



Business Going To The Dogs?

By Michael S. Mitchell (New Orleans)

Imagine a big night at your restaurant: the place is packed with guests, all enjoying themselves. A diner shows up with an unexpected companion – a dog. You're concerned about health regulations and the effect on other patrons. Politely but firmly you tell the guest she cannot enter with the dog. Either it stays outside or she does. Any problem? Yes. You've just politely but firmly violated the Americans with Disabilities Act.

There has been a lot of coverage recently about the changes in the ADA, but this particular area has been around for a long time. Unfortunately many restaurateurs still seem to get it wrong.

Like Restaurants, These Animals Are In The Service Business

The ADA requires reasonable modification of policies and practices to accommodate disabled individuals with service animals. Most people think of dogs when they think of service animals, but dogs aren't all you might conceivably see. Indeed, monkeys, pigs, and miniature horses now may serve this role (though it's highly unlikely any disabled patron would show up with a miniature horse!).

Moreover, animals are now trained to provide far more services such as hearing or signaling (alerting deaf individuals to sounds); mobility assistance (pulling wheelchairs, picking up things that are dropped, providing stability for walking); and seizure alert/response (alerting owners to impending epileptic seizures).

The Department of Justice defines "service animal" as "any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair or fetching dropped items."

The DOJ regulations do not require service animals to have a state certification or permit and restaurants may not require proof of certification as a condition of the animal entering. Nor may restaurants exclude a guest's service animal because the animal does not meet a state law definition of service animal. You may, of course, ask the guests whether their disability requires the animal if you cannot visually determine whether or not the animal is a service animal. Generally speaking, service animals are recognizable by the special harness or collar they wear.

Coming To Your Emotional Rescue

Further complicating the reasonable modification request is the existence of "emotional-support animals." For example, a patron with a mental disability may ask the restaurant to permit his "emotional-support animal." Unlike service animals, emotional-support animals do not necessarily have "task specific training" and are therefore different and treated differently under the ADA.

That means you may deny guests' requests for an emotional-support animal to stay with them unless a patron with a mental disability can show that the animal has been trained to perform specific tasks to ameliorate the effects of the disability. In that situation you will be required to grant the request. So someone who requests that Fluffy or Fido sit at the table with them because "it makes me feel more comfortable" can be turned down.



Additional Rules

Once the service animal is in the restaurant, you may not charge patrons an extra fee because of the animal. Nor may you require disabled patrons with service animals to use service elevators if your establishment is multi-story.

Of course, restaurants can impose requirements that a service animal not pose a direct threat to the safety or health of others. But even if a service animal is a direct threat, you should not automatically exclude the disabled patron. Rather, you should offer the guest the opportunity to dine without a service animal on the premises. But such situations should be rare, since service animals are unlikely to create safety or threat problems given their specialized training and desensitization to distractions. The more likely problem is keeping other diners and staff from treating the animal like a pet when the animal is "working."

Restaurants are not required to grant the accommodation request under the ADA if doing so would significantly or fundamentally alter the nature of the dining experience. Again, this is unlikely to occur with a service animal, but if it does (for example, if a guide dog barks or is otherwise disruptive) you may exclude the animal – again you should offer the option to the patron of continuing without the service animal). Finally, the ADA does not require you to permit an animal-in-training to stay in the restaurant nor to permit non-disabled patrons who request to have animals they are training for the disabled to stay with them.

An Animal Checklist

Whether a patron's request for a service animal is a reasonable modification of your rules requires some thought. In making your decision the restaurant should evaluate the following issues:

- Is the patron disabled? While certain impairments are easily understood to limit major life activities – paralysis, blindness, deafness – others, such as chronic fatigue syndrome or depression, are not.

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Slumping Economy Drives Employee-Defection Lawsuits

By Joseph P. Shelton (Atlanta)

Competition to obtain more customers, sell more products, and make more profits is a motivating factor that drives every company. With new revenue hard to find in the present economy, retaining what business you do have, or that you have lined up in the pipeline, is at a premium. In a situation like this, the ramifications from employee defections can be crippling – i.e., years of hard work and “fair competition” can be quickly undone by a former employee who takes the benefits of those efforts to a competitor. Now is the time to make sure that you have maximized all means of protecting your client relationships and confidential information.

No employer wants to invest time and money in hiring, training and developing an employee only to have that employee quit, taking with him valuable information and contacts which allow a competitor to, in effect, steal customers and hire away the employer’s workforce. Even in this economy, and arguably because of this economy, lawyers across the country are receiving calls from panicked clients when employees depart and begin working for a competitor. Often, the call goes something like this:

This is the owner of Canned Ham Catering. My best meeting planner, Darrell Departed, was recently recruited away by my competitor, Cut-Rate Catering. I just learned five minutes ago that our best account is leaving us and going to the competitor. I’ve heard through the grapevine that Darrell went to the account offering lower pricing and bad-mouthing us.

I just checked Darrell’s former office. Confidential files and documents are missing. After looking at his old computer, I’m convinced that he copied some of our customer information databases before he left. Something I found on his computer also suggests that he was diverting business away from my company to the competitor months before he resigned. I want Darrell arrested and I want to go after Cut-Rate too. Okay, what do we do next?

Put Out An APB?

While the “let’s arrest Darrell” demand is rarely a realistic option, there are several potential avenues to pursue both against him and Cut-Rate Catering. The starting point for determining exactly where to go next is usually tied to whether or not Darrell had signed any type of contract with Canned Ham restricting his post-employment competitive activities. Some of the more common provisions include non-competition, non-solicitation of customers, non-recruitment of employees, confidentiality, and return of property. These protections are generally referred to as “restrictive covenants.”

The laws in virtually every state have long provided at least some protection for companies against theft and acts which amount to conversion of corporate property and proprietary information. That focus has expanded somewhat as the result of technological advances which have made theft of much information virtually undetectable. For example, a disgruntled employee may abscond with a company’s confidential information simply by downloading it onto a disk or emailing the information to a competitor.

Employees and competitors may also compromise competitive information by gaining unauthorized access to computer systems, deleting data, or releasing a computer virus into an employer’s operating system. Fortunately, recent federal and state laws have been enacted to address this growing problem.

Even with growing statutory protection available, simple contracts remain an invaluable tool for companies to use to protect their corporate

assets in today’s business climate. There are a variety of basic types of restrictive covenants to protect your interests. The different types of covenants may appear together in one document, or they may appear in any combination.

Surveying The Legal Landscape

Non-Competition

In its purest sense, a non-competition provision prohibits a departing employee from competing with the former employer after termination for a limited period of time. This type of covenant can prevent the former employee from working for a competing business even if the new company does not necessarily injure the business of the former employer. Since this is the most restrictive type of contract, it is also the one that courts scrutinize most strictly. Many states highly restrict their use.

Non-solicitation

Non-solicitation provisions allow an employee to work for a competitive business, but prohibit the solicitation of specific customers. The employee is free to compete and is free to work in whatever territory he or she desires, so long as the employee does not solicit business from a specific group of customers.

Non-recruitment

A non-recruitment (or no-raiding) clause is designed to protect your employees from being hired away by former employees. Your former employees know the strengths and weaknesses of your workforce. Non-recruitment covenants restrict departing employees from trying to take others with them.

Of course, as a practical matter, employees are free to leave on their own, even if it is to join a departing employee who has signed a no-raid agreement.

Non-disclosure

A confidentiality (or non-disclosure) provision usually limits the employee’s ability to disclose information learned about customers, suppliers, or the employer’s operations. While non-disclosure agreements often include the term “trade secrets,” most states have a trade-secrets statute that prohibits misappropriation of such information even without a contract. But only certain types of information rise to the level of a “trade secret.” You need to define and protect confidential information carefully.

Return of property

A return of property agreement typically states that the employee must return all company property and all documents related to the company upon termination of employment. While all employers expect their employees to return company property upon termination of employment, there is oftentimes a dispute as to what is company property and what is the employee’s property.

For example, many employees may claim that their rolodex or list of business prospects is their “property,” despite the fact that such information was assembled on company time and with company resources. A return of property agreement may help an employer avoid such disputes by defining via contract what the company considers to be its property rather than the employee’s.

Unfortunately, there is no uniform federal law governing restrictive covenants. Rather, because these are contractual issues, the validity of such agreements is determined by state law. Nearly every state has unique and distinct requirements for restrictive covenants. Accordingly, a contract that is lawful in one state may be completely unlawful in a neighboring state. For a company operating in multiple states, the differences in state laws can make drafting and enforcement of restrictive covenants a challenge. Regardless of whether you operate in one state or multiple states, care must be taken to draft these agreements so they will hold up in court if challenged.

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I-9 Compliance Challenges In The Hospitality Industry

By Brock McCormack (Atlanta)

In the past several years, businesses in the hospitality industry have particularly borne the brunt of increased federal enforcement of the nation's immigration laws. Through high-profile tactics including raids of businesses large and small, the previous administration put employers on notice that hiring unauthorized workers could result in million dollar fines, jail time for company owners, and months of damaging press coverage.

Predictions that the incoming administration would ease enforcement actions against employers were recently dashed when Secretary of Homeland Security Janet Napolitano confirmed the agency's commitment to finding and prosecuting employers of unauthorized workers. In reaffirming its goal to "target the root cause of illegal immigration," the Department of Homeland Security announced it will focus its resources on the criminal prosecution of employers who hire unauthorized workers.

Fortunately for employers, the law recognizes that sometimes verifying an employee's work authorization may be complex and difficult. Even an employer who has no intent to hire an illegal worker can be duped by a fraudulent Social Security card or counterfeit driver's license.

The law may protect such employers so long as they attempted in good faith, and by following specific procedures, to hire only legally authorized workers. For businesses in the hospitality industry, a number of factors make screening workers more challenging than in other industries. What follows are some common challenges for businesses in the hospitality industry, and tips for how you can protect your company and ensure full compliance.

A Stitch In Time Saves I-9

The Form I-9 is one of the most effective tools for ensuring that a newly-hired employee is authorized to work in the United States. Federal law requires employers to complete a Form I-9 before any new employee can begin work, the sole purpose of which is to verify that the employee has authorization to work in the United States. The current version of Form I-9 became effective on April 3, 2009, and employers are required by law to use only the most recent version of the form.

While completing an I-9 form takes a little time, a few minutes spent properly completing the form can prevent a subsequent government audit or immigration raid, and may insulate you from incurring civil fines or being criminally charged.

Employers who have heavy turnover, or who have multiple locations, should consider replacing paper I-9 forms with an electronic software program. Federal law allows the electronic completion of I-9 forms, giving employers access to computer-generated alerts about expiring employee documents as well as the ability to run comprehensive reports.

Moreover, an electronic I-9 program instantly double-checks that each form is entered completely and accurately. These programs can also be synchronized with the E-Verify federal database, if used or required.

Problems Common In The Hospitality Industry

Multiple Hiring Sites

Employers in the hospitality industry often have more than one location in which they do business. In many cases, individuals are hired at various locations and personnel paperwork is not processed centrally. This presents the challenge of ensuring that the hiring manager at each location is properly and consistently completing I-9 forms for each new employee, and is also maintaining them for a specified period as required by law. One hiring manager's mistaken understanding of how to properly complete the I-9 form may mean that all forms from that particular location contain the same technical errors. In the case of an audit, each paperwork violation on an I-9 form can generate a fine of \$110 to \$1,100.

Your best defense is to make available company-wide training-and-compliance manuals. A written policy dictating the timeline for when an

I-9 form should be completed, together with simple but comprehensive instructions, can help ensure that your company's human resources personnel are completing I-9s in a consistent and accurate manner. Because proper training is never going to fully eliminate errors and omissions, employers should conduct a central audit of all I-9 forms at least annually.

Independent Contractors

The use of independent contractors is widespread in the hospitality industry. For example, an outside catering agency may provide staffing for a hotel ballroom, or a crew of painters may be brought in to refurbish a restaurant dining room. In the case of a true independent-contractor relationship, the business hiring the services of the independent contractor is not required to complete a Form I-9 for employees of the independent contractor. While this rule appears simple, it is in reality rather complex.

First, this rule only applies to true independent contractors. If an investigating federal agency, such as the Department of Labor, determines that the individual is actually an employee rather than an independent contractor, the employer will then be liable if the individual lacks valid work authorization.

Second, federal law prohibits the use of independent contractors when done to avoid inquiring into a worker's legal authorization to work. Using the labor of an independent contractor can lead to fines and even jail time if you had reasonable notice that the independent contractor lacked authorization to work in the U.S. This "common sense" test takes into account the totality of the circumstances: in other words would a "reasonable person" have suspected that the independent contractor did not have authorization to work? If you have doubts about the work authorization status of an independent contractor, consult with an immigration attorney to determine if additional investigation should be undertaken.

Short-Term Laborers and Re-Hired Former Employees

Because of the seasonal nature of many hospitality businesses, it's common for employees to work for a particular establishment for only part of the year, or for a one-time event such as a convention. This leads to a common scenario where an employee is hired, subsequently terminated, and re-hired during a later season or for a later event.

Employers in this situation often assume that since an I-9 form was completed on that employee's behalf originally, there is no need to re-verify that the employee has authorization to work. But this is not true. An I-9 form completed for a previously-terminated employee is only valid upon re-hire if the documents originally used for the I-9 form are still valid and have not expired. Also, the individual's original start date must not have been more than three years in the past.

Any employer re-hiring a former employee should carefully complete the reverification box in Section 3 of the I-9 form, and should ensure that the employee's employment authorization document continues to be current. Also, if the government has released a more current version of the Form I-9, be sure to use the most recent version for re-verification.

The Bottom Line

These are just some of the most common compliance challenges in the hospitality industry. While proper completion of the I-9 form might sound like just another human resources paperwork requirement, failure to comply can result in serious monetary fines and even criminal sanctions. For example, an unauthorized employee picked up by law enforcement, perhaps for something as minor as a routine traffic stop, can identify your business as his or her employer, instantly putting your establishment on the radar screen of federal immigration authorities.

Businesses in the hospitality industry should be aware that many of the hiring scenarios they commonly encounter may require additional research into the proper steps to ensure I-9 compliance. Our advice?

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- If there is a disability, is the animal a service animal? If you cannot determine whether it is, you may ask what tasks the animal has been trained to do.
- Does the animal ameliorate the problems the patron's disability causes? Keep in mind no federal standards exist with respect to answering this question, which would most likely be answered by the patron's physician in the event of litigation.
- Will the animal's presence create a threat to the health and safety of the other patrons?
- Will the presence of the animal fundamentally alter the nature of the restaurant's service?

Accommodating a disabled patron is, of course, the right thing to do. It is also the "legal thing" to do, so be sure you have a policy in place covering service animals, and train your staff so that they are aware of and comply with Title III of the ADA.

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The Rest Of The Story

So back to the frantic call from fictional Canned Ham Catering. What happens next? If Darrell Departed had signed an agreement that included a non-compete or a non-solicit provision, filing a lawsuit in court asking for an injunction preventing further conduct in violation of the contractual restraints is an option. In addition to claims against Darrell, Cut-Rate Catering could be joined in the lawsuit.

Before rushing to court, it's often advisable to write a "cease and desist" letter to see if the departed employee and the hiring company will voluntarily comply with your restrictions. Oftentimes the warning letter will prompt settlement talks between the parties. A negotiated settlement might be an attractive option, particularly where the contractual provisions that would be scrutinized by the court have potential flaws. The cost-savings of avoiding a protracted legal battle are another positive factor to securing settlement terms that may be short of a homerun but still offer sufficient protection.

What about the employee-defection scenario where there are no post-employment restrictive covenants in place or where you discover that the ones in place are clearly unenforceable? The Darrell Departed hypothetical above includes other potential causes of action.

Darrell's "bad-mouthing" to the customer might give rise to a claim for defamation (slander or libel) depending on exactly what he said, and to whom. If Darrell had diverted business from Canned Ham Catering to Cut-Rate Catering prior to his resignation, Canned Ham might be able to pursue a claim for something called "breach of duty of loyalty." If Cut-Rate was involved in such misconduct, it could be sued for tortious inducement of Darrell's misconduct.

Any misuse of the company's computer system or theft of information from the computer might give rise to federal and state statutory claims for computer abuse. Taking documents and hard copy files could constitute common law conversion (basically the civil claim for theft). Use of confidential or proprietary information would support a breach of contract claim if Darrell had signed a confidentiality agreement. It is also possible that the information taken could rise to the level of a trade secret under state statutory law which in turn would support a misappropriation of trade secrets claim.

To Sum It Up

The list could go on. The main point is that you are not without protections when departing employees leave in a cloud of smoke and do not behave themselves after they are gone – good economy or bad. Before you find yourself in a situation like this, review your existing agreements to make sure they still comply with governing law. And if you do not currently utilize restrictive covenants, you should reconsider. Maybe it's time to do so.

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Pro-actively institute company-wide training and compliance guidelines to ensure that non-compliance at one location doesn't attract government scrutiny for the entire company. Finally, the I-9 form appears deceptively simple but can be complex. Don't be afraid to seek assistance in properly completing and retaining I-9 forms.

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