

Restaurant Management Employment Law Overview

Prepared and Presented at the
HUB Food Service Industry Workshop
November 30, 2016


Presented by:
Amanda Fugazy, Esq.
www.egsllp.com

EGS
Ellenoff Grossman & Schole LLP

COURSE OBJECTIVES

- ▶ To enable managers to:
 - Identify laws and legal issues that impact employment decision making.
 - Gain greater understanding of the application of US employment laws.
 - Understand managers' responsibilities with regard to US employment laws.

LAWS

- ▶ Federal Laws: Apply to all individuals across the country, and sometimes extraterritorially, pretty much the same – e.g., FMLA, ADA, FLSA.
 - ▶ State Laws: Are different in every state and generally apply only to individuals working within that state.
 - ▶ Local Laws: Are different in every locality and generally apply only to individuals working within that locale.
- 


EMPLOYMENT AT WILL

- ▶ Employment can be terminated for any lawful reason, or no reason, with or without cause, and with or without notice.
 - Strength of concept varies from state to state and country to country
 - NY– Strong
 - DC/CO– Medium
 - CA– Weak
 - MT– Non-existent

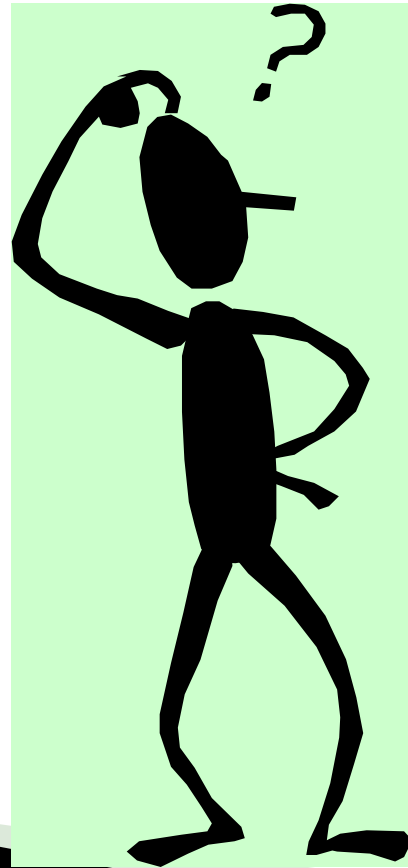
PRACTICE PROGRESSIVE DISCIPLINE WITHOUT LIMITING YOUR OPTIONS

- ▶ The Stages of Progressive Discipline:
 - Corrective Feedback
 - Corrective Feedback With Verbal Warning and Written Confirmation
 - Corrective Feedback With Verbal Last Chance and Written Confirmation
 - Termination

SOME LAWS THAT IMPACT EMPLOYMENT DECISION MAKING

- ▶ Non-Discrimination Laws
 - Title VII, the ADA, the ADEA, GINA, the EPA, State and City Laws
 - ▶ Defamation
 - ▶ COBRA
 - ▶ FMLA
 - ▶ FLSA
 - ▶ NLRA
 - ▶ Misc. State and City Laws/Handbook/Wage Theft Prevention Act
- 

DISCRIMINATION OR HARASSMENT




**WHAT'S THE
DIFFERENCE?**

HARASSMENT

- ▶ 1. QUID PRO QUO
- ▶ 2. HOSTILE WORK ENVIRONMENT
 - unwelcome conduct
 - by a supervisor, co-worker or third party business invitee
 - based on a protected characteristic
 - that rises to the level of being severe or pervasive


MANAGERS' RESPONSIBILITY IN AVOIDING CLAIMS OF DISCRIMINATION

- ▶ Be aware of and observe Restaurant's policies against discrimination/harassment
 - ▶ Act promptly and seriously in situations in which you observe or are notified of inappropriate or offensive behavior
 - ▶ Take ALL complaints seriously
 - ▶ Report and discuss concerns ALL complaints regarding harassment with senior management ASAP
- 

MANAGERS' RESPONSIBILITY IN AVOIDING CLAIMS OF DISCRIMINATION, cont'd.

- ▶ Don't allow negative feelings to linger
- ▶ Provide continuous open and honest feedback about performance to prevent misunderstanding
- ▶ Practice progressive discipline (but don't promise it)
- ▶ Document employee behavior, both positive and negative
 - Lets the employee know that you are serious and limits miscommunication
 - Provides strong evidence that a decision was valid
 - Contradicts allegations of oral or implied promises
 - Creates a record for your supervisors, a judge, jury or arbitrator

MANAGERS RESPONSIBILITY IN AVOIDING CLAIMS OF DISCRIMINATION, cont'd.

- ▶ Use legal language responsibly
 - ▶ Avoid compromising situations
 - ▶ Respect boundaries-- watch what you say and what you do
 - ▶ Encourage employees to come to you with concerns
- 

MANAGERS MUST TAKE ACTION WHEN THEY:


- ▶ get a complaint regarding behavior that is prohibited by the policy
 - i.e., offensive behavior pertaining to sex/gender, race, religion, color, national or ethnic origin, marital status, sexual orientation, age, disability, etc.
- ▶ know (or should reasonably know) about behavior that is prohibited by the policy
 - i.e., offensive behavior pertaining to sex/gender, race, religion, color, national or ethnic origin, marital status, sexual orientation, age, disability, etc.


WHAT HAPPENS WHEN MANAGERS FAIL TO ACT?


- ▶ Liability (corporate and personal)
- ▶ Continued Offensive Behavior
- ▶ Disciplinary Action




**WHEN YOU GET A
COMPLAINT OF
DISCRIMINATION OR
HARASSMENT OR KNOW
OFFENSIVE CONDUCT HAS
OCCURRED...**

- ▶ Consult with senior management/employment atty at the soonest possible opportunity so s/he can assist you and consult on next steps
 - ▶ Meet with the complaining employee in private (as opposed to discussing over email or in public setting)
 - ▶ Actively listen to the complaining employee and take notes
 - ▶ Do not judge and keep your opinion to yourself
 - ▶ Instruct the complaining employee about Restaurant's applicable policy
- 


- ▶ Assure the complaining employee his/her complaint is, and will continue to be, taken seriously and investigated; inform the complaining employee you will get back to him/her with next steps
 - ▶ If the complaining employee expresses a desire to complain externally or file a lawsuit, make sure the employee knows about his or her internal avenues, but do not overtly discourage complaints to courts or governmental bodies
 - ▶ Assure the complaining employee that information will be treated discreetly and ask him/her to do the same
 - ▶ Assure the complaining employee that he/she will not be retaliated against
- 

- ▶ Inform the complaining employee that senior management will likely contact them
 - ▶ ASAP after taking a complaint, contact senior management to discuss the complaint
 - ▶ Prepare and send senior management (and in some situations, your supervisor) an email regarding the complaint you received and your subsequent action (be specific!!)
 - ▶ Do not retaliate or condone retaliation
- 


MANAGERS' RESPONSIBILITY REGARDING RELIGIOUS ACCOMMODATIONS

- ▶ Speak with senior management if a member of your team has expressed a need for a religious accommodation or if you feel one should be offered.
 - ▶ Never say “no” without checking first.
- 

MANAGERS' RESPONSIBILITY REGARDING DISABILITIES

- ▶ Speak with senior management if you suspect your employee has a disability or if your employee has requested a reasonable accommodation.
 - ▶ Never say “no” without checking first.
- 


THE FMLA

- ▶ Provides eligible employees unpaid leave if a qualifying event has occurred.
 - ▶ The employer must continue to provide health insurance benefits for the employee during the leave period.
 - ▶ In most circumstances, employee must be restored to the same or equivalent position upon return from leave.
- 


THE FMLA

- ▶ The FMLA provides legally protected leave for the following duration/reasons:
 - 12 weeks for the birth or placement of a child with the employee for adoption or foster care, and care for the newly born/placed child;
 - 12 weeks to care for a spouse, son, daughter or parent with a serious health condition;
 - 12 weeks to care for the employee's own serious health condition which renders the employee unable to perform the functions of his/her job;
 - 12 weeks to tend to a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty; and/or
 - 26 weeks to care for a covered service member that is a spouse, son, daughter parent or next of kin with a serious injury or illness.


MANAGERS' RESPONSIBILITY IN REGARDS TO FMLA

- ▶ Be aware of and familiar with Restaurant's FMLA policy.
 - ▶ Know and understand the qualifying events that trigger FMLA rights.
 - ▶ If an employee has been out for five (5) consecutive days, find out the reason and report that reason to a owner.
 - ▶ If an employee notifies you of a triggering event, notify senior management.
- 

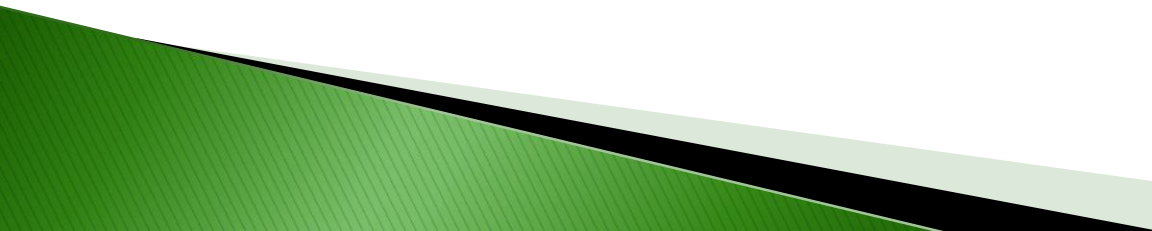
WORKERS' COMPENSATION

- ▶ It is insurance coverage.
 - ▶ Covers employees' medical costs and partial lost earnings resulting from work-related injuries or illnesses.
 - ▶ Provides a death benefit in the event of the death of an employee in the course and scope of employment, and a disability benefit for permanent or partial disabilities.
 - ▶ Laws vary by state.
 - ▶ It is unrelated to leave.
 - ▶ All employees are covered.
 - ▶ Shields employers from personal injury lawsuits.
- 

MANAGERS' RESPONSIBILITY IN REGARDS TO WORKERS' COMP.

- ▶ If any employee is hurt while working, immediately:
 - Get medical help, even if the injury seems minor.
 - Once the injured person is attended to, document the date, time, place that the injury occurred, who was involved, how the accident happened, and who witnessed the accident.
 - Call senior management for further instructions.
- 

THE FLSA & NYLL

- ▶ Requires recordkeeping and overtime for certain employees
 - ▶ Exempt employees are exempt from the overtime and certain recordkeeping requirements of the FLSA & NYLL
 - ▶ Non-exempt employees are subject to the recordkeeping and overtime requirements of the FLSA & NYLL
 - ▶ Employees are determined exempt/non-exempt depending upon:
 - Amount and method of payment
 - Job duties
- 

THE FLSA & NYLL

▶ Minimum Wage:

- Current– \$9/hour; \$13.50/OT hour (over 40 hours in one work week)
- Effective 12/31/16, New York City Employers with 11 or more employees:

Effective Date	Minimum Wage	Minimum OT
12/31/16	\$11.00	\$16.50
12/31/17	\$13.00	\$19.50
12/31/18	\$15.00	\$22.50

THE FLSA & NYLL

▶ Tip Credit:

- Current: ALL Restaurant Tipped Employees– \$1.50/hour
 - \$7.50 “tipped minimum wage” (\$9 minus \$1.50 tip credit)
 - \$12 “tipped OT minimum wage” (\$13.50 minus \$1.50 tip credit)
- Effective 12/31/16, New York City Employers with 11 or more employees:

Effective Date	Minimum Wage	Tipped Minimum Wage	Tip Credit	Min. OT	Tipped Minimum OT
12/31/16	\$11.00	\$7.50	\$3.50	\$16.50	\$13.00
12/31/17	\$13.00	\$8.65	\$4.35	\$19.50	\$15.15
12/31/18	\$15.00	\$10.00	\$5.00	\$22.50	\$17.50

THE FLSA & NYLL

- ▶ You Can Loose The Tip Credit If:
 - Managers participate in tip pool
 - Non-service employees participate in tip pool
 - No greater than 20% or 2 hours must be spent on non-tipped work
 - You don't provide adequate notice of taking the tip credit
 - The 195.1 Wage Theft Prevention Act Form
 - Must be filled out accurately and completely

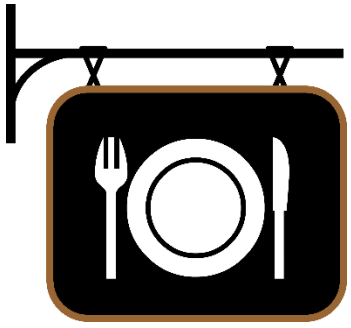
THE FLSA & NYLL

▶ Misc. Provisions

- Call-In Pay
 - 3 hours for one shift/6 hours for two shifts/8 hours for three shifts
 - Unworked hours must be paid at regular rate/no less than full minimum wage
- Spread of Hours
 - When the spread of work day equals or exceeds 10 hours, must pay one additional hour at the full minimum wage
- Uniform Maintenance Pay
 - In the hospitality industry, employers must purchase or reimburse employees for required uniforms. If there is a required uniform, and the employer does not maintain the uniform, AND the uniform is not wash & wear, then the employer must pay an additional weekly sum
- Meal Credits
 - The employer is allowed to make a deduction per meal for providing meals

Misc.

- ▶ Handbooks
 - Important
 - Employees who don't agree with policies can and should be terminated
- ▶ Arbitration Agreements
 - Separate agreements are required
 - Agreement not to sue in court, but to settle disputes privately
 - Can ban class & collective actions
 - Can be a condition of employment; i.e., employee who don't agree can and should be terminated



Restaurant Management Employment Law Overview

QUESTIONS?

Presented by:
Amanda Fugazy, Esq.
www.egsllp.com

EGS
Ellenoff Grossman & Schole LLP