



“Good Morning. I’m From The Labor Department...”

By John Thompson (Atlanta)

The unprecedented explosion continues in the filing of federal Fair Labor Standards Act wage-hour lawsuits. But enforcement statistics for the U.S. Labor Department’s Wage and Hour Division, taken together with the Division’s enforcement priorities for the foreseeable future, emphasize another reason why every industry employer needs to ensure that its practices comply with the law: DOL investigations.

What’s Involved

The investigations remain focused on so-called “low-wage” industries, a group in which DOL includes hotels, motels, and restaurants. In 2007, DOL conducted around 11,400 investigations in its nine “low-wage” target categories and collected back-wage payments of almost \$53 million, nearly one-quarter of all DOL-enforced payouts. Of particular note to hospitality employers is that 47% of those investigations involved hotels, motels, and restaurants, resulting in back-pay liability alone of close to \$20 million.

Common industry trouble spots include things like paying only straight-time rates for overtime hours; failing to record and pay for all hours worked; making improper deductions for uniform costs, “walk outs,” and so on; not properly computing an employee’s regular hourly rate for overtime purposes; automatically deducting time for meal periods without knowing whether employees actually took them; or maintaining flawed “tip-credit” or “tip-pooling” practices.

Problems also arise from improperly classifying employees as being overtime-exempt or as being “independent contractors.” Still others involve failing to add together all of an employee’s hours worked to see whether he or she was due overtime, such as when the employee worked in different departments or at different locations.

DOL will be carrying out regional and local initiatives which are likely to include scheduling selected employers for compliance audits even though no employee has made a DOL complaint. For example, DOL is especially interested in looking into whether minors are engaging in prohibited activities relating to paper-balers and box-compactors. Although DOL typically undertakes “directed” audits to look into specific issues, management should not necessarily expect an investigator to limit his or her inquiries to these areas.

DOL is also going to review the compliance status of at least some employers whom it has previously found to be in violation. It is possible, maybe even likely, that DOL will assert civil money penalties of up to \$1,100 per violation or will take even more-serious action if these follow-up audits reveal additional shortcomings.

Our Advice

Particularly in light of the publicity that will surround the scheduled FLSA minimum-wage increase this coming July, industry employers should waste no time finding out whether they are fully in compliance with the FLSA and with all applicable state or local laws.

Are your employees accurately recording all of their hours worked? Are pay deductions both lawful and properly computed? Is the FLSA tip credit being handled in the correct way? Can you prove that every employee who is being treated as exempt really is exempt? Is overtime pay being figured properly? Are all of the applicable child-labor requirements and limitations being followed to the letter?

If you are not certain about the answers to these and other critical compliance questions, you should start getting on top of this today.

For more information contact the author at jthompson@laborlawyers.com or 404.231.1400.

Don’t Put Litigation On The Menu

By Andria Ryan (Atlanta)

In light of a recent federal court decision, restaurateurs should reevaluate how their employees handle requests by disabled patrons.

Under Title III of the Americans with Disabilities Act (ADA) individuals with disabilities are protected from discrimination in the “full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation.” According to the Second Circuit Court of Appeals, this protection extends beyond mere access to a restaurant’s facility. *Camarillo v. Carrolls Corporation*.

Read me the menu, or I’ll Read you your Rights

Alice Camarillo, who is legally blind but able to read enlarged writing at a very close distance, said she frequently visited five restaurants

near her upstate New York home. She said she asked for large print menus, which the restaurants did not have, or for the employees to read her the menu items. Her complaint alleges that she was ridiculed, stared at, made to wait for customers behind her in line to be served, and only read part of the menu by employees.

A federal district court initially dismissed her complaint for lack of standing since the restaurants permitted her to eat so she suffered no harm under Title III. But the U.S. Court of Appeals for the Second Circuit reversed, stating that the restaurants’ failure to provide adequate communication of their menu items stated a cause of action under the ADA.

The restaurants unsuccessfully argued that the ADA cannot regulate employees’ conduct so as to ensure that they will never be rude or insensitive to persons with disabilities. While the Second Circuit agreed with that, the Court also pointed out that Camarillo alleged more than rudeness or insensitivity. The Court said her complaint raised a reasonable

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inference that the defendants failed to adopt policies or procedures to effectively train their employees on how to deal with disabled patrons. The Court went on to say that the *failure to train* can constitute a violation of the ADA.

Our Advice

Restaurants and other places that provide services to the public should:

- teach employees to recognize persons with disabilities and to understand the nature of the accommodation the customer may need;

- train your employees to use common sense in accommodating customers with disabilities;
- educate employees about various auxiliary aids available at your establishment, such as large-print, pre-recorded, and Braille menus; and
- adopt policies about how you expect your employees to treat your customers, including those with special needs.

While this decision is applicable only in the states within the Second Circuit (Connecticut, New York and Vermont) other courts may adopt a similar finding. Even if it is not the law in your jurisdiction, training your employees to sensitively and practically respond to accommodation needs is consistent with providing good service and makes good business sense.

For more information, email the author at aryan@laborlawyers.com or call 404.231.1400.

Box Score Compiled by the HLL Staff

There have been 24 union petitions at hospitality employers, that we are aware of, filed since the beginning of 2008.

Employer	City and State	Union	Date
Missouri Gaming Company/Argosy Riverside	Riverside, MO	United Auto Workers	01/04/2008
Marquis Hospitality, Inc.	Albany, NY	UNITE HERE	01/07/2008
United Staffing Group LLC (Hospitality Services)	New York, NY	UNITE HERE	01/09/2008
Four Points by Sheraton	Los Angeles, CA	UNITE HERE	02/29/2008
Foxwoods Resort Casino	Ledvard, CT	Operating Engineers	03/07/2008
The Ritz – Carlton	White Plains, NY	Operating Engineers	03/10/2008
Culinary, Inc. at Jersey City University	Jersey City, NJ	Food & Commercial Workers	03/12/2008
Sheraton Great Valley Hotel	Frazer, PA	UNITE HERE	03/13/2008
WR Hotel Properties dba Hotel Mead	Wisconsin Rapids, WI	UNITE HERE	03/14/2008
Majestic Star Casino II, Inc.	Gary, IN	Operating Engineers	03/14/2008
MGM Mirage Corporation	Las Vegas, NV	Security, Police & Fire Professionals	03/14/2008
Andalusia at Coral Mountain	South La Quinta, CA	Laborers	03/20/2008
Wheeling Island Racetrack and Gaming Center	Wheeling, WV	Food & Commercial Workers	03/20/2008
Wheeling Island Racetrack and Gaming Center	Wheeling, WV	Machinists & Aerospace Workers	03/26/2008
155 East Tropicana LLC dba Hooters	Las Vegas, NV	Operating Engineers	03/28/2008
Foxwoods Resort and Casino	Mashantucket, CT	Electrical Workers	04/08/2008
Four Points by Sheraton Chicago Midway/Airport	Chicago, IL	Operating Engineers	04/10/2008
Gaming Enterprise dba Foxwoods Gaming Casino	Mashantucket, CT	Auto Workers	04/14/2008
Mashantucket Pequot Gaming Enterprise dba Foxwoods Resort Casino	Mashantucket, CT	Auto Workers	04/14/2008
White Lodging dba Hilton Garden Inn Hotel	Ronkonkoma, NY	United Service Workers	04/15/2008
Trump Taj Mahal Casino Hotel	Atlantic City, NJ	Teamsters	04/17/2008
MGM/Mirage Corporation	Las Vegas, NV	Security, Police & Fire Professionals	04/17/2008
Westin Hotels & Resorts – Westin LAX	Los Angeles, CA	Operating Engineers	04/22/2008
Allgavers Fireside	Northbrook, IL	UNITE HERE	04/22/2008

BYOGC Policy Doesn't Cut It Under ADA

By Myra Creighton (Atlanta)

Most golf courses that allow golf carts provide them to players; most of the time players aren't told they can bring their own. Three patrons with serious mobility impairments, who wanted to play golf at a course managed by Marriott International, didn't like being told to bring their own specialized carts. They filed a lawsuit alleging violations of Title III of the ADA and of California state law.

The complaint alleged that Marriott violated the ADA because it did not provide single rider golf carts to disabled individuals. A federal court in California granted summary judgment for the plaintiffs holding that Marriott had discriminated against them by not providing the carts.

What's At Issue

A single rider cart is a cart that is specially designed to allow individuals with mobility impairments to hit a golf ball while seated on a rotating swivel seat. Mobility impaired users can use hand brakes and accelerators to drive them. In 2005, three individuals, two of whom were restricted to wheelchairs and one of whom had a limited use of the left side of his body, wrote Marriott expressing an interest in playing golf on one or more of the courses it manages and specifically requesting single rider golf carts.

Upon learning that Marriott did not have any such carts at its courses, two of the individuals complained to Marriott about its failure to provide them. Marriott responded that the ADA did not require it to do so but indicated that the golfers could bring their own carts. The lawsuit soon followed alleging that Marriott had failed to make reasonable accommodations, to remove barriers, and to provide auxiliary aids and services, in violation of Title III of the ADA.

Club Rolls Into Trouble

Marriott tried but failed to have the suit thrown out arguing first that the owners of the golf course had to be joined to the lawsuit. The court rejected this, noting that Marriott's management contract gave it the responsibility of deciding what equipment to provide at the courses it managed. The court also rejected Marriott's contention that the golfers could not sue because they had not tried to play at every Marriott golf course. The court reasoned that the golfers had called numerous golf courses, only to find that single rider carts were not provided. The deterrent effect of not providing the carts was an actual injury to the plaintiffs, the court ruled.

The court also rejected Marriott's arguments that there was not a specific regulation under the ADA that required it to provide single rider carts. The plaintiffs could bring their claim under the ADA's general

anti-discrimination provision, which forbids all practices that prevent disabled individuals from participating on an equal basis in recreational opportunities.

The court noted an opinion from the Department of the Interior that accessible golf carts are a reasonable modification that public golf courses have to provide, if they provide regular golf carts, as well as a Department of Defense announcement that it would provide accessible golf carts on all the courses it operates.

Marriott could not meet its Title III obligations simply by allowing disabled golfers to bring their own accessible cart, to play from a standard cart under a medical flag, or to bring an assistant to ride with them, the court ruled, because that would not provide disabled golfers with an experience "equivalent" to non-disabled golfers "to the extent feasible." Therefore, Marriott's policy violated the ADA.

Finally, Marriott argued that providing the single rider cart was a direct threat to the health and safety of others because there was evidence that the carts could be unsafe and the Company still was evaluating their safety. Marriott had conceded that its direct threat argument was related to the safety of the golfer using the specialized cart. The court concluded that regulations under Title III of the ADA (the public accommodation section of the law) were only concerned with direct threat to others and not with direct threat to self. (This is contrary to the ADA's direct threat provision under Title I, the employment section of the law).

Lessons Learned

If you manage a place of public accommodation for an owner, the language in your management contract is key to whether or not you are the party responsible for complying with the ADA. Liability will depend on the level of authority you can exercise. If you must have the owner's authorization to modify policies, you should consider an indemnification clause to the extent that the owner's refusal to modify a policy or practice as recommended, violates the ADA.

And just because there is not a specific regulation requiring you to provide something, or to modify a policy, doesn't mean you do not have to reasonably modify your policies or practices. Title III of the ADA requires employers to take affirmative steps to make sure that disabled individuals have an equal opportunity to participate in or to benefit from your goods, services, facilities, advantages or accommodations.

If you're not certain that your policies are doing that, give us a call.

For more information, email the author at mcreighton@laborlawyers.com or call 404.231.1400.

Box Score Compiled by the HLL Staff

During that same period we are only aware of six petitions which went all the way to an election. All but one were company victories.

Employer	City and State	Union	Date	Result
Eleni Operating Coop	Yonkers, NY	Journeyman & Allied Trades	02/01/2008	Company Win 1 – 8
Missouri Gaming Company/Argosy Riverside	Riverside, MO	Auto Workers	02/19/2008	Company Win 68 – 113
Sodexho	Piscataway, NJ	Operating Engineers	02/21/2008	Company Win 4 – 9
Support Service Worldwide	Christianstad, VI	Steelworkers	03/10/2008	Company Win 51 – 6
SQKFC	Jamaica, NY	Retail Wholesale Depart. Store Workers	03/18/2008	Union Win 5 – 4
Hilton Costa Mesa	Costa Mesa, CA	Teamsters	03/24/2008	Company Win 4 – 5

Sailing Away With The Tips

By John Fletcher (New Orleans)

Cutting into potential profits, New York's highest court rules that restaurants may not pocket mandatory service charges that are represented to customers as gratuities for the wait staff.

Like many states, New York State law bars employers from demanding "any part of the gratuities, received by an employee, or retain[ing] any part of a gratuity or of any charge purported to be a gratuity for an employee." Ruling that under the State law a mandatory customer charge could, under some circumstances, be considered a

"gratuity," the court rejected World Yacht's literal reading of the law; a law which reads that "in order to constitute a gratuity..., a payment must be voluntary and not mandatory."

The court reasoned that even if the charge is mandatory, and not subject to negotiation with the customer, when a service charge has been represented to a consumer as a compensation to the employer's wait staff in lieu of the gratuity, it raises a valid issue for trial under the State law. *Samiento v. World Yacht Inc.*

"Where Are My Tips?"

World Yacht offered its customers a package of fine dining, dancing, entertainment and sightseeing on New York harbor. The Company essentially provided three types of dining experiences – chartered banquet meals, dining cruises for the general public and special event and holiday cruises.

Although the wait staff was paid an appropriate hourly wage, they alleged that they rarely received tips. Furthermore, they claimed that customers did not leave tips because World Yacht misrepresented to the customers that gratuities were included in the cost of the cruise.

According to the wait staff, customers were required to pay a mandatory 20 percent "service charge" on the banquet cruises. The waiters asserted that they never received any portion of this amount. As for the public dining and special event cruises, the employees argued that World Yacht "manipulated the custom of tipping by representing to the customer that the gratuity was included in the ticket price but then only remitting to its employees a gratuity of between 4 to 7 percent" (the lawsuit claimed that this is a luxury dining experience where customers would expect to pay a gratuity of between 15 to 20 percent).

Contending that the Yacht was illegally withholding the service charge, several employees filed the instant state court claim. A trial court dismissed most of the claims, and the appellate court certified the issue to the State's high court.

What did the Customers Know, And When did they Know It?

According to the waiters, customers were discouraged from leaving a tip because they were led to believe that a proper gratuity was accounted for in the price of the ticket or through the mandatory service charge. The court found that given the language, "any charge purported to be a gratuity" and the remedial nature of the wage/hour statute, such language should be "liberally construed in favor of the employees."

The court recognized that a Company's representations to customers are material, agreeing with the Attorney General of the State of New York and the New York Department of Labor, "that the standard under which a mandatory charge or fee is purported to be a gratuity should be weighed against the expectation of the reasonable customer."

Don't Make "Gratuitous" Remarks

New York has determined that if a reasonable customer believes that charges are in fact gratuities, "an employer can not be allowed to retain these monies." The bottom line for the hospitality industry is that many states have similar statutes. Therefore, you should consult with counsel if there is any question in your mind about whether your wage and hour policies comply with state law. Your policies regarding pay should be clear to your employees, and your policies regarding charges to customers must be equally clear.

For more information email the author at jfletcher@laborlawyers.com or call 504.522.3303.

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Office Locations

Atlanta

1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, GA 30326
phone (404) 231-1400

Charlotte

Suite 2020
227 West Trade Street
Charlotte, NC 28202
phone (704) 334-4565

Chicago

1000 Marquette Building
140 South Dearborn Street
Chicago, IL 60603
phone (312) 346-8061

Columbia

Suite 1400
1901 Main Street
Columbia, SC 29201
phone (803) 255-0000

Dallas

Thanksgiving Tower
Suite 4343
1601 Elm Street
Dallas, TX 75201
phone (214) 220-9100

Denver

Suite 3300
1999 Broadway
Denver, CO 80202
phone (303) 218-3650

Fort Lauderdale

Suite 800
450 East Las Olas Boulevard
Fort Lauderdale, FL 33301
phone (954) 525-4800

Houston

Two Allen Center
Suite 2220
1200 Smith Street
Houston, TX 77002
phone (713) 292-0150

Irvine

Suite 400
18400 Von Karman Avenue
Irvine, CA 92612
phone (949) 851-2424

Kansas City

Suite 400
104 West 9th Street
Kansas City, MO 64105
phone (816) 842-8770

Las Vegas

Suite 650
3993 Howard Hughes Parkway
Las Vegas, NV 89169
phone (702) 252-3131

New Jersey

430 Mountain Avenue
Murray Hill, NJ 07974
phone (908) 516-1050

New Orleans

Suite 3710
201 St. Charles Avenue
New Orleans, LA 70170
phone (504) 522-3303

Orlando

1250 Lincoln Plaza
300 South Orange Avenue
Orlando, FL 32801
phone (407) 541-0888

Philadelphia

Radnor Financial Center
Suite 650
201 King of Prussia Road
Radnor, PA 19087
phone (610) 230-2150

Portland

Suite 1250
111 SW Fifth Avenue
Portland, OR 97204
phone (503) 242-4262

San Diego

Suite 950
4225 Executive Square
La Jolla, CA 92037
phone (858) 597-9600

San Francisco

One Embarcadero Center
Suite 2340
San Francisco, CA 94111
phone (415) 490-9000

Tampa

SunTrust Financial Centre
Suite 2525
401 E. Jackson Street
Tampa, FL 33602
phone (813) 769-7500

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