

5 Looming Regulatory Changes For The Hospitality Industry

By **Sindhu Sundar**

Law360, New York (October 03, 2013, 2:17 PM ET) -- Hotels, restaurateurs and other members of the hospitality industry are facing an unusually robust climate of regulatory reform this year — and key changes are likely to hit businesses on a range of issues from pay and benefits to food safety. Here, attorneys share with Law360 the most likely regulatory shakeups companies should start thinking about now.

Immigration Reform

Immigration reform will be one of the biggest concerns for the industry. A sizable portion of its roughly 13 million-strong workforce is made up of immigrants, including some of the more than 11 million living in the U.S. without legal permission, according to figures from the National Restaurant Association.

Most employers are currently not required to sign on to employee immigration status verification systems including the U.S. Department of Homeland Security's E-Verify program and Social Security number checking systems, as they are voluntary for employers in most states as well as for firms that don't contract with the federal government, according to U.S. Citizenship and Immigration Services.

But hospitality industry employers have felt the heat of a growing enforcement crackdown in recent years, with hundreds of investigations each year under the Obama administration since 2009. Now the U.S. Senate's immigration reform bill, which passed in June, would make immigration status checks mandatory for all employers, a move that would radically affect the restaurant industry, attorneys said.

"When you have national corporations running hotels, they tend to be more compliant with the Immigration Reform and Control Act, because they have more to lose," said Joseph Farelli, a partner at Pitta & Giblin LLP who represents labor unions in the hospitality industry. "But for smaller employers, very few of them submit such information."

Although immigration reform would include a strong enforcement component, the Senate bill also includes issuing the W-visa, another visa option for low-skill workers in addition to the H-2B visa, which is meant for seasonal, temporary employment and has a cap of 66,000 visas issued per year, according to U.S. Immigration and Customs Enforcement.

“Right now, besides the H-2B, for which employers have to show a shortage in the industry, there’s really no other option for nondegreed, lower-skilled workers,” said Lisa Stephanian Burton, a business immigration partner in Morgan Lewis & Bockius LLP’s labor and employment practice. “Especially with the Obama administration crackdown and increasing fines, and the rising demand for restaurant jobs, the industry has been clamoring for visa options, so the W-visa will be a big one.”

The restaurant industry, one of the biggest employers in the U.S. that hires some 10 percent of the workforce, is expected to add more than 1 million employees in the next 10 years, and is projected to employ nearly 14.5 million by 2023, according to the National Restaurant Association.

Despite the corporate and political momentum for immigration reform and the recent Senate bill passage with bipartisan support, when it will ultimately pass and take effect is still doubtful, attorneys said.

“With the combination of politics in Washington right now and the juggling of pressing items on Congress’ docket, it makes it difficult for anyone to predict when it will actually happen,” said Avi Morell, a partner in Pryor Cashman LLP’s business immigration group.

Affordable Care Act Implementation

The Affordable Care Act’s employer mandate requires large employers with at least 50 full-time employees to provide them with basic health care coverage. And although more than 90 percent of eating and drinking establishments don’t meet that employee cutoff, based on National Restaurant Industry figures, most midsize restaurants and hotel chains meet this threshold and will likely face some confusion over whom to insure, hospitality industry experts said.

The confusion may largely arise from the ACA’s requirement that employees working 30 hours per week would be entitled to medical benefits. The hospitality industry, not known for its generosity with health care benefits to its workforce, could end up reducing the number of hours its many employees work weekly to 27 hours to deal with the requirements, said Christopher Craig Muller, the former dean of the Boston University School of Hospitality Administration.

“It’s a total mess. From a moral and rational sense it’s important to give employees health care, particularly in a business handling food, but the restaurant industry opposes Obamacare,” said Muller, who has previously owned restaurants and is now a professor at the university’s hospitality school. “Hotels have similar issues. The 30-hour number is just a tough place for most employers.”

The mandate was originally intended to take effect in January, but the U.S. Department of the Treasury announced in July that implementation would be delayed until 2015, which would allow the Internal Revenue Service more time to simplify employers’ reporting requirements, the IRS and Treasury Department have said.

In the meantime, Congress is also considering measures to increase the employee working-hours threshold to 40 hours a week in order for them to be eligible for employer-sponsored health care coverage.

Paid Sick Leave Measures

The paid sick leave movement has been gaining traction around the U.S., with cities including Seattle, New York, San Francisco and Portland, Ore., passing their own sick leave measures in recent years.

In a year in which New York City Council speaker Christine Quinn vied for the mayoral office, the city council in June overrode Mayor Michael Bloomberg's veto and put into effect a measure that requires employers to provide sick leave — paid or unpaid depending on the size of the business.

Earlier this month, members of the D.C. Council introduced a bill that would extend the district's current paid sick leave policies to most tipped workers, and Democrats in New Jersey have been pushing to require businesses to provide paid, earned sick leave to workers, even those with only a handful of employees.

Philadelphia's City Council previously approved similar legislation, though Mayor Michael A. Nutter vetoed the measure in April, saying it would cost jobs.

"This push has caused a lot of tension in an industry that deals with a large and often transient workforce," said Carolyn Richmond, co-chair of Fox Rothschild LLP's hospitality practice, who called it an "HR nightmare" for hospitality businesses with employees in different cities and states.

"It's one thing to try to comply with different state laws, but it's another to track the laws within different cities and municipalities," she added. "And there's no evidence the paid sick leave movement is going to die down."

Jersey City Mayor Steven Fulop earlier this month indicated plans to introduce legislation allowing workers to earn paid sick leave, and Tacoma, Wash., is mulling a paid sick days city ordinance.

Minimum Wage Hikes

The hospitality industry has been similarly wary of impending minimum wage hikes and the living wage initiative taking flight across the country, in which fast-food restaurant workers and others have argued that the minimum wage has not kept pace with inflation and that they should be paid wages they can survive on.

If minimum wages had increased in tandem with inflation, the federal minimum wage would be \$10.74 instead of the current \$7.25, according to calculations by employment advocacy group the National Employment Law Project.

While federal measures to increase the minimum wage will likely face tough hurdles in Congress, the movement is starting to gain momentum at the state and local level, with various cities passing or floating measures to require employers to pay employees more of a livable wage.

Restaurant workers on average earned \$15,092 in 2009, roughly a third of the \$45,155 average for the private sector that year, according to a 2011 report by restaurant worker advocacy group Restaurant Opportunities Centers United.

As of January, San Francisco employees receive a minimum wage of \$10.55 an hour, the highest in the nation. In November, San Jose voters approved an ordinance increasing the city's minimum wage to \$10 an hour and requiring that it increase annually by the cost of living. And in March, the New York state legislature approved a measure to gradually raise the current state minimum wage from \$7.25 an hour to \$9 an hour by 2015, although this increase does not apply to tipped employees.

Tipped employees, including restaurants' so-called front of house staff such as servers and bartenders, get paid below the minimum wage, in the understanding that the difference will be covered by the tips they receive from customers. If those tips don't cover the difference, the employer must make up for it. New York's wage hikes don't apply to tipped employees, so enforcing these new, inconsistent standards for different employees within an establishment could be ripe for conflict and confusion, attorneys said.

"If New York has a different wage level for different hotel and restaurant employees, that's going to create confusion on the part of employees and employers," said Joseph Farelli, a partner at Pitta & Giblin LLP who represents labor unions in the hospitality industry. "That's something that's buried in the statute books, that it only applies to some employees but not others."

In some instances, there may also be some confusion about who counts as a tipped employee and who doesn't, he said.

"I would advise clients to a) stay informed b) be prepared to fight these initiatives to the extent you don't like them," said Greg Duff, chairman and founder of Garvey Schubert Barer's hospitality, travel and tourism group.

Duff said the group has worked with companies on fighting such legislation by working with local city councils to influence the language of the rules and on educating clients on how to comply with them.

"It's a political process," Duff said. "We try to work with local city councils to negotiate what these statutes and ordinances should look like, because once they're passed, you're stuck."

Calorie Counts

The ACA requires restaurants and other food vendors with 20 or more locations to label the calorie information for standard food items on restaurant menus and boards, even on drive-thru menu boards, according to the U.S. Food and Drug Administration.

"Supermarkets have trained people to read labels, and now consumers want the same information available at restaurants," Muller of Boston University said.

Restaurants with fewer than 20 employees have the option of voluntarily signing up to provide such information, the agency has said.

Besides calorie count, such establishments also have to provide other nutritional information such as fat and saturated fat content, as well as cholesterol and sodium levels, and carbohydrate, sugar, fiber and protein content, though these details would only have to be offered on request, according to the agency.

The ACA also requires vending machine operators with at least 20 vending machines to indicate the calorie content of some of their products.

The FDA is planning to finalize such rules in 2014, according to the agency.

--Additional reporting by Ben James and Martin Bricketto. Editing by John Quinn and Jeremy Barker.