

THE DAILY RECORDER

December 29, 2009

Employment Law on the Menu

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Whether it is menu planning, budgeting, negotiating leases or franchise agreements, monitoring the internet for the latest customer reviews, or getting food prepared and to the table, restaurateurs are pulled in many directions every day. With such diverse and unrelenting pressures, it is easy to overlook compliance with the many employment laws governing the workplace. Many restaurants are small employers, without the resources to employ human resources management. It is left to the chef, general manager, or owner to know the law and apply it correctly.

Compliance with anti-discrimination, wage and hour, and other laws applicable to employers in all industries is difficult and frustrating. But profit margins in the restaurant industry, if they exist at all, are too narrow to allow for payment of unanticipated and preventable claims. One wage and hour, discrimination, or harassment claim can drain a restaurant's finances faster than a cook with sticky fingers and a taste for filet mignon.

Here are some of the most common issues that restaurateurs and management should address to prevent employment law claims and minimize potential losses.

Know the Applicable Wage Order

Many of the wage laws employers must follow in California are contained in an Industrial Welfare Commission Wage Order. Wage Order 5-2001 governs restaurants, and must be posted along with other required posters and notices. The order contains provisions regarding overtime, meal and rest periods, reporting pay, and other mandates.

Along with the wage order, other postings are required, such as workers' compensation information, a pay day notice, and several equal employment opportunity notices. There are others, of course. Consider subscribing to one of the services that update these automatically. Non-compliance can lead to penalties.

Meal and Rest Periods

One issue the wage order addresses is rest and meal breaks. The law imposes specific requirements regarding both rest and meal periods, which we won't detail here because they are in the wage order and covered in other articles.

Restaurateurs who believe they are exempt from break requirements because of the nature of the business, or because employees are given a free staff meal, are taking potentially costly risks. At minimum, it is critical to have lawful break policies, ensure rest and meal

periods are made available to employees, have a system in place for relieving workers on break, and ensure management does not interfere with employees who take breaks. Because the California Supreme Court is reviewing a case involving a restaurant's meal break practices, the law is unsettled as to whether an employer must "force" an employee to take a 30-minute meal period or just make it available.

The penalties for non-compliance start with up to two hours' pay per day per employee and can involve other sanctions as well. Therefore, it is important to stay aware of the law as it develops in this area.

Tips

Restaurateurs must learn California's unique rules regarding tips. Most fundamentally, tips are not credited towards minimum wage, and belong to the service staff, not the house. Tip pooling, lawful if properly administered, has generated a great deal of litigation. Banquet service charges in which the house may participate can be legal under narrow circumstances.

Work Time

Employers must pay employees for all hours they "suffer or permit" employees to work. Employees who work when not authorized are subject to discipline, but must be paid for their time.

“Side work” is work time, even if the employee shows up before the scheduled time to perform it, and even without permission. An employee who runs an errand before she “punches in” is working “off the clock,” which is unlawful. A server who punches before finishing closing side work is another potential liability. Working a double shift for tips without punching in for the second shift is unlawful, even if the employee agrees to do so in writing.

Another issue that arises in restaurants is time spent changing into uniforms, particularly in the kitchen. Changing time is generally work time, and must be paid. Similarly, the pre-shift meeting is work time, even if employees are hanging out, wine tasting and trying the specials.

Restaurateurs should have a policy prohibiting off-the-clock work and providing a means to correct time records when employees forget to punch in or out. Managers also must not ignore facts indicating employees may be working off-the-clock. If possible, employees and supervisors should sign all time records, verifying the accuracy of the records.

Sometimes managers cut payroll when business is slow. Employers must be aware of reporting time pay rules, also contained in the wage order. A worker sent home involuntarily is entitled to up to four hours’ pay. Employees called in for a special meeting are also entitled to reporting time pay. Therefore, it may be worthwhile to put these employees to work because reporting pay will be due anyway.

Safety First

With hot liquids, chemicals, sharp objects, and slippery floors around, the risk of serious injury in a restaurant is quite real. Cal-OSHA, California’s workplace safety agency, requires restaurants to have in place an illness and injury prevention plan and maintain logs of workplace injuries. Employers with under 10 employees may comply by taking less formal measures. Restaurants also are responsible for keeping records of hazardous materials and workplace injuries. Cal-OSHA inspections, often triggered by employee complaints, can result in heavy fines.

Ending Employment

The restaurant business can get contentious. Firings and quitting without notice are a common event. California law is unforgiving when it comes to timely payment of final wages. Where an employer terminates an employee, it must pay all final wages owed on the same day. If an employee resigns without notice, all wages owed must be paid within 72 hours of the resignation. If an employee resigns with at least 72 hours notice, then the employer must pay all wages owed upon completion of the employee’s last shift.

If final pay is untimely, the employer will generally owe the employee “waiting time penalties” – the employee’s daily wages until the wages owed are actually paid, up to a maximum of 30 days. And remember, firing an employee in the middle of the shift may result in reporting time pay obligations, as discussed above.

Leaves

Particularly in small restaurants, running without a full complement

of employees can be disastrous. Today, though, there are a host of reasons employees can miss work with legal protection against discipline or termination. Some leave laws apply only to larger employers; others, such as San Francisco’s sick leave ordinance, apply to large and small operations alike. Before taking action against an absent employee, it pays to know whether the absence is protected by one of the leave laws.

Equal Employment Opportunity

The California Fair Employment and Housing Act applies to restaurants and other employers of five or more employees. That law prohibits discrimination, harassment, and retaliation based on a variety of protected characteristics.

The restaurant workforce is often young and ethnically diverse. Common issues arising in restaurants include race and national origin discrimination, disability discrimination and reasonable accommodation, and harassment based on sex, sexual orientation or race.

Restaurateurs should take seriously their obligations under the anti-discrimination laws. Managers must be trained, and trained again, not to tolerate conduct that may lead to harassment or discrimination claims. Larger restaurants are required by law to conduct training for supervisors, but it is wise for all restaurants to train all employees regarding the organizations’ anti-harassment and anti-discrimination policies. There are online programs available at a reasonable cost.

Employers also must be aware of the requirement to offer reasonable accommodation to employees with disabilities. Accommodations may be required for workers injured on and off the job. Sometimes, a leave of

absence or honoring physical limitations can be difficult for restaurant operations. However, employers should consult counsel before deciding such accommodations pose an “undue hardship.”

Conclusion

Running a successful restaurant is an imprecise recipe combining art and science. The right mix of food,

service, ambience and location spell the difference between a flash-in-the-pan and a long term successful business. But even the most creative menu and the best reviews cannot save a restaurant from the harm a big verdict or settlement can wreak on a business’ finances.

The above discussion is just a summary of some employment law issues that, if not heeded, can bite

hard. Prevention is always cheaper in the long run. The best way to prevent wage and hour or other employment law claims is by ensuring management is aware of its responsibilities, and makes compliance a management priority. The fish, after all, rots from the head down.

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