
Is a Wage & Hour Class Action Secretly on Your Menu?

By Jonathan M. Boulahanis / Sep 29, 2014

Many in the hospitality industry are focused on the newest trends and keeping up with the ever-changing tastes and desires of their consumer base. While restaurant and bar menus have begun changing seasonally, or more frequently, to keep up with the rapid change in tastes, the hospitality industry has been slow to keep up with workforce regulations and laws that have evolved at a frantic pace.

The hospitality industry has unquestionably had a bulls-eye on its back in recent years when it comes to Wage and Hour violations. Besides the class action lawsuits and private lawsuits targeting restaurants, bars and hotels, the Government has drastically increased its scrutiny. According to Department of Labor ("DOL") statistics, from 2009-2013 Fair Labor Standards Act ("FLSA") investigations into hotels and restaurants increased from approximately 4,500 investigations to approximately 7,300 investigations. In 2013, investigations into restaurants and hotels made up approximately 53% of all DOL investigations. As part of the DOL's P3 initiative (Plan/Prevent/Protect), nearly 2,000 investigators have been added in the last three years. On top of DOL investigations, each state regulates wage and hour violations (in Illinois, it's the Illinois Department of Labor that enforces the Illinois Minimum Wage Law and Wage Payment Collection Act).

Why is the hospitality industry being disproportionately targeted by wage and hour lawyers and regulatory agencies? There are a few answers. First, attorneys are much more willing to take these cases because they allow for the recovery of attorneys' fees, and courts have been much more willing to certify class actions in recent years. Class actions don't necessarily mean a class of 500 - in these cases the similarity of issues has let employees in small to mid-size establishments certify a class or join as many employees or former employees as is possible. Second, there is a much more educated workforce regarding their rights. Media coverage of high profile wage and hour suits, including against big corporations like Applebee's and Friday's, as well as against high profile celebrity owned restaurants like those owned Mario Batali and Joe Bastianich, have made employees take notice. Third, when an establishment utilizes the tip credit, it adds a layer of complicated rules and regulations that are difficult to understand, and even more difficult to navigate. Fourth, the hospitality industry has been slow to conform to the additional regulations that have gone into place, and have been slow to institute and enforce uniform policies that comply with the regulations.

Given that background, what can an operator in the hospitality industry do to ward off wage and hour issues? Before highlighting some areas of concern and ways to approach them, it is essential that your establishment recognize the danger, and take steps to limit the risk. Meeting with an employment attorney familiar with the industry to audit current practices and policies is a great first step. Preparing an updated handbook documenting practices, policies, and compliance with regulations, and distributing the handbook to current employees and new hires is important as well. An operator also should have a discussion with its insurance provider to make sure that any EPL (Employment Practices Liability) insurance in place contains coverage for wage and hour litigation.

As for potential problems and solutions - here are some of the top recurring issues that confront hospitality industry operators:

Improperly Classifying Employees as Exempt

Very few employees in the hospitality industry actually fall into a clearly defined exception to the FLSA overtime requirements. The recognized exceptions are executive, administrative, professional, and outside sales. Any "exempt" employee must make at least \$455/week. Executive exempt employees are owners and operators, or managers if they are clearly defined as such, their primary duty is management, they supervise two or more employees, and have authority to hire and fire employees. The administrative exemption likely applies to bookkeepers and the like. The primary duty for those in the "administrative" category includes non-manual office work, and requires the exercise of independent judgment and discretion on matters of significance. The "professional" exception was created for learned professionals and applies to lawyers, doctors, and accountants. It also applies to creative professionals who perform work requiring invention, imagination, and talent. A chef could arguably be classified as such, but the case law does not clearly accept the profession yet, thus it would be best to tread carefully before classifying the chef as such. Outside sales is someone who is primarily and regularly engaged in making sales away from the employer's business. 80% of such duties must include attempting to make those sales for the employee's benefit.

Every other employee, whether salaried or not, is entitled to time and a half for hours worked over 40 hours. This is a very common pitfall for hospitality industry owners.

Tip Credit - Tip Sharing/Pooling

A common problem is allowing improper personnel to share in the tip pool. Members of management, employers, and owners can never share in the tip pool. Kitchen and office staff also have been held to be improper. Additionally, tip pool portions that go back to "the house" for administrative expenses or training are also improper.

Servers, bussers, bar backs, service bartenders, and food runners all may be proper. However, their job descriptions and actual roles should be clearly defined so that there can be no argument that the employees are properly sharing in the tip pool.

Tip Credit - Overtime

According to the FLSA and IRS regulations, employers cannot take a greater tip credit on overtime hours than they do on regular hours. Taking a larger tip credit results in underpayment to the employee and violation of the FLSA. For example, in Illinois an employer can take a 40% tip credit on the

applicable minimum wage of \$8.25 - so the tip credit is \$3.30. When an employee works more than 40 hours, they are entitled to 1 1/2 times the minimum wage, but the employer can only subtract \$3.30.

Tip Credit Distribution of Work

In order for a tipped employee to be paid the tip credit minimum wage, at least 80% of their work must be in furtherance of the tipped occupation. For example, servers, who are also bussing tables, making coffee, setting tables, and occasionally washing dishes are performing duties in furtherance of the tipped occupation. If they have half their shift doing bar inventory, or working in the kitchen, then the tip credit is inappropriate.

Work Before Employees Clock In or After Employees Clock Out

Employees must be paid for all hours performing activities for the benefit of the employer. Beware of automatic clock out systems. Establishments run into issues when they require employees to come in before their shift to prepare stations for service or set up the restaurant, or stay after to clean up. The employee should be clocked in for every minute they are performing duties that are even arguably benefiting the employer.

Walk Outs/Breakage

Walk outs and breakage cannot be charged back to the employee. Additionally, there cannot be a portion of the tip pool to cover walk outs or breakage. If there is a pattern with a certain employee, it is best practice to have a provision in the disciplinary policy regarding walk outs and breakage that will result in loss of a shift or termination.

Automatic Gratuity

Automatic gratuity, or service charges, are not considered "tipped wages" by either the FLSA or the IRS. A recent IRS ruling confirmed as much. The employer can suggest a tipped amount by printing suggested 15%, 18% and 20% calculations, but automatic tips that are applied without an independent choice by the consumer are not considered tips. In that circumstance, it is improper to utilize the tip credit for the employee's hourly wage, and doing so results in underpayment to the employee.

This is just a sample of common issues that confront employers in the hospitality industry. It is by no means a comprehensive list, and many of these issues have deeper layers that should be explored in more detail. As an owner/operator or member of management, it is important to understand that these issues are real, continuing to evolve, and are extremely dangerous for the industry. Look closely at your policies, talk to a professional, and please make sure that you do not have the wage and hour class action hidden somewhere on your menu.

Please contact Jonathan Boulahanis at 312.985.5930, or another member of Clark Hill's Food and Beverage Team, if you have any questions on the content of this article.