HOSPITALITY LAW CONFERENCE

FEBRUARY 9-11, 2015,

MINIMUM WAGE LEGISLATION AND HOSPITALITY

Presented by:

Bruno W. Katz, Esq. of Wilson Elser

&

Kalley R. Aman, Esq. of Buchalter Nemer



PRESENTER



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❖ Maintains a diverse business litigation practice that includes labor and employment, professional liability, corporate litigation and complex, multi-party litigation. Bruno represents a wide variety of clients, including hospitality companies, real estate management companies, transportation companies, and entertainment companies.

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FAIR LABOR STANDARDS ACT

- ◆ National workweek and overtime
- ◆ National minimum wage (\$7.25)
- ◆ Overtime for nonexempt workers-40 hours
- ◆ Prohibit “Oppressive Child Labor”
- ◆ Effective Jan 1, 2015-\$10.10 for federal contractors

WARNING: States can implement more onerous standards.



MINIMUM WAGE AS NATIONAL ISSUE

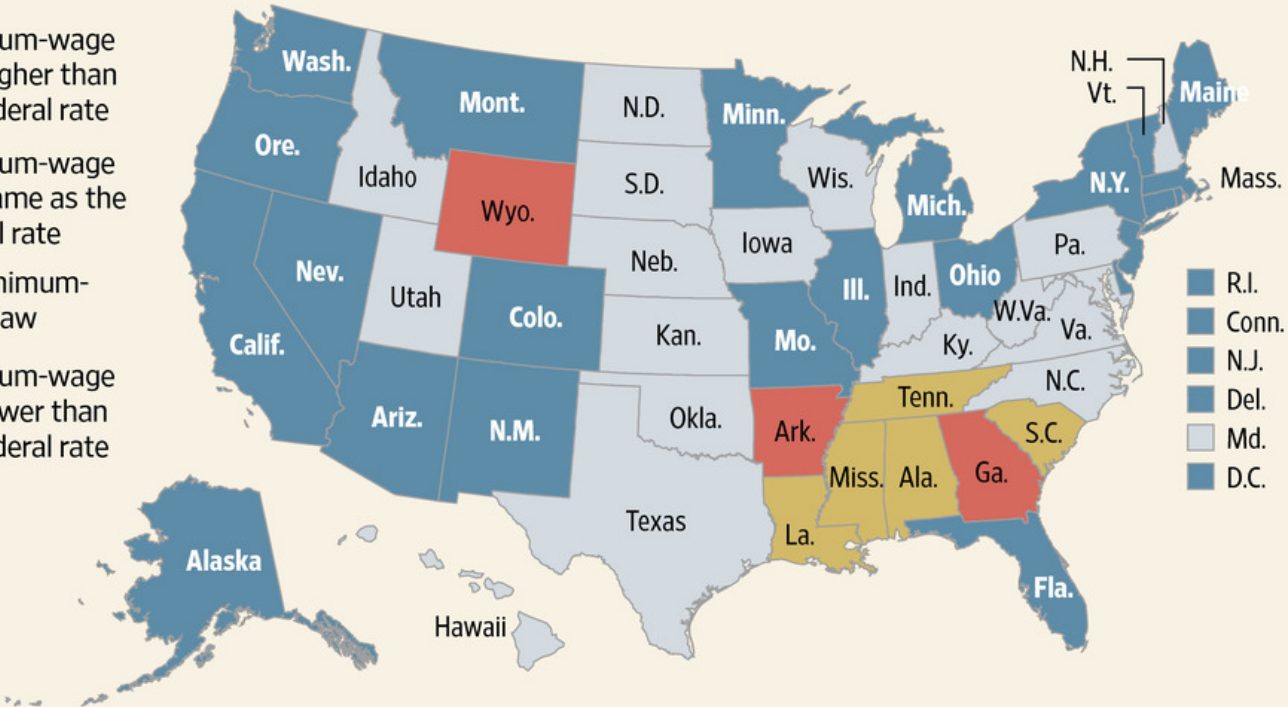
- ◆ President Obama calls for \$10.10 minimum wage
- ◆ Many states raised minimum wage above federal level of \$7.25
- ◆ Municipalities passing individual ordinances
- ◆ Labor activists efforts i.e. Fight for \$15



Hourly Pay | Many states continue to follow the federal minimum wage (\$7.25 an hour), though a growing number of states plan to increase their minimum wages in coming years.

Minimum-wage laws by state, 2014

- Minimum-wage rate higher than the federal rate
- Minimum-wage rate same as the federal rate
- No minimum-wage law
- Minimum-wage rate lower than the federal rate



On Tuesday, five states voted to increase their minimum wage within the next few years.

HOURLY MINIMUM WAGE

	Current	Future
Alaska	\$7.75	\$9.75 by 2016
Arkansas	\$6.25	\$8.50 2017
Illinois [†]	\$8.25	\$10.00 2015
Nebraska	\$7.25	\$9.00 2016
S. Dakota	\$7.25	\$8.50 2015

Note: Where states have no or lower minimum-wage rates than the federal rate, the federal rate applies. Minimum wage current as of Sept. 1; [†]Non-binding measure
Source: U.S. Labor Department (laws); state labor departments (wage figures)

The Wall Street Journal



HOSPITALITY INDUSTRY AS TARGET-HISTORY

- ◆ Illinois' Hotel Room Attendant Amendment
 - Found to be preempted by the NLRA under the Machinists doctrine-520 South Michigan Avenue v. Shannon (7th Circuit December 17, 2008)
- ◆ Emeryville, California's Measure C
 - Only applicable to "large hotels" over 50 rooms, living wage ordinance, mandatory employee retention
- ◆ Los Angeles, CA-LAX Hotel Workers Living Wage, Worker Retention and Tip Protection Policy



RATIONALE FOR TARGETING HOSPITALITY

- ◆ No Fear of Moving of Jobs Overseas/Outsourcing
- ◆ Less Likely to Respond to New Regulations By Closing or Reducing Employment
- ◆ Perception that Many Jobs Similar to Janitorial Industries that Already have Labor Code Protections on Worker Retention
- ◆ Owners Not as Well Organized as Other Industries or Funded to Fight Labor Campaigns



LABOR TURNS TO POLITICS

- ◆ Unions have a poor record of winning unionization elections under the National Labor Relations Act (NLRA)
- ◆ Leveraging their political strength to do what their workers will not
- ◆ Project Labor Agreements in the construction sector
- ◆ Card check in the hospitality and other sectors, or direct recognition of the union as the exclusive bargaining representative/union security clause



DECLINE OF ORGANIZED LABOR

- ◆ 30% of Employees were union members in the 1950s
- ◆ 11.1% of American workers were union members in the year 2014
- ◆ 6.6% of private sector employees union members in 2014

Source: BOL Statistics - January 23, 2015

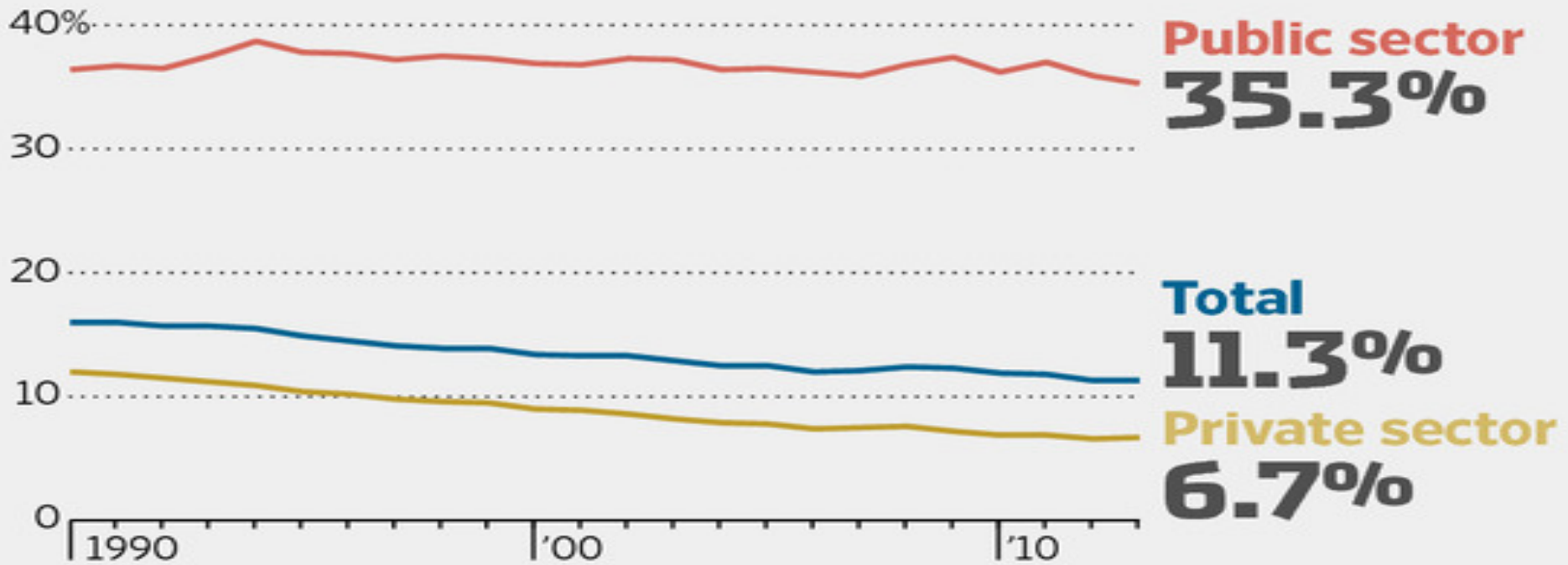
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State of the Unions

Union membership has been declining over the past two decades, but the overall level was steady in 2013 from the year prior. Here, union members as a percentage of total employed:



Source: Bureau of Labor Statistics

The Wall Street Journal



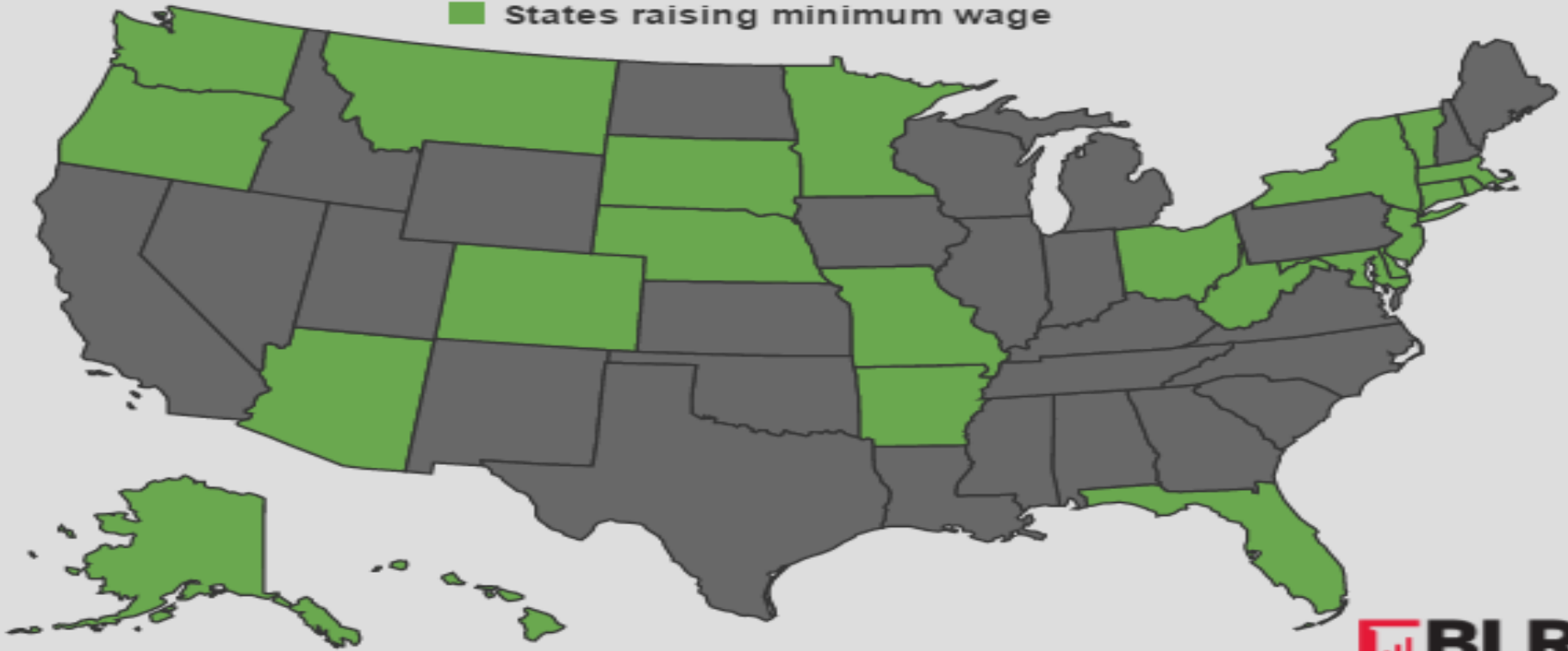
PARTIAL LIST OF MINIMUM WAGE SUPPORTERS

- ◆ SEIU
- ◆ UNITE-HERE
- ◆ UFCW
- ◆ UFW
- ◆ AFL-CIO
- ◆ ROC
- ◆ LAANE
- ◆ FIGHT FOR \$15



State Minimum Wage Increases for 2015

■ States raising minimum wage



BLR
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STATEWIDE INITIATIVES-2014

- ◆ Alaska: \$8.75 per hour. The minimum wage is also scheduled to increase to \$9.75 per hour on January 1, 2016.
- ◆ Arkansas: \$7.50 per hour. The minimum wage is also scheduled to increase to \$8.00 per hour on January 1, 2016 and \$8.50 on January 1, 2017.
- ◆ Nebraska: \$8.00 per hour. The minimum wage is also scheduled to increase to \$9.00 per hour on January 1, 2016.
- ◆ South Dakota: \$8.50 per hour.
- ◆ Illinois: Non-binding to \$10.00 per hour.

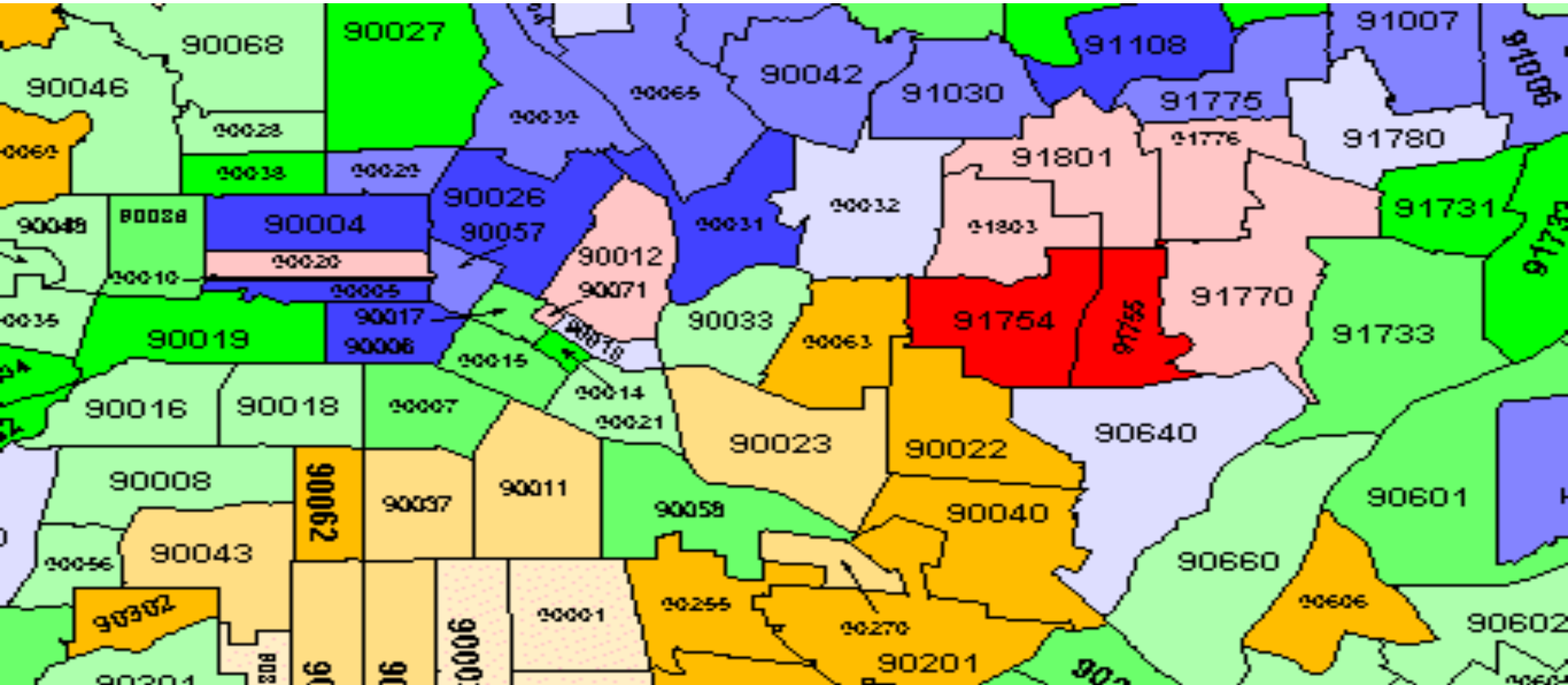


RECENT MUNICIPAL MINIMUM WAGE EFFORTS

- ◆ SEATAC and Seattle, WA: \$15/hr
- ◆ Oakland, CA: \$12.25/hr plus mandatory sick leave
- ◆ San Francisco, CA: \$12.25/hr. May 1, 2015 with annual increase up to \$15/hr by July 2018
- ◆ Richmond, CA: \$12.30/hr by City Council vote
- ◆ Los Angeles, CA: \$15.37 for large hotels passed by City Council in September 2014 but lawsuit filed in December by AH&LA and AAHOA. Citywide minimum wage proposal to \$13.25 an hour tabled to allow outside economic firm to study its potential effect.
- ◆ Chicago, IL: \$15/hr Minimum Wage Advisory Referendum



FUTURE MIN WAGE MAP?



POTENTIAL IMPACT OF PATCHWORK MINIMUM WAGE LAWS

- ◆ Higher wages for employees and increased productivity
- ◆ Narrowing of income gap
- ◆ Reduced revenue due to lower demand
- ◆ Loss of Jobs
- ◆ Increased competition
- ◆ Decreased value of hospitality products
- ◆ Increase cost to consumer of products

OVERALL: LOWER PROFITS ESP TO SMALL BUSINESSES



RECENT STUDIES

- ◆ Congressional Budget Office: Loss of 500,000 jobs
- ◆ Penn State School of Hospitality Management:
 - \$2.53 billion loss from \$10.10 minimum wage to hotel industry
 - \$15.37/hr rate in Los Angeles estimated loss \$255.4 million to hotels

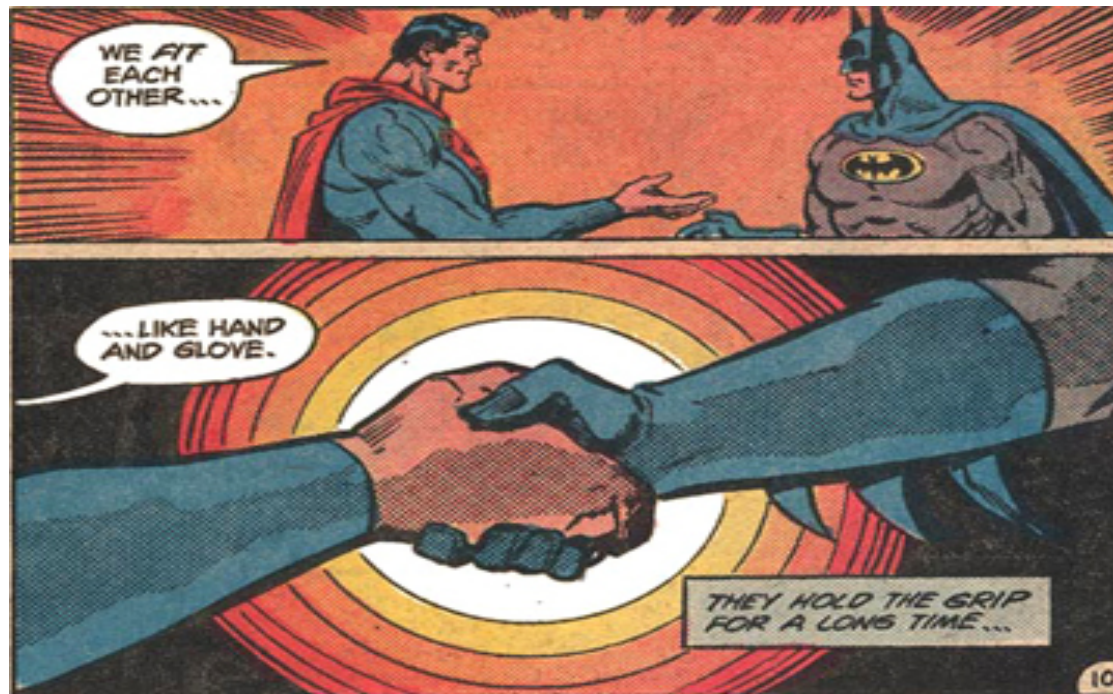


POTENTIAL ENGAGEMENT EFFORTS

- ◆ Know your Neighbors
- ◆ Build Industry and Business Coalition
- ◆ Engage your local legislators
- ◆ Coordinated Lobbying
- ◆ Offer Alternative Legislative Proposals
- ◆ Jointly Funded Litigation if necessary



Employers Must Engage in a Permanent, Coordinated Campaign!



THE PROACTIVE CAMPAIGN

- ◆ Develop a clear vision/policy
- ◆ Communicate the vision to all allies
- ◆ Train on the vision and message
- ◆ Educate on the issues and know the facts better than opponents

PERFECT COMMUNICATION IS ESSENTIAL!



THANK YOU!

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STATISTICS ON EMPLOYEE THEFT

- **2009 Ponemon Institute Survey – Interviews of 1,000 individuals who were laid off, fired or changed jobs:**
 - **59% stole employer's confidential information**
 - **53% downloaded information to CD or DVD**
 - **42% downloaded information to USB drive**
 - **38% sent attachments w/ company information to personal email account**
 - **82% said employers did not review their paper or electronic documents when they left**



MORE STATISTICS ON EMPLOYEE THEFT

- **2012 Symantec Study**
 - **50%** of all employees who left jobs in last **12** months kept confidential corporate data and
 - **40%** plan to use in their new jobs
 - **62%** say it is acceptable to transfer work documents to personal files/emails etc. and majority never delete it
 - **56%** do not believe it is a crime to use competitor's trade secret information
 - **51%** think it is acceptable to take corporate data because their company does not strictly enforce policies



WHAT IS A TRADE SECRET?

- 1. Has independent economic value outside the company that gives competitive advantage**
- 2. Generally unknown and unlikely to be discovered by lawful means**
- 3. Company takes efforts to maintain its secrecy**



RECIPES AS TRADE SECRETS

- **Recipes generally cannot be copyrighted.**
- **To be protectable, a recipe must be a trade secret.**
- **The recipe must be unique and confidential to qualify as trade secret.**

- **Vraiment Hospitality, LLC v. Binkowski (M.D. 2011):**
 - **Salted caramel brownie recipe with the same unique texture, look, and taste of plaintiff's.**
 - **Court: Defendant not using the plaintiff's recipe and the alleged secret ingredient was unimpressive. Having the same texture, look, and taste does not mean the brownies are made from the same recipe. A plaintiff must show more than superficial similarities to win a misappropriation claim. Preliminary injunction denied.**



MR. CHOW V. PHILIPPE CHOW

Mr. Chow v. Philippe Chow (2009 Fla. District Court):

- **Mr. Chow sued former kitchen employee for stealing several signature dishes and going on television to promote them for his new restaurant “Philippe Chow.”**
- **\$1 million jury verdict for Mr. Chow for False and Deceptive Advertising.**
- **Mislabeled Philippe Chow as Mr. Chow’s restaurant on google maps**
- **No Trade Secrets**
- **No Trademark Infringement**

WHEN IS TRADE DRESS PROTECTABLE?

- **Inherently distinctive; or**
- **Has acquired distinctiveness through secondary meaning; and**
- **Primarily nonfunctional**
- **Confusingly similar**



TRADE DRESS - INHERENTLY DISTINCTIVE

Two Pesos Inc. v. Taco Cabana (1992) U.S. Supreme Court:

- **Shape and color scheme of its exterior, the décor, menu, signage, servers' uniforms, and so on—that reflected its total image could be protected against another restaurant using confusingly similar design and décor elements.**
- **Retail trade dress—defined as the total image and appearance of a business including the floor plan, decor, color combinations, and even particular sales techniques featured at a location—can qualify as a protectable trademark.**

WHAT IS PRIMARILY NONFUNCTIONAL?

Hooters v. Winghouse of Florida Inc. (2004 11th Circuit):

- **Hooters argued that its “Hooter Girl” uniform of tank top and running shorts and “beach shack” interior décor were protected trade dress.**
- **The court disagreed: the décor and design elements of the competing chain were sufficiently different**
- **“Hooters Girl” look was predominantly functional—that function being “to titillate, entice, and arouse male customers’ fantasies. She is the very essence of Hooters’ business.”**

HOOTERS AND OTHERS

- **Twin Peaks v. Grand Tetons (U.S. District Court, N.D. Texas 2010):**
 - **Twin Peaks sued claiming the “Northern Exposure” restaurant infringed on Twin Peaks’ trademarks and “trade dress”: namely, their double- entendre-laden name and slogan, their wilderness lodge-themed décor, and, of course, their scantily-clad female servers outfitted in low-cut plaid tops and short shorts.**
- **Hooters v. La Cima Restaurants (September 2011 Ga. District Court):**
 - **Hooters VP left to help start Twin Peaks restaurant chain. He downloaded substantial amount of documents from Hooters relating to distribution, management, sales, recruitment. Hooters claimed their “iconic” Hooters Girls are the “cornerstone of the [Hooters] concept,” and Twin Peaks directly competes with [Hooters] in the market of casual dining restaurants with an all female waitstaff.”**



RECENT TRADE SECRET/TRADE DRESS CASES

- **Dog Haus v. WSH Enterprise (Cal. 2013)**: Line cook and prep cook stole recipes, sauces, vendor information, trade dress and décor (restaurant décor, floor plan, menu, serving style)
- **Riverboat Corp. of Miss. v. Shipley (February 8, 2013 Miss.)**: Biloxi Hotel Casino sued former manager/VP and others for sharing confidential information with new employer.
- **Little Caesars v. Ready to Go Pizza (2014 Georgia)**: Former manager had access to information on preparing pizza and special sauces, creating distinctive décor, managing inventory, training, advertising campaigns, sales information and was fired after Little Caesars learned he was opening rival business. Little Caesars alleged he absconded with information on laptop.



THEFT BY NON-EMPLOYEES

Franchisees:

- **New York Pizzeria v. Seal (S.D. Texas 2013): 30+ restaurant chain Terminated franchisee allegedly took plate specifications, supplier and ingredient lists, training and restaurant operations manuals and illegally accessed NYP's online portal using company password, enabling them to take special recipes and concepts**

Business partners:

- **Reser's Fine Foods v. Bob Evans Farm (January 17, 2013 Or. District Court): 20 year business relationship breakup (Reser sold private label for Bob Evans). Risers alleged Bob Evans misappropriated its baking technique – a unique process creates refrigerated baked food items with a crunchy, caramelized, browned top layer over creamy bottom layer when reheated.**



CRIMINAL LIABILITY

- **Pepsi tips off Coca Cola that its employees offered to sell trade secrets to Pepsi**
- **Undercover sting operation: Employees gave FBI agent 14 pages of Coca Cola documents labeled “Classified, Confidential, Highly Restricted” and requested \$10,000 for initial papers**
- **Employees gave additional papers for \$5000 and agreed to take \$1.5M to provide information about highly confidential new Coke project**
- **Arrested on July 4**
- **8 and 5 year prison terms**



HOW TO PREVENT TRADE SECRET THEFT

- 1. Put employees on notice of the trade secrets**
 - **Employee Handbook**
 - **Written confidentiality agreements (Instruct no erasing on departure) and identify trade secrets in writing**
 - **Recipes: Have the chefs or others involved in developing recipes sign agreements that the recipes belong to the company. Don't generally disseminate to all employees. Limited access and sign non-disclosures**
- 2. Non compete and non solicitation agreements – enforceability depends entirely on jurisdiction**
- 3. Keep trade secrets secure (password protection/limited employee access)**
- 4. Exit Interviews and Inventory**
- 5. Take your own policies seriously**



STEPS TO TAKE IF YOU BELIEVE DEPARTING EMPLOYEE TOOK TRADE SECRETS

- 1. Preserve all electronic data – emails, laptops, cell phones, flash drives.**
- 2. Delete from cloud storage.**
- 3. Immediately terminate all logins/passwords/email account.**
- 4. Sign an acknowledgement that employee has not taken any confidential company property and will not use in future and she/he no longer has access to company databases.**
- 5. Inspect employee's office.**
- 6. Preservation often means don't even allow IT to touch it.**
- 7. Once preserved, review emails and other files.**
- 8. Cease and desist letter.**



FEDERAL TRADE SECRET LEGISLATION

- **Legislation introduced in House and Senate**
- **Both bills create uniform federal law and a federal civil action for trade secret misappropriation**
- **Both bills track USE except also provide for EX PARTE SEIZURE ORDER**
- **House bill: punitive damages up to 3x actual damages for willful/malicious misappropriation and 5 year statute of limitations**
- **House Judiciary Comm. Approved the Trade Secrets Protection Act on Sep. 17, 2014**
- **Senate bill referred to Senate Judiciary committee**

