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HOSPITALITY LAW

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Restaurant cannot bar servers from wearing union buttons

NLRB held that union insignia did not interfere with public image

By Robert C. Nagle

A recent National Labor Relations Board decision is just the latest instance where the board found that a common workplace rule impermissibly restrained employees in the exercise of their rights under the National Labor Relations Act.

In *Grill Concepts Services, Inc., d/b/a The Daily Grill, 364 NLRB No. 36*, the board determined that Grill Concepts Services, Inc., which operates 33 restaurants throughout the country, violated federal labor law by maintaining and enforcing a rule which prohibited employees from wearing union buttons on their uniforms during their shifts.

Grill Concepts required servers and bussers to dress in accord with its uniform policy: a white button-down long-sleeved dress shirt, black shoes, black pants, along with a brown vest and black apron furnished by the restaurant. The uniform standards also require servers to carry server order books, a wine tool, crumber and pens. The uniform policy did not expressly address buttons, pins or other insignia. At times, however, the employer permitted employees to wear "trainer" pins and anniversary pins.

In late 2013, UNITE HERE began efforts to organize employees at the Century Daily Grill, located in the Westin Hotel adjacent to Los Angeles International Airport. In February 2014, several employees approached management with a list of grievances. Over the next few months, on several occasions, individual employees wore union buttons on their uniforms during their shifts. The union buttons were about one inch in diameter and said "UNITE HERE! LOCAL 11" in red and black lettering. On each occasion, a member of management instructed the employee to remove the button or clock

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Statement by HR scuttles effort to dismiss retaliation claims

Email leads court to deny summary judgment to restaurant group

By A. Michael Weber

A disputed email prompted a district court to allow a former executive chef to proceed to trial on claims that she was fired for complaining about the restaurant founder's conduct toward female employees. *Benefield v. MStreet Entertainment*, No. 3:13-cv-1000, 2016 WL 3568566, 2016 U.S. Dist. LEXIS 86095 (M.D. Tenn. July 1, 2016). District Judge Waverly Crenshaw of the Middle District of Tennessee held that statements made by the restaurant's human relations director to the Equal Employment Opportunity Office — including that the executive chef's complaint "played a heavy role" in her termination — constituted binding admissions that precluded summary judgment.

Jessica Benefield began working at the Nashville restaurant Virago in 2010 as a kitchen expediter. She quickly rose in the ranks to executive chef, and even represented the restaurant in the city's Iron Fork cooking competition, which she won. In early 2013, however, Virago began to lose money for the first time in over a decade, while restaurant group's three other restaurants remained highly profitable. This decline in profits prompted an emergency meeting of the company directors, who dispatched the restaurant's founder, Chris Hyndman, to investigate.

On June 20, 2013, Hyndman visited the restaurant and concluded that it was overstaffed. He instructed the management team to have Benefield send a number of kitchen staff home. Benefield responded by text messaging the company's director of operations, Eric Martino, to complain about the directive from Hyndman and demand that Martino come to the restaurant immediately to intervene. If he did not, she added, she would walk out in the middle of the dinner rush.

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Under Mississippi law, the owner or operator of a business owes an invitee the duty to exercise ordinary care to keep the premises in a reasonably safe condition.

Jury to decide if lack of handicapped room led to unsafe premises

Guest who says she requested handicapped room injured in fall

When a hotel assigned a woman who requested a handicapped room with a traditional guest room, did it fail to keep the premises reasonably safe? That is a question for a jury to decide, held a district court in a lawsuit filed by an elderly woman who was injured in her room. *Raine v. New Palace Casino, LLC,* No. 1:15CV300-LG-RHW (S.D. Miss. 06/27/2016).

An 85-year-old woman and her husband claimed that they reserved a handicapped room at a hotel-casino, but when they checked in, they said they realized the room was not equipped for handicapped guests. The couple said they decided not to request a room change, but the woman, who uses a cane to walk, fell after using the toilet. She hit her head and suffered severe injuries in the fall.

The couple then filed a premises liability lawsuit against the owner of the hotel and casino, claiming that the hotel was negligent because it failed to assign her to a handicapped-accessible room. She also claimed that she would not have fallen if the bathroom had been equipped with safety bars and rails. The hotel moved for summary judgment on her claims, but a district court held that the woman could proceed with her negligence charges.

Under Mississippi law, the owner or operator of a business owes an invitee the duty to exercise ordinary care to keep the premises in a reasonably safe condition. Although Mississippi courts have not addressed the issue of whether the failure to include safety bars and rails constitutes a breach of the duty to keep a premises in a reasonably safe condition for elderly or disabled invitees, a state appeals court did hold that a failure to provide special accommodations on the basis of disability does not necessarily constitute a breach of duty.

However, in *Vivians v. Baptist Healthplex*, No. 2014-CA-01828-COA, 2016 Miss. App. LEXIS 373, 2016 WL 3153971 (Miss. Ct. App. 06/07/2016), a court held that employees of a fitness facility had no duty to assist a man who was injured after entering a therapy pool on the premises because signs warned of slippery surfaces near the pool and the man did not ask for accommodation.

Despite that ruling, the court found that a jury should decide the question of whether the hotel's assignment of a room without safety bars to an elderly person who requested a handicapped-accessible room constitutes a failure to keep the premises in a reasonably safe position. ■

N.J. court found in favor of hotel

The court in *Raine* located only one lawsuit addressing the issue of whether a failure to provide a handicapped accessible room amounted to negligence.

In *Sanders v. Sheraton Hotels & Resorts (*D. N.J. 01/07/ 2014), a guest requested a handicapped-accessible room through a travel agent; she was assigned a reuglar room and did nto request a room change. She slipped and fell in the shower, injuring her ankle, and a court granted summary judgment to the hotel because there was no evidence that the travel agent had informed the hotel of the guest's request for a handicapped-accessible room. ■

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Guest may proceed with false imprisonment charges against hotel

Man accused of using counterfeit 100s believed he was under arrest

Questions over whether guests accused of a crime believed security officers had a legal right to detain them led a district court to deny summary judgment to a hotel on the guest's false imprisonment claim. *Berg, et al., v. San Juan Marriott Hotel & Stellaris Casino, et al.*, No. 14-1746 (BJM) (D. P.R. 07/06/2016).

A guest at the Marriott Hotel in San Juan, Puerto Rico, visited the on-site casino and gambled a number of $100 bills that he said he had brought with him from St. Croix and had been stored in a safe there for four or five years. After the casino conducted a "soft count" of bills, 16 $100 bills were flagged as counterfeit, and the security department found during its investigation that the bills had been played by the guest. The hotel contacted Secret Service and the police department. Security then approached the guest in the parking lot. Hotel personnel said they merely asked the man to return to the lobby because there was a problem with a $100 bill he had used earlier, but the guest said that he was ordered to remain at the hotel for using counterfeit money. The man was interviewed, and his friends were also escorted to the lobby and told to remain in sight. One claimed that officers followed her into the bathroom and waited outside her stall. They were never arrested and the issue was dropped.

The three filed a complaint against the hotel alleging that they were falsely imprisoned. The Marriott moved for summary judgment, or in the alternative, dismissal due to lack of subject matter jurisdiction. A district court denied the hotel's motion, holding that the guests could proceed with their claims.

The Supreme Court of Puerto Rico has recognized a cause of action for false imprisonment "every time that a 'person, whether or not a law enforcement officer, may by himself or through another one unlawfully detain or cause the unlawful detention of another person.'" The court found that because the guests were approached by two or more security guards, escorted to the hotel lobby, and ordered the remain in the lobby for several hours, the court held that the hotel could not show that it was entitled to summary judgment as a matter of law. The court noted that the guest accused of using the counterfeit funds testified that he was told that he was being detained, and that he and his friends were closely supervised while they were in the lobby. As a result, the court held that a jury could conclude that the guests reasonably believed that security officers had the legal authority to detain them and that they would have been physically restrained if they had tried to leave the hotel lobby.

Although the hotel argued that its employees' actions were reasonable given the facts of the case, the court disagreed, holding that it could not conclude that the security employees' actions were reasonable. The court stated that hotel security could have verified that the bills were actually counterfeit before making any move to confront the guest — especially given the fact that he was booked at the hotel for an additional three nights when the confrontation occurred. The court also denied the hotel's motion to dismiss for lack of subject matter jurisdiction. ■

Let law enforcement handle arrests

By Chad Callaghan

Arrests and detention of patrons by security officers can present unique challenges. Generally, security officers have the same arrest powers as ordinary citizens, which can occur when one of the following situations occurs:

- A public offense has been committed in the presence of the security officer.
- A felony has been committed, whether in the officer's presence or not, or when there is reasonable cause to believe the person has committed a felony.

There are some exceptions to this rule, primarily when a jurisdiction has granted higher powers to security officers as special police officers or deputies.

Under the law, an arrest occurs when a person is deprived of their freedom of movement; this need not include physical restraint or confinement, but can include the perception by the detainee that they are not free to leave. This is an important element of which security officers should be aware.

The most important action for security officers to take when arrest is imminent is to contact law enforcement immediately and let them affect the arrest whenever realistically possible.

Chad Callaghan is principal at Premises Liability Experts in Atlanta, Ga. ■

Lawsuit proposes 3-year phase-in of exempt threshold

A group of legislators have introduced a bill to initiate a three-year phase-in of the U.S. Department of Labor's new overtime rule. The new rule, which raises the threshold for employees who are exempt from overtime pay from $23,660 to $47,476, is slated to take effect Dec. 1, 2016. The legislation, the Overtime Reform and Enhancement Act, would incrementally phase in the new threshold of $47,476 over the next three years, beginning with a 50 percent increase this December. As the final threshold more than doubles, this is the first time since 2004 that the threshold for overtime exemption will be raised.

"Since the DOL's immediate phase-in date was announced, we've heard from business owners and their employees who are worried about implementing this increase overnight," aid Rep. Congressman Kurt Schrader, D-Ore. Without sufficient time to plan for the increase, cuts and demotions will become inevitable, and workers will actually end up making less than they made before. It's long past time we strengthen overtime pay protections for American workers in a meaningful and effective way."

If the bill passes, on Dec. 1, the required wage for employees who are exempt from overtime pay would increase to $35,984. Each year following, the salary threshold will be raised by $74 per week until December 1, 2019, when we reach the DOL's proposed $47,476 threshold. ■

"The basic lesson for employers in this decision is that the NLRA protects various forms of activity and expression by employees — and, sometimes, non-employees — which employers would prefer to restrict or eliminate." — Robert C. Nagle, attorney

UNION (continued from page 1)

out and leave the restaurant on the grounds that the buttons were not an approved part of the employees' uniforms. Typically, employees refused to remove the button, and were sent home, resulting in a loss of work time and pay. On one occasion, a server showed his manager a poster explaining employee rights under the NLRA, including his right to wear a Union pin, but to no avail – the server was sent home and paid only for the time he worked, plus tips.

During this time, the NLRB accused the Century Daily Grill management ramped up its response to the union organizing campaign, including holding mandatory meetings, soliciting grievances, promising benefits, interrogating employees about their support for the union, and other actions. The union filed unfair labor practice charges against Grill Concepts, alleging a host of violations based upon the conduct described above, including the prohibition against servers wearing union buttons on their uniforms.

In its review of the charge, the NLRB cited a venerable decision of the U.S. Supreme Court, stating: "It is well settled that an employer violates [the NLRA] when it prohibits employees from wearing union insignia in the workplace, absent special circumstances." According to the board, such "special circumstances" exist only when the display of union insignia may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.

Where an employer attempts to justify a restriction on employee rights based upon its "public image," the board considers the appearance and message of the insignia to determine if it interferes with the employer's desired public image. Importantly, neither the fact that employees are required to wear a uniform, nor the fact that customers or co-workers may be exposed to union insignia, is alone sufficient to constitute "special circumstances."

Grill Concepts claimed it had demonstrated "special circumstances" because permitting employees to wear union buttons while interacting with customers would unreasonably interfere with the restaurant's public image as a "traditional American grill restaurant," where customers could come to get "predictable, reliable service" and the servers' role was (i) to be "seen, and not heard," and (ii) to "deliver food and not make any statements of any kind, other than supporting our restaurant."

The board rejected this rationale, noting that the employer had not presented any evidence on how the union's small "non-inflammatory" buttons would unreasonably interfere with the server's ability to provide service or the restaurant's public image. The board went on to note that if Century Daily Grill's asserted rationale were to constitute special circumstances, the exception effectively would swallow the general rule.

It should be noted that the NLRB's decision was not based on a finding that the employer did not have a written rule regarding the conduct at issue, nor that the employer was discriminating against union activity by prohibiting union insignia but permitted other buttons.

The board ordered Grill Concepts to rescind its rule prohibiting employees from wearing union buttons, to cease and desist from disciplining or threatening to discipline employees for wearing union buttons, and to compensate employees for all work hours they lost due to being sent home for refusing to remove their union insignia.

The basic lesson for employers in this decision is that the NLRA protects various forms of activity and expression by employees — and, sometimes, non-employees — which employers would prefer to restrict or eliminate. This is particularly true in cases involving employee communications regarding unions or employees' own terms and conditions of employment, as evidenced by the numerous board decisions upholding employee rights to criticize or disparage their employers in social media.

This case also serves as an object lesson for employers confronted with union organizing, which is increasingly prevalent in the hospitality business. Frequently, nonunion employers are not as familiar with their obligations under the NLRA as they are with other employment laws. Be assured that UNITE HERE and other unions are very familiar with the NLRA and they will not hesitate to exploit an unwary employer's lack of awareness in this area, which can result in expensive litigation and potentially onerous remedies.

Robert C. Nagle is a partner in the Philadelphia, Pa., office of Fox Rothschild LLP. ■

Employee failed to show delay in schedule change was retaliatory

Failure to give man preferred shift immediately not an adverse action

Working within the union grievance process can often hinder schedule changes, promotions, and more. A hotel easily showed the court that a six-week delay in promoting an employee to his preferred schedule was not discriminatory or retaliatory, and did not amount to an adverse employment action. *Lee v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 14 Civ. 5278(KPF) (S.D. N.Y. 06/22/2016).

A Jamaican man who works as a house attendant at a New York hotel claimed that he was discriminated against on account of his national origin. The man began working at the hotel in 2003, and his position, which is a union position, involves varied work duties, which can include working as a runner and attending to guest needs on particular floors or undertaking projects around the hotel. His only disciplinary issues during his tenure were three late-to-work notices. House attendant hours vary based on hotel needs and the duties the attendant will be performing during a particular shift.

Under the hotel's collective bargaining agreement with the union, the hotel may add or reduce shifts based on operational needs or economic conditions, so long as the hotel observes seniority criteria.

When the most senior house attendant was terminated in 2012, his 7 a.m. to 2 p.m. shift became available. After the next most senior attendant failed to sign up for the shift, the plaintiff attendant sought the shift. However, because the senior attendant, who is originally from Ghana, then complained that he should have been awarded the shift even without signing up. For six weeks the shift remained empty, but eventually, the hotel and union agreed to place both of the attendants on the 7 a.m. shift, which was the shift with the highest overtime earning potential.

In the summer of 2013, the employee claimed that he attempted to sign up for several shifts but that they were given to other employees because the shifts either conflicted with his currently scheduled shifts or were given to more senior employees. He claimed that the delay in granting him his preferred shift and the denial of his requests for extra shifts were because of his national origin.

Establishing case of retaliation

To establish a claim of retaliation against an employer, an employee must first establish a prima facie case that the employer retaliated against him by demonstrating that:

- He engaged in a protected activity by opposing a practice made unlawful by Title VII;
- His employer was aware of that activity;
- He suffered a materially adverse employment action; and
- There was a causal connection between the protected activity and the adverse employment action.

If the prima facie case is established, the employer must produce evidence that the adverse employment actions were taken for a legitimate, non-retaliatory reason.

The employee then must prove that the employer's proffered reason "was not the true reason for the employment decision," and must establish facts "to support a rational finding that the legitimate reasons proffered by the defendant were false and that more likely than not retaliation was the real reason for the employment action."

In *Lee*, the employee failed to show that the delay in giving him his desired morning shift was discriminatory in any way, or that he was retaliated against for engaging in any type of protected activity. ■

A district court dismissed his claims. The court held that a six-week delay in being switched to a preferable schedule did not constitute an adverse action, noting that the employee did not suffer a reduction in salary due to the delay or that the delay hurt his career. The court further found that the delay was caused not by the supervisors, but because of the union grievance filed by the most senior attendant who also sought the shift.

Even if he had been denied the transfer all together, the court said, he failed to present any evidence that he was discriminated against or that the other employee, of Ghanaian descent, received preferential treatment because of his national origin.

Although the employee also claimed that the hotel managers failed to abide by the anti-discrimination policy, and that he had witnessed harassment and discrimination based on race and national origin, the court found that he failed to provide any specific instances or details to back his charge. ■

Suit challenges Jimmy John's noncompete agreements in Illinois

The Illinois Attorney General filed a lawsuit against Jimmy John's for imposing highly restrictive non-compete agreements on its employees, including sandwich shop employees and delivery drivers. Between its franchise and corporate-owned locations, Jimmy John's operates nearly 300 sandwich shops in Illinois.

The complaint alleges that Jimmy John's requires all employees to sign a non-compete agreement, which the company claims is covered by copyright, as a condition of employment. The agreement restricts employees during their employment and for two years afterward from working in any other business that earns more than 10 percent of its revenue from selling "submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches." Under the terms of the non-compete agreement, this work restriction applies to any sandwich business located within three miles of any Jimmy John's Sandwich Shop in the country. A later and nearly identical version of the non-compete agreement, also purportedly covered by copyright, modified the geographic limitation to two miles around any Jimmy John's Sandwich Shop in the country.

The lawsuit alleges the agreement is illegal and unenforceable under Illinois law. Under Illinois law, non-compete agreements must be premised on a legitimate business interest and narrowly tailored in terms of time, activity and place. ■

RETALIATION (continued from page 1)

The following morning, Benefield emailed the human resources director to say that there was a "serious problem" with Hyndman's conduct toward female employees. The email alleged that over time Hyndman had made a number of derogatory comments to other women, including about what "kind of hot" those individuals were. Benefield also complained that Hyndman was "bullying," "aggressive," and "intimidating" to her during his visit to the restaurant, and suggested that he would not "commandeer" kitchens of the company's male chefs.

Benefield was terminated within days after sending the email. The restaurant group insisted that Martino and Hyndman decided to terminate Benefield after Hyndman's visit to the restaurant, but before she sent the email the following day. But Benefield persuaded the court that there was an issue of fact regarding the reasons for her termination. She cited statements made by the human resources director to the Tennessee Department of Labor and the EEOC that, among the reasons for letting her go, was "making false and malicious statements regarding superiors." The HR director also sent a note to the state investigators that he was attaching "the email that played a heavy role in determining her termination." The attached file was labeled "Benefield, Jessica - Term Cause Email.pdf."

The restaurant group argued that the HR director was not one of the decision-makers and that he was indeed wrong in his statements about the reasons for her termination. The court was unmoved. The HR director signed Benefield's separation notice as a representative of the employer with "first-hand knowledge of the separation," and indicated on forms to the administrative agencies that he was the one who discharged Benefield. The judge found the HR director's admissions to be binding on the restaurant group and denied summary judgment on the retaliation claim. The court dismissed Benefield's other claims of gender discrimination and hostile work environment.

A. Michael Weber is a shareholder in the New York City office of Littler Mendelson, P.C. ■

4 comments did not create hostile environment

In *Benefield*, a former executive chef claimed that the founder of the restaurant group had created hostile work environment because of comments he allegedly made about women staff members. The court dismissed this charge, holding that the chef failed to offer evidence of any inappropriate comment or behavior toward her, or show that any alleged harassment unreasonably interfered with her ability to perform her job.

The court noted that the only comment the executive chef heard first-hand was a text message sent by the founder to another employee, asking her to send home a "fat" female dancer who was working at a private club in the back of the restaurant. The court said that although the comments about womens' appearances were unprofessional and inappropriate, they were not sufficiently severe "to amount to a change in the terms and conditions of employment."

As a result, the court held that no reasonably jury could find that a few inappropriate comments in her two-plus hears of employment altered the conditions of her employment. ■

Woman terminated for violating policy, not taking FMLA leave

Resort did not retaliate against worker for exercising FMLA rights

A clear policy forbidding the resale of discount tickets helped a waterpark resort obtain summary judgment in a lawsuit filed by a former employee who claimed that she was terminated for exercising her rights under the Family and Medical Leave Act. *Reed v. LMN Development, LLC*, No. 3:14 CV 1695 (N.D. Ohio 06/28/2016).

The employee worked at a Kalahari Resorts & Conventions, which employs approximately 1,500 people. Employees for the resort received discounts on certain resort amenities. One perk included $10 day passes for up to five additional individuals, which normally cost $60 each. However, resale of these passes is strictly prohibited and grounds for immediate dismissal, pursuant to the resort's employee code of conduct.

When the woman began working as a housekeeper at the resort in 2008, she was disciplined several times for poor performance. In July 2012, she injured her back moving a chair and filed a workers' compensation claim. She was offered a light-duty temporary position in the laundry while she was medically restricted.

At the end of 2012, she requested a transfer to a cashier position in the retail department, which was granted. Because the position was light duty, she was not required to perform any tasks outside of her physical restrictions. In March 2013, she requested a transfer to the front desk at the spa, which was granted. However, she said that although she could physically perform the work, the spa was too stressful so she transferred back to her temporary laundry position.

In July 2013, the resort added a time limitation to an employee's use of light-duty work to a maximum of 120 days. The employee signed her acknowledgement of the change. To help her return to her housekeeping position, the resort provided her with an occupational therapist, but she refused to meet with the therapist after two sessions. When her temporary time was nearly up, she was involved in a car accident and requested FMLA leave. She said she was unable to perform her housekeeping position and remained on leave until it expired in March 2014.

In January 2014, while on FMLA leave, she purchased 14 water park day passes from the front desk at $10 each. She then gave them to her nephew's girlfriend and friend and received $156 for the passes. She claimed that the additional $16 was to reimburse her for the gas she used to drive to the resort to purchase the tickets. The group arrived the day after the passes expired and were denied admittance. After complaining loudly, they were eventually given new passes. The resort's security team asked the employee to come to the resort at a convenient time to discuss the incident, but she refused. She was subsequently terminated.

The employee then filed a complaint against the waterpark alleging that she was retaliated against her for exercising her FMLA rights and pursuing a workers' compensation claim. A district court easily dismissed her claims, granting summary judgment to Kalahari.

The court found that the resort gave the woman FMLA leave when she requested it, and extended her time even without her request. Although she claimed that the company interfered with her leave, the court noted that when an employee remains unable to perform the essential function of her prior position because of a physical or mental condition at the expiration of FMLA leave that no interference occurs.

Although she argued that she should have been entitled to remain in her light-duty position, the court found that this was a temporary position, and that Kalahari did not violate her rights by deciding that she was ineligible for further light-duty positions under company policy. ■

Company policy clear in case

In *Reed*, the district court easily dismissed a former waterpark employee's retaliation claims, noting that the resort hat Kalahari had a legitimate, nondiscriminatory reason for terminating her employment — she violated company policy by selling water park passes for a private.

The resort showed that the employee had signed her acknowledgement of the policy. Although the employee argued that the waterpark's policy did not prohibit employees from being reimbursed for the cost of the discounted water park passes, the court found that the issue was not reimbursement, but that she acknowledged that she received more money than the cost of the passes. ■

FLSA, OSHA violations now tied to inflation, announces DOL

The U.S. Department of Labor has introduced two new final rules adjusting penalties for infractions based on inflation.

In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act — which adjusted penalties assessed by the DOL Wage and Hour Division, Occupational Safety and Health Administration, and Office of Workers' Compensation Programs — for inflation. The new civil penalties amounts are applicable to civil penalties assessed after Aug. 1, 2016, and although the new method for assessing the penalties are tied to inflation, the amount of the increase is capped at 150 percent of the existing penalty amount. The baseline is the last increase other than for inflation.

Under the new rule, OSHA's maximum penalties, which have not been raised since 1990, will increase by 78 percent. The top penalty for serious violations will rise from $7,000 to $12,471. The maximum penalty for willful or repeated violations will increase from $70,000 to $124,709. For workers' compensation violations, the OWCP's penalty for failure to report termination of payments made under the Longshore and Harbor Workers' Compensation Act, has only increased $10 since 1927, and will rise from $110 to $275.

WHD's penalty for willful violations of the minimum wage and overtime provisions of the FLSA will increase from $1,100 to $1,894. ■

Make sure independent contractors aren't actually employees

In the past several years, the U.S. Department of Labor has been cracking down on companies for misclassifying employees as independent contractors. In 2015, the DOL released guidance for determining whether a worker is an employee or independent contractor that requires employers to consider economic reality factors as well as who controls meaningful aspects of the work performed.

The Economic Policy Institute suggests that between 10 and 20 percent of employers have at least one employee misclassified as an independent contractor when that employee should be considered a W-2 worker. Employers who misclassify these workers may need to answer to the DOL, Internal Revenue Service, and the National Labor Relations Board, which has been busy targeting misclassification as an unfair labor practice. In the past few years, the DOL has signed agreements with 31 states that have committed to protecting protect workers from being misclassified as independent contractors.

In the hospitality field, the use of independent contractors — including outsourcing entire departments — is a common trend. But Lori Brown, president and chief operating officer of ComplianceHR, a company under the umbrella of law firm Littler Mendelson that uses web-based applications to help human resources directors make decisions, urges hospitality employers to review those contracts to ensure independent contractors remain classified as such.

"Hospitality employers would be well advised to look at their compliance efforts from two equally important angles: contractual considerations and operational considerations," says Brown.

For example, a hotel that contracts with an outside agency to perform housekeeping on the premises needs to make sure that it protected from joint employer liability. Key aspects to consider include making sure the contracted company has a certificate of insurance protecting the hotel from negligence or other bad acts of its workers. Brown also suggests that hospitality companies take the extra step of ensuring that the company with whom they contract is treating its workers as employees — paying minimum wage and overtime, unemployment, FICA, etc. — and complying with its Equal Employment Opportunity laws as well as state, federal, and local laws.

"That's what the government will care about," she says. "If a hospitality employer engages an agency to provide housekeepers, yet none of the workers are employees of that particular agency, then somebody is likely going to be held responsible on a joint basis."

As for operational considerations, Brown says it's crucial that hospitality employers cannot be accused of managing the employees of the contracted agency. There's a fine line between what regulators would consider is a client's right to accept or reject the quality of the work and directing the actual work being completed, she says. For housekeepers, a hotel needs to ensure that the contracted company manages all employees and directs their work — and that the hotel communicates its desires or complaints to the supervisor at the contracted company only.

Another area where hospitality employers often get into trouble is regarding uniforms, Brown says. She suggests that hotels and restaurants make sure that the contracted company is providing uniforms for the workers, and that these uniforms are not branded with the hotel or restaurant name, but the name of the contracted company.

"Requiring a certain professional look in and of itself is discussable," she says. "It's when you go that extra step of having a hospitality entity supply clothing or certain branding or logos … that's not advisable." ■

Penalties can be steep

What happens if a hospitality employer is found to be misclassifying employees as independent contractors? It can be an expensive mistake, with a "multifaced" liability standard, says Lori Brown of Compliance HR. Since two different government agencies enforce worker classification — the U.S. Department of Labor and the Internal Revenue Service — this means multiple fines.

According to Brown, companies found to be misclassifying employers could be responsible for back taxes, payroll taxes, state unemployment accounts and workers' compensation. They also will likely be on the hook for violations of the Fair Labor Standards Act, including uncovered benefits such as health insurance, and overtime. ■