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HOSPITALITY LAW

Helping the Lodging Industry Face Today's Legal Challenges

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Calif. court declares employers have discretion to schedule breaks

Employers not required to ensure employees take meal, rest periods

By Carolyn D. Richmond & Eli Z. Freedberg

Employers in California earned a significant victory when a state appellate court clarified employers' obligations to provide certain employees with meal and rest breaks. *Brinker Restaurant Corp. v. The Superior Court of San Diego County*, Super. Ct. No. GIC834348 (Cal. Ct. App. 07/28/08). State law requires employers to provide a 30-minute, unpaid meal break to nonexempt employees who work more than five hours per day, and an additional 30-minute meal break to those who work more than 10 hours per day. State law also requires employers to provide nonexempt employees with a 10-minute rest period for each four-hour period worked.

Several employees who worked at Brinker-owned Chili's Grill & Bar, Romano's Macaroni Grill, and Maggiano's Little Italy filed a class action lawsuit alleging that Brinker violated California's meal and rest break regulations and unlawfully required its employees to work off the clock during meal periods. They argued that California employers must "ensure" that employees take advantage of rest breaks to be in compliance with laws, and argued that Brinker maintained a policy of providing workers with meal breaks at the beginning of their shifts. This was illegal, they said, because the law requires employers to provide breaks toward the middle of a shift in order to give workers a true break.

Brinker argued that it was only required to provide employees with a rest period, but claimed that it was not obligated to compel each employee to take the break. The company argued that the plaintiffs' interpretation of California's wage and hour laws would essentially provide employees with a meal break for every five-hour block of time worked, regardless of the total hours worked that day. Brinker further argued that a holding for the employees would result in a total disruption of the hospitality industry

(See **BREAKS** on page 4)

Hospitality employers must be proactive about immigration

Compliance strategies necessary to avoid enforcement penalties

By Elise A. Healy

Despite any short-term dips in employment caused by the economic slowdown, the hospitality industry retains its strong demand for immigrant workers. Bureau of Labor Statistics figures put total employment in accommodation and food service jobs at 8.7 million in 2006, of which 1.8 million were with hotel and other accommodation providers. The BLS projects total employment demand to grow 14 percent from 2006 to 2016 — far in excess of the rate for the overall labor force. The industry increasingly looks to immigrant workers to fill the employment gap.

Yet the experience of 2008 shows how difficult it can be to fill that gap under current immigration law. The failure of Congress to renew a provision that exempted returning foreign guest workers from counting toward the limit of 66,000 foreign guest workers per year meant that the quota for H-2B visas was filled remarkably fast — cutting the employment pool for many hospitality employers who rely on the national temporary guest-worker program.

This hits small industry employers especially hard, because they don't have extensive recruiting resources. About 75 percent of hotels and other lodging providers employed fewer than 20 workers in 2006, and 55 percent employed fewer than 10. These employers may be tempted to fill their needs by turning to the 20 million-plus foreign-born persons currently in the United States without documentation. But, given current employment law requirements and immigration realities, that is a dangerous course to pursue.

(See **IMMIGRATION** on page 6)

'Sexual harassment against men is just as egregious as against women. All employees, both men and women, have a right to work in a harassment-free workplace.' — Mary Jo O'Neill, regional attorney of the EEOC's district office in Phoenix

EEOC files same-sex harassment suit against restaurant chain

Agency says male employees subjected to physical abuse

The Equal Employment Opportunity Commission recently filed a lawsuit against The Cheesecake Factory, alleging that the restaurant chain violated federal law by subjecting male employees to a sexually hostile work environment at its store in Chandler, Ariz. *EEOC v. The Cheesecake Factory Inc.*, a Delaware corporation, Civil Action No. CV08-01207-PHX-NVW (D. Ariz. 07/10/08).

In the lawsuit, the agency alleged that The Cheesecake Factory permitted a class of male employees to be sexually harassed repeatedly by groups of other male employees. According to the EEOC, the abuse included repeated sexual assaults by groups of male employees, who would grab another man and take turns simulating sex with the victim.

The agency also said the conduct included bumping into victims from behind in a sexual manner and grabbing their genitals on multiple occasions. According to the complaint, The Cheesecake Factory failed to address the harassment even after the male employees complained to management.

Some of the employees, the EEOC said, were harassed more than 20 times. Bryce Fitzpatrick, a kitchen supervisor, said he would often be attacked by five or more coworkers, who would lift his legs into the air and rub their bodies against him.

Mary Jo O'Neill, regional attorney for the EEOC's district office in Phoenix, said the alleged conduct violated Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991, which prohibit employment discrimination based on sex, race, color, religion or national origin, as well as retaliation.

"Employers who subject individuals to harassment based on sex are violating federal law," O'Neill said. "Sexual harassment against men is just as egregious as against women. All employees, both men and women, have a right to work in a harassment-free workplace."

The EEOC filed suit after first attempting to reach a voluntary settlement. The lawsuit seeks compensatory and punitive damages for the victims who filed charges with the EEOC and for the other men affected. It also seeks appropriate injunctive relief to prevent any sex-discriminatory practices.

Officials from The Cheesecake Factory released a statement saying that the company is cooperating with the EEOC to resolve the allegations. In addition, the restaurant chain said it is committed to providing a positive, productive and professional work environment.

For more information on the case, visit the EEOC Web site at www.eeoc.gov. ■

Male harassment on the rise

Sexual harassment claims are generally thought to involve female employees. However, according to the Equal Employment Opportunity Commission, complaints filed by male employees shouldn't be overlooked.

"Approximately 16 percent of all of our sexual harassment charges involve male victims — a figure which has steadily increased over the past 15 years," said Chester Bailey, EEOC district director. "The EEOC will continue to enforce the statutes prohibiting this behavior." ■

HOSPITALITY LAW

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Guest fails to provide enough evidence that motel was negligent

Court: Alleged assault not due to lack of security by motel

Protecting guests is one of the most important duties of a hotel, but when a guest claims she has been assaulted but has no recollection of what occurred the night before, it can put the hotel into a precarious situation. *Trask-Morton v. Motel 6 Operating L.P.*, No. 07-2417 (7th Cir. 07/17/08).

Marilyn Trask-Morton was a guest at the Motel 6 in Indianapolis. After she checked in around midnight, she parked near the third-floor room she rented, went to her room and locked the door, took a muscle relaxer, and went to bed. The next morning, Trask-Morton staggered into the lobby acting dazed and confused, slid sideways, and fell to the floor. A guest, who was an EMT, checked her pulse, found that it was dangerously low, and called an ambulance. Her friend, who was meeting her at the motel that morning, went to her room and found her belongings strewn everywhere. Trask-Morton was taken to the hospital. She had no memory of what happened between the time when she went to bed at the motel and when she regained consciousness. She took a taxi back to the motel and discovered that her purse and cell phone were missing.

The following morning she called the police to report the theft, but said she did not believe she was sexually assaulted. She contacted the police a second time when she noticed she was missing underwear, a sports magazine was on the floor, and someone had used her make-up and towels. She then said she believed she was sexually assaulted. A hospital examination found swelling on Trask-Morton's forehead, generalized redness to her cervix, and a few bruises on her arms and lower legs.

Trask-Morton filed suit against Motel 6 for negligence, claiming she was brutally assaulted, robbed and raped, and accused the motel of providing inadequate security. Motel 6 moved for summary judgment, which was granted except for Trask-Morton's loss of property claims. The U.S. District Court, Southern District of Indiana found that Trask-Morton failed to present sufficient evidence for the case to proceed. Trask-Morton appealed, arguing that had the District Court viewed the evidence properly, it would have found that she produced enough evidence for a jury to conclude that Motel 6's negligence caused her injuries.

HLAW comment by Chad Callaghan

The case has many of the earmarks of a so-called "acquaintance assault", which is an assault that occurs when a person comes into contact with another person who puts a "date-rape" drug into her drink. This type of assault has become increasingly more common in lounges and hotels with lounges. The common elements are that the person usually meets someone at a lounge or hotel, then wakes up the next day with little or no memory as to what has occurred, but discovers that she has been sexually assaulted and/or robbed. This is in no way suggestive that the guest was duplicitous in this incident.

Unfortunately, there is little that hotels can do to prevent this type of incident. In order to deter this type of crime, or to mitigate any legal exposure from such a crime, hotels should consider the following procedures:

- Be alert for patrons who exhibit unusual behavior or appear intoxicated or drug-impaired. Regular alcohol-server training should include how to recognize early signs of intoxication and how to deal with such instances.
- Hotels have a duty to provide reasonable security measures, which could include recognizing any signals that a guest or patron might be in danger.
- Noise complaints in guest rooms should be responded to and acted upon if appropriate. In this case, with evidence that the room was in disarray, it is possible that someone heard unusual noises coming from the room.
- Hotels should provide periodic, documented patrols of guest room floors, parking lots and public spaces.

It is possible that none of these measures would have prevented this incident from occurring, but they could assist in proving to the court that reasonable care was taken in providing for the safety of Trask-Morton and all of the hotel's guests.

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The 7th U.S. Circuit Court of Appeals, however, found that there was a complete lack of evidence connecting Trask-Morton's generalized evidence of high crime and shoddy security to the sexual assault she alleges occurred in her room. The court found that there was no evidence that an assault occurred under circumstances for which Motel 6 should be held at fault. The 7th Circuit found that the District Court property granted summary judgment for negligence claims relating to the alleged sexual assault, and affirmed the ruling. ■

Dairy Queen customer accuses restaurant of discrimination

A Texas man with a disability filed a discrimination lawsuit against Dairy Queen, claiming he was never served and was told to "get the hell out" of the restaurant by employees at the Hughes Springs, Texas, location.

Cordell Moody believes because he wore a Martin Luther King Jr. T-shirt that the workers refused to serve him and then would not refund his money for the order of tacos. Moody said that after he left the location, he called the Dairy Queen location's supervisor, who offered him his meal, but he declined. In his complaint, Moody is asking for more than $250,000. His complaint states that Dairy Queen violated the Civil Rights Act by failing to serve him, and that the manager should have made sure the workers at the restaurant were acting appropriately.

Moody also has another lawsuit pending against food purveyor Tyson Foods. He alleges that he suffered injuries to his teeth when he bit into a rock that he said was in a package of the company's ground beef. Moody also claims in that lawsuit that Tyson discriminated against him and is asking the food giant to pay more than $6 million for mental anguish, pain and suffering that he incurred as a result of the rock. He also claims he was injured by delays by Tyson to rectify the situation.

Moody is representing himself in court for both lawsuits. ■

'The **Brinker** *decision is encouraging for California restaurant owners who have not had much good news lately on the legal front.' — Carolyn D. Richmond and Eli Z. Freedberg, attorneys*

BREAKS (continued from page 1)

because the plaintiffs were arguing that employers must provide employees with meal breaks during the most lucrative part of the day.

In April 2006, plaintiffs moved for class certification of their wage and hour claims, and defined the class as all present and former employees of Brinker holding nonexempt positions who had not been provided with or compensated for meal and rest breaks in accordance with California law. They argued that the class was identifiable because Brinker maintained its payroll data in a searchable format that identified employees who had not taken their meal and rest breaks. The plaintiffs also argued that common legal and factual issues predominated because: 1) Brinker's time records revealed which employees' time cards had been adjusted; 2) current and former employees filed affidavits and declarations stating that Brinker maintained a uniform corporate meal and rest break policy throughout its restaurants; and 3) it maintained statistical analysis showing that breaks were not granted in accordance with state law.

In opposing the motion for class certification, Brinker maintained that deciding whether individual employees took the meal and rest breaks is a "hopelessly individualized" inquiry. The company also argued that it was entitled to offer meal breaks at the beginning of each shift, rather than during the middle of the day, because the middle of the day was the busiest time of the day for Brinker's restaurants. Brinker also submitted declarations from current and former employees stating that its policies allowed employees to take meal and rest breaks, and that Brinker never had a policy requiring management to adjust employees' time records.

The trial court granted the employees' motion for class certification; Brinker appealed. The appellate court reversed, finding that the trial court failed to properly interpret the underlying wage and hour statutes, and held that an employer is obligated to provide a certain number of rest breaks based upon the total number of hours the employee worked on any particular day. Thus, if an employee worked seven hours, the employee is entitled only to one rest period, regardless of whether the first rest period was taken one or two hours into the shift; the plaintiffs believed that if a break was taken in the first hour of a seven-hour shift, another rest break should be offered four hours later. The court also recognized than an employer has discretion over the timing of the rest period, and acknowledged that the law would be counterproductive if it required employers to provide breaks at impracticable times: "[t]he discretion is of particular importance for jobs, such as in the restaurant industry, that require flexibility in scheduling breaks because the middle of a work period is often during a mealtime rush when an employee might not want to take a rest break in order to maximize tips and provide optimum service to restaurant patrons."

The appellate court also reversed the trial court's decision to grant class status with respect to the meal break, holding that employees are not entitled to a "rolling" meal break, but rather an employer must provide one half-hour meal break for every five hours worked, in total, by the employee; the plain meaning of the statute says a second meal break is triggered only when the employee works 10 hours per day.

Finally, the appellate court held that Brinker satisfied its legal obligations by simply granting its employees the option to take meal breaks; Brinker was under no obligation to ensure that their employees took advantage of the offer.

HLAW COMMENT BY FOX ROTHSCHILD LLP

The *Brinker* decision is encouraging for California restaurant owners who have not had much good news lately on the legal front. The appellate court recognized a restaurateur's need to have flexibility in scheduling meal and rest breaks in order to operate. The court also found that employers are not required to force employees to take their meal and rest breaks. However, employers should not interpret this decision to mean that they can "offer" these breaks in name only while simultaneously taking steps to dissuade employees from taking these meal and rest breaks. California employers must ensure that their policies have "teeth," and that employees who work more than four or five hours, or a major fraction thereof, may take their meal and rest breaks without interference, if they so choose.

Employers, however, should be aware that this case is likely to be appealed to California's Supreme Court. If upheld by the Supreme Court, the standards set forth in the *Brinker* decision would dramatically change the interpretation of California's meal and rest period requirements. ■

Overly restrictive covenants make agreement unenforceable

Court says franchise agreement was not reasonable to franchisee

Protecting your franchise's proprietary information is crucial to your company's success. But to protect that information, you must be sure your franchise agreement is iron-clad.

Atlanta Bread Company v. Lupton-Smith et al., A08A0348, A08A0349 (Ga. Ct. App. 06/04/08).

Sean Lupton-Smith owned five franchises of the Atlanta Bread Company, but was served with Notices of Termination of the Franchise Agreement after Atlanta Bread Company discovered Smith was operating a competing business called PJ's Coffee and Lounge, allegedly using the company's methods and proprietary information.

A trial court entered a partial summary judgment in favor of Smith, finding that two of the restrictions in the franchise agreements were not enforceable; the trial court did deny Smith's motions on the wrongful termination pleadings, and denied Atlanta Bread Company's cross-motion for summary judgment.

On appeal, Atlanta Bread Company argued that the trial court erred in concluding that a restriction on in-term competition was invalid and that geographic limitation was required as a matter of law in the restriction.

Atlanta Bread Company's franchise agreement has confidentiality restrictions dictating that a franchisee may not, during and one year following the termination of the agreement, engage in or acquire interest in a "bakery/deli business whose method of operation is similar to that employed by store units within the system." The agreement also specified that a franchisee could not use or share trade secrets incorporated in the "system" for any business not within the system, but could use the information only for training employees.

Under Smith's agreement with PJ's Coffee, the company agreed to waive the franchise fee if Smith helped develop an operating manual.

The Georgia Court of Appeals found that the trial court did not err in denying Smith's motion, finding the restrictive covenants unenforceable. The court found that because the first restriction of the franchise agreement failed to specify the nature of business activities in which Smith was forbidden to engage in, the covenant was unreasonable and unenforceable. The court also found that the second restriction contained shifting and expanding territorial restrictions, also making it unenforceable.

On the accusation of disclosure of trade secrets, the court found that if Smith did breach the trade secret restriction, the franchise agreement would have been materially breached; whether Smith disclosed company trade secrets and violated his contractual duties in the agreement is a question of fact for the jury to determine. The appeals court concluded that the trial court did not err in denying Smith's motion for judgment on the pleadings. ■

HLAW comment by Diana S. Barber

The outcome of this case is a reminder to all lawyers that restrictions in a franchise agreement must be carefully drafted to comply with the law. In the state of Georgia, a covenant not to compete in a franchise agreement must be reasonable as to the nature and scope of the restriction. Since the restrictive covenant is a restraint of trade, the Georgia courts have held that these covenants must be strictly limited in duration and territory. The provision must protect the franchisor but cannot be unreasonably vague or overly broad.

Georgia courts do not apply the blue-pencil doctrine of severability and will not enforce just the legal components of a restrictive covenant and toss aside the unenforceable ones. If one part fails, then the entire covenant is unenforceable.

Atlanta Bread Company failed to specify the nature and type of business it deemed competitive with its brand; the court found that the lack of specificity caused the entire covenant to fail.

The franchise agreement prohibited the franchisee from engaging in activity related to the bakery/deli business, which was not clearly defined in the agreement. The court stated that any business operation that bakes or sells baked goods or cooked meat would be prohibited, but the court gave the example that if the franchisee were to take a position as a janitor in a deli, this would trigger a violation of the covenant. Therefore, the covenant was held invalid.

In addition, another provision contained in the franchise agreement allowed Atlanta Bread Company to expand its system to additional territories and further restrict the franchisee. The court stated that the franchisee could not determine the additional territories that Atlanta Bread Company's restrictive area would expand into until such time as a termination of the franchise agreement occurred. The court would not enforce this type of provision, finding it unreasonable to hold a franchisee to this changing and/or expanding restrictive covenant.

It's important to make sure that any restrictive covenants in a franchise agreement be carefully worded by a trained legal expert in the franchise law area in order to maintain the enforceability of these restrictions and protect the franchisor to the greatest extent possible. ■

Lawsuit filed in Georgia over E. coli outbreak

One of the first lawsuits stemming from the national E. coli outbreak linked to seven states was recently filed in the U.S. District Court for the Middle District of Georgia, Valdosta Division. The suit was filed against Nebraska Beef Limited on behalf of Evelyn and John M. Stewart of Moultrie, Ga.

According to the lawsuit, the Stewarts ate at the Barbeque Pit in Moultrie in June 2008. Days later, Evelyn Stewart began having bloody diarrhea and signs of renal failure. She was admitted to the Colquitt Regional Medical Center, where she tested positive for E. coli, and was diagnosed with hemolytic uremic syndrome — a severe and life-threatening complication. She was transferred to the Archbold Memorial Hospital Medical Intensive Care Unit in Thomasville, Ga., where she continued to battle the complications of the infection.

According to officials, a cluster of E. coli illnesses appeared in the area in late June, and were traced to the Barbeque Pit. The restaurant closed voluntarily, and has been involved in rigorous testing and disinfection procedures.

Officials said the Georgia cases have been genetically matched to the outbreak in Ohio, Michigan, Kentucky, New York, Utah and Indiana. The multistate outbreak has been traced to tainted meat from Nebraska Beef Ltd., which was a supplier to the Barbeque Pit in Moultrie. ■

'Given today's heightened concerns over illegal immigration and homeland security, and the severe civil and criminal penalties that even employers who act in good faith can face, all employers must prepare an effective response to immigration enforcement activities.'
— Elise A. Healy, attorney

IMMIGRATION (continued from page 1)

By law, each employer must check the identity and employment eligibility documents of every worker hired. The basic document for doing so is Form I-9, the Employment Eligibility Verification form issued by the Department of Homeland Security. Employers and their managers, especially in the hospitality industry, are increasingly targeted for criminal prosecution if they "look the other way" when hiring managers know, or should have known, that new hires have presented false documents.

Form I-9 requires an employer to examine the new hire's evidence of identity and employment eligibility and to record the documents the employee presents. Employers may not demand a specific document; instead, the worker chooses which of the documents listed on the Form I-9 he will provide. Employers must accept such documentation at face value and may not investigate further, unless the document does not appear to be "genuine" or it "appears" to belong to someone else. Requesting additional documents or information can result in claims of discrimination.

To date, federal law does not require employers to "verify" that a new hire's Social Security number is valid and that it belongs to the person hired. However, state laws are increasingly requiring this additional step, using the E-Verify online system offered by the Social Security Administration. Recently, the Bush administration issued an executive order requiring federal contractors to use E-Verify. Some states already require their contractors to do this. Any employer who supplies the federal government must therefore use E-Verify, despite its known deficiencies and inaccuracies. Regardless, stricter government enforcement makes failure to use E-Verify increasingly dangerous for employers.

U.S. Immigration & Customs Enforcement, the largest law enforcement agency in the Department of Homeland Security, is responsible for work site enforcement. ICE ensures compliance with federal immigration and customs laws, and works in tandem with the FBI, attorneys throughout the country, as well as state and local law enforcement. As ICE has grown in manpower and resources since its establishment in 2003, its work site enforcement initiatives have resulted in major investigations, arrests, criminal fines, and, in some cases, convictions of companies and their HR managers, as well as employees and contractors. As of July 2008, ICE made 937 criminal arrests in connection with work site investigations in the current fiscal year, a 45-fold increase since 2001. Of those arrests, 99 involved owners, managers, or human resources supervisors on such charges as knowingly hiring, harboring and transporting illegal aliens. ICE has made more than 3,500 administrative arrests of workers charged with civil immigration violations.

Companies with high employee turnover, such as those in the hospitality industry, often are uncertain how much time and financial resources they should devote to such organized compliance efforts. However, given today's heightened concerns over illegal immigration and homeland security, and the severe civil and criminal penalties that even employers who act in good faith can face, all employers must prepare an effective response to immigration enforcement activities. The only sure way to minimize risk is to make all reasonable efforts at compliance, documentation and verification.

Elise Healy is an immigration law attorney at Spencer, Crain, Cubbage, Healy & McNamara PLLC in Dallas, representing both domestic and international clients from multinationals to start-ups on all types of immigration matters. She can be reached at ehealy@spencercrain.com *or (214) 290-0004.* ■

4 elements needed for compliance

By Elise A. Healy

An investigation of a hospitality employer may arise from an employee tip, immigration intelligence about a company's processes, or even from using E-Verify if it reveals an employer knew that unauthorized workers have fraudulently presented valid, but stolen, identification documents. Given this reality, the best defense to an investigation is full and robust compliance with the law. An effective compliance commitment should encompass these elements:

- Establishing and enforcing clear policies on recruiting, hiring, and document examination and retention.
- Undertaking periodic unscheduled, unannounced internal audits of actual recruiting, hiring and I-9 practices, including response to No-Match letters.
- Setting guidelines on exactly what steps to take if ICE comes calling, including identification of a responsible contact person and communication to employees of what they should do in the event of a subpoena or a raid.
- Using the government's E-Verify system to check the Social Security number and name combination of all new hires (after hiring, not before), even though E-Verify cannot detect workers improperly using valid documents. ■

Agreement deemed 'unconscionable' due to cost language

Employee said she didn't realize she agreed to arbitration contract

As companies hope to reduce costs associated with litigation from employment disputes, many have chosen to implement arbitration policies. However, the courts have been increasingly siding with employees over the validity of many of these policies, and employers must be careful to reduce the likelihood that their arbitration agreements are ruled unconscionable by a court. *Liebrand v. Brinker Restaurant Corporation, et al.*, G039017 (Cal. Ct. App. 06/18/08).

Jamie Liebrand worked as a server at Chili's and had been employed by the company since 2004. A year later, she told her employer that she was pregnant, and when she experienced medical issues related to the pregnancy, she requested leave and accommodation. She said she was then terminated for taking the leave. She sued her employers for pregnancy discrimination, intentional infliction of emotional distress, and failure to provide pregnancy leave.

Brinker Restaurant Corporation filed a motion to compel binding arbitration or an automatic stay of proceedings pending the completion of arbitration, claiming Liebrand executed the arbitration agreement on Nov. 1, 2004. Brinker also sent a letter in May 2007 asking Liebrand to dismiss her case and submit to arbitration. After her refusal, Brinker offered to waive the location and cost-sharing provisions; Liebrand did not respond.

She said she did not recall signing an arbitration agreement, rescinded any arbitration agreement she may have unwittingly signed, and stated that the agreement is void on account of unconscionability. The court also noted that the two documents provided by Brinker as evidence that Liebrand signed the contract looked like they were signed by two different individuals.

A trial court denied Brinker's motion to compel arbitration. Although Brinker met its burden of proving that Liebrand agreed to arbitrate the dispute, the court found that the arbitration agreement was void because it was procedurally and substantively unconscionable. Liebrand had to sign the agreement "to even be considered for employment." In addition, the contract was adhesive because it mandated that arbitration take place in Texas, and that employees share the costs — terms that were condemned by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services* (2000).

The court found that Brinker's failure to rewrite the agreement after the 2000 *Armendariz* ruling was akin to "bad faith conduct."

The California Court of Appeal said it agreed with the trial court that Brinker failed to ensure its preemployment arbitration agreements complied with California laws, and noted that it waited until after Liebrand rejected the request to arbitrate before offering to waive provisions. The appeals court affirmed the denial of the company's motion to compel arbitration. ■

Court looked to 2000 case for guidance

In *Liebrand v. Brinker*, the court looked to a California Supreme Court decision, *Armendariz, et al., v. Foundation Health Psychcare Services, Inc.*, 99 Cal. Rptr. 2d745 (Cal. 08/24/00), for guidance. In this case, the court determined that the arbitration clause contained in a mandatory employment agreement is enforceable if it allows an employee to his statutory rights.

But the California courts require that, at a minimum, a company's mandatory arbitration agreement must grant:

- Neutrality of arbitrators.
- A fair discovery period.
- An arbitration decision that can be appealed for judicial review.
- A limit on cost, so that the cost incurred by the employee would be no more than what would have been required to litigate the employment dispute.

In *Armendariz*, the court found that because the arbitration agreement required the employees, but not the employer, Foundation Health Psychcare, to arbitrate, it was unconscionable. The court also found it unconscionable on the grounds that the agreement limited the damages that could be recovered by the employee. ■

HLaw Glossary

What does 'unconscionable' mean?

Courts often use the word "unconscionable" to describe something grossly unfair, and in favor of the person with more bargaining power.

In many cases, a court will determine that an agreement is unconscionable when an employer's contract with an employee is one-sided and that no reasonable or informed person would agree to it. ■

Lawsuit claims chain restaurants lie about calories on diet menus

A complaint has been filed against several of Dallas-based Brinker International's restaurants, alleging that the restaurants misrepresent the actual caloric content of their food to unsuspecting consumers.

The complaint, filed by Anne Paskett, argues that the entrees listed on the diet menus of restaurants such as Chili's, Romano's Macaroni Grill, and On the Border Mexican Grill & Cantina contain much more fat and calories than indicated.

Paskett, who is on the Weight Watchers diet program, said she found that after carefully following her allotted caloric intake, in part by dining on diet menu items listed at these restaurants, she gained weight due to the misrepresentation by the restaurant of the calories and fat contained in their so-called "low fat" meals.

The complaint claims that items on Chili's "guiltless" menu have more than double or triple the amount of fat and calories than are listed. An independent investigation by a media outlet confirmed this report, noting that items such as salmon on the "guiltless menu" had three times the amount of fat stated.

Paskett's complaint requests more than $5 million in damages. ■

Restaurant did not owe duty to perform first aid on choking victim

Court determined that only duty required was the summoning of first aid to patron

Instructing staff members on how to administer first aid to patrons is a good idea, but may not always be necessary depending on your state's laws. In a case involving the death of a patron by choking, a restaurant's demurrer was sustained because the court found that the only duty the restaurant owed to a choking customer was to summon first aid. *Salo, et al. v. Mill Ring Restaurant Partners*, No. E043780 (Cal. Ct. App. 06/18/08).

Julie Salo and a friend were eating at the Mill Ring Restaurant in San Bernardino County when a piece of meat became lodged in her throat. The friend cried out for assistance, but no one at the restaurant administered first aid to Salo as she choked. The employees called 911 and requested medical assistance, but the paramedics who arrived on site were unable to resuscitate Salo, and she died at a local hospital several days later due to lack of oxygen while choking.

Salo's daughters alleged that if the restaurant's staff had administered first aid, then their mother would not have died. They filed a complaint against Mill Ring alleging that the restaurant's negligence caused their mother's death.

The restaurant filed a demurrer to the daughters' complaint, arguing that the duty a restaurant owes to a choking patron is limited to summoning medical assistance, and therefore, the complaint failed to state facts sufficient to constitute a cause of action. The trial court said it would sustain the demurrer, and after the daughters declined to amend, the court said the demurrer would be sustained without leave to amend.

The daughters argued that the restaurant owed a duty to administer first aid to a choking patron based on a May 2005 statute from the state's Health and Safety Code, which addressed choking in restaurants. This statute, which was repealed a year later, required restaurants to adopt first aid instructions on how to deal with choking victims, and also declared it would provide restaurants with instructions to be posted in a conspicuous place on how to handle choking. However, the statute's language also included the line, "Nothing in this section shall impose any obligation on any person to remove, assist in removing, or attempt to remove food that has become stuck in another person's throat …"

The appeals court determined that the only duty imposed on a restaurant to help a choking guest is to summon medical assistance, and it disagreed with the daughters that common law establishes an independent duty to provide first aid because no precedent existed supporting this argument.

The court determined that the trial court correctly sustained the restaurant's demurrer and affirmed the judgment. ■

First aid not required

In *Salo v. Mill Ring Restaurant*, the court looked to the 1984 decision, *Breaux v. Gino's, Inc.*, 153 Cal.App.3d 379, for guidance. In *Breaux*, the court determined that a restaurant's duty to a choking patron was limited to summoning medical assistance.

The daughters argued that when the statute was replaced, it expressed intent to supersede the *Breaux* decision. ■

Despite casino worker infractions, retaliation case will proceed

Employee's affair with boss may have constituted harassment

Even with policies prohibiting romantic relationships at the workplace, they often do happen, and can sometimes end in court if employees claim they were harassed or retaliated against for a relationship. *Hughes v. Hollywood Casino Corp.*, Civil Action No. 2: 07CV026-SAA (N.D. Miss. 05/22/08).

Judy Hughes began her employment as a table games dealer with Hollywood Casino Tunica in August 2000 and received satisfactory employee performance appraisals on four or five occasions, but she also received disciplinary actions for falling asleep on the job, failing to notify management of a romantic relationship with her supervisor, Danny Foppiano, and making discriminatory comments about an employee on duty.

Hughes was terminated, about three months after she reported her affair with Foppiano to supervisors, for making discriminatory remarks and arguing with coworkers. She then filed a charge with the EEOC alleging she was subjected to a hostile work environment arising from sexual harassment by Foppiano, and that she was retaliated against for reporting this harassment. She said she was required to drive Foppiano to work (because of his DUI violation) and that he made sexual advances to her and that they'd had sexual relations in Hughes' car, in the woods, and at her house. Hughes also claimed that Foppiano also repeatedly warned her that if she told anyone of their sexual encounters, that they would both be terminated.

Although some of Hughes' claims were time-barred, because her relationship with Foppiano ended in 2005 but resumed again in May 2006, with the two having relations as late as July 2006, claims relating to her relationship after May 15, 2006, were not.

The court found that although Hughes was disciplined and terminated for her behavior, there was a genuine issue of material fact regarding whether the stated reasons for her termination were pretexual or whether she suffered adverse employment action as a result of the alleged sexual harassment by Foppiano. The court also noted that a casino vice president mentioned in his affidavit after Hughes' second warning regarding her affair with Foppiano that if she committed one more infraction at work, she would likely be terminated. Therefore, the court denied the casino summary judgment.

The court also sided with Hughes on her hostile work environment claim. After management learned of her relationship with Foppiano and placed her on a different work shift, there was occasional overlap where Foppiano was Hughes' supervisor for a portion of the shift. This potential for overlapping supervision could enable Hughes to demonstrate that she was subjected to "unwanted sexual harassment" from her supervisor as a condition of employment.

Regarding Hughes' claim of retaliation, the court found that although Hughes' evidence was weak, it would also deny her employer's request for summary judgment on that claim.

The court did, however, grant the employer summary judgment regarding Hughes' state law claims. ■

Documenting discipline not enough

Hollywood Casino Tunica had reasons for terminating Judy Hughes' employment. Over two years, she received reprimands on:

- April 17, 2005: written warning stating that the casino's surveillance department had video recorded of Hughes falling asleep on the job.
- Oct. 12, 2005: written warning for failing to notify management of a romantic relationship with table games floor supervisor Danny Foppiano, in violation of the written policy restricting personal relationships in the workplace.
- August 5, 2006: "Final Written Counseling" notice for violation of policy regarding restricting personal relationships in the workplace.
- Sept. 7, 2006: written warning documenting a three-day suspension from work without pay for sleeping on or at her table while on duty.
- Oct. 20, 2006: written counseling notice for verbally arguing with another employee while on duty and making discriminatory comments to another employee.

Despite her less than exemplary track record, the court noted Hughes' claims that her written warnings for sleeping and arguing were pretext for terminating her based on her relationship with her superior.

Employers can learn from this case that even with having a policy prohibiting relationships at the workplace, it's crucial to properly train your supervisors to understand the consequences of having relationships with their subordinates, and to provide thorough training to all employees about your company's sexual harassment policies. ■

Ohio legislation would target bedbugs in hotels

Ohio lawmakers recently introduced legislation that would promote awareness of bedbugs and prevention strategies for hotels.

Rep. Dale Mallory, D-Cincinnati, cosponsor of the bill with 30 other legislators, said the legislation was crafted to combat the growing number of bedbug cases reported at Ohio hotels, as well as nursing homes and hospitals. The legislation would secure more than $330,000 in state money to create a bedbug program under the direction of the Ohio Department of Health.

Specifically, the bill would use the funding to provide hotel owners with education on the difference between bedbugs and other types of vermin. In addition, the state would establish a toll-free number for residents who want to report bedbug infestations or who are seeking seek information.

There have been a number of bedbug lawsuits filed against hotels in recent years, often resulting from infestations in bedsheets. In Cincinnati and surrounding Hamilton County, officials received more than 800 complaints of bedbugs last year. However, there is no state law that requires the reporting of infestations of bedbugs. ■

Case of retaliation for ADA compliance will proceed

Restaurant must pay attorney's fees for refusing to serve patron

The Americans with Disabilities Act makes it unlawful to 'discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.'

Every establishment occasionally must serve a cringe-inducing customer — someone who is generally rude, an extremely poor tipper, or even someone who has filed a lawsuit against your restaurant. Although it may be tempting to invoke the "right to refuse service" line posted on the wall, think twice. A decision to remove an unsavory customer could lead to an unwanted lawsuit. *Wilson v. Murillo*, No. A118499 & A119121 (Cal. Ct. App. 06/10/08).

Ron Wilson and his friend, who both use wheelchairs, visited Murillo's Mexican Restaurant for lunch one afternoon. Wilson had previously visited Murillo's on several occasions and had sent handwritten letters to Frances Murillo identifying accessibility issues he had encountered. She responded to each of the letters and ultimately made modifications totaling more than $130,000 to become compliant with the Americans with Disabilities Act.

After Wilson and his friend went to the accessible part of the bar and were served beverages, chips and salsa, Murillo held up a sign that said "We have the right to refuse service to anyone" and told Wilson that he was not welcome in her restaurant. She ordered the bartender to remove the chips, salsa and beverages from the bar. After the men said that they were going to finish their drinks before they left the premises, a waitress began taking photographs of them, and another made an offensive gesture aimed at the men as they left the restaurant. Murillo called the police, who told her that she did not have the right to refuse service to the men.

Wilson then filed a lawsuit against Murillo, alleging that he was refused service and subjected to ridicule and harassment at the restaurant in retaliation for his efforts to ensure that the restaurant would be accessible for use by the disabled under the Americans with Disabilities Act. He did not, however, make an explicit claim of retaliation under the ADA, but rather asserted Murillo violated the ADA provision making it unlawful to "discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act." Wilson sought injunctive relief and damages for his experience at the restaurant.

Murillo argued that the retaliatory acts alleged by Wilson were too trivial to constitute adverse retaliatory action, and claimed that although they had "words," she said she didn't eject or refuse to serve him. A trial court sided with Murillo, granting her motion for summary judgment; a posttrial order awarded her attorney's fees.

On appeal, the California Court of Appeal determined that the trial court erred by granting Murillo summary judgment and attorney's fees. The court found that if Wilson's claims are true, they are sufficient to allow a fact finder to conclude that he was subjected to retaliatory actions.

In addition, Murillo admitted in her deposition that her decision to eject Wilson was motivated by his earlier ADA complaint, which the court found provided substantial factual support for Wilson's retaliation claim. The court also said there was enough evidence to support Wilson's claim of harassment. The court reversed the grant of summary judgment to Murillo, as well as the award of attorney's fees. Costs of the appeal were awarded to Wilson. ■

Proving retaliation under the ADA

The Americans with Disabilities Act specifically prohibits discrimination because an individual has opposed any act or practice made unlawful by the ADA. To establish a prima facie case of retaliation under the ADA, an individual must prove:

- He was engaged in a protected activity.
- The alleged retaliator knew that he was involved in the protected activity.
- An adverse decision or course of action was taken against him.
- A causal connection exists between the protected activity and the adverse action.

The court noted that in *Wilson v. Murillo*, after Ron Wilson established he had a prima facie case against the restaurant, the burden fell on the restaurant to establish a legitimate reason for the adverse action.

Although the court considered Frances Murillo's arguments that Wilson was a serial litigator who was unlikely be offended by what had happened at her restaurant, the court said that it could only consider the factual record before it, and determined that triable issues of material fact precluded it from affirming Murillo's prior award of summary judgment. ■

Courts split over barrier changes for historic buildings

Hotels, restaurants should prepare to show burden of ADA changes

As more hospitality groups look at converting historic buildings into unique lodging facilities, ensuring that you are compliant with Title III of the Americans with Disabilities Act is a concern. Title III requires public accommodations, such as hotels and even bed and breakfasts, to remove architectural barriers where the removal is readily achievable, even in historical buildings. But who bears the burden of proving that removing the barrier will not threaten or destroy the historic significance of a property? The Americans with Disabilities Act does not allocate the burden, and the 9th and 10th U.S. Circuit Courts of Appeals have split over the issue, making it even more complicated for those involved with property conversions.

In *Colorado Cross Disability Coalition, et al. v. Hermanson Family Limited Partnership, et al.*, 21 NDLR 182 (10th Cir. 2001), the 10th Circuit said an individual must produce evidence that barrier removal is readily achievable without destroying the historic significance of the building. Once that evidence is produced, the burden shifts to the facility to show that it could not accomplish the proposed barrier removal without threatening or destroying the building's historic significance.

U.S. Circuit Judge Carlos F. Lucero issued an opinion that concurred and dissented with the majority's ruling. Judge Lucero stated that the majority placed too heavy a burden on Title III plaintiffs. He argued that these individuals should bear the burden of advancing a reasonable plan to remove each barrier, but that the businesses are better positioned to produce detailed evidence describing why a plan fails to meet the readily achievable standard.

In *Molski, et al., v. Foley Estates Vineyard and Winery, LLC*, No. 06-56385 (9th Cir. 07/09/08), the 9th Circuit adopted Judge Lucero's reasoning that a public accommodation located in a historically significant building had the burden of producing evidence describing how barrier removal would threaten or destroy a building's historical significance. The 9th Circuit reasoned that the facility's owner had the best access to this evidence.

The 9th Circuit noted that Section 4.1.7 of the ADA Accessibility Guidelines also supports placing the burden of production on the public accommodation. The section states that if the "entity undertaking the alterations" believes compliance with the ADAAG requirements would threaten or destroy the historical significance of a building, it should consult with the state historic preservation officer. The 9th Circuit noted that the ADAAG did not place the burden on the party advocating for remedial measures.

Depending on which way other courts decide, hotels and restaurants located in historic buildings may not have the same protections from the ADA they think they have, and preparing themselves for the event of an accessibility lawsuit may be wise. ■

Many concerned over ADA changes

Every industry, including hospitality, is concerned over the House-approved amendments to the Americans with Disabilities Act. Depending on the outcome, employers may be expected to accommodate more individuals under the ADA then they had expected. But many U.S. senators are concerned that the amendments are too ambiguous and certain terms need clarification.

Sen. Tom Harkin, D-Iowa, who sponsored the bill, said during a recent hearing that changes to the current ADA are necessary because there are veterans returning from Iraq who have lost a leg but who may not be able to qualify under the proposed definition because they can function with prostheses.

"I want to caution supporters of the House bill that, here in the Senate, serious procedural and substantive concerns have been raised," Harkin said. The senator "will do everything he can to see [the legislation] passed and signed into law this year," a spokeswoman for Harkin said.

Samuel Bagenstos, a law professor from Washington University in St. Louis, urged the Senate to ensure courts interpret the term "disability" broadly. "Absent the broad-construction provision, many judges will feel free to lean toward a strict and demanding construction of the disability definition in cases of ambiguity."

Bagenstos also suggested clearly defining the words "materially restricts," pointing out that the original ADA left interpreting the words "substantially limits" up to the courts. He suggested including the definition used by the EEOC, and define "materially restricts" as "significantly restricted as the condition, manner or duration under which an average person in the general population can perform that same major life activity." ■

Nevada high court approves WC benefits for certain suicides

The Nevada Supreme Court recently ruled that the family of a hotel-casino bartender who committed suicide after suffering a work-related injury may recover workers' compensation death benefits. *Vredenburg v. Sedgwick CMS,* No. 49289 (Nev. 07/24/08).

The court determined that if a sufficient chain of causation is established between a worker's industrial accident and his suicide, the worker's family may recover benefits. It returned the case for the appeals officer to conduct further proceedings.

The employee slipped on a flight of stairs while working and injured his back. Although he underwent fusion surgery on his spine, he continued to experience neck and lower back pain. His doctors tried several treatments, none of which alleviated his "intractable" pain. He eventually committed suicide.

The Supreme Court determined that the widow's entitlement to death benefits was not foreclosed by the worker's suicide. If she could establish an "unbroken chain of causation" between the original injury and her husband's eventual suicide, she would be entitled to benefits.

The Supreme Court explained that under the chain-of-causation test, a claimant may recover benefits "even if the employee's choice to commit suicide was deliberate." ■

Employees who work overtime at risk of anxiety, depression

The hospitality industry doesn't often present employees with a traditional work environment. Specifically, for hotel and restaurant employees, this can mean long shifts and extended late-night hours. However, according to a recent study, employees who work overtime are at an increased risk of suffering from anxiety and depression.

According to the study, published in the June issue of the *Journal of Occupational and Environmental Medicine*, researchers from Norway analyzed data on work hours from a large study of male and female employees. The study compared 1,350 employees who worked overtime — 41 to 100 hours per week — to approximately 9,000 employees who worked regular schedules — 40 hours or less. For men, depression increased from about 9 percent for those with normal work hours to 12.5 percent for those who worked overtime. For women, the rate of depression increased from 7 percent to 11 percent. Anxiety rates increased for both groups of overtime workers.

Previous research has pointed to health and safety concerns, including "presenteeism" — days when the employee was at work but was performing at less than full capacity. That study found that the number of work hours mattered much less in accounting for employee outcomes than factors whose origins preceded the number of hours worked — compensation type, demographics, and prior diseases and health status.

In addition, a study by Circadian Technologies found that as overtime hours increase, so do an employer's health care and workers' compensation costs. The study found that the average workers' comp costs for an employee working a very high amount of overtime — more than 20 percent of total hours worked — is double that of an employee who works a low amount of overtime hours, such as less than 5 percent of total hours worked. Health care costs for employees working a very high amount of overtime is more than $10,000 — five times as high as an employee working a low amount of overtime.

Other social factors that have been found in overtime workers include higher rates of alcohol and substance abuse.

To prevent these disorders in hospitality workers, researchers recommend:

- **Avoiding or minimizing overtime, whenever possible.**
- **Providing part-time staff for peak periods.** For many restaurants and hotels, the holiday and summer vacation months can mean a significant influx in customers. Consider taking on additional staff members to prevent employees from working too much overtime.
- **Scheduling overtime on off-days, instead of extending the regular work shift.** This will allow employees a period of recovery between shifts.
- **Incorporating a work ramp-up period for new hires.** Work demands and hours that your hotel or restaurant sets for experienced employees may be too high for those who are new to the job. Allow a gradual ramp-up period for new hires that increases their job demands over several weeks, or until employees can perform at the same pace as experienced workers.

For more information on the study, visit the American College of Occupational and Environmental Medicine Web site at www.acoem.org. ■

Absenteeism, turnover at risk

A study by Circadian Technologies that examined the impact of overtime work — including employees in the hotel and restaurant service industries — found that absenteeism and turnover are significant problems for these workers.

Researchers found that the average cost of absenteeism per overtime worker was $8,035. Absenteeism is higher in overtime jobs because of the reduced sleep, poorer health, and difficulties with family and social life that these jobs can cause. Those factors, researchers said, have caused an excessively high absenteeism rate among overtime workers.

In addition, the study found that turnover among overtime workers is nearly 10 percent per year, compared to 3.2 percent among non-overtime U.S. employees overall. Researchers said turnover is sometimes the end point of increased absenteeism, and the reasons for turnover are mostly similar to the causes of absenteeism.

Researchers said employers with more stress and fatigue problems had higher rates of turnover. However, companies that implemented employee training programs and allowed employees to choose their shift schedules had lower rates of turnover. ■