

EMPLOYMENT UPDATE

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Restaurant and Hospitality Employers -- Big Changes in 2015 that Will Affect 2016

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Federal wage and hour lawsuits reached an all-time high in 2015, reflecting an eight percent increase from 2014. Unfortunately for restaurant and hospitality employers, this upward trend is set to continue. As explained below, several legal changes are likely to accelerate this growth.

U.S. Department of Labor Amendments the FLSA White Collar Exemption Rule

This past June, the U.S. Department of Labor (DOL) issued its proposed amendments to the Fair Labor Standards Act (FLSA) white collar exemption rule. The proposed changes would more than double the current salary threshold amount required to qualify as exempt from the FLSA's overtime requirement. The impact of this rule will be particularly harsh on the restaurant and hospitality industry.

Due to the nature of the industry, employers generally hire workers in various positions to meet their broad range of business needs, such as managers, assistant managers, chefs, and accountants. Although many of these workers are currently classified as exempt, most of these workers may not meet the salary threshold requirements under the proposed amended rule, thus, causing these employees to be re-classified as non-exempt and overtime eligible.

Although the release of the final rule has been delayed until late-2016, the hospitality industry needs to brace itself for the uncertainties that lie ahead and, in particular, that an increase in non-exempt overtime eligible workers will be accelerate the upward trend in wage-and-hour lawsuits.

New York State Department of Labor Implements Fast Food Minimum Wage Increase

New York State announced its own sub-set of minimum wage increases, which have taken effect this year.

Last year, Governor Andrew Cuomo created the Fast Food Wage Board, a special panel within the New York State Department of Labor (NYSDOL). In September 2015, the NYSDOL accepted the Fast Food Wage Board's recommendation to gradually increase the minimum wage for fast food workers to \$15 per hour in New York City by 2018 and throughout New York State by 2021. Effective December 31, 2015, the minimum wage for New York fast food workers is \$10.50/hour.

This significant increase in minimum wage may have unintended consequences, such as hiring freezes, reduction in service levels, increasing prices to consumers, or lowering food quality.

Some franchises have already implemented pilot projects on a national level, experimenting with automated ordering kiosks, which may eventually replace the job functions of certain employees.

The Second Circuit Makes it More Difficult to Settle Wage and Hour Lawsuits - *Cheeks v. Freeport Pancake House, Inc.*

In August 2015, the Second Circuit in *Cheeks v. Freeport Pancake House* affirmed a district court ruling that "parties cannot enter into private settlements of FLSA claim[s] without either the approval of the district court or the [DOL]." Since that decision, the district courts in the Second Circuit have implemented a variety of interpretations of *Cheeks*' requirements for judicial review and approval of wage and hour lawsuit settlements. Thus, depending upon the judge, the district courts have in some instances:

- Required the settlement agreement to be posted on the court's electronic docket, but in other instances this has not been required so long as there was a public "fairness" hearing to review the settlement's terms. In other instances, courts have required the monetary amount of the settlement to be posted on the court's electronic docket, but not the rest of the settlement agreement's terms.
- Refused to approve agreements where the court concluded the release was overly broad because it required employees to release more than wage and hour claims or required release of both "known and unknown claims."
- Refused to approve agreements where employees are prohibited from discussing the terms of the wage and hour settlement with other people, including current and former employees of the employer.

The clear trend is generally toward more public disclosure of settlements, which makes it more difficult (if not impossible) to keep wage and hour settlements confidential. This trend will make it more difficult to settle wage and hour class and collective actions early and less expensively.

If you have any questions, please contact one of the attorneys in Martin Clearwater & Bell LLP's Employment and Labor Practice Group. Greg Reilly at (212) 916-0920 or gregory.reilly@mcblaw.com or Adam Guttell at (212) 916-0938 or adam.guttell@mcblaw.com. For more information on MCB's Employment and Labor Practice Group and its services, please visit www.mcblaw.com.