



Seven Signs Your Employees May Be Poachable

By Michael R. Greco and Christopher P. Stief (Philadelphia)

A recent survey by Manpower suggests that employers across the country are planning to increase their hiring during the second quarter of 2011. Will they be hiring your best people away from you? Putting it another way . . . are your employees poachable? Consider the following:

1) Is employee morale down?

If so, it may not be long before the word is out. With the use of social media growing exponentially, there are more ways than ever before for recruiters to find out which employees are fed up with their companies and ready to tiptoe out the door. You need to know if your employees are unhappy before your competitors do. Don't wait until they are broadcasting their discontent on social networks. If you are unclear about how your employees feel, conduct an internal survey to measure morale before it's too late.

2) Is upheaval shaking up your industry?

The hospitality industry is facing increased regulation on several fronts: a shortage of willing and qualified unskilled labor; mergers and acquisitions; changes in management companies; and uncertainty about tomorrow's profitability. In the face of this, employees are more apt to want to leave to find a more stable environment. With fluctuations based on uncontrollable factors – the general economy, natural disasters like last month's floods or the BP oil spill, and the high cost of gasoline – that certainly applies to the hospitality industry.

If your property is in transition, don't leave your employees guessing about what's going on. Be open and honest. Employees who feel like they are being kept in the know feel more loyalty to their companies and are less likely to bolt for the door when turbulence is afoot.

3) Are you experiencing turnover at the top?

CEO turnover is higher than it's ever been. Unfortunately, unrest in the upper levels of management can cause a chain reaction of defections. Employees may either want to follow their old boss out the door or may feel that a new manager is chasing them away. Changes at the top are inevitable. But when one occurs, consider how managers closest to the General Manager, Director of Sales, or Director of Food and Beverage will respond. Will they likely be relieved or more willing to leave? Conversely, try to involve top managers in the decision-making process to replace their leader, where possible.

4) Are your employees well trained or specialized?

Having the best of the best employees is a blessing and a curse. A popular exchange rounding the internet these days between a fictitious CFO and CEO reads as follows: CFO to CEO: "What if we train our employees and they leave us?" CEO to CFO: "What if we don't and they stay?" The fact is, employees with highly specialized expertise, like special language skills or culinary fame, are probably the most poachable of all. Your competitors will be pleased to find talent with fine-tuned skills and low-learning curves, and they may believe such employees are well worth the risk of litigation.

If you're investing heavily in training, invest equally in retention by rewarding employees. But, don't focus solely on money as a motivator. Provide personalized options. Some employees, especially younger ones, might choose flex-scheduling options, an open policy on shift swapping, or transfers between locations over a plump paycheck; these employees may well be worth catering to.

5) Is your competition moving in?

If your competitor has opened a new restaurant down the street, they are probably making a beeline for your back door. It's cheaper to poach your servers than to recruit and train new ones. Now is an optimal time to let your employees know that you care. Take steps to make their job at your company the "best opportunity." Make work meaningful for your employees – support and participate in organizations, groups, and charities that are important to them. Recognize and appreciate employees' efforts. Be sensitive to cultural differences or languages. In other words, create a workplace where employees feel cared about, valued and respected.

6) Do your employees have confidential information?

Employees who embody your service, such as sales managers and meeting planners, can be prime candidates for poaching because they often have contacts that may be willing to come along for the ride, exponentially boosting the employee's value. Remember that your client list may qualify for trade secret protection. And of course, you should protect your company with suitable restrictive covenants. But the best prevention is to keep your employees happy.

7) Are you sharing the bounty?

During the recent economic downturn, many hotels and restaurants were forced to tighten their belts. In turn, employees were asked to make sacrifices. Many employees responded favorably because they were grateful to have a job, and putting in a few extra hours or foregoing an annual raise was viewed as a reasonable sacrifice to remain employed in a difficult economy. But as the economy rebounds, employees are taking notice. As your profits increase, are you sharing the bounty with employees?

Sharing the bounty does not always mean paying employees a bonus or giving them a raise. Consider offering employees special training opportunities. Ambitious employees are always looking to improve themselves. Are you providing them with training opportunities to expand and sharpen their existing skills, improve their understanding and value to the entire operation, and structuring cross-training to expand job enrichment opportunities?

In this environment where many employees are looking for a change and recruiters are happy to oblige their wishes, non-competes are not optional. When used in conjunction with competitive intelligence and retention techniques, you can have a comprehensive strategy to fend off intruders from absconding with your valuable talent, trade secrets and clients during these precarious times. Let your employees know you care, and cater to their interests.

Of course, some employees are always going to choose to join a competitor. For these departures, it is important to be prepared with a plan of action. Let us know if we can help.

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DOL's New Tip-Credit Interpretations

By John E. Thompson (Atlanta)

The federal Fair Labor Standards Act's "tip credit" was among the many topics addressed by the U.S. Labor Department's recent final rule. DOL's tip-related pronouncements are a mixed-bag for employers.

The General Principles

The FLSA allows an employer to credit a portion of a tipped employee's tips toward the FLSA-required minimum wage (currently \$7.25 per hour). Employers taking an FLSA tip credit must pay a cash wage of not less than \$2.13 per hour, so at present they are limited to a tip credit of no more than \$5.12 per hour ($\$7.25 - \$2.13 = \5.12).

The FLSA defines tipped employees as those who are engaged in occupations in which they "customarily and regularly" receive more than \$30 a month in tips. For FLSA tip credit purposes, a "tip" is a payment that patrons decide in their discretion whether or not to make, including how much to give and for whom to leave it; so, not all "gratuities" are "tips." This rule does not apply to service charges, for example.

The law says that you may take a tip credit only if 1) the tipped employees have been "informed" of the law's provisions; and 2) the employees retain all of the tips they receive, except for amounts pooled among employees who customarily and regularly receive tips.

What Does "Informed" Mean?

DOL's position is that an employer must tell the employee that it intends to take a tip credit and must also specifically notify the employee in advance:

- of the amount of the direct cash wage you will pay to the employee;

- of the amount you are taking as a credit against tips received, which cannot exceed the difference between the FLSA minimum wage and the actual cash wage paid to the employee;
- that the additional amount you claim as a tip credit may not exceed the value of the tips the employee *actually* receives;
- that the tip credit shall not apply with respect to any tipped employee unless the employee has been informed of the FLSA's tip-credit provisions; and
- that all tips employees receive must be retained by the employees, except for the pooling of tips among employees who customarily and regularly receive tips.

DOL says that an employer is not required to provide these notifications in writing, but it notes that doing so would provide evidence that you have, in fact, given them.

No Limit On Pool Contributions

In the past, DOL's enforcement position was that an otherwise-valid tip-pool arrangement could not require employees to contribute a greater percentage of their tips than was "customary and reasonable," but added that it would not question pool contributions of 15% or less of the employee's tips.

DOL now acknowledges that the law "does not impose a maximum contribution percentage on valid mandatory tip pools". But DOL takes the position that an employer "must notify its employees of any required tip pool contribution amount. . . ."

Time For A Check-Up

As with other areas affected by the Final Rule, employers can expect DOL investigators and plaintiffs' lawyers to be scrutinizing tipped-employee pay practices even more than they already were. Take a fresh look at where your tipped-employee compensation stands. This review should include not only DOL's recent changes, but also other potential FLSA tipped-employee issues, as well as any state or local requirements and limitations.

More DOL News

In a press release on April 20, 2011, the Wage and Hour Division cautioned restaurants in a Southeastern part of the country: "The restaurant industry employs some of our country's lowest-paid workers who, especially during hard economic times, are vulnerable to exploitation. Investigators will be making unannounced visits to full-service restaurants to remedy widespread labor violations, and ensure that law-abiding employers who pay their workers full and fair wages are not placed at a competitive disadvantage."

The Wage and Hour Division said they are concerned about the prevalence of unlawful pay practices such as 1) requiring employees to work exclusively for tips, without regard to minimum wage standards; 2) making illegal deductions from workers' wages for walk-outs, breakages, and cash register shortages; and 3) incorrectly calculating overtime by using the \$2.13 per hour base rate before tips, instead of using the federal minimum wage of \$7.25 per hour.

The Division also noted that significant child labor violations – such as allowing minors to operate hazardous equipment including dough mixers and meat slicers – persist in this industry.

For more information check out our blog at www.wage-hour.net or contact the author at jthompson@laborlawyers.com or 404.231.1400.

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