Down the Rabbit Hole of Wage and Hour Compliance in the Hospitality Industry

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The hospitality industry continues to face increasingly complex wage and hour compliance demands. The federal government and state agencies across the country have stepped-up vigorous enforcement the rules. Plaintiffs' attorneys are filing high-stakes lawsuits against restaurants, hotels, and other hospitality businesses on a daily basis. Plaintiffs' attorneys love wage and hour lawsuits. Why? Claims result in costly judgments and settlements for technical violations, the statute of limitations is lengthy, the potential back pay and civil money penalties are significant, collective actions will cover all employees who worked during the period in question and there is the potential for liquidated damages and automatic attorney's fees.

Compliance is key. And hospitality employers, like other industries, must comply with the basics of the federal and state wage and hour laws. But the industry is unique and therefore often face unique wage and hour challenges.

Minimum Wage: Covered Employers must pay the minimum wage. The Fair Labor Standards Act (FLSA) requires a minimum wage of $7.25 an hour, and many states and localities impose higher minimum wages. Hospitality employers must consider state laws that require supplemental wages for split shifts, federal and state limitations on deductions for uniforms, cash shortages and lodging, among others.

Exemptions: Improperly classifying employees as exempt, and therefore not eligible for overtime and not required to keep proper time records, is a common FLSA violation. Employers bear the ultimate burden of showing the employee meets one of the exemptions under the FLSA. Hospitality employers must carefully consider the status of certain unique positions in the industry, such as sales managers and sous chefs.

Child Labor: The FLSA's child-labor limitations regulate the employment of individuals under 18 years of age. There is an age-18 limit for numerous jobs falling within seventeen "Hazardous Occupations Orders" issued by the U.S. Secretary of Labor. Fourteen- and 15-year-olds may work in limited occupations including retail and food service. Even then, they may work only within strict hours and times-of-day limitations. Leisure and hospitality is the number one employer of youth labor. Hospitality employers must review and adjust personnel policies to ensure they cover

minor issues, ensure compliance with maximum hour, time of day restrictions and break requirements, train managers and supervisors on permitted tasks, hours of work and rules governing minors, and ensure proper supervision of minors while on the job.

Overtime: All covered employers must pay non-exempt employees overtime after 40 hours in a workweek (or pursuant to state law). Hospitality employers often have unique pay and scheduling issues affecting the payment of overtime. These include: on-call pay, shift differentials, piece rate pay, and employees working jobs at different hourly rates, to name a few.

Tip Credits: Hospitality employers are plagued with legal claims challenging the use of the tip credit. Under the FLSA, employers are permitted to pay certain employees a direct cash wage below the federal minimum wage ($2.13/hr.) with a "tip credit" of up to $5.12/hr. to make up the difference to the minimum wage. he direct wage plus tips must equal $7.25/hr. or the employer must pay the difference. Some states have different tip credit requirements and some prohibit using the tip credit altogether. Employers must provide advance notice of the tip credit to employees and if no notice is provided, the full minimum wage is due. Under the federal Department of Labor's 80/20 Rule, employers can take the tip credit for all time that tipped employees spend performing "tip-producing work." But, if tipped employees spend more than 20% of working hours in a week performing "directly supporting work" (i.e. side work), the tip credit is lost for the excess time and the full minimum wage must be paid for the time beyond 20%. In a twist, employers can also have a violation even if employee does not perform "directly supporting work" for more than 20% of the week. If a tipped employee performs "directly supporting work" for any continuous period of more than 30 minutes, the tip credit cannot be taken for the excess and full minimum wage must be paid for the time beyond 30 minutes. Determining what is and accounting for tip-producing work versus directly supporting (side) work is often difficult but the key for compliance.

Tip Pooling: Hospitality employers often use tip pools, where they collect all or part of the tips received by employees into a pool and then redistribute the tips among tipped employees. Improper tip pooling arrangements can lead to significant liability. If the employer takes the tip credit, only front of house may participate in a tip pool. If the employer does not take the tip credit, the pool can be mixed. Supervisors and managers can never receive tips from a tip pool. The potential landmines are significant.

This is just an overview of the always complex federal and state wage and hour laws that directly affect hospitality employers. Accordingly, it is vital to check both federal and state laws when assessing potential liability for wage and hour violations.