Arizona Restaurant Association

Restaurant Operation Matters

2022

EXTENDED VERSION

A RESTAURATEUR'S GUIDE
TO PROCEDURAL COMPLIANCE
2022 UNABRIDGED EDITION

This booklet is intended to give helpful, general information from the Arizona Restaurant Association to restaurant operators and is not meant to be used as a legal document. Individual circumstances may require a licensed attorney or Certified Public Accountant. It is recommended you contact those professionals for individual advice and direction.

The information included in this booklet is current as of January 2022. Tax laws and other legal matters are constantly changing and you should consult legal or tax professionals for your specific situations.

Information updates may occur after January 2022.

Please check with the Association or your legal or tax advisor for any changes.

Restaurant Operation Matters was produced by the Arizona Restaurant Association (ARA), a not-for-profit association, established in 1939 to represent and serve Arizona's restaurant industry.

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CHOICE OF ENTITY – TAX CONSIDERATIONS

With the late 2017 passage of the Tax Cuts and Jobs Act (TJCA), many commentators have suggested a move from "flow-through" format (taxation as a partnership or S corporation) to C corporation format to take advantage of the reduction in federal C corporation tax rate from a top rate of 35% to 21%. Careful consideration should be given prior to converting from flow-though taxation to C corporation format, however. First, all the positive factors outlined below still apply to make flow-through format superior in most respects. Second, the IRC Section 199A deduction for Qualified Business Income (outlined later on in this document) will apply to reduce the top marginal rate on flow-through income from 37% to 29.6%. Since C corporations are still subject to double taxation, the effective tax rate on distributed C corporation earnings is roughly 37% for individuals in the top tax brackets. Thirdly, given the contentious political climate, it might be unwise to bank on the tax laws and/or rates continuing at the current levels for a long period of time. Finally, another potential benefit of operating in C corporation format, the ability to exclude gain on the sale of "small business" C corporation stock under IRC Section 1202 is specifically not available to restaurant or other hospitality companies (such as hotels).

Whether establishing a new restaurant or acquiring an existing restaurant, the type of legal entity chosen to operate the business is important and can have long range implications. There are numerous choices of entities, although most businesses operate as one of the following: a sole proprietorship, a general or limited partnership, a limited liability company (LLC), and a corporation,

which can be either an “S” corporation or a “C” corporation. Each of these entities can insulate the owner from most forms of liability that can arise from operating a restaurant business, assuming the proper steps are followed, except for those that operate as sole proprietorships or general partnerships. For that reason, neither a sole proprietorship nor a general partnership is recommended.

Deciding which entity to choose depends on a number of factors such as how active the owner will be in the business, whether the business will raise money from outside investors, and how is the business to be financed.

An LLC is governed by an Operating Agreement, which provides for the ownership of the LLC by its “Members”, the management of the entity, the capital structure, buy-sell provisions, the ordering of cash distributions, allocations of profits and losses, liquidation provisions as well as many other governance provisions. An LLC is managed by its “Manager” and can either be “member-managed” (where the manager is one or more of the members) or managed by a third party “manager”.

An LLC is probably the most flexible entity type. An LLC is not a creature of the Internal Revenue Code, rather one of state law. As such, a decision must be made as to how the LLC will be taxed: as a partnership, S corporation or C corporation. Unless an affirmative action is taken, an LLC will “default” to be taxed as a partnership. A partnership is a “flow through” entity which means that the entity itself does not pay federal income taxes, rather the owners of the entity pay taxes on their respective share of the partnership’s income. Partnerships allow for different classes of equity interests, thus providing for a flexible capital structure. These entities also allow for different or non-pro rata sharing ratios, which can also change over time. Finally, the entities can also provide “profits interests” as a technique to provide equity incentives to people who may not be putting up capital. However, a point to keep in mind is that if a profits interest is disposed of within three years, the income to the employee on the disposition will be deemed a short-term capital gain.

Somewhat similar to a partnership, an S corporation is another type of flow through entity. An S corporation is another creature of the Internal Revenue Code and can either be a state law LLC or state law corporation which elects to be taxed as an S corporation. There are limitations on the number and type of shareholders that an S corporation can have. For example, only US individual tax filers can be S corporation shareholders and the current limit is 100 shareholders. As with anything related to the tax code, there are many exceptions: certain trusts can be S corporation shareholders and members of the same family can be aggregated for purposes of counting shareholders.

Like a partnership, an S corporation does not pay federal income taxes (with one important exception, explained below) rather its shareholders pay taxes on their pro rata share of S corporation income.

Unlike a partnership, an S corporation can only have one class of equity (though both voting and non-voting shares are allowed) and S corporation income and loss items must be allocated among the shareholders strictly on a pro rata basis. As well, cash distributions from the S corporation to its shareholders must be on a pro rata basis. This will generally make it more difficult to operate as an S corporation if the owner is planning to raise funds from investors because investors often want preferential returns on investment.

Operating as a flow through entity presents both pros and cons. On the pro side, the owners are taxed directly on the profits of the business and if the business has losses the losses may be utilized to offset other types of income. Thus, the owners are only subject to tax on the business income once. In addition, if the business is sold for a gain, that gain may be taxed at more favorable rates.

On the con side, flow through entities will make the operator's life a bit more complex because, as mentioned above, the owners are taxed directly on their respective allocation of the flow through entities income items which makes preparing the owners' personal tax returns more complicated. As such, it is safe to say that professional fees could be greater as either a partnership, LLC or an S corporation will need documents that provide for governance and buy-sell provisions (mentioned above) in the case of the LLC Operating Agreement, the Limited Partnership Agreement or, in the case of an S corporation, a Buy-Sell Agreement is strongly recommended, particularly if there are multiple unrelated shareholders. In addition, LLCs in particular can run into some complex tax accounting issues particularly if there are transfers of equity, raising new equity or providing profits interests to key employees/managers. Finally, as flow through company income generally winds up in an individual tax return, and individuals are required to file calendar year returns, most flow through entities are calendar year tax filers. There are exceptions where in some cases, fiscal years may be elected for newly created entities or in the case of an LLC which is predominantly owned by fiscal year C corporations.

A state law corporation which has not elected to be taxed as an S corporation (or an LLC which elects to be taxed as a C corporation) will be taxed as a C corporation, which is a separate federal tax-paying entity from its shareholders. C corporation structures are said to be "double taxed" in that the corporation pays federal income tax on its income. If income is distributed to the shareholders in the form of dividends, the shareholders would then be subject to tax again on those dividend distributions.

There are pros and cons to operating as a C corporation. Advantages include the fact that a C corporation allows for multiple classes of equity, simplifies the tax filing of the individual owners, do not have limitations on number, type, or tax filing home of shareholders that can invest. A C corporation can more easily operate on a fiscal year other than a calendar year which might align more with the businesses natural business cycle.

A big disadvantage in addition to double taxation is the fact that C corporations do not have preferential tax rates on the sale of business assets as individuals do. This spread in tax rates can be 20%, which then magnifies the effect of double taxation. Since most business owners hope to sell the business for a gain one day, it becomes critical to consider carefully before concluding to operate as a C corporation.

If the shareholders of a C corporation have enough leverage to sell their corporate shares rather than have the corporation sell its assets, then there are some advantages to the C corporation choice of entity. For one, the sale of C corporation shares is a capital transaction and thus the gain or loss will be taxed as such. If the shares have been held longer than one year, and are sold at a gain,

then favorable capital gains rates are used to determine the tax owed on the gain. If the shares are sold for a loss, then that loss may only be used to offset other capital gains. Any excess loss is limited to $3,000 per year against the individual's other income.

It is possible for a C corporation to elect S corporation status. Of course, the corporation must meet all the requirements to elect S status (limit on number and type of shareholders, etc.). If a C corporation elects to be taxed as an S corporation, then the corporation needs to determine the fair market value of its assets on the effective date of the S election. In order to subject the assets existing on that date to double taxation, there is a corporate level "built in gains" tax to the extent assets are sold for a gain during a proscribed period of time. That period had been initially 10 years and then, to induce economic stimulus, the built-in-gain period had been reduced several times to seven years and then five years. The Protecting Americans from Tax Hikes (PATH)Act permanently set the built-in gains period at five years.

As the reader may surmise, there is no one-size fits all answer to the question "which entity should I use"? The operator needs to consider the various pros and cons, the eventual exit strategy, etc. The prudent operator is well advised to do homework before making the decision and enlisting the help of both a qualified CPA and attorney

BASIS OF ACCOUNTING

Generally, there are two acceptable methods of accounting, cash and accrual. The preferred method of accounting for restaurants is the accrual basis of accounting. Within the accrual basis of accounting, restaurants may select either a tax basis or GAAP (Generally Accepting Accounting Principles) basis of accounting. There are vast differences between accrual accounting on a tax basis and a GAAP basis. Some notable differences are as follows:

- Depreciation of fixed assets is provided under an accelerated method for tax and a straight line basis for GAAP.
- Expendables or smallwares (linen, china, glassware, silver, and utensils) for tax are deductible in the year the materials and supplies are actually consumed and used in the business, which is generally when they are received at the restaurant and are available for use. For GAAP, there are three methods to account for expendables:
    - o Capitalized cost method – The original purchases are capitalized at cost and replacement items are expensed as purchased. The capitalized cost is not amortized.
    - o Amortized cost method – Same as the capitalized cost method, except, the original cost is amortized to 50% of the original cost over three years or less.
    - o Inventory method – Expendables or smallwares are inventoried and priced at their cost.
- Start up expenses – For tax purposes, up to $5,000 can be deducted but the $5,000 limitation is reduced dollar for dollar by the amount of start up expenses greater than $50,000. The remaining start up expense are amortized over 15 years. For GAAP, start up expenses are expensed as incurred.

- Building and equipment leases – For tax, generally building leases are treated as operating leases and tenant allowances reduce the amount capitalized; thereby, decreasing future depreciation of the building/improvement asset. However, for GAAP, a new accounting standard for leases went into effect for publicly traded companies in 2019 and for non-publicly traded companies it will go into effect in 2022. Under the new standard, a lessee will be required to recognize assets and liabilities for leases with terms of more than 12 months.
- Gift certificates or gift cards – For tax purposes, the general rule of taking these sales into income upon receipt of cash has two exceptions (see gift cards section for tax treatment). For GAAP purposes, the sale of a gift certificate or gift card should be deferred until the customer redeems the gift certificate or gift card or until they expire or are escheatable to the state based on each states escheatment laws. Also, with the new revenue recognition standards for GAAP effective January 1, 2019 it is now required to evaluate unredeemed gift certificates or gift cards for breakage.
- Up-front payments from suppliers to enter into long term purchase contract – For tax, the upfront payment is considered income upon receipt. For GAAP, the payment would be amortized to cost of sales over the life of the contract.
- Impairment of assets and closed store reserves – For GAAP, an analysis of impaired assets for underperforming restaurant locations and closed restaurant reserves needs to be performed. If open restaurants are deemed to be impaired, then a write down of asset value needs to be recorded. If restaurants have closed, then potential lease obligations are due and the amounts of these liabilities will need to be recorded.

ACCOUNTING PERIOD

Restaurants can utilize either a four week accounting period, a 52/53 week year or a month end accounting cutoff method. Utilizing a four week accounting period allows for more accurate period-to-period performance comparison and evaluation. For example, with a four week to four week comparison, there are the same number of days where as the number of days in a month are not similar on a consecutive basis. In addition, months start and end on different days of the week, thus in one month you may have more peak business days than another. Utilizing a four week reporting period provides for the same number of peak or weekend business days in each reporting period.

ACCOUNTING SOFTWARE

There are numerous accounting software programs to assist you in compiling your accounting records and generating financial statements. Whatever program you choose, be sure it provides you the ability to generate information necessary for you to monitor the performance of your restaurant on several levels including:

- Weekly and Monthly reporting for management needs – Reports should be prepared and reviewed by management on a weekly and monthly basis including a balance sheet and an income

statement with an analysis of revenue and expenses on a weekly, monthly and year-to-date basis. It is also helpful to prepare income statements showing a year to year comparison and also actual to budget variance analysis (i.e.: budgeted revenue and expenses for the period vs. actual revenue and expenses for the period.)

- Method of accounting – Generally, there are two acceptable methods of accounting, cash and accrual. Under the cash basis of accounting, revenue is recorded when cash from sales is received and expenses are recorded when they are paid. Under the accrual basis of accounting revenue is recognized when earned and expenses are recognized when incurred. It is recommended that a restaurant use the accrual basis of accounting as it will provide the most accurate accounting for income and expenses.
- Standardized chart of accounts – Utilizing a restaurant industry standard chart of accounts will provide you with financial information in a usable format that will allow you to compare your costs and profit margins with other restaurants. This will enable you to benchmark your performance in key areas and better manage your operations.

IMPORTANCE OF MAINTAINING GOOD RECORDS

Maintaining accurate and timely records is imperative for several reasons. First, timely and accurate financial information provides management with valuable resources for managing current restaurant operations and planning future growth or expansion. Second, accurate financial information is also necessary to substantiate revenue and expenses reported to third parties. There may be several external parties requesting to review your internal documentation for various reasons such as financial statements (audits, reviews or compilations) required by lenders or investors, federal and state tax agency audits validating revenue and deductions for income or sales tax purposes as well as landlords when rents are based on a percentage of sales.

For more information on maintaining good accounting records, click on the following link: **Henry+Horne Accounting Services**

DOCUMENTATION REQUIREMENTS FOR IRS AND OTHERS

There are various record retention guidelines depending on the nature of the documentation. The general rule is seven years based on the statute of limitations in the Internal Revenue Service Code. Documentation that should be kept permanently include: capital stock and bond records; corporate minute books, operating agreements, deeds, mortgages and bills of sale; financial statements, supporting general ledgers and year end trial balances; investment records; tax returns and trademark registrations.

Records and documentation should be maintained for all expenses paid including payments to vendors, services rendered, leases, etc. IRS will review and audit records for deductions claimed in your tax return.

INTERNAL CONTROLS

Maintaining good controls is important for many reasons. Not only does it help to ensure reliable financial information and the effectiveness and efficiency of operations, it also helps to prevent and detect fraudulent acts by employees and others, such as theft. Proper controls should be in place to minimize the opportunity for theft and maintaining effective operations.

Weekly controls – Controls should include (but are not limited to) the following:

- Controls should be in place so that the person responsible for counting the drawer at the end of the night is not the same individual making the deposit in the bank.
- Making deposits of cash frequently (daily is best) and keeping all undeposited cash locked in a safe.
- Controls should be in place so the person handling cash, such as making the deposit, does not also have access to modify the accounting records.
- Controls should be in place to reconcile daily deposit reports and compare these reports to both what is deposited in the bank and reports from the point of sale. Only management should be able to void register over-rings and mistakes and have access to register or point-of-sale (POS) system readings.
- Each cashier or server should have their own register or separate account and password for their use of the POS system. A receipt should be given to each customer for every sale.

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- When making purchases, a list of approved vendors should be used.
- A purchase order system should be used when possible.
- A policy should be in place regarding the receipt of gifts from vendors.
- Payroll registers should be reviewed by management prior to processing.
- Review the results of store performance for accuracy. Office computers and POS files should be backed up regularly, with off-site storage of backup copies.

The controls noted above are just a sample of a few very important controls to consider. There are additional daily, weekly, monthly and yearly controls that need to also be considered depending on the needs of the company.

THEFT

Theft occurs when individuals have the attitude, incentive and opportunity. Controls cannot change an individual's attitude and incentive. However, with proper controls in place the opportunity for theft can be minimized. Controls can't stop all acts of theft but having adequate controls can limit an individual's chances.

Certain POS systems and liquor management systems are available in the marketplace that can be used to minimize employee theft.

TECHNOLOGY

Advanced technology is a vital part of how restaurants operate. New digital solutions are constantly evolving to make running a restaurant easier, faster, and more profitable. Use of modern technology can help the restaurant owner better manage their business with a reduced chance of error and the freedom to review data from home or while travelling. Modern point of sale systems (POS) provide real time data that can help you manage labor costs, manage food costs, analyze sales by menu item and even help with theft issues. Many other products and technologies are available to assist with inventory control, alcohol control, gift cards and fraud, etc. You can reduce paper, save time and be more efficient in the process.

INVENTORY

Inventory management is very important to restaurants due to the perishable nature of food and beverage and because it is typically one of the largest costs of a restaurant. Maintaining proper controls over inventory is vital to manage loss, waste and misuse. A balance must be found between having enough inventory on hand to meet sales demands with minimal food spoilage. To determine appropriate food inventory levels, the day's sales in inventory (the number of days of food on hand) can be calculated by dividing the ending food inventory amount by the average daily food cost. Food inventory has a short shelf life, therefore, the numbers of days of food on hand should average around one week. To ensure accurate information relating to inventory levels for reporting and decision-

making purposes, physical inventory counts for both food and bar should be performed weekly or, at a minimum monthly. Significant differences of overages or shortages should be investigated timely.

INVENTORY CAPITALIZATION (UNICAP) RULES

The TCJA simplified these rules with respect to small businesses which are now defined as entities with less than $25 million in gross receipts for both resellers and manufactures. If you meet the definition of a small business, you are no longer required to calculate uniform capitalization (UNICAP) adjustments. If you have been doing so and you qualify as a small business, you may change your method of accounting in which case you likely would have a "favorable" adjustment to reduce your taxable income for the year of change. If you do business through multiple entities, you may be required to aggregate your business together for purposes of determining whether you can take advantage of the simplified rules. UNICAP rules of IRC Sec. 263A require businesses to capitalize or treat as inventory costs certain indirect costs they previously deducted as period expenses. These costs are then deducted as the related inventory is sold. The effect is the deferral of a tax deduction for these expenses until the inventory is sold. So there typically is a timing difference between book and tax income.

In the past, this rule typically only applied to manufacturers. However, in more recent years, the IRS has taken the position that this rule applies to restaurants. The term used in the Code and Regulations is "produce" and not "manufacture". The term "produce" includes construct, build, install, manufacture, develop, create, raise, or grow. Because this definition is so broad, almost any business that acquires inventory and then changes its form in any way before selling it could be considered a producer subject to the UNICAP rules. Under the broad definition of Reg. 1.263A-2(a), a restaurant is a producer, since it converts raw materials (ingredients) into a meal.

All restaurants using the accrual method of accounting not meeting the definition of a small business, must use UNICAP when valuing inventory. However, restaurants using the cash method of accounting avoid the UNICAP rules.

Bars are generally considered to be resellers (unless the bar is a brew pub). Resellers of personal property whose average annual gross receipts for the three previous years do not exceed $25 million are exempt from the UNICAP rules. These taxpayers are referred to as small resellers. A reseller that also produces property must follow the rules prescribed by IRC Sec. 263A for produced property if not a small business. However, Reg. 1.263A-3(a)(2)(ii) provides an exception for small resellers who have de minimis production activity incident to their resale activities. Production activities are considered to be de minimis if gross receipts from the sale of produced property are less than 10% of total gross receipts, and the labor costs allocable to the production activities are less than 10% of total labor costs. The result is that if average annual gross receipts do not exceed $25 million, the bar is a small reseller and so is not subject to the UNICAP rules. If the gross receipts exceed this threshold, the bar would have to apply UNICAP to its production (food) operations.

In general, taxpayers subject to IRC Sec. 263A must capitalize all direct costs and certain indirect costs property allocable to property produced or acquired for resale. Direct costs include direct material and direct labor. Indirect costs are all other costs that directly benefit or are incurred because of the performance of production or resale activities. For a restaurant, direct costs can include the following expenses: raw material or ingredients, kitchen labor, indirect labor, officer compensation, depreciation, insurance, utilities, and repair and maintenance costs. Costs not required to be capitalized include marketing, selling and distribution costs such as cost of waiters, cashiers, etc.

ARIZONA UNCLAIMED PROPERTY

Unclaimed Property is a financial asset owed to an individual or business. Property is considered unclaimed when there has been no owner contact for a specified period of time, usually between one and three years. When efforts by the holder to locate the owner fail, the funds must be turned over to the Department of Revenue who is then responsible for safeguarding the funds, attempting to locate the owners, publicizing the names of apparent owners who cannot be located otherwise, and returning the assets to the owners as they come forward.

Unclaimed property is any intangible asset that is held, issued or owing in the ordinary course of a holder's business that has remained unclaimed by the owner for a statutory period of time after it became payable or distributable. Some examples include outstanding payroll or vendor checks, savings and checking accounts, uncashed money orders, unreturned security deposits, accounts receivable credit balances and discounts due.

All businesses are required to report whether they have any unclaimed property to remit before November 1 of each year.

To access forms, visit the **Arizona Department of Revenue website**

BENCHMARKING AND PERFORMANCE MANAGEMENT

Restaurants should review weekly and monthly its cost of sales, labor and controllable costs.

Use of the National Restaurant Association uniform chart of accounts will enable you to prepare and analyze your financial statement in a format that makes benchmarking easier.

A restaurant should maintain its prime costs between 55% to 60% of its net sales and general and administrative costs should be in the range of 5% - 7%. Prime costs are the combination of your cost of sales and labor costs. An example is below:

Net Sales	100%
Cost of Sales	27%-32%
Labor	28%-33%
Total Prime Costs	55%-65%

Occupancy costs should not exceed 10% of net sales and base rent should be around 6% of net sales.

The above are ranges only and will differ for each restaurant depending upon its type of segment (quick service, fast casual, casual, upscale fine dining, etc.).

TIPS AND SERVICE CHARGES

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DEFINITION OF "TIP"

To understand the legal restrictions on tip income under federal tax and labor laws, it is important to understand what a tip is and who owns it. A tip is a sum a customer gives as a gift or gratuity in recognition of some service performed. Whether to give a tip, and how much to give, is solely the customer's decision. Generally, the customer has the right to determine who shall be the recipient of the tip. See 29 C.F.R. § 531.52 and IRS Revenue Ruling 2012-18 or click here **https://www.irs.gov/irb/2012-26_IRB#RR-2012-18**

Tip ownership is an important question. To the extent that tips are determined legally to be the property of the employee, for instance, tips cannot be used to pay for uniforms or to reimburse management for shortages, breakage, walkouts or other establishment losses.

The question of who owns a tip also plays into the legality of certain tip-pooling arrangements. Federal wage regulations generally prohibit employers from requiring tip-earning employees to share tips with employees who do not regularly and customarily receive tips (e.g., back-of-house employees).

According to the Department of Labor's ("DOL") regulations, an "employer is prohibited from using an employee's tips, whether or not [the employer] takes a tip credit, for any reason other than" as a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip-pooling arrangement. See 29 C.F.R. § 531.52.

Although federal tip-credit law generally prohibits back-of-house employees from participating in tip pools, the Ninth Circuit Court of Appeals ruled in 2010 that federal tip-credit restrictions do not apply in cases where the employer pays tipped employees the full minimum wage in cash and does not take advantage of the tip credit. The DOL's 2011 amended regulations are at odds with this decision. No other federal appeals courts have sustained the DOL's regulations. This issue is discussed more fully under "Tip Pooling," below.

Tips received by an employee are also considered remuneration for employment, according to the federal tax code, I.R.C. Section 3121(q). The remuneration is deemed paid when tips are reported to the employer by the employee. In cases where employees fail to fully report their tips, the remuneration is deemed paid when the IRS issues the employer a notice and demand for payment of the employer's share of FICA payroll taxes on the unreported tips.

TIPS VS. SERVICE CHARGES

The DOL's regulations and IRS' interpretations distinguish between a tip voluntarily paid by a customer and a mandatory charge imposed upon the customer. See 29 C.F.R. §§ 351-52 and 531.55 (a) and (b); see also IRS Rev. Rul. 2012-18.

A service charge is an amount automatically added to a customer's bill by management. IRS Revenue Ruling 2012-18 lists four factors, all of which must be present in order for the customer's extra payment to be deemed a tip:

- the customer's payment must be made free from compulsion;
- the customer must have the unrestricted right to determine the amount;
- the payment should not be the subject of negotiation or dictated by the employer policy; and
- generally, the customer has the right to determine who receives the payment.

IRS Revenue Ruling 2012-18 gives the following examples to distinguish when a gratuity left by the customer will be considered a "tip" or "service charge":

Example 1: A restaurant's menu specifies that an 18% gratuity will be added to all customer bills. A customer's bill for food and beverages includes an amount on the "tip line" equal to 18 percent of the price for food and beverages and the total includes this amount. The restaurant distributes this amount to the servers and bus persons. Under these circumstances, the customer did not have the unrestricted right to determine the amount of the payment because it was dictated by employer policy. The customer did not make the payment free from compulsion. The 18% gratuity is not a tip within the meaning of section 3121 of the federal tax code. The amount included on the tip line is a service charge dictated by the restaurant.

Example 2: A restaurant includes sample calculations of tip amounts beneath the signature line on its charge receipts for food and beverages provided to customers. The actual tip line is left

blank. A customer's charge receipt shows sample tip calculations of 15%, 18% and 20% of the price of food and beverages. The customer inserts the amount calculated at 15 percent on the tip line and adds this amount to the price of food and beverages to compute the total. Under these circumstances, the customer was free to enter any amount on the tip line or leave it blank; thus, the customer entered the 15 percent amount free from compulsion. The customer and the restaurant did not negotiate the amount nor did the restaurant dictate the amount. The customer generally determined who would get the amount. The amount the customer entered on the tip line is a tip within the meaning of section 3121 of the federal tax code.

If the gratuity is deemed to be a service charge rather than a tip, under federal law, service charges:

- belong to the establishment;
- become a part of the establishment's gross receipts ;
- must be considered as income to the employer,; and
- may be retained entirely by management or distributed to employees in any amount management chooses.

Service charges that get distributed to employees are treated as wages under federal law. Distributed service charges may be used to help employers meet their obligation to pay employees the minimum wage. If the employer uses the services charges to meet the employee's minimum wage, the employer needs to ensure that such wages are included in any overtime calculation when the employee works in excess of 40 hours in a workweek (although employers may be able to use the FLSA's 7(i) exemption).

Compulsory service charge, however, cannot be counted as a tip credit. Under the DOL's regulations (29 C.F.R§ 531.55) restaurants that automatically add a gratuity, for example, for large parties or catered events (deemed by DOL to be a service charge and not a tip), cannot take a tip credit for the mandatory gratuity the establishment receives, even if management passes the gratuity on as a tip to employees.

Instead, the mandatory-gratuity receipts would be considered part of the employer's receipts. Money paid from those receipts to employees would be considered wages rather than tips. The DOL regulation is codified at 29 C.F.R. § 531.55, and in Wage-Hour Opinion Letter 2005-31, the DOL reaffirmed that a compulsory service charge is not a tip and cannot be counted as a tip even if the employer distributes the service charge to employees.

It is important for restaurants to inform guests of service charges and the amount of the charge before the guest orders, either by a conspicuous notice on the menu or some other means. Some states require a specific form of notice.

TIP REPORTING BY EMPLOYEES

All tips received by employees are required by the IRS to be included in the employee's taxable income. The law requires that 100% of tips be reported. Employers and employees are required to track and report income received from tips. If the total tips reported by employees are less than 8% of the total food and beverage sales, then the employer is required to allocate the difference between 8%

of total food and beverage sales and the amount of reported tips among all directly tipped employees who reported less than 8% of their share of sales. Allocated tips are reported on the employees' W-2 forms. See the section title " When are Employers Required to Allocate Tips" for a more in-depth discussion of allocating tips.

TIP REPORTING BASICS

100% IS THE MAGIC NUMBER: ALL TIPS ARE TAXABLE.

All tips count as income that you must report and pay taxes on. This includes cash tips, charge card tips and any tips you get from other employees, minus what you tip out to others. You may have heard that all you need to do is report tips equal to 8% of sales. This is a misconception. The law requires you to report and pay taxes on 100% of the tips you keep after tip-outs.

EMPLOYEES MUST KEEP DAILY RECORDS

All employees who receive tips of at least $20 in a month must keep a daily record or other evidence of the tips they receive. The daily record should show the employee's name and address, the employer's name (and, if different, the establishment name), the amount of cash and charge tips received directly from customers and from other employees, the amount of tips paid to other employees, and the names of the other employees to whom the employee paid tips.

Although no particular form of daily record is required under federal law (but check to see if your state law requires a particular form), IRS Form 4070-A, Employee's Daily Record of Tips, is recommended. Publication 1244, "Employee's Daily Record of Tips and Report to Employer," provides helpful information on the tip reporting process.

EMPLOYEES MUST REPORT TIP EARNINGS TO EMPLOYERS

IRS regulations require that any employee who directly or indirectly receives tips of at least $20 per month must furnish to the employer a written statement of all tips received -- cash tips as well as credit/debit card tips -- by the 10th day of the month following the month in which the employee received the tips. The requirement applies to directly tipped employees (e.g., servers) as well as to indirectly tipped employees (e.g., bus persons). See 26 C.F.R. § 31.6053-1.

The employer may require employees to furnish such statements more frequently. Many restaurant operators have found that these statements are more likely to reflect all tips received if they are submitted daily. The written statement should be signed by the employee and should disclose:

- the date the statement was furnished;
- the employee's name, address and Social Security number;
- the employer's name and address;
- the period the statement covers, with exact dates (e.g., November 2009 or Nov. 1, 2009 to Nov. 7, 2009, etc.) ; and
- total tips the employee received during that period.

As long as all of the above information is included, the IRS prescribes no particular form for the written statement. IRS Form 4070 (Employee's Report of Tips to Employer) is recommended.

If a restaurant establishment has a point-of-sale computer system, tip reporting can be incorporated into this process. Since the point-of-sale system will account for tips charged on credit cards, the employee must only account for cash tips left by diners. When such a system is used, the employer must report the amount of tips to the employee monthly. This reporting requirement can be met by including the amount on a payroll stub or by a separate statement.

Employees are required to report as earnings only the tips they keep. Servers who "tip out" or contribute to a tip pool, for example, should report to their employer only the tips they retain. However, employees should keep a record of what happened to all the tips they receive.

FAILING TO REPORT ALL TIP INCOME

Since all tip income is taxable, unreported tips can cause big problems for both employers and employees. A 2011 IRS study indicates that tipped employees are in the aggregate reporting only about 50% of total tips, resulting in a shortfall of between $2.5 and $4.4 billion in unreported taxes each year. Employees who fail to report tips can be held liable for income tax and their share of FICA tax on unreported tips. They also could be assessed penalties and interest. The 20% accuracy penalty or even fraud penalty potentially can be assessed.

Employers can face problems too. Section 3121(q) of the Internal Revenue Code makes employers liable for paying the employer share of FICA payroll taxes on tip income, whether tips are reported or not. The IRS has used this provision of the tax code to tax employers with an aggregate estimate of unreported tips in an establishment.

The estimate is usually based on the IRS's review of the employer's tip-reporting paperwork, rather than on examinations of individual employees. In these cases the IRS will give the employer a tax bill (officially, a "notice and demand") for the employer's share of FICA payroll taxes on tips the IRS alleges employees earned but did not report.

Employers are in a tough spot when it comes to tip reporting. The law generally does not require employers to police employee tip reports, nor does it make employers responsible for reporting tips on behalf of employees. Except as required by and in strict accordance with certain allocation requirements set by law as explained later in this chapter, the law also does not authorize the employer to "assign" to tipped employees tip income equal to a certain percentage of the tipped employees' sales.

Unfortunately, though, the IRS can still estimate unreported tips in a restaurant — and use this data to collect back taxes from the employer. Because of this potential liability, employers are strongly encouraged to remind tipped employees of their obligation to report all tips they retain, including cash as well as charged tips.

Employers should remind their employees that the obligation to report tip income applies to any person who receives $20 or more in

tips in a month, whether they are directly tipped employees such as servers or indirectly tipped employees such as persons.

HOW THE IRS ESTIMATES UNREPORTED TIP INCOME

The IRS is permitted to use what's known as the "McQuatters Formula for Tip Rate Calculation" to estimate unreported tips in a restaurant. The formula was approved by a federal tax court in 1973. Details can be found at McQuatters v. Commissioner, 32 Tax Court Memo, 1973-240.

The McQuatters Formula allows the IRS to estimate unreported tip income for an establishment and its employees by:

1. Determining the average tip rate in the restaurant: This is derived by looking at the tip rate on credit-card sales and adjusting it slightly downward to account for a slightly lower tip rate on cash sales.
2. Determining employees' average sales per hour: The IRS divides an establishment's total sales by the total number of hours worked by all servers during the year. (Note: The IRS will first reduce total establishment sales by a certain percentage, to account for tip sharing and for customers who leave little or no tips.)
3. Determining each server's yearly sales: The IRS will multiply the number of hours each server works in a year by average sales per hour (#2) to come up with each server's yearly sales.
4. Determining yearly tip income for each server: The IRS then multiples yearly sales of each server (#3) by the average tip rate (#1).

IRS TIP-REPORTING AGREEMENTS

Under pressure from the IRS, thousands of restaurateurs have signed agreements with the IRS agreeing to take on a bigger role in employee tip reporting.

The IRS believes that employees will report more income when employers play a bigger role in tip reporting. And employers who sign agreements with the IRS often do so because they would like to avoid costly "3121(q)" audits and assessments for FICA taxes on allegedly unreported tips. Employers who engage in a tip program with the IRS generally get a guarantee that the IRS will not conduct "employer first" or "employer only" tip audits and assessments, from the time the employer joins and as long as the employer complies with the program.

The IRS currently has - -three types of tip-reporting agreements. -. Some are not very popular with employers but all remain available as of 2021:

- Tip Rate Determination Agreement (TRDA) (1993);
- Tip Reporting Alternative Commitment (TRAC) (1995); and
- Employer-created TRAC (EmTRAC) (2000)

TIP RATE DETERMINATION AGREEMENT

The IRS released its Tip Rate Determination and Education Program in 1993. The program launched the Tip Rate Determination Agreement (TRDA). The TRDA program was aimed at restaurants that either failed to file a Form 8027, or that reported unrealistic tips on the Form 8027.

The TRDA mandates a role for both employees and employers. On the employee side, the TRDA requires at least 75% of the establishment's tipped employees to sign agreements with the IRS agreeing to report tips at a fixed rate determined by historical data and the McQuatters' Formula. On the employer side, participating employers have a series of obligations under the TRDA, including paying FICA payroll taxes on six months of previously unreported tips. The most controversial aspect of the TRDA program was the requirement that the employer report to the IRS the names of employees who declined to participate or who reported a lower rate of tips. The TRDA has not been well-received by employers or employees.

TIP REPORTING ALTERNATIVE COMMITMENT

The IRS established the Tip Reporting Alternative Commitment (TRAC) in 1995. The TRAC is an agreement between an employer and the IRS. Generally, an employer who signs the TRAC agrees to:

- establish an educational program to educate newly hired and existing employees about tip-reporting requirements;
- keep a record of all charge tips received by employees; and
- establish a procedure whereby:
  - each directly tipped employee is provided with a written statement of charge-card tips attributed to him or her,
  - each directly tipped employee is given the opportunity to verify or correct the charge-card tips attributable to him or her to reflect tip-outs, tip sharing, tip pooling and other adjustments, and
  - each directly as well as indirectly tipped employee provides the employer with a written and signed statement of the charged as well as cash tips received by him or her.

The IRS in exchange for signing a TRAC promises it will not audit and assess the employer FICA taxes on unreported tips for the time the TRAC is in effect without first determining that individual employees owe FICA taxes on unreported tips.

The IRS revised the TRAC in 1999 at the National Restaurant Association's request. Under the revised agreement, the IRS guarantees that employers who sign and comply with the TRAC's requirements won't be thrown out of the TRAC just because the agency decides employees still aren't reporting enough tips. As long as the employer complies with all of its TRAC obligations, the revised TRAC gives employers complete protection from employer-only FICA tax assessments on unreported tips during the time the employer is in the TRAC program.

EmTRAC

The National Restaurant Association, its members and the IRS negotiated a third tip-agreement option in 2000.

The EmTRAC employer-created TRAC (EmTRAC) lets employers propose their own tip-reporting education program to the IRS. It is available only to employers in the food and beverage industry that have employees who receive both cash and charged tips. The IRS is required to approve the proposal. Once approval is given, participating employers are protected from employer-only

audits and assessments as long as they comply with the approved program. Employers in the EmTRAC program are not required to sign an agreement with the IRS.

EMPLOYER REPORTS OF TIPS TO THE IRS: FORM 8027

The IRS requires large food and beverage establishments to file a Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, for each calendar year for each large food or beverage establishment.

Returns are due on or before the last day of February following the end of the calendar year for which the information is being reported. 26 C.F.R. § 31.6053-3 The due date is extended from the last day of February to March 31 if the form is filed electronically.

WHICH RESTAURANTS ARE REQUIRED TO FILE FORM 8027?

The law requires that a Form 8027 be filed for "each large food or beverage establishment" that employs tipped employees. Specifically, the 8027 requirement applies to any food or beverage operation:

- where tipping is customary;
- which provides food and beverages for on-premises consumption; and
- which normally employs more than 10 employees (tipped and non-tipped) or their equivalent (80 employee hours) on a typical day.

Food and beverage establishments with wide seasonal fluctuations compute the employee threshold by averaging employee hours during the calendar month in which food and beverage sales were the greatest with those in the calendar month when sales were the least (not zero).

A separate Form 8027 should be filed for each food and beverage operation that meets the above criteria. For employers who conduct food-and-beverage operations at more than one location or at different locations within a single building (e.g., a gourmet restaurant, coffee shop and cocktail lounge in a hotel), each location is deemed a separate food and beverage operation if gross receipts for each location are recorded separately. A separate 8027 should be filed for each operation that has a separate employer identification number. Click on the link to access Form 8027 from the IRS website **https://www.irs.gov/pub/irs-pdf/f8027.pdf**

Multiple filings: Employers who file more than one Form 8027 each year must file with the IRS a Form 8027-T, Transmittal of Employer' Annual Information Return of Tip Income and Allocated Tips. Employers who file 250 or more Forms 8027 with the IRS each year must file these forms magnetically or electronically. For details, visit the IRS website for a copy of Publication 1239, Specifications for Filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, Magnetically/Electronically.

WHEN ARE EMPLOYERS REQUIRED TO ALLOCATE TIPS?

The IRS Form 8027 requires employers to report to the IRS the establishment's food-and-beverage sales, as well as the total tips (cash and charged) that employees reported to the employer. If total reported tips fall below 8% of sales — If total tips reported by employees are less than 8% of the establishment's food-and-beverage sales (not counting carryout sales and sales to which a service charge of 10% or more is added) -- the employer is required to allocate the difference among all directly tipped employees who reported less than 8% of their share of the restaurant's sales.

Allocation is done either on the basis of a good-faith agreement between employers and employees or, if there is no such agreement, on the basis of IRS prescribed allocation rules. Under IRS rules, tips may be allocated annually or on any "reasonable division of the calendar year," such as a biweekly payroll period. 26 C.F.R. § 31.6053-3(g)

Allocated tips must then be shown on employees' W-2 forms. If total tips reported exceed 8% of the establishment's food and beverage sales (not counting carryout sales and sales to which a service charge of 10% or more is added) -- no allocation of tips is required.

Note: Employers cannot assume they are "safe" from IRS scrutiny if employees report tips of at least 8% of sales. Employees are obligated to report all their tips, not tips equal to a certain percentage of sales. The IRS has sent some employers large tax bills for FICA taxes on unreported tips even in cases where reported tips equaled 8% of sales.

If the employer or employees believe the 8% threshold that triggers tip-allocation requirements is unfair, the IRS allows the employer or a majority of employees to petition the agency to reduce the 8% threshold to a lesser amount, to as low as 2%. The petition should be filed with the district director of the IRS district in which the establishment is located or where the greatest number of establishments are located.

If employers are required to allocate tips to certain employees, the IRS outlines two approaches:

- Good faith agreement: Employers can use a "good faith agreement" to allocate tips to employees. A good-faith agreement is a written agreement between the employer and at least two-thirds of the tipped employees of each occupational category (e.g., servers, bus persons, maître d's) providing for a good-faith approximation of the actual distribution of tip income among the tipped employees. A good-faith agreement takes effect only after the date of adoption, and has no retroactive effect. Employers who use a good-faith agreement to allocate tips must attach a copy of the agreement to Form 8027.
- Allocation in the absence of a good faith agreement: If there is no good-faith agreement in effect, employers who are required to allocate tips to employees must do so according to IRS rules set forth in the Form 8027 instructions and in 26 C.F.R. §§ 31.6053-3(f)(1)(i)(vii).

Establishments with fewer than 25 full-time employees or the equivalent thereof (on average, less than 200 employee hours a day during the payroll period) may allocate tips according to either the gross receipts attributable to directly tipped employees or the hours worked by these employees.

Establishments with 25 or more full-time employees or their equivalent (on average, more than 200 employee hours a day) must allocate tips according to the gross receipts attributable to directly tipped employees.

PENALTIES FOR FAILURE TO FILE THE 8027

IRS regulations provide for a penalty for each 8027 not filed in a timely manner. The penalty can be substantial if the failure is due to an employer's intentional disregard of the filing requirements. 26 C.F.R. § 301.6721-1

TIP CREDIT: WHAT IS THE TIP CREDIT?

The Fair Labor Standards Act (FLSA) requires an employer to pay employees at least the federal minimum wage prescribed by law. The current federal minimum wage is $7.25 an hour. With restrictions, the FLSA permits employers of tipped employees to take what is referred to as a "tip credit." The tip credit allows employers to "credit" a portion of an employee's tip earnings toward the employer's obligation to pay the employee the minimum wage.

Maximum tip credit allowed: The maximum tip credit allowed under federal law (i.e., the FLSA) is the difference between the federal minimum wage (currently $7.25) and the minimum cash wage of $2.13 that the FLSA requires employers to pay to tipped employees. See 29 U.S.C. § 203(m); 29 C.F.R. § 531.29.

Thus, current federal law permits employers to deduct a maximum tip credit of $5.12 an hour from cash wages paid to tipped employees ($7.25 federal minimum wage minus $2.13 federal minimum cash wage for tipped employees). The DOL's regulations indicate that while the "credit allowed on account of tips may be less than that permitted by statute [FLSA] it cannot be more." See 29 C.F.R. § 531.59(b).

STATE LAWS AND TIP CREDIT

As pointed out in the discussion of wages, the FLSA provides that when any state law or municipal ordinance establishes a minimum wage higher than the federal minimum wage or a maximum workweek of fewer hours than the federal maximum workweek, the law that is most favorable to the employee must be followed. See 29 U.S.C. § 218.

The same principle applies to the tip credit. Some states prohibit employers from taking any tip credit, or limit the tip credit to an amount less than that authorized under federal law.

In these cases, the law most favorable to the employee prevails. If the cash wage for tipped employees required under federal law (the federal minimum wage minus the federal tip credit) is greater than the cash wage required under state law, federal law prevails. Conversely, if the cash wage required for tipped employees under

state law is greater than the cash wage required under federal law, state law prevails.

In Arizona, as of 2021, the minimum wage for tipped employees is $9.15 per hour and the minimum wage for all other employees is $12.15 per hour. This will increase $0.65 per hour effective January 1, 2022. The maximum allowable tip credit is $3.00.

REQUIREMENTS FOR TAKING A FEDERAL TIP CREDIT

Under the FLSA, employers must meet the following requirements in order to take a federal tip credit (see 29 U.S.C. §§ 203 (m) and (t)):

1. A tip credit can be taken only against the wages of employees who are in an occupation that customarily and regularly receives at least $30 per month in tips.
2. The amount of credit claimed can never be more than the prescribed tip-credit limit under the applicable minimum-wage rate.
3. The amount of the tip credit claimed cannot be more than the amount the employee actually received in tips. To the extent that the tips received by an employee are less than the permitted tip credit, the employer must pay the employee a higher cash wage (i.e., the difference between the tips reported and the minimum wage).
4. The employer must inform a tipped employee before it utilizes the tip credit, of the following: (a) the direct cash wage the employer is paying a tipped employee, which can be more than, but cannot be less than, $2.13 per hour (but $9.80 under Arizona

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law, effective January 1, 2022); (b) the additional amount the employer is using as a credit against tips received, which cannot exceed the difference between the minimum wage specified under the FLSA and the actual cash wage paid by the employer to the employee; (c) that the additional amount claimed by the employer on account of tips as the tip credit may not exceed the value of tips actually received by the employee; (d) that the tip credit shall not apply with respect to the tipped employee unless he or she has been informed of the tip credit provisions under Section 3(m) of the FLSA; and (e) that all tips received by the tipped employee must be retained by the employee except for the pooling of tips among employees who customarily and regularly receive tips. See 29 C.F.R. § 531.59(b).

5. While the employer notice requirements specified above do not have to be in writing, the DOL strongly urges employers to put this in writing to each tipped employee in order for it to demonstrate that it has complied with these obligations. Furthermore, DOL recordkeeping obligations, (29 C.F.R. § 516.28(a)(3)), require that the amount of a tip credit the employer takes per hour must be reported in writing to the employee each time it is changed from the amount taken previously.
6. Generally, employees must be allowed to retain all of their tips. As noted in the discussion of wages, this requirement prevents the employer from retaining any of the tips or using any of the tips to pay for such things as uniforms, breakage or losses. This requirement does not prevent valid tip-pooling arrangements.
7. The employer must be able to prove that the employee received tips in an amount at least equal to the amount of the tip credit claimed. Employees' written tip reports are the best proof of tips received.

TIP CREDIT AND "REGULAR RATE OF PAY"

Tips applied as a tip credit toward the employee's minimum wage are included as part of the employee's regular rate of pay. Tips that are received by an employee in excess of the amount of tips used to meet the minimum wage are excluded from the regular rate of pay of a tipped employee. See 29 C.F.R. § 531.60; DOL Field Operations Handbook, Chapter 30, 30d00(e), available at **https://www.dol.gov/whd/FOH/FOH_Ch30.pdf**

TAKING A TIP CREDIT FOR INCIDENTAL WORK

Can an employer take a tip credit for the time a server spends cleaning and setting tables, toasting bread, making coffee, or occasionally washing dishes?

The DOL has indicated that the tip credit can be taken for the time spent on such general preparation work or incidental work related to tipped work. The DOL takes the position, however, that if servers are routinely assigned maintenance duties (e.g., floor cleaning) or if they spend more than 20% of their time performing general preparation work or maintenance or incidental work, this is not tipped employment and the tip credit may not be taken for time spent on such work. See 29 C.F.R. § 531.56(e); DOL Field Operations

Handbook, Chapter 30, 30d00(e), available at **http://www.dol.gov/whd/FOH/FOH_ch30.pdf** .

TAKING A TIP CREDIT FOR AN EMPLOYEE WITH DUAL JOBS

When an employee works at two jobs, one of which is tipped (e.g., a server or bartender) and the other not (e.g., a cashier), DOL regulations are clear that the tip credit can be taken only for the time worked as a tipped employee. See 29 C.F.R. § 531.56(e).

DEDUCTING THE COST OF UNIFORMS FROM TIPS

Federal law prohibits an employer from using an employee's tips to pay for uniforms. The National Restaurant Association asked the DOL whether a portion of the tips can be applied toward employee uniforms or uniform cleaning in states that prohibit a tip credit or limit it to less than the federal tip credit. The answer is no. In a formal opinion letter to the National Restaurant Association (Wage-Hour Opinion Letter 2006-21), the DOL stated that any tips received by tipped employees above the tip credit used to meet the employer's minimum-wage obligation cannot be taken by the employer to pay for such costs because this tip income is the employee's property. The DOL reiterated its interpretation in its amended regulations. See 29 C.F.R. § 531.52.

The DOL's Wage-Hour Opinion Letter 2006-21 further indicates that, while tips may be assigned by the employee to a third party (e.g., an insurer or bank), the third party may not be a cleaning company because assignments to third parties must be for the benefit of the employee and not the employer.

TIP POOLING

The FLSA states employers may not take a tip credit unless an employee retains all of his or her tips. This does not prevent tip-splitting or tip-pooling arrangements among employees who customarily and regularly receive tips. The FLSA specifically allows employers to take a tip credit towards its minimum wage obligation of tip pool participants provided that certain conditions are met. See 29 U.S.C. § 203(m); 29 C.F.R. § 531.50-59.

Tip pooling is the practice of sharing tips among the various employees involved in serving the customer. Employees who do not customarily and regularly receive tips are eligible to participate in a tip pooling arrangement, but only if the employer is not claiming a tip credit. Additionally, no supervisory or managerial employees may participate in the tip pool. In a tip pooling scenario, the wait staff may give a portion of the tip to the bus person, bartender, etc. The employee distributing the tip should keep a record of the other employees involved and how much was paid to them.

MANAGEMENT-RUN TIP POOLS

Employers often ask whether it is possible for management to run a tip pool or participate in operating one. The answer is a qualified yes provided certain requirements established by the DOL are met:

1. The requirement that an employee retain all tips does not prevent tip-splitting or tip-pooling arrangements among employees who customarily and regularly receive tips, and with non-customarily tipped employees provided the employer is not claiming a tip credit. The following occupations have been recognized by the DOL as falling within the eligible category: bellhops, waiters and waitresses (including cocktail servers), counter personnel who serve customers, bus persons, and service bartenders. It is not required that those who share in tips receive tips directly from customers. Both the amounts retained by the servers and those given to bus persons, for example, are considered the tips of the individual who retains them.
2. According to the DOL's regulations (29 C.F.R. § 531.54), the FLSA does not impose a maximum percentage on employee contributions to validate mandatory tip pools. To be valid, however, the employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and the employer may not retain any of the employee's tips for any other purpose.

If the conditions above are met, the tip pool may be established and supervised by the employer, and it does not require the voluntary consent of the employees involved.

DOL policies also state the following regarding management-supervised tip pools:

- In requiring that tipped employees retain all their tips, it does not appear that Congress intended to prevent tipped employees from deciding what to do with their tips. This includes sharing tips with co-workers of their choice in any amount they please, using tips to make payments to a 401(k) retirement plan or asking their employer to withhold federal and state taxes from their tips, as long as such decisions by the employee are entirely voluntary.
- An employer cannot retain any portion of the tips. "Employer" is defined under the FLSA to mean "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203.

Employees who act in a managerial or supervisor capacity are considered by DOL and courts to be employer agents for purposes of the FLSA. When an employer-established tip pool includes any ineligible employees, the employer must reimburse those who contributed to the pool in an amount equal to the tips turned over to the ineligible employees, and the employer may lose its eligibility to apply a tip credit against the wages paid to employees. The employer may not seek reimbursement from ineligible employees.

Keep in mind that state laws may restrict the use of tip pooling, including requiring employers to get employees' voluntary consent.

CREDIT CARD TIPS AND CREDIT CARD COMPANY SERVICE CHARGES

The DOL has adopted the following policy regarding credit card tips: "Where tips are charged on a credit card and the employer must pay the credit card company a percentage of this bill for use of its credit facilities, we will not question a practice whereby the employer reduces the amount of credit card tips paid over to the employee by an amount no greater than that charged by the credit card company." See Field Operations Handbook, §30d05(a), **https:/ www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch30.pdf**.

For example, when a credit card company charges an employer 5% on all charge sales for use of its credit facilities, paying the employee 95% of all his or her tips charged with the company's credit card will not result in a violation of the law. However, the 95% of tips owed to the employee must be paid to him or her no later than the next regular payday and may not be held by the employer until reimbursement by the credit card company.

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PAYROLL TAXES

WITHHOLDING FEDERAL INCOME TAXES FROM EMPLOYEE WAGES

FICA TAXES

ADDITIONAL 0.9% MEDICARE TAX

FUTA TAXES

WITHHOLDING TAXES IN THE PROPER ORDER

EARNED INCOME TAX CREDIT

NOTIFYING EMPLOYEES ABOUT THE EITC

ARIZONA WITHHOLDING TAXES

ARIZONA UNEMPLOYMENT TAXES

USE OF PAYROLL SERVICE PROVIDERS OR EMPLOYEE LEASING COMPANIES

WITHHOLDING FEDERAL INCOME TAXES FROM EMPLOYEE WAGES

Federal income taxes must be withheld from an employee's total wages. Wages generally include all remuneration for services performed by the employee for the employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash (26 C.F.R. § 31.3401(a)-1).

The Fair Labor Standards Act permits employers to make deductions of taxes from an employee's wages even if the deduction reduces the remaining wages below the minimum wage (29 C.F.R. § 531.38).

Tip income: Tips are considered remuneration for income-tax-withholding purposes if they are paid in cash, by check or by credit card, the employee customarily and regularly receives tips, and the tip income amounts to $20 or more per calendar month (26 C.F.R. § 31.3401(f)-1(b)).

FICA TAXES

Federal Insurance Contribution Act (FICA) payroll taxes are paid by both employers and employees.

These taxes fund the Social Security and Medicare systems. The current FICA tax rate is 7.65 percent, and has two components:

- Social Security tax: Employers and employees each pay a 6.2% Social Security tax, assessed in 2021 on a taxable wage base of up to - $142,800 . In 2022, the taxable wage base increased

to $147,000. The maximum Social Security tax an employee or employer will pay in 2022 is $9,114 (6.2% of $147,000).

- Medicare tax: Employers and employees each pay a 1.45% Medicare tax, assessed on all wages.
- Taxable wages: FICA taxes must be paid on an employee's total wages, which generally means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash (26 C.F.R. § 31.3121(a)-1).

The employee's share of the FICA tax is deducted from wages that are under the employer's control or from funds provided by the employee. Tips are considered remuneration for employment for FICA tax purposes if they are paid in cash, by check or by credit card, the employee customarily and regularly receives tips, and the tip income amounts to $20 or more in a calendar month (26 C.F.R. § 31.3121(a)(12)-1).

Wages include all tips reported in writing by the employee to the employer, as well as all unreported tip income (26 U.S.C. § 3121(q)). However, employer FICA taxes on unreported tip income do not become due and payable until the Internal Revenue Service gives the employer a 3121(q) notice and demand for such taxes.

ADDITIONAL 0.9% MEDICARE TAX

Beginning in 2013, the employee portion of the Medicare tax was increased from 1.45% to 2.35% on wages received in a calendar year in excess of $200,000 ($250,000 for married couples filing jointly; $125,000 for married couples filing separately). The additional tax will be calculated on Form 8959 (Additional Medicare Tax), which will be attached to the individual's personal income tax return. Employers must withhold and remit the increased employee portion of the Medicare tax for each employee whose calendar-year wages for Medicare tax purposes is over $200,000. There is no employer match for this additional Medicare tax. Therefore, the employer's Medicare tax rate continues to be 1.45% on all Medicare wages.

FUTA TAXES

The Federal Unemployment Tax Act (FUTA) tax is imposed on the employer only. For FUTA purposes, wages generally mean all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash (26 C.F.R. § 31.3306(b)-1(b)). In addition to wages, tips reported in writing by the employee to the employer are subject to the FUTA tax (26 U.S.C. § 3306(s)).

WITHHOLDING TAXES IN THE PROPER ORDER

Employers withhold federal income and FICA payroll taxes from employees' wages. IRS regulations (26 C.F.R. § 31.3402(k)-1(c)) specify the following order for withholding these two taxes from an employee's wages:

- FICA taxes due on the wages earned by the employee;
- Federal income taxes due on the wages earned by the employee;
- FICA taxes due on the tips reported by the employee;
- Federal income taxes due on the tips reported by the employee.

The order of withholding is important because sometimes the cash wage paid by the employer to a tipped employee will not be sufficient to cover all the federal taxes that should be withheld. In these cases the employee gets a "zero" paycheck. In cases where an employee's cash wages are not sufficient to cover the required withholding of FICA taxes on reported tips, regulations (26 C.F.R. § 31.6053-2) require the employer to indicate the amount of uncollected FICA taxes on the employee's Form W-2, Wage and Tax Statement, in the section for "uncollected Social Security taxes on tips." There are civil penalties for failure to show this amount on the W-2.

Note: States also may prescribe an order for withholding state taxes. Employers should check with their tax advisor or payroll service for state requirements.

EARNED INCOME TAX CREDIT

The Earned Income Tax Credit (EITC) is a refundable federal income-tax credit for full and part-time workers whose earnings fall below a certain level. The credit increases for families with two or more children, with a child under a year old and that pay for health insurance to cover a child.

Most employees who qualify for the EITC claim the credit when they file their federal income-tax returns. However, employees also have the option of filling out a Form W-5, Earned Income Credit Advance Payment Certificate, to receive part of the basic credit in each paycheck. Employers must include the EITC in paychecks for any worker who fills out a Form W-5, but are not responsible for verifying a worker's eligibility for the tax credit. The money that gets added to the employee's paycheck does not come out of the employer's pocket. Instead, employers get the money for advance payment of the EITC by using withheld income and payroll-tax dollars they otherwise would deposit with the IRS. A new W-5 form must be filled out each year by employees who want the credit in advance. The IRS has extensive information on the advance EITC.

NOTIFYING EMPLOYEES ABOUT THE EITC

Employers are required to give written notice about the EITC to employees who have no income tax withholding. Notice is not required for employees who claim exemption from withholding on their W-4 Form. However, employers are encouraged to notify any employee whose wages for 2021 were less than $56,884 that they may be eligible to claim the credit. Employers should use IRS Notice 797, Notice of a Possible Federal Tax Refund Due to the Earned Income Credit, or provide a written notice with all of the information on the Notice 797 within one week of furnishing the employee with his or her Form W-2. The notice may be delivered to employees along with their Form W-2, hand-delivered or sent via first-class mail. It's not enough to post a sign on the bulletin board.

Note: If the employee's copy (Copy C) of the Form W-2 contains the basic information about the EITC, the employer is not required to furnish Notice 797 or a reproduction thereof to employees. The official IRS Form W-2 contains the required notice.

ARIZONA WITHHOLDING TAXES

Employers are required to withhold Arizona taxes from their employee wages based on the current Arizona Form A-4 filed with the employer by the employee. Effective July 1, 2010 the withholding rate is based on a percentage of the "gross taxable wages" paid to the employee. The employer may not be required to withhold on nonresident employees if they do not meet the filing requirements for Arizona nonresident status. The nonresident employee must be in Arizona less than 60 days a year for the purpose of performing a service for the benefit of the employer. If an employee meets this requirement, the employer should have them fill out Form Arizona WEC. The employer will then send one copy with the current Arizona Quarterly Withholding return and keep one on file.

The quarterly withholding payments and report deadlines are as follows:

First Calendar Quarter – Due April 30

Second Calendar Quarter – Due July 31

Third Calendar Quarter – Due October 31

Fourth Calendar Quarter – Due January 31

If the due date falls on a holiday or weekend, the returns will be due the following business day.

If the employer is required to remit the Arizona withholdings at the same time as the federal withholding, the due dates are the same as the federal due dates. Depending on the tax liability, there could be a requirement to make all reports and payments electronically.

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When the return is not filed on time or payments are not paid by the due date, penalties will be assessed. The late filing penalty is 4.5% of the tax required shown on the return for each month or fraction of month until paid. The maximum is 25% penalty. The late payment penalty is 1/2% of unpaid tax each month until paid. The maximum is 10% of unpaid tax.

ARIZONA UNEMPLOYMENT TAXES

Employers are required to pay unemployment taxes for the first $7,000 of wages paid to an employee. The employer is required to file a quarterly report (UC-018) with the Department of Economic Security (DES) if they meet any one of the following conditions:

- Pay wages of at least $1,500 in a quarter;
- Employ at least one worker for some part of a day in each of 20 weeks in a calendar year;
- Acquire a business from someone who was already subject for unemployment.
- Are required to pay federal unemployment;
- Pay a domestic/household worker at least $1,000 in wages in a quarter;
- Pay agricultural workers at least $20,000 cash wages in a calendar quarter or employ at least 10 agricultural workers for some part of a day in each of 20 weeks in a calendar year;
- Voluntarily elect to provide unemployment coverage;
- Leasing or temporary services which provides workers to other businesses; or
- Are Indian tribes, or are any subdivisions, subsidiary, or business enterprise wholly owned by such Indian Tribe.

The initial rate of tax is 2% for the first two calendar years. After this two year period, DES will evaluate your account and adjust the rate accordingly. The adjustment is based on the “reserve ratio” that is calculated for the two year period. There is an additional .10% tax for Arizona Job Training Tax. The following employers are exempt from this additional tax:

- Eligible employers choosing the Reimbursement Option;
- Employers with a positive reserve ratio of at least 13%;
- Employers with a positive reserve ratio of at least 12%;
- Employers assigned the new employer rate; and
- Employers with a negative reserve ratio.

The quarterly withholding payments and report deadlines are as follows:

- First Calendar Quarter – Due April 30;
- Second Calendar Quarter – Due July 31;
- Third Calendar Quarter – Due October 31; and
- Fourth Calendar Quarter – Due January 31

If the due date falls on a holiday or weekend, the returns will be due the following business day.

When the return is not filed on time or payments are not paid by the due date, penalties will be assessed. The late filing penalty is

.10% of the wages paid in the quarter with a minimum of $35 and a maximum of $200. In addition, interest will be assessed at 1% of the tax due per month or fraction of a month that the tax is not paid.

USE OF PAYROLL SERVICE PROVIDERS OR EMPLOYEE LEASING COMPANIES

Due to the complexity of payroll and the tax deposit requirements it is recommended that a professional payroll service be used. These services prepare all employee checks (or direct deposit) and employer required tax deposits along with filing all quarterly and annual reports that are required by the various taxing agencies. They can also provide information for the FICA tip credit (described below) and other various credits.

Employee leasing organizations also provide the above payroll services but can also offer employee benefits (such as health insurance, retirement plans, etc.) that are either too expensive for an individual business or are too difficult to maintain.

TRANSACTION PRIVILEGE TAX (SALES TAX)

PERSONAL PROPERTY TAXES

TRANSACTION PRIVILEGE TAX (SALES TAX)

If you are operating a restaurant business in Arizona you are subject to the Transaction Privilege Tax (TPT). You need to obtain an Arizona Transaction Privilege Tax, Use Tax, and Employer Withholding license using the **Arizona Joint Tax Application**. Restaurant operators are required to collect and remit Arizona, city and county sales taxes (TPT). Tax rates will vary by locality and in some instances county TPT taxes apply.

Generally, restaurants will file and remit the sales taxes on a monthly basis via Form **TPT-2** or **TPT-EZ**. They are normally due by the 20th of the following month. There are different rules that apply with regard to the licensing procedures and should be reviewed by the operator. It is important to check with the **Arizona Department of Revenue** to determine if you have a requirement to apply for a license and pay this tax.

If a monthly (or quarterly in some instances) TPT return is not filed on time or payment is not paid by the due date, penalties will be assessed. The late filing penalty is 4 Ð% of the tax required shown on the return for each month or fraction of month until paid. The maximum penalty is 25%. The penalty for late payment of the tax is 1/2% of the unpaid tax for each month until paid. The maximum penalty is 10% of the unpaid tax.

In several states, there has been legislation passed on marketplace facilitators (a business that contracts with third parties to sell goods and services on its platform and facilitates retail sales) resulting in the marketplace facilitators being responsible for remitting sales taxes versus the retail organizations. In the restaurant industry, some states have determined that prepared food delivery companies (Uber Eats, Grubhub, DoorDash, etc.) are marketplace facilitators. The Arizona Department of Revenue has excluded third-party prepared food delivery companies from the definition of marketplace facilitators as they exclude restaurant sales and the transportation of food between restaurant and consumer from the definition of retail sales and are taxable under the restaurant classification not the retail classification. As such, the restaurant must report and remit the TPT on the full price of the prepared food (even if a portion is retained by the prepared food delivery company.

Tips are not subject to transaction privilege tax, provided that the employer keeps separate records of the gratuities for all employees providing services, and all of the gratuities are distributed directly to the employees who provided the service. Employers should take care to keep detailed records of tips received and distributed in the event of a TPT audit.

PERSONAL PROPERTY TAXES

For Arizona tax purposes, personal property is defined as “all” types of property other than real estate. This includes property used for commercial, industrial and agricultural purposes. It is considered movable and not permanently attached to the real estate. Kitchen equipment, dining room furniture and fixtures, office equipment, etc. used in the restaurant operations are subject to the Arizona Business personal property tax.

Business personal property, inventory and merchandise held for resale is subject to the tax and the first $167,130 (2018 exemption, adjusted for inflation annually) of full cash value for most taxpayers is exempt from property tax. Your business is required to file annually a listing of all personal property with the County Assessor by April 1st. Once the assessor receives the Form 82520 (or other form as specified by your county), they will analyze the original cost, the age of the property and they will calculate a replacement value. This value is what is used to assess the property tax for that calendar year.

If the the taxpayer disagrees with the valuation, a petition must be filed with the assessor within 30 days of receiving the notice of valuation.

If the assessed tax liability is over $100 you will be able to pay the tax liability in two payments, October 1 and March 1. If the liability is less than $100, the balance in full is due on October 1.

For a full discussion of personal property taxes, see the Arizona Department of Revenue's **Personal Property Manual**.

GIFT CARDS

TAX TREATMENT FOR GIFT CERTIFICATES/ GIFT CARDS

TAX TREATMENT FOR GIFT CERTIFICATES/ GIFT CARDS:

Gift card sales have become an important tool for restaurants for both marketing purposes and cash flow. There are many issues to deal with when it comes to recognizing gift card income. If you are a cash basis taxpayer you recognize all income for tax purposes in the year in which the gift card is sold rather than when redeemed.

As a general rule, accrual basis taxpayers, those who recognize business transactions when an economic event occurs (i.e.: sale of goods to a customer), not necessarily when cash is transferred between the parties (i.e.: payment in 30 days), also recognize gift card sales in gross income in the year of cash receipt. There are a few exceptions to this general rule. If you are an accrual basis taxpayer and you meet the exception under Regulation 1.451-5, if certain requirements are met, unredeemed gift card sales can be deferred and the income recognized for tax purposes in the second taxable year following the taxable year of receipt (i.e. income from gift cards sold in 2010 can be recognized in 2012).

To meet this exception, the business:

1. Must be accounting for the gift cards in accordance with their method of accounting that does not result in deferral of the income for greater than what is required by the IRS (i.e.: two years).
2. Has received "substantial advance payments" (i.e.: sale of gift certificates/cards for cash).
3. Has on hand, or available to it through its normal source of supply, goods of substantially similar kind and in sufficient quantity to satisfy the redemption of the gift certificate/card as of the last day of the tax year.

Under this exception you will still recognize the income from the gift card sales at the time they are redeemed if the redemption is prior to the second taxable year.

Operators with multiple locations and/or concepts tend to have the various stores owned by different legal entities. Since many of these related stores sell gift cards that can be redeemed at any store or different concepts, the question became how to account for the gift card sales and deferrals. Until recently, there was a question as to whether the deferral to accrual method taxpayers was available to a legal entity which sold the gift card but that might not be the entity which ultimately redeemed the gift card. The IRS issued guidance, Rev. Proc. 2011-18, which provided that if the company selling the gift card (taxpayer) is primarily liable to the customer or gift card holder until expiration and if the other entity is legally obligated to honor the gift card, then the deferral is available consistent with the other provisions of this section.

Furthermore, if the taxpayer issues an applicable financial statement (AFS), then typically, the revenue would be recognized in the year of the redemption which was one of the requirements. If an unrelated entity must honor the gift card, then the income would never be recognized in the AFS, which could have caused a problem. In 2013, the IRS issued Rev. Proc. 2013-29, which provided that the deferral could be available in those cases where the seller would never

recognize the income in an AFS. In the case where an AFS is not issued (the taxpayer does not issue audited financial statements), the deferral is available as well.

An example to illustrate these principals, assume that a restaurant concept has two stores held in two separate corporations, A and B. Assume in Year One that A sells a gift card for $100, which is redeemable at either the A store or B and that expires in Year Three. During Year Two, the gift card is redeemed at the store held in B. Using the deferral available, in Year One, A would record receipt of $100 cash and would have a liability for $100 to cover the gift card obligation. In Year Two, B would record a sale of $100 for the redemption of the gift card and the offsetting entry would be a receivable for $100 from A. To close the transaction, A would then remit $100 in cash to B to satisfy the liability on its books. As a result, A never recognizes the $100 as a sale which would have been a problem prior to the 2013 clarification.

If gift cards are accounted for under Regulation 1.451-5, a disclosure statement must be attached to the tax return for each tax year that the regulation applies. The schedule must include the total amount of gift card sales for the current year, the total amount of advances received in prior tax years that has not been included in income and the total amount of payments received in prior tax years which has been included in gross income for the current year, as follows:

ABC Restaurant, LLC

EIN: 86-9999999

ELECTION TO DEFER SUBSTANTIAL ADVANCED PAYMENT OF GIFT CERTIFICATE INCOME UNDER

REGULATION SECTION 1.451-5

Unredeemed Gift Certificates as of 1/1/21 $100,000

Current Year Gift Certificate Sales 80,000

Total Gift Certificates Available for Redemption during 2021 $180,000

Less: Gift Certificates Redeemed During 2021 75,000

Unredeemed Gift Certificates as of 12/31/21 $105,000

To ensure proper reporting and disclosure of gift card income, it is important to maintain detailed record keeping on gift card sale activity. If detailed records are not available or maintained to track the outstanding gift cards then they are recognized as income in the tax year sold. Implementation of Regulation 1.451-5 can be complex. Please consult with your tax advisor.

RECORDS & POSTERS

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DOL RECORDS THAT APPLY TO EXEMPT EMPLOYEES
DOL RECORDS ON EMPLOYEE MEALS AND LODGING
DOL RECORDS THAT APPLY TO TIPPED EMPLOYEES
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DOL WAGE-AND-HOUR RECORDS

The Department of Labor (DOL) requires that every employer subject to the federal Fair Labor Standards Act (FLSA) maintain records with certain employment information.

Although the DOL prescribes no particular form of records, an employee's records must be sufficient to substantiate the information required. Employers who fail to maintain complete records are in violation of the law.

Under 29 C.F.R. § 516.1, records may be maintained and preserved on microfilm or on computer, among other formats, as long as adequate projection or viewing equipment is available, the reproductions are clear and can be identified by date or pay period, and transcriptions of the information required are made available upon request.

The DOL's most important recordkeeping requirements are summarized here.

DOL RECORDS THAT APPLY TO ALL EMPLOYEES

Under 29 C.F.R. § 516.2, every employer subject to the FLSA should maintain and preserve the following records. For each employee:

1. Employee's full name (the same name used for Social Security purposes), as well as any identifying symbol or number used in place of the employee's name on timesheets or other payroll records;

2. Home address, including ZIP code;
3. Date of birth if employee is under age 19 (operators who take advantage of the special youth opportunity wage, available for certain employees under age 20, should maintain records showing these employees are age 20);
4. Sex of the employee, and the occupation in which the person is employed;
5. Time of day and day of week when employee's workweek begins; and
6. Pay-rate information: (a)regular hourly rates of pay, and hourly rates for any week when overtime is worked; (b) the basis on which wages are paid (for example, $8 per hour, $75 per day, $350 per week, $300 per week plus 5 percent commission on sales over $1,000, etc.); (c) the amount and nature of each payment that is excluded from the regular rate of pay (these records may be in the form of vouchers or other payment data); (d) hours worked each workday and total hours worked each workweek (a "workday" is any consecutive 24 hours and a "workweek" is a regularly recurring period of 168 consecutive hours) ; (e) total daily or weekly straight-time earnings or wages ; (f) total overtime earnings for the workweek ; (g) total additions to and deductions from wages paid each pay period (e.g., tip and meal credits). *Every employer making additions to or deductions from wages also must maintain in individual employee accounts a record of the dates, amounts and nature of the items which make up the total additions and deductions; (h) total wages paid each pay period; (i.) date of payment and the pay period covered by payment.*

DOL RECORDS THAT APPLY TO EXEMPT EMPLOYEES

By virtue of their salary and duties, executive/managerial, professional and administrative employees are exempt from the minimum-wage and overtime provisions of the FLSA. The DOL requires employers to maintain certain records for these "exempt" employees. 29 C.F.R. § 516.3.

For these employees, the DOL requires an employer to maintain and preserve the records specified in numbers 1 through 5 of "DOL Records That Apply to All Employees," above. In addition, the employer must maintain records of the basis upon which wages are paid in sufficient detail to permit calculation of the employee's total remuneration for each pay period, including fringe benefits. For example, this may be shown as $1,000 per month; $500 per week, plus 2% commission on gross sales, hospitalization and insurance plan A, benefit package B, two weeks' paid vacation, etc. The employer's records must also show the date of payment and the pay period covered.

DOL RECORDS ON EMPLOYEE MEALS AND LODGING

Under 29 C.F.R. § 516.27, the DOL requires that every employer who makes deductions from wages for board, lodging or other facilities (such as meals) must maintain and preserve records substantiating the cost, consistent with good accounting practices. Such records are generally required to be kept on a workweek basis.

DOL RECORDS THAT APPLY TO TIPPED EMPLOYEES

In addition to the records that the DOL requires for all employees, as outlined above, 29 C.F.R. § 516.28 mandates that the employer maintain and preserve the following records for tipped employees:

1. A symbol, letter or other notation on pay records identifying each employee whose wage is determined in part by tips ;
2. The daily, weekly or monthly amount of tips reported by the employee to the employer (this may consist of reports made by the employees to the employer on IRS Form 4070 or a similar form) ;
3. The amount per hour the employer takes as a tip credit ;
4. The hours worked each workday in any occupation in which the employee does not receive tips, and the total daily or weekly straight-time payment for such hours ; and
5. The hours worked each workday in occupations in which the employee receives tips, and the total daily or weekly straight-time earnings for such hours.

RECORDS TO SUPPORT THE TIP CREDIT

With restrictions, federal law allows an employer to take a federal tip credit against the wages paid to some tip earning employees. The amount claimed as a tip credit may never exceed the amount of tips actually received by the employee. Some states prohibit employers from taking any tip credit, or restrict the amount.

The DOL outlines recordkeeping requirements to support the taking of a federal tip credit at 29 C.F.R. § 531.50-531.60. In short, the employer is obligated to prove that the employee received tips in an amount at least equal to the tip credit claimed.

The written statements of tip income that an employee furnishes to the employer are the best and easiest way to prove the tip credit. In addition to this suggestion, DOL Wage-Hour Opinion Letter 1405 (August 1975), permits the employer to establish by observation the tipping habits in his or her establishment, e.g., 10 percent, 15 percent, etc. That percentage can then be applied to the sales attributable to the employee to determine his or her tip income. Before the employer can take a tip credit based on that estimate of tip income, the employer must show that the reported tips of another tipped employee working in a similar situation in the same establishment were at least equal to the tip credit taken. The employer also should check with the IRS on how to handle the tax consequences of using this approach.

The IRS also prescribes recordkeeping rules for businesses that employ tipped employees.

DOL RECORDS ON CHILD LABOR

Federal teen labor laws restrict hours and duties for 14- and 15-year-olds, set limits on duties for employees under age 18, and enable employers to pay a federal "youth opportunity wage" for certain workers under age 20.

Consistent with 29 C.F.R. § 570.5-570.12, an employer can avoid violating teen-labor laws and regulations by obtaining a certificate from the employee that shows he or she is the proper age to perform the work. Such a certificate should be either an unexpired age certificate that an appropriate DOL office has issued to the minor, or a DOL-approved certificate of age issued by a state. It is recommended that an employer obtain such a certificate whenever the applicant is under 18 (for duty limitations) and under 20 (for paying the federal youth opportunity wage) in order to avoid unwitting violations.

HOW LONG TO KEEP DOL WAGE AND HOUR RECORDS

Under the DOL rules, each employer must preserve wage and hour records for at least: (1) three years, (a) from the date of last entry for all payroll records; and (b) from the last effective date for all certificates, such as student certificates; (2) two years, (a.) from the date of last entry for all basic time and earnings cards or sheets showing starting and stopping times of employees, such as time cards ; (b) from the last effective date for all tables or schedules showing rates to compute wages ; (c) from the last effective date for all schedules establishing hours and days of employment of employees; and (d) records explaining wage differentials for employees of the opposite sex in the same establishment.

DOL RECORDS ON FAMILY AND MEDICAL LEAVE

The federal Family and Medical Leave Act was enacted in 1993 and amended in 2008 and 2010. The law is administered by the DOL and requires employers to maintain the following records for three years (29 C.F.R. § 825.500):

1. Basic payroll and identifying employee data, including name, address and occupation, rate or basis of pay and terms of compensation, daily and weekly hours worked per pay period, additions to or deductions from wages, and total compensation paid.
2. Dates FMLA-eligible employees take FMLA leave. All FMLA leave must be designated in records as FMLA leave. Leave designated as FMLA leave may not include leave required under state law or an employer plan that is not also covered by the FMLA.
3. The hours of the leave, if FMLA leave is taken by eligible employees in increments of less than one full day.
4. Copies of employee notices of leave furnished to the employer under FMLA if in writing, and copies of all general and specific written notices given to employees as required under FMLA. Copies may be maintained in employee personnel files.
5. Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leave.
6. Premium payments of employee benefits.
7. Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

The above records must be retained for at least three years and must be made available for inspection, copying and transcription by the DOL. The records may be maintained on microfilm or other data source as long as records are available for viewing.

OSHA RECORDS

The Occupational Safety & Health Act of 1970 (OSHA) requires most private-sector employers to keep certain records. OSHA generally exempts the following employers from recordkeeping requirements:

(1) employers with no more than 10 full- or part-time employees at any one time in the previous calendar year (29 C.F.R. § 1904.1); and (2) employers in retail trade, finance, insurance, real estate and services industries, including restaurants and bars (except for those located in hotels and other lodging places) (29 C.F.R. § 1904.2).

Employers covered by OSHA's recordkeeping rules must maintain several forms described in 29 C.F.R. § 1904.29:

1. Log of Work-Related Injuries and Illnesses (OSHA No. 300) and the Summary of Work-Related Injuries and Illnesses (OSHA No. 300-A). Employers must complete this form within seven calendar days after receiving information about a recordable injury or illness. The form explains which cases must be recorded.
2. Injury and Illness Incident Report (OSHA No. 301). This form requires additional information to be recorded for every

recordable injury or illness entered on the Log of Work-Related Injuries and Illnesses form.

Records must be maintained at each establishment for five years after the end of the calendar year in which the incident occurred. If an establishment changes ownership, the new employer must preserve the records for the remainder of the five-year period.

An employer's OSHA records are subject to inspection at any reasonable time by authorized federal or state government representatives. OSHA Form No. 300 must be made available to employees, former employees and their representatives for examination and copying by the end of the next business day after the initial request.

On May 12, 2016, OSHA issued a Final Rule amending the Recordkeeping Rule, 29 CFR Part 1904 (commonly referred to as the "Electronic Recordkeeping Rule"), to include electronic submission provisions that require employers with 250 or more employees to file their OHSA 300 Logs, OSHA 300As and OSHA 301 Incident Reports with OSHA electronically every year. 81 Fed. Reg. 29692-93 (May 12, 2016). Employers with between 20 and 249 employees classified in the "high hazard" industries will be required to submit their OSHA 300A summaries to OSHA electronically every year. Id.

Employers who are exempt from OSHA's recordkeeping requirements still are required to comply with OSHA standards, display the OSHA poster and report to OSHA within 8 hours any accident that results in one or more fatalities or the hospitalization

More than a better point-of-sale.

Get POS & **a better way to run your restaurant.**

kitchen management

tableside payments

in-person installation

no-fee reservations

mobile-optimized reports

delivery management

guest loyalty & marketing

real-time revenue tracking

more at spoton.com/arizona-news

24/7 personal support

4G back-up connection

online ordering

of 3 or more employees. Reports can be made by calling: 1-800-321-OSHA.

As noted above, restaurants and bars are exempt from OSHA's recordkeeping requirements. However, the DOL's Bureau of Labor Statistics may require certain restaurants and bars to participate in the agency's statistical survey of occupational injuries and illnesses. In that case, these restaurants and bars must maintain the Log of Work-Related Injuries and Illnesses and Summary Form referred to above.

OSHA BLOOD BORNE PATHOGEN RULE

If an employer has any employee who in the performance of his or her duties may come into contact with blood or any other potentially infectious material, such as human body fluids, under 29 C.F.R. § 1910.1020, OSHA requires that the employer keep certain records. For each employee who may be exposed to blood or other potentially infectious material, the employer must keep a medical record that includes: the employee's name and Social Security number; a copy of the employee's hepatitis B vaccination status, including dates of vaccinations; and a copy of medical testing and follow-up procedures, if any.

These medical records must be kept confidential and retained after the employee leaves his or her job.

OSHA's blood borne pathogen rule also requires employers to provide certain training to employees who may come into contact with blood or other potentially infectious materials. Employers must keep records of the training, including dates and summaries of training sessions, names and qualifications of the trainers, and the names and titles of employees who attended. These records must be kept for three years from the date of the training. These medical and training records must be made available to OSHA for inspection upon request.

STATE OSHA LAWS

Many states cooperate with OSHA in recordkeeping and reporting programs. Some states have their own safety and health laws that may impose different or additional requirements. Employers should consult their state safety and health laws concerning these requirements.

IMMIGRATION-RELATED RECORDS

Federal immigration law requires employers to complete an Employment Eligibility Verification Form (Form I-9) for all employees hired after November 6, 1986.

Employers must retain I-9 forms and make them available for inspection for three years after the employee is hired or one year after the employee leaves, whichever is later. 8 USC § 1324a(b)(3). These forms can be maintained in paper form (photocopies not acceptable), electronically, or on microfilm or microfiche.

IRS RECORDS - BUSINESS RECORDS

IRS regulations require taxpayers to record information that is relevant to the calculation and collection of federal taxes. The IRS

does not require any particular form or accounting technique for recording information, but the information must be reasonably ascertainable from the records. Various methods of storing information can be used, including microfilm, accountants' worksheets and computer systems.

The regulations require that all employers keep records sufficient to establish gross income, deductions and credits. Such records would include tax returns; proof of tax payments and other business records; and records of financial transactions, such as sales slips, invoices, receipts and canceled checks.

In addition, employers must keep any other records and data necessary to support the entries in their books and on their returns. Paid bills, canceled checks, etc., that support entries in books should be filed in an orderly fashion and kept in a safe place.

REQUIRED RECORDS ON INCOME- AND PAYROLL- TAX WITHHOLDING

IRS regulations require that employers keep the following information for each employee:

1. employee's name, address, occupation and Social Security number;
2. total amount and date of each wage payment, annuity and pension payment, tips reported, and the fair market value of in-kind wages paid, as well as the period of services covered by payment;
3. amount which constitutes wages subject to withholding;
4. amount of tax collected and if collected other than at the time payment was made, the date collected;
5. the reason total payment and taxable amount are not equal if applicable;
6. fair-market value and date of each payment of noncash remuneration for services performed as a retail-commission salesperson with respect to which no income tax is withheld;
7. beginning and ending dates of each period of absence from work for which payment was made under a wage-continuation plan and sufficient information to establish the amount and weekly rate of each payment;
8. withholding allowance certificates (Form W-4) that employees file with their employer;
9. agreement between employer and employee for withholding of additional amounts of tax if applicable; and
10. the dates in each calendar quarter on which employee performed services not in the course of employer's trade or business, and the amount of cash paid at any time for such services performed within such quarter, to the extent material to a determination of tax liability.

Employers must also keep identification numbers, duplicated copies of returns filed and dates and amounts of deposits made on deposit forms.

HOW LONG TO KEEP RECORDS ON INCOME AND PAYROLL TAX WITHHOLDING

An employer's records on tax withholding should be kept for at least four years after the date the taxes to which they relate become due, or after the date the taxes are paid, whichever is later. W-4s should be kept for as long as they are in effect and for four years thereafter.

IRS RULES FOR RETAINING RECORDS ON TIPS

IRS regulations require employees who receive tips of at least $20 in a calendar month to furnish the employer with a written statement of all tips received. Employers must retain those written statements, as well as copies of the charge receipts for charge tips, along with other wage-withholding information previously discussed in this chapter, for the period described in the section below, "How Long to Keep Business Records."

Recordkeeping rules may be slightly different for employers who have entered into a tip-reporting agreement with the IRS.

IRS regulations also require that employers who operate large food-and-beverage establishments must file annually IRS Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips. Employers must keep records sufficient to substantiate the information on such returns for three years after the due date for such returns. Such returns are due on the last day of February.

HOW LONG TO KEEP BUSINESS RECORDS

26 C.F.R. § 1.6001-1(e) requires that business records be kept as long as they are material. Below is some guidance for determining which business records to retain:

- Keep ordinary business records, such as canceled checks, credit-card and other receipts, customer checks and whatever other records are used to support income, deductions, credits and other items on the income-tax returns at least until the statute of limitations expires. Typically, the statute of limitations for an income-tax return is three years after the return is filed or the due date of the return, whichever is later. After assessment, the IRS has six years to begin a collection proceeding. The taxpayer has three years to claim a refund after filing a return (except that he or she may claim a refund of payments within two years after payment). Thus, in some cases, it would be wise to keep records for as long as 11 years — the maximum period in which assessment, collection and claim for refund can be made.
- Net operating losses can generally be carried back for 2 years and carried forward for 15 years. (Note: To help businesses combat the recession, Congress in 2009 passed laws to allow businesses to carry net operating losses from 2008 or 2009 back for five years. Visit the IRS's website for details.) Therefore, businesses should retain all related records until the losses are used or until the 15-year period expires, plus the three-year statute of limitations.
- Keep all individual retirement account and other retirement-plan records indefinitely.

- Keep records and documents of any losses in investments, such as real property and stocks, until the asset is sold, plus the three-year statute of limitations.

Many states have statutes of limitations for business records that vary from the federal statute of limitations. The National Restaurant Association recommends that operators check with their accountant or tax advisor about these state requirements.

IRS ACCESS TO YOUR RECORDS

The IRS has the right to examine business books and records to ascertain the correctness of a return and to determine or collect a tax liability. The IRS also has the right to inspect withholding-tax records. Employers who use an automated accounting system should set it up so records can be available when the IRS requests them.

EQUAL EMPLOYMENT OPPORTUNITY RECORDS & THE EEO-1 FORM

On or before September 30 each year, the U.S. Equal Employment Opportunity Commission (EEOC) requires employers of 100 or more employees (excluding state and local governments, schools, Indian tribes, and tax-exempt private membership clubs other than labor organizations) to file an Employer Information Report (EEO-1). The EEO-1 helps the EEOC gather data on the race, sex and ethnicity of employees in specified job categories.

The employer must retain the EEO-1 indefinitely and make it available for inspection by the EEOC at each reporting unit or at company or division headquarters. Employers face fines or imprisonment under 18 U.S.C. § 1001 for making willfully false statements on the EEO-1. Employers may apply to the EEOC for an exemption if they believe that preparing and filing the EEO-1 would create undue hardship.

TITLE VII AND AMERICANS WITH DISABILITIES ACT

For purposes of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 (ADA), under 29 C.F.R. § 1602.14, the EEOC requires employers to keep certain personnel or employment records for one year after the record is made or the personnel action taken, whichever is later. Examples of records that must be retained include requests for reasonable accommodation under the ADA, job applications, and other records of hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training.

Where a charge of discrimination has been filed or an action against the employer, the employer must preserve all personnel records relating to the charge or action until the final disposition of the case.

AGE DISCRIMINATION IN EMPLOYMENT ACT

29 C.F.R. § 1627.3, relating to the federal Age Discrimination in Employment Act of 1967, requires that employers retain:

- For at least three years, payroll and other records for each employee that contain the employee's name, address, date of birth, occupation, rate of pay and weekly compensation;

- For at least one year from the date of the personnel action taken, all personnel and employment records, including job applications, resumes, replies to job ads, and documents relating to promotions, discharge, selection for training, transfer and demotions, etc; and
- For at least one year after an employee program's termination (e.g., benefit plans, pension plans or insurance plans), records on all such plans, including the written plan documentation or a fully outlined memorandum detailing the terms of the plan.

EMPLOYEE RETIREMENT INCOME SECURITY ACT

The Employee Retirement Income Security Act (ERISA) requires employers to:

- Retain for at least six years from the end of the employer's accounting period, records providing the basis for all required plan descriptions or reports, as well as records necessary to certify information (including vouchers, receipts, etc.); and
- Retain for as long as relevant, records for each employee-participant in the plan pertaining to the determination of benefits that are due or might become due.

COBRA

The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) requires certain employers to allow eligible former employees and beneficiaries to continue buying into company health plans. COBRA does not contain specific recordkeeping requirements. However, employers must be able to show compliance in case a covered beneficiary asserts a violation of his or her COBRA rights. Proper documentation that employers should keep to defend against such claims includes:

- A list of covered employees and records of terminations, reductions in hours, leaves or deaths;
- Information on covered employees' Medicare eligibility and disability status;
- Names of retirees covered by the employer's group health plan;
- Employees' or beneficiaries' acknowledgement of receipt of a notice of COBRA rights from the employer;
- Records of COBRA premiums paid by employees, and the method used to calculate these premiums;
- Information on any changes to the group health plan ; and
- Names of employees who have been denied COBRA coverage, including the reasons for the denial.

REQUIRED POSTERS

Within the DOL, multiple agencies require businesses to post notices. The DOL offers several all-in-one guides to poster requirements for all the laws the agency enforces:

- Workplace Poster Requirements, DOL, Office of Small Business Programs;
- Posters, DOL, Office of Compliance Assistance Policy; or
- First Step Poster Advisor, DOL e-Laws.

Or you can visit individual DOL agencies for individual posters:

- DOL regulations (29 C.F.R. § 516.4) require that every employer employing any employees subject to the FLSA shall post in a conspicuous place a notice explaining the FLSA;
- OSHA regulations (29 C.F.R. § 1903.2(a)(1)) require that every private employer post in a conspicuous place a notice informing employees of the protections and obligations under OSHA;
- Polygraph restrictions: DOL regulations (29 C.F.R. § 801.6) require that every employer post in a prominent and conspicuous place a notice explaining the Employee Polygraph Protection Act of 1988;
- DOL regulations (29 C.F.R. § 825.300) require that every employer subject to the Family and Medical Leave Act post in a conspicuous place a notice explaining this federal leave law; and
- In addition to these posters, 29 C.F.R. § 519.6 requires that every employer employing full-time students at a special subminimum rate post the certificate issued by the DOL in a conspicuous place.

Visit the DOL's site for information on the subminimum wage.

In addition to the DOL requirements, EEOC regulations (29 C.F.R. § 1601.30) require that every employer subject to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 post in a conspicuous place a notice relating to discrimination prohibited by such laws.

The Arizona Restaurant Association offers an all-in-one poster at a discount to Association members that combines all federal and state posters.

STATE LAWS

State laws may require that additional records be kept or additional posters posted. Visit your state government's website for details, or contact your state restaurant association.

Required posters for the State of Arizona are available at **http://www.hr.az.gov/PolicyLegislativeAffairs/PLS_Required_Posters.asp.**

RESOURCES

Internal Revenue Service, "How Long Should I Keep Records?"

Internal Revenue Service, "Employer's Tax Guide" for use in 2014

Internal Revenue Service, Tax Topics, Recordkeeping

Internal Revenue Service, Recordkeeping

U.S. Department of Labor, eLaws, Recordkeeping

OSHA's Recordkeeping Handbook

An Employer's Guide to Group Health Continuation Coverage Under COBRA

THE BASIC RULE

REST BREAKS

MEAL PERIODS

NURSING BREAKS

HOLIDAYS, VACATIONS AND ILLNESS

WAITING TIME, ON-CALL TIME, SPLIT SHIFTS AND ROUNDING

EMPLOYER-PROVIDED LODGING

CLOTHES CHANGING AND OTHER PREPARATORY AND CONCLUDING ACTIVITIES

MEETINGS AND TRAINING

TRAVEL

MEDICAL ATTENTION

CIVIC WORK

RESOURCES

THE BASIC RULE

Calculating an hourly employee’s pay means knowing how many hours the employee worked. That is not always as simple as it sounds. In general, “hours worked” under the Fair Labor Standards Act (FLSA) includes work if it is controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. Hours worked also includes time an employee is permitted to, even if the employer does not request that such work be performed.

For example, an employee may voluntarily continue working at the end of a shift. He or she may want to finish an assigned task, correct errors or prepare reports. Regardless of the reason the employee continues to work, the employee is working and must be compensated for this time. This applies even to work that an hourly employee performs away from the employer’s premises or the job site, including work performed at home.

The employer has the right to exercise control and to ensure that the work is not performed if the employer does not want it to be performed. If the employer does not exercise such control, the employer is required, by law, to pay the employee for the time spent performing the work. An employer cannot permit an employee to work without compensation even if the employee indicates he or she will do the work for no pay. Merely declaring a rule against such work is not enough. The employer has the power to enforce the rule and must make every effort to do so.

REST BREAKS

The FLSA does not require employers to give employees a general rest break or meal period, but many restaurant operators provide it anyway. Note: Some states may require breaks after a certain number of hours worked. For more information on break or rest period requirements under state laws, see **www.dol.gov/whd/state/rest.htm**. Whether employees are required to be paid for break times under federal law depends on two factors: how much time the employee has for the break, and whether the employee is relieved from work duties during that time. If rest breaks are brief , a coffee break or a similar rest break running 20 minutes or less, for example, the time must be counted as hours worked. 29 C.F.R. § 785.18.

MEAL PERIODS

The employer is not required to pay employees for a bona fide meal period during the scheduled work day. Ordinarily, the DOL considers lunch breaks of 30 minutes or more to be bona fide meal periods, provided that the employee is relieved of all duties and is free to leave his/her duty post.

There may be separate meal period requirements under various state laws, which can be found at **www.dol.gov/whd/state/meal.htm.**

NURSING BREAKS

The FLSA requires employers to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk. Employers are also required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

HOLIDAYS, VACATIONS AND ILLNESS

Nothing in the FLSA requires an employer to pay non-exempt employees for hours not worked because of holidays, vacations, illness, lack of work or other similar reasons. Whether or not there is payment for such time is a matter of policy by the employer. State laws, however, may require such payments. Check with your state restaurant association or state labor department.

WAITING TIME, ON-CALL TIME, SPLIT SHIFTS AND ROUNDING

Employees must be compensated for all hours worked, even if there are times that the employee is waiting. Whether waiting time must be paid requires a case-by-case analysis. If an employee is required to wait while on duty or while performing his/her primary duty, it is considered working time.

Refraining from other activity often is an important factor in determining compensability. An employee need not be compensated for waiting time if: (1) the employee is completely relieved from duty and allowed to leave the job, or (2) the employee is relieved until a specified time and the relief period is long enough

for the employee to use the time as he or she sees fit. See 29 C.F.R. § 785.16.

Time spent by employees who are not required to remain on the employer's premises and are free to engage in their own pursuits — subject only to the understanding that they leave word at their home or with the employer as to where they may be reached — is generally not considered working time.

An employee who has substantial time off in the middle of the workday (split shifts) — long enough to use effectively as he or she wishes — and who understands he or she does not have to return to work until a specified time would not be considered as working during this period. This is in contrast to the employee who is waiting for work or who is required to wait. Some state laws have special requirements that govern payment for split shifts.

An employer does not have to pay employees who wait before starting their duties because they arrive earlier than their required starting time. However, if an employee reports at the required time and then waits because there is no work to be done, the waiting time is generally considered compensable as of the normal starting time. Also, if the employee does work while waiting to officially start, this time is compensable.

An employer is allowed to "round" an employee's starting and stopping times when they punch in and out on a time clock. The DOL has taken the position that it will allow employers to round an employee's starting and stopping time "to the nearest 5 minutes, or to the nearest one tenth or quarter of an hour." 29 C.F.R. § 785.48.

To use the rounding concept, however, the employer must ensure that its practice "will not result in, over a period of time, any failure to compensate employees properly for all time they actually worked." This means the rounding cannot just benefit the employer.

Example: Say an employee scheduled for an 8 a.m. start time punches in at 7:51 a.m. The employer typically rounds punch-in and punch-out times to the nearest quarter hour. In this case, the employer must round the time back to 7:45 a.m., thus paying for this time even though the employee did not actually work the six minutes between 7:45 a.m. and 7:51 a.m. Conversely, if the employee punches out at 4:07 p.m. for a shift that was to have ended at 4 p.m., the employer may under this practice round the employee's time to 4 p.m. and not pay the employee for the additional seven minutes. Because this employer practice of rounding is essentially a "wash," it is permissible.

EMPLOYER-PROVIDED LODGING

An employee who resides on the employer's premises on a permanent basis for extended periods of time is not considered to be working all the time he or she is on those premises. Ordinarily, the employee may engage in normal, private pursuits and thus have enough time for eating, sleeping, entertaining and other periods of complete freedom during which he or she may leave the premises to tend to personal matters. It is difficult, of course, to determine the exact hours worked under these circumstances; any reasonable agreement between the parties, taking into consideration all pertinent facts, will be accepted.

CLOTHES CHANGING AND OTHER PREPARATORY AND CONCLUDING ACTIVITIES

Where clothes changing or cleaning up are indispensable to the performance of the employee's job or are required by the rules of the employer, the time spent in such activities on the employer's premises — both at the beginning and the end of the workday — would be an integral part of the employee's activity. In the usual case, this time must be counted as hours worked. (There is an exception to this rule for employees who operate under collective bargaining agreements that specifically exclude time spent changing clothes, washing, or similar practices from compensable time.)

Employees are not considered to be working while dressing at home even though the uniforms they put on are required for work. Similarly, any clothes changing an employee does at home at the day's end is not an integral part of his or her employment, and is, therefore, not regarded as working time.

MEETINGS AND TRAINING

Attendance at lectures, meetings, training programs and similar activities does not have to be counted as working time if: (1) attendance is outside of the employee's regular hours ; (2) attendance is, in fact, voluntary; (3) the course, lecture or meeting is not directly related to the employee's job; and (4) the employee does not perform any productive work during such attendance periods. 29 C.F.R. § 785.

Attendance is not considered voluntary, of course, if it is required by the employer. Nor is it voluntary if employees are given reason to believe their employment status would be adversely affected if they do not attend.

Training is considered to be directly related to the employee's job when the training is designed to enable the employee to handle his or her job more effectively. Training is not considered "directly related" if it trains the employee for another job or for a new or additional skill. Time spent in such training, whether the training is required by the employer or conducted under the employer's supervision, constitutes hours worked.

However, when an employee on his or her own initiative attends on-line training or trade sessions after hours, the time does not constitute hours worked for the employer under certain conditions. This holds true even if the courses are job-related and the employer is paying the tuition.

In letter 2006-5, dated March 3, 2006, the DOL found that certain restaurant employees who spent time outside of work voluntarily studying English to increase their proficiency did not need to receive compensation for the off-duty study time. In this situation, the employees' jobs did not require language proficiency, even though English proficiency would enhance their job opportunities and improve workplace morale. The DOL based its ruling on the fact that attendance was outside regular working hours; attendance was voluntary; the training was "general in scope" and designed to boost employees' English skills; the training did not make the employees handle their jobs more efficiently; and the employees did no productive work during the training time.

When an employee is required to attend a staff meeting, the time spent in that meeting counts as working time and the employee must be compensated.

TRAVEL

Ordinary home-to-work travel is a normal incident of employment and is not compensable. This holds true whether the employee works at a fixed location or at various job sites. Time spent by an employee in travel as part of the job's principal activity, such as travel from job site to job site during the workday, however, must be counted as hours worked.

When an employee is required to report at a meeting place to receive instructions or to perform other work, the travel between the meeting place and the work site is part of the day's work. It must be counted as hours worked regardless of contract, custom or practice. For example, if an employee who normally finishes his on-premises work at 5 p.m. is sent to another job and works until 8 p.m., and then is required to return to the employer's premises, arriving at 9 p.m., then all of the that time is working time and must be compensated. However, if the employee goes home instead of returning to the employer's premises, the travel after 8 p.m. is work-to-home travel and is not considered hours worked.

MEDICAL ATTENTION

Time spent by an employee waiting for and receiving medical attention on the premises at the employer's direction during normal working hours on days when he or she is working constitutes hours worked.

CIVIC WORK

Time spent working for public or charitable purposes at the employer's request or under the employer's direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's working hours does not constitute hours worked.

RESOURCES

U.S. Department of Labor, eLaws, FLSA Hours Worked Advisor

WORKERS' COMPENSATION

OVERVIEW

WORKERS' COMPENSATION AS THE SOLE REMEDY

EXCEPTIONS TO THE SOLE REMEDY

NOTICE OF INJURY

TIMELINES

OVERVIEW

The people of Arizona amended the Arizona Constitution in 1925 creating the Industrial Commission of Arizona (ICA) and the modern workers' compensation no-fault structure. All employers must either purchase workers' compensation insurance or be approved by the ICA to be self-insured individually or through a group. It is a felony for an employer not to have workers' compensation insurance or be an approved self-insurer no matter the number of employees. All workers are presumed to be covered by workers' compensation insurance.

WORKERS' COMPENSATION AS THE SOLE REMEDY

It is a fundamental workers' compensation concept that industry should bear the cost of work-related injuries and deaths. In support of this goal, workers' compensation provides for a no-fault system by which an injured employee, or the heirs of a deceased employee, would not sue the employer or the co-employee in tort, but, rather, file a claim for the appropriate benefits. Workers' compensation benefits would, in turn, be provided by the employer's insurance carrier or the employer if it were self-insured. The result of this is that workers' compensation is the sole remedy for workplace injuries or deaths, subject to certain exceptions.

EXCEPTIONS TO THE SOLE REMEDY

There are four exceptions to workers' compensation being the sole remedy for workplace injuries.

1. The worker has rejected workers' compensation coverage (the worker must do this prior to injury).
2. The employer has no coverage for the worker. In this situation, the worker has the election of filing a tort claim or a No Insurance claim with the ICA's special fund.
3. The employer intentionally injured the worker with the direct object of causing the injury suffered.
4. The employer failed to post notification of workers' compensation coverage and to maintain rejection slips at the workplace. This is construed to mean that the worker did not know that he/she had the right to reject coverage. Therefore, employers need to provide postings in the workplace regarding evidence of workers' compensation coverage and provide rejection slips to avoid tort liability.

NOTICE OF INJURY

Immediately upon notice of an industrial injury, an employer is required to provide certain information to the injured worker who reports the injury. This information includes the name and address of the employer's workers' compensation insurance carrier and the policy number, and the date of expiration of coverage. An employer is also required to notify its workers' compensation insurance carrier and the ICA within ten days after receiving notification of a work

related injury or disease using the Employer's Report of Industrial Injury form.

TIMELINES

There are several timelines with respect to workers' compensation claims. According to the traditional "statute of limitations" timeline, workers' compensation claims must be filed within one year of the accident or injury, subject to certain limited exceptions. These exceptions include: insanity, incapacity, and justifiable reliance upon misrepresentations. Another timeline deals with reporting the injury. A worker must report an injury on the job "forthwith" to the employer. There are lifetime rights to reopen closed claims and rearrange unscheduled permanent disability benefits.

EMPLOYEE MEALS

OVERVIEW

THE MEAL CREDIT

CALCULATING THE "REASONABLE COST" OF AN EMPLOYEE MEAL

EMPLOYEES NOT REQUIRED TO VOLUNTARILY PARTICIPATE

STATE LAWS ON MEAL CREDITS

EMPLOYEE MEALS AS A NON-TAXABLE FRINGE BENEFIT

MEALS PROVIDED FOR THE EMPLOYER'S CONVENIENCE

DISCOUNTS ON EMPLOYEE MEALS

EMPLOYER-OPERATED EATING FACILITIES

NONDISCRIMINATION REQUIREMENTS

OVERVIEW

Many restaurants provide meals for their employees, which triggers some common legal concerns. Can employers reduce an employee's cash wage to reflect part of the cost of the meal? Do employees owe federal income taxes on the value of employer-provided meals?

THE MEAL CREDIT

Under certain conditions, federal minimum wage law allows employers who provide meals to employees to take a "meal credit" for the reasonable value of the meals and reduce employees' cash wages accordingly. The meal credit is in addition to any tip credit the employer is permitted to take.

Specifically, an employer who customarily furnishes meals or lodging to employees may reduce the cash wages paid to those employees in an amount equal to the reasonable cost of the meals or lodging as determined by the Department of Labor.

The employer's right to the meal credit is authorized by a provision in Section 3(m) of the Fair Labor Standards Act (FLSA): "'Wage' paid to any employee includes the reasonable cost … to the employer of furnishing such employee with board, lodging, or other facilities if such board, lodging or other facilities are customarily furnished by such employer to … employees[.]" 29 U.S.C. § 203(m).

Most restaurants that take a meal credit do so by deducting a small amount from employees' wages on an hourly basis.

Employers must maintain records to substantiate the costs of furnishing meal credits as a benefit under Section 203(m). 29 C.F.R. § 516.27(a).

Example: If an employer furnishes an employee with a meal, and the reasonable cost of that meal to the employer is $2.40, the employer may deduct the cost of that meal at the rate of $.30 per hour for an eight-hour day ($2.40 divided over eight hours). Similarly, if the reasonable cost of a specially prepared meal furnished to employees is $1.20, $.15 may be deducted for each hour of an eight-hour shift.

Example: If the reasonable cost of meals furnished to employees is 50 percent of the menu price, and an employer informs an employee that he or she may order $4 worth of food from the menu, the employer may take a total meal credit of $2 (50 percent of the menu price), and deduct from the cash wages of each employee $.25 for each hour of an eight-hour shift.

CALCULATING THE "REASONABLE COST" OF AN EMPLOYEE MEAL

Employers can take a meal credit for the "reasonable cost" of an employee meal. This reasonable cost includes only the actual cost to the employer of the food, its preparation and related supplies, under DOL regulations. 29 C.F.R. § 531.3. Reasonable cost does not include costs that would have been incurred regardless of whether employees were furnished meals, the DOL noted in a 1997 opinion letter. Reasonable cost includes salary and wage costs only to the extent that these costs are directly attributable to the cost of

providing meals to employees. For example, if an employer paid food-preparation/serving employees the same rate of pay even if meals were not provided to employees, wage costs cannot be included in determining the "reasonable cost" of employee meals. Conversely, if an operator had to hire extra people or pay higher wages to existing employees to furnish meals to employees, this extra expense would be a legitimate cost that could be included in determining the reasonable cost of meals.

EMPLOYEES NOT REQUIRED TO VOLUNTARILY PARTICIPATE

The 11th Circuit Court of Appeals ruled in 1983 that as long as meals are "regularly provided" to employees, employers are entitled to take a meal credit under Section 3(m) of the FLSA — even if meals are not "voluntarily accepted" by the employee. The court said employers can reduce cash wages paid to employees for the cost of "regularly provided" meals even if employees are not able to choose cash instead of a meal credit. See Davis Brothers, Inc. v. Donovan, 700 F.2d 1368 (11th Cir. 1983). Other courts have reached the same conclusion. See, e.g., Donovan v. Miller Properties, Inc., 711 F.2d 49 (5th Cir. 1983).

The Davis Brothers case effectively overturned DOL regulations at 29 C.F.R. § 531.30 that said employees were required to voluntarily participate in a meal plan in order for an employer to claim a meal credit.

The DOL confirmed in an opinion letter to the National Restaurant Association in 1997 that the agency no longer enforced the voluntary participation requirement. In July 2008, the DOL proposed a formal update to § 531.30 to clarify that employers can take a meal credit even if employees do not voluntarily accept the meal.

STATE LAWS ON MEAL CREDITS

Many states have laws on meal credits. Some states permit employers to take a meal credit only if the meal is actually consumed. In those states, a cash register receipt or similar documentation is necessary to substantiate the value of the each meal and prove that the meals have actually been consumed.

Other states prohibit or limit meal credits beyond what federal law allows. Employers must follow whichever law — state or federal — is more favorable to the employee. Employers should consult state law for the amount of meal credit permitted.

EMPLOYEE MEALS AS A NON-TAXABLE FRINGE BENEFIT

While employees' gross income under federal tax law generally includes the value of fringe benefits paid or given to employees (26 U.S.C. § 61(a)(1)), certain fringe benefits are not considered taxable income to the employee under federal law. Certain free or discounted employee meals are included, such as:

- Meals provided to employees for the employer's convenience;
- Meal discounts for employees; and
- Meals provided in company cafeterias or other employer-operated eating facilities.

MEALS PROVIDED FOR THE EMPLOYER'S CONVENIENCE

Federal law does not consider meals provided to employees by an employer for the employer's convenience as a taxable fringe benefit. Specifically, IRS regulations at 26 C.F.R. § 1.119-1(a) provide that the value of meals furnished to an employee by the employer shall be excluded from the employee's gross income if the meals are furnished on the business premises of the employer and for the convenience of the employer.

The IRS defines meals provided "for the convenience of the employer" as meals provided for a substantial noncompensatory business reason. Under tax law, this specifically includes:

- Meals furnished to a foodservice employee immediately before, during or immediately after an employee's working hours, for each meal period during which the employee works (26 C.F.R. § 1.119-1(d)); and
- Meals furnished without charge to an employee who is required to occupy living quarters on the business premises of the employer. 26 C.F.R. § 1.119(a)(2).

Because employees are not required to pay federal income taxes on these meals, the value of the meals is excludable from wages subject to federal income tax withholding. The value of these meals is also excludable from FICA and FUTA payroll taxes. Rowan Companies, Inc. v. U.S., 101 S. Ct. 2288 (1981).

However, in some states, such as California, the value of such meals is included in the employee's state gross income for state unemployment and other state tax purposes. The National Restaurant Association recommends contacting your state revenue department to determine if the value of such meals is included in state gross income.

Note: If an employer furnishes meals to employees for some reason other than the employer's convenience, IRS Rev. Rul. 68-321 explains how to value these meals so they can be included in wages for federal employment tax purposes.

DISCOUNTS ON EMPLOYEE MEALS

Employers who offer meal discounts to employees can exclude the value of the discount from the employee's gross income if the discount does not exceed the gross profit the employer receives on the meal, based on the prices charged to customers. 26 U.S.C. § 132(c)(1)(A). For example, if the employer's gross-profit percentage on a meal is 60 percent, the employee's nontaxable discount cannot exceed 60 percent. If the employer's gross profit on a meal is $6, the employee's nontaxable discount cannot exceed $6.

EMPLOYER-OPERATED EATING FACILITIES

Employers who provide a company cafeteria or other dining facility for employees can exclude the value of the meals from employees' gross income if the facility's annual revenues are enough to

cover the facility's direct operating costs and if all the following requirements are met:

- the facility must be owned or leased by the employer
- the facility must be operated by the employer or by a third party under contract with the employer
- the facility must be located on or near the employer's business premises
- the meals (which include food, beverages and related services) must be provided during, or immediately before or after, the employee's workday. 26 C.F.R. § 1.132-7.

NONDISCRIMINATION REQUIREMENTS

In order to exclude from an employee's taxable income the value of meals sold to employees at a discount or the value of meals provided for employees through an employer-operated eating facility, IRS regulations codified at 26 C.F.R. § 1.132-8 provide that these meal benefits must be available on substantially the same terms to all employees.

The benefits may not discriminate in favor of highly compensated employees, generally defined as the top earners in a company. When benefits favor highly compensated employees, the entire value of the benefit must be included in those employees taxable income.

IMMIGRATION

OVERVIEW
EMPLOYER OBLIGATIONS: THE BASICS
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WHEN YOU HIRE NEW EMPLOYEES
WHEN WORK AUTHORIZATION EXPIRES FOR CURRENT EMPLOYEES
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HIRING VIOLATIONS
PAPERWORK VIOLATIONS
DISCRIMINATION VIOLATIONS
STATE IMMIGRATION LAWS
EMPLOYMENT VISAS
ARIZONA IMMIGRATION LAWS – "LAWA" AND SB1070

OVERVIEW

Federal immigration law touches every employer. The law makes it illegal to knowingly hire or continue to employ any person unauthorized to work in the United States; requires employers to complete paperwork to verify an employee's employment eligibility, and prohibits discrimination based on national origin or citizenship status.

EMPLOYER OBLIGATIONS: THE BASICS

The federal Immigration and Nationality Act, codified at 8 U.S.C. §§ 1324a-1324b, makes it unlawful for any employer to:

- Knowingly hire an individual not authorized to work in the United States. This includes situations where an employer actually knows a person is an unauthorized alien as well as situations where any person exercising reasonable care should have known from facts and circumstances that a worker was unauthorized to work in the United States (referred to as "constructive knowledge");
- Hire any person without complying with the law's employment-verification and recordkeeping requirements; and/or
- Continue to employ a worker knowing the person is or has become an unauthorized worker under immigration requirements.

An unauthorized alien is someone who is not authorized to work in the United States. The Immigration and Nationality Act also makes it

unlawful for an employer to discriminate against a person because of his or her national origin or citizenship status.

THE I-9 PROCESS

All employers are required to verify the employment eligibility of and complete a **Form I-9** (Employment Eligibility Verification Form) for every employee hired after Nov. 6, 1986. Employers who show good-faith compliance with the employment-verification requirements establish a defense that they have not knowingly hired an unauthorized alien. 8 C.F.R. § 274a.4.

The most current version of the Form I-9 was released on October 21,, 2019. Employers must use the latest I-9

- For all new hires; and
- To re-verify the work eligibility of existing employees when applicable (see below).

WHEN YOU HIRE NEW EMPLOYEES

Employers go through two steps when a new employee is hired. First, the employee provides and verifies personal identity information and work authorization documents. Then the employer reviews and verifies the employee's documentation to ensure that the employee is authorized to work in the United States. The USCIS Handbook for Employers (Form M-274) and the Instructions for Completing Form I-9 offer detailed instructions, but here is a general overview:

Employee Information and Verification (Section 1 of the I-9)

All new employees must fill out the correct information in Section 1 of the I-9, and sign and date the form. This must be completed no later than the time of hire (defined as the first day of paid employment). Employees must check a box in Section 1 indicating they are authorized to work in the United States.

Employees can get help from a translator to complete Section 1. In these cases the translator reads the form to the employee and helps the employee complete, sign and date Section 1. The preparer then completes the "Preparer/Translator Certification" on the I-9.

The I-9 is available in Spanish, but only as a translation guide, unless it is being used in Puerto Rico.)

Employees are not required to furnish a Social Security number for Section 1 of the I-9. The only employees required to furnish a Social Security number are those whose employers participate in the federal E-Verify program.

USCIS updated the M-274 Handbook for Employers on November 24, 2020. The Handbook is available for download on the USCIS website at **https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274** or by calling (800) 375-5283. The updated M-274 Handbook for Employers re-emphasizes many items, such as the following:

- Providing a Social Security number on Form I-9 is voluntary for all employees unless you are an employer participating in the USCIS E-Verify program. Providing an e-mail address or telephone number is voluntary.

- Ensure that the employee completes Section 1 of Form I-9 at the time of hire. “Hire” means when employment in exchange for wages or other remuneration begins. The time of hire is noted on the form as the first day of employment. Employees may complete Section 1 of Form I-9 before the time of hire, but no earlier than acceptance of the job offer. Review the employee’s document(s) and fully complete Section 2 of Form I-9 within three business days of the hire. For example, if the employee begins employment on Monday, you must complete Section 2 by Thursday.
- The employee must present to you an original document or documents that show his or her identity and employment authorization within three business days of the date employment begins. For example, if the employee begins employment on Monday, you must complete Section 2 by Thursday. Some documents show both identity and employment authorization (List A). Other documents show identity only (List B) or employment authorization only (List C). The employee must be allowed to choose which document(s) he or she wants to present from the Lists of Acceptable Documents. These lists appear in Part Eight and on the last page of Form I-9.

The following helpful tips appeared in the most recent version of handbook. As these issues continue to appear frequently, they are included here for easy reference:

1. Do citizens and noncitizen nationals of the United States need to complete Form I-9?

Yes. While citizens and noncitizen nationals of the United States are automatically eligible for employment, they too must present the required documents and complete Form I-9, Employment Eligibility Verification. U.S. citizens include persons born in the United States, Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands. U.S. noncitizen nationals are persons who owe permanent allegiance to the United States, which include those born in American Samoa, including Swains Island. Citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) are not noncitizen nationals, however they are eligible to work in the United States.

2. Do I need to complete Form I-9 for independent contractors or their employees?

No. For example, if you contract with a construction company to perform renovations on your building, you do not have to complete Form I-9 for that company’s employees. The construction company is responsible for completing Form I-9 for its own employees. However, you may not use a contract, subcontract, or exchange to obtain the labor or services of an employee you know is unauthorized to work.

3. What happens if I properly complete and retain a Form I-9 and DHS discovers that my employee is not actually authorized to work?

You cannot be charged with a verification violation. You will also have a good faith defense against the imposition of employer

sanctions penalties for knowingly hiring an unauthorized individual, unless the government can show you had knowledge of the employee's unauthorized status.

4. Can I ask an employee to show a specific document when completing Form I-9??

No. The employee may choose which document(s) they present from the Lists of Acceptable Documents. You must accept any document (from List A) or combination of documents (one from List B and one from List C) listed on Form I-9 and found in Section 12.0 that reasonably appear to be genuine and to relate to the person presenting them. To do otherwise could be an unfair immigration-related employment practice that violates the anti-discrimination provision in the INA. You must not treat individuals who look and/or sound foreign differently in the recruiting, hiring, or verification process.

For more information about discrimination during the Form I-9 process, contact IER's employer hotline at 800-255-8155 (TTY for the deaf or hard of hearing: 800-237-2515) or visit their website at **justice.gov/ier.**

Note: Employers who participate in E-Verify can only accept a List B document if it contains a photograph.

5. What is my responsibility concerning the authenticity of document(s) an employee presents to me?

You must physically examine the original document(s), and if they reasonably appear to be genuine and to relate to the person presenting them, you must accept them. To do otherwise could be an unfair immigration-related employment practice. If the document(s) do not reasonably appear to be genuine or to relate to the person presenting them, you must not accept them.

However, you must provide the employee with an opportunity to present other documents from the Lists of Acceptable Documents.

6. May I accept a copy of a document from an employee?

No. Employees must present original documents. The only exception is that an employee may present a certified copy of a birth certificate.

7. When can employees present receipts for documents in place of actual documents from the Lists of Acceptable Documents?

The "receipt rule" is designed to cover situations in which an employee is authorized to work at the time of initial hire or reverification, but does not have the actual document listed on the Lists of Acceptable Documents. You cannot accept a receipt showing the employee has applied for an initial grant of employment authorization. See Section 4.3, Acceptable Receipts, for more information.

8. My new employee presented two documents to complete Form I-9, each containing a different last name. One document matches the name she entered in Section 1. The employee explained that she had just gotten married and

changed her last name, but had not yet changed the name on the other document. Can I accept the document with the different name?

You may accept a document with a different name than the name entered in Section 1 as long as the document reasonably relates to the employee. You also may attach a brief memo to the employee's Form I-9 stating the reason for the name discrepancy, along with any supporting documentation she provides. An employee may provide documentation to support a name change, but is not required to do so. If you determine the document containing a different name does not reasonably appear to be genuine and to relate to the employee, you may ask her to provide other documents from the Lists of Acceptable Documents on Form I-9.

9. The name on the document my employee presented to me is spelled slightly differently than the name they entered in Section 1 of Form I-9. Can I accept this document?

If the document contains a slight spelling variation, and the employee has a reasonable explanation for the variation, the document is acceptable as long as you are satisfied that the document otherwise reasonably appears to be genuine and to relate to the employee.

10. My employee's EAD expired and now they want to show me a Social Security card. Do I need to see a current DHS document?

No. During reverification, you must allow an employee to choose what document to present from either List A or List C. If the employee present an unrestricted Social Security card, the employee does not also need to present a current DHS document. However, if the employee present a restricted Social Security card, you must reject it since it is not an acceptable Form I-9 document and ask the employee to choose a different document from List A or C.

EMPLOYER REVIEW AND VERIFICATION (SECTION 2 OF THE I-9)

As the second step in the I-9 process, the employer asks the new employee to present original documents to establish identity and work eligibility. These documents must be presented within three business days of the date the employee starts work, as stated above. (See below for what to do if employees cannot present documents within three days.)

Employees can present either a single "List A" document for I-9 purposes (proving both identity and employment authorization) or a combination of one document from List B (proving identity) and one document from List C (proving employment authorization). The USCIS Employer Handbook outlines acceptable List A, B and C documents and provides photos of many of them. Employees can choose to present any documents that the law authorizes. An employer may not specify which documents an employee should present, and may not request more or different documents than the employee provides if the documents provided are authorized by law.

Although an employer is not required to be a document expert who may readily spot a fraudulent document, an employer must exercise reasonable care to examine each document an employee has presented to determine that it relates to the employee and reasonably appears to be genuine. An employer must also complete, sign and date Section 2 of the I-9, being careful to record the title, issuing authority, number and expiration date, if any, of the documents that were presented.

Federal law permits but does not require the employer to copy the document or documents examined for I-9 purposes (contrast with E-Verify, which requires copies to be made of employees' EAD cards (Form I-766) and Permanent Resident Cards (Form I-551). Photocopying does not relieve the employer of the obligation to complete Section 2 of the I-9. Employers who choose to photocopy documents must do so consistently for each employee. If an employee is unable to present the required document or documents within three business days of the date the employee starts work, all of the following are required:

- Within three business days, the employee must show the employer receipts indicating he or she has applied for the required replacement documents. The employee must check the box in Section 1 indicating he or she is eligible to be employed in the United States;
- The employer must record the document title in Section 2 and write the word "receipt" and any document number in the "Document" space; and
- The employee must present the actual documents within 90 days after the employee begins work. At that time the employer should cross out the word "receipt" and any document number, insert the number of the actual document, and initial and date the change.

Special cases:

Person hired for fewer than three days: If a person is hired for fewer than three business days, Sections 1 and 2 of the I-9 must be completed when the employee begins work. A receipt for the required replacement document or documents is not acceptable.

Person referred by state employment agency: The employer does not need to comply with the above requirements if the prospective employee is referred by a state employment agency, as long as the agency certifies it has complied with the requirements. The employer must keep this certificate from the state employment agency for three years after the employee begins work or one year after the employee's employment terminates, whichever is later.

WHEN WORK AUTHORIZATION EXPIRES FOR CURRENT EMPLOYEES

An employer may not continue to employ any worker whose work authorization has expired, unless the individual is a lawful permanent resident. Even though the green card of a lawful permanent resident may expire, that individual's work authorization does not expire with the card. Employers are advised to set up a tickler system to remind employees at least 90 days before their work authorization expires

to renew their work authorization. Lawful permanent residents do not require revalidation.

Before the work authorization expires, the employee must present to the employer a document that shows new work authorization. The employer must then complete, sign and date Section 3 of the I-9, "Updating and Re-verification," with the new information. Employers should note that some work authorization is extended by filing a timely extension, whereas others would require the actual issuance of the new work authorization documents. Please consult the M-274 Handbook for additional information.

If an employer chooses to complete a new I-9 form to re-verify an employee's work authorization, instead of completing Section 3 of the existing I-9 form, the employer must use the most current two-page I-9 form.

WHEN YOU REHIRE FORMER EMPLOYEES

An employer who rehires a former employee must make sure the employee is still authorized to work.

If the employee is rehired within three years of the date of the initial I-9 and the employee has the same or a new grant of work authorization, the employer can re-verify work authorization by completing, signing and dating Section 3 of the employee's existing Form I-9.

The employer must complete a new I-9 for a returning employee if (1) Section 3 of the existing I-9 has already been used, (2) the employee's previous work authorization has expired and has not been renewed, or (3) the employee is rehired more than three years after the date of the initial I-9.

Not all employees who take leave and return to the same employer require re-verification. For example, employees on approved leaves of absence (paid or unpaid), employees temporarily laid off due to a lack of work, and employees who transfer from one unit of the employer to another unit of the same employer are not considered to be "rehired" employees when they return. As long as the employee has a reasonable expectation of continuing employment with the employer after a period of leave, they are not considered to be "rehired" employees and re-verification is not required. 8 C.F.R. § 274a.2(b)(1)(viii)

RECORDKEEPING

All I-9s must be retained for three years after the employee begins work or for one year after the employee leaves, whichever date is later. Forms may be retained in their original form, in electronic format, or on microfilm or microfiche. The DHS fact sheet "Electronic Signature and Storage of the I-9 Employment Eligibility Verification Form" has details on how to complete, sign and store I-9s electronically.

I-9s must be available for inspection in their original form, in electronic format, or on microfilm or microfiche upon request by the U.S. Department of Labor or the Department of Homeland Security. If the I-9s are kept at a location other than where the request is made, the employer must make arrangements for inspection at the location where the I-9s are kept or stored electronically. The employer is entitled to at least three days prior notice of the inspection.

10 DO'S AND DON'TS FOR I-9 FORMS

Some suggestions for making sure you are following the proper steps to verify employees' work eligibility:

DOs	DON'Ts
Do require all new hires to complete and sign Section 1 on their first day of work.	**Don't** ask an applicant to complete an I-9 prior to making a job offer. Applicants who are not hired can use I-9 information to allege that you discriminated against them.
Do review each employee's documents to make sure the new I-9 includes these as acceptable documents and that the documents appear to be genuine.	**Don't** ask new hires for any particular documents or for more documents than the I-9 requires. The employee chooses the documents, not you.
Do establish a consistent procedure for completing I-9s, and educate your hiring managers on that procedure..	**Don't** consider the expiration date of I-9 documentation when making hiring or firing decisions.
Do make and retain copies of all I-9 documentation provided. (Only a few states make this mandatory, but it's a good idea	**Don't** forget to keep a tickler file to follow up on expiring documents that limit the employee's authorization to work.
Do keep I-9s and copies of documents for three years after the employee's hire date or one year after his or her termination, whichever comes later.	**Don't** put the I-9 in an employee's personnel file. To protect your company against discrimination claims, keep the I-9 and supporting documentation in a separate file.

E-VERIFY

E-Verify is a mostly voluntary web-based system that allows employers to check the employment eligibility of employees online. The Department of Homeland Security runs the program in cooperation with the Social Security Administration.

Employers who participate in E-Verify voluntarily use the system in addition to the regular I-9 verification process. An employer who participates in E-Verify voluntarily still must verify employment authorization and record the verification on the Form I-9, just as all other employers are required to do.

Find out more about E-Verify and how to enroll on the DHS's E-Verify website or the USCIS E-Verify website.

E-VERIFY REQUIRED FOR SOME EMPLOYERS

Some employers are required to use the E-Verify system to check the work eligibility of their employees. For example, some states, including Arizona, have made E-Verify mandatory for certain employers; check with your state restaurant association to see if this applies. A presidential executive order also made the use of E-Verify mandatory for some federal contractors and subcontractors. The mandate applies to businesses with federal contracts over $100,000, plus businesses that subcontract with covered federal contractors and whose subcontracts for services, supplies or construction exceed $3,000. The mandate applies to new federal contracts that began on or after Sept. 8, 2009, and to some existing federal contracts and subcontracts.

ANTI-DISCRIMINATION PROVISIONS

The Immigration and Nationality Act makes it unlawful for an employer to:

- Discriminate against a person in hiring or firing because of the person's national origin or citizenship status (8 U.S.C. 1324a–1324b);
- Intimidate, threaten, coerce or retaliate against any individual for filing a discrimination complaint or for the purpose of interfering with any right or privilege of the individual under the Immigration and Nationality Act, or for participating in any manner in an investigation, proceeding or hearing;
- Request "more or different documents" than those authorized under the Immigration and Nationality Act; and
- Refuse to honor "documents tendered that on their face reasonably appear to be genuine."

Employers must be careful not to discriminate against new employees by limiting the choice of acceptable documents, rejecting documents that reasonably appear to be genuine, or treating individuals differently based upon their national origin, or citizenship or immigration status.

The Justice Department's Office of Special Counsel for Unfair Immigration-Related Business Practices offers tips and materials to help small businesses avoid immigration-related discrimination.

The Immigration and Nationality Act's provisions banning discrimination on the basis of citizenship status cover employers

with four or more employees. The law's provisions banning discrimination on the basis of national origin apply to employers with 4 to 14 employees. Employers with 15 or more employees are prohibited from discriminating based on national origin by Title VII of the Civil Rights Act of 1964 42 U.S.C. 2000 e, as enforced by the Equal Employment Opportunity Commission.

NOTE: The Immigration and Nationality Act permits an employer to hire a U.S. citizen or national instead of an alien if the two persons are equally qualified.

"NO-MATCH" LETTERS FROM THE GOVERNMENT

Thousands of employers and employees get letters from the government each year notifying them that employee names on W-2 forms don't match Social Security numbers in the government's databases.

No-match letters are usually issued based on the W-2s employers file with the federal government to report employees' annual wages and withheld income and FICA (Social Security and Medicare) taxes. The Social Security Administration ("SSA") processes W-2s for the IRS and uses the data to credit withheld FICA taxes to individual employees' Social Security accounts.

The SSA says it finds millions of cases each year where information on W-2s does not match names and numbers in the Social Security database. In these cases the SSA will frequently send "Employer Correction Requests" — also known as no-match letters — to employers.

The SSA generally sends letters to any employer with more than 10 W-2s indicating a mismatch, and where these W-2s represent more than 0.5 percent of the W-2s an employer submits. The letter advises employers to tell employees about the discrepancies and give employees an opportunity to fix the problem. The SSA asks the employer to file a Form W-2c to correct the information.

The SSA instructs employers not to conclude, based on a no-match letter alone, that the employee in question is unauthorized to work in the United States. But some government officials believe the no-match letters should be used to target employers who may be hiring illegally. The Bush Administration tried in 2007 to force new requirements on employers who receive no-match letters. The 2007 plan would have subjected employers to civil and criminal liability if they did not fire employees who were unable to resolve discrepancies between their names and Social Security numbers (SSNs) within 90 days. The Bush-era no-match rule never took effect. A federal court put the regulations on hold in 2007 and the Obama Administration withdrew the regulations effective November 7, 2009.

After several years without "no-match" letters, however, the SSA in April 2011 again began sending no-match letters to employers whose workers' Social Security numbers do not coincide with SSA records. The SSA's 2011 version of the no-match letter makes several changes to earlier versions: For example, it lists only one employee per letter and does not contain the so-called "warning language" cautioning that an employer's failure to act could constitute "constructive knowledge" of employing unauthorized workers.

Employers who receive the 2011 SSA "no-match" letter should check their records to see if the SSA information about a "no-match" is correct. If it is, they should ask the employee to re-verify the Social Security number; if the employee cannot resolve the discrepancy, they should ask the employee to contact the SSA office. If the issue remains unresolved, this should be documented in the employee's file and the employer should contact legal counsel to discuss how best to proceed. Always keep in mind that a Social Security number mismatch does not necessarily mean the employee lacks work authorization – it just means that the employer should investigate the situation.

WORKPLACE RAIDS

The Department of Homeland Security (DHS) has been raiding workplaces in a number of industries to discover unauthorized foreign workers.

Restaurateurs should plan in advance for a DHS workforce enforcement action. A plan to handle raids can make the process, while undesirable, less disruptive. Several steps to consider include:

- Select the person at the restaurant who will take the lead in responding to the DHS agents in event of a raid (e.g., in-house attorney, outside counsel, etc.);
- When a raid occurs, the person responding should confirm the identity documentation of the primary DHS agent handling the raid, confirm the scope of the raid and mission, and read the search warrant;
- An attorney-client confidential file should be identified and arrangements made with the government on how to handle the files without sacrificing the attorney-client privilege;
- Copy any computer hard drives if computer equipment is to be seized; and
- Inform employees that no one should obstruct access to property identified in the search warrant, destroy records or hide employees.

PENALTIES FOR EMPLOYERS WHO VIOLATE IMMIGRATION LAWS

Employers can face the penalties set forth below if they violate the hiring or paperwork provisions of the Immigration and Nationality Act.

HIRING VIOLATIONS

Employers who knowingly hire unauthorized workers or who continue to employ workers whom the employer knows are not authorized to work in the United States will be ordered to discontinue the violation or violations and as of February 3, 2017 pay a civil penalty of:

- between $548 and $4,384 for each unauthorized alien for first-time violations;
- between $4,384 and $10,957 for each unauthorized alien for a second violation; or
- between $6,575 and $21,916 for each unauthorized alien if there have been three or more prior violations.

Businesses with multiple locations: How are hiring-related penalties levied against companies that operate multiple stores? Is each store in a multi-unit company considered separate and thus responsible only for its own violations? Or, can the government apply progressive penalties to one unit based on previous violations by another unit in the same company? The answer: For employers with distinct, physically separate subdivisions — each handling its own hiring without regard to the practices of other subdivisions and not under the control of or having common control with another subdivision — each subdivision is considered a separate employer for purposes of immigration-related penalties. However, DHS retains full discretion to extend any I-9 audit to any affiliated stores. Further, while an affiliated store may legally be a separate entity, an employer should consider the audit and raid of one of its stores as warning that its other stores may be under investigation.

PAPERWORK VIOLATIONS

Employers who fail to complete or retain I-9s or make them available for inspection will be required to pay a civil penalty of between $220 and $2,191 for each employee for whom the I-9 was not properly completed, retained and/or made available for inspection.

CRIMINAL VIOLATIONS

Employers may face criminal penalties for violations that involve a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens. The Immigration and Nationality Act requires that the employer be fined not more than $3,000 for each unauthorized alien, face imprisonment of not more than six months or both.

Immigration & Customs Enforcement (ICE), however, has a number of tools it employs in worksite enforcement. The criminal harboring statute appears to be an agency favorite.

ICE has developed a comprehensive worksite enforcement strategy that is designed to target both workers and employers for criminal charges. See *Memo, Forman, Director, Office of Investigations, ICE, "Worksite Enforcement Strategy" (Apr. 30, 2009)*, directing field offices to "use administrative tools to advance criminal cases." The strategy includes the use of traditional tools of criminal investigation, such as "confidential sources and cooperating witnesses, introduction to undercover agents, consensual and nonconsensual intercepts, and Form I-9 audits." *Id. at 2*. In the absence of criminal prosecution, the strategy will focus on civil fines and debarment. Nonetheless, ICE maintains that "[o]ftentimes, Form I-9 inspections [will be] an effective means of furthering criminal investigations." *ICE, Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties (Nov. 5, 2008).*

Some employers appear to misunderstand the scope of their potential exposure for immigration-related violations. In many cases, a civil audit represents the beginning of an employer's problems. ICE, of course, takes the view that double jeopardy does not attach to civil fine proceedings, making it possible for the agency to pursue both civil sanctions and criminal prosecutions against the same employer. *Memo, Virtue, G.C. (HWCOU 90/10.6-P: 90/5/5-P); Hudson*

v. U.S., 522 U.S. 93 (1997).

As mentioned, the most common legal theory under which employers are prosecuted in the immigration context arises under the harboring or encouraging or inducing statute. *See INA § 274(a).* This felony statute's most relevant subsections include the following activity:

> (1) (A) Any person who-
>
> *** *** ***
>
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law, shall be punished as provided in subparagraph (B); or
>
> *** *** ***
>
> Shall be punished . . . .

The foregoing statute also applies to those who engage in conspiracy to commit such acts or aid and abet others who participate in them (e.g., an independent contractor, a staffing agency, etc.). *See §§ 274(a)(1)(v)(I) and (II)*.

We note that *IRCA § 112, PL 99-603, 100 Stat. 3359 (Nov. 6, 1986)* amended the harboring statute to eliminate the *"Texas Proviso"* exception that mere employment is not harboring. Although Legacy INS regulatory comments initially claimed this statute would not be applied to cases involving only employment, *52 Federal Register 16217 (May 1, 1987)*, both ICE and the courts have changed that tune in recent years. In *U.S. v. Kim*, *193 F.3d 567, 572-74 (2d Cir. 1999),* for example, the Court ignored the regulatory comments and found that knowing employment of illegal workers would constitute harboring. Another court found that it was not reversible error for a district judge to refuse to give a "mere employment" jury instruction to harboring and smuggling charges. *U.S. v. Khanani, 503 F.3d 1281, 1285-89 (11th Cir. 2007)*. The penalties associated with the harboring and encouraging and inducing statute are extreme. Individuals who engage in such conduct for commercial advantage face up to 10 years per count in prison. *INA § 274(a)(1)(B)(i)*. Even if no such advantage can be shown, they would face up to five years per count. *INA § 274(a)(1)(B)(ii).*

In addition, *INA § 274(b)*, any property or gross proceeds involved in the illegal activity may be subject to civil forfeiture. In the IFCO Pallet Company case, for example, in an effort to avoid indictment of the corporate entity, the company agreed to pay approximately $20 million in civil forfeitures.

The government has a number of additional legal theories that often arise in the context of employing illegal workers. The following theories are especially common:

- Under *INA § 274(a)(3)(A)*, it is a criminal offense, carrying a penalty of up to five years, for "any person who during a 12-month period knowingly hired for employment at least 10 unauthorized

individuals with actual knowledge" that they are not authorized to work and "were brought to the United States in violation of [law];"

- Under *18 USC § 1957,* an employer can be convicted of money laundering for engaging in a financial transaction with proceeds of specified unlawful activity, including harboring, attempting to harbor, aiding and abetting harboring, and conspiracy to harbor. The maximum penalty for each violation is 10 years imprisonment and fines;
- Under *42 USC § 408(a)(7)(B)*, an employer that impedes, impairs, or obstructs lawful government functions of the Internal Revenue Service, Social Security Administration, etc., by providing false information (e.g., fake Social Security Numbers) is engaging in conduct that is punishable by up to five years in prison;
- Under *18 USC § 1001 and 18 USC § 1546*, a material misrepresentation on a Form I-9, Employment Eligibility Verification, will be punishable by up to five years; and
- Upon conviction of any federal felony, under the Criminal Asset Forfeiture statute, *18 USC § 982(a)(6)(a),* a jury may authorize seizure of all assets used in the commission of the crime and all proceeds of the crime.

In the end, the government has a broad variety of criminal statutes and theories at its disposal. The purpose of this section is to provide only an overview of some of the more common approaches we have seen in recent years.

DISCRIMINATION VIOLATIONS

The law also prescribes penalties for businesses that discriminate against new employees by limiting the choice of acceptable documents for purposes of the I-9 or rejecting documents that reasonably appear to be genuine, or by treating individuals differently based upon their national origin, or citizenship or immigration status.

- ,For violating the Immigration and Nationality Act's antidiscrimination provisions — including discriminating against a person (other than an unauthorized alien) in hiring or firing because of the person's national origin or citizenship status, or intimidating, coercing or retaliating against an individual for filing a discrimination complaint (see the first two items in section describing the ban on discrimination, above) — employers not only face orders to discontinue the discrimination but may also face civil penalties of $452 to $3,621 for each person discriminated against if there have been no prior violations; $3,621 to $9,054 per person if there has been one prior violation; and $5,432 to $18,107 per person if there have been two or more prior violations.
- For violating the document-discrimination provisions — i.e., requesting more or different documents from employees than the law authorizes, or refusing to honor employee documents that reasonably appear to be genuine — employers face civil penalties of $181 to $1,811 for each individual discriminated against.

Employers also may be required to keep for up to three years the names and addresses of each person who applies, in person or in writing, for an existing job; to hire or reinstate the person discriminated against, with or without back pay; to educate hiring personnel about the requirements of the law; and to post notices to employees about their rights and the employers' obligations.

In addition, in any complaint regarding unfair immigration-related employment practices, reasonable attorneys' fees may be awarded to the prevailing party (other than the United States) if the losing party's argument is "without reasonable foundation in law and fact."

STATE IMMIGRATION LAWS

All provisions of the federal Immigration and Nationality Act may not necessarily preempt or supersede all similar state and local laws. The U.S. Supreme Court ruled in May 2011 in *Chamber of Commerce of the U.S. v. Whiting*, for example, that an Arizona law requiring all Arizona employers to use the federal E-Verify system was not preempted under federal immigration laws. and would stand because it was merely a "licensing law," not an "immigration law".

EMPLOYMENT VISAS

Restaurant operators occasionally hire employees under visa programs. Several visas are commonly used in the restaurant industry, including the H-2B, H-1B, and L-1.

H-2B Visa

The H-2B visa lets U.S. employers bring foreign nationals to the United States to fill temporary seasonal jobs when U.S. workers are not available. The government allocates 66,000 H-2B visas each fiscal year — 33,000 for jobs with a start date between October and March, and 33,000 for jobs that start April through September. The H-2B classification requires employers to get a temporary labor certification from the Secretary of Labor ascertaining their need for employees.

H-1B Visa

The H-1B visa is for specialty occupations, and requires a sponsoring U.S. employer. The position must be one that requires a specific degree and the employee must possess such degree. Like the H-2B visa, the H-1B visa is subject to a numerical cap (65,000 petitions per fiscal year for individuals who have earned baccalaureate degrees and an additional 20,000 petitions per fiscal year for those who have earned master's or higher degrees from institutions of higher education in the United States). In 2018, the numerical cap was hit within six days of the earliest possible filing date (April 1).

L visa

The L visa is for intra-company transfers and is used widely by international and chain restaurant companies with a U.S. presence to transfer employees from abroad to the United States. The L-1A visa, for executives and managers, is valid for up to seven years. The L-1B visa, for employees with specialized knowledge, is good for up to five years.

To obtain an L-1 classification, a person must have had one year of continuous employment outside the United States with the company within three years of transfer to the United States in the executive, managerial or specialized-knowledge capacity. In addition, the U.S. employer must be a qualifying organization, i.e., must be a parent, branch, subsidiary or affiliate, or joint venture, of the organization outside of the U.S.

It should be noted that a variety of additional visa options exist. Employers with potential staffing shortages may want to consult with competent immigration counsel to explore additional options.

ARIZONA IMMIGRATION LAWS – "LAWA" AND S.B. 1070

Effective January 2008, Arizona became one of the first states in the country to enact legislation that prohibits the hiring of persons not legally entitled to work in the United States in accordance with the Immigration and Nationality Act. This statute, entitled the Legal Arizona Workers Act ("LAWA"), requires employers to use the federal E-Verify system to determine the lawful work status of every worker hired on or after January 1, 2008.

Employers who "knowingly" or "intentionally" hire or retain employees who are not lawfully permitted to work in the United States as defined under the Immigration and Nationality Act are subject to temporary and even permanent loss of applicable business licenses. A "knowing" violation may be based on an employer's constructive knowledge of a worker's immigration status (i.e., the employer had the information relating to an employee's illegal immigration status available to it, even if the employer does not "intend" to hire illegally). An "intentional" violation occurs when the employer has knowledge of the circumstances that makes its conduct illegal, but still chooses to employ or continue to employ the worker. LAWA imposes progressive sanctions for violations leading up to temporary loss of business licenses, with potential permanent loss of licensure imposed for "intentional" and repeated violations.

Employers may avoid these penalties by using E-Verify to document immigration status. Furthermore, LAWA provides an affirmative defense that an employer did not intentionally employ an unauthorized worker if the employer complies with its federal I-9 reporting requirements.

In 2010, Arizona amended aspects of LAWA with passage of immigration legislation popularly known as "S.B. 1070." Although portions of S.B. 1070 relating to regulation of immigration by law enforcement have been enjoined by federal courts, other portions of S.B. 1070 relating to LAWA and Arizona employers remain in-tact. The primary impact on employers comes with S.B. 1070's new record retention requirements for E-Verify checks. Under this amendment, employers are required to maintain E-Verify records "for the duration of the Employee's employment or at least three years, whichever is longer." S.B. 1070 also provides some additional protection for employers by including an affirmative defense to LAWA violations for "entrapment." This defense may be available when the employer can demonstrate that the idea of committing the violation originated with law enforcement, the law enforcement agent urged and

induced the employer to commit the violation, and the employer was not predisposed to committing the violation.

S.B. 1070 also makes it a class 1 misdemeanor for anyone to transport, conceal or harbor an unauthorized alien "if the person knows or recklessly disregards" that the alien is in the country illegally. Penalties for violation include a fine and possible impoundment of the vehicle. Although it is still uncertain how courts will define what is meant by "recklessly disregard" immigration status, employers may, under some circumstances, be subject to penalties under this statute.

In June 2012, the U.S. Supreme Court ruled on some provisions of S.B. 1070. Specifically, the Supreme Court decided that the following three provisions of S.B. 1070 could not stand as they conflicted with federal immigration law:

- Section 3, which imposes penalties under state law on immigrants who fail to carry "registration" papers.
- Section 5(c), which imposes penalties under state law on unauthorized immigrants who work or solicit work.
- Section 6, which authorizes the warrantless arrest of any immigrant, authorized or unauthorized, who police suspect has committed an offense for which they could be deported.

However, the Supreme Court allowed Section 2(B) of S.B. 1070 to stand, which requires state and local police to inquire about the immigration status of people they stop for other reasons and who they suspect are in the country illegally.

Many view this decision as a split decision where immigrant advocates and the State of Arizona both claimed victory. As a practical matter, this decision does not alter any of the I-9 and E-Verify requirements with which employers must comply. The effects of the S.B. 1070 rulings rest primarily on the individuals and not employers.

MEDICAL MARIJUANA

MEDICAL MARIJUANA

The Arizona Medical Marijuana Act (AMMA) allows a "qualifying patient" with a "debilitating medical condition" and a "designated caregiver" to obtain (from a registered medical marijuana dispensary) and possess up to 2.5 ounces of marijuana in a 14-day period. In specific instances, the AMMA allows a "qualifying patient" and a "designated caregiver" to cultivate up to 12 marijuana plants. A.R.S. § 36-2801 et seq.

The AMMA prohibits employers from discriminating against workers who are medical marijuana cardholders; meaning, individuals who have been certified by a physician to use marijuana for medicinal purposes and who have obtained an authorization card for that use from the Arizona Department of Health Services. Cardholders also include designated caregivers and nonprofit medical marijuana dispensary agents. Specifically, the AMMA prohibits employers from refusing to hire, disciplining, or discharging a cardholder employee merely based on their status as a cardholder or based solely on a positive marijuana screen test. Despite the protections afforded to cardholder workers under the AMMA, these individuals still may be subject to discipline or discharge if they use, possess, or are "impaired" by marijuana while at work or during working hours.

The Arizona drug testing statute (A.R.S. § 23-493 et seq.) contains an extensive definition of the symptoms of "impairment" that an employer can consider in determining that "a prospective employee or employee while working may be under the influence of drugs or alcohol that may decrease or lessen the employee's performance of the duties or tasks of the employee's job position." "Impairment" is

defined as symptoms that a prospective employee or employee exhibits while working, which gives the observer a reasonable suspicion that the individual may be under the influence of drugs, including marijuana, or alcohol that may decrease or lessen his or her performance of the duties or tasks of the employee's position, including symptoms of the employee's speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the employee or others, involvement in an accident that results in serious damage to equipment, machinery or property, disruption of a production or manufacturing process, any injury to the employee or others or other symptoms causing a reasonable suspicion of the use of drugs or alcohol. If a cardholder is impaired in the workplace or during working hours, the employer can take disciplinary action regardless of the employee's status as a cardholder.

If an employer has a written drug testing policy that complies with Arizona's drug testing statute, it can avoid liability for actions taken to exclude a cardholder employee from performing "safety-sensitive positions." This may include "reassigning the employee to another position or placing an employee on paid or unpaid leave." This exclusion can be based on an employer's good faith belief that the employee performing the safety-sensitive position "is engaged in the current use of any drug, whether legal, prescribed by a physician or otherwise, if the drug could cause an impairment or otherwise decrease or lessen the employee's job performance or ability to perform the employee's job duties."

Employers who would stand to lose a monetary or licensing benefit under Federal law or regulations are not required to comply with the anti-discrimination provisions in the AMMA. In other words, employers who satisfy these criteria are not precluded from refusing to hire or taking disciplinary action against cardholder workers merely because of their cardholder status or because of the mere presence of marijuana or marijuana metabolites in their systems.

DRUG TESTING

DRUG TESTING

Arizona has no mandatory drug testing laws, but instead, has a statute under which compliance is voluntary. (A.R.S. § 23-493 *et seq.*) Although no penalty exists for not complying with the drug testing statute, if an employer chooses to comply with it, the statute provides a "*safe harbor*" by shielding the employer from certain civil liability arising out of the testing procedure, including adverse employment actions.

Pursuant to the Arizona statute, the drug and alcohol testing policy must be distributed to every employee subject to testing, or be made available to employees in the same manner as policies are provided to employees. The statute details specific requirements to be included in an employer's written policy distributed to all employees, as well as detailing the requirements for drug testing employees and applicants. To qualify for the employer protections: (1) any drug testing or alcohol impairment testing by an employer of employees normally shall occur during, or immediately before or after, a regular work period and shall be deemed work time for the purposes of compensation and benefits for current employees; (2) the employer shall pay all actual costs for drug testing and alcohol impairment testing required of employees by the employer, but it is in the employer's discretion to pay the testing costs for prospective employees; (3) the employer shall pay reasonable transportation costs to current employees if their required tests are conducted at a location other than the employee's normal work site; and (4) all sample collection and testing for drugs and alcohol impairment under the Arizona drug testing statute shall be performed in accordance with the conditions set forth in the statute.

The employer's written policy must include at least the following: (1) a statement of the employer's policy respecting drug and alcohol use by employees; (2) a description of those employees or prospective employees who are subject to testing; (3) the circumstances under which testing may be required; (4) the substances as to which testing may be required; (5) a description of the testing methods and collection procedures to be used; (6) the consequences of a refusal to participate in the testing; (7) any adverse personnel action that may be taken based on the testing procedure or results; (8) the right of an employee, on request, to obtain the written test results; (9) the right of an employee, on request, to explain in a confidential setting, a positive test result; and (10) a statement of the employer's policy regarding the confidentiality of the test results.

Within the terms of the written policy, an employer may require the collection and testing of samples for any job-related purposes consistent with business necessity including: (1) investigation of possible individual employee impairment; (2) investigation of accidents in the workplace (employees may be required to undergo drug testing or alcohol impairment testing for accidents if the test is taken as soon as practicable after an accident and the test is administered to employees who the employer reasonably believes may have contributed to the accident); (3) maintenance of safety for employees, customers, clients or the public at large; (4) maintenance of productivity, quality of products or services or security of property or information; and (5) reasonable suspicion that an employee may be affected by the use of drugs or alcohol and that the use may adversely affect the job performance or the work environment. Additionally, employees or groups of employees may be required to undergo drug testing on a random or chance basis.

ARIZONA SMOKE FREE WORKPLACE ACT

The Smoke-Free Arizona Act (Act), A.R.S. § 36-601.01, which became effective May 1, 2007, establishes a statewide prohibition on smoking in "public places and places of employment," unless specifically exempted. The Arizona Department of Health Services (DHS) is authorized to implement and enforce the Act. The Act prohibits smoking in most enclosed public places and places of employment, including (but not limited to): (1) restaurants, bars, grocery stores, or any establishment that serves food; (2) office buildings and work areas such as meeting rooms, employee lounges, classrooms, and private offices; and (3) company-owned or employer-owned vehicles during working hours if the vehicle is occupied by more than one person. The implementing regulations establish an outside smoke-free "reasonable distance" "of at least 20 feet in all directions measured from each outer edge of an entrance, an open window, or a ventilation system" of a public place or non-vehicle place of employment. R9-2-102. The proprietor of a public place or non-vehicle place of employment must make sure tobacco smoke does not drift into the reasonable distance area. Business proprietors are also required to post "No Smoking" signs that meet certain size and informational requirements at their establishments and in business vehicles.

The Act permits smoking in outdoor patios of a bar or restaurant so long as tobacco smoke does not enter areas where smoking is prohibited through entrances, windows, ventilation systems, or other means. A.R.S. § 36.601.01(B)(6). A number of regulations implement the Act's limited exemption for outdoor patios from the smoking prohibition. See R9-2-101(7)-(8) and (18)-(20), R9-2-104(F), and R9-2-108. There is specific criteria for designation of an area as an outdoor patio where smoking is permitted, including physical location and structural requirements, proximity to a place of employment or public place and control of the area by the proprietor of the place of employment or public place. In response to public comments, DHS simplified some of the physical requirements, including:

(1) R9-2-108(A)(3), allowing outdoor patio designation when only one side of the area is completely open, consists of permeable material, or consists of open space and permeable material, or when one side has a low wall and is otherwise open or consists of permeable material. The low wall can be no more than three and one-half feet high or the minimum height that is more than three and one-half feet required by an applicable local ordinance or building code; and

(2) R9-2-108(E), permitting a proprietor to designate as an outdoor patio where smoking is permitted an area that is less than 20 feet from any entrance of a public place or non-vehicle place of employment. A proprietor who does so must use a method that permits an individual to avoid breathing tobacco smoke when using the entrance and that does not permit tobacco smoke to drift into smoke-free areas.

Requirements in other statutes, rules, or regulations applicable to food or beverage operations still apply. Additional information about the Act is available at **www.smokefreearizona.org.**

ARIZONA’S GUNS IN PARKING LOTS LAW

ARIZONA’S GUNS IN PARKING LOTS LAW

In 2009 Arizona enacted a “guns in parking lots” law. The law, codified at A.R.S. § 12-781, prohibits property owners, tenants, public or private employers and other business entities (collectively “Property Owners”) from establishing, maintaining or enforcing a policy that prohibits an individual from lawfully storing or lawfully transporting a firearm in their vehicle (including motorcycles) while it is parked in the Property Owner’s parking facilities. This law requires firearms to be kept out of visibility and locked in the individual’s vehicle.

There are eight exemptions from the requirement that guns be allowed in parking facilities.

1. **Where the possession of firearms is prohibited by federal or state law.** Both state and federal law prohibit certain individuals from possessing firearms and prohibit the possession of firearms in certain sensitive environments. This law recognizes these state and federal prohibitions and exempts Property Owners that operate under circumstances where firearms are prohibited. For example, under state and federal law, it is unlawful to possess a firearm on grade or high school grounds.
2. **Motor vehicles owned or leased by the Property Owner.** Property Owners may prohibit individuals from transporting or storing firearms in motor vehicles owned or leased by the Property Owner. This exemption applies only when the individual is using the Property Owner’s motor vehicle in the course of his/ her employment.

3. **Secured parking lots.** The mandate does not apply to Property Owners that provide parking in an area that meets each of the following requirements: (1) the parking area is secured by a fence or other physical barrier; (2) access to the parking area is limited by a guard or other security measure; and (3) secure firearms storage is provided. The firearms storage unit must be monitored, readily accessible upon entry into the parking area, and allow for immediate retrieval of firearms upon exit from the parking area.
4. **Possession of firearms necessitates violation of federal or state law or regulation.** Property Owners are exempt from the mandate if compliance would necessitate the violation of any state or federal law. Under this exemption, a Property Owner is exempt if it cannot comply with both this law and another applicable federal or state law or regulation.
5. **Nuclear generating facilities.** Nuclear generating facilities that provide a secured and gated or fenced parking area and secured firearms storage are exempt. The firearms storage unit must be readily accessible upon entry into the parking area and allow for immediate retrieval of firearms upon exit from the parking area.
6. **Single family detached residence.** The mandate does not apply to owner-occupied or tenant-occupied single family detached residences. The bill does not contain exemptions for apartment or condominium complexes.
7. **Defense contractors.** Property Owners that are current United States Department of Defense contractors may prohibit transporting and storing firearms on their property that is located in whole or in part on a United States military base or installation.
8. **Alternative parking.** A Property Owner may prohibit individuals from transporting or storing firearms in its parking area if it provides an alternative parking option that is "reasonably proximate" to the primary parking area and does not charge an extra fee to park in the alternative parking area.

AT-WILL EMPLOYMENT

OVERVIEW

LAWS MAY RESTRICT EMPLOYERS FROM TERMINATING AN EMPLOYEE AT WILL

COURTS HAVE SET LIMITS ON TERMINATING EMPLOYEES AT WILL

IMPLIED-CONTRACT EXCEPTION

PUBLIC POLICY EXCEPTION

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING EXCEPTION

OTHER CLAIMS ARISING FROM TERMINATION OF THE EMPLOYMENT RELATIONSHIP

OVERVIEW

In the absence of an employment contract or collective bargaining agreement, most employees are considered "at-will" employees. The doctrine of "at-will" employment means that such employees may quit at any time and for any reason and that an employer generally may terminate such employees for any reason or for no reason at all. Although the at-will doctrine generally means either party can break the relationship with no liability, that is not always the case. There are important exceptions to the at-will doctrine, including restrictions imposed by statute and restrictions imposed by courts. This chapter looks at those exceptions.

LAWS MAY RESTRICT EMPLOYERS FROM TERMINATING AN AT-WILL EMPLOYEE

Some federal, state, and local statutes restrict an employer's right to terminate an at-will employee. For example, various nondiscrimination statutes discussed elsewhere in this manual restrict an employer's ability to terminate an employee based on certain personal characteristics such as age, disability, race, color, religion, sex and national origin. In addition, federal laws, including the Occupational Safety and Health Act and the Fair Labor Standards Act, and their state counterparts prohibit retaliatory action against employees who exercise their rights under these laws. Finally, some states have considered statutes that would discard the at-will doctrine entirely, in which case employers would be required to have "just cause" to fire an employee. Restaurateurs should consult with legal counsel to determine what laws apply in states where they operate.

COURTS HAVE SET LIMITS ON TERMINATING EMPLOYEES AT WILL

Many state courts have substantially limited the at-will doctrine. To varying degrees, courts have carved out judicial exceptions to the doctrine because of the perceived harsh effects at-will employment can have on employees. Limitations imposed by state courts can be grouped into three broad categories of cases:

- Cases in which an employer breaks an implied contract with the employee (the "implied contract exception" to the at-will doctrine);
- Cases in which the employee has been wrongfully discharged for engaging in activity that courts deem a public policy (the "public-policy exception"); and
- Cases in which an employer has terminated an employee in order to prevent him or her from receiving some benefit of employment (the "implied covenant of good faith exception").

IMPLIED CONTRACT EXCEPTION

Courts in most states have held that an employer may create an "implied contract of employment" with an employee or job applicant through such means as an employee handbook or discussions between an interviewer and a job applicant. Implied contracts are generally created only when the terms of the contract are clear, definite and unambiguous. Extending a job offer using such words as "permanent," "lifetime," "for a career" or "as long as performance is satisfactory," for example, may not be sufficiently definitive to create an implied contract of employment.

Employers who provide employees with a handbook should take particular caution to ensure that the handbook does not become an "implied contract." In some cases, a prominent disclaimer notice indicating that the handbook does not create a contract of employment, together with an acknowledgement signed by employees may suffice to eviscerate any claim that a handbook is an implied contract. Restaurateurs should exercise caution and consult with counsel prior to including at-will disclaimers, however. The National Labor Relations Board has ruled that certain at-will disclaimers violate the National Labor Relations Act.

PUBLIC POLICY EXCEPTION

Courts also have recognized a "public policy exception" to the at-will doctrine, which protects employees from being discharged from their jobs for exercising a clearly established legal duty. This could include, for example, an employee who refuses to lie in testimony before state lawmakers, or a driver who refuses to exceed the speed limit to meet scheduled deliveries. Similarly, employees may not be discharged for filing workers' compensation claims or for saying they intend to file a claim, for refusing to submit to illegal polygraph examinations, for serving on a jury, or for giving court-ordered testimony. Federal and state laws also protect employees against retaliation for "whistle -blowing" activities aimed at bringing an employer's illegal conduct to the attention of authorities. Employees who raise matters of public concern, such as issues of health, safety or general welfare, may receive protection from discharge for that reason.

Arizona law has largely—although not entirely—done away with the public policy exception to the doctrine of at-will employment. The Arizona Employment Protection Act substantially limits the types of claims employees may assert based upon wrongful discharge in violation of public policy. The statute also limits the remedies available to employees in such cases.

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING EXCEPTION

Courts in a few states have recognized the existence of an "implied covenant of good faith and fair dealing" in employment. This would prevent an employer from discharging a worker in order to prevent the employee from receiving some benefit of employment. Although most states have not yet adopted this rule, the "implied covenant" doctrine is broad and in theory could impose on employers an obligation to dismiss employees only for "good cause."

OTHER CLAIMS ARISING FROM TERMINATION OF THE EMPLOYMENT RELATIONSHIP

Although at-will employment remains the norm for most employment relationships, restaurateurs should proceed with caution when evaluating whether to terminate an employee. In addition to wrongful termination claims, employees in most states may also assert a variety of other common law claims in connection with the termination of their employment, including intentional or negligent infliction of emotional distress, libel, and slander. Unlike many federal and state statutory claims, these common law claims may carry with them the threat of punitive damages if an employee prevails on his or her claims.

EMPLOYEE RIGHTS

EMPLOYEES SERVING JURY DUTY

STATE LAW ON TIME OFF TO VOTE IN ELECTIONS

EMPLOYEES' RIGHT TO INSPECT PERSONNEL RECORDS

EMPLOYEE BACKGROUND CHECKS -- REFERENCES

EMPLOYEE PROTECTION AGAINST USE OF SOCIAL SECURITY NUMBERS

EMPLOYEE RIGHTS IN NON-UNIONIZED WORKPLACES

EMPLOYEE PRIVACY RIGHTS IN USE OF EMPLOYER-OWNED ELECTRONIC EQUIPMENT

EMPLOYEES SERVING JURY DUTY

Employees called to serve on juries enjoy job security guaranteed by federal and state law. See 28 U.S.C. § 1875; A.R.S. § 21-236. These statutes provide that employers cannot discharge or penalize employees because of their service as a juror. However, employers are not required to compensate employees during their absence for jury duty. Further, under Arizona law, "[a]n employer shall not require or request an employee to use annual, vacation or sick leave for time spent responding to a summons for jury duty, participating in the jury selection process or actually serving on a jury." A.R.S. § 21-236(A).

Under federal law, an employer who violates this law may be fined up to $5,000 for each violation, ordered to reinstate the employee, required to pay an employee's lost wages and attorneys' fees, and ordered to perform community service. 28 U.S.C. § 1875(b). Under Arizona law, an employer, who violates the statute, will be found guilty of a class 3 misdemeanor under A.R.S. § 21-236(E) and is subject to a wrongful termination claim under A.R.S. § 23-1501.

STATE LAW ON TIME OFF TO VOTE IN ELECTIONS

Arizona law protects employees who take time off from work to vote in elections. A.R.S. § 16-402. "[I]f there are less than three consecutive hours between the opening of the polls and the beginning of [the employee's] regular workshift or between the

end of [the employee]s regular workshift and the closing of the polls," then the employer must provide leave to the employee to vote. The amount of leave must be "for such length of time at the beginning or end of [the employee's] workshift that, when added to the time difference between workshift hours and opening or closing of the polls, will provide a total of three consecutive hours." A.R.S. § 16-402(A). Employers may, however, specify the hours during which employees may be absent. An employer may not deduct wages or salary as a result of an absence to vote. Id. An employer who refuses to permit an employee to take time to vote on Election Day, or penalizes an employee for doing so, is guilty of a class 2 misdemeanor. A.R.S. § 16-402(B).

EMPLOYEES' RIGHT TO INSPECT PERSONNEL RECORDS

Arizona does not have a law that governs employees' right to inspect personnel records. Many states and Washington, D.C., however, give individuals the right to inspect, copy, correct or provide explanations regarding information contained in their personnel files.

EMPLOYEE REFERENCES

Hiring and retaining qualified, honest employees is critical to the success of any business. As discussed in other chapters of the Legal Problem Solver (e.g., Equal Employment Opportunity), however, there are several laws, federal and state, that could impact employee background checks. In addition to matters discussed in those chapters, many prospective employers ask applicants to provide references, including from previous employers. When a prospective employer asks an applicant's previous employer about its former employee, the former employer enjoys a "qualified privilege" under most state laws to report its experiences and impressions of the former employee.

In Arizona, A.R.S. § 23-1361(B) et seq., provides qualified immunity from civil liability for employers giving job references regarding former employees. A former employer may provide a requesting prospective employer with information concerning a person's education, training, experience, qualifications and job performance to be used for the purpose of evaluating the person for employment. An employer that in good faith provides information requested by a prospective employer about the reason for termination of a former employee or about the job performance, professional conduct or evaluation of a current or former employee is immune from civil liability for the disclosure or the consequences of providing the information. However, an employer may not disclose the information with actual malice or with the intent to mislead. If the reference is made in writing, a copy of the communication must be mailed to the former employee's last known address. There is a presumption of good faith for employers with fewer than 100 employees that provide only the information described in the statute. The good faith presumption also applies to employers with at least 100 employees, provided the employer has a regular practice in Arizona of providing information requested by a prospective employer about the reason for termination or about the

employee's job performance, professional conduct or evaluation of the employee.

Providing information, however, does not occur without some risk to the former employer. For example, lawsuits have been filed by the former employee against his or her former employer for statements about the former employee *See, e.g. Adler v. American Standard Corp., 538 F. Supp. 572 (D. Md. 1982)* (suing the former employer for stating that the employee was dismissed for unsatisfactory performance); *Weissman v. Sri Lanka Curry House, Inc., 469 N.W.2d 471 (Minn. Ct. App. 1991)* (suing the former employee for stating that the employee was dishonest and unreliable).

To offset such potential risks about providing information and to encourage former employers to respond to reference checks, prospective employers request that applicants sign a waiver absolving the former employers from liability for providing any information about the former employee's performance or work experience. Former employers also often only provide neutral references for former employees, confirming only wages, dates of employment and job title.

EMPLOYEE PROTECTION AGAINST USE OF SOCIAL SECURITY NUMBERS

Arizona law prohibits (1) the intentional communication of an individual's Social Security number to the general public; (2) printing an individual's Social Security number (or sequences of five or more numbers identifiable as part of a Social Security number) on any card required for the individual to receive products or services; (3) requiring transmission of a Social Security number over the Internet unless encrypted or secured; and (4) requiring a Social Security number to access an Internet website unless a password or other authentication is also used. A.R.S. § 44-1373 It is also a violation to print an individual's Social Security number on materials that are to be mailed unless state or federal law requires the Social Security number on the document or other limited exceptions apply. A knowing and intentional violation of this statute is punishable by a $100 civil penalty per violation. Id.

EMPLOYEE RIGHTS IN NON-UNIONIZED WORKPLACES

The National Labor Relations Act (NLRA) prohibits discrimination against employees based on union membership and governs the collective bargaining process between unions and management. It also protects the rights of all private-sector employees and employers, regardless of whether employees are unionized or not.

Section 7 of the NLRA sets forth legal rights of employees, which are enforced by the National Labor Relations Board (NLRB). 29 U.S.C. §§ 151-169. These include the legal right to engage in "concerted activities" for employees' "mutual aid or protection." 29 U.S.C. § 157. Employers cannot interfere with or restrain activities that fall under this broadly worded phrase, whether in a union or non-union setting. Concerted activity "requires two or more employees acting together to improve wages or working conditions, but the action of a single employee may be considered concerted if he or she involves

co-workers before acting, or acts on behalf of others." *Protected Concerted Activity*, National Labor Relations Board, **http://www.nlrb.gov/rights-we-protect/protected-concerted-activity**

The below Q&A addresses how these protections can apply:

Question: Two dishwashers who work with several employees in the kitchen complain to their supervising chef that the kitchen is too hot; they ask the chef to do something to lower the temperature. The supervising chef tells them to get back to work. Instead, the employees walk off the job and go home. Can the dishwashers be fired?

Answer: The NLRB would likely find any disciplinary action to be unlawful since the employees were acting to address collective concerns about working conditions.

Question: We believe that what we pay employees is a private matter between management and each employee. We have a policy that prohibits employees from discussing pay with other employees. Does this present a potential issue under the NLRA?

Answer: Yes. The NLRB views employee discussions regarding pay as protected activity. Any policy prohibiting such discussions may interfere with employee rights to engage in concerted activity protected under Section 7 of NLRA. *See e.g., NLRB v. Main Street Terrace Care Ctr., 218 F. 3d 531 (6th Cir. 2000)*.

Question: Can I prohibit my employees from wearing union hats, t-shirts or pins at my restaurant?

Answer: This will depend on the job type and the interactions that the employees have with customers. Employees may generally wear or display union paraphernalia at work. *See P.S.K. Supermarkets, 349 N.L.R.B. 34 (N.L.R.B. 2007)*.

Question: Can I invoke a policy prohibiting employees from soliciting and distributing union propaganda while on my worksite?

Answer: In part "yes" and in part "no." An employer may prohibit the distribution of union literature in work areas at all times with a legitimate business justification. *See Oaktree Capital Mgmt., LLC, 353 N.L.R.B. 1242 (N.L.R.B. 2009)*. During non-work time and in non-work areas, however, employees may solicit other employees and distribute union literature.

EMPLOYEE PRIVACY RIGHTS IN USE OF EMPLOYER-OWNED ELECTRONIC EQUIPMENT

Arizona does not have a statute protecting employee privacy rights when using employer-owned electronic equipment. The federal Electronic Communications Privacy Act (ECPA) of 1986 prohibits the intentional interception of "any wire, oral or electronic communication," but it does include a business use exemption that permits email and phone call monitoring. Generally, only communication sin which the employee had a reasonable expectation of privacy are protected.

Employers should inform employees in writing that they have no reasonable expectation of privacy when sending or receiving information through company-owned electronic resources. Additionally, employers should have a legitimate business reason to conduct such a search, and the search should not be excessively intrusive.

CLOSING YOUR BUSINESS

WHICH BUSINESSES MUST GIVE ADVANCE NOTICE?

CLOSINGS AND LAYOFFS

NOTIFYING EMPLOYEES OF EMPLOYMENT LOSS

WHAT IF I SELL MY BUSINESS?

WRITTEN NOTICE IS REQUIRED

CAN NOTICE EVER BE LESS THAN 60 DAYS?

PENALTIES FOR VIOLATING THE LAW

STATE LAWS

OVERVIEW

Federal law requires some businesses to give employees at least 60 days' advance notice if the business is going to have a mass layoff or close a plant.

WHICH BUSINESSES MUST GIVE ADVANCE NOTICE?

The federal Worker Adjustment and Retraining Notification Act of 1988 (WARN), 29 U.S.C. §§ 2101-2109, lays out advance-notice rules for some businesses that close or lay off a certain number or percentage of employees. The law applies to businesses that employ 100 or more full-time employees, or businesses that employee 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of overtime). Part-time employees are those who average fewer than 20 hours per week or who have been employed for fewer than 6 of the 12 months preceding the date on which notice is required. Whether a subsidiary is considered a separate employer or part of the parent company for WARN purposes depends on the degree of independence between the two entities. Factors to be considered include the degree of common ownership, common directors and/or officers, exercise of common control, personnel policies originating from a common source, and the interdependency of operations.

CLOSINGS AND LAYOFFS

WARN triggers advance-notice rules for employers in two cases -- plant closings and mass layoffs.

- A plant closing is the permanent or temporary shutdown of a single employment site or of one or more facilities or operating units within a single site that is reasonably expected to result in an employment loss of 50 or more full-time employees during any 30-day period.
- A mass layoff is a reduction in a single site's workforce that is not the result of a plant closing and that is reasonably expected to result in an employment loss during any 30-day period of at least: (1) 500 employees (excluding part-time employees); or (2) at least 33 percent of the full-time employees and at least 50 full-time employees.

NOTIFYING EMPLOYEES OF EMPLOYMENT LOSS

Advance notice of 60 days is required only if the plant closing or mass layoff results in an employment loss. An employment loss occurs when an employee's job is terminated (except where an employee quits voluntarily, retires or is fired for cause), when an employee will be laid off for longer than six months or when a worker's hours will be reduced by more than 50 percent during each month of any six-month period. When a closing or mass layoff is a result of an employer's decision to relocate or to consolidate all or part of the business, affected employees will not be considered to have experienced "employment loss" if within a prescribed time period the employer offers to transfer employees to a different employment site.

WHAT IF I SELL MY BUSINESS?

The responsibility to notify employees whose employment will be terminated as a result of a sale of all or part of the employer's business remains with the employer (seller) up to and including the effective date of the sale. After that, members of that work force become employees of the buyer and it is the buyer's responsibility to provide any required notice. The regulations (29 C.F.R. § 639.4(c)(2)) state that it "may be prudent" for the seller and the buyer to determine the impact of the sale on the employees and "arrange between them for advance notice" if such notice is required.

WRITTEN NOTICE IS REQUIRED

Generally, notice must be timed to reach the required parties at least 60 calendar days before a plant closing or mass layoff. Notice must be provided to either affected workers or their representatives (e.g., a labor union).

No particular form of notice is required. All notices, however, must be in writing and written in language understandable to the employees. Generally, the notice must be specific and "based on the best information available to the employer at the time the notice is served." The notice must contain: (1) a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (2) the

expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated; (3) an indication whether or not bumping rights exist; (4) the name and telephone number of a company official to contact for further information.

Notice must also be provided to the State dislocated worker unit and to the chief elected official of the unit of local government in which the employment site is located. The written notice sent to the State dislocated worker unit and to the chief elected official of the unit of local government must contain the following information: (1) the name and address of the employment site where the plant closing or mass layoff will occur; (2) the name and telephone number of a company official to contact for further information; (3) the expected date of the first separation; and (4) the number of affected employees.

In addition, the employer must maintain the following information on site and ensure that it is "readily accessible to the State dislocated worker unit and to the unit of general local government."

1. The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;
2. A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
3. The expected date of the first separation, and the anticipated schedule for making separations;
4. The job titles of positions to be affected, and the number of affected employees in each job classification;
5. An indication as to whether or not bumping rights exist; and
6. The name of each union representing affected employees, and the name and address of the chief elected officer of each union.

CAN NOTICE EVER BE LESS THAN 60 DAYS?

Reduced notice is permissible in the following three situations: (1) the faltering company exception when a plant closes; (2) unforeseeable business circumstances, which were not reasonably foreseeable at the time notice otherwise would have been required; and (3) where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm. If one of the exceptions applies, the employer must give as much notice as is practicable and must include a brief statement of the reason for reducing the notice period.

PENALTIES FOR VIOLATING THE LAW

An employer who violates the WARN Act by not providing appropriate notice is liable to each aggrieved employee for an amount including benefits and back pay (at a rate of compensation not less than the higher of either the employee's average regular rate during the last three years of the employee's employment or the employee's final regular rate) for the period of violation, up to 60 days. The employer's liability may be reduced by such items as wages paid by the employer to the employee during the period of

the violation, voluntary and unconditional payments made by the employer to the employee and payments made by the employer to a third party (e.g., premiums for health benefits or payments to a defined contribution pension plan).

Further, an employer who fails to provide notice as required to a unit of local government is subject to a civil penalty not to exceed $500.00 for each day of violation. This penalty may be avoided if the employer satisfies the liability to each aggrieved employee within 3 weeks after the closing or layoff is ordered by the employer. In addition, the court, in its discretion, may allow the prevailing party reasonable attorneys' fees as part of the prevailing party's costs in a lawsuit to enforce rights under the WARN Act.

STATE LAWS

Employees' rights and remedies under WARN are in addition to rights provided under state laws. Arizona does not have a state law addressing plant closings and/or mass layoffs.

MORE RESOURCES

United States Department of Labor, **www.doleta.gove/layoffice/warn.ofm**

EMPLOYEES VERSUS INDEPENDENT CONTRACTORS

THE RULES ARE VAGUE – BUT IMPORTANT

WHY THE EMPLOYEE VS. CONTRACTOR DISTINCTION MATTERS

TESTS TO DETERMINE EMPLOYEE VS. CONTRACTORS

WAGE-HOUR TESTS

ARIZONA'S INDEPENDENT CONTRACTOR STATUTE

STEPS TO TAKE

THE RULES ARE VAGUE – BUT IMPORTANT

Guidance on who's considered an independent contractor can be vague. Bills have been introduced in Congress to clarify the definition but none have passed. The Internal Revenue Service may look at the classification one way, while federal agencies that enforce wage-and-hour or discrimination laws and the courts may utilize a different set of criteria. If an organization has the right to control and direct how a worker performs his or her job, the worker most likely will be treated as an employee under federal law.

Overall, the most critical factor seems to be that if the worker is merely directed toward an end result that must be achieved — without specific directions on how to achieve it — the worker is likely to be classified as an independent contractor.

WHY THE EMPLOYEE VS. CONTRACTOR DISTINCTION MATTERS

Generally, a business must withhold income taxes, pay Social Security and Medicare taxes, and pay unemployment taxes on wages paid to an employee. A business does not generally need to withhold or pay any taxes on payments made to independent contractors. If a business classifies an employee as an independent contractor and it has no reasonable basis for doing so, the business may be held liable for employment taxes for that worker.

TESTS TO DETERMINE EMPLOYEE VS. CONTRACTORS

The IRS considers numerous factors in determining whether a worker is an employee or independent contractor. The agency poses three categories of questions as a guideline: (1) behavioral, (2) financial, and (3) type of relationship. If the answer is "yes" to most of the questions below, it's likely the worker in question is an employee. If the majority of answers are "no" — especially for questions 1, 2, 3, 9 and 15 —independent-contractor status is more likely. Although there is no specific number of factors that is determinative of whether a worker is an independent contractor or an employee, the IRS looks at the relationship as a whole, considering the degree or extent of the right to direct or control the worker.

Behavioral

1. Does the worker receive instructions from you about when, where and how to perform the work?
2. Does the organization supply the worker with tools and materials?
3. Are the services required to be rendered by a specific person?
4. Does the worker receive training from your organization?
5. Is the work performed according to a set sequence determined by your organization?
6. Is the work performed on your company's premises?
7. Does your organization employ assistants for the worker?
8. Does your organization require the worker to submit reports?

Financial

9. Does the worker have significant investment in the activity?
10. Are payments based on time rather than completion of the job?
11. Is the payment arrangement such that the worker cannot incur a financial loss?
12. Does your organization pay the worker's business expenses?
13. Is your organization the worker's only significant client or customer?
14. Does the worker forego offering services to the public?

Type of Relationship

15. Is there a continuing relationship between the worker and your organization?
16. Are the worker's services integrated with your organization's activities?
17. Do you have the right to fire the worker?
18. Does the worker have the right to quit without penalty?
19. Does your organization set the working hours?
20. Does your organization require a full-time commitment from the worker?

WAGE-HOUR TESTS

Under federal wage-hour laws (the Fair Labor Standards Act), courts use an "economic reality test" to measure the difference between

an employee and an independent contractor. Unlike the IRS test above, the wage-hour economic reality test focuses on the economic reality of the working relationship between the worker and the company for whom the work is performed. *For example, in Cromwell v. Driftwood Electrical Contractors, No. 90-60212, 2009 WL 3254467 (5th Cir., Oct. 12, 2009)*, workers were deemed to be employees even though the workers controlled how and when they performed the work, lacked close supervision, provided their own tools and equipment, took responsibility for their own insurance and employment taxes, and exercised a high level of skill. The court ruled that these factors were outweighed by the following "economic reality" factors:

1. degree of control exercised by the alleged employer,
2. extent of the relative investments of the worker and the alleged employer,
3. the degree to which the worker's opportunity for profit or loss is determined by the alleged employer,
4. the skill and initiative required in performing the job, and
5. the permanency of the relationship.

ARIZONA'S INDEPENDENT CONTRACTOR STATUTE

A.R.S. § 23-1601 allows an employer contracting with an independent contractor to prove the existence of the independent contractor relationship by having the independent contractor execute a declaration of independent business status. The declaration must be signed and dated by the independent contractor and must substantially comply with the following form:

This declaration of independent business status is made by (contractor) in relation to services performed by the contractor for or in connection with (contracting party). The contractor states and declares the following:

1. The contractor acknowledges that the contractor operates the contractor's own independent business and is providing services for or in connection with the contracting party as an independent contractor.
2. The contractor acknowledges that the contractor is not an employee of the contracting party and the services rendered for or in connection with the contracting party do not establish any right to unemployment benefits or any other right arising from an employment relationship.
3. The contractor is responsible for all tax liability associated with payments received from or through the contracting party and the contracting party will not withhold any taxes from payments to the contractor.
4. The contractor is responsible for obtaining and maintaining any required registration, licenses or other authorization necessary for the services rendered by the contractor.
5. The contractor acknowledges at least six of the following:

   (a) That the contractor is not insured under the contracting party's health insurance coverage or workers' compensation insurance coverage.

(b) That the contracting party does not restrict the contractor's ability to perform services for or through other parties and the contractor is authorized to accept work from and perform work for other businesses and individuals besides the contracting party.

(c) That the contractor has the right to accept or decline requests for services by or through the contracting party.

(d) That the contracting party expects that the contractor provides services for other parties.

(e) That the contractor is not economically dependent on the services performed for or in connection with the contracting party.

(f) That the contracting party does not dictate the performance, methods or process the contractor uses to perform services.

(g) That the contracting party has the right to impose quality standards or a deadline for completion of services performed, or both, but the contractor is authorized to determine the days worked and the time periods of work.

(h) That the contractor will be paid by or through the contracting party based on the work the contractor is contracted to perform and that the contracting party is not providing the contractor with a regular salary or any minimum, regular payment.

(i) That the contractor is responsible for providing and maintaining all tools and equipment required to perform the services performed.

(j) That the contractor is responsible for all expenses incurred by the contractor in performing the services.

6. The contractor acknowledges that the terms set forth in this declaration apply to the contractor, the contractor's employees and the contractor's independent contractors.

A written declaration of independent business status does not guarantee the existence of an independent contractor relationship. Execution of the declaration, however, does create a rebuttable presumption of independent contractor status.

STEPS TO TAKE

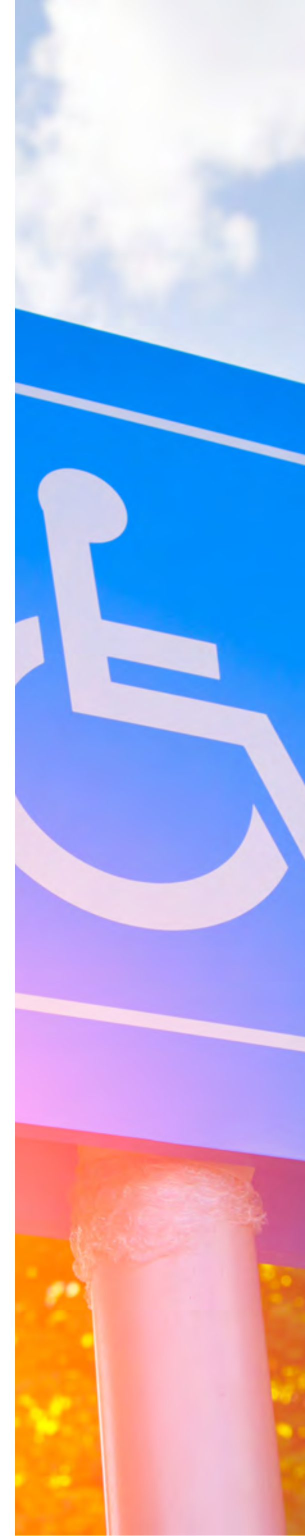
There are steps an employer can take to help enhance its chances of surviving a classification challenge.

Do have every independent contractor:

- sign a written independent -contractor agreement
- engage in work that is limited to a specific term or project
- determine how, when, and where the work will be performed
- set forth in the agreement that the contractor is not covered by the employer's liability, health or worker's compensation insurance and receives no benefits provided to the employer's employees
- agree to indemnify the employer for tax or other liability if the contractor is held to be an employee
- complete a Form W-9 to provide the employer with a correct taxpayer identification number for the contractor to insure that the employer will not be liable for "back up withholding" on payments to the contractor

Do not:

- conduct performance evaluations of independent contractors
- provide extensive or on-going training
- require them to work specific hours or attend company meetings
- give them employee handbooks (only policies that relate to their status as contractors, e.g., harassment, workplace violence, security, etc.)



AMERICANS WITH DISABILITIES ACT

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OVERVIEW

The Americans with Disabilities Act ("ADA"), as amended in 2008 by the Americans With Disabilities Act Amendments Act ("ADAAA"), 42 U.S.C. Section 12101 et. seq., is a federal law that prevents discrimination against people with disabilities. It affects restaurant operators in two ways. It prohibits them from discriminating against employees and job applicants with disabilities or perceived disabilities. It also prohibits them from discriminating against guests with disabilities or perceived disabilities.

WHO IS PROTECTED BY THE LAW?

The ADA protects people with disabilities. The law defines "disabilities" broadly. Generally, the ADA protects three categories of people:

- people with a physical or mental impairment that substantially limits one or more major life activities
- people with a record of such impairment; and
- people regarded as having such impairment.

42 U.S.C. § 12102

In considering whether someone has a protected disability, the ADA looks at a person's condition before any "mitigating measures" are taken into account. For example, some people can use aids such as medication, prosthetics, assistive technology, hearing aids or other medical equipment to control or eliminate their condition. (Prior to 2009, disability status under the ADA was based on the person's condition after mitigating measures were taken into account.)

The one exception is that people who use ordinary eyeglasses or contact lenses to improve poor vision are not considered to have a vision disability under the ADA. This exception applies only to sight.

PEOPLE WITH A PHYSICAL OR MENTAL IMPAIRMENT

The ADA protects people with a physical or mental impairment that substantially limits one or more major life activities. Having an impairment does not mean a person is automatically entitled to the ADA's protections. For the person to be protected by the ADA, the impairment must substantially limit one or more major life activities.

Definitions:

A. "Substantially limits": The Equal Employment Opportunity Commission, at the direction of Congress in the ADA Amendments Act of 2008, has defined in new regulations effective May 24, 2011, nine so-called "rules of construction" to be applied in determining the meaning of the term "substantially limits":

1. "Substantially limits" is to be construed as broadly as the ADA allows.
2. The impairment need only substantially limit the ability to perform a major life activity compared to most people in the general population. It need not prevent, or significantly or severely restrict, the individual from performing the major life activity. "Substantially" means something less than "significantly."

3. The focus of analysis is on whether employers have complied, not necessarily on whether the impairment substantially limits a major life activity.

4. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. The degree of limitation is lower than it was pre-ADAAA. The final rules contain the new concept of "predictable assessments," meaning there are impairments that in virtually all cases will be considered disabilities, such as: deafness, blindness, intellectual disability (formerly called mental retardation), missing limbs, autism, cerebral palsy, cancer, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, posttraumatic stress disorder, obsessive compulsive disorder, and schizophrenia. As a result, in many cases, the "individualized assessment" will be perfunctory.

. The comparison of an individual's performance of a major life activity to that of the general population will not usually require scientific, medical or statistical analysis, although such analysis may still be used. For those with learning disabilities, the comparison is still with those without the learning disability, even though the usual method of diagnosis may be in terms of the difference between actual and expected achievement of the individual. Success in school does not mean that the person does not have a protected disability.

6. The ameliorative effects of mitigating measures are ignored for the purposes of determining substantial impairment. In contrast, the negative effects of mitigating measures, such as the side effects of the medications, should be considered. The ADAAA made an exception for "ordinary eyeglasses or contact lenses," which may be taken into account in determining whether or not a person has a disability. Consistent with the ADAAA, aids for those with "low vision" are not "ordinary eyeglasses." The new rules defined "ordinary eyeglasses or contact lenses" as "lenses that are intended to fully correct visual acuity or to eliminate refractive error." The EEOC said in its amended Interpretive Guidance that, if any employer imposes a qualification standard that requires uncorrected vision, adversely affected applicants or employees may challenge that standard, and the employer will be required to demonstrate that the qualification standard is job-related and consistent with business necessity.

7. An impairment that is episodic or in remission can be a disability, even if not active or in remission. This applies to a broad range of episodic conditions, conditions with "flare ups," and conditions that may be at least temporarily cured.

8. Only one major life activity need be substantially limited.

9. For the purposes of determining whether an individual has an actual disability ("prong one" of the definition of covered persons), or has a record of a disability ("prong two" of the definition), Impairments that last or are expected to last less than six months may be substantially limiting. The EEOC specifically declined to create a bright-line exclusion for short-term limitations. The final rule retains the concepts

of "condition, manner, or duration" as factors that may be relevant to the determination of whether an impairment substantially limits a major life activity. Thus, duration is just a factor, along with severity.

29 CFR § 1630.2.

B. "Major life activity": The ADA includes examples of major life activities covered by the law.

- caring for oneself
- performing manual tasks
- seeing
- hearing
- eating
- sleeping
- walking
- standing
- lifting
- bending
- speaking
- breathing
- learning
- reading
- concentrating
- thinking
- communicating
- working
- operation of major bodily functions, including "functions of the immune system, normal cell growth, digesting, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions" (Congress added this to the ADA's list of major life activities as part of the ADA amendments that took effect Jan. 1, 2009.)

Major life activity is now defined under the new rules effective May 24, 2011, to encompass not only those activities formerly included, but several more such as "interacting with others." The ADAAA added the operation of a major bodily function as a major life activity, and the EEOC added to the statutory definitions in the new regulations virtually every physiological function. Thus major life activities now include the functioning of the immune, musculoskeletal, neurological, brain, genitourinary, circulatory, and reproductive systems, and all major organs.

According to the new rules effective May 24, 2011, major life activity need not be determined by reference to whether it is of central importance to daily life, explicitly determining that the previous standard in *Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002)*, no longer applies after the ADAAA. Nor is the degree of impairment to be confused with whether a particular activity is a major life activity.

The EEOC's new regulations make it clear that the intention is to include virtually all physical and mental conditions, except those

which have never been considered impairments, such as genetic predisposition to a disease (now covered by the Genetic Information Nondiscrimination Act), pregnancy (but not pregnancy-related disability), eye color, left-handedness, and personality traits such as a bad temper. The sweep of the new definition of major life activity is such that the EEOC eliminated its former regulations and guidance regarding the major life activity of "working." Instead, the EEOC also noted in its amended Interpretive Guidance that major life activity of working will be analyzed under the "regarded as" prong of the definition of disability.

The list is not exhaustive, and Congress cautioned against interpreting "major" too strictly. And it's likely that more people will qualify as disabled under the ADA due to the amendments that took effect in 2009. For example, people may more likely be construed as disabled if they have a condition such as insomnia (i.e., they are impaired in the major life activity of sleeping), dyslexia (learning), stuttering (speaking), attention deficit disorder (concentrating) and infertility treatments (reproductive functions).

PEOPLE WITH A RECORD OF IMPAIRMENT

The ADA protects people who have a record of a physical or mental impairment that substantially limits major life activities, but who have recovered or are recovering from such an impairment. The ADA also protects those who have been misclassified as living with a disability under the "record of" prong. The records which may contain such information include, but are not limited to, education, medical, or employment records.

Examples include people with a history of mental or emotional illness, heart disease or cancer; and recovered alcoholics or drug addicts.

PEOPLE REGARDED AS HAVING AN IMPAIRMENT

This category also protects people who have no impairment, or do not have an impairment that substantially limits major life activities, but who are viewed by others as having an impairment. Examples include victims of severe burns, individuals who use hearing aids and people with controlled diabetes or epilepsy.

In these cases of perceived disability, if a person's perceived disability is transitory or minor – meaning the perceived disability is expected to last six months or less – the person is not protected by the ADA. If a person has an actual disability, however, he/she is protected even if the condition lasts for less than six months.

Under the ADAAA and the new rules, persons who are regarded as disabled need not show that they have a substantial limitation on a major life activity, but only that they were regarded by the employer as having a disability, and because of that were subject to an adverse employment action. An exception is provided by the ADAAA for impairments that are "transitory and minor." Transitory means lasting or expected to last six months or less. The EEOC's new rules make this exception an affirmative defense, and place the burden of proof on the employer.

Whether the impairment is transitory and minor must be determined objectively, not subjectively, by the employer. As the employer has

only very limited access to medical information about candidates for employment (and none about applicants) and employees, employers may have considerable difficulty using this defense. The EEOC also explains that it does not matter whether myths, fears, or stereotypes motivated the employer's decision, only whether the employer's decision was based on an actual or perceived impairment.

The EEOC also explains in its new regulations that the "regarded as" prong should be the primary means of establishing coverage under the ADA in cases that do not involve the need for reasonable accommodations. The EEOC rules incorporate the clarification provided by the ADAAA that persons who are regarded as disabled, but who do not claim to have an actual disability or a record of disability, need not be provided with reasonable accommodations.

ACCOMMODATING EMPLOYEES AND JOB APPLICANTS WITH DISABILITIES (ADA, TITLE I)

Title I of the ADA affects how employers deal with employees and job applicants. Title I prohibits employers from discriminating against any individual with a disability who with or without reasonable accommodation can perform the essential functions of a job. The ban on discrimination covers all aspects of employment, including job-application procedures, hiring and firing, compensation, advancement, job training and any other term, condition or privilege of employment.

WHICH EMPLOYERS ARE COVERED BY TITLE I OF THE ADA?

Title I of the ADA covers employers of 15 or more employees. The EEOC defines this to include any employer with at least 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Employers of fewer than 15 employees are not covered.

SPECIFIC REQUIREMENTS OF TITLE I OF THE ADA

The ADA's Title I, as amended by the ADAAA and interpreted by the EEOC in its new regulations effective May 24, 2011, requires employers to:

- Reasonably accommodate the known physical or mental limitations of a job applicant or employee with a disability, unless the employer can show that the accommodation would impose an undue hardship on the employer's business;
- Not deny employment opportunities to a job applicant or employee with a disability simply because the employer does not want to make a reasonable accommodation;
- Not limit, segregate or classify an applicant or employee in a way that adversely affects that person's status or opportunities because of his or her disability;
- Not discriminate against an individual because of that person's relationship or association with an individual with a disability (spouse, child, etc.);

- Not use employment tests or other selection criteria that tend to screen out people with disabilities unless the employer can show that the test or criteria is job related and consistent with business necessity; and
- Choose and administer employment tests in the most effective manner to make sure results accurately reflect the employee's or applicant's skills, aptitude or whatever other factor the test purports to measure, rather than any impairment in sensory, manual or speaking skills (unless these skills are the factors the test purports to measure).

WHAT DOES IT MEAN TO MAKE A "REASONABLE ACCOMMODATION"?

The ADA requires employers to make reasonable accommodations to the known disabilities of employees or job applicants. In general, an accommodation is any change in the work environment or in the way things are usually done that enables an individual with a disability to enjoy equal employment opportunities and benefits. An accommodation is not required unless it is reasonable, meaning it does not impose an undue hardship on the employer.

Examples of reasonable accommodations include

- making it easy for employees with disabilities to get to, enter and use existing facilities;
- restructuring a job;
- offering a part-time or modified work schedule;
- reassigning the disabled person to a vacant position;
- providing devices such as audiotapes, phone headsets or electronic visual aids;
- raising or lowering furniture;
- adjusting or modifying exams, training materials or policies; or
- providing qualified readers or interpreters.

It should also be noted that under the new EEOC regulations only individuals with actual disabilities or a record of a disability are entitled to reasonable accommodations. Individuals only regarded as disabled are not.

WHEN DOES AN ACCOMMODATION IMPOSE AN "UNDUE HARDSHIP"?

The ADA requires employers to make reasonable accommodations to the needs of an employee or job applicant with a known disability as long as accommodation does not impose an undue hardship.

The ADA defines undue hardship as an action requiring significant difficulty or expense -- that is, an action that is unduly costly, extensive, substantial, disruptive or that will fundamentally alter the nature of the services offered.

In determining what constitutes an undue hardship, such factors as the size of the business, its overall financial resources and the cost of the accommodation will be taken into consideration. For example, in some businesses it would be a reasonable accommodation to let an employee come in an hour late (if that would accommodate his or her disability and still have the employee perform the essential

functions of the job). However, this accommodation could constitute an undue hardship if a small business has no one else available to help customers during that hour.

EMPLOYEES/APPLICANTS MUST BE ABLE TO PERFORM A JOB'S ESSENTIAL FUNCTIONS

Title I of the ADA prohibits employers from discriminating against individuals with disabilities. To be considered for a job, employees or applicants with disabilities must be able to perform the job's essential functions with or without accommodation. Essential functions under the ADA are the fundamental job duties necessary for the performance of a job. Attendance is generally considered an essential function of many jobs, for example. While an employer may be required to accommodate a reasonable number of absences or modified work schedule, it need not accommodate substantial or unpredictable absences.

In determining what the essential functions are, consideration will be given to the employer's judgment as to what functions are essential. Written job descriptions -- prepared before an employer advertises a job or interviews applicants -- also will serve as evidence of the functions an employer considers essential.

MEDICAL EXAMS AND MEDICAL QUESTIONS

Under the ADA an employer may not conduct a pre-employment medical examination or make pre-employment inquiries into the nature, severity or existence of a disability. The employer may, however, inquire about the applicant's ability to perform job-related functions.

After an offer of employment has been made and before an applicant starts work, an employer may require a medical examination and may condition the offer of employment on the results of the examination, as long as all new employees are required to be examined and information from the examination is kept confidential and maintained in a separate medical file.

A test to determine whether an employee is using illegal drugs is not considered a medical examination under the ADA.

KEEPING DISABILITY INFORMATION CONFIDENTIAL

Once the employer learns of an applicant's or employee's disability, such information must be kept confidential and must not be communicated to anyone who does not need to know. For example, if an employee has epilepsy, it would be important for the employee's supervisor to know about his or her condition, in the event of a seizure. A supervisor may also need to be informed regarding any necessary accommodations. If an establishment has an employee or employees responsible for rendering first aid, such employee or employees would also need to know but other workers would not need to know.

DEFENDING AGAINST CHARGES OF DISCRIMINATION

Employers may defend themselves against disability-related job-discrimination charges in the following ways:

- An employer can show that the alleged discriminatory standards or criteria are job-related and consistent with business necessity and that the worker could not have performed the job even with reasonable accommodation;
- An employer can show that the individual in question poses a direct threat to the health and safety of the employee or others in the workplace. "Direct threat" means a significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation. Whether the employee or applicant would pose a direct threat is based on an individualized assessment considering the duration of the risk, nature and severity of potential harm, likelihood of the occurrence of potential harm, and the imminence of potential harm; and
- A discrimination charge on the basis of the "regarded as" prong allows a defense if the disability the employee is perceived as having is transitory and minor.

FOOD HANDLERS WITH INFECTIOUS OR COMMUNICABLE DISEASES

Restaurateurs are concerned that they could inadvertently violate the ADA by taking steps to enhance public health. For example, restaurateurs have asked if and when they can move a food handling employee into a non-food-handling position because of concerns that an employee has an infectious or communicable disease.

The Centers for Disease Control and Prevention publishes an annual list of infectious and communicable diseases that can be transmitted through the handling of food. If an individual employee has one of the diseases on the list, employers will not violate the ADA by transferring food-handling individuals into non-food-handling positions.

These are the diseases that can be transmitted through food-handling, according to the government's list:

- Astroviruses
- Bacillus cereus
- Campylobacter jejuni
- Clostridium perfringens
- Cryptosporidium species
- Entamoeba histolytica
- Enterohemorrhagic E. Coli
- Enterotoxigenic E. Coli
- Giardia intestinalis
- Hepatitis A virus
- Nontyphoidal salmonella
- Noroviruses
- Rotaviruses

- Salmonella typhi
- Sapoviruses
- Shigella species
- Staphylococcus aureus
- Streptococcus pyogenes
- Taenia Solium – cysticercosis
- Vibrio cholera
- Yersinia enterocolitica

The list does not include acquired immune deficiency syndrome (AIDS) or human immunodeficiency virus (HIV).

A foodservice employer may require employees to report symptoms and/or a diagnosis of pathogens on the list. If an employee contracts one of the above diseases, the employer should not publicize the name of any such employee but may put other employees on alert and test the other employees. The medical results must be kept confidential and should be maintained separate from the employee's personnel file.

The EEOC offers How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers. The booklet looks at how the ADA applies in restaurants – and how restaurateurs can comply with public-health rules without violating the ADA. The guide looks in particular at the interplay between the ADA (which protects employees with disabilities) and the Food and Drug Administration's Food Code (which guides states and localities in regulating safety and public health in restaurants).

Concerns about the flu (H1N1) pandemic resulted in a 2009 update by the EEOC to its guidance on workplace issues that may arise during a flu pandemic. The guidance – Pandemic Preparedness in the Workplace and the Americans with Disabilities Act – explains how employers can protect the workplace during a pandemic outbreak while still complying with the ADA. Questions addressed in the EEOC guidance include:

- May an employer send employees home if they display flu-like symptoms during a pandemic?
- How much information may an employer seek from an employee who calls in sick?
- May an employer compel all employees to take the influenza vaccine regardless of their medical condition or religious believes?
- When an employee returns to work, does the ADA allow employers to require a doctor's note certifying the employee's fitness for duty?

The EEOC guidance also helps employers develop a plan to manage their workplace before, during and after a potential outbreak.

THE ADA AND HEALTH INSURANCE PLANS

The ADA prohibits covered employers from discriminating against a qualified individual with a disability in any privilege of employment.

The ADA does not require employers to provide health insurance. However, for those who choose to offer health insurance to their

employees, employer provided health insurance is a privilege of employment. Thus an employer may not directly, indirectly or through a health-care provider discriminate against an individual with a disability in the health insurance provided by the employer.

The law on how the ADA affects employer-provided health insurance is still evolving, but the following guidance is suggested:

- An employer may not refuse to hire and may not fire an individual with a disability because either the individual or a family member or dependent with a disability would increase the employer's insurance costs.
- An employer must provide all employees, including employees with disabilities, equal access to the insurance plan.
- An employer may limit insurance coverage and exclude coverage for pre-existing conditions; limit lifetime benefits; and raise deductibles or employee co-payments provided such limiting features apply to all employees.
- The employer's health insurance may make disability-based distinctions based on cost or actuarial data provided the employer can prove that the plan is bona fide and that the distinction is not a subterfuge to evade the law.

EEOC guidelines also indicate that employers may provide coverage for dependents with disabilities that is different from that provided for employees with disabilities. For example, it would not violate the ADA for a health-insurance plan to cover prescription drugs for employees but not for employees' dependents.

POSTER REQUIREMENT

Employers are required to post an EEOC poster that includes information on the ADA in a conspicuous place. See the Legal Problem Solver's chapter on records and posters for more information on this and other posters.

HOW ADA'S TITLE I IS ENFORCED

Remedies and procedures for claims filed under Title I of the ADA are essentially the same as those for claims filed under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e). Generally, ADA job discrimination claims must be filed with the EEOC within 180 days of the date of the claimed discrimination. In states with EEOC-approved fair employment-practices agencies, job-discrimination claims can be filed within 300 days.

The statute of limitations for filing pay-related discrimination claims under the ADA may be longer than 180 days or 300 days because of the Lily Ledbetter Fair Pay Act, signed into law Jan. 29, 2009. Under the Lily Ledbetter Fair Pay Act, the statute of limitations for filing pay-discrimination claims starts not on the date the alleged discrimination took place, but on the most recent date the employee is affected by the original discriminatory act. If an employer discriminatorily denied a pay raise on Jan. 1, 2010, for example, the employee would not be required to file a discrimination claim within 180 or 300 days of Jan. 1 alleging discrimination. Instead, the employee's time clock for filing a claim would start anew with each payroll period, since the employee is allegedly not being paid the full amount at any time after the original discriminatory act.

Usually, the EEOC has 180 days after the filing to investigate the charge and either bring a civil action against the employer or issue a right-to-sue letter to the individual who filed the complaint.

REMEDIES

Remedies for the employee or job applicant in ADA cases include:

- A court order requiring the individual to be hired or reinstated, with or without back pay;
- Reasonable attorneys' fees and costs; and
- A court order requiring the employer to make reasonable accommodations.

Job applicants or employees who successfully argue in jury trials that an employer intentionally discriminated against them may also be eligible for monetary damages of up to $300,000, depending on the size of the business. However, damages will not be awarded in ADA Title I cases where a plaintiff alleges the employer failed to make a reasonable accommodation and where the employer can show he or she made a good-faith effort -- in consultation with the employee or applicant, after the employee or applicant informed the employer that an accommodation was needed -- to find a reasonable accommodation that did not cause an undue hardship for the employer.

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SUGGESTIONS FOR EMPLOYER COMPLIANCE WITH TITLE I OF THE ADA

Employers can use these suggestions for how to comply with Title I of the ADA. Avoid bias in the hiring process by reading the Legal Problem Solver chapter on equal employment opportunity. Make a list of every job in the establishment. Prepare written job descriptions listing the primary functions of each job. The National Restaurant Association's Model Position Descriptions for the Foodservice Industry offers more than 40 sample descriptions for jobs ranging from chef to server.

Make the decision to hire based on an applicant's ability to perform the functions listed in the job description, keeping in mind that the employer is obligated by law to accommodate known disabilities of the applicant unless this creates an undue hardship.

Talk to the employee or applicant about the accommodations that would enable the applicant to perform the primary job functions. In determining what kind of accommodation to provide, consider the applicant's preference and consult with experts. The Job Accommodation Network is a free service that offers practical, inexpensive ideas that have proven effective for other employers. Other tips are available through **Disability.gov** or vocational rehabilitation training programs.

Provide individuals with disabilities with a working environment as favorable as that provided to other employees, including access to non-work areas such as employee lunchrooms, lounges and toilets. Evaluate the work performance of individuals with disabilities according to the same criteria you use for other employees. Offer increases in wages and promotions on the same basis as for other employees without regard to the accommodation(s) provided such individuals.

For more information on Title I of the ADA, visit the **EEOC Web site** or contact the EEOC at (800) 669-4000.

AVOIDING DISCRIMINATION WHEN YOU SERVE GUESTS WITH DISABILITIES (TITLE III OF THE ADA)

Title III of the ADA bans discrimination against people with disabilities by "places of public accommodation," including restaurants, bars, and other establishments serving food or drinks.

Title III prohibits a foodservice operator from discriminating against an individual with a disability in the full and equal enjoyment of all services the foodservice establishment offers. Further, the ADA requires places of public accommodation to make their services available -- i.e., accessible -- to people with disabilities in the most integrated setting appropriate to the needs of the individual.

SPECIFIC REQUIREMENTS OF TITLE III

Title III of the ADA requires places of public accommodation to provide equal opportunity, not just equal treatment, to people with disabilities. Specifically, Title III of the ADA requires a foodservice operator to:

- Not impose eligibility criteria that limit the opportunity of people with disabilities to fully enjoy the facilities and services provided unless it can be shown these criteria are necessary for providing these services;
- Make reasonable modifications to policies and practices to accommodate individuals with disabilities unless doing so would fundamentally alter the nature of the accommodations or services provided;
- Provide "auxiliary aids and services" to make sure people with disabilities have equal access to goods and services unless it can be shown that this is an undue burden or fundamentally alters the nature of the services provided;
- Remove architectural and communication barriers in existing facilities wherever this is readily achievable -- i.e., easily to accomplish without much difficulty or expense; and
- If barrier removal is not readily achievable, implement any readily achievable alternative ways of making services or accommodations available. If a ramp cannot be installed because the flight of stairs leading to the front door is too long, for example, other readily achievable alternatives must be considered, such as curbside service or home delivery.

The ADA also requires that:

- New structures be constructed to be accessible; and
- Significant renovations in existing structures be made accessible.

REMOVING BARRIERS IN EXISTING FACILITIES

As noted, the ADA requires existing facilities to remove architectural and communication barriers wherever that is readily achievable. This includes removing or relocating physical barriers such as steps, curbs, telephones, tables, and towel dispensers, as well as removing communication barriers that affect individuals with visual, hearing, or other communication impairments. A written menu, for example, is a communication barrier to the visually impaired, as is a policy limiting customers to ordering from a drive-through after the lobby of a restaurant closes. An audible alarm system is a barrier to the hearing-impaired.

New Department of Justice (DOJ) standards issued in 2010 for alterations or new construction generally must be followed if an application for a building permit was submitted or physical construction or alterations began after March 15, 2012

WHAT BARRIER REMOVAL IS "READILY ACHIEVABLE"?

Barrier removal is considered readily achievable when it is easy to accomplish and carry out without much difficulty or expense. What is readily achievable for one restaurant may not be for another. Courts make decisions case by case, taking into account such factors as the nature and cost of the action needed; the overall financial resources and size of the facility; and the relationship of the facility to a controlling or parent company with greater resources.

As businesses remove barriers, they must do so in a way that ensures compliance with the DOJ's ADA Standards for Accessible Design. Sometimes businesses will find there is no readily achievable way to remove barriers in compliance with the DOJ's ADA standards. In these cases, the business must at a minimum ensure that any barrier-removal measures do not pose a significant risk to the health or safety of individuals with disabilities or others.

WHAT MAKES A BUSINESS "ACCESSIBLE"?

The ADA Accessibility Guidelines (ADAAG) define what makes a business accessible. These technical specifications outline accessibility in every aspect of a business, from the width of aisles to the height of self-service counters.

Some of the 2010 ADA rules went into effect on March 15, 2011 (e.g. service animal amendments) and others went into effect on March 15, 2012 (for building alterations and new construction). Which guidelines apply to a particular business may depend on whether the premises were fully compliant with the prior 1991 guidelines.

PROVIDING AIDS AND SERVICES TO ENSURE ACCESS

Foodservice operators can be held liable for failing to provide auxiliary aids and services to ensure that individuals with disabilities have access to goods, services and accommodations. Businesses may not be required to provide these aids and services if doing so constitutes an undue burden. Examples of auxiliary aids and

services include interpreters for people with hearing impairments, or readers for blind customers. An undue burden is an action that requires significant difficulty or expense, taking into account such factors as cost and an operator's financial resources. The operator has the burden of showing that providing the auxiliary aid or service would constitute an undue burden.

If one auxiliary aid or service constitutes an undue burden, a foodservice operator must try to provide another that does not. For example, an operator may not have to provide a menu in Braille or large print if one of the servers can help the customer read the menu. An operator may not have to provide an interpreter if he or she could communicate with a hearing-impaired person using a pen and pad.

ENSURING ACCESSIBILITY IN ALTERATIONS AND NEW CONSTRUCTION

The ADA requires new buildings and facilities undergoing alterations to be readily accessible to and usable by individuals with disabilities. "Readily accessible" and "usable by" mean that a facility can be easily and safely approached, entered, and used by individuals with disabilities.

The degree of accessibility required depends on whether a building is "newly constructed" or going through alterations:

- New construction: Any facility opening for first occupancy after January 26, 1993 must be readily accessible, including everything from parking spaces and restrooms to entrances and work areas. Alterations to the facility that were started after March 15, 2012 must comply with the new 2010 ADA standards.
- Alterations: An alteration is defined as any change that affects or could affect the usability of a facility, such as remodeling, renovation, or rearrangement of wall configurations or structural elements. The term does not include very minor changes such as painting or hanging wallpaper. When alterations are undertaken, the altered areas must, to the maximum extent feasible, be readily accessible to individuals with disabilities, including wheelchair users.

Alterations that affect an area containing a primary function of the establishment (a restaurant's dining room, for example) trigger an additional requirement — that the path of travel to the area and the phones, restrooms, and water fountains serving it must also be readily accessible. If the cost of the path-of-travel alterations exceeds 20 percent of the cost of alterations to the primary function area, an operator is not required to make the changes.

Elevators are not required to be installed if the facility is less than three stories high or has less than 3,000 square feet per story, unless the facility is in a shopping center or mall or unless the attorney general determines that a particular category of facilities requires elevators.

Businesses must make sure new buildings -- and to the maximum extent feasible, altered facilities --comply with the DOJ's ADA Standards for Accessible Design. As mentioned above, the new DOJ 2010 regulations have been in effect in part since March 15, 2011,

with the remainder of the requirements in effect since March 15, 2012.

THE DIRECT THREAT DEFENSE TO MAKING ACCOMMODATIONS

A foodservice operator is not required to provide services or accommodations to an individual with a disability if the operator can show that doing so would pose a "direct threat" to the health and safety of others. Direct threat means a significant risk to the health or safety of others that cannot be eliminated by modifying the operator's policies, practices or procedures, or by providing auxiliary aids or services.

ENFORCEMENT OF TITLE III OF THE ADA

Remedies and procedures under Title III of the ADA generally provide for a civil action for preventive relief and reasonable attorneys' fees and costs. Courts also may order a public accommodation to remove barriers, provide aids and services, and modify policies. In addition, if the attorney general has reason to believe the facility has engaged in a pattern or practice of discrimination, the attorney general may bring a civil action for monetary damages and the court may impose a civil penalty of up to $50,000 for the first violation and $100,000 for subsequent violations.

WAYS TO MAKE YOUR OPERATION ACCESSIBLE TO GUESTS WITH DISABILITIES

These tips may help businesses comply with Title III of the ADA:

- Order a copy of the Americans with Disabilities Act: Toolkit for Restaurant Operators from the National Restaurant Association, available for download at **http://www.restaurant.org/Pressroom/Press-Releases/National-Restaurant-Association-Offers-Toolkit-on.**
- If the facility is leased, review the lease to determine whether the landlord or the tenant has the responsibility for ensuring ADA compliance and making alterations required by law. Consult an attorney, if necessary.
- Inspect the facility, including sidewalks, parking area, entrances, aisles and passageways, floor coverings, restrooms, and table/booth configurations, to determine whether architectural and communication barriers to individuals with disabilities, including individuals in wheelchairs, exist.
- Remove architectural and communication barriers when this is easy to accomplish without much difficulty or expense. Strive to make the facility readily accessible. The DOJ suggests the following priorities if an operator cannot afford to make all necessary modifications at once: (1) do everything possible to help people with disabilities reach and get into the facility; (2) improve access to dining rooms or other areas of primary functions; (3) work to make restrooms accessible; and (4) make other services accessible.

- Increase the staff's sensitivity to people with disabilities. Ask local rehabilitation agencies or disability advocacy organizations for tips or help with training. Employees who are familiar with different disabilities and who make an honest and reasonable effort to accommodate customers can be an operator's greatest asset.

For more information on Title III of the ADA, visit the **U.S. Department of Justice's ADA Web site.**

TAX INCENTIVES /TAX CREDIT

Section 44 of the Internal Revenue Code (26 U.S.C. § 44) allows eligible small businesses to take a "disabled access (tax) credit" for expenses associated with ADA compliance.

The credit can be used to cover a variety of expenditures, including:

- removal of architectural barriers in facilities to comply with applicable accessibility standards
- provision of readers for customers or employees with visual disabilities
- provision of sign language interpreters
- purchase of adaptive equipment
- production of accessible formats of printed materials (i.e., braille or large print menus)

Amounts spent must be reasonable and may not include spending not necessary to accomplish the intended purposes. Small businesses must make sure that when they remove barriers (or provide services, modifications, materials or equipment), the barrier-removal or services provided meet the DOJ's Standards for Accessible Design. The tax credit can be used only to adapt existing facilities; it cannot be used for the cost of new construction.

The tax credit is equal to 50 percent of the eligible access expenditures in a year, up to a maximum expenditure of $10,250. The business gets no tax credit for the first $250 of expenditures. Thus the maximum tax credit is $5,000 in a year.

Eligible small businesses must have gross annual receipts under $1 million or 30 or fewer full-time employees in the preceding tax year. A full-time employee is one who worked 30 or more hours a week for 20 or more calendar weeks during the taxable year.

All members of the same controlled group of corporations and all persons under common control are treated as one business for the purpose of the gross-receipts limitation, employee limitation, and maximum tax credit.

For more information and to claim the tax credit: download **IRS Form 8826**.

Tax Deduction: All businesses are entitled to take an annual tax deduction of up to $15,000 under §190 of the Internal Revenue Code (26 U.S.C. § 190) for removing specified architectural or transportation barriers in order to make their facilities more accessible to and usable by people with disabilities. This includes making steps, doorways, restrooms, and parking areas more accessible. To qualify for the deduction, the removal of barriers must meet DOJ/Access Board and Treasury Secretary standards.

TAX CREDIT OR TAX DEDUCTION?

An eligible small business can take both the tax credit and the tax deduction for separate expenses.

A restaurateur cannot, however, claim both a credit and a deduction for the same expense. Information on the credit and deduction can be obtained from the Internal Revenue Service by reading *Publication 907, Tax Highlights for Persons with Disabilities* (see "business incentives") and *Fact Sheet 4. Tax Incentives for Improving Accessibility*, published by Adaptive Environments Center, Inc. and Barrier Free Environments, Inc. and available at **www.ada.gov**.

STATE LAWS

The ADA does not preempt state laws nor does it invalidate state laws that provide equal or greater protection for individuals with disabilities. The Arizonans with Disabilities Act largely mirrors the requirements of the ADA.

SERVICE ANIMALS

A business must modify policies, practices, or procedures to permit the use of service animals. Service animals are permitted in all areas of the business where customers are permitted to go, including dining rooms and restrooms. Certain exceptions exist that allow a business to request that an individual with a disability remove a service animal from the premises, specifically if the animal is out of control and no effective action is taken or if the animal is not housebroken. If a service animal must be excluded, the business still must provide the individual with the disability the opportunity to obtain goods, services, and accommodations without the animal on the premises, for example, by providing curbside service.

Service animal means any dog or miniature horse that is individually trained to perform tasks for the benefit of the individual with a disability. The tasks performed by the service animal must directly relate to the individual's disability. Such tasks may include: assisting individuals who are blind or have low vision, alerting individuals who are deaf to the presence of people or sounds, providing protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, and helping persons with psychiatric or neurological disabilities by preventing or interrupting impulsive or destructive behaviors. Any other species of animal, whether trained or untrained, does not qualify as a service animal under the ADA and the 2010 ADA rules or the Arizonans with Disabilities Act. If an individual with a disability uses a miniature horse as a service animal is afforded the same rights as individuals with service dogs, after considering certain factors such as the size and weight of the horse, the level of control exerted by the handler, whether the miniature horse is housebroken, and whether legitimate safety requirements are compromised.

The service animal must have a harness, leash or tether on, unless the handler is unable to because of the disability or the use of such item would interfere with the service the animal provides.

To determine whether the animal qualifies as a service animal, the business may ask if the animal is required because of a disability and what tasks the animal has been trained to perform, but only if

the animal's trained task is not readily apparent (i.e., if the dog is observed guiding an individual who is blind or has low vision, the animal's trained task is readily apparent). However, the business cannot ask about the nature or extent of the individual's disability. In addition, the business cannot require documentation of the animal's training.

A business may not require or request a surcharge for the service animal, even if generally customers are requested or required to pay a surcharge if accompanied by pets. However, a business may charge for any damage caused by a service animal if the business normally charges customers for any damages caused by pets.

EQUAL EMPLOYMENT

PROHIBITED DISCRIMINATION: AN OVERVIEW

PRE-EMPLOYMENT INQUIRIES

RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN

DISABILITY

SEX-BASED DISCRIMINATION

PREGNANCY AND CHILDBIRTH

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AGE DISCRIMINATION

GENETIC DISCRIMINATION

ENFORCEMENT OF THE DISCRIMINATION LAWS

PROHIBITED DISCRIMINATION: AN OVERVIEW

Federal equal employment opportunity laws prohibit employers from discriminating against employees and job applicants based on:

- Race, color, religion, sex or national origin *See* 42 U.S.C. § 2000e, also known as Title VII, which prohibits discrimination under these categories by employers with 15+ employees.
- Disability. *See* Americans with Disabilities Act (ADA), Title 1, which prohibits covered employers (employers with 15+ employees) from discriminating against employees or job applicants based on disability.
- Age. *See* The Age Discrimination in Employment Act (ADEA), which prohibits covered employers (20 or more employees) from discriminating against any person age 40 or older.
- ,Genetic information. *See* The Genetic Information Nondiscrimination Act (GINA), which prohibits employers from discriminating on the basis of genetic information about employees.

Arizona law prohibits employers with 15+ employees from discriminating against employees and job applicants based on:

- Race, color, religion, sex, age, national origin, or on the basis of disability. See A.R.S. § 41-1463(B)(1).
- Results of a genetic test. See A.R.S. § 41-1463(B)(3).

Arizona law prohibits employers with at least one employee from committing sexual harassment. See A.R.S. § 41-1461.6.

PRE-EMPLOYMENT INQUIRIES

Employers must take strong precautions not to discriminate, even inadvertently, during the pre-employment process.

Whether intentionally discriminatory or not, some questions asked on application forms, in background checks or during interviews could leave employers vulnerable. Courts generally assume the questions an employer asks will be used to make hiring decisions. When pre-employment questions result in an adverse impact on a protected class and, as a result, such questions are challenged as discriminatory, the employer has the burden of proving that questions are job-related and consistent with "business necessity." See, e.g., 42 U.S.C. § 2000e-2(k)(1)(A)(I); see also 42 U.S.C. § 12113(a) (same defense to ADA adverse impact claims).

Courts define business necessity narrowly. The employer should consider if the practice: (1) is necessary to the safe and efficient operation of the business; (2) effectively carries out the purpose it is supposed to serve; and (3) whether there are alternative policies or practices that would serve the same purpose better or equally well with less discriminatory impact.

Employers should ask themselves the following questions:

- Is the information sought job-related?
- Is the information needed to judge the applicant's competence or qualifications for the job?
- Is the information a valid predictor of successful job performance?

- Will the answer to the question tend to screen out minorities, people with disabilities, people over age 40, or members of one sex?
- Will the answer likely disqualify a significantly larger percentage of members of a particular group than others?

To comply with antidiscrimination laws, applicants should generally not be asked the following types of questions, unless job-related and consistent with business necessity:

- The applicant's age.
- The applicant's date of birth.
- The applicant's place of birth.
- The applicant's citizenship status.
- The applicant's dates of school attendance.
- The church the applicant attends or the name of the applicant's priest, rabbi or minister.
- The applicant's mother and father's last name(s).
- The applicant's maiden name.
- The applicant's marital status.
- The applicant's spouse's name.
- The applicant's spouse's income.
- The applicant's living situation.
- Whether the applicant is pregnant or planning to become pregnant.
- How many children the applicant has.
- The applicant's childcare or family care responsibilities.
- The work or residence of the applicant's spouse or parent(s).
- The applicant's financial information, such as banking or debt information.
- The name of the applicant's bank or any information as to amounts of loans outstanding.
- The applicant's arrest record.
- The applicant's armed forces history of another country.
- The applicant's U.S. military history.
- The applicant's sexual orientation or gender identity.
- The applicant's club memberships(s).
- The applicant's foreign language abilities.
- The applicant's union membership status.
- The applicant's garnishment and bankruptcy history.
- The applicant's public benefits history.
- The applicant's workers' compensation benefits.
- The applicant's medical benefit requirements.
- The applicant's requirement for leave to attend religious services on religious holidays.
- The applicant's opinions about working with employees or supervisors of other ethnicities or races.

RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN

The United States Equal Employment Opportunity Commission ("EEOC") enforces Title VII of the Civil Rights Act. The EEOC offers guidelines, summarized here, to help employers understand what they can and cannot ask on job interviews and job application forms to avoid Title VII discrimination.

Race, Color, Religion, Sex or National Origin

Pre-employment inquiries that either directly or indirectly disclose information about race, color, religion or national origin may constitute evidence of discrimination prohibited by Title VII or Arizona state law.

An employer may legitimately seek information needed to implement affirmative-action programs or court-ordered or other government reporting or recordkeeping requirements. However, employers must be able to show that they collect this data for legitimate business purposes. They should keep this information separate from regular permanent employee records to insure that it is not used to discriminate in making personnel decisions.

Denial of equal opportunity to individuals because they are married to or associated with persons of a specific national, ethnic or racial origin, or because they attend schools or churches or are members of organizations identified with particular racial or ethnic groups, may also be considered a violation of Title VII or state laws against discrimination.

Height and Weight

The EEOC and courts have found minimum height and weight requirements to be illegal if they screen out a disproportionate number of protected classes (e.g. women), and the employer cannot show that these otherwise neutral standards are essential to the performance of the job in question.

Marital Status, Number of Children and Provision for Child Care

Questions about marital status, pregnancy, future child-bearing plans, and the number and age of children may be used to discriminate against women and may be a violation of Title VII or Arizona law if used to deny or limit employment opportunities. Employers are cautioned against use of such non-job-related questions. Information needed for tax, insurance or Social Security purposes may be obtained after applicants are employed.

The EEOC cautions businesses to be careful about "unlawful disparate treatment of workers with caregiving responsibilities." EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, Notice No. 915.002 (May 23, 2007). The EEOC warned that disparate treatment of employees who care for children, parents or other family members may violate Title VII's ban on sex or race discrimination. Id. For example, it is a violation of Title VII for employers to require pre-employment information about child-care arrangements from female applicants only. *See Phillips v. Martin Marietta Corp., 400 U.S. 542 (U.S. 1971)* (holding that employers may not have different hiring policies for men and women with preschool children).

Sex Stereotyping and Gender Identity

Courts recognize "sex stereotyping" as a form of prohibited sex discrimination under Title VII. Sex stereotyping happens when an employer makes an assumption about a person based on stereotypes related to the person's sex, gender or perceived gender. Recently, the EEOC ruled that a complaint of discrimination based on "gender identity, change of sex, and/or transgender status" is a cognizable claim under Title VII as discrimination "based on sex." *Macy v. Holder, EEOC Appeal No. 0120120821 (April 20, 2012)*. While this decision specifically concerned federal employees, the EEOC has taken the same approach with private sector employees under Title VII. Courts' opinions vary. The implications may be significant to current employer policies and procedures, including:

- Non-discrimination, harassment and EEO procedures.
- Pre-employment screening and background or security procedures.
- Codes of conduct, dress codes or appearance standards.
- Policies concerning pronouns and terminology.
- Health insurance coverage.
- Policies concerning use of restrooms and/or other gender-specific facilities.

Additionally, many Arizona cities have passed ordinances protecting employees against discrimination based on gender identity and sexual orientation, and even gender expression. *See*, e.g., Flagstaff City Code § 14-02-001-0003; Tucson City Code, chapter 17, Article II, § 17-1; Phoenix City Code, chapter 18, Article I, § 18-1; Tempe City Code Article VII, § 2-603; Sedona City Code Chapter 9.30.

English-Languag Skill

When the use of an English-language proficiency test or requirement has an adverse effect upon a particular minority group, and English-language skill is not essential for the work to be performed, the EEOC presumes this is evidence of discrimination. In order to justify an English-only policy, the EEOC will look to see if there are business justifications for the policy, such as effective communication with customers or supervisors; if the policy promotes safety, especially in emergencies or other situations in which workers must speak a common language; or if the policy promotes efficiency in work assignments. Even if an employer institutes an English-only policy, the EEOC indicates that employees must be allowed to speak different languages when not engaging in work, such as during lunch hours or break times.

Educational Requirements

Employers must be able to show how their educational requirements relate to the required job performance. The U.S. Supreme Court has found an employer's requirement of a high school education discriminatory where statistics showed such a requirement operated to disqualify African-Americans at a substantially higher rate than whites and there was no evidence that the requirement was significantly related to successful job performance. *See Griggs v. Duke Power Co., 401 U.S. 424 (U.S. 1971)*.

Friends or Relatives Working for the Employer

Information about friends or relatives working for an employer is irrelevant to an applicant's competence. Requesting such

information may be unlawful if it indicates a preference for friends or relatives of present employees, and the composition of the present work force is such that this preference would reduce or eliminate opportunities for women or minority-group members. A nepotism policy that prohibits or limits employment opportunity of a spouse or other relative may also be illegal if it has an adverse impact on job opportunities for either women or men as a group.

Arrest Records

Because members of some minority groups are arrested substantially more often than others in proportion to their numbers in the population, making personnel decisions on the basis of arrest records involving no subsequent convictions has been construed by the EEOC as having a disproportionate effect on the employment opportunities of members of these groups. See Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, Apr. 25, 2012 available at **http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm**. An employer may not use arrest records to deny employment opportunities; however, an employer may make employment decisions based on the conduct underlying the arrest if the conduct makes the applicant unfit for the position in question. *Id*.

To meet the job-related and consistent with business necessity standard, the employer must demonstrate that the criminal conduct, and its dangers, connect to the risks inherent in the duties of the employment position. Id. Employers can show this relationship by evaluating, on an individual basis, (1) the nature of the crime; (2) the time elapsed; and (3) the nature of the job. Id. The employer must also provide "an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity." *Id*.

Conviction Records

A record of conviction usually serves as proof that the applicant engaged in criminal conduct. See Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, Apr. 25, 2012, available at **http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm**.

Again, however, the employer must have a basis for denying employment based on the criminal conduct, which relates to the connection between the conduct and the job requirements. Id. To the extent employers want to make such inquiries, they may wish to develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct that includes identifying essential job requirements for doing so, and how to determine specific offenses that may render someone unfit for performing the job in question. *Id*.

Arizona does not have law prohibiting an employer from asking an applicant about prior convictions; however, the Arizona Attorney General's Office has stated that such an inquiry must include a statement that "conviction will not be an absolute bar to employment." Tom Horne, Guide to Pre-Employment Inquires[sic] Under the Civil Rights Act, available at **https://www.azag.gov/sites/default/files/documents/files/PRE-EMPLOYMENT_INQUIRIES.pdf**.

Discharge from Military Service

Employers should not, as a matter of policy, reject applicants with less than honorable discharges from military service as this could lead to a violation of Title VII due to the adverse impact such a policy has on minorities.

As in the case of conviction records discussed above, questions regarding military service should be accompanied by a statement that a dishonorable or general discharge is not an absolute bar to employment and that other factors will affect a final hiring decision.

The federal Uniformed Services Employment and Reemployment Rights Act ("USERRA") prohibits employers from discriminating against applicants in whole or in part because the applicant either has been or is a member of the uniformed services or because he or she may be required to perform service duties.

Citizenship

Both state and federal law protect all individuals — U.S. citizens and noncitizens — against discrimination on the basis of race, color, religion, sex or national origin.

Treating applicants or employees unfavorably because of their national origin, or the national origin of their spouse or connection to a certain ethnic organization, qualifies as discrimination under Title VII and A.R.S. § 41-1463. See National Origin Discrimination, available at **http://www.eeoc.gov/laws/types/nationalorigin.cfm**; Civil Rights Division of the Arizona Attorney General, Guide to Pre-Employment Inquires[sic] Under the Civil Rights Act, available at **https://www.azag.gov/sites/default/files/documents/files/PRE-EMPLOYMENT_INQUIRIES.pdf.**

Economic Status

Inquiries into an applicant's credit rating, bankruptcy and garnishment history, car or home ownership, bank accounts, or current and past assets should be avoided, unless such information is essential to the job in question. See Pre-Employment Inquiries and Credit Rating or Economic Status, available at **http://www.eeoc.gov/laws/practices/inquiries_credit.cfm**.

An employer may request an employee's credit report for "employment purposes" from a consumer-reporting agency as long as the use of the information does not violate a state or federal employment law, which means that it must relate to the job in question. *See* 15 U.S.C. § 1681b. The employer must also notify the person that the employer will be requesting such a report and also provide a copy of the credit report if the employee requests one. *Id*.

There is no Arizona law regulating whether an employer may ask applicants about their economic status; however, such questions should only be asked if they relate to the job in question.

Availability for Work on Weekends or Holidays

Pre-employment questions concerning an applicant's weekend or holiday availability may have an exclusionary effect on applicants of certain religions. Questions about an applicant's availability to work weekends or holidays may be asked if the job requires work on these days. Employers, however, have an obligation to

accommodate the religious beliefs of employees and applicants, unless doing so would cause undue economic hardship. EEOC, Religious Discrimination, available at **http://www.eeoc.gov/laws/types/religion.cfm**.

Arizona permits pre-employment questions about hours or shifts to be worked. See Civil Rights Division of the Arizona Attorney General, Guide to Pre-Employment Inquires [sic] Under the Civil Rights Act, available at **https://www.azag.gov/sites/default/files/documents/files/PRE-EMPLOYMENT_INQUIRIES.pdf**.

DISABILITY

Title I of the Americans with Disabilities Act (ADA) generally prohibits any pre-employment inquiries about disability. This ensures employers do not screen out candidates because of disabilities before evaluating the candidate's ability to do a job. This is particularly important for people with hidden disabilities, who frequently are excluded and do not have any opportunity to present their qualifications because of information requested in application forms, medical-history forms, job interviews and pre-employment medical examinations.

The Application and Hiring Process

Employers must make reasonable accommodations to enable applicants with disabilities to apply and interview for jobs. The employer may find it helpful to state in an initial job notice or on the application form that applicants who need accommodation for an interview should request this in advance. Accommodations for interviews may include accessible locations for people with mobility impairments, an interpreter for a deaf person, a reader for a blind person, or other assistance to help individuals with visual, learning or mental disabilities fill out application forms.

Employers should be on guard for anything that may prevent an accurate and objective assessment of an applicant's qualifications for the job during an interview. For example, if an interviewer does not know how to communicate effectively with people who have certain disabilities or makes negative, incorrect assumptions about the abilities of a person with a disability, this likely will get in the way of accurately appraising whether an applicant is qualified for a particular job.

Focus on Ability, Not Disability

Under the ADA, an employer may not make any pre-employment inquiry about a disability or about the nature or severity of a disability on application forms, in job interviews, or in background or reference checks. An employer may ask questions to determine whether an applicant can perform specific job functions, with or without reasonable accommodations, as long as these questions are not phrased in terms of a disability.

Here are some guidelines on pre-employment inquiries:

- It is permissible to ask the applicant to describe or demonstrate how he or she will perform specific job functions if this is required of everyone who applies for a job in this job category, regardless of the applicant's disability.

- An employer can attach a job description to the application form with information about specific job functions. The applicant could then be asked: “Are you able to perform these tasks with or without an accommodation?”
- If an applicant has a known disability that would appear to interfere with or prevent the performance of a job function, the applicant may be asked to describe or demonstrate how these functions will be performed, with or without an accommodation, even if other applicants are not asked to do so.
- If a known disability would not interfere with performance of job functions, an individual may only be required to describe or demonstrate how he or she will perform a job if this is required of all applicants for the position.
- If an applicant indicates that he or she cannot perform an essential job function even with an accommodation, the applicant would not be qualified and could be rejected for the job in question.

Examples of Questions Not to Ask

Employers should eliminate disability-related questions on job application forms and in interviews. Pre-employment questions about illness or medication should not be asked because they may reveal the existence of a disability. However, an employer may provide information on his or her attendance requirements and ask if an applicant will be able to meet those requirements.

The following questions, for example, should not be asked either on application forms or during interviews:

- Have you ever been hospitalized? If so, for what condition?
- Have you ever been treated by a psychiatrist or a psychologist? If so, for what condition?
- Have you ever been treated for any mental condition?
- Is there any health-related reason you may not be able to perform the job for which you are applying?
- Have you had a major illness in the last five years?
- How many days were you absent from work because of illness last year?
- Do you have any physical defects that would preclude you from performing certain kinds of work?
- Do you have any disabilities or impairments that may affect your performance in the position for which you are applying?
- Are you taking any prescription medication?
- Have you ever been treated for drug addiction or alcoholism?
    - o Employers are prohibited from asking this because the ADA protects people who have been successfully rehabilitated from drug or alcohol addiction or who are undergoing rehabilitation.

Medical Inquiries and Tests

An employer generally may not make any medical inquiry or conduct any medical examination prior to making a conditional offer of employment. See How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food

Service Employers, available at **http://www.eeoc.gov/facts/restaurant_guide.html**. However, this does not prevent an employer from obtaining necessary information regarding an applicant's qualifications, including medical information necessary to assess qualifications and ensure health and safety on the job.

The employer may make a job offer that is conditioned on satisfactory results of a post-offer medical examination or inquiry. In these cases, the employer may condition a job offer on the results of a medical examination or on the responses to medical inquiries if such an examination or inquiry is required of all entering employees in the same job category, regardless of disability.

Restaurant employers have inquired about job applicants who may carry a pathogen that can be spread through food. The ADA prohibits a foodservice employer from initially asking a job applicant whether he or she has a pathogen that can be spread through food. Once a conditional job offer is made, however, the employer may inquire about this topic, as long as all such conditional applicants are asked the same questions. Information from such inquiries or examinations must be kept confidential.

The ADA requires the Centers for Disease Control and Prevention to provide an annual list of pathogens that can be transmitted through food. If an employee is disabled by one of these pathogens, the employer may exclude the employee from the establishment after determining that no reasonable accommodation can be made to eliminate the risk of disease transmission or that all reasonable accommodations would pose an undue hardship on the employer.

Drug Tests

The ADA does not consider current illegal use of drugs to be a protected disability. Substance-abuse testing is almost exclusively governed by state laws. Under Arizona law, drug and alcohol testing is permitted, and employers gain a safe harbor, as long as certain procedures are followed. See A.R.S. § 23-493 *et seq*.

Under the Arizona Medical Marijuana Act ("AMMA"), most employers are prohibited from discriminating against cardholding applicants or current employees (i.e., individuals who possess an identification card permitting them to obtain and use medical marijuana) either because of their cardholder status or because they test positive for the presence of marijuana through a drug test. Subsequent to the AMMA, the legislature passed HB 2541, which amended Arizona's drug testing statute to provide employers with substantial flexibility in addressing issues arising with cardholders in the workplace. In order to take advantage of the protection afforded by HB 2541, employers must meet certain criteria, including, but not limited to, having a drug testing policy and initiating a drug-testing program that complies with Arizona law, including the new requirements from HB 2541.

Inquiries about Attendance

Information about previous work attendance records may be obtained on the application form, in the interview or in reference checks, but the question should not refer to illness or disability.

The interviewer may provide information on the employer's regular work hours, leave policies and any special attendance needs of

the job, and may ask if the applicant can meet these requirements (provided that the requirements actually are applied to employees in a particular job).

An interviewer may not ask whether an applicant will need or request leave for medical treatment or for other reasons related to a disability. Additionally, the employer should not ask whether a poor attendance record was due to illness, accident or disability. However, applicants may feel free to provide an explanation for poor attendance at a previous job that includes information related to a disability. For example, an applicant might disclose voluntarily that previous absences were due to surgery for a now-corrected medical condition, treatment for cancer that is now in remission, or to adjust medication for epilepsy, but that he or she is now fully able to meet all job requirements.

Background and Reference Checks

Before making a conditional offer of employment, an employer may not ask previous employers or other sources about an applicant's disability, illness, workers' compensation history or any other question that the employer is not permitted to ask of the applicant. In short, the employer may not request any information about a job applicant that the employer is not permitted to ask the job applicant directly.

A previous employer may be asked about job functions and tasks performed by the applicant; the quality and quantity of work performed; how job functions were performed; attendance record; and other job-related issues that do not relate to disability. In cases where an applicant has a known disability and has indicated that he or she could perform a job with a reasonable accommodation, a previous employer may be asked about accommodations for that employee.

If an employer uses an outside firm to conduct background checks, the employer should make sure this firm complies with the ADA's and other laws' prohibitions on pre-employment inquiries. Such a firm is an agent of the employer and the employer may be responsible for its actions.

SEX-BASED DISCRIMINATION

The broad ban on "sex discrimination" under Title VII of the Civil Rights Act an A.R.S. § 41-1463 can cover everything from sexual harassment to fringe benefits. *See* 29 C.F.R. §§ 1604.1-11.

In general, employers should be aware of the following:

- Avoid classifying jobs as "men's jobs" and "women's jobs,"or using similar names like "busboy," since doing so tends to deny employment opportunities to one sex or the other. The rare exception is when gender is a "bona fide occupational qualification"(BFOQ), meaning that it is required for the job in question (i.e., the job requires an actor or actress);
- It is unlawful to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee;
- It is unlawful to establish a rule forbidding or restricting the

employment of married women if the same rule is not equally applicable to married men;

- It is unlawful to indicate in a help-wanted ad any preference or specification for a male or female, unless gender is a BFOQ for that particular job; and
- It is unlawful to discriminate between men and women with regard to fringe benefits, including medical, hospital, accident, life-insurance and retirement benefits, profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

Pregnancy and Childbirth

Title VII includes in its definition of sex discrimination bias that is based on pregnancy, childbirth and related medical conditions 42 U.S.C. § 2000e(k).

The EEOC guidelines regarding pregnancy discrimination state (available at **http://www.eeoc.gov/eeoc/publications/fs-preg.cfm**):

- A policy or practice that excludes job applicants based on reasons related to pregnancy, childbirth or related medical conditions is a violation of Title VII.
- Disabilities that are caused by pregnancy, childbirth or related medical conditions must be treated the same as disabilities caused by other medical conditions under an employer's health or disability insurance or sick-leave plan.
- Policies and practices related to the start or length of leave, the availability of extensions, the accrual of seniority, payments under health or disability insurance plans, sick leave, reinstatement, and all other benefits and privileges, must be applied on the same terms and conditions to disabilities related to pregnancy or childbirth as they are applied to other disabilities.

Maternity and Paternity Leave

As noted previously, pregnancy, childbirth and related medical conditions should be treated as any other temporary disability. Thus, a female employee who becomes disabled because of any such condition should be granted a leave of absence on the same terms and conditions as would be afforded any other employee who has a temporary disability. Mandatory maternity leaves of arbitrary duration unrelated to the individual's ability to work are unlawful.

Assuming the pregnant employee on leave had a satisfactory work record and there was no overall cutback in jobs by the employer that would affect the employee's position, she would be entitled to post-leave reinstatement. In businesses covered by the federal Family and Medical Leave Act, employees are entitled to be restored to their same or an equivalent position.

Employers who grant leave to new mothers and who do not tie that leave to a pregnancy-related disability may be vulnerable to sex-discrimination charges from male employees. "To avoid a potential Title VII violation, employers should carefully distinguish between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth." EEOC

Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, Notice No. 915.002 (May 23, 2007).

SEXUAL HARASSMENT

Harassment on the basis of gender violates Title VII. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

In the landmark U.S. Supreme Court case of *Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986)*, the Court further clarified sexual-harassment law, holding:

- Sexual harassment that creates a hostile or offensive working environment is a form of sex discrimination;
- In hostile-environment cases, an employee who alleges discrimination need not suffer economic damage as a result of the harassment — for example, be denied promotion or forced to quit — for a company to be held liable;
- An employee need not prove that he or she was forced to grant sexual favors against his or her will; the question is whether the sexual advances were unwelcome;
- The fact that the employee failed to give notice to the employer of the harassment does not of itself absolve the employer of liability; and
- The fact that the employer had a grievance procedure and a policy against discrimination and that the employee failed to use that procedure does not of itself absolve the employer of liability.

Employers Are Liable for the Actions of Supervisors and Others

The U.S. Supreme Court has ruled that when a supervisor sexually harasses an employee and the result is a tangible job detriment (for example, if the employee is fired or loses a promotion or pay raise), the employer is strictly liable for the supervisor's acts even if the employer was unaware of the misconduct. *See, e.g., Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998)*.

In cases where the sexual harassment does not result in a tangible job detriment to the employee, the employer would still be liable for the supervisor's behavior unless it could show that: (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any corrective opportunities provided by the employer or otherwise failed to avoid the harm.

Employers may also face sexual-harassment claims when nonsupervisory employees engage in harassment. In these "environmental harassment" claims, unwelcome sexual conduct by nonsupervisory employees against other nonsupervisory employees has resulted in an intimidating or offensive work environment, even though the actions do not affect employment conditions such as promotions, pay raises, etc. An employer is liable for such harassment when the employer knew or should have known of the harassment.

Employers can help prevent sexual harassment by educating both supervisory and nonsupervisory employees that sexual harassment is prohibited. They must take prompt and decisive action in response to any sexual-harassment complaint. Many employers keep a checklist to show that prompt and decisive action has been taken in the event of a sexual-harassment complaint. Such a checklist should include the following:

- A specific description of the event from the parties involved;
- Names of any witnesses;
- All other relevant information (e.g., how long the alleged misconduct has occurred and whether the employee has ever shown his or her displeasure);
- Detailed records of all the employer's meetings with both parties;
- What course of action the alleged victim is seeking;
- Follow-up checks to make sure that unwanted conduct has stopped; and
- Appropriate action if necessary (e.g., reassigning or terminating a worker).

Sexual Harassment by Non-Employees

An employer can be held liable for the sexual advances of non-employees, such as vendors and customers, in the workplace. However, an employer can avoid liability by showing that "immediate and appropriate corrective action" was taken once the employer knew of such advances. 29 C.F.R. § 1604.11. The EEOC will consider "the extent of the employer's control or any other legal responsibility which the employer may have with respect to the conduct of such nonemployees." *Id*.

Sexual Harassment Based on Uniform Requirements

In a restaurant setting, uniforms or other types of required dress can present sexual-harassment problems. Female servers, for example, may complain that their required dress is too revealing and subjects them to verbal abuse or physical harassment. Such arguments have received a sympathetic ear at the EEOC and in the courts with the result that an employer who requires sexually revealing or provocative attire may be held responsible for sexual harassment committed by customers or other third parties. *See, e.g., E.E.O.C. v. Newtown Inn Associates, 647 F. Supp. 957, 958 (E.D. Va. 1986)*

The mere fact that an employer requires such attire may in and of itself be sex discrimination.

SEX STEREOTYPING AND GENDER IDENTITY

Sex stereotyping based on a person's gender or perceived gender likely qualifies as sex discrimination under Title VII. *See, e.g., Schroer v. Billington, 525 F. Supp. 2d 58 (D.D.C. 2007)* (finding protection under Title VII for a transsexual who was denied a job offer based on her gender identity); *Macy v. Holder, EEOC Appeal No. 0120120821 (April 20, 2012)*.

Legal protections may apply to people undergoing gender reassignment surgery, people who use dress or other physical characteristics to express their core gender identity, or with gender non-conforming expression.

DRESS AND APPEARANCE POLICIES

Dress and appearance policies may be a form of sex or race discrimination. When such policies are related to business necessity, are applied to both men and women, and do not negatively or disproportionately impact employees of a protected group under Title VII (i.e., racial, religious, etc.), they are not discriminatory. Below are some guidelines regarding dress and appearance policies:.

Dress: A policy based on offensive or demeaning sexual stereotypes, such as requiring females to wear uniforms but permitting males to wear "appropriate business attire," is discriminatory. Similarly, policies that prohibit females from wearing eyeglasses but allow males to do so. However, different dress policies for men and women are permissible if the policies are not based on offensive or demeaning stereotypes (i.e., requiring men to wear ties).

Height and weight requirements: As discussed earlier, minimum height and weight requirements may constitute sex and race discrimination because such policies have an adverse impact on females and members of ethnic groups. If an employer can demonstrate business necessity for such requirements the policy may be lawful.

Beards, hair length and styles: Appearance policies regulating beards, hair length and styles are generally nondiscriminatory if uniformly applied, related to a business purpose, and not based on a stereotype. For example, short-hair requirements for males, but not females, do not constitute sexual discrimination because such hair styles are in accordance with generally accepted community standards. *See Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1092 (5th Cir. 1975)*.

However, a policy requiring females to wear hairnets and males to wear hats when handling food is discriminatory when the employer refuses to require males with long hair to wear a hairnet. *See Roberts v. General Mills, Inc., 337 F. Supp. 1055, 1057 (N.D. Ohio 1971)*.

Employer policies prohibiting certain hairstyles and beards may constitute race discrimination. For example, no-beards policies may present a problem because a percentage of African-American males suffer from pseudo-folliculitis barbae, a skin disorder that makes regular shaving impossible. Because these policies have been found to have a discriminatory effect on African-American males, employers who apply rigid no-beard regulations to African-Americans suffering from this condition may be charged with

a violation of Title VII. Employers can, however, require that: (1) employees provide medical evidence that they are suffering from the condition; and (2) such individuals trim their beards and wear them at the shortest possible length in accordance with medical needs. Employers also may require that such employees wear hairnets over their beards when handling food.

Additionally, employers who prohibit females from wearing a cornrow hairstyle, in which the hair is divided and braided tightly to the scalp, may be liable for discrimination. *See Vazquez v. Caesar's Paradise Stream Resort, NO. 3:CV-09-0625, 2013 U.S. Dist. LEXIS 170178 (M.D. Pa. Dec. 3, 2013).*

DISCRIMINATION ON THE BASIS OF ASSOCIATION

An employer may violate Title VII if it takes action against an employee because of an employee's association with a person of another race. *See Holcomb v. Iona College, 521 F.3d 130 (2d Cir, 2008)* (holding that the employee was allowed to proceed on a discrimination claim after he was fired due to his interracial marriage).

OTHER FEDERAL LAWS

The Civil Rights Act of 1866 is a lesser-known, but still important, civil rights law. 42 U.S.C. § 1981. The Act was enacted after the Civil War to provide African-Americans with the equal benefit of all laws, including the right to make and enforce contracts. Since then, courts have extended the Act's reach to include employment claims. In 1991, Congress made it clear that the 1866 Act applies not only to

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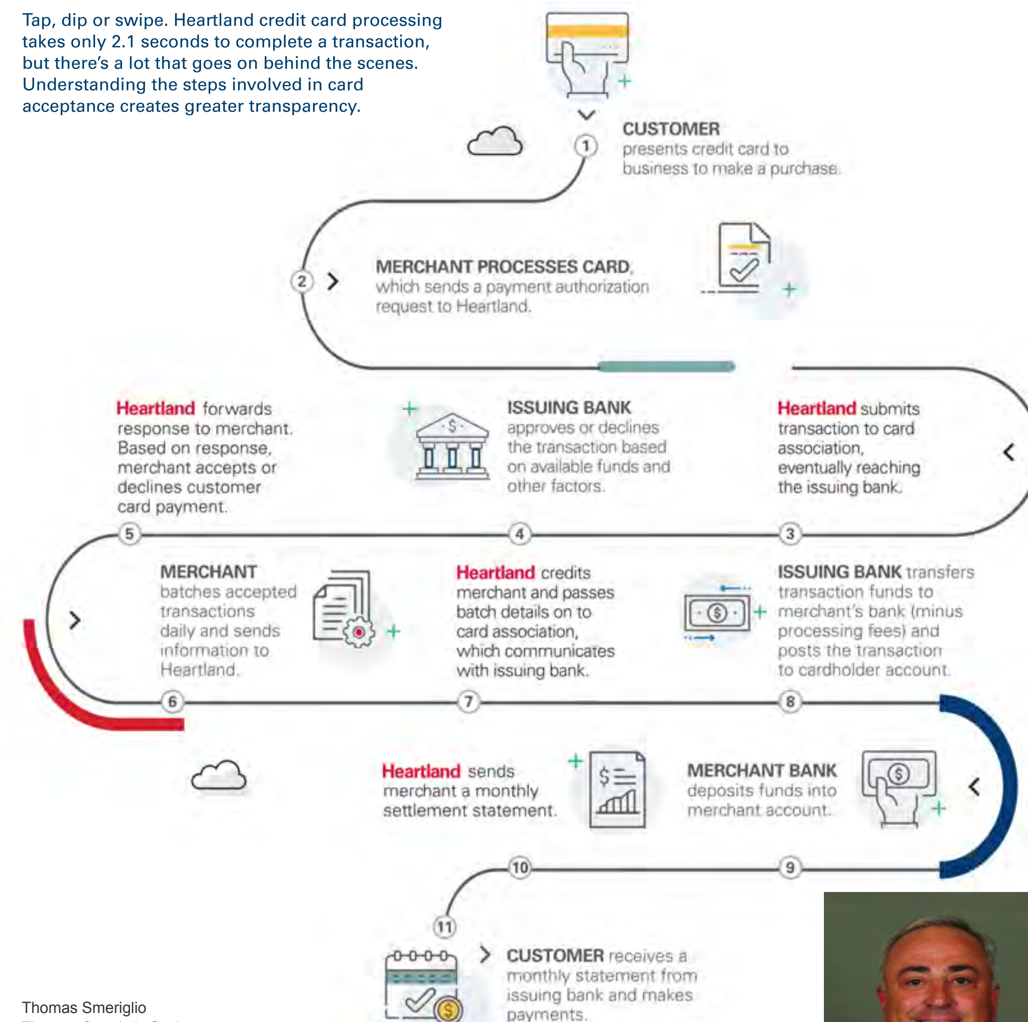

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discrimination in the hiring process, but also to bias in all aspects of employment when based on race, color or ethnicity.

Unlike Title VII of the Civil Rights Act of 1964, which covers employers of 15 or more, the 1866 Act covers all employers regardless of the number of employees. Additionally, applicants and employees may pursue legal action immediately under the 1866 Act, rather than having to file a complaint with an administrative agency. Lastly, there is no cap on the monetary damages recoverable for a claim brought under the Civil Rights Act of 1866.

AGE DISCRIMINATION

The Age Discrimination in Employment Act of 1967 (ADEA) makes it illegal for an employer with at least 20 employees to discriminate against any person age 40 and older in hiring, firing, compensation, or in the terms, conditions or privileges of employment. See 29 U.S.C. §§ 621-634.

The ADEA also bans discrimination in employee benefits, requiring that employers provide older employees with benefits at least equal to those provided to younger employees, unless the employer can prove that the cost of providing an equal benefit is greater for an older employer than for a younger one. See EEOC Compliance Manual, Chapter 3: Employee Benefits, available at **http://www.eeoc.gov/policy/docs/benefits.html**. In limited circumstances, an employer can reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers. *Id*.

Employers that discriminate on the basis of age could be liable for discrimination under the ADEA. *See, e.g., Smith v. City of Jackson, 544 U.S. 228 (U.S. 2005)* (holding that the ADEA authorizes recovery in disparate-impact cases). Employers, however, are not restricted from favoring older employees over younger ones. *See*, e.g., 29 C.F.R. § 1625.4(a). To ensure that applicants meet the minimum age requirement, rather than asking ask, the employer can ask if the applicant is old enough for the position (i.e., Are you at least 18 years old?).

GENETIC DISCRIMINATION

The Genetic Information Nondiscrimination Act ("GINA") prohibits employers from discriminating against applicants and employees on the basis of genetic information. It also bans discrimination in health insurance based on genetic information. Specifically, GINA:

- Prohibits discrimination on the basis of genetic information in hiring, compensation, and other personnel processes;
- Prohibits the collection of genetic information by employers and allows workplace genetic testing only in very limited circumstances, such as monitoring the adverse effects of hazardous workplace exposures;
- Requires genetic information possessed by employers to be confidentially maintained and disclosed only to the employee or under other tightly controlled circumstances ;
- Prohibits enrollment restriction and premium adjustment in health insurance policies on the basis of genetic information or genetic services;

- Prevents health plans and insurers from requesting or requiring that an individual take a genetic test; and,
- Covers all health insurance programs, including those under ERISA, state-regulated plans, and the individual market.

GINA broadly defines "genetic information" to include not only information gathered through genetic tests, but also information about an employee's family medical history. This includes genetic information about an individual's genetic traits, a family member's genetic traits, the manifestation of a disease or disorder in family members (family history), information about any request or receipt of genetic services, or genetic information of fetuses or embryos. Additionally, GINA takes an expansive view of what constitutes an impermissible "request" for genetic information, which includes:

- Conducting an Internet search on an individual likely to result in acquisition of genetic information;
- Actively listening to third party conversations or searching someone's personal effects to obtain genetic information; or
- Requesting medical information likely to elicit genetic information.

The regulations include a model "safe harbor" notice employers can use to caution individuals or healthcare providers not to provide genetic information in response to otherwise lawful requests for medical information.

- EEOC Model Notice: "The Genetic Information Nondiscrimination Act of 2008 (GINA) restricts employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

As mentioned earlier, genetic discrimination in the workplace is also prohibited under Arizona law. A.R.S. § 41-1463(B)(3).

ENFORCEMENT OF THE DISCRIMINATION LAWS

The EEOC enforces Title VII of the 1964 Civil Rights Act, as well as Title I of the ADA, the ADEA, and GINA. Additionally, Arizona enforces these rights under the Arizona Civil Rights Act.

There are different time limits for filing charges. See EEOC, Time Limits For Filing a Charge, available at **http://www.eeoc.gov/employees/timeliness.cfm**. In Arizona, an employee or applicant must file a charge within 300 days of the date of the claimed discrimination. Id. See also A.R.S. § 41-1481. There is a one-year statute of limitations for claims brought under the Arizona Civil Rights Act. A.R.S. § 41-1481.

Possible remedies in these cases include a court order requiring that an individual be hired or reinstated with or without back pay and receive reasonable attorneys' fees and costs. Where an employer is found to have engaged in intentional discrimination, the applicant or employee may also be able to recover punitive damages, depending on the size of the employer. Jury trials are permitted.

EXEMPT EMPLOYEES

OVERVIEW

SALARY TESTS FOR EXEMPT EMPLOYEES

DUTIES TESTS FOR EXEMPT EMPLOYEES

THE EXECUTIVE/MANAGERIAL EMPLOYEE DUTIES TEST

THE PROFESSIONAL EMPLOYEE DUTIES TEST

THE ADMINISTRATIVE EMPLOYEE DUTIES TEST

EXEMPTION FOR HIGHLY COMPENSATED EMPLOYEES

ARIZONA LAW

OVERVIEW

Employees who work in a bona fide executive, administrative or professional capacity are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (the "FLSA"). Like all employers, restaurateurs must exercise caution when classifying employees as "exempt." If the Department of Labor (the "DOL") determines that an employee or group of employees does not meet specific criteria for exempt status, employers may be required to pay improperly classified employees thousands of dollars in back pay and overtime.

In order to be classified properly as an exempt employee, an employee's terms and conditions of employment must satisfy three tests:

- The "salary level" test—i.e., the employee must be paid a minimum salary.;
- The "salary basis" test—i.e., the employee must be paid on a salary, rather than an hourly or other basis; and
- The "duties test"—i.e., the employee must perform job duties that fall within an FLSA exemption.

These tests and certain exemptions likely to exist in the food service industry are explained in greater detail below.

SALARY TESTS FOR EXEMPT EMPLOYEES

Employees must meet two salary tests to be classified as exempt employees under the FLSA. If either of the following tests is not met,

then the employee properly would be classified as non-exempt and, therefore, entitled to minimum wage and overtime under the FLSA.

The "Salary Level" Test

First, the exempt employee must earn a salary of at least $455 per week ($23,660 per year). The minimum salary level is absolute, and this test must be satisfied whether the employee works full - or part-time.

The "Salary Basis" Test

Second, the exempt employee must be paid on a "salary basis." To meet this requirement:

- The employee must receive a fixed, weekly salary.;
- The salary cannot vary with the number of hours the employee works.;
- The salary cannot be reduced because of variations in the quality or quantity of the employee's work; and
- With certain narrow exceptions, the employee must receive his or her full salary for any workweek in which the employee performs any work, regardless of the number of days or hours worked.

The salary basis test prohibits employers from docking exempt employees' pay based on the number of hours or days an employee works. As long as the employee is ready, willing and able to work, deductions may not be made for time when work is unavailable during the workweek. If an employer makes impermissible deductions from an exempt employee's salary, the employee will no longer be considered to be paid on a salary basis, and his or her exempt status will be forfeited.

There are limited exceptions in which an employer may make deductions from an exempt employee's salary, including:

- When an exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability ;
- For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary loss due to illness or disability;
- To offset amounts that salaried employees receive as jury or witness fees or for military pay;
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace-conduct rule infractions;
- For penalties imposed in good faith for safety-rule violations of major significance;
- In the initial or terminal week of employment (if the employee does not work the full week); and
- For weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

Employers who dock an exempt employee's pay for partial or full days for any reason not listed above jeopardize the employee's exempt status.

DUTIES TESTS FOR EXEMPT EMPLOYEES

In addition to meeting both of the salary tests discussed above, employees also must meet a "duties" test to be properly classified as exempt from the FLSA. An employee's actual job duties, rather than his or her job title, are determinative of exempt status. The FLSA and related federal regulations delineate several categories of exempt employees, each with its own duties test. The exemptions discussed below concern those categories of employees most likely to work in the food service industry. Because the determination as to whether an employee qualifies for an FLSA exemption is based upon that employee's actual duties and is a fact-intensive inquiry, restaurateurs must give careful consideration to all of the facts and circumstances of an employee's employment in classifying him or her as exempt.

THE EXECUTIVE/MANAGERIAL EMPLOYEE DUTIES TEST

Certain restaurant employees may be exempt from the requirements of the FLSA because their duties qualify them for the "executive" or "managerial" exemption. To meet the executive/managerial exemption, the employee's primary duty must consist of:

- Managing the business or a recognized division, subdivision or department;
- Customarily and regularly supervising and directing the work of two or more full-time employees or their equivalent; and
- Having authority to hire or fire other employees, or having their recommendations as to hiring, firing, job advancement, promotion or any other change of status of employees be given particular weight.

For purposes of this exemption, "primary duty" means the "principal, main, major, or most important duty that the employee performs. The DOL looks at various factors to evaluate an employee's "primary duty," including:

- The importance of the exempt duties as opposed to the other duties the employee performs;
- The amount of time the employee spends performing exempt duties versus other, nonexempt duties;
- The employee's freedom from direct supervision; and
- The relationship between the employee's salary and wages versus the wages paid to nonexempt employees.

According to the DOL, the duty of "managing a business or department," includes but is not necessarily limited to activities such as:

- Interviewing, selecting and training employees ;
- Setting and adjusting rates of pay and hours of work ;
- Directing the work of employees;
- Maintaining production or sales records ;
- Evaluating employee productivity and efficiency for purposes of recommending promotions or change of status ;

- Handling employee complaints ;
- Disciplining employees ;
- Planning work, and determining materials to be used;
- Providing for the safety of employees on the premises; and
- Planning or controlling the budget.

“Customarily and regularly” supervising the work of others means the exempt employee supervises with a “frequency greater than occasional but less than constant.” DOL regulations further specify that this means that exempt managerial employees “normally and recurrently” perform such supervisory work every week, rather than engaging in isolated or one-time tasks.

Guidance from the DOL indicates that several categories of restaurant employees may, but do not necessarily, qualify for the managerial/executive exemption to the FLSA. Those employees include: assistant managers whose primary duty is management, as opposed to performance of non-exempt work (e.g., food or beverage service); business owners who own at least 20% of a business and are actively engaged in restaurant management; front-of-house managers; and bar managers. In addition, chefs and executive chefs may qualify as exempt under the managerial/executive exemption

THE PROFESSIONAL EMPLOYEE DUTIES TEST

Employees with bona fide professional duties also are exempt from the minimum wage and overtime requirements. According to DOL regulations, the professional exemption covers employees who meet the salary tests and whose primary duty consists of:

- Work requiring "knowledge of an advanced type in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction" (referred to as the "learned professional" exemption); or
- Work requiring "invention, imagination, originality or talent in a recognized field of artistic or creative endeavor" (referred to as the "creative professional" exemption).

As noted above, restaurant chefs may be FLSA-exempt if they have supervisory duties and meet the other criteria for the managerial/executive exemption. Other chefs are exempt from the FLSA because they meet the professional exemption, as either "learned" or "creative" professionals. Chefs who satisfy the requirements of professional exemption are not required to meet the more stringent duties tests required for the managerial/executive exemption, including holding supervisory duties.

DOL guidance provides that "Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary-arts program generally meet the duties requirements for the learned professional exemption." In addition, the DOL has indicated that a chef who has a primary duty of work requiring invention, imagination, originality or talent, such as creating or designing unique dishes and menu items may be considered exempt creative professionals, even if the chef does not have a four-year specialized academic degree. The DOL takes the position that the creative professional exemption applies to "original chefs"—such as "those who work at 'gourmet establishments,' whose primary duty requires invention, imagination, originality or talent." Cooks or others who engage in routine preparation without any originality or inventive function do not qualify for the creative professional exemption. Ultimately, whether a chef properly can be classified as a creative professional for purposes of the FLSA exemption is a case-by-case determination.

THE ADMINISTRATIVE EMPLOYEE DUTIES TEST

Many restaurateurs employ workers who may qualify as exempt from the FLSA under the administrative exemption. These employees generally fulfill a restaurant's overhead functions. Such employees support business processes but generally do not produce goods or service the customers. Examples of exempt administrative employees include payroll, human- resources, finance, and information technology employees.

To be properly classified as exempt from the FLSA's minimum wage and overtime requirements of the FLSA, administrative employees must meet the following duties test:

- The employee's primary duties consist of non-manual work directly related to management or general business operations; and

- The employee must exercise discretion and independent judgment with respect to matters of significance or importance.

EXEMPTION FOR HIGHLY COMPENSATED EMPLOYEES

Food service employers may also employ individuals who are exempt from the FLSA under the "highly compensated employee" exemption. To qualify as FLSA-exempt, a highly compensated employee must meet the following requirements:

- The employee must earn total annual compensation of at least $100,000;
- The employee must earn at least $455 per week on a salary basis, with the difference between salary earnings and total compensation coming from commissions, nondiscretionary bonuses, or other nondiscretionary compensation;
- The employee's primary duty must consist of office or non-manual work; and
- The employee must customarily and regularly perform any of the exempt duties identified in the administrative, professional, or managerial/executive exemptions.

The regulation explaining the "highly compensated employee" exemption makes clear that a substantial salary is highly indicative of an employee's exempt status. As such, the DOL takes a less stringent view of highly compensated individuals and requires that such employees satisfy a less stringent "duties" test than other exempt employees.

ARIZONA LAW

Many states have wage-and-hour laws and regulations independent of federal law. Employers in such states must examine both sets of standards to determine which applies to their business. Again, where the federal and state laws vary, the employer must follow whichever provision most benefits the employee. In Arizona, for instance, the state minimum wage exceeds the minimum wage established by the FLSA. The minimum wage is currently $10.00 in Arizona, as opposed to the federal minimum wage, which is currently $7.25.

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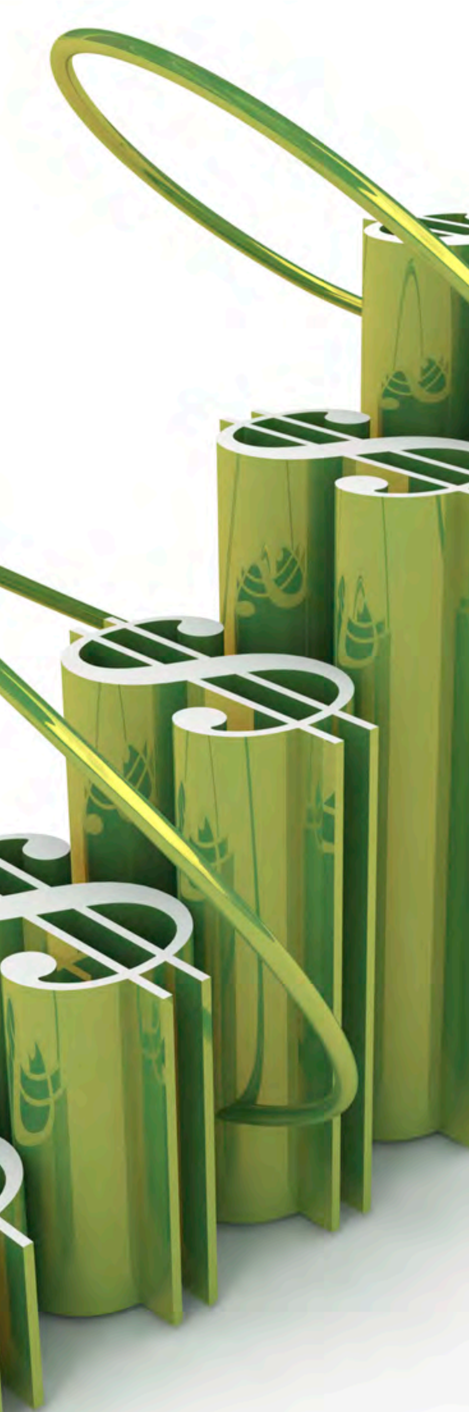

BENEFIT PLANS

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) AND THE INTERNAL REVENUE CODE

NON-DISCRIMINATION RULES FOR BENEFIT PLANS

RECORDING AND REPORTING REQUIREMENTS FOR BENEFIT PLANS

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SUPREME COURT DECISION

SAME-SEX MARRIAGE - TAX AND BENEFIT IMPLICATIONS

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) AND THE INTERNAL REVENUE CODE

The principal federal laws regulating health-benefits, pension and other welfare plans are the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (the Code).

ERISA, found at 29 U.S.C. §§ 1001-1461, sets requirements for employers who provide certain employee benefits, including pension plans and welfare plans. The law sets forth a variety of complex provisions for employers who offer benefit plans, including documentary and operational requirements. The law also sets forth rules of conduct governing individuals who take responsibility for managing these plans (called “fiduciaries”). If a participant claims that she did not receive the correct benefits under a benefit plan covered by ERISA, her options for redress and possible remedies are set forth under ERISA.

The Code is found in Article 26 of the United States Code, and provisions governing employee benefits are spread throughout the article. By complying with the requirements of the Code, employers are able to provide tax-favored pension and welfare benefits to their employees. Code Section 401 contains many of the essential rules governing pension plans, including the code section for which one of the most common plans is named, Code Section 401(k).

NON-DISCRIMINATION RULES FOR BENEFIT PLANS

The Internal Revenue Code requires that pension, profit-sharing and 401(k) plans satisfy certain nondiscrimination tests each year, including minimum coverage and participation tests. In general, these tests must show that rank-and-file employees are permitted to participate in each plan and receive an amount of benefits that is not significantly less than the participation levels and benefits received by highly compensated employees. If a plan fails to meet such requirements, the plan loses its status as a qualified plan, which creates serious tax consequences for both the employees and the employer.

Federal tax laws apply nondiscrimination requirements to group term life-insurance plans, self-insured medical reimbursement plans and cafeteria plans. Certain qualification rules also are in effect for group legal-services plans, cafeteria plans, educational-assistance programs and dependent-care assistance plans. Although there were previously no nondiscrimination rules for insured accident and health plans, such rules were included in the provisions of the Patient Protection and Affordable Care Act of 2010 and will take effect upon issuance of Internal Revenue Service ("IRS") guidance regarding compliance.

RECORDING AND REPORTING REQUIREMENTS FOR BENEFIT PLANS

Many types of employer-sponsored benefit plans must file annual information returns on Form 5500. Employers who do not file the required report or who file it late are subject to a penalty of $25 per day up to a maximum of $15,000 per return.

If these are filed timely and correctly, in most cases a three-year statute of limitations from the date of filing is set for IRS and Department of Labor ("DOL") audits of plan documents and operations (though certain transactions and errors are subject to longer or no statutes of limitations.)

Good recordkeeping is essential to the operations of any pension or retirement plan. Employers who provide any such plan must maintain sufficient records to show that the requirements have been met for excluding the benefits of the plan from the employee's gross income. A good general rule to observe is to retain all plan records indefinitely and to only destroy them with the approval of legal counsel.

COBRA COVERAGE

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires private employers who offer a group health-insurance plan to provide employees and their families the option to continue coverage under that plan if certain qualifying events occur. COBRA applies to both insured and self-insured plans.

The law has been amended over the years, including by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the American Recovery and Reinvestment Act of 2009 (ARRA), and the Temporary Extension Act of 2010, signed March 2, 2010.

Events that qualify an employee or family member to continue coverage include the employee's termination for reasons other than gross misconduct, as well as death, divorce and separation.

COBRA covers employers who normally employ 20 or more full- or part-time employees on a typical business day during the immediately preceding calendar year.

There are basically seven qualifying events that trigger an employee's or a beneficiary's right to opt for continued coverage under the employer's health plan, including:

1. A covered employee dies and is survived by a spouse or a dependent child;
2. A covered employee's employment terminates for reasons other than gross misconduct;
3. A covered employee's hours are reduced;
4. A covered employee is divorced or legally separated from his or her spouse;
5. A covered employee becomes eligible for Medicare benefits;
6. A dependent child ceases to be covered under the employer plan; and
7. A covered employee is retired and his employer files for bankruptcy (special restrictions may apply).

COBRA allows the following people to continue health-care coverage under the employer's plan:

- Employees who would lose coverage because they are voluntarily or involuntarily terminated (except in cases of gross misconduct) or because their hours are reduced;
- Any individual who on the day before the qualifying event is covered under the plan as a covered employee, a spouse or dependent child of the covered employee;
- Children born to an employee or placed for adoption with an employee during a period when the employee is receiving continuation coverage even if they were not qualified on the day before the qualifying event referenced in #2, above.

A "qualified beneficiary" can be:

- A former employee covered under a group health plan if the coverage is provided because of the previous employment;
- A spouse of a covered employee;
- A dependent child of a covered employee; or
- A child born to or placed for adoption with a covered employee during the period of COBRA coverage.

Question: When may a qualified beneficiary elect COBRA continuation coverage?

Answer: IRS regulations (29 C.F.R. Parts 54 and 602) indicate that, in general, a qualified beneficiary must be given the opportunity to elect COBRA continuation coverage at any time during the election period. The election period begins no later than the date the qualified beneficiary would lose coverage by reason of a qualifying event; it ends no earlier than 60 days after that date or 60 days after the date the beneficiary is provided notice of his or her right to elect COBRA, whichever date is later.

Question: How long can an employee or beneficiary continue COBRA coverage?

Answer: The maximum period for which coverage may be continued differs, depending on which qualifying event occurs. Generally, coverage is as follows:

- 18 months in cases involving a covered employee's termination or reduction in hours. This may be extended for up to 29 months if the employee or beneficiary is considered "disabled" under the Social Security Act.
- 36 months in cases involving all other qualifying events.

Question: What is the cost of COBRA coverage?

Answer: Except as provided below, employers are permitted to charge the employee or qualified beneficiary a premium of not more than 102 percent of the applicable premium for the standard 18- or 36-month periods of continued coverage. Where a former employee or beneficiary extends the 18-month period to 29 months because of a disability, the employer may charge 150 percent of the premium during the extended period.

Question: What changes were made in 2009 and 2010?

Answer: The American Recovery and Reinvestment Act (ARRA), signed by President Obama on Feb. 17, 2009, helps recently unemployed employees buy COBRA coverage. As modified by other acts of Congress in late 2009 and early 2010, ARRA allows eligible individuals to pay no more than 35 percent of their COBRA premium for a period of up to 15 months. The COBRA subsidy applies only to employees (and their family members) whose employment is involuntarily terminated (for reasons other than gross misconduct) on or after September 1, 2008, and before March 31, 2010. The former employer pays the 65 percent subsidy during the coverage period and recovers that amount as a dollar-for-dollar reduction in their federal payroll tax obligation. The updated IRS Form 941, quarterly employment tax return, allows the employer to account for the COBRA premium subsidy.

The notice provisions of the continuation health coverage obligation are involved and have proven to be troublesome to employers. The Department of Labor's Employee Benefits Security Administration provides extensive guidance on COBRA Continuation Coverage Assistance under ARRA, including model notices for employers to notify employees of the COBRA premium subsidy.

HEALTH CARE LAW

President Obama signed the Patient Protection and Affordable Care Act (PPACA) (P.L. 111-148) into law on March 23, 2010, and signed several amendments into law a week later through the Health Care and Educational Reconciliation Act.

In general, PPACA will require every citizen to maintain health insurance that provides certain "minimum essential coverage" by 2014. It also imposes a complex set of rules, incentives, subsidiaries and penalties to expand the availability of coverage, with the goal of making health insurance more affordable to individuals.

The following are a few of the new provisions that will affect employers:

- States will be required to establish health benefit "exchanges" through which eligible employees and small employers may purchase "minimum essential coverage."
- Certain large employers will be required to provide "minimum essential coverage" to their employees.
- Lower-income individuals may be entitled to credits or "free-choice vouchers" (funded by employers) to help pay for health insurance.
- Certain tax credits are available to "eligible small employers" for 2013 (no more than 25 full-time employees; annual wages paid by employer during taxable year do not exceed $50,000; and the employer makes non-elective contributions for each employee equal to a specified amount). For 2014, full credit available to "eligible small employers" (no more than 10 employees and average wages of $25,000 or less and then phases out).

ADDRESSING THE EMPLOYER MANDATE

PPACA requires an employer to make substantial changes for plan years starting in 2015. This "employer mandate" includes two basically important parts:

If covered employers fail to offer "minimum essential coverage" to all their full-time employees, you will face a tax penalty of $166.67 per month for each full-time employee you have ($2,000/full-time employee per year) until you do so (subject to an exemption for the first 30 full-time employees you have).

Even if you offer "minimum essential coverage" to all your full-time employees, to the extent some of your full-time employees turn down that offer of coverage and it is not affordable and instead purchase their own "qualified health plan" coverage through an exchange, you may face a separate tax penalty of $250 per month ($3,000/year) for each of those opting-out employees whose independent purchase coverage is eligible to be taxpayer-subsidized.

The $2,000 tax penalty only affects employers that have more than 50 full-time equivalent employees. The $3,000 tax penalty essentially penalizes any employer that offers coverage so inadequate or so expensive (in terms of the cost the employee is charged), that the employer's own lower-paid employees would rather purchase taxpayer-subsidized coverage in the marketplace.

WHICH EMPLOYERS ARE SUBJECT TO THE MANDATE

Not all employers will be subject to the employer mandate. The following examples illustrate how the size of an employer's employee population impacts its obligations (including the mandate):

- An employer with less than 25 full-time employees and average annual wages of less than $50,000 will qualify for a small business tax credit if it provides subsidized coverage that meets minimum standards.

- An employer with 25-49 full-time employees (including full-time-equivalent (FTE) employees) will receive no tax credit, but also will not be penalized for not providing subsidized coverage that met minimum standards.
- An employer with 50 or more full-time employees (including full-time-equivalent (FTE) employees) will be subject to the "employer mandate" described above.
- An employer with more than 100 full-time employees will have the same obligations -- and face the same potential tax penalties -- as an employer with 50 or more full-time employees (above). However, an employer this size will not be able to purchase coverage for its employees through the new exchanges prior to 2017, even if it is too small to self-insure, and despite having an employer mandate capable of generating a meaningful tax penalty.
- An employer with more than 200 full-time employees will have the same obligations -- and face the same potential tax penalties -- as an employer with 50 or more full-time employees (above). Also, like employers with more than 100 full-time employees, these large employers will not be able to purchase coverage through the new exchanges prior to 2017). However, in addition to the above requirements and conditions, an employer with more than 200 full-time employees will be required to automatically enroll all of its new full-time employees in one of the plans it maintains.

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SUPREME COURT DECISION

The 2010 law was challenged on constitutional grounds by numerous states. On June 28, 2012, a majority of the U.S. Supreme Court, however, upheld the constitutionality of the new law in National Federation of Independent Business, et al. v. Sebelius, Secretary of Health and Human Services, et al., No. 11-393 S. Ct. (2012).

SAME-SEX MARRIAGE (TAX AND BENEFIT IMPLICATIONS)

In United States v. Windsor 570 U.S. ______ (2013), the Supreme Court struck down as unconstitutional Section 3 of the Defense of Marriage Act ("DOMA"), which defined "marriage" for federal purposes as meaning only a legal union between one man and one woman, and "spouse" as meaning only a person of the opposite sex. While the Court found Section 3 to be unconstitutional, the Court didn't address Section 2 of DOMA. Section 2 provides an exception to the Full Faith & Credit Clause, providing that no State must recognize a same-sex marriage of another state.

In late August, the IRS issued Revenue Ruling 2013-17 advising that a same-sex marriage which is recognized as legal in the state or jurisdiction of celebration, will be recognized for all federal tax purposes. "Jurisdiction" includes a state or foreign jurisdiction. The Department of Labor is also following the 'state of celebration rule' for most employment related issues, but not for FMLA.

Regarding Employer Provided Benefits, what must Arizona Employers know about Windsor and the subsequent IRS and DOL Pronouncements?

1. From September 16, 2013 forward, all qualified retirement plans (401(k)s'; pensions; etc.) must be administered in a manner that treats a same sex-spouse the same as an opposite sex spouse, if the same-sex marriage was valid in the state of celebration.
2. This rule applies regardless of whether the Employer and Plan are maintained exclusively in Arizona, which does not recognize same-sex marriages, or the Employer has employees in additional states (such as New Mexico) which recognize same-sex marriages.
3. There is no current requirement to offer healthcare benefits to any spouse, regardless of their sex.
4. If you provide healthcare benefits to a same-sex spouse, this benefit can be provided on a pre-tax basis, just as it is for opposite sex spouses.
5. If you provide healthcare benefits to a same-sex spouse, and the Employer is subject to COBRA, the same-sex spouse is now considered a 'qualified beneficiary' and must receive all required notices and election opportunities on the occurrence of a qualifying event.
6. If you have previously provided a same-sex spouse with healthcare benefits, you may be eligible for payroll tax refunds; see IRS Notice 2013-61.

7. The IRS has promised to offer additional guidance on this issue to address plan amendment requirements and necessary corrections relating to plan operations for periods prior to such guidance.
8. An Employer may have retroactive liability for actions prior to September 16, 2013, due to not treating a same-sex spouse as a spouse for benefit plan administrative purposes, but the law in this area is not yet clear.
9. This area of the law is rapidly changing.

FAMILY AND MEDICAL LEAVE ACT

OVERVIEW

FOR WHAT REASONS CAN EMPLOYEES TAKE FMLA LEAVE?

WHAT COUNTS AS A SERIOUS HEALTH CONDITION?

CERTIFICATION FOR MEDICAL LEAVE

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ENFORCEMENT

STATE AND LOCAL FAMILY LEAVE LAWS

RESOURCES

OVERVIEW

The federal Family and Medical Leave Act ("FMLA") entitles eligible employees to take unpaid, job-protected time off for family and medical reasons.

Employees can take time for their own serious health conditions, or to care for sick relatives or new or adopted children. Military caregivers and other military family members may qualify for special FMLA leave related to military service.

FOR WHAT REASONS CAN EMPLOYEES TAKE FMLA LEAVE?

The FMLA entitles eligible employees to take unpaid, job-protected leave:

- For the birth of a child (son or daughter) and for the care of such newborn child;
- For the placement of a son or daughter with the employee for adoption or foster care;
- For the serious health condition of the employee; or
- To care for a spouse, child (son or daughter) or parent with a serious health condition.

Since early 2008 family members of military personnel have been able to take FMLA leave:

- To care for a serviceperson or veteran with a serious illness or injury; or
- When a "qualified exigency" arises as a result of an employee's spouse, parent or child being on active duty (or called to active duty) in the Armed Forces in a foreign country.

WHAT COUNTS AS A SERIOUS HEALTH CONDITION?

An employee may take FMLA leave for his or her own serious health condition or for the serious health condition of a spouse, child (son or daughter) or parent of the employee.

On June 22, 2010 the DOL clarified the meaning of "son or daughter" to include persons who assume the role of caring for a child regardless of the legal or biological relationship. In DOL Interpretation No. 2010-3, the DOL explained that a grandparent or any other person, such as one who shares in raising an unmarried partner's biological child, could be entitled to leave under FMLA. Under the new DOL interpretation, leave should be granted under FMLA to an employee to care for the son or daughter of the employee's same-sex domestic partner (gay or straight).

Generally, a serious health condition means an illness, injury, impairment, or physical or mental condition that involves one of the following:

- Hospital care — inpatient care (overnight stay) in a hospital, hospice or residential medical-care facility;
- Absence plus treatment — generally, a period of incapacity of more than three consecutive days that involves at least two treatments by a health-care provider within 30 days of the start

of the incapacity (the first visit must be within seven days of the start of the incapacity);

- Pregnancy — any period of incapacity due to pregnancy or for prenatal care
- Chronic conditions requiring treatments — a “chronic condition” includes conditions that require at least two visits for treatment by a health-care provider per year, continue over an extended period of time, and may cause episodic rather than continuing periods of incapacity (for example, asthma, diabetes, epilepsy); or
- Permanent/long-term conditions requiring supervision of a health-care provider; or multiple treatments (for non-chronic conditions) by a health-care provider either for restorative surgery after an accident or surgery or for a condition that likely would result in a period of incapacity of more than three consecutive days in the absence of medical treatment (such as chemotherapy for cancer or dialysis for kidney disease).

CERTIFICATION FOR MEDICAL LEAVE

When an employee needs to take leave for his or her own (or a qualified family member’s) serious health condition, the employer may require an employee to provide certification of the health condition.

The DOL offers a two-page form that health-care providers may use to certify an employee’s need for FMLA leave because of a serious health condition.

This form — DOL Form WH-380, Certification of Health Care Provider — is available from the DOL and can be downloaded from **www.dol.gov/esa/forms/whd**.

The employer has certain rights in this area:

- The employer is allowed to contact the health care provided to obtain information required by the certification form. (Restrictions are imposed, however, on who is permitted to contact the health-care provider on the employer’s behalf.)
- If the employer believes the medical certification form is incomplete, the employer can notify the employee in writing what is needed, and ask that the information be provided within seven days.
- Employers who doubt the validity of the certification may at their own expense require that the employee obtain a second opinion from a health-care provider designated or approved by the employer. This designated or approved health-care provider must not be employed on a regular basis by the employer. Conflicting opinions would be resolved by a third opinion by a health care provider selected jointly by the employer and employee. This would be at the employer’s expense.
- The employer is allowed to request recertification of an ongoing condition every six months in conjunction with an absence.
- The employer is also allowed to require employees to provide new medical certification every 12 months for conditions that exceed one year.
- Employers are permitted to require employees who take FMLA

medical leave to submit a “fitness for duty” certification before returning to work, and that the certification specifically address the employee’s ability to perform the essential functions of the job.

MILITARY-RELATED FAMILY AND MEDICAL LEAVE

Family members of service persons qualify for two new types of FMLA leave under the National Defense Authorization Acts of 2008 and 2010.

Military caregiver leave: Family members are entitled to FMLA leave to care for service members being treated for a serious injury or illness. The following rules apply:

- The caregiver may take leave to care for either a current service person or a veteran. For a current service person, the person must have been injured or fallen ill in the line of duty, or had a serious injury or illness before active duty that was aggravated in the line of duty. For a veteran, the person must have an injury or illness that was incurred in the line of duty or that existed before active duty started and then was aggravated by service in the line of duty.
- The current service person or veteran must be undergoing medical treatment, recuperation, or therapy for the serious injury or illness. Veterans are covered if they were a member of the Armed Forces at any time in the five years preceding the treatment, recuperation or therapy.
- The military caregiver must be the spouse, child, parent or next of kin (nearest blood relative) of the serviceperson. The family service member may designate in writing who his or her nearest blood relative is for purposes of military-caregiver leave. If no such designation is made, and several relatives have the same level of relationship with the service members, all such family members will be considered next of kin.

The employer may require the caregiver to submit certification for their request for FMLA leave. The DOL offers optional form WH 385 for such purposes.

Qualified-exigency leave: The second type of military-related FMLA leave allows family members of certain military personnel to take FMLA leave due to a “qualified exigency” arising out of the fact that the employee’s spouse, parent or child is on (or has been notified of an impending call to) covered active duty in the Armed Forces in a foreign country.

According to the DOL, the leave is available for:

- Short-notice deployment;
- Military events and related activities;
- Child care and school activities;
- Financial and legal arrangements;
- Counseling;
- Rest and recuperation;
- Post-deployment activities; and/or
- Additional activities to address other events that arise out of the service member’s active duty.

The employer and employee need to agree on the timing and duration of leave. The DOL offers an optional WH 384 form to allow employees to self-certify the reasons for "qualified exigency" leave.

WHO IS COVERED BY THE LAW? WHICH EMPLOYERS MUST PROVIDE FMLA LEAVE?

The FMLA covers employers who have 50 or more full- or part-time employees on their payroll for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

If the employer operates more than one establishment, employees at all establishments in a 75-mile radius are counted in determining the 50-employee threshold. The employer must have 50 or more employees within the 75-mile radius as of the date the employee makes the request for leave. 29 C.F.R. § 825.110(e). The 75-mile radius is measured as "surface miles, using surface transportation over public streets, rather than linear miles from point to point," according to DOL regulations at 29 C.F.R. § 825.110 that have been held up in several court rulings.

WHICH EMPLOYEES ARE ELIGIBLE FOR LEAVE?

To qualify for FMLA leave, an employee must have been employed by the employer for at least 12 months and worked at least 1,250 hours during the 12 months. The 12 months do not need to be consecutive.

An employee's previous employment with the same employer counts toward the 12 months, as long as no more than a seven-year gap exists between periods of employment. 29 C.F.R. § 825.110(b)(1). If the gap in employment with that employer is longer than three years, the burden is on the employee to show that the total gap in employment was less than seven years, since current regulations requires employers to maintain records for only three years.

If the employee's gaps in employment were to fill National Guard or Reserve military service obligations, there is no limit on the gap between periods of employment.

LENGTH OF FMLA LEAVE

Eligible employees are generally entitled to take up to 12 weeks of FMLA leave during any 12-month period.

The leave allowance is longer for military caregivers. Family members of U.S. service personnel are entitled to up to six months (26 workweeks) of FMLA leave during a 12-month period to care for a service member who incurred a serious injury or illness in the line of active duty. The 12-month period begins when the employee starts taking the military caregiver leave, and applies for each family service member and each illness or injury. While the employee may take more than one period of leave,

26 workweeks is the maximum time during a 12-month period regardless of the number of caregiver leaves taken.

The employee's total amount of FMLA leave for any purpose may not exceed 26 weeks. Leave that qualifies both for military-caregiver leave and regular FMLA leave to care for a family member with a

serious health condition during a single 12-month period may not be designated as both. It is either one or the other.

Employees may use accrued paid leave as a substitute for (unpaid) FMLA leave. Employers may require employees to first use paid vacation, personal or sick leave before taking the unpaid leave. If such paid leave is used, the employer is required to provide only enough unpaid leave to total 12 weeks.

In cases where spouses employed by the same employer both want to take leave for the birth or adoption of a child or to care for a seriously ill parent or child, the aggregate leave for the husband and wife is limited to 12 workweeks in any 12-month period.

TAKING LEAVE IN INCREMENTS

Depending on the reason for leave, employees may in some cases take their FMLA leave on an intermittent basis rather than all at once.

- For birth, adoption or foster care: Where FMLA leave is being taken for birth, adoption or foster care, the employee must take the leave all at once unless the employer and employee agree otherwise. Leave in these cases may not be taken on an intermittent basis or through a reduced work schedule.
- Serious health conditions: Where leave is being taken for the employee's or a family member's serious health condition, the employee may take leave intermittently (in increments as short as 15 minutes) or on a reduced-hours schedule when such leave is medically necessary. In these situations the employer may require the employee to temporarily transfer to an alternate position with equivalent pay and benefits, where the alternate position would accommodate periods of recurring leave better than the employee's regular position.

EMPLOYEES MUST PROVIDE NOTICE

Employees must give employers advance notice when they need to take FMLA leave. The amount of notice depends on the reason for leave:

- For birth, adoption or foster care: When the need for leave for birth, adoption or foster care is foreseeable, an employee must provide the employer with at least 30 days' advance notice before the leave is to begin. If this is not possible, the employee must provide as much advance notice as is practicable.
- For serious health conditions: In cases of leave for serious health conditions, the employee must provide as much notice as is practicable. Subject to the approval of his or her health care provider, an employee must make a reasonable effort to schedule the treatment so as not to unduly disrupt the employer's operations. DOL regulations permit the employer to require employees to follow normal employment procedures for reporting absences. The only exceptions would be for extraordinary circumstances, such as when an employee is hospitalized and his or her spouse calls the employee's supervisor to report the person's absence, not knowing that the employer's policy may require a report to the human resources

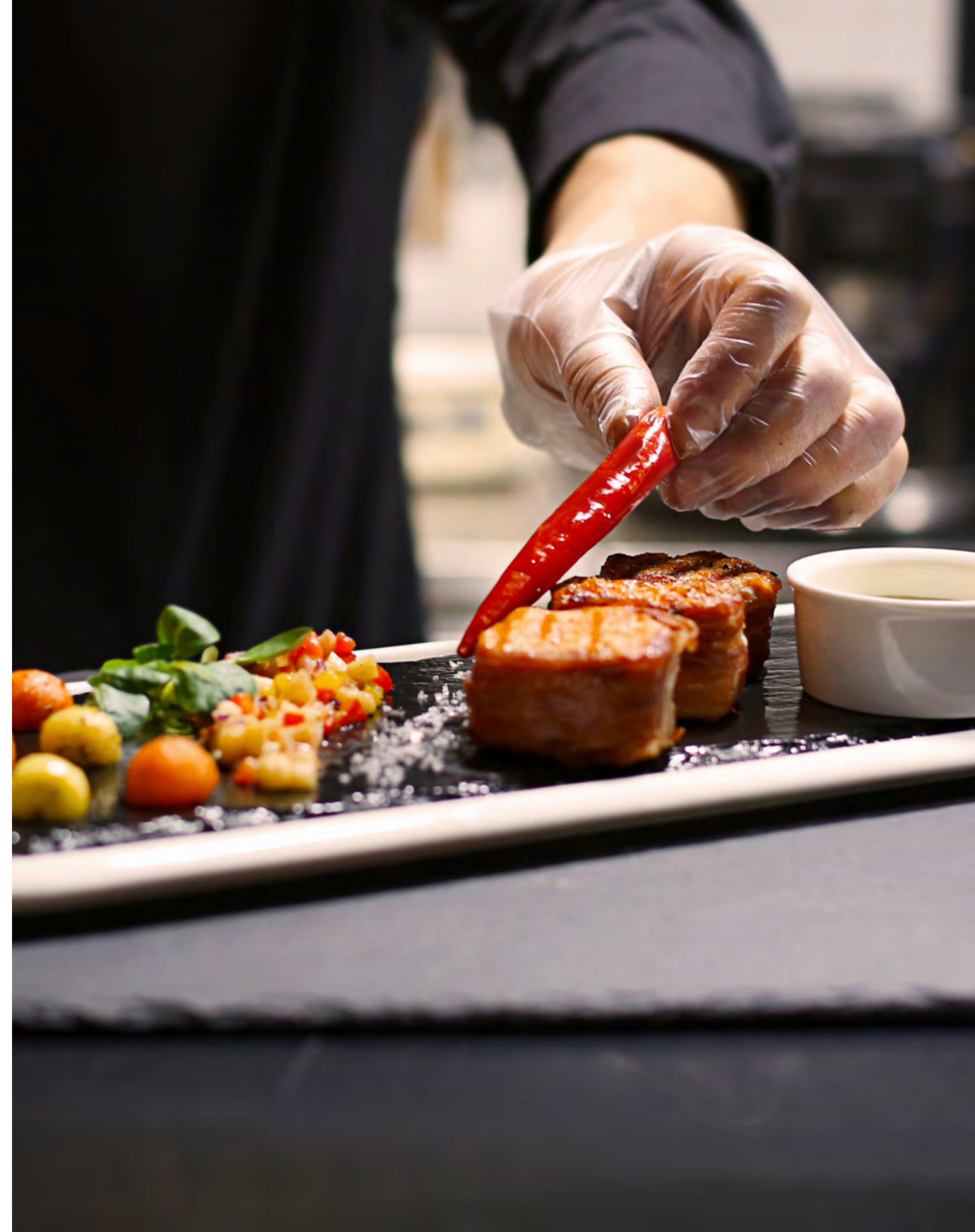
department. Under updated DOL regulations that took effect Jan. 16, 2009, the employer may require the employee to provide information to verify that the condition renders the worker unable to perform the functions of the job, or renders the family member unable to perform daily activities.

- Military caregiver leave or cases of "qualified exigencies" resulting from service duty or a call to service duty: In the case of military caregivers or employees who need to deal with "qualifying exigencies" arising out of a family member's active duty or call to active duty, the employee must provide his or employer with as much notice as is reasonable and practicable.

EMPLOYERS MUST INFORM EMPLOYEES ABOUT FMLA

Employers have significant responsibilities to ensure employees understand their legal rights under the FMLA.

- General notice: Covered employers must post a general FMLA notice in a conspicuous place explaining the FMLA, including the new FMLA entitlements for military family members. Employers also need to provide the general FMLA notice to each employee when he or she is hired, unless the notice is contained in employment policies provided to employees. Electronic posting of this general FMLA notice may be substituted if all employees and applicants have access to electronic information.
- Specific notice: Since Jan. 16, 2009, the DOL has required that employers provide more specific notice to employees about



FMLA leave. When an employee requests FMLA leave, the employer must provide the employee with a written notice, generally within five business days, explaining the employee's obligations during FMLA leave. The DOL's Notice of Eligibility & Rights and Responsibilities (DOL Form WH-381) is for this purpose. When an employer has information to know that an employee's leave is covered by FMLA, the employer must notify the employee within five business days that leave is FMLA-designated. The DOL offers forms to help implement these steps on the DOL's web site.

- Covered employers who offer employees written guidance about employee benefits and leave rights must include information about the FMLA in these materials. The U.S. Department of Labor's FMLA Fact Sheet #28 can be incorporated into an employer's materials.
- Employers who do not offer employees written guidance about employee benefits are still required to provide a written summary of the FMLA for any employee who requests FMLA leave. The DOL's FMLA Fact Sheet may be used for this purpose. The FMLA also requires employers to keep certain records relating to employees who take FMLA leave.

PROTECTING JOBS AND BENEFITS FOR EMPLOYEES ON LEAVE

Employees returning from FMLA leave must be reinstated to the same position or to a position equivalent in benefits, pay and other terms and conditions of employment.

As a condition of reinstatement, an employer may require that employees be certified by a health-care provider as able to resume work.

For highly compensated employees — defined as the highest-paid 10 percent of workers employed by an employer within 75 miles — an employer may deny reinstatement where the denial is necessary to prevent substantial and grievous economic injury to the employer's operations. Employers must notify the employee of their intent to deny reinstatement as soon as the employer determines such economic injury will occur.

If the employer provides a group health plan for employees, the employer must continue coverage "during the leave period at the level and under the conditions coverage would have been provided" absent the leave. If the employer pays the premium for the plan, it is clear that the employer must continue to do so during the leave. To the extent the employee pays the premium for such health insurance, DOL Form WH-381 explains how employees must make these payments. It is important to note that:

- The employer may not require the prepayment (prior to the commencement of the leave) of the employee's portion of the premiums that will become due during the leave period.
- The employee has a 30-day grace period during which to pay his or her portion of the premiums.
- The employer must notify the employee in writing at least 15 days before the coverage will lapse advising the employee

that coverage will lapse on a specified date unless payment is received by such date.

The law also provides that the employer may recover the cost of premiums for employees who are able to return to work but who fail to do so.

In addition to health-care coverage, employees may not lose any other employment benefit they accrued prior to the date on which they began their leave.

However, the reinstated employee is not entitled to the accrual of any seniority or employment benefits during the leave period.

Further, the law prohibits employers from retaliating or discriminating against employees who have taken leave or who have cooperated in proceedings under the law.

ENFORCEMENT

The DOL is responsible for enforcing the FMLA. Employees may also bring lawsuits. Employers found to be in violation are liable to the employee for any wages, salary, employee benefits, or other compensation denied or lost, plus interest and attorneys' fees.

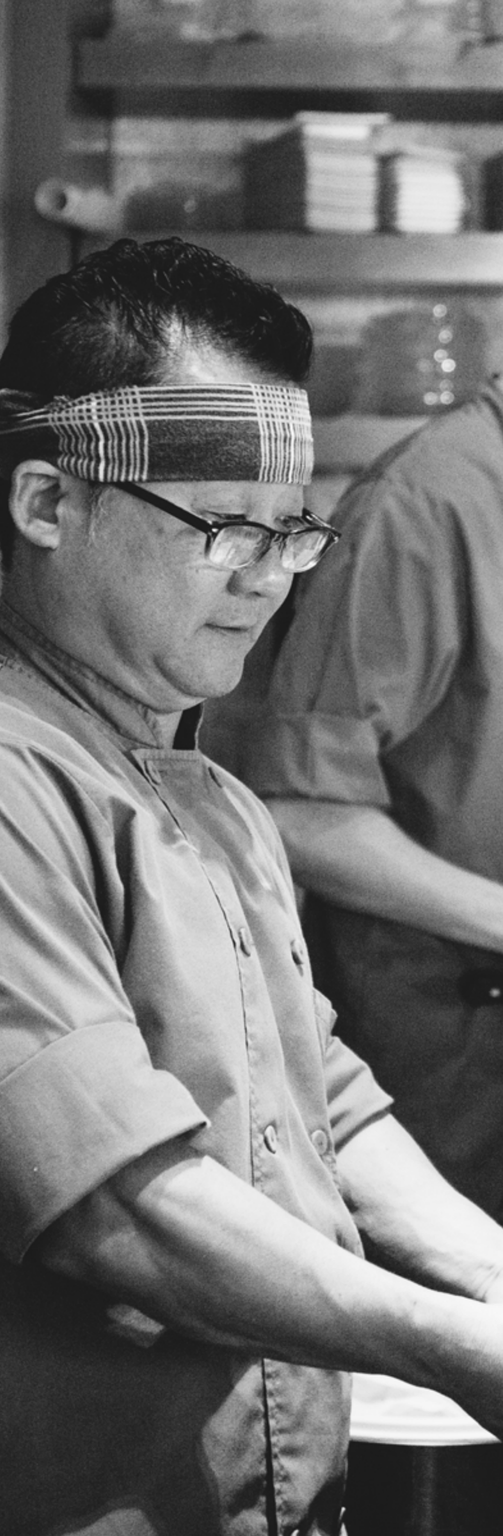
The statute of limitations for filing suit is two years after the last event constituting the alleged violation, or three years in the case of a willful violation.

STATE AND LOCAL FAMILY LEAVE LAWS

Some states and the District of Columbia have family- or medical-leave laws. Some of these laws provide greater benefits for employees than the federal law. Employers must follow the provisions that are most favorable to the employee. Check with your state restaurant association for more information.

RESOURCES

The DOL has issued extensive and complex regulations regarding the FMLA. This chapter provides a glimpse of the employer's obligations under the regulations. Specific questions can be answered only by an examination of those regulations. Information on the FMLA can be found at the DOL's Web site and at 29 U.S.C. §§ 2601-2654.



ARIZONA PAID SICK LEAVE LAW (EFFECTIVE JULY 1, 2017)

WHO IS COVERED?

WHAT IS "PAID SICK TIME"?

HOW DOES PST ACCRUE?

IN WHAT KINDS OF SITUATIONS MAY PST BE USED?

WHAT HAPPENS TO UNUSED, ACCRUED PST AT THE END OF A YEAR?

WHAT HAPPENS TO ACCRUED PST WHEN EMPLOYMENT ENDS?

WHAT NOTICES ARE REQUIRED?

VERIFICATION PERMISSIBLE, BUT VERY LIMITED

CONFIDENTIALITY AND NONDISCLOSURE

RECORDKEEPING REQUIREMENTS

COLLECTIVE BARGAINING AGREEMENTS

NONDISCRIMINATION AND NONRETALIATION PROVISIONS, ENFORCEMENT, AND PENALTIES

WHO IS COVERED?

Employers: Virtually every private employer with employees in Arizona, as well as all municipalities and school districts, are covered. So-called "small businesses" are exempt from coverage. However, to qualify as a "small business," a business must have gross annual revenues of less than $500,000 and not be engaged in interstate commerce or in the production of goods for interstate commerce. State of Arizona employees and federal workers are also exempt.

By way of comparison, in the case of nongovernmental employers, the federal Family and Medical Leave Act of 1993 (FMLA)—which requires the provision of certain unpaid leave benefits—applies only to companies with 50 or more employees within a radius of 75 road miles for at least 20 workweeks in the current or preceding calendar year. The difference means that even small Arizona companies, which up to now have not been subject to any mandatory leave requirements, must now find the time and resources to ensure compliance with the new PST law.

Employees: The Arizona Minimum Wage Act (AMWA), which Prop. 206 amended, defines as a covered employee "any person who is or was employed by an employer," except for those working for a parent or sibling and babysitters. "Employee" even includes recipients of public benefits who are engaged in "work activity" as a condition of receiving public assistance.

By way of comparison, to be a covered employee under the FMLA, an individual must work for the employer for at least 12 months and have worked at least 1,250 hours during the previous year. As a practical matter, employees in Arizona who may never become eligible for FMLA leave will be eligible to take PST beginning 90 days after starting employment—and benefit accrual begins on the first day of work.

Family Members: The PST law also covers an employee's time off to care for or obtain defined services for a "family member." The law broadly defines family members to include:

- Children of any age (including biological, adopted, or foster children, legal wards, children of a domestic partner, or children for whom the employee stands in loco parentis);
- Parents (including biological, foster, stepparents or adoptive parents or legal guardians of the employee or the employee's spouse or domestic partner, including persons who stood in loco parentis when the employee or employee's spouse or domestic partner was a minor child);
- Spouses or domestic partners;
- Grandparents, grandchildren, or siblings (including foster, adoptive, or step relationships) of the employee or the employee's spouse or domestic partner; or
- Any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

WHAT IS "PAID SICK TIME"?

Paid sick time is defined as "time that is compensated at the same hourly rate and with the same benefits, including health care benefits, as the employee normally earns during hours worked." In other words, PST must be paid at no less than the rate the employee would have earned had he or she actually worked the PST. Employees may use accrued PST in the smallest increments that the employer's payroll system uses to account for absences "or use of other time."

HOW DOES PST ACCRUE?

Rate of Accrual: An employee's PST accrues at a rate of no less than one hour for every 30 hours worked. If the employer has 15 or more employees, the maximum accrual is 40 hours of PST per year. If the employer has fewer than 15 employees, the maximum accrual is 24 hours of PST per year.

FLSA-Exempt Employees: Employees who are exempt from the federal Fair Labor Standards Act's (FLSA) overtime requirements (e.g., salaried exempt managers, professionals, administrative employees, or outside salespeople) are presumed to work 40 hours per week for accrual purposes, except for weeks in which they work less than 40 hours, in which case their PST accrues based on the actual number of hours worked.

Loaning PST: Employers may "loan" PST to an employee in advance of the employee's earning it. The statute is silent, however, as to how an employer may recover loaned PST upon the employee's termination of employment. Perhaps this gap and other unanswered matters will be addressed in regulations that the PST law mandates the Industrial Commission of Arizona (ICA) issue.

What is a "Year"? The statute says a year is "a regular and consecutive 12-month period as determined by the employer." Therefore, employers may designate a fiscal year (or some other consecutive 12-month period) as an accrual or usage year. However, if an employer fails to designate a year, the statute is silent on what a "default" year should be. Presumably, the ICA regulations will address this. By comparison, an FMLA accrual year defaults to a calendar year.

Existing PTO Policies: Employers with existing paid time off (PTO) policies that meet or exceed the benefits provided under the PST law are "not required to provide additional paid sick time." A logical reading of this clause suggests that any PTO policy which provides fewer benefits than the PST law should be amended to reflect that PST supersedes the company's PTO policy for its Arizona employees.

IN WHAT KINDS OF SITUATIONS MAY PST BE USED?

PST in Arizona may be used for a wide assortment of reasons—many more than under the FMLA. For example, while FMLA requires the existence of a "serious health condition" for medically based FMLA leave, PST must be permitted for an employee's (or for an employee to care for a family member's) "mental or physical illness,

injury or health condition," "need for medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition," or "need for preventive medical care."

PST may also be used if a public health emergency causes the employee's "place of business" to close, or the employee's child's school or daycare to close. Employees also may use accrued PST to address various issues (whether as to the employee or the employee's family member) relating to domestic or sexual violence, or "abuse or stalking," including the need for medical attention, services from a victim services program, counseling, relocation, or attendance at legal hearings. However, unlike FMLA, PST does not mandate time off to care for newborn or newly placed adopted children.

WHAT HAPPENS TO UNUSED, ACCRUED PST AT THE END OF A YEAR?

Unused, accrued PST carries over to the following year but will not affect the minimum annual accrual and use caps during that following year (i.e., the employer still is not required to allow more annual accrual or use than the minimum 24 or 40 hours requirements, depending on size). The law also includes an unusual payout provision that permits an employer to pay out unused, accrued PST in lieu of carryover to the following year. However, any incentive to employ this option is thwarted by the law's simultaneous requirement to "provide the employee with an amount of earned paid sick time that meets or exceeds the requirements of [the PST law] that is available for the employee's immediate use at the beginning of the subsequent year." In other words, voluntarily paying out accrued PST merely earns the employer the obligation to advance that sum of PST to be immediately available the following year.

WHAT HAPPENS TO ACCRUED PST WHEN EMPLOYMENT ENDS?

Termination Without Reinstatement: Employers are not required to pay unused, accrued PST to employees whose employment terminates for any reason, including involuntary termination, voluntary resignation, layoff, or death.

Reinstated Employment: All accrued PST must be reinstated if, after a "separation from employment," the employer rehires the employee within nine months. Presumably, this would apply to employees reinstated after a temporary layoff.

Successor Employers: If an employer "succeeds or takes the place of an existing employer," the PST accrued by employees of the original employer who "remain employed" by the successor employer remains valid and exercisable. The statute does not define what constitutes a "successor" employer, nor does it explain whether "remain[ing] employed" means the same thing as being hired by the "successor." Unless specifically addressed to the contrary in the ICA's anticipated regulations, successor employers should consider treating accrued PST as an assumed liability irrespective of how the predecessor employer's employees become employees of the successor.

WHAT NOTICES ARE REQUIRED?

Employers' General Notice Requirements: Employers are subject to various notice and disclosure requirements under the PST law. By its effective date (July 1, 2017), employers must post notices to employees informing them of their entitlement to earn PST, how much PST they are entitled to earn, the guaranteed terms of PST use, the prohibition against retaliation, the right to file a complaint, and the ICA's contact information. This notice must be provided in English, Spanish, and any other language the ICA requires. The statute directs the ICA to create sample notices in each language.

EMPLOYEES' NOTICE REQUIREMENTS

- **"Foreseeable Leave":** If the PST is "foreseeable" (the statute does not elaborate on the meaning of this term), employees must make a "good faith effort" to give their employers advance notice and schedule their absences in a way that lessens the impact on the employers' businesses. Exactly what constitutes "good faith effort" is undefined. However, the statute does expressly state that a request for PST leave "may be made orally, in writing, by electronic means or by any other means acceptable to the employer." Absent clear regulatory guidance on the timing and content of notice, employers should proceed very cautiously before denying PST on the basis nonexistent or deficient notice of foreseeable leave.
- **"Unforeseeable Leave":** The law allows employers to require employees to give notice of an "unforeseeable" need for PST, provided those notice requirements are contained in a written policy that explains the procedures that employees must follow to provide notice and the policy is disseminated to affected employees before the leave arises. The scope of such procedures is not addressed in the statute. It is noteworthy that the statute does say that "when possible, the [employee's] request shall include the expected duration of the absence."
- **Replacements:** Employers cannot require an employee to find a replacement worker for his or her time off during PST leave.

VERIFICATION PERMISSIBLE, BUT VERY LIMITED

Employers' ability to verify that employees are not abusing PST is limited, especially when leave is taken for a short duration. For example, employers may require certain statutorily defined reasonable documentation that PST is being used for a permissible purpose only when the employee takes three or more days of consecutive PST. The implication, of course, is that employers likely will be unable to verify if employees are using PST for permissible reasons when taken in increments shorter than three days.

For PST leave of three or more consecutive days taken for medical reasons, a note signed by a health care professional is reasonable documentation. For PST taken for domestic violence reasons, a police report, court order, signed statement from a domestic violence services organization, signed statement from an attorney, clergy member, doctor, or even the employee's own written statement are all considered reasonable verifying documentation.

CONFIDENTIALITY AND NONDISCLOSURE

Employers are prohibited from requiring employees to disclose details of the nature of the employee's (or family member's) health condition or details relating to domestic violence, sexual violence, abuse or stalking, as a condition of providing earned PST. Also, if employers possess such health or other PST qualifying information, they must treat it as confidential and may only disclose it to the affected employee or with the affected employee's permission. Notably, there is no listed exception for disclosure to law enforcement officials, or if compelled by subpoena or court order. As written, this apparent omission seemingly conflicts with the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), which typically exempts such information, when maintained as employment records, from protected health information.

RECORDKEEPING REQUIREMENTS

The AMWA already requires employers to maintain detailed payroll records (for four years) for every covered employee, which includes, among other things, the number of hours worked each workday and workweek, rates of pay, and "additions to or deductions from wages paid." (See A.A.C. R20-5-1210). The new law amends the AMWA to also require the maintenance of records for all accrued and used PST. Failure to maintain such records creates a rebuttable presumption that the employer did not pay earned PST.

Paycheck Notification: Employers must either record in, or attach

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to, employees' paychecks the amount of PST the employees have available, the amount of PST used, and the amount of pay received as earned PST.

COLLECTIVE BARGAINING AGREEMENTS

The PST law does not apply to employees covered by a collective bargaining agreement ("CBA") that is in in effect on July 1, 2017 (the effective date) until that CBA expires. As for CBAs entered into after July 1st, the PST law's requirements can be waived by the parties if the PST law is "expressly waived" by "clear and unambiguous" language in the CBA.

NONDISCRIMINATION AND NONRETALIATION PROVISIONS, ENFORCEMENT, AND PENALTIES

Employers are prohibited from interfering with, restraining, or denying the exercise of any right under the PST law. Such rights include, but are not limited to requesting to use PST, filing a complaint with the ICA, filing a complaint in court, informing anyone about a violation, participating in an investigation or proceeding, and informing others about their PST rights. The statute expressly prohibits discrimination or retaliation against any person who mistakenly, but in good faith, alleges violations of the PST law.

Like FMLA leave, employers may not count PST absences against an employee (i.e., in a way that could result in adverse action).

Because the PST law is part of the AMWA (and the latter's enforcement mechanism), any person or organization may file an administrative complaint with the ICA charging that an employer violated the PST law as to "any employee or other person." After the ICA receives a complaint, it has the authority to review all employee records at the implicated worksite in order to "protect the identity of any employee identified in the complaint" and "determine whether a pattern of violations has occurred." The name of any employee identified in a complaint may only be disclosed with the employee's consent.

The same enforcement provisions also authorize the filing of lawsuits to enforce the PST law by enforcement officers or by individuals "injured" by a violation of the law. In other words, lawsuits may be brought by the Arizona Attorney General, county attorney, city attorney, town attorney, or by an affected individual employee or group of employees. The AMWA also includes a presumption that within 90 days of an employee's engaging in any protected activity, any adverse action taken against that person is retaliatory, and such a presumption can only be rebutted by "clear and convincing evidence" that the action was taken for other permissible reasons.

Employers that violate the PST law are subject to civil penalties of at least $250 for a first violation, at least $1,000 for each subsequent or willful violation, and additional monitoring and inspections. Such employers also must pay affected employees the balance of any PST owed, including interest, and an amount equal to twice the amount of previously unpaid PST (i.e., "liquidated damages"). If an employer is found to have retaliated against an individual for exercising his or her rights under the PST law, the employer "shall

be required to pay the employee" at least $150 for each day that the violation continued or until legal judgment is final. A prevailing plaintiff is entitled to reasonable attorneys' fees and costs.

The statute of limitations for filing a claim for a PST violation is two years from the date of the last violation, unless the violation was willful, in which case the statute of limitations is three years. The statute of limitations is tolled during any investigation by the ICA.

Finally, "no verbal or written agreement or employment contract may waive any rights under [the PST law]." In other words, as with the FLSA, the settlement of a PST dispute might not be binding without ICA or court intervention.

MARKETING RESTRICTIONS

E-MAIL MARKETING

FAX MARKETING

ELECTRONIC SIGNATURES

CREDIT AND DEBIT CARD RECEIPTS

E-MAIL MARKETING

Restaurants are restricted in sending out unsolicited e-mail to market their businesses.

The federal CAN-SPAM Act regulates business e-mail marketing. The law has been in effect since 2004 and governs business e-mail marketing. This includes all e-mail whose primary purpose is the commercial advertisement or promotion of a commercial product or service, including advertising or promoting content on a Web site that operates for a commercial purpose.

Business e-mails that facilitate an agreed-upon transaction or update a customer in an existing business relationship are not covered by most provisions of the CAN-SPAM Act. However, under the CAN-SPAM Act these "transactional or relationship messages" must not contain false or misleading routing information.

The CAN-SPAM Act requires that commercial e-mail messages contain:

- a clear and conspicuous message that it is an ad or solicitation
- an accurate originating e-mail address
- a notice of an opt-out option
- non-misleading subject headings
- a valid sender-posted address.

The Federal Trade Commission website offers more information. Many states have "CAN-SPAM"-like statutes. Businesses should check state law for additional restrictions on e-mail marketing.

FAX MARKETING

Restaurants and other businesses also face strict limitations on sending unsolicited faxes to advertise to customers and other recipients.

Unless a company has an existing business relationship with a fax recipient, the federal Junk Fax Prevention Act makes it unlawful for a company to send unsolicited ads to any fax machine without the recipient's prior express invitation or permission. The law permits a restaurant or other commercial business to transmit unsolicited fax ads only if:

- The restaurant has an existing business relationship with the fax recipient. An existing business relationship is generally defined as a prior or existing relationship:
- Formed by a voluntary two-way communication between a person or entity and a person or business customer on the basis of an inquiry, application, purchase or transaction by the customer regarding the product or services offered by the restaurant
- Where the relationship has not been ended by either party; and
- Where the restaurant advertiser can demonstrate that the recipient provided their fax number directly, such as by filling out a contact information form, or indirectly, by voluntarily providing the number for public distribution. (For businesses that can show that they had a relationship with a fax recipient that existed before that law was enacted on July 9, 2005, and who possessed

the recipient's fax number before that date, it is permissible to send that recipient fax advertisements without demonstrating how the fax number was obtained.)

- The restaurant provides clear instructions on page 1 of the fax transmission (a) informing the recipient that he/she may request not to receive any future ads, (b) noting that failure to comply with the customer's request is unlawful; and (c) providing a cost-free, 24-hour means by which the customer may issue such a request.
- The recipient has not previously requested to be excluded from receiving ads from the restaurant.

The fax restrictions took effect in August 2006 and are part of the Telephone Consumer Protection Act at 47 U.S.C. § 227. The Federal Communications Commission enforces the law and offers more information on fax restrictions.

Federal law does not preempt states from imposing additional restrictions on faxes.

ELECTRONIC SIGNATURES

Congress enacted the Electronic Signatures in Global and National Commerce (E-Sign) Act in 2000 to facilitate the use of electronic signatures and recordkeeping in transactions affecting interstate commerce. 15 U.S.C. §§ 7001-7006.

E-Sign provides that a "signature, contract or other record…may not be denied legal effect, validity or enforceability solely because it is in electronic form." 15 U.S.C. § 7001(a)(1). The statute also provides that a "contract…may not be denied legal effect…solely because an electronic signature was used…" 15 U.S.C. § 7001(a)(2).

The term "electronic signature" means any electronic sound, symbol or process attached to or logically associated with a contract or other record that a person executes or adopts with an intent to sign. 15U.S.C. § 7006(5). For example, if an employer sends a copy of its updated employee policy to its employees by e-mail, and each employee is required to double-click the "Acceptance" button, the act of double-clicking the "Acceptance" button is the electronic signature.

You should also check to see if your state laws have any "E-sign" provision.

CREDIT AND DEBIT CARD RECEIPTS

The Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681 c(g) requires that electronically printed credit or debit card receipts of customers not display "more than the last 5 digits of the card numbers," or the "expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." The Federal

Trade Commission and Consumer Financial Protection Bureau are authorized under FACTA to interpret the law.

MUSIC COPYRIGHT LAWS

OVERVIEW

WHY YOU NEED TO PAY THE PIPER

ABOUT THE PERFORMING RIGHTS SOCIETIES

IF YOU PLAY MUSIC JUST ON RADIOS AND TV

CHALLENGING LICENSING FEES

PENALTIES FOR COPYRIGHT INFRINGEMENT

OVERVIEW

Many restaurant operators play music in their establishments for the enjoyment of their guests. By doing so, however, operators could run afoul of the U.S. copyright law. This chapter discusses federal copyright law and how it applies to foodservice establishments playing music — whether through radio, television, CDs, live bands, or other means.

WHY YOU NEED TO PAY THE PIPER

Musical compositions are almost invariably copyrighted, and owners of music copyrights have the exclusive right to perform or authorize the "performance" of their copyrighted works. 17 U.S.C. § 106(4).

Unless a copyright owner or their agent authorizes the performance of their work, the owner's copyright is infringed. Courts have made it clear that "performances" include occasions when a commercial establishment uses a radio, stereo, television, live band or CD player to play musical compositions for the enjoyment of guests.

Even music played on TVs during commercials is deemed a performance. If a business broadcasts such music without authorization, the business may be subject to a copyright infringement claim.

Copyright protection is long-lasting. Copyright protection for songs written before 1978 lasts for the life of the artist plus 95 years. The copyright for songs written after 1978 extends through the artist's life plus 70years. After that time has elapsed, the work goes into the public domain and no licensing fee is required.

ABOUT THE PERFORMING RIGHTS SOCIETIES

Federal copyright law permits a copyright owner or their agent to authorize the performance of the owner's copyrighted works.

In the case of transmitted music, the performance rights are generally licensed on behalf of the composer or artist by one of the performance rights societies, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI) or SESAC Inc. The societies offer license agreements to commercial establishments for the privilege of playing music composed by the copyright owners whose performing rights the societies hold.

Fees charged by the societies to commercial establishments generally depend on such factors as whether the music is recorded or live, whether dancing is permitted, and room occupancy and establishment size.

ASCAP, BMI and SESAC each license a repertoire of well over a million songs. It's theoretically possible for a restaurant operator to negotiate a license with only one of the societies, but this may be difficult in practice because it would require that the operator play only the music licensed by one of the societies.

A restaurant operator can avoid entering into license agreements with performing-rights societies by signing an agreement with a background-music provider, such as MUZAK. MUZAK and similar providers enter into agreements with performing-rights societies. This enables a commercial establishment to pay the background-music provider rather than the societies with which MUZAK has an agreement.

IF YOU PLAY MUSIC JUST ON RADIOS AND TV

Congress amended U.S. copyright law in 1976 to permit a narrow exemption from copyright fees for certain performances of music. 17 U.S.C. § 110(5). The exemption applied to commercial establishments that transmitted copyrighted music on "a single receiving apparatus commonly used in private homes." The exemption applies in cases where there was no direct charge to hear the music and where the music was not transmitted further. But the language of the exemption was unclear. It was difficult to know which establishments and equipment qualified.

Through the efforts of the National Restaurant Association, Congress enacted a broader exemption in the Fairness in Music Licensing Act of 1998, 17 U.S.C. § 110(5)(B). The 1998 amendment exempted certain uses of music from copyright fees. Specifically, the act exempted foodservice establishments that play radios, televisions, cable and satellite sources and do not charge guests admission to hear or see the music. The exemption applies only to music that is transmitted over radios, TVs and cable and satellite sources. If an establishment uses any other means to transmit music — for example, live bands, tapes or CDs — a licensing obligation with ASCAP, BMI or SESAC (or perhaps all three) likely exists.

Establishments that use only radios, TVs or cable or satellite sources and charge no fees for music have two ways to qualify for the exemption. For establishments under 3,750 gross square feet, the exemption generally applies no matter how many radios or TVs are played or what size the equipment is. Gross square footage includes

all interior and adjoining outdoor space used to service guests, including the kitchen space, interior hallways, closets, bathrooms, etc. It does not include the parking lot unless the parking lot is used for a purpose other than parking. Space used for residential purposes is not included.

For foodservice and drinking establishments with gross square footage of 3,750 square feet or more, qualifying for the exemption is more complicated. Such establishments are exempt from music-licensing obligations if they play no more than four TVs (each with a screen size no greater than 55 inches diagonally), and if they have no more than one TV per room, no more than six speakers total and no more than four speakers in any room.

Where establishments of more than 3,750 gross square feet play radios, there must not be more than six speakers total, with no more than four speakers per room.

CHALLENGING LICENSING FEES

The 1998 amendments to 17 U.S.C § 110(5) also gave commercial establishments such as restaurants a new way to challenge the fees and rates of ASCAP, BMI and any other licensing society that operates under a federal-court consent decree governing license rates or fees for the playing of music. (SESAC is not subject to any consent decree, so challenges can be made only through normal court procedures.)

Before the 1998 Act, businesses had to go to a single New York City rate court to contest fees. Now a proprietor who has a rate dispute and who owns or operates no more than six non-publicly traded establishments in which music is played can take his or her challenge to the following areas:

- District of Columbia;
- Boston (for establishments in Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico);
- New York (for establishments in Connecticut, New York and Vermont);
- Philadelphia (for establishments in Delaware, New Jersey, Pennsylvania and the Virgin Islands);
- Richmond, Virginia (for establishments in Maryland, North and South Carolina, Virginia, and West Virginia);
- New Orleans (for establishments in Louisiana, Mississippi and Texas);
- Cincinnati (for establishments in Kentucky, Michigan, Ohio and Tennessee);
- Chicago (for establishments in Illinois, Indiana and Wisconsin);
- St. Louis (for establishments in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North and South Dakota);
- San Francisco (for establishments in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington State and Guam);
- Denver (for establishments in Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming); and
- Atlanta (for establishments in Alabama, Florida, and Georgia).

A restaurateur is limited to one legal proceeding per license agreement. Owners of more than six establishments or who operate publicly traded organizations cannot use this procedure. Certain time and application requirements apply. Although the rate-dispute mechanism is far superior to what existed before Congress changed the law, establishments still must weigh the cost of a federal lawsuit against paying the higher rate demanded ASCAP or BMI. Anyone interested in filing a rate or license-fee challenge should check with their attorney or call the National Restaurant Association at (202) 331-5910 for more information.

PENALTIES FOR COPYRIGHT INFRINGEMENT

Copyright law provides that anyone who infringes a copyright may be liable for:

- The copyright owner's actual damages as a result of the infringement and any profits of the infringer attributable to the infringement, or
- Statutory damages of $750 to $50,000 per copyrighted work performed without proper authorization may be imposed. If the infringement was willful, the court may increase the damages.

In addition to the above damages, the court may award reasonable attorneys' fees to the prevailing party.

OCCUPATIONAL SAFETY AND HEALTH ACT

OVERVIEW

OSHA AND THE RESTAURANT INDUSTRY

HAZARD COMMUNICATION STANDARD

BLOOD BORNE PATHOGEN STANDARD

OTHER OSHA REGULATIONS

PANDEMIC FLU PROTECTIONS

RECORDKEEPING OBLIGATIONS

"BRING-YOUR-GUN-TO-WORK" LAWS

OVERVIEW

The Occupational Safety and Health Act of 1970 ("the Act") and its "general duty clause" require all employers to provide employees with a workplace free from recognized hazards that cause or are likely to cause death or serious injury. The Act is aimed at assuring, to the extent possible, safe and healthful working conditions for every employee. The Act does not prohibit specific employment practices. Instead, the law lays out the general duty clause, gives the federal Occupational Safety and Health Administration ("OSHA") the authority to develop detailed health and safety standards, and requires employers to comply with these standards.

The United States Department of Labor ("DOL") implements and enforces the Act, unless state agencies have standards and enforcement plans similar to OSHA's. In such cases, responsibility for enforcing safety and health regulations may be the responsibility of the states. Roughly half of the states have assumed such enforcement responsibility.

OSHA AND THE RESTAURANT INDUSTRY

OSHA has issued thousands of standards for employers in four broad subject areas. Just one of these subject areas generally applies to foodservice establishments. Standards of particular interest to restaurateurs are discussed below.

HAZARD COMMUNICATION STANDARD

OSHA's Hazard Communication Standard is designed to ensure that the hazards of all chemicals are communicated to both employees and employers. Employers who have potentially hazardous chemicals in the workplace must comply with the Hazard Communication Standard by preparing a written safety program. This program must include: employee training; proper labeling of all products that contain any hazardous chemical; and a file of material safety data sheets. Material safety data sheets, also referred to as MSDSs, must be provided for any product containing a hazardous chemical.

BLOOD BORNE PATHOGEN STANDARD

OSHA's Blood borne Pathogen Standard is designed to eliminate or minimize employee contact with any other person's blood or other potentially infectious material (such as human body fluids) that can cause disease, such as the hepatitis B virus and the human immunodeficiency virus (HIV).

The Blood-borne Pathogen Standard principally applies to health-care workers, clinical laboratory workers and employees in public and private safety forces. OSHA has advised that the standard also applies to employees in foodservice establishments who administer first aid or perform duties where contact with blood or "other potentially infectious materials" is "reasonably anticipated." Potentially infectious materials include vomit and any fluid visibly contaminated with blood. The standard also applies to employees, such as back of the house employees, who handle sharp objects that can penetrate the skin or laundry that may be soiled with blood.

Under OSHA's Blood-borne Pathogen Standard, employers who have employees who perform duties that can be reasonably anticipated to bring them in contact with blood or other potentially infectious materials are required to:

- Establish a written plan, called an exposure-control plan, aimed at eliminating or minimizing such employees' exposure to another person's blood;
- Offer a hepatitis B vaccination to such employees within 24 hours of exposure to another's blood;
- Make a confidential medical examination immediately available to employees whose broken skin, eye, mouth or other mucous membrane is exposed to another's blood;
- Keep a record of each employee's exposure to another's blood; and
- Establish a training program for employees designed to eliminate or minimize employees' exposure to another's blood, and keep a record of such training.

The Blood-borne Pathogen Standard's requirement for an exposure-control plan covers employers with employees who administer first aid. Although the risk is low that such employees would be exposed to another person's blood, it is recommended that employers do the following:

- Supply single-use disposable gloves in the establishment's first-aid kit;
- Instruct employees to use disposable gloves before rendering first aid;
- Instruct employees to avoid as contact with blood and especially contact with skin that is broken or with mucous membranes, such as the eye;
- Instruct employees to wash their hands and any other skin that may have been exposed to blood with soap and water, as well as flush their eyes — or any other mucous membrane exposed to blood — with water immediately after removing gloves;
- Instruct employees to place blood-stained gloves, clothing, bandages, laundry, etc., in leak-proof containers, and establish a policy that these containers be picked up by authorized waste-removal companies only;
- Require immediate reports to the employee's supervisor of any incident in which there has been exposure to blood; and
- Establish an evaluation procedure to determine whether or not the employee should be given a hepatitis B vaccination or medical evaluation.

OTHER OSHA REGULATIONS

In addition to the Hazard Communication Standard and the Blood-borne Pathogen Standard, OSHA has a number of other regulations affecting foodservice workplaces. For instance, employers are obligated to maintain the floor of every workroom in a clean, and as far as possible, dry condition, and to keep the aisles and passageways clear, in good repair and free from obstructions that could create a hazard. Restaurant employers also must establish a written emergency action plan providing for evacuation in emergencies. Employers are obligated to provide employees with protective equipment for the eyes, face, head and extremities, protective clothing and protective shields and barriers whenever necessary to prevent injury to the employee. Further, Whenever an employee is cleaning or adjusting power-driven equipment, the energy source must be locked out to prevent inadvertent startup.

PANDEMIC FLU PROTECTIONS

The Act also requires employers to provide employees with a workplace free from recognized hazards that cause or are likely to cause death or serious physical harm. Pandemic flu is one such recognized hazard, according to OSHA. OSHA's Guidance on Preparing Workplaces for an Influenza Pandemic offers general advice on steps employers can take to prevent or abate the hazard.

The guidance is not a standard or a regulation but can help employers meet their responsibilities under the Act.

RECORDKEEPING OBLIGATIONS

OSHA requires most employers to keep extensive records on workplace safety. Foodservice operators are among the industries exempt from most of these recordkeeping requirements, with the exception of rules concerning reporting fatalities or multiple hospitalization accidents.

“BRING-YOUR-GUN-TO-WORK” LAWS

Some states have passed laws to prevent employers from prohibiting employees or customers from bringing lawfully possessed guns to work or on the business premises.

Arizona law allows property owners and operators of public establishments to prohibit individuals (including employees) from carrying firearms on private property. Property owners must generally provide reasonable notice of their firearms policy along with a description of what is and is not allowed. Property owners may not prohibit individuals (including employees) from lawfully storing or transporting firearms in locked private vehicles, so long as the firearms are not visible from the outside of the vehicle. Operators of public establishments must also provide temporary and secure storage for firearms that are removed prior to an individual entering the establishment.

Some state laws may be inconsistent with employee workplace safety policies or business policies to protect customers. Restaurateurs who maintain employment or business policies concerning the carrying of firearms at the workplace should consult with legal counsel to determine whether state law imposes restrictions on such policies.

OVERTIME

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WHAT IF EMPLOYEES GO BEYOND 40 HOURS WITHOUT AUTHORIZATION?

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WHEN IS OVERTIME PAY REQUIRED?

Federal minimum wage law -- the Fair Labor Standards Act -- generally requires employers to pay workers one and one-half the employee's "regular rate of pay" for all hours worked over 40 per week. Employers are required to pay for overtime when they knew or should have known that the employees were working.

Specifically, the FLSA says that "no employer shall employ any ...employee...for a workweek longer than 40 hours unless such employee receives...for employment in excess of [40] hours at a rate not less than one and one-half times the regular rate....". 29 U.S.C. § 207 (a) (1). "Employ" is defined broadly, to include all hours that an employee is "suffered or permitted to work." 29 U.S.C. § 203 (g). U.S. Department of Labor regulations explain that "work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of a shift [no matter what the reason] and...[if the] employer knows or has reason to know that the employee is continuing to work,...the time is working time." 29 C.F.R. § 785.11.

While the term "work" is not specifically defined, the U.S. Supreme Court ruled in the 1940s that "work" is an exertion or loss of an employee's time that is (1) controlled or required by an employer, (2) pursued necessarily and primarily for the employer's benefit, and (3) performed outside the scheduled work time, an integral and indispensable part of the employee's principal activities. *Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123*, 321 US 590.

WHAT IF EMPLOYEES GO BEYOND 40 HOURS WITHOUT AUTHORIZATION?

Are employers required to pay overtime to employees who voluntarily and without employer authorization go beyond 40 straight-time hours in a workweek?

One federal appeals court ruled that an employer was required to pay overtime to an employee even though the employer had a policy requiring pre-authorization for any overtime hours, did not authorize the overtime, and only learned of the overtime after it was performed. *Chao v. Gotham Registry, Inc.*, 2008 WL 191038.

The court said a written policy requiring pre-approval for overtime was not sufficient in this case. The court said the employer should have taken extra steps to reinforce its position against unauthorized overtime, such as:

- Keeping daily records of employee hours and reassign shifts that would result in overtime;
- Disciplining employees who violate the overtime policy, and warn employees in advance that disciplinary action will be taken; and
- Refusing to assign shifts to employees who habitually violate the policy.

HOW TO CALCULATE OVERTIME

Employees are entitled to time-and-a-half pay under federal law after 40 hours worked in a week. That sounds straightforward, but

employers must make sure each part of their calculation is correct. In particular, employers must be sure to use a single workweek as their standard, along with the right base rate of pay.

USE A SINGLE WORKWEEK AS THE STANDARD

Employers must use a single workweek as the standard when calculating an employee's overtime pay. 29 C.F.R. § 778.104. A workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It may begin on any day or at any hour of the day. 29 C.F.R. § 778.105.

Generally, employers may not average an employee's hours over two or more weeks. 29 C.F.R. § 778.104. For example, if an employee works 30 hours one week and 50 hours the next, no overtime is due in the first week but overtime must be paid for 10 hours in the second week. This holds true whether the employee is paid daily, weekly, biweekly, monthly or on any other basis.

The FLSA does not require that an employee be paid overtime for working more than eight hours per day or working on weekends or holidays unless the maximum weekly standard of 40 hours is exceeded. However, employers should check state law, as some states require overtime pay when an employee exceeds daily maximum limits (for example, works more than eight hours in a day) even if the employee works 40 or fewer hours in a week.

USE "REGULAR RATE OF PAY" AS THE BASE

Overtime pay is based on an employee's "regular rate of pay." 29 C.F.R. § 778.107. Regular rate of pay includes all remuneration for employment, except payments such as:

- when an employer reimburses an employee for expenses the employee incurred on the employer's behalf (for example, money paid to an employee to reimburse the employee for a uniform he or she was required to purchase)
- discretionary bonuses (bonuses where the actual award of any bonus or the exact amount and time of the bonus is not agreed upon in advance)
- payments in the nature of special gifts on certain occasions (for example, a turkey given to each employee at Thanksgiving time)
- payments for those occasional periods when no work is performed because of a vacation, holiday or illness.

CALCULATING OVERTIME FOR HOURLY EMPLOYEES

For an employee paid the current federal minimum wage of $7.25 per hour, the overtime rate for hours worked beyond 40 per week is $10.875 per hour ($7.25 x 1.5 = $10.875, or $10.88 if rounded).

WHEN FEDERAL AND STATE LAWS DIFFER

If a state or local minimum wage law is more favorable to the employee than the federal minimum wage, the state or local law

prevails. For example, if a state has a minimum wage of $8 per hour, the employee must be paid one and one-half times that rate, or $12 per hour, for hours worked beyond 40 in a week.

CALCULATING OVERTIME PAY FOR TIPPED EMPLOYEES

Employers need to be careful when calculating overtime rates for tipped employees.

Overtime under federal law is based on an employee's regular rate of pay, which includes credits used to meet the minimum wage, such as the tip credit, and which can never be less than the applicable minimum wage rate.

Take a tipped worker who earns the current federal minimum wage of $7.25. The employee's wage consists of two parts: the minimum cash wage required for tipped employees under federal law (currently $2.13 per hour) and the maximum tip credit permitted under federal law (currently $5.12 an hour). This employee's regular rate of pay is $7.25.

The Department of Labor takes the following approach to calculating overtime. (Note: The DOL outlined this approach in a 1998 DOL Wage-Hour Opinion Letter issued at the request of the National Restaurant Association. Figures in this example have been adjusted to reflect the current $7.25 federal minimum wage.)

- Hours worked during week: 44
- Cash wages: $2.13 cash wage per hour x 44 hours = $93.72
- Tip credit permitted: $5.12 tip credit per hour x 44 hours = $225.28 (In other words, the DOL allows employers to take the full tip credit of $5.12 an hour against the pay rate for overtime hours.)
- Overtime earnings: $7.25 "regular rate of pay" x .5 x 4 hours = $14.50
- Total weekly pay for employee: $333.50

Employers should note the following about the DOL approach:

- The DOL approach requires employers to apply the same tip credit to the overtime calculation as to the straight-time hours. Employers may not take a larger tip credit for overtime hours than they take for the first 40 hours. If the employer decides to take a tip credit for the first 40 hours of work that is less than the tip credit otherwise permitted by law, the employer also must limit the tip credit for hours in excess of 40. For example, if an employer takes a tip credit of $3 per hour rather than the $5.12 per hour permitted under current federal minimum wage law, the employer must limit the tip credit to $3 in calculating the overtime rate.

- The DOL approach requires employers to follow all the same requirements for taking the tip credit for the overtime hours as for the straight-time hours. For example, an employer can never take a tip credit that exceeds the amounts of tips earned. The employer has the burden of proving that the employee earned tips at least equal to the amount of tip credit claimed by the employer. 29 C.F.R. section 531.59.

Effective January 1, 2017, the minimum wage in Arizona is $10.00 per hour. Employers may provide a maximum tip credit of $3.00, and must pay tipped employees at least $7.00 per hour. For any overtime hours, th employer must pay the minimum effective hourly rate ($15.00 per hour) less the $3.00 tip credit. A tipped employee being paid $7.00 would have to be paid $12.00 per hour for each hour of overtime.

See requirements for taking a tip credit.

WHEN FEDERAL AND STATE LAWS DIFFER

Under the rule outlined above, employers covered by both federal and state laws must base overtime-pay calculations on whichever minimum wage rate is higher, federal or state.

But the legal issue may be unsettled on how employers should calculate both straight-time (first 40 hours worked in the work week) and overtime (hours over 40) for tipped employees when federal and state "tip credits" differ. Specifically, some states let an employer credit more tip earnings toward minimum-wage obligations – i.e., take a higher tip credit -- than federal law allows.

OVERTIME AND SERVICE CHARGES

Service charges distributed to employees are considered wages under federal law and thus become a part of the employee's regular rate of pay. The employer is entitled to apply service charges toward his or her obligation to pay employees the minimum wage.

- **Example:** The hourly overtime rate for employees paid the current federal minimum wage of $7.25 per hour plus service charges of $10 per hour is $25.88 per hour ($17.25 regular rate of pay x 1.5 = $25.875, or $25.88 if rounded).
- **Example:** The overtime rate for an employee receiving service charges of $10 an hour (which includes the current federal minimum wage of $7.25 per hour) is $15 per hour ($10 x 1.5 = $15) for all hours in excess of 40 hours in a week.

OVERTIME FOR SALARIED EMPLOYEES

Many salaried employees are exempt from overtime-pay requirements because they are executive, administrative or professional employees exempt from the Fair Labor Standards Act. Salaried employees who are not exempt from the FLSA are entitled to overtime pay if they work more than 40 hours in a workweek.

Employers must keep in mind that an employee's regular rate of pay includes not only total salary, but also any other includable remuneration. Bonuses are one example. A fixed-amount, nondiscretionary bonus must be included in determining the employee's regular rate of pay.

"COMP TIME" AS A SUBSTITUTE FOR OVERTIME PAY

The FLSA lets certain employers provide eligible employees with compensatory time off in lieu of overtime pay in certain situations. A public agency employer can provide "comp time" in

lieu of overtime" at a rate not less than 1-1/2 hours for each hour of employment for which overtime compensation is required," according to Section 207(o) of the FLSA.

Private-sector employers are generally not allowed to use comp time in lieu of overtime pay for non-exempt employees (that is, employees who are covered by the FLSA's minimum wage and overtime requirements).

OVERTIME IN MULTIPLE-JOB SITUATIONS

Working At More Than One Site

Assume restaurants A and B are owned or controlled by the same person or group and that an employee works for restaurant A for 30 hours during a given week and for restaurant B for 20 hours during the same week. Should the employee receive overtime pay for working a total of 50 hours in a week, or is the employee considered to be working for two separate employers and thus no overtime is involved?

The answer likely lies in the ownership and control of the two restaurants. If the restaurants are owned or controlled by the same people -- even though they have two separate names and maintain two separate payrolls -- then the employee would be entitled to overtime for all hours worked above 40. If the two restaurants were owned or controlled by different persons or groups, then no overtime pay would be necessary.

Penalties are steep if an employer gets the calculation wrong, since the business may be liable not only for overtime pay but also for damages. In Chao v. Barbeque Ventures LLC, the Eighth Circuit Court of Appeals ruled in 2008 that owners of several chain restaurants had to pay employees not only $90,000 in overtime but an additional $90,000 in liquidated damages. The court ruled that the company should have been combining the hours employees worked at all of its restaurants for purposes of overtime- pay calculations.

Doing More Than One Type of Work

How does an employer compute the overtime rate for an employee who in a single workweek works at two or more different types of work, for which different non-overtime rates of pay (of not less than the applicable minimum wage) have been established?

Generally, the regulations indicate that the employee's regular rate for that week is the weighted average of such rates. 29 C.F.R. § 778.115. The employee's total earnings are computed to include the employee's compensation during the workweek from all such rates and are then divided by the total number of hours worked at all jobs.

Example: Consider an employee who works 40 hours during a week as a server for $7.25 an hour and 10 hours as a hostess at $7.55 an hour. The employee's regular rate of pay that week is $7.31 an hour -- a weighted average of the two rates ($290 [40 hours x $7.25] + $75.50 [10 hours x $7.55] = $365.50; $365.50 divided by 50 hours = $7.31). The employee's overtime rate that week is $10.97 ($7.31 x 1.5).

Based on this overtime rate, the employee must be paid compensation for that workweek of $371.10 (40 x $7.25 = $290; 10 x

$10.97 = $109.70; $290 + $109.70 = $399.70).

In multi-job situations, the employer may take a tip credit, but only for those hours the employee worked as a tipped employee. In this the tip credit may be taken for the 40 hours the employee works as a server.

Assuming the employer takes the federal tip credit (currently $5.12 per hour), this employee's cash wages for the week would be $194.90 ($399.70 - $204.80 in tip credit [40 hours x $5.12] = $194.90).

VALUE OF MEALS FOR OVERTIME

If an employer provides meals to employees and does not qualify to take a meal credit, he or she must include the value of those meals as part of an employee's total remuneration when calculating the employee's regular rate of pay to determine overtime pay. However, DOL regulations permit an employer to enter into an agreement with any or all of his or her employees to exclude the cost of a "free daily lunch or other single daily meal furnished to employees" when computing overtime rates. In these instances, the following requirements must be met in order for the meal to be excluded from overtime rates:

- the meal must be provided at no cost to the employees
- the employer may not take a meal credit
- the employer and the employee must agree to this arrangement before meals are furnished.

SPECIAL OVERTIME EXEMPTIONS

Not all employees are required to be paid at time-and-a-half rates when they work more than 40 hours in a week.

As noted above, the FLSA exempts certain executive, administrative and professional employees from minimum wage and overtime requirements, for example. The FLSA also provides certain other exemptions, including:

Servers who receive commissions. Employers that impose service charges instead of relying on customers to leave tips may be able to claim an "inside sales" exemption from overtime requirements if they turn the service charges over to their tipped employees. 29 U.S.C. § 207(i). This exemption from overtime permits "retail or service establishment" employers (e.g., hotels and restaurants) to avoid paying overtime to employees who (1) receive more than one -half (1/2) of their total earnings in commissions (service charges), and (2) earn more than one and one-half (1-1/2) times the minimum wage. 29 C.F.R. § 779.42. A "retail or service establishment" is defined as an establishment "75 percent of whose annual dollar volume of sales of goods or services is not for resale and is recognized as retail sales or services in the industry." 29 C.F.R. § 779.411. To take advantage of this overtime exemption under the current minimum wage of $7.25 per hour, the server must be paid at least $10.88 per hour, receive "commissions" (service charges), and earn at least half the compensation from the commissions. 29 C.F.R. §779.416 and 417.

Salaried, non-exempt employees whose hours fluctuate. The

FLSA regulations provide a special exemption for overtime pay for nonexempt employees employed on a salary basis who work hours that fluctuate from week to week. 29 C.F.R. § 778.114. This exemption basically lets employers pay overtime at the rate of one-half (one-half) of the employee' s regular rate of pay rather than at time and one-half (one and one-half). The concept, as recently stated in Urnikis Negro v. Am. Family Prop. Servs., 2010 U.S. App. LEXIS 16126 (7th Cir. 2010), is that because a salaried employee's guaranteed salary amount has already been paid for all hours, including the overtime hours, only the "one-half" remains to be paid for the hours in excess of 40. It applies only if the following conditions are met:

- The employee is paid a salary with the understanding with his or her employer that he or she will receive a fixed amount as straight-time pay for whatever hours the employee works in a workweek.
- The salary paid to the employee must at least equal the federal minimum wage for the greatest number of hours he or she works in a workweek, plus not less than one-half (not one and one-half) the employee's regular rate of pay for all hours worked over 40 per workweek.
- The fluctuating-workweek method of computing overtime pay, as described above, may not be used for employees who customarily work a regular schedule of hours.

The following shows how overtime pay would be computed under this regulation, using as an example an employee who works fluctuating hours and who earns a weekly salary of $350:

45-hour workweek

The employee's regular rate of pay in this example is $10 per hour ($450 divided by 45 hours). His or her overtime rate is $5 per hour ($10 x .5). The employee's total pay this week is $475: $450 in straight-time pay, plus $25 in overtime (5 overtime hours x $5).

50-hour workweek

In this case, the employee's regular rate of pay is $9 per hour ($450 divided by 50 hours), and his or her overtime rate is $4.50 per hour ($9 x .5). The employee's total pay this week is $495: $450 in straight-time earnings, plus $45 in overtime pay (10 overtime hours x $4.50).

The regulation specifies that this method of computing overtime is based on an employee's "understanding with his or her employer." A written agreement is the best way to prove that an understanding exists.

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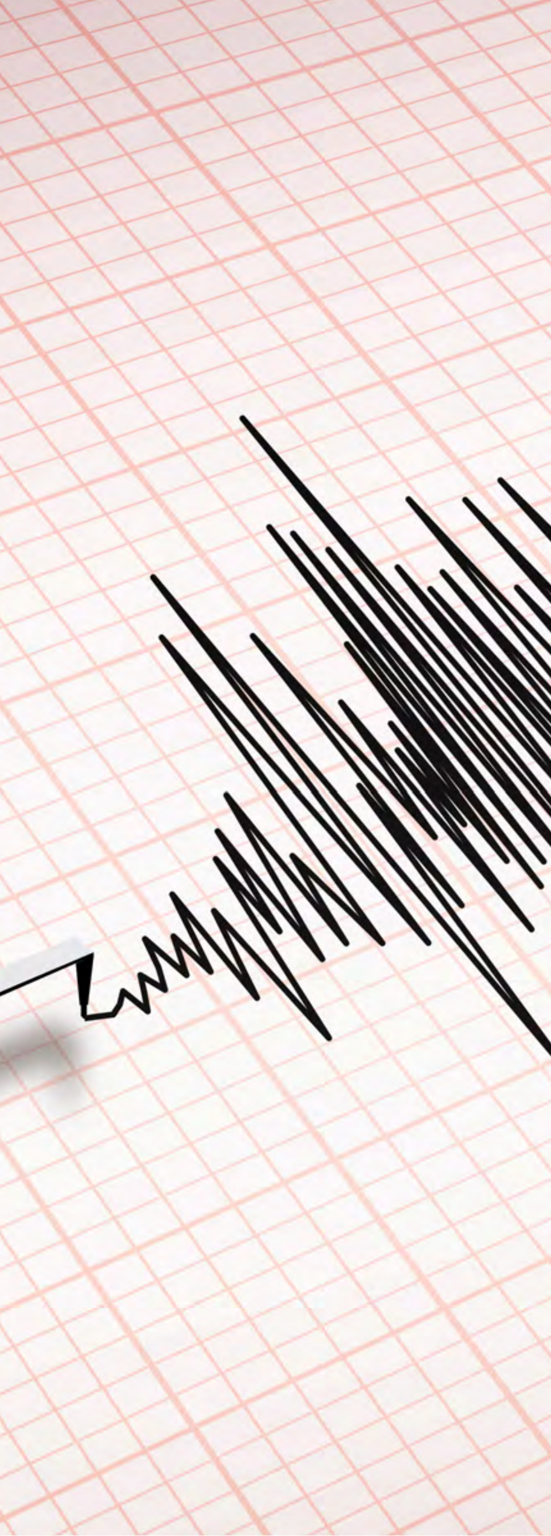

USE OF POLYGRAPH TESTS IN EMPLOYMENT

THE EMPLOYEE POLYGRAPH PROTECTION ACT

LAWFUL USE OF POLYGRAPH TESTS

EMPLOYEE RIGHTS

RECORD-KEEPING AND NOTICE REQUIREMENTS

PENALTIES

STATE LAWS

THE EMPLOYEE POLYGRAPH PROTECTION ACT

Under the federal Employee Polygraph Protection Act (the "EPPA") it is unlawful for any employer to:

- Require or request that any employee or prospective employee submit to a lie-detector test;
- Use, accept, or ask about the results of previous lie-detector tests taken by an employee or prospective employee;
- Terminate, discipline, deny a job or promotion to or in any way discriminate against or threaten an employee or prospective employee on the basis of the results of a lie-detector test, or because the employee or prospective employee refused to submit to a test;
- Discriminate or take any retaliatory action against an employee or prospective employee who files a complaint against an employer under the EPPA, testifies in a proceeding under the EPPA, or exercises any right under the EPPA.

Under the statute, a lie detector is a polygraph, voice-stress analyzer, psychological-stress evaluator, or any other similar mechanical or electrical device used to evaluate an individual's honesty or dishonesty. Drug or alcohol tests, handwriting tests, and written or oral tests are not "lie detectors" under the EPPA.

LAWFUL USE OF POLYGRAPH TESTS

Under the EPPA employers may use lie detector tests in one circumstance. Specifically, employers may use lie detector tests

in the course of an ongoing investigation into economic loss or injury to the employer's business, such as theft, embezzlement, or misappropriation. Lie detectors may be used in such circumstances, however, only if the following four conditions are met:

- The test must be administered in connection with an ongoing investigation into a specific incident involving economic loss or injury to the employer's business;
- The employee must have had access to the property that is the subject of the investigation.;
- The employer must have a reasonable suspicion that a particular employee was involved in or responsible for the loss or injury; and

•The employer must provide written notice to the employee before the test. In general, the notice must identify the incident or activity involving economic loss, identify the specific economic loss or injury to the employer, state that the employee had access to the property that is the subject of investigation prior to the loss, and describe the basis for the employer's suspicion that the employee being tested was involved in the incident. The notice must be given to the employee at least 48 hours before the test and the employee must sign the notice indicating receipt of a copy.

Under the EPPA, random polygraph testing is not permitted. Inventory loss in and of itself is not sufficient to meet the specific incident or activity requirement.

EMPLOYEE RIGHTS

In the very narrow situations in which employers may use lie detector tests, employees subject to polygraph testing have certain procedural rights. Employers must ensure that polygraph testing occurs consistent with these rights. Otherwise, the exemption described above will not apply, and employers may be subject to penalties, described in greater detail below.

Specifically, during the polygraph test:

- The examiner may not ask any questions that were not presented in writing to the employee for review prior to the test;
- An employee has a right to consult with an attorney before each phase of the test, although attorneys or employee representatives may be excluded during actual testing;
- During all phases of the examination, which may last no longer than 90 minutes, the employee being examined may terminate the test at any time; and
- The employee may not be asked questions which are unnecessarily intrusive or that concern religious beliefs, racial matters, sexual preference, or behavior or beliefs concerning labor organizations.

Before taking any adverse action based on the results of a polygraph test, the employer must further interview the examinee on the basis of the test results and give the examinee a written copy of any opinions or conclusions rendered in response to the test, as well as a copy of the questions asked during the test along

with the corresponding charted responses. Importantly, the EPPA prohibits employers from taking adverse action against an employee based solely on the basis of the polygraph results or for refusing to take a polygraph examination. An employer must have additional supporting evidence before taking any adverse employment action.

RECORD-KEEPING AND NOTICE REQUIREMENTS

For a period of three years, employers must maintain copies of any notice given to examinees, and copies of all opinions, reports or other records that the examiner furnishes to the employer. All records must be made available for inspection and copying by the United States Department of Labor upon request. In addition, employers must post a notice explaining the EPPA in a place where it can be readily observed by employees and applicants.

PENALTIES

An employer who violates the EPPA can face civil penalties of up to $10,000 per violation. In addition, an applicant or employee may sue an employer for violating the EPPA and may be awarded reinstatement and lost wages. If the applicant or employee is successful, he or she may also obtain an award of attorneys' fees.

STATE LAWS

The EPPA does not preempt any provision of state or local laws or collective-bargaining agreements that impose stricter requirements than the EPPA. Although Arizona has not enacted any statute concerning use of polygraph examinations in the employment context, other states have enacted such laws.

TEEN EMPLOYMENT

overview

RESTRICTIONS ON EMPLOYMENT OF 14- AND 15-YEAR-OLDS; MINIMUM AGE FOR EMPLOYMENT

RESTRICTIONS ON HOURS AND TIME FOR 14- AND 15-YEAR-OLDS

RESTRICTIONS ON COOKING AND OTHER KITCHEN ACTIVITY FOR 14- AND 15-YEAR-OLDS

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OVERVIEW

Teen labor is an important area of the law for restaurateurs. Federal teen labor law, which is governed by the Fair Labor Standards Act (FLSA), limits hours and responsibilities for employees age 14 and 15. It also restricts workers under age 18 from performing certain duties. The Department of Labor (DOL) enforces the FLSA and can issue additional regulations to protect teen workers.

Arizona teen labor law limits hours and areas of employment for employees under the age of 16. A.R.S. §§ 23-232 and 33. It also limits the areas of employment in which employees under the age of 18 can work. A.R.S. § 23-231.

FEDERAL RESTRICTIONS ON EMPLOYMENT OF 14- AND 15-YEAR-OLDS; MINIMUM AGE FOR EMPLOYMENT

Although the minimum age for employment under federal law is generally 16 years, 14 and 15-year-olds are permitted to work under certain conditions. 29 C.F.R. § 570.31-38. Generally, the DOL allows teens who are 14 and 15 years old to work in most occupations as long as their employment does not interfere with their schooling or their health and well-being. 29 C.F.R. § 570.31. Employers can protect themselves from unintentional violations of federal teen labor regulations by keeping an employment or age certificate on file for each employee under the age of 18. 29 C.F.R. § 570.5; 29 C.F.R. § 570.6(b)(1). This certificate shows that the employee is at or above the minimum age for the job. Employers return the certificate to the employee at his or her termination. 29 C.F.R. § 570.6 (b) (1).

FEDERAL RESTRICTIONS ON HOURS AND TIME FOR 14- AND 15-YEAR-OLDS

Under the FLSA, 14 and 15-year-olds may not be employed:

- During school hours, except when participating in Work Experience and Career Exploration Programs;
- Before 7 a.m. or after 7 p.m;
    - From June 1 through Labor Day, 14- and 15-year-olds may work until 9 p.m;
- More than three hours a day on school days;
- More than 18 hours a week during school weeks, except when participating in Work Experience and Career Exploration Programs;
- More than eight hours a day on non-school days; and
- More than 40 hours a week during non-school weeks.

29 C.F.R. § 570.35. "Week" is defined as "a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods—that is identical to the workweek that the employer establishes for" other employees. See id.; 29 C.F.R. § 778.105. The above restrictions apply even if the teenager does not attend school. Federal regulations allow limited exceptions to the working-hours restrictions for 14 and 15-year-olds. See 29 C.F.R. § 570.35(c).

FEDERAL RESTRICTIONS ON COOKING AND OTHER KITCHEN ACTIVITY FOR 14 AND 15-YEAR-OLDS

The following duties are permissible for workers age 14 and 15 under federal law:

- MAY use “milk shake blenders,” which means equipment used to make “to-order” milkshakes for an individual customer. Other types of blenders and mixers are generally prohibited for this age group;
- MAY cook with a gas or electric grill that does not have an open flame;
- MAY use a deep fryer that is equipped with a device that automatically raises and lowers the basket;
- MAY perform various food-and-beverage prep work. Examples of machines and devices employees age 14 and 15 may work with include:
    - o Microwave ovens that do not have the capacity to warm above 140 degrees Fahrenheit;
    - o Dishwashers;
    - o Devices used to maintain food temperatures (warmers, heat lamps, etc.);
    - o Toasters (defined to mean, 29 C.F.R. § 570.34(i), “pop-up” toasters used to toast slices of bread, as opposed to broilers, high speed ovens and rapid toaster machines operating at high temperatures);
    - o Coffee machines;
    - o Popcorn poppers;
    - o Dumbwaiters;
- MAY clean, maintain and repair cooking devices such as grills, deep-fat fryers, and steam tables if equipment surfaces are below 100 degrees Fahrenheit; *
- MAY change, clean, and dispose of oil and grease or oil and grease filters if the temperature of the liquid is less than 100 degrees Fahrenheit; *
- MAY enter the freezer momentarily to retrieve items needed for restocking or food preparation.

* The DOL stated that these temperature limits require vigilance by employers. Managers and supervisors need to ensure that equipment and materials are cooled to 100 degrees Fahrenheit or less before 14 or 15-year-olds are allowed to undertake any clean-up tasks, such as washing the machines or removing or filtering oil and grease. The DOL advises managers to use thermometers, cool-down waiting periods and other methods to ensure that the temperature restrictions are met.

The following duties are NOT permissible for workers age 14 and 15 under federal law:

- May NOT cook on a grill that has an open flame;
- May NOT perform any baking;
- May NOT use a deep-fryer basket that must manually be raised or lowered;
- May NOT use a rotisserie, broilers or pressurized equipment, including fryolaters, or cooking devices that operate at extremely high temperatures, such as “Neico broilers;”

- May NOT clean equipment such as grills, deep-fat fryers and steam tables when the surface of the equipment is hotter than 100 degrees Fahrenheit;
- May NOT filter and dispose of cooking oil or grease that is hotter than 100 degrees Fahrenheit (, including lifting, moving, or carrying containers or hot grease or oil 100 degrees Fahrenheit or higher;
- May NOT operate, set up, adjust, clean, oil or repair power-driven food slicers and grinders, food choppers and cutters, and bakery-type mixers; and
- May NOT work in freezers and meat coolers, except for work requiring them to "occasionally" enter freezers only momentarily to retrieve items (e.g., counter workers in quick service establishments).

FEDERAL RESTRICTIONS ON EMPLOYMENT OF 16 AND 17-YEAR-OLDS

Federal law does not the restrict nighttime or morning work or set maximum daily or weekly hours for 16 and 17-year-olds. However, workers age 16 and 17 may not be employed in occupations that the Secretary of Labor has declared particularly hazardous. The DOL has issued a number of "hazardous orders" to define which occupations are hazardous. See 29 C.F.R. § 570.50 et seq.

Under the DOL's hazardous orders, workers age 16 and 17 cannot participate in the following activities:

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- Working as a motor-vehicle driver or outside helper on any public road or highway;
- Operating, assisting in operating, or setting up, adjusting, repairing, oiling or cleaning any horizontal or vertical dough mixer (except they may operate power-driven pizza dough rollers and portable countertop food mixers), batter mixer, bread-divider, rounding or molding machine, dough brake, dough shooter, combination bread slicer and wrapping machine, or cake-cutting band saw. This also applies the setting up or adjusting of a cookie or cracker machine; and
- Working as an operator of, or helper on, the following power-driven fixed or portable machines: circulator saws, bond saws and guillotine shears. The restriction also applies to setting up, adjusting, repairing, oiling or cleaning these machines.

DRIVING ON THE JOB UNDER FEDERAL LAW

17-year-olds can drive cars or trucks at work if all of the following are true:

- Driving is restricted to daylight hours;
- The employee has a valid license and no record of moving violations at the time of hire and has completed a state-approved driving course ;
- The vehicle has a seat belt and the employer instructs the minor to use it;
- The vehicle weighs 6,000 pounds or less;
- The driving does not involve urgent, time-sensitive deliveries, route deliveries or sales or the transporting at any one time of more than three passengers;
- The driving is done within a 30-mile radius of the place of employment;
- The driving does not entail traveling more than twice a day from the place of employment; and
- The driving is "incidental and occasional," defined as no more than one-third of the teen's working time in one day nor more than 20 percent of the teen's working time in one week.

LIMITED EXEMPTIONS FROM FEDERAL TEEN LABOR LAWS

Students in School-Supervised Work Experience and Career Exploration Programs

14 and 15-year-olds enrolled in approved Work Experience and Career Exploration Programs ("WECEP") supervised and administered by schools have more relaxed restrictions on their working hours than other workers under age 16. Employees in approved WECEP programs can work during school hours, for as many as three hours on school days, and for as many as 23 hours in a school week. They also may work in occupations that may otherwise be prohibited for this age group but for which DOL's Wage and Hour Administrator has granted a variation. See 29 C.F.R. § 570.36.

Teens Employed By Their Parents

Teens under age 16 who are employed by their parents are exempt from the DOL's teen labor regulations. However, workers under 16 are not permitted to engage in any occupation the U.S. Secretary of Labor has declared hazardous (see above).

Other Students and Learners

The FLSA exempts certain apprentices and student learners from teen labor regulations. 29 C.F.R. § 570.50 (b), (c). An apprentice is defined as "a worker, at least sixteen years of age unless a higher minimum standard is otherwise fixed by law, who is employed to learn a skilled trade through a registered apprenticeship." 29 C.F.R. § 520.300. A "student learner" is defined as a student at least 16 years old, or 18 if the work is deemed hazardous, who is receiving instruction at an accredited school and is employed on a part-time basis as part of a bona fide vocational training program by a state or local educational authority Id.

PENALTIES FOR VIOLATIONS OF FEDERAL TEEN LABOR LAWS

Employers who violate any provision of the DOL's teen labor regulations face civil penalties of up to $11,000 per violation per employee. Penalties of up to $100,000 are possible when a child labor violation results in the death or serious injury of a minor employee, and up to $200,000 for repeat violations. The FLSA also provides for criminal fines for willful violations, and employers who commit a second offense after conviction for a similar offense could face a fine or imprisonment for up to six months, or both. The Secretary of Labor also may ask a federal district court to issue an injunction to restrain the employer from any future violations of the child labor provisions of the FLSA.

SPECIAL YOUTH OPPORTUNITY WAGE

The FLSA allows employers to pay "newly hired" employees under age 20 a $4.25-an-hour "youth opportunity wage" during the first 90 calendar days of work. 29 U.S.C. § 206(g).

Employers may not displace any employee in order to hire a youth at the youth opportunity wage Id.

Arizona's minimum wage law requires that all workers are paid $10.00 per hour, effective January 1, 2017.

STATE LAWS

Arizona has teen labor restrictions. Whenever the state standard differs from the federal standard, the higher standard must be observed.

STATE RESTRICTIONS ON EMPLOYMENT OF MINORS UNDER AGE 18

Minors under age 18 may not work in the:

- Operation of power-driven bakery machinery; or
- Operation of power-driven saw.

See A.R.S § 23-231.

Minors under age 18 may not work as motor vehicle drivers, unless driving is incidental to employment and the total driving time is not:

- more than two hours per day or more than 25 percent of the work period per day; or
- more than 50 miles per day.

See A.R.S § 23-231.

Unless variation is granted, minors under age 16 may not work in:

- Maintenance or repair of machines or equipment, except dispensing gasoline and oil, car cleaning, washing and polishing cars;
- Cooking and baking, except at soda fountains, lunch counters, snack bars, or cafeteria serving counters;
- Setting up, adjusting, cleaning, oiling or repairing power-driven food slicers, grinders, choppers, and cutters;
- Any work preparing meat for sale, except wrapping, sealing, labeling, weighing, pricing, and stocking.

See A.R.S § 23-232.

Minors under age 16 may not work:

- More than 40 hours per week, when not enrolled in school or when school is not in session;
- More than eight hours per day, when not enrolled in school or when school is not in session;
- More than 18 hours per week, when enrolled in school and school is in session; and
- More than three hours per day, when enrolled in school and on a day when school is in session.

Additionally, minors may not work at night, defined as 9:30 p.m. to 6:00 a.m. on nights preceding a school day and 11 p.m. to 6 a.m. on nights preceding a non-school day. See A.R.S § 23-233.

STATE RESTRICTIONS ON EMPLOYMENT OF MINORS UNDER AGE 19

Minors under the age of 19 are not allowed to sell, serve or manufacture alcoholic beverages. A.R.S. § 4-244. However, minors under age 19 may clean tables and wash dishes. Id.

PENALTIES FOR VIOLATIONS OF STATE TEEN LABOR LAWS

Arizona child labor laws are enforced by the state industrial commission. See A.R.S § 23-107. The Industrial Commission may serve a cease and desist order on any person violating child labor law, which will include a civil penalty up to $1000. A.R.S. § 23-236. Additionally, violation of the Arizona child labor laws qualifies as a Class 2 misdemeanor. A.R.S. § 23-239.

UNIFORMS

THE QUESTION: IS IT A UNIFORM?

IF IT'S A UNIFORM, WHO PAYS?

KEEPING IT CLEAN

NO DEPOSIT, NO RETURN?

STATE LAWS

THE QUESTION: IS IT A UNIFORM?

Are the clothes your employees wear for work considered a required uniform? The answer determines whether the employer is responsible for providing and maintaining an employee's work clothes or whether employees can be required to buy and maintain their own work clothes. If work clothes meet the definition of a "uniform," the employer generally is responsible for the cost of buying and maintaining the uniform.

The United States Department of Labor offers no hard-and-fast rules on what work clothes constitute a uniform, but its Field Operations Handbook provides the following guidelines:

- If an employer merely prescribes a general type of ordinary, basic street clothing to be worn while working and permits variations in details of dress, the garments chosen by the employees would not be considered uniforms.
- Where the employer prescribes a specific type and style of clothing to be worn at work, such clothing would be considered a uniform. This would include, for example, when a restaurant or hotel requires a tuxedo, a skirt and blouse, or a jacket of a specific or distinctive style, color or quality.
- More obvious examples of clothes that the DOL considers uniforms are uniforms required to be worn by culinary personnel.

The DOL has answered specific questions about whether work clothes constitute a uniform, which provides some guidance. For example, in a March 30, 2004 letter, the DOL issued an opinion

finding that employees who were required to wear a navy blue polo or golf shirt without a logo and khaki colored pants or shorts without cargo pockets or logos were not wearing a uniform. Likewise, in a May 2008 letter, the DOL found a restaurant's requirement that employees wear dark shoes without open toes and with slip-resistant soles did not constitute a uniform.

What constitutes a uniform is determined on a case-by-case basis. In general, the more specific the employer's requirements for employee apparel, the more likely it is that it is a uniform. In close cases, the DOL will likely classify the work clothes as a uniform that should be purchased and maintained by the employer.

IF IT'S A UNIFORM, WHO PAYS?

If the wearing of uniforms is required by law, the employer or the nature of the work, the financial burden of providing and maintaining these uniforms may not be imposed upon the employees if to do so would reduce the employee's wages below the minimum wage. The employer may ask a minimum-wage employee to buy the uniform before beginning work, but must fully reimburse the employee no later than the next regular payday.

Employees who earn cash wages above the minimum-wage rate may be charged for uniforms only to the extent that those charges do not reduce their wages below the required federal minimum wage, and as long as any applicable state law does not prohibit such charge.

Even though an employee's tips may bring the employee's total earnings well above the minimum wage, the employer may not require the employee to use tips to pay for a uniform.

KEEPING IT CLEAN

Employees are responsible for cleaning and caring for work clothes that are not considered uniforms. But if an employee's work clothes do constitute a uniform, the employer must pay for the cost of cleaning the uniform if deducting the cleaning costs from the employee's pay would reduce the employee's net pay below the minimum wage.

There is one exception: If the uniform is of wash-and-wear material that can be washed and tumbled dry with the regular wash and does not require daily washing, commercial laundering, ironing or other special treatment (such as dry cleaning), the employer is not required to pay to maintain the uniform.

The exception for wash-and-wear uniforms does not always apply. If the employer furnishes the employee with just one uniform, employers must pay laundering costs even for wash-and-wear uniforms.

Some employers launder employees' uniforms on site. Others send them out for cleaning. However, employers who ask employees to maintain their own uniforms are required to compensate the workers. If the uniform is not wash-and-wear and the actual cost of laundering the uniform has not been determined, the DOL says it is acceptable for the employer to compensate the employee with a weekly amount no lower than the federal minimum hourly wage. Currently, this means $7.25 a week in states that follow federal wage rates.

NO DEPOSIT, NO RETURN?

Employers may not require a uniform deposit or deduct the cost of a uniform from an employee's wages if to do so would reduce the employee's wages, included tipped employees, who are paid minimum wage. The DOL stated in an April 5, 1991, Wage-Hour Opinion Letter that those deposits or deductions violate federal wage laws because they reduce an employee's wage below the federal minimum wage.

STATE LAWS

Some states have regulations relating to employee uniforms. If those regulations are more favorable to the employee than the DOL regulations, the state regulations apply. Contact your state department of labor or state restaurant association for more information.

WAGES

overview

WHO MUST COMPLY WITH THE FEDERAL MINIMUM WAGE LAW?

ENTERPRISE COVERAGE

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SHORTAGES, BREAKAGE AND OTHER DEDUCTIONS

OVERVIEW

The Fair Labor Standards Act of 1938 (FLSA) is one of the most important federal laws with which restaurant operators must comply. The FLSA prescribes standards for the basic federal minimum wage and overtime pay, and affects most private and public employment. It details how employers should handle tip credits, meal credits, uniforms and more. The FLSA also limits working hours and duties for many employees under 16-years-old.

The FLSA is codified at 29 U.S.C. §§ 201-219 and is administered by the Employment Standards Administration's Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL). Penalties for noncompliance can be substantial.

WHO MUST COMPLY WITH THE FEDERAL MINIMUM WAGE LAW?

There are two ways that an employee can be covered by the FLSA: (1) enterprise coverage; and (2) individual coverage.

Enterprise Coverage

All employees of enterprises with gross annual sales of $500,000 or more are required to be paid the federal minimum wage if the employer employs two or more employees "engaged in commerce or in the production of goods for commerce, or who handle, sell or otherwise work on goods or materials that have moved in or are produced for commerce." 29 U.S.C. § 203(c)(1). Gross annual sales do not count excise taxes at the retail level which are separately stated.

Generally, federal regulations define "enterprise" as the same or similar activities performed by one or more persons, firms or corporations for a common business purpose. 29 C.F.R. §§ 779.200-779.269

How to compute annual sales: An enterprise must compute accurately its annual sales — more specifically, annual gross volume — to determine whether it meets the $500,000 threshold for FLSA coverage. An enterprise that uses calendar-year accounting may measure its annual gross dollar volume at the beginning of each calendar quarter (January 1, April 1, July 1 and October 1) by looking at sales during the preceding four calendar quarters.

An enterprise that uses fiscal-year accounting may adopt the same method, using the four quarters of the fiscal year instead of calendar quarters. Whichever method is adopted, the enterprise must use the same method in all subsequent calculations.

A business that has been open fewer than 12 months must project as accurately as possible its annual dollar volume. Where doubt exists, the business may use its gross receipts during the first quarter as representative in computing its dollar volume for the year. After the new business has been in operation for a full year, regular coverage rules apply.

Individual Coverage

Employees who in any workweek "engage in commerce or the production of goods for commerce" are required to be paid the current federal minimum wage, even if the enterprise they work for has gross annual sales of less than $500,000.

Generally, an employee is engaged in commerce if he or she is "doing work involving or related to the movement of persons or things (whether tangibles or intangibles, including information) in interstate commerce." 29 C.F.R. § 776.9.

The principal employees engaged in commerce are those whose regular and recurring duties — even though few — involve the receipt and distribution of goods across state lines or the use of the mail, including e-mail, or the telephone for communication across state lines. By example, employees are covered if they unload food and supplies shipped directly to the foodservice establishment from another state, if their duties involve the handling or processing of credit- or debit-card charges mailed or electronically transmitted across state lines for collection, or if they use the telephone to receive out-of-state customer orders or reservations.

Employees of enterprises with gross annual sales of less than $500,000 must be paid at least the current federal minimum wage only for those workweeks during which they engage in commerce or in the production of goods for commerce. An employee may be covered one workweek and not the next. An employer with annual sales under $500,000 may find that some employees (those who engage in interstate commerce or the production of goods for commerce) are covered by the FLSA and others are not.

WHAT IS THE FEDERAL MINIMUM WAGE?

The federal minimum wage is $7.25 as of July 24, 2009. The minimum wage does not increase automatically. Congress must pass a bill which the President signs into the law in order for the minimum wage to go up.

Youth Minimum Wage

Under certain conditions, the FLSA permits employers to pay newly hired employees under the age of 20 a minimum wage of $4.25 per hour during the first 90 consecutive calendar days of employment. 29 U.S.C. § 206. Important restrictions apply in the use of the youth minimum wage. An employer may not displace a current employee in order to hire a teenager at the lower minimum wage. Once an employee turns 20, he or she must be paid the regular minimum wage, even if his or her 20th birthday occurs before the 90-day period has expired. Also, state minimum-wage laws may require payment of a minimum wage higher than $4.25 an hour and not make any exceptions for employees under the age of 20. Check with your state labor department for details.

Certain Full-Time Students

Section 14 of the FLSA authorizes the payment of special subminimum wages to certain full-time students employed in retail or service stores, agriculture, or colleges and universities. 29 U.S.C. § 214. Employers may pay eligible full-time students a minimum wage not below 85 percent of the current federal minimum wage. Employers must abide by a number of restrictions, including the number of students employed at these rates as well as the number of hours the students work. Once students graduate or leave school for good, they must be paid the current federal minimum wage. Such payment of subminimum wages to full-time students is permitted only under certificates issued by the WHD. To apply, contact the WHD National Certification Team member who covers your state.

Student Learners

Section 14 of the FLSA authorizes the payment of subminimum wages – at rates not less than 75 percent of the current federal minimum wage – to a student learner (vocational education students), messenger, or apprentice. Such payment of subminimum wages to a student learner is permitted only under certificates issued by the WHD. To apply, contact the WHD National Certification Team member who covers your state.

Workers with Disabilities

Section 14 of the FLSA permits employers to pay special minimum wages – wages less than the current federal minimum wage – to workers whose earning or productive capacities for the work to be performed are impaired by physical or mental disabilities, including those related to age or injury. Such payment of subminimum wages to an eligible worker is permitted only under certificates issued by the WHD. To apply, contact the WHD National Certification Team member who covers your state.

Interns

A separate category under the FLSA affects student interns. Many colleges team up with businesses to integrate a semester or summer of work with the student's academic studies. If an internship is part of a student's academic studies, does the student have to be paid for time on the job? That depends. A student intern is not considered an employee under the FLSA— and therefore, would be exempt from minimum wage and overtime requirements — only if all, according to the DOL of the following criteria are met:

- The internship, even though it includes actual operations of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The employer derives no immediate advantage from the intern's activities. and, on occasion, its operations may actually be impeded;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer and intern understand that the student is not entitled to wages or compensation for time spent in the internship; and
- The intern is not necessarily entitled to a job at the completion of the internship. For more information on the internship issue, see the DOL Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act.

WHAT THE FEDERAL MINIMUM WAGE LAW DOES NOT REQUIRE

The FLSA does not require an employer to :

- Provide rest periods (except for mothers who wish to express breast milk—see explanation in Chapter 2), holidays off, days off, vacations or any other fringe benefit, such as severance pay, sick pay, accident, health or life insurance, or pension benefits;
- Pay employees for bona fide meal break times;
- Pay a premium to employees who work weekends or holidays;
- Give pay raises;
- Limit the hours that may be worked by employees 16 years of age and older ; or
- Give an employee a notice of the reason for termination.

The above matters are subject to agreement between the employer and the employee or the employee's authorized representative, such as a union.

States may, and often do, regulate conditions of employment that the employer must follow. For example, a state may require a paid 10-minute rest break for every four hours worked or require employers to provide employees with a 30-minute meal break after five hours of work. Many states allow employees time off to vote; some even require paid time off for voting. Contact your state restaurant association or state department of labor for details.

PENALTIES FOR WAGE OR OVERTIME VIOLATIONS

An employer who violates Section 6 (minimum wage) or Section 7 (overtime) of the FLSA may be liable:

- To the employee(s) involved for the unpaid minimum and/or overtime wages, plus an equal amount for "liquidated damages" awarded for the employer's lack of good faith in complying with the law.
- For a civil penalty of up to $1,100 per violation for repeat or willful violation.

STATE AND LOCAL MINIMUM WAGE LAWS

Section 18 of the FLSA provides that when any state law or municipal ordinance establishes (1) a minimum wage higher than the federal minimum, (2) a higher cash wage for tipped employees than the $2.13 minimum cash wage required under federal law, or (3) a maximum workweek lower than the federal maximum workweek, the law that is most favorable to the employee must be followed.

Examples: If a state has a minimum wage of $8.25 per hour (i.e., higher than today's federal minimum wage of $7.25), employees in that state must be paid $8.25 per hour. If a state or local law requires that tipped employees be paid a minimum cash wage higher than the $2.13 cash wage currently required under federal law, the employer in that state or local jurisdiction must pay the tipped employee the higher cash wage. If a state law requires that employees receive overtime pay after they work more than 46 hours a week, employees in that state who are covered under federal law must be paid according to the more favorable federal law — which requires time-and-one-half overtime pay for hours worked beyond 40 in a week, at least up to the time when state overtime law would apply.

For questions about whether federal or state law applies to your restaurant, contact your state labor department or the National Restaurant Association's legal department.

SHORTAGES, BREAKAGE AND OTHER DEDUCTIONS

An employee may be paid wages under the FLSA in any combination of cash, tips, board, lodging, etc. Generally, employers may deduct a meal and lodging credit from the cash wages of a minimum-wage employee in the restaurant industry who is covered by the FLSA. For tipped employees, see chapter on tip credit and separate obligations as to a minimum cash wage that employers are required to pay.

Losses from shortages, breakage, walkouts and the like may not be deducted from the wages of a minimum-wage employee, nor can a minimum-wage employee be required to pay for such losses directly or indirectly. The FLSA does not prohibit deductions for such losses for employees paid in excess of the federal minimum wage. However, deductions are permitted only to the extent of the excess paid above minimum wage. Also, some state laws prevent employers from taking a deduction even from the excess paid above minimum wage.

TAXES: DEDUCTIONS AND CREDITS

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OVERVIEW

There are several tax deductions and credits that are available, a number of which are new incentives stemming from COVID relief legislation. These incentives are available now, but some may be traded away in the future to lower overall tax rates.

SECTION 199A - 20% PASS-THROUGH DEDUCTION

The Tax Cuts and Jobs Act of 2018 (TCJA) brought with it many drastic changes to the tax law, arguably the most important (and complex) of which is the 20% deduction allowable for pass-through income, covered by Section 199A of the Internal Revenue Code. Before we dive into the details, what is pass-through income anyway? Pass-through income is earnings generated by partnerships and S-corporations, which are subsequently "passed-through" to the owners of the business. The owners then pay the tax on this income, rather than the entity itself paying the tax. Under TCJA, this income is eligible for an up to 20% deduction on the individual's tax return. However, there are numerous variables that determine how much, if any, of the 20% deduction a taxpayer is entitled to. These variables include the taxpayer's overall taxable income, W-2 wages paid by the pass-through entity in question, and depreciable property owned by the pass-through entity. The good news for restaurant owners is that they operate in an industry which typically pays significant wages as part of regular operations, as well as employing significant depreciable assets, such as leasehold improvements and kitchen equipment. All this adds up to a higher likelihood of receiving the maximum pass-through deduction possible.

How exactly is the deduction calculated? As long as taxable income for a married taxpayer is below $315,000, they will receive the full 20% deduction of their pass-through income. Once the $315,000 threshold is crossed however, the calculation becomes more complicated. At this point, the amount of the deduction the taxpayer is entitled to is based on the amount of wages paid to employees by the pass-through entity, and on the amount of depreciable property owned by the entity. Specifically, the deduction is limited to the greater of 50% of W-2 wages paid, or 25% of W-2 wages paid plus 2.5% of the unadjusted basis of depreciable property owned. Not confusing enough? This limitation only applies in full once the taxpayer's taxable income exceeds $415,000. Between taxable income of $315,000 and $415,000, the wage and property limitation is only partially in effect – it is phased in gradually as income increases between the two thresholds.

Despite being known primarily as a pass-through deduction, there are other situations in which a taxpayer can take advantage of the 20% deduction. Sole-proprietor restaurant owners reporting their income and expenses directly on Schedule C of their individual tax return are eligible for the deduction – however, bear in mind that the income limitation rules still apply.

The Section 199A deduction involves a lot of moving parts and can be highly complex. Given the radically different results taxpayers can receive from this portion of the tax law, it is especially important to consult your tax advisor when planning for any potential 199A deduction.

WORK OPPORTUNITY TAX CREDIT

Employers may be eligible to reduce their federal income taxes by a tax credit of up to $2,400 per employee when they hire certain workers considered disadvantaged. Under a law passed by Congress in 2007 as amended by the aforementioned PATH Act, the credit applies for eligible employees hired before December 31, 2025.

The amount of the WOTC depends on the number of hours an employee works. If the employee works 400 or more hours, the employer is eligible for a 40% tax credit against the first $6,000 the employee earns and can receive the maximum tax credit of $2,400. For employees who work between 120 and 400 hours, the credit is 25% against the first $6,000 the employee earns. No credit is available for employees who work fewer than 120 hours.

To claim the Work Opportunity Tax Credit, the employer must apply to the state employment agency for certification that the employee belongs to one of the WOTC's eligible employee groups. The employer must:

- Complete IRS Form 8850, Pre-Screening Notice and Certification Request for the Work Opportunity Credit. This form screens applicants for WOTC eligibility and must be completed on or before the date a job offer is made.
- Complete DOL Form 9061, Individual Characteristics Form, with applicant information.
- Mail these forms to the state employment agency within 21 days of the employee's start date. The state agency will then

determine if the employee qualifies and will issue the employer a "certification," which allows the employer to claim the tax credit.

The WOTC is currently scheduled to expire on December 31, 2025, after being extended by the Consolidated Appropriations Act of 2021

Visit the DOL's WOTC Web site for more information and access to the forms.

https://www.dol.gov/agencies/eta/wotc

FICA TAXES PAID ON EMPLOYEE TIPS: TAX CREDITS

If you employ tipped workers, you may be eligible to claim a federal income tax credit for the FICA (Social Security and Medicare) taxes you pay on your employees' tips. The so-called 45(B) credit, named after Section 45(B) of the federal Internal Revenue Code (26 U.S.C. § 45B), is a "general business credit" that lets restaurateurs reduce their federal income taxes by the amount of FICA taxes they pay on certain employee tips. Congress established the credit in 1993 at the urging of the National Restaurant Association.

The 45(B) credit applies to employers who operate a food or beverage establishment where tipping is customary and where food or beverages are served for either on- or off-premises consumption.

To calculate and claim the credit, businesses fill out IRS Form 8846, Credit for Employer Social Security and Medicare Taxes Paid on Certain Employee Tips, and file it with their federal income tax return.

Employers are entitled to the 45(B) credit for the FICA taxes they pay on employee tips "exceeding $5.15 per hour." The IRS notes on Form 8846 that the amount of tips for any month that are used to figure the credit must be reduced by the amount by which the wages that would have been payable during that month at $5.15 an hour exceed the wages (excluding tips) paid by the employer during that month.

The IRS uses the example of an employee who worked 100 hours and received $450 in tips for October 2009. The employee's cash wages (not including tips) were $375, or $3.75 an hour. Had the employee been paid $5.15 an hour, the employee's cash wages (not including tips) would have been $515.

Employers cannot claim the 45(B) credit for FICA taxes paid on the full $450 in tips, the IRS says. Instead, for purposes of the 45(B) credit, the $450 in tips is reduced by $140 (the difference between $515 and $375). So only $310 of the employee's tips for that month can be taken into account for purposes of the 45(B) credit, the tax agency says. The IRS offers further explanation of the credit here.

The 45(B) credit is open to all restaurateurs but with some limitations. An experienced accountant can help restaurateurs of all sizes understand how to take advantage of the credit. You should be aware of the following:

- You must owe federal income taxes to claim the credit. Because you can use the 45(B) credit only to the extent you owe federal

income taxes, there may be some restaurateurs who cannot take advantage of the credit. This would include operators who break even or lose money, and thus have no taxable income. However, with some limitations even operators without federal income tax liability in a particular year may carry the credit back or forward to a year in which they owed, or will owe, federal income taxes.

- You may not claim both a credit and deduction. Restaurateurs who take the 45(B) credit may not deduct those same FICA taxes as a business expense. However, for purposes of Arizona state income taxes, the non-deductible FICA taxes for Federal purposes are allowed as a deduction on the Arizona return.
- Businesses that file under the Alternative Minimum Tax (AMT) system typically are not able to take advantage of most tax credits and deductions. However, Congress included in its 2007 minimum wage bill a provision to allow both individual and corporate AMT filers to use any or all of the 45(B) tax credit to offset their AMT liability. Check with your tax advisor for details.
- While allowed to offset the Alternative Minimum Tax, the 45(B) tax credit is not allowed to offset self-employment tax, which is often incurred by restaurant operators.

EMPLOYEE RETENTION CREDIT

The employee retention credit (ERC) is a refundable payroll tax credit which was was created as a result of the CARES Act in March of 2020 as a result of the COVID pandemic. Businesses during the COVID pandemic that suffered a substantial reduction in gross receipts in 2020 or 2021 and/or were partially or fully shutdown due to government orders may qualify for the ERC. If eligible, the ERC allows a credit that business can claim on qualified wages, including certain health insurance costs, paid to employees for certain quarters in 2020 and 2021. The ERC rules have been amended with the series of stimulus bills passed in 2020 and 2021 subsequent to the CARES Act. The ERC may result in a credit on an employee by employee basis ranging up to $5,000 per employee for the year in 2020 or up to $7,000 per employee per quarter in 2021. The ERC is available for up to three years after filing you quarterly 941 payroll tax forms and is obtained by amending your 941's previously filed. See your CPA or a tax professional for more details on eligibility to qualify for these credits.

CAPITALIZATION RULES

After many attempts to issue/implement new capitalization rules, Treasury was finally able to come up with a set of rules that taxpayers could live with beginning in 2014. These rules govern when costs must be capitalized and depreciated over time versus when they may be expensed. It may seem obvious, but the rules define what is a supply (items to be consumed within a year) which will have significance to restaurants.

In addition, the rules that provide that taxpayers adopt a "capitalization policy", a written statement to be part of the taxpayer's corporate records which states the minimum cost for which taxpayers will capitalize the cost of purchased assets subject to depreciation. Costs for assets below the thresholod may be

expensed. For example, if an operator adopts a policy to expense assets purchased for less than $2,500 and purchases 30 tables for $2,000 each, the operator can expense $60,000 rather than capitalize and depreciate the tables. The IRS requires that the policy be written and that the taxpayer must use the same amount/threshold for both financial statement purposes and tax return purposes. In addition, the rules allow for a per item or per invoice determination. Thus, in the above example, if the invoice indicated simply "tables" as opposed to "60 tables", the documentation would not be sufficient to support expensing.

The threshold amount that IRS will not challenge depends on whether the taxpayer has an independent CPA issue audited financial statements which are deemed to be "applicable financial statements" (AFS). If a taxpayer has AFS, then the safe harbor amount is $5,000 per item. Recall that the amount for financial statements and tax return purposes must be consistent. If the taxpayer's auditor believes the policy should reasonably be set at $3,500, then that is the amount the taxpayer must use.

If the taxpayer does not have an AFS, then the threshold should not exceed $2,500 per item. This amount was increased from $500 per item in December 2015 which should allow most small businesses to greatly simplify recordkeeping on a going forward basis. Businesses operating at the $2,500 threshold should file a Section 1.263(a) -1(f) De Minimis Safe Harbor election statement with their tax return. This election simply needs to state the business name, address, EIN, and a basic statement that the taxpayer is making the de minimis safe harbor election. For more detail, see the link below to a Henry+Horne blog post covering the topic.

https://www.hhcpa.com/blogs/income-tax-accountants-cpa/expense-property-de-minimis-safe-harbor/

SMALL BUSINESS EXPENSING

The Section 179 deduction, named for its spot in the Internal Revenue Code, is an important financial benefit for small and medium-sized businesses. The Section 179 deduction allows small businesses to deduct all or part of the cost of equipment and other tangible assets in the year the property is put into service. Instead of having to spread out depreciation deductions over years, businesses can get immediate income tax benefits by using a section 179 deduction to expense costs in a single tax year.

The Tax Cuts and Jobs Act expanded Section 179 limits from a $500,000 available deduction to $1,000,000, which begins phasing out if total assets purchased in a year exceed $2,500,000, and is completely phased out at $3,500,000 of asset additions.

Bonus depreciation was also significantly expanded by TCJA – under the old law, assets eligible for bonus depreciation could be written off 50% in the year placed in service, with the remaining 50% depreciated over the asset's appropriate class life. Under the new law, assets eligible for bonus depreciation can be written off 100% in the year placed in service, with no applicable phase outs. Under current legislation, 2022 will be the final year for 100% bonus depreciation. Beginning in 2023, the applicable bonus percentage will decrease by twenty percentage points each year until the allowance reaches zero in 2027.

In addition to furniture, equipment and the like, one would expect that bonus depreciation could be applied to "qualified improvement property" (QIP), defined as any improvement to an interior portion of a building that is nonresidential real property if such improvement is placed in service after the date such building was first placed in service. Additionally, QIP does not include any improvement for which the expenditure is attributable to the enlargement of the building, any elevator or escalator, or the internal structural framework of the building.

BUSINESS MEALS AND ENTERTAINMENT

More significant changes enacted by TCJA impact the deductibility of business meals and entertainment. Under the old law, taxpayers could deduct 50% of the expenses incurred for any food or beverages, however, TCJA now disallows deductions for any activity generally considered entertainment, amusement or recreation, as well as for the facility used in connection with such activity. TCJA completely repealed the deduction for entertainment expenses, but allowed business meals to remain 50% deductible. It is important to note however, that under the CARES Act of 2020 business meals will be allowed a 100% deduction for income tax purposes in tax years 2021 and 2022.

Taxpayers incurring expenses that are comprised partially of meals and partially of entertainment should ensure that the facility separately states the meals portion of the bill, and also ensure that these expenses are correctly accounted for in their bookkeeping software. Lumping all of the expenses into one account called "Meals and Entertainment" will no longer be sufficient for recordkeeping, as they must be separately stated in order to determine their deductibility.

Accounting for business meals can become complex, particularly when employees are involved. Restaurateurs should consult their tax advisors to ensure proper treatment.

There are numerous qualifications to taking the deduction; consult an accountant or tax attorney for details.

BUSINESS INTEREST LIMITATION

On November 26, 2018, the IRS and Treasury released proposed regulations under new section 163(j), which was enacted by the Tax Cuts and Jobs Act (TCJA) and imposes limits on deductibility of "business interest." Business interest subject to this limitation is carried forward and treated as business interest paid or accrued in the next succeeding taxable year (when it is again subject to the limitation). In general, new section 163(j) applies to taxable years beginning after December 31, 2017.

The amount allowed as a deduction for business interest expense is limited to the sum of:

1. The taxpayer's business interest income for the tax year:
2. 30% of the taxpayer's adjusted taxable income (ATI) for the tax year; and
3. The taxpayer's floor plan financing interest expense for the tax year.

The limitation under Code Sec. 163(j)(1) applies to all taxpayers, except for certain small businesses that meet the gross receipts test in Code Sec. 448(c). That is, if average annual gross receipts does not exceed $25 million, this limitation does not apply. If you conduct your business through multiple flow-through entities with overlapping ownership, you may be required to aggregate your activities for purposes of determining whether or not you are a "small" business exempt from these rules. Even so, it may be important to report out income in excess of the limitation should other partners/shareholders have limitation issues elsewhere.

For purposes of this limitation, adjusted taxable income means taxable income of a taxpayer with additions such as depreciation and amortization, net operating loss deduction, and deductions under section 199A, among others. For taxable years beginning on or after January 1, 2022, however, you will need to reduce your adjusted taxable income by amounts of depreciation and amortization thus making an entity more likely to be subject to this limitation.

In addition, "interest" expense is very broadly defined and includes interest expense on related party loans/advances and certain guaranteed payments for preferred returns on capital.

There are many other nuances to this new tax law. Please consult a tax advisor to determine if your business interest is limited.

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