

Saving Money on Employment Matters

By **Dennis Monroe**

Employment law is nuanced, and contains many pitfalls and traps for the unwary. The purpose of this article is not to discuss all of the intricate details of the law but to focus on how recent trends affect food service operators financially. The short answer is that there are no short answers. However, we do believe that creative and judicious employment policies and procedures can have a meaningful effect on controlling costs.

Let us look at some problems that we have seen and give you some ideas on how to minimize costs.

Arbitration and Class Action Lawsuits

Lately, many class action lawsuits have been brought against multi-unit operators, particularly franchisees. Often, they were minor violations if applied only to a single employee. But costs and the risk of bad outcomes escalate when multiplied by a thousand employees. The first way to avoid these issues is to have good human resources procedures, policies and personnel. One way to reduce risk is to have employees sign mandatory arbitration agreements, as well as waivers to participate in any class action. This way, you can deal with employees individually. However, a word of caution: Certain mandatory arbitration agreements and class waivers may not be wholly enforceable depending on the breadth of the agreement or waiver, and the particular location of your business.

Minimum Wage Requirements

We all know that many municipalities are considering whether to impose minimum wage requirements that exceed state or federal law. You may be able to avoid certain higher minimum wage requirements if your corporate office is not located in one of these municipalities. For example, the difference between Minneapolis and Saint Paul is tremendous, so you have to understand the municipalities in which you are working. Recently, we've heard of regulations stating that if the company has employees located in a particular city but the company itself is located somewhere else, then the minimum wage requirements may not apply. There seems to be a trend in some legislatures to pass what is known as preemptive laws, which means the municipalities do not have local authority for establishing minimum wages, and that these need to be uniformly established at the state level. Many minimum wage statutes have certain exemptions for part-time, seasonal and student workers. Those provisions should be utilized to the fullest, which is why it's important to be aware of all the minimum wage requirements and exemptions.

Exempt Employees

The definition of exempt employees has been a complicated matter in the past few years. It is important to make the job description clear as it relates to the attributes for an exempt employee and compensation level. There are rules currently pending which provide a compensation-based exempt employee system. Definitions are not going to be as important, since many of the employees now considered exempt will be below the Department of Labor's minimum compensation level of \$47,476. We know this specific rule did not come into effect, but I think it's a matter of time until we have a minimum level of compensation that will be the definition of exempt/non-exempt employees. In a recent article, the Society of Human Resources Management (SHRM) discussed the new regulations and proposed an appropriate threshold number of \$32,000.

Employee Manuals

The restaurant industry always struggles with effective and concise employee manuals. Part of the reason is some restaurant companies operate in several states. Even operators confined to one state have found varying employment-related regulations in different municipalities. Correctly tailoring employee manuals to make sure they provide for appropriate state and local law can be a challenge but worth it in the long run. Key is these employment manuals should be reviewed with each new employee, periodically reviewed with existing employees and followed to the letter. This can be done through a formal HR process using an HR staff member, or by the management team at an individual restaurant. But in all cases, it's important these manuals be kept up to date and the employees be all informed of their contents. A manual is a contract between the employer and the employee, and can help the employer avoid disputes and save money by clarifying what the policies are.

Effective Employer Liability Insurance

The acquisition of employer liability insurance – generally known in the industry as “Employment Practices Liability (EPL) insurance – could be one of the best things a company can do to control adverse employee costs. These policies are expensive, but they may be worth it; however, they do need to be carefully negotiated and understood so they cover the most expansive list of risks employers in the restaurant industry face. While specific terms vary by insurer, the company should ask for coverage beyond the normal harassment and wrongful termination provisions, such as wage and hour concerns, third-party Americans with Disabilities Act claims, theft, cyber-bullying, and others. Another important issue to negotiate in these policies is the right to tender the case immediately to

the insurance company, even before a former employee has started a formal legal proceeding against the company. That way, the insurer becomes immediately responsible for the costs of resolving the dispute. Other important rights that may be negotiable include the right to select counsel and cost-sharing agreements in circumstances where the insurer and insured may disagree about the best way to settle a dispute.

In summary, here are four takeaways from this article:

1. Be proactive as it relates to your employees. Get certain waivers and agreements upon hiring. Continue to update your employee manuals as needed.

2. Get the correct EPL insurance for your business. The policy should be fully negotiated and allow you to conduct your business appropriately.

3. Do not forget about exempt employees. We don't know what the compensation threshold will be, but it's important to know the new policies to maximize the exempt employee status.

4. Make sure you understand the state and local provisions for minimum wage to which you may be subject, and look at all the nuances of the statutes to minimize your costs.

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