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HOSPITALITY LAW

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Workers promised ownership in venture not covered by FLSA

Lawsuit dismissed despite unpaid hours worked for cooperative

By Carolyn D. Richmond & Eli Z. Freedberg

In *Godoy v. Restaurant Opportunity Center of New York, Inc.*, 615 F. Supp. 2d 186 (S.D.N.Y., 05/01/09), a group of restaurant workers, several of whom were formerly employed by Windows of the World, a restaurant that was destroyed during the 9/11 terrorist attacks on the World Trade Center, alleged a series of wage and hour, breach of contract, and fraud claims against the Restaurant Opportunity Center of New York. ROC-NY is a not-for-profit corporation that is affiliated with the Hotel and Restaurant Employees Union, also known as HERE, and purports to advocate on behalf of restaurant workers in New York City.

During the summer of 2003, ROC-NY, in conjunction with HERE, announced a plan to create a restaurant that would be cooperatively owned by the restaurant's employees, many of whom were left without a job as a result of 9/11. To further the business venture, ROC-NY created a "cooperative committee" that was tasked with obtaining grants to finance the restaurant.

According to the workers' complaint, ROC-NY and its directors induced people to join the cooperative committee by promising these restaurant workers an equity interest in the new restaurant in consideration for completing 100 hours of work on behalf of the committee. The workers said they all joined the cooperative committee and worked in excess of 100 hours by picketing other restaurants that were accused of violating state and federal labor laws, meeting with politicians, attending press conferences designed to publicize ROC-NY's efforts, and catering, cooking, setting up and cleaning for ROC-NY's fundraising events.

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Calif. Supreme Court throws out 'intentional discrimination'

2 questions certified may make it easier to sue under state's laws

A California Supreme Court decision may make it easier for disabled patrons to sue for damages under the Americans with Disabilities Act and state discrimination laws.

In *Munson v. Del Taco*, S162818 (Cal. 06/11/09), the California Supreme Court determined that proof of intentional discrimination under Title III of the ADA and California law is not necessary in order for an individual with a disability, who has been prevented from obtaining the full use and enjoyment of public accommodations because of accessibility barriers, to obtain damages under California state law.

Kenneth Munson, who uses a wheelchair, claimed that he visited the Del Taco Mexican restaurant and encountered accessibility barriers in the parking area and restrooms. He sued under state disability discrimination laws and ADA Title III. A District Court granted summary judgment to the restaurant, and the patron appealed. Before ruling on the merits of the patron's case, the 9th Circuit certified two questions to the California Supreme Court for resolution: 1) Must a plaintiff who seeks damages under California state law claiming the denial of full and equal treatment on the basis of disability in violation of the Unruh Civil Rights Act and ADA Title III prove intentional discrimination? and 2) if so, what does "intentional discrimination" mean in this context? The California Supreme Court determined that proof of intentional discrimination is not required in order to collect damages.

The court determined that *Lentini v. California Center for the Arts* correctly held that the law should be construed liberally in order to effectuate its goals of creating and preserving a nondiscriminatory environment in California businesses. It pointed out that violations of ADA Title III need not be intentional to be actionable and that California's Civil Code 51

(See **ADA** on page 6)

The court noted that there was no evidence describing what scabies is, how it's contracted, or whether it can be contracted through contact with hotel bedding.

Customers could not show they contracted scabies at hotel

Group failed to produce evidence that rooms were infested with mites

When guests stay at your hotel or resort, the first thing they expect is a clean and sanitary room. A church group alleged that they were not provided with that at a Best Western and claimed they contracted scabies from sleeping in a room infested with mites. *Mills, et al., v. Best Western Springdale*, No. 08AP 1022 (Ohio Ct. App. 06/18/09).

Katrena Jean Mills and her infant son Samuel traveled with a church group to the Best Western in Springdale, Ohio, for a retreat. The two, along with two other group members, stayed in room 608 for the night, and claim that they contracted scabies, a skin condition caused by itch mites, during the hotel stay. As a result, Mills filed a complaint against the hotel, arguing that the Best Western breached its duty to provide the church group with a clean, habitable hotel room and engaged in unfair and deceptive business practices. Best Western argued that there was no evidence connecting the group's scabies to the hotel stay, and that the group had no evidence that the hotel engaged in deception. Mills also filed a motion arguing that the group was entitled to judgment as a matter of law regarding their negligence claim.

The trial court granted Best Western's motion for summary judgment and denied Mills' motion, finding that the record contained no evidence that there were mites in the hotel room or that the group's hotel stay led to the scabies outbreak.

Mills appealed and argued that the trial court erred in its decision. In its defense, Best Western noted the lack of medical evidence linking the group's scabies to their hotel stay, arguing that the two short, handwritten doctor's notes did not suffice, and the fact that the other two women sharing room 608 did not contract scabies.

The medical evidence showed that after one church member who stayed in another room was diagnosed with scabies, Mills, who had started itching and noticed a rash, went to urgent care but was diagnosed with a staph infection and folliculitis. However, she was later diagnosed with scabies and a yeast infection and prescribed medication. Samuel, too, was diagnosed with scabies during that year. The hotel settled a claim with the church group member who was first diagnosed with scabies, but it says it did that as a goodwill gesture.

Despite Mills' argument that the medical record linked the scabies to the hotel, the appeals court found that there was no evidence that the scabies resulted in a breach of contract or duty by Best Western, or that the outbreak coincided with the hotel stay. The court noted that there was no evidence describing what scabies is, how it's contracted, or whether it can be contracted through contact with hotel bedding.

Regarding Mills' argument that the hotel engaged in deceptive trade practices for placing them in a room with mites and failing to pay their medical bills, the court agreed with the trial court that there was no basis for the allegation since Mills and the group failed to produce evidence that the hotel room was infested with mites. The appeals court, therefore, affirmed the decision. ■

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Cashier may proceed with case against McDonald's

Jury will decide whether window was factor in worker's shooting

A McDonald's cashier who was shot after being pulled out of the drive-thru window by her assailant will have a jury determine whether McDonald's was negligent in its selection of drive-thru windows. *Thompson v. McDonald's Corp.*, No. B206000 (Cal. Ct. App. 06/15/09, *unpublished*).

Janette Thompson was working as a cashier at the drive-thru window of McDonald's when a man walked up to the window, allegedly opened it from the outside, pulled Thompson partly through the window, and shot her with a handgun in the abdomen.

The franchisee, Sanders-Clark & Co. Inc., held a franchise agreement and operator's lease with McDonald's, which controlled how the restaurant was built, managed and maintained. McDonald's chose the type of drive-thru window — a self-closing model. Thompson said the window did not self-lock and could be opened from the outside unless she manually locked it.

Thompson filed a complaint against McDonald's, arguing that the company was negligent and owed her a duty of care to adopt safety measures to protect her from the shooting that occurred, and that the company caused her injury by failing to use and maintain a drive-thru window that provided adequate security.

McDonald's filed a motion for summary adjudication, which was denied on the basis that material fact existed with respect to the corporation's control over the restaurant and the reasonable foreseeability of the crime given the high crime rate in the area. However, the court found that Thompson failed to present evidence of a causal link between McDonald's alleged negligence and her injury, and granted summary judgment to McDonald's.

Thompson appealed, stating that McDonald's negligently failed to install a security drawer, rather than a window, which would have prevented the incident from occurring.

The appeals court agreed, finding that McDonald's failed to show that the "openable" window was not the cause of the incident, and reversed the trial court's judgment. ■

How far must restaurant go to protect drive-thru workers?

By Diana S. Barber

The California Court of Appeals in the *Thompson* case reviewed the lower court's decision and ruled that the plaintiff deserved a break today and reversed the summary judgment previously ruled in favor of McDonald's Corp.

The court found that a reversal was in order on two independent points. One was McDonald's inability to satisfy its initial burden since it didn't offer any evidence that the incident would have happened even if the restaurant had used an unopenable window at the drive-thru. Was this an oversight or a technicality?

The opinion discussed that perhaps a drive-thru window similar to the ones used by banks — such as a security window — might have prevented the robbery and the injury to the plaintiff. To my knowledge, the security window-type used by banks is not a standard in the fast-food industry, as I've never visited a restaurant that had such a window. What you do see at the window is a sticker that states that only customers in vehicles will be served at the window, and walk-in guests must come into the restaurant.

The other point was a disputed issue of a material fact in the case involving causation. The court concluded that there is a disputed fact whether the window, when opened, would close automatically and lock. The worker in *Thompson* contends that the window must be manually locked. The court concluded that a jury could find that McDonald's selection of a manually locking drive-thru window, rather than an automatically locking type, may have caused the incident.

One point that may be brought up during the trial is whether the franchisee who operated the restaurant did in fact comply with the standards set by the franchisor for the type of window to be used at the restaurant. Generally speaking, a franchisee, which has the day-to-day duties of operating the restaurant, is held responsible for liability on the property unless the franchisor dictates a standard that creates a negligent situation. We aren't told in the opinion about the franchisee's exposure in this case, if any.

Another issue for consideration at trial is whether the defendant has a duty of care to know the history of criminal activity that has taken place in the area.

Just how secure are those drive-thru windows, and just how far do fast-food restaurants have to go to protect the employees at the window? A jury will now decide the case.

Diana S. Barber is an attorney and faculty member at the Cecil B. Day School of Hospitality at Georgia State University. ■

Woman files lawsuit against Las Vegas casino for shooting

A woman who was shot outside a Las Vegas casino in 2007 has filed a complaint in Nevada District Court alleging that a lack of security contributed to the incident.

Carrie Zeravica was injured when a man began firing a gun in the middle of the New York New York Las Vegas Hotel & Casino on July 6, 2007, just after midnight. Zeravica, who was vacationing in Las Vegas from Pennsylvania with her boyfriend and two cousins, was hit in the knee by a bullet fired by Steven Francis Zegrean, an unemployed Hungarian house painter. Zegrean was recently found guilty of 51 felony counts against him, including assault with a deadly weapon and battery.

Prosecutors said Zegrean fired 16 shots inside the crowded casino that injured five patrons. More than 30 people witnessed the shooting, which Zegrean's attorney claimed was an attempt by Zegrean to commit suicide.

In Zeravica's complaint, she argues that the casino and its parent company, MGM, were negligent and should have secured the premises to protect patrons. Zeravica, who worked as a dancer, is asking for damages for pain and suffering, medical expenses, and loss of income.

The case is *Zeravica v. MGM Mirage, et al.*, No. A-09-594470-C (D. Nev. 07/01/09). ■

In this case, the court found that the workers were not covered 'employees' because they had entered into an agreement with ROC-NY to become co-owners and share in the risks of owning a business. — Carolyn D. Richmond & Eli Z. Freedberg, attorneys

FLSA (continued from page 1)

According to the workers, they were not paid wages for this work.

Eventually the relationship between ROC-NY and the workers began to sour. According to the workers, approximately two years after the venture was announced, ROC-NY began holding mandatory meetings of the cooperative committee and threatened to expel people who failed to attend. The workers said those who were expelled were divested of their rights to obtain an ownership interest in the new restaurant, and alleged that ROC-NY presented members of the committee with a contract stating that they had to work an additional three hours per week, without compensation, until the opening of the restaurant. Those who refused to sign the new contract were expelled, the workers said.

Ultimately, the workers alleged that they learned that ROC-NY did not intend to provide any member of the cooperative committee with an immediate ownership interest in the restaurant. Rather, they said that ROC-NY would own 50 percent of the restaurant's stock, while another cooperatively-owned restaurant that had invested $1 million in the venture would own the other 50 percent interest.

When several members of the committee challenged this plan, ROC-NY terminated their membership in the cooperative committee. The workers then filed a lawsuit against ROC-NY for, among other things, failure to pay wages pursuant to the Fair Labor Standards Act for the hundreds of hours of work they performed on behalf of the cooperative committee. ROC-NY moved to dismiss the claims.

Definition of employees pursuant to the FLSA

The court held that only "employees" are protected by the FLSA. Accordingly, as a threshold matter, the court had to determine whether "workers laboring for and together with a not-for-profit corporation to develop a business that they would co-own are employees of that corporation for purposes of the FLSA." In general, courts will utilize a five-part "economic-reality" test to determine whether a particular worker constitutes an "employee." The test usually examines:

1. The degree of control exercised by the employer over the workers.
2. The workers' opportunity for profit or loss and their investment in the business.
3. The degree of skill and independent initiative required to perform the work.
4. The permanence and duration of the working relationship.
5. The extent to which the work is an integral part of the employer's business.

The court held that the ordinary "economic reality" test used to determine employment status needed to be modified in a setting where workers are also co-owners of their business. In such situations, courts focus exclusively on the second prong of the test and examine whether the workers assume the risk that the business will lose money and incur liabilities, share in the profits of the business, contribute capital to the organization, own company assets, and share in the management of the company. If these factors are met, then the workers are not employees.

In this case, the court found that the workers were not covered "employees" because they had entered into an agreement with ROC-NY to become co-owners and share in the risks of owning a business. Accordingly, the court held that the workers were not protected by the FLSA and granted ROC-NY's motion to dismiss the claims.

Carolyn D. Richmond is cochair of the Hospitality Practice Group and partner in the New York office of Fox Rothschild LLP. Eli Z. Freedberg is an associate at the firm. ■

No standing under FLSA

By Carolyn Richmond & Eli Z. Freedberg

ROC-NY has been the scourge of the New York City restaurant industry for much of the past decade. The organization has been behind a number of wage and hour lawsuits, protests and picket lines against high-profile dining establishments. All the while, ROC-NY has held itself out as the representative of the immigrant worker community. Ironically, the *Godoy* decision highlights a viable defense in wage and hour lawsuits brought by individuals who were paid pursuant to a profit-sharing system, or who were promised an equity stake in the enterprise in exchange for their services.

Pursuant to this decision, workers who perform services in exchange for an ownership interest in the enterprise are not necessarily covered under the Fair Labor Standards Act and do not have standing to bring a lawsuit alleging FLSA violations. ■

Owner not immune to Title VII suit because of multiple entities

Worker's claims of discrimination may proceed against Subway shop

Employers with 15 or fewer employees aren't required to play by the same rules as larger businesses. However, assuming that your company is protected from Title VII lawsuit could be irresponsible — particularly if you own several hospitality corporations that could be considered an "integrated employer" by the courts. *Snow v. Khazeni, Cardinal Crossing Subway, Inc., et al.*, No. 1:08CV0070 (M.D.N.C. 06/19/09).

Mary Snow applied for a job at the Cardinal Crossing Subway, and was told by manager Mahnaz Nobakht that he would hire her if she could also work at the Strickland Subway location, both of which are owned by Khosrow Khazeni. In October 2005, Snow brought Nobakht a letter from her counselor requesting that she be allowed to work at just one location and given a regular schedule because the lack of stability exacerbated her panic and anxiety disorders. Nobakht arranged for her to work only at Cardinal Crossing, but Snow did not feel that she had sufficient hours and a regular schedule, and complained several times. In December 2005, she filed a complaint with the Equal Employment Opportunity Commission, alleging that she was discriminated against on the basis of her national origin, religion and disability, and for retaliation. On Dec. 29, 2005, Nobakht issued Snow a warning to follow the rules and wear her uniform; the warning also said Snow had been orally warned 10 times. Snow said she did not recall any prior warnings and refused to sign the document. She said Khazeni also approached her, yelling that his lawyers would bury her, and told Snow she was being transferred to one of his other Subway locations: Alamance. She said that when she called about the schedule, she was told that she was not listed, and was fired two weeks later. Khazeni said Snow never reported for work at Alamance.

The court first looked at whether any of Khazeni's separate Subway franchise corporations qualified as an employer for the purposes of discrimination under Title VII. Standing alone, none of the corporations employed 15 people, but as an "integrated employer," the number employed was large enough to lose the legal exemption. The court found that sufficient evidence existed for a jury to find that the three corporations were interrelated enough to constitute a single employer because Khazeni, as owner of each, exercised significant control over the hiring and firing of employees. In addition, employees routinely shifted between restaurants, Nobakht managed two locations, and Snow herself was shifted between three locations.

The court also found that a material fact existed as to whether Snow was retaliated against for making a complaint with the EEOC, finding that a reasonable worker might have been dissuaded from filing a charge of discrimination if she had known she would face a written warning or a verbal and physical confrontation with the owner less than three weeks after her complaint.

The court denied summary judgment to all three of the Subway franchises. ■

The argument of numerosity

The argument of numerosity is commonly used to exclude small businesses from a lawsuit, but an employer shouldn't assume that the argument will protect its company every time — especially if an employer holds more than one similar hospitality company.

However, small companies may use their size as a defense from lawsuits under several federal laws:

Title VII, the antidiscrimination statute, applies to companies with 15 or more employees.

The Americans with Disabilities Act also affects employers with 15 or more employees.

The Age Discrimination and Employment Act applies to entities with 20 or more employees.

The Family Medical Leave Act affects companies with 50 or more employees. ■

What makes an 'integrated employer'?

To be considered an "integrated employer," the U.S. Department of Labor uses a four-part test. If an employer is found to be an "integrated employer" under the law, the employees that make up the various entities will be counted in determining whether the employees are protected by federal laws such as the Family Medical Leave Act, the Americans with Disabilities Act and Title VII. For two or more entities to be considered an integrated employer, they must have:

1. Common management.
2. Interrelations between operations.
3. Centralized control of labor relations.
4. A degree of common ownership/financial control. ■

Widow files another lawsuit in carbon monoxide poisoning

A widow whose husband and daughter were killed when they were exposed to carbon monoxide at a Days Inn has filed another lawsuit — this time against the local fire department — asking for $20 million in damages. The case is *Boughter v. Town of Ocean City, Md.—Department of Emergency Services Fire/EMS, et al.*, No. 1:2009cv01689 (D. Md. 06/26/09).

Yvonne Boughter's complaint against the fire division of Ocean City, Md., claims that the department took more than four hours to respond to the carbon monoxide poisoning. She said that she called 911 when her husband and 10-year-old daughter appeared ill and were vomiting, and gave the dispatch operator her room and cell phone number.

Four hours later, when she briefly resumed consciousness, she said she called 911 again because no one had responded. However, the two were already dead. Boughter and her 7-year-old daughter survived the incident.

The department claimed that those who arrived on the scene may have responded to the wrong room.

Boughter also filed a claim against the Ocean City Days Inn, the manufacturer of the water heater that emitted the carbon monoxide and the installer. Boughter and the hotel operators settled the lawsuit in March. The terms of the settlement were not released. ■

Calif. court ruling could lead to increase in public accommodation litigation

By Elisabeth Moriarty-Ambrozaitis

The *Munson v. Del Taco* case highlights the importance of ensuring that your establishment complies with Title III of the Americans with Disabilities Act. In *Munson*, the California Supreme Court held that a plaintiff could seek damages under California's Unruh Civil Rights Act for violations of the federal ADA without proving intentional discrimination.

Title III of the ADA requires, among other things, that places of public accommodation remove architectural barriers in existing facilities where such removal is readily achievable. The Unruh Act provides for protection against discrimination in business establishments, and was later amended to include protection from discrimination that violates the ADA.

In *Munson*, the 9th U.S. Circuit Court of Appeals asked the Supreme Court of California to decide questions of California law, including whether a plaintiff seeking damages under California law and the ADA must prove intentional discrimination. Munson has a physical disability that requires him to use a wheelchair. He claimed that when he visited the Del Taco restaurant, he encountered architectural barriers that denied him legally required access to the parking area and restrooms. Munson contended that the doorway to the restaurant's restroom was too narrow, forcing him to use a restroom at a business across the street, and he further alleged that the restaurant lacked a level clearance in front of the restaurant door, forcing him to hang onto the door handle and drag himself into the restaurant to avoid rolling backwards.

After engaging in a thorough review of prior case law and legislative history, the California Supreme Court found that Munson need not establish intentional discrimination to pursue damages under the Unruh Act. The California Supreme Court's ruling stresses the importance of ensuring that your establishment complies with the requirements of Title III of the ADA. In California, plaintiffs may now seek damages for violations of Title III through the Unruh Act — despite the fact that the plaintiffs would not have a private cause of action to pursue damages for claims based solely on the federal ADA. Significantly, plaintiffs may seek these damages without proving that an establishment engaged in intentional discrimination.

The court's ruling in *Munson* will likely lead to an increase in public accommodation litigation. Establishments should act now to ensure that their facilities are in full compliance with the requirements of Title III of the ADA. Those who fail to do so may find themselves vulnerable to claims under the Unruh Act, which could result in liability regardless of any intent to discriminate.

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was amended to provide remedies to all violations of ADA Title III. The California Supreme Court confirmed that the legislative history and text of the statute and its amendments reinforced this interpretation.

Therefore, the California Supreme Court rejected *Gunther v. Lin*, which had held that in cases of intentional discrimination, the entity would be required to pay a $4,000 penalty for violating California code. This, however, mandated that damages would only be paid if the court found that there was intentional discrimination by the business of patrons with disabilities. ■

Failure to disclose information could lead to adverse inference

Circuit Court reverses decision on discrimination of black couple

It can be difficult to respond to the requests of all guests quickly, but repeatedly failing to return calls or meet with prospective patrons — especially if they are members of a protected class — could open up your hotel or restaurant to a discrimination lawsuit. *Keck v. Graham Hotel Systems, Inc*., No. 08-2024 (6th Cir. 05/21/09).

Alfreda and Devon Keck sued Graham Hotel Systems for allegedly discriminating against them by refusing to host their wedding reception at the company's Kensington Court Hotel because they are African-American.

The hotel rented banquet space and its wedding specialist secured contracts for wedding receptions, requiring a $12,000 food and beverage minimum and $1,200 deposit up front. Angela Dietrich served as the specialist until Aug. 13, 2004, and was replaced on Aug. 31.

In June 2004, the Kecks visited the hotel, which was then operating as a Crowne Plaza, and filled out an inquiry form for the wedding specialist. When the Kecks didn't receive a response after several follow-up phone calls, two walk-in visits, and the completion of a second inquiry form, someone in the catering department finally contacted Alfreda informing her that the wedding specialist was on vacation. After another visit to the hotel and a tour from the restaurant manager, the Kecks said they wanted to book the wedding and requested an appointment with the wedding specialist. Alfreda placed several 10-day holds on the wedding date and attempted to arrange meetings with the wedding specialist both in person and via the phone. The Kecks said they felt that they were being discriminated against on the basis of their race and booked another venue for their wedding.

Alfreda filed a complaint with the Fair Housing Center of Southeastern Michigan and two pairs of "testers" were sent to the hotel — one couple was white, and one couple was black. In the first test on Oct. 15, 2004, the black couple was unable to meet the wedding specialist but encouraged to fill out an inquiry form. The white couple was able to meet with the specialist, offered a 10-day hold on their desired date, and invited to visit a wedding reception scheduled for the coming weekend. In a second test in June 2005, a black woman waited 15 minutes to see the wedding specialist and was told to return with her fiancé. A white tester waited two minutes, met with the specialist, and was invited to see a wedding that weekend. In two other tests, the center determined that one showed evidence of discrimination, while the fourth test did not.

After the Kecks filed a lawsuit against the hotel, a District Court granted the hotel summary judgment, finding that the Kecks failed to prove that their treatment differed from similarly situated non-protected couples. Although the court noted that it was undisputed that the hotel hosted weddings for white couples, there was no evidence about the treatment of these couples during the three months the Kecks tried to book the facility. The court said as a result, the Kecks could not rebut the hotel's nondiscriminatory explanations — that the hotel changed hands and also temporarily lacked a wedding specialist — for the Kecks' treatment.

On appeal, the 6th U.S. Circuit Court of Appeals found that the District Court erred in its conclusion. The Circuit Court noted that when the Kecks requested that the hotel disclose whether it entered into wedding reception contracts with white couples between June 1 and Oct. 31, 2004, the hotel refused, arguing that the materials were overly burdensome and that the request was overbroad. The Circuit Court stated that this information was crucial to the Kecks' case, and that the refusal "may lead to an adverse inference about the nature of such evidence."

Therefore, the Circuit Court reversed and remanded the District Court's decision. ■

Staff turnover not sufficient excuse

In *Keck v. Graham Hotel Systems*, the 6th U.S. Circuit Court of Appeals disregarded the hotel's argument that its name and franchise agreement led to the confusion regarding the Kecks because there was no turnover in the hotel's ownership, management or lower-level staffing. It further determined that the turnover in the wedding specialist position was not enough of a justification for the experience of plaintiffs Alfreda and Devon Keck, particularly because the experiences of three of the four groups of testers sent by an antidiscrimination organization to meet with the wedding specialist and reserve the reception hall revealed evidence of discriminatory treatment. ■

Legislation, position intended to improve safety of food supply

New legislation is on the horizon to improve the policing of the food industry and give the U.S. Food and Drug Administration more power and funding to ensure the nation's food supply is safe.

Because of numerous food-related illnesses the past few years, legislators hope to grant the FDA the ability to recall food, penalize offenders and improve standards. However, the bill would impose an annual fee on many types of food producers. In addition, the Obama administration has created a "deputy food commissioner" position to further improve food safety and coordinate response efforts in the event of an outbreak, such as salmonella, which sickens approximately 140,000 each year.

Beth Johnson, the executive vice president of public affairs for the National Restaurant Association, said the industry applauds the appointment and other governmental efforts, and hopes that the efforts will continue to strengthen the safety of the U.S. food supply.

"The emphasis on prevention and the creation of a deputy foods commissioner position within the FDA brings renewed focus to reforming our nation's food safety system," she said. "We look forward to continuing our work, together with the administration and members of Congress, in helping forge solutions and supporting bipartisan legislation to strengthen the safety of America's food supply." ■

Improve communication, training in preparation for change

Congress may still be focused on improving the economy, but when their attention begins to shift, hospitality lobbyists and industry executives are anxious about the potential passage of legislation that could further deplete their dwindling profits by increasing union power and litigation.

Janine Yancey, the CEO of emTRAIN, a company that delivers training programs and learning management systems for hospitality employers, said she expects several pieces of legislation to pass in the coming year that could present problems for the industry. These bills include:

The Paycheck Fairness Act. If this is signed into law, the burden shifts to employers to establish a business necessity for any pay differential.

"Under this legislation, the employer has to argue the case from the get-go. It may not seem like a big change, but with the way the bill is written, it's basically a mechanism for trial lawyers to be able to file claims," Yancey said. "This legislation also really imposes an extra burden on [the] employer to make sure their recordkeeping practices are excellent."

Yancey said depending on the final language of the bill, the Paycheck Fairness Act could also extend to promotional decisions and advancement opportunities — and any other tangible employment decisions. To prepare for the challenges that could plague the hospitality industry if this legislation is signed into law, Yancey suggested that all important employment decisions are reviewed by senior managers to ensure the decision can be defended if challenged. And, she said, make sure the justification for decisions is specific and in writing.

"It's an administrative burden, but to the extent that folks can incorporate this into their daily routines is hugely beneficial," she said. "There's power in documentation."

The bill passed in the House in January, but has been tabled in the Senate.

The Working Families Flexibility Act. This bill, patterned on legislation in Europe, would allow employees to request a change in the number of hours worked, the times required to work, and the location where the work is performed. The current language would require a manager to sit down with an employee within 14 days of the employee's written request.

"This was written by somebody who's not a manager. It's definitely an administrative burden," Yancey said. "It sounds easy to do, but in the realities of the workplace, it's not that simple to sit down with someone within 14 days of their request. This is imposing duties on line managers similar to what I see happening in FMLA [Family Medical Leave Act] and ADA [Americans with Disabilities Act]."

Yancey said that adding this interactive component can be challenging because it imposes an additional level of knowledge on managers who may not know their duties under the law.

"My frustration for the last 10 years is that we have all these cases, all these violations that are unintentional," she said. "I don't see many managers or employers wanting to violate an employee's FMLA rights or disability rights — they just don't know the intricacies of the law. This would be a third type of legislation like that."

Yancey said if the legislation does pass, it's crucial that hospitality companies educate their employees and create very well-documented procedures that are communicated to all managers.

Both the House and Senate versions of this bill have been referred to committee. ■

Highlight the positive

For several years, the hospitality industry has feared the passage of the Employee Free Choice Act, which would change existing law to certify a union as a bargaining representative without a secret-ballot election if a majority of employees have signed cards in support of the union. Hospitality employers, she said, should start improving communication with employees now to help reduce the impact this legislation could have on their companies.

"Hospitality folks have to constantly be waging a public relations battle within their workforce," Yancey said. She suggests that employers improve communication and advertise the positive aspects of working for their companies.

"It might seem cheesy, but go the extra step — are employees aware of all the benefits you offer?" she asked. "Do consistent, regular morale boosting … low-cost endeavors that focus on the employees is really the best defense."

The House and Senate versions of this bill are in committee. ■