



Hospitality Industry Legal Alert: Tennessee Hotel and Motel Industry Targeted in Department of Labor Enforcement Effort

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Executive Summary: The hotel and motel industry has long been an enforcement priority for the U.S. Department of Labor's Wage and Hour Division (WHD). Recently, however, the WHD has embarked upon a multiyear enforcement initiative focused on the hotel and motel industry in Tennessee. Regulators say they are finding "widespread noncompliance with the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act (FLSA)." In 2011, the WHD found violations at 35 hotels and motels in Tennessee, resulting in \$14,552 in civil money penalties and \$173,045 in back wages. Despite their best efforts at compliance, due to the complexity of the laws and challenges unique to the hotel and motel industry, employers in this industry often unwittingly find themselves out of compliance with wage-and-hour laws. Rather than educating the industry, recently the WHD has begun increasingly to rely on "gotcha" audits to increase their enforcement statistics. Now, more than ever, it is important for employers to conduct self-audits and perfect the good faith defenses provided under wage-and-hour statutes.

Background

Under the initiative, investigators are visiting hotels and motels in major tourism areas to assess compliance among hotel and motel owners, third-party management companies and staffing agencies providing housekeeping, food service, landscaping and janitorial maintenance. Investigators are also actively engaging parent companies to identify issues and ensure compliance. When violations are found, the WHD has pledged to "pursue corrective action – including litigation, civil money penalties and liquidated damages – to recover workers' wages and ensure accountability under the law."

The WHD is also providing compliance assistance to employers and industry associations – including chambers of commerce and the Tennessee Hospitality Association – on all applicable wage and hour regulations, child labor restrictions and joint employer responsibilities. Additionally, the WHD is conducting outreach programs for workers, community organizations, immigrant rights groups, and foreign consulates to inform them of the ongoing initiative and encourage their participation in promoting industry-wide compliance.

In 2011, the WHD found the following common violations: (1) charging employees in excess of the reasonable cost of board and lodging, causing their wages to fall below the federal minimum wage of \$7.25 an hour; (2) paying a flat salary without regard to overtime requirements; (3) paying housekeepers by the room, causing their wages to fall below the federal minimum wage; (4) failing to pay temporary employees and those hired through staffing companies for all hours worked; and (5) misclassifying employees as independent contractors.

Employers' Bottom Line:

The hotel and motel industry in Tennessee utilizes a wide variety of employment arrangements such as sub-contracting, franchising and third-party management, which often obscure the worker-employer relationship and create pitfalls for employers. As the WHD continues its multiyear initiative, it is important for hotel and motel owners, third-party management companies and staffing agencies to evaluate their compliance with the FLSA *before* the WHD commences an investigation or a private lawsuit is initiated. In addition to back pay, non-compliance can result in liquidated damages equal to the amount of back pay owed, civil money penalties, and, in the case of private lawsuits, attorneys' fee awards.

Ford & Harrison recommends that employers in the hotel and motel industry conduct internal audits of their wage-and-hour practices, under the guidance and at the direction of counsel, to ensure their practices are in compliance with the FLSA's requirements. Attorneys in Ford & Harrison's Hospitality Practice Group have extensive knowledge about, and experience with, the issues that are unique to the hospitality industry. Additionally David Prather, dprather@fordharrison.com, a partner in our Memphis office, and Salvador Simao, ssimao@fordharrison.com, a partner in our Short Hills, New Jersey office, formerly worked for the DOL and offer unique insight into the agency's practices. In addition to working at the DOL, both have conducted audits for Fortune 100 companies, as well as medium/small public and privately held companies that successfully reduced the companies' potential liability and perfected the good faith defenses available to the companies under the law.

If you have any questions about the issues addressed in this Alert, or wish to learn more about Ford & Harrison's experience in conducting internal wage-and-hour audits or the firm's Hospitality Practice Group, please contact Mr. Prather, Mr. Simao, Memphis partner Delaine Smith, dsmith@fordharrison.com, or the Ford & Harrison attorney with whom you usually work.