Hospitality and Labor & Employment
ALERT
Fox Rothschild LLP
ATTORNEYS AT LAW

July 2021

NYC HOSPITALITY ALLIANCE

Labor & Employment Considerations for the Post-Pandemic New York Hospitality Employer

By Carolyn D. Richmond, Glenn S. Grindlinger and Timothy A. Gumaer

Approximately 16 months after COVID-19 forced New York to a screeching halt, many restaurants, hotels, bars, caterers and other hospitality establishments are finally reopening for business. As the hospitality industry gradually returns to normal, however, employers must be aware of several litigation pitfalls in the new, post-pandemic world.

While not an exhaustive list, this article aims to shed light on some of the significant issues many hospitality employers will face as operations increase and their labor force rejuvenates. Complicating matters, on July 13, 2021, the Small Business Administration publicly released the names of those entities that received monies under the Restaurant Revitalization Fund program. The heightened visibility of the recipients of such a fund will likely encourage the plaintiffs' bar to pounce, believing that such entities are flush with capital. Accordingly, it is now more important than ever to ensure compliance with federal, state and local labor and employment laws.

This alert covers the following topics:

Banquets and Private Events: Make it Clear Whether That Charge is an Administrative Fee or a Gratuity

With the world on its way to a more "normal" existence, special (e.g. weddings, anniversaries, bar and bat mitzvahs) and corporate events are being booked at rapid rates. The "service charge" litigation issue that has plagued the industry for the last 12 years is still an ever-present threat. Case law has been evolving over the last few years and the financial risks remain high for venues that do not pay careful heed to some changes in the law.

While perfectly legal to institute a mandatory charge for a private event, an employer **must** ensure that both its employees and the customer paying for the event understand that such a charge is a fee and not a voluntary gratuity to be distributed to those working the event. If an employer fails to make it abundantly clear that such a charge is an administrative fee and not a gratuity, then a class action lawsuit can be filed by rapacious service employees who will contend that the charge purported to be a gratuity. There is a six-year statute of limitation in New York. And with damages including unpaid wages, 100% liquidated damages, fines and attorneys' fees and costs, such class actions can be financially devastating for an employer.

Background

New York Labor Law (NYLL) § 196-d prohibits employers from "retain[ing] any part of a gratuity or of any charge purported to be a gratuity for an employee."

In 2008, the New York Court of Appeals handed down a critical decision in *Samiento v. World Yacht, Inc.*, 10 N.Y.3d 70 (2008) concluding that a charge (such as a private event administrative fee) that is not a voluntary payment may be nonetheless a "charge purported to be a gratuity" within the meaning of NYLL § 196-d unless certain requirements are met. In interpreting this provision, the Court of Appeals held that "the reasonable patron standard should govern when determining whether a banquet patron would understand a service charge was being collected in lieu of a gratuity." In other words, if a reasonable person could not understand the service charge was not a gratuity, then the charge will be treated as a gratuity and will then need to be distributed to those employees who worked the event.

Without getting caught up in the legal minutiae of the decision, the court in *World Yacht* was most concerned with what the customer understood the mandatory charge or fee to represent: Did it purport to be a gratuity? In applying a "reasonable customer" standard, the court held that lower courts must examine whether a reasonable customer believed that the service charge was a gratuity, and if so, the entire charge must be distributed to the service team.

In 2011, in response to the landmark *World Yacht* decision, the New York State Department of Labor (NYDOL) implemented regulations in a new Hospitality Wage Order that codified the holdings in the *World Yacht* case and provided further requirements and guidance to hospitality employers regarding this issue. Specifically, the Hospitality Wage Order provides that charges purported to be gratuities must be distributed in full as gratuities to those employees who provided the service at the event. Moreover, there is "a rebuttable presumption that any charge in addition to charges for food, beverage, lodging and other specified materials or services, including but not limited to any charge for 'service' or 'food service,' is a charge purported to be a gratuity."

Charges for "the administration of a banquet, special function, or package deal" are required to be clearly identified as such and customers must be notified that the charge is not a gratuity or tip. Accordingly, it is the employer's burden to demonstrate that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity. An employer provides "adequate notification" if it includes:

> *"**a statement in the contract or agreement with the customer, and on any menu and bill listing prices**, that the administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and will not be distributed as gratuities to the employees who provided service to the guests. The statements shall use ordinary language readily understood and shall appear in a font size similar to surrounding text, but no smaller than a 12-point font."*

What Can Employers Do to Mitigate Potential Exposure?

If an employer wants to retain all or a portion of the administrative fee for a banquet or private event, then they must comply with the state's convoluted labor laws governing such fees. First, both the customer and the employees working the event need to be made aware of the administrative fee. Contracts governing these events—***and any other documentation discussing the financials of the banquet or private event, including emails, receipts, invoices and credit card slips—***should have a clear and explicit disclaimer to the customer that the administrative fee is not a gratuity and will not be distributed to those employees working the event as such. Second, that disclaimer must be in 12-point font. Third, in advance of working an event, employees should be informed about how they will be compensated, whether a service charge will be paid to them and if gratuities are available. Accordingly, an updated New York State Rate of pay form (NYDOL form LS54 or LS55) must be provided to employees in some instances.

Alternatively, an employer can separate a mandatory administrative fee as a line-item amount as well as a separate gratuity line. The gratuity line should indicate to the customer that it is discretionary and generally, a guest must be given the option of selecting the amount of the gratuity (including, nothing). Or, a mandatory fee can be charged as one line item, with a separate service charge going directly to the service employees. Again, the contract—***and any other documentation discussing the financials of the banquet or private event, including emails, receipts and invoices***—should clearly indicate what the fees are and that neither is a gratuity.

With respect to a tip credit, if all the requirements necessary to take a tip credit are satisfied, then a tip credit can be taken provided there is gratuity line which the customer had the opportunity to insert, revise, or change. If the gratuity is a "mandatory gratuity" or some automatic charge that could be construed as a gratuity, then a New York employer cannot take the tip credit even if all of the monies from that line item go to the service employees and all of the other requirements necessary to take a tip credit are met. Thus, as set forth in the above paragraph, if the employer has a separate gratuity line and the customer is given the option of selecting the amount of gratuity, then a tip credit may be taken provided all of the other necessary requirements to take a tip credit are satisfied. In contrast, in the above paragraph, when there is a mandatory service charge for which the guest has no input, even if the money goes directly to the service staff, a tip credit may not be taken.

An employer's failure to explicitly communicate to its customers and employees that such a charge is an administrative fee and not a gratuity can have financially devastating consequences. As explained above, New York has a six-year statute of limitations in which employees may bring suit against an employer to recover such costs. Thus, if an employer failed to make clear what the administrative charge is in *every* event contract (and their related documentation, including every email, receipt and invoice in which the event's financials are discussed) in the last six years, an employer may be liable for providing back pay (and liquidated damages, fines and attorneys' fees) to *every* single employee who worked *every* single event during that time period. This can easily reach an amount in the hundreds of thousands (if not millions) of dollars. Therefore, any document that mentions prices must contain the disclaimer—not just the event contract. Banquet Event Orders (to the extent provided to the guest), emails discussing the price of the event, marketing material that discloses prices and sales slips provided post event must all have the disclaimer.

Accordingly, it is strongly recommended that employers consult with an experienced labor and employment attorney to ensure that their documentation for banquets and private events are in order or risk significant loss.

Bringing Back Employees: Avoid Direct and Indirect Age (and Other) Discrimination

Over the past 16 months, many hospitality employers had to lay off, furlough or terminate a significant number of employees to survive the COVID-19 pandemic. With the hospitality industry returning to a new normal, employers will likely be re-hiring and/or bringing back some of those employees. Employers should be aware, however, that the rehiring process—including the determination of who and who not, to bring back—comes with certain legal risks. An employer's failure to be aware of these risks can give rise to possible claims of discrimination when a disgruntled employee is not brought back.

Federal, state and local law prohibits discriminating against employees during the hiring (and re-hiring) process based on membership in a protected class, such as age, race, color, national origin, sex/gender, disability or religion. While employers should be conscious of all the lawfully protected classes in the context of re-hiring in the post-pandemic world, employers should be especially mindful of unintentionally committing age discrimination amidst concerns of saving costs.

A common misunderstanding among employers is that if an employee was terminated, they won't have a future claim if not rehired. That is not true. While it is okay if employers decide not to "recall" or "hire" certain employees, those decisions must be based on legitimate, non-discriminatory reasons. These reasons could include factors such as seniority, operational needs or past performance issues. Employers should document their decision-making process now, before deciding who will be invited to return to work. By working now to document the factors used to determine who will be rehired, an employer will protect itself from potential claims asserting that they "made up" reasons after the fact to cover up a discriminatory basis for failing to rehire an employee. We have seen a significant uptick in age-discrimination claims over the past three months as former employees are not "recalled" and do not understand why. They believe it is because they are older than new hires.

If a business did not terminate or furlough its entire workforce, the same factors that were used to make the initial termination or furlough decisions should also be used in rehiring. If a business chose employees to be furloughed/terminated based on seniority, then seniority should be a significant factor when deciding who to bring back to the active workforce. If an employer's furlough process was driven by skill set and positions needed, then those same concerns should be used during the rehiring process.

Using the same factors for both the termination and the rehiring decision will help show both that the rehiring decision was based on legitimate, non-discriminatory factors and that the original termination decision was as well.

Ideally, an employer took steps to actively document the performance of all of its workers prior to the pandemic. Employers should be aware during the re-hiring process that if they decide not to bring back an older employee based on legitimate, past performance issues, but they failed to adequately document those issues pre-pandemic, they may have a more difficult time defending an age discrimination suit. Past performance is a very difficult factor to use when re-hiring employees because there have been no performance problems during the pandemic. Going forward, make sure that performance problems are dealt with at the time they occur. It is best to discipline or terminate an employee in close proximity to the problem.

In sum, employers should evaluate their re-hiring decisions to see how it would be perceived under a discrimination lens. Documentation is key. Employers should create a list of employees by job title, seniority and age. When contemplating why they are bringing back certain employees and why they are not bringing back others, what are the reasons for those decisions? Are those decisions motivated by legitimate, non-discriminatory business reasons? What are those motives? Documenting the re-hiring process can help mitigate the risk of future litigation by former employees who are ultimately not brought back into the fold.

Re-Hired Employees: Repeating the Onboarding Process

When an employer makes the decision to bring back former employees, it may believe that it does not need to repeat the onboarding process for them because it already has the requisite documents on file. Unfortunately, this can land an employer in hot water.

Federal, state and local law requires an employer to provide a new hire—even if the new hire is a former employee—with certain forms and notices at the beginning of employment. Employers should issue new tax forms, rate of pay notices, handbooks and certain federal, state and local labor law notices. And, as done with brand new employees, employers should ensure that the employee provides written acknowledgment of receipt of these documents. Failure to receive written acknowledgment can lead to costly litigation in scenarios where an employee claims that they never received certain documents required by law.

Further, employers need to be prepared to ensure compliance with Form I-9 and E-Verify (where applicable) requirements. Notably, there are certain situations where a new hire and/or rehire is not considered to have taken place, despite an interruption in employment. The facts and circumstances for each business will be different and it is essential to work with counsel to confirm a compliant strategy as businesses will certainly be liable for the handling of I-9 compliance in the event of an ICE audit—regardless of the national pandemic.

While repeating the onboarding process for familiar employees may seem redundant, employers are nonetheless required to repeat it. In addition, an employer should keep in mind that laws, regulations and guidelines are consistently changing. What an employee received (or did not receive) during their previous stint with the employer may not be what is required (or not required) to be given to employees now. Repeating the onboarding process—and making sure that the onboarding documents are up to date and in compliance with current law—can save an employer from an even worse headache down the road.

The above-mentioned documents are not an exhaustive list and additional documents may be required depending on the nature of the employer and the newly re-hired individual's position. For more information, Fox Rothschild has created a document entitled "Checklists and Compliance Tips for the New York City Hospitality Employers." This document contains hyperlinks to documents an employer can easily access.

Tip Credits and Other Allowances: Check Your Employees' Pay Stubs, Because You're Not the Only One

With hospitality employers (hopefully) beginning to experience a financial rebound, employers should take the time to review pay stubs issued to employees to ensure compliance with the law.

As explained in our December 14, 2020 alert, the New York State Wage Theft Prevention Act (WTPA) and the New York State Hospitality Industry Wage Order (Wage Order) require that employers provide their employees with detailed paystubs that contain the following information:

- Dates of work covered by that payment of wages;
- Name of the employee;
- Name, address and phone number of the employer;
- Rate or rates of pay (both regular *and* overtime) and basis of pay (i.e., whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or other method);
- Regular hours worked;
- Overtime hours worked;
- Gross wages;
- Detailed list of deductions/withholdings;
- Allowances/credits, if any, claimed as part of the minimum wage, including the rate of the allowance/credit (e.g., tip credit rate, meal credit rate, etc.), the number of units (e.g., hours for which a tip credit was taken, meal

taken, etc.) and total allowance/credit taken;
- Net wages; and
- The amount of sick leave provided (and, if the employer is in New York City, (i) the amount of safe/sick time accrued and used during the pay period and (ii) an employee's total balance of accrued safe/sick time).

New York courts have consistently found that if an employer takes a tip credit against an employee's wages and that employee's wage statement does not ***separately*** list the tip credit rate, the total number of hours for which a tip credit was taken and the total amount of the tip credit taken that week, that employer has violated the WTPA and is subject to penalties of $250 per day, up to $5,000 per employee.

To some employers, $5,000 in statutory damages may seem like a *de minimis* amount. However, this is the amount that employers may be liable to *every* tipped employee they may have employed over the New York Labor Law's six-year statute of limitations. Indeed, if the payroll company's system produces to the employer the same, uniform wage statement for all of its employees and none of those statements contain the required information concerning the tip credit, the employer is potentially liable for up to $5,000 in damages to all of its tipped employees. Given that turnover is traditionally high in the hospitality industry, even a modestly sized, family-owned restaurant could have as many as 150 tipped employees over a six-year period. That business's misplaced reliance on a professional payroll company could result in up to $750,000 in damages to that single restaurant.

For better or worse, it is the **responsibility of the employer** to ensure that their paystubs are accurate and in compliance with state and local law. While many employers rely on third-party companies to handle payroll, including the issuance of employee paystubs, many payroll companies have failed (and continue to fail) to provide employers with statements that comply with the WTPA and Wage Order. Thus, an employer should not blindly trust their payroll service provider to ensure that their paystubs comply with New York law. Accordingly, it is strongly recommended that employers consult with an experienced labor and employment attorney to ensure that their paystubs are in compliance with the law.

Emerging from the Pandemic: Make Sure That Your Employees Are Doing What They Were Hired to Do

Recovery from the COVID-19 pandemic will likely be slow and steady for many hospitality employers and with that recovery comes a slow but steady return to a full workforce. While a New York hospitality employer dealing with a labor shortage may be tempted to have its employees juggle a broad swath of job responsibilities (and maybe even different titles), they must be careful not to run afoul of New York's so-called "80/20" rule.

In New York, the law prohibits an employer from taking a tip credit against a food service employee (such as wait staff, bartenders, barbacks, bussers and food runners) if that employee works more than 20% or two hours of their daily shift in a non-tipped job capacity. For example, this means that an employee is prohibited from working five hours of a shift as a bartender earning tips and then three hours doing non-tipped work, such as cleaning or inventory, because they would have exceed both the 20% mark and two-hour rule. If that occurs, the employer "violates" the 80/20 rule, meaning that the employer cannot take a tip credit against that employee's hourly wage and must instead pay them the full hourly minimum wage for all hours worked during that shift. It also impacts who can and cannot receive gratuities from house tip pools. For more information on the 80/20 rule, please click here.

Recruiting these days is very hard and many venues are operating with significantly less employees than pre-pandemic. Accordingly, hospitality employers with a smaller staff must keep the 80/20 rule in mind when delegating job duties and responsibilities to ensure that they do not lose their tip credit capabilities. Having tipped employees performing non-tipped duties for any extended period could risk the tip credit for all employees, especially if the establishment operates a pooled house. In such event, the tip pool could be corrupted.

While this may be difficult for many short-staffed employers, they will benefit in the long run by mitigating risk of future class actions. In other words, if an employer continues to take a tip credit when its service employees spend 20% or more than 2 hours of their daily shift performing non-tipped duties, this can result in tremendous liability in the form of class actions brought by **all** service employees (within a six year period!) seeking to recover daily unpaid wages owed to them, liquidated damages and attorneys' fees. Requiring service employees to perform non-tipped work to account for a short staff now is simply not worth the risk in the long run.

Exempt v. Non-Exempt Employees: Make Sure Your Employees are Properly Classified and Paid Accordingly

Employers who are short-staffed must also ensure that their employees are performing the work required of their position to avoid the potential consequences that come with employee misclassification.

While many employers believe that a salaried employee does not get overtime and is therefore properly classified as exempt from federal and New York State's overtime requirements, merely paying an employee a salary, alone, is only half the story. Whether an employee is exempt from overtime requirements calls for an analysis of the duties and responsibilities actually performed by the employee and not just those contained in the employee's job description.

Under New York and federal law, the primary exemption categories for hospitality employers are:

- Executive/Managerial Employees;
- Administrative Employees; and
- Professional Employees.

In order for an employee to be exempt from receiving overtime compensation, an employee must satisfy both (i) a salary test; and (ii) a duties test. An employee must satisfy both tests, as set forth under each of the above categories. In the hospitality industry, these duties are typically performed by management and above. To ensure whether an employee is properly classified as an exempt employee under one of the above categories, Fox Rothschild has prepared an article entitled "Wage & Hour Law for the New York Hospitality Employer." This article sets forth the salary threshold and requisite duties an employee must satisfy to be exempt under each category.

Presently, many employers are short-staffed and may be tempted to have their exempt employees assist in performing those tasks otherwise performed by hourly, non-exempt employees who are subject to overtime requirements in order to ensure that the establishment is running in an efficient manner. Yet blurring the line between who is performing what type of work, and whether that work is properly characterized as "exempt work" under one of the above categories, can lead to trouble.

For example, an employee who receives a salary and was originally hired to perform work under one of the above exempt categories may now be tasked with performing work that no longer enables the employer to treat them as an exempt employee under the law. While an employer may be grateful for that help now, an exempt employee who is no longer performing exempt duties may bring suit claiming that they are owed overtime compensation.

Thus, employers should take care to ensure that its exempt employees are performing the work that they were hired to do, and that non-exempt employers are doing the same. While it may be difficult for those short-staffed, doing so will ensure compliance with the law and avoid unnecessary litigation.

Sharp Increase in Harassment and Discrimination Claims: Don't Touch Those Employee Documents

Hopefully, hospitality employers have already seen the worst of the COVID-19 pandemic. However, employers must ensure compliance with federal, state and local anti-discrimination laws or risk severe financial consequences.

Fox Rothschild has seen a sharp rise in discrimination, retaliation and harassment claims for alleged events that occurred two to three years ago that are now being filed in federal and state court. It is no coincidence that these cases are coming at a time where employers are beginning to recover from the pandemic and at a time when New York businesses are perceived to have more money than they did in the prior 16 months.

Generally, allegations of discrimination, retaliation and harassment claims brought in New York have a three-year statute of limitations. However, as explained above, claims of wage and hour violations can have up to a six-year statute of limitations. Thus, while employers may be enticed to clean out those old personnel files, pay records and human resources documents to start fresh in the post-pandemic world, doing so may negatively impact an employer from efficiently defending a late-filed discrimination or wage and hour lawsuit. As such, employers must keep employment, time and pay records for at least six years.

Employers should continue to preserve records from before the pandemic, make sure that they are continuing to internally investigate allegations of unlawful activity and creating a paper trail that they may refer back to if necessary. Investigations must be documented in writing and "evidence" preserved. It is important to save all relevant videos, emails, texts and other documents that might be needed later to defend a claim. Such documentation is vital in cases involving alleged discrimination, retaliation and harassment as well as lawsuits brought for violations of the wage and hour laws. Getting rid of this documentation can only expose the employer to a greater risk of liability.

New York HERO Act: Get Those Plans Ready by August 5, 2021

The New York Health and Essential Rights Act (HERO Act)— which we covered in our March 15, 2021 alert, April 23, 2021 alert and July 9, 2021 alert—requires nearly all employers in the state to adopt a health and safety plan to protect workers form future airborne infectious disease outbreaks. Although the HERO Act was designed to prevent further spread of the COVID-19 virus, the law itself covers other airborne infectious diseases and will remain in place long after COVID-19 is (hopefully) a thing of the past.

On July 6, 2021, the New York State Department of Labor (NYDOL) published an airborne infectious disease exposure prevention standard and general model airborne infectious disease prevention plan. The NYDOL also published 11 industry specific plans, including one for the Food Service Industry.

By August 5, 2021, employers with worksites in New York State must adopt a written airborne infectious disease exposure prevention plan. Employers can choose to adopt the NYDOL model plan specific to their industry or establish an alternative plan that meets or exceeds the State's minimum requirements. However, if an employer decides to create a plan of its own, employees must meaningfully participate in its drafting. Regardless of whether an employer adopts the NYDOL's standards or implements its own, it must provide the plan to its employees in English and the primary language of each individual employee, if available. For a more in-depth discussion on the steps employers are required to take under the HERO Act, please refer to our July 9, 2021 alert here.

Employers should note that while they must adopt a plan by August 5, 2021, they do **not** need to implement the plan until the New York State Commissioner of Health designates an airborne infectious agent or disease as a highly contagious communicable disease (whether COVID-19 or otherwise) that presents a serious risk of harm to the public health. At the time of this article, no designation is in effect.

What is the financial risk? If an employer fails to adopt an airborne infectious disease exposure prevention plan by **August 5, 2021**, it may be subject to a penalty of at least $50 per day until a plan is implemented. If an employer fails to comply with its adopted plan during a designated airborne infectious disease period, it may be subject to a penalty ranging from $1,000 to $10,000 ($1,000 to $20,000 if the employer is found to have violated its plan for a second time within six years from the first violation).

For more information about this alert, please contact Carolyn D. Richmond at 212.878.7983 or crichmond@foxrothschild.com, Glenn S. Grindlinger at 212.905.2305 or ggrindlinger@foxrothschild.com, or Timothy A. Gumaer at 646.601.7652 or tgumaer@foxrothschild.com or any member of Fox Rothschild's national Labor & Employment Department.