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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

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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.

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'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

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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.

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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. ■