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FEBRUARY 2019

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by Lauren Giles

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Payments Developments in 2018 and Outlook for 2019

by Lauren Giles

The cost of accepting payments is one of the most significant expenses faced by most retailers, and managing those costs is an ongoing struggle. The year 2018 saw significant litigation developments that directly affected retailers' costs of payments acceptance. In particular:

- The ability of merchants to surcharge credit card transactions continues to grow as a result of a series of court decisions overturning state anti-surcharge statutes. In addition, the Visa and Mastercard "swipe fee" class action appears to have reached final settlement, and the Visa/Mastercard rule changes that allow surcharging will be maintained.
- Litigation may continue between Visa/Mastercard and merchants that elect to opt out of the settlement.
- Following a U.S. Supreme Court decision in favor of the network, retailers that accept American Express continue to be prohibited from steering customers to lower-cost credit cards. However, Amex's anti-steering rules have again been challenged, this time on grounds of consumer harm, in an antitrust class action filed in early 2019.

Revised Visa and Mastercard Swipe Fee Settlement Approved

It appears that the Visa/Mastercard "swipe fee" class action is finally drawing to a close, with additional funding made available for payments to merchants. Merchants that do not wish to participate in the settlement are free to opt out and pursue separate claims.

Details

On January 24, 2019, Judge Margo Brodie of the Eastern District of New York granted preliminary approval of the revised settlement agreement in the long-running

antitrust class action against Visa, Mastercard, and a group of issuing and acquiring banks. The action, which alleged anticompetitive behavior by the networks and banks in setting swipe fees and prohibiting merchants from imposing surcharges for use of credit cards, had reached a preliminary settlement in 2012. The preliminary settlement included both changes to the Visa and Mastercard rules to allow merchants to impose surcharges where permitted by state law and a cash payment to merchants as compensation for overpaid fees. However, the settlement was thrown out by the Second Circuit in 2016 over potential conflicts of interest between class representatives and certain class members, forcing the defendants back to the table. At the time the settlement was overturned, Visa and Mastercard had already revised their rules to permit surcharging where legal, and the networks maintained those rule changes during the appeal process. Under the new settlement, the rule changes will continue to be maintained, the defendants are required to set aside additional funds for payment of claims, and any class member is permitted to opt out of the settlement.

(continued on next page)

More information

All documents related to the class action, *In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 1:05-md-01720 (E.D.N.Y.), including Judge Brodie's order, are available at [the court-authorized settlement website].

Anti-Surcharging Statutes Overturned

While six states still prohibit credit card surcharging, those state statutes are likely vulnerable to challenge on First Amendment grounds given the Supreme Court's 2017 decision that New York's anti-surcharging law was a regulation of free speech. In 2018, anti-surcharging statutes in California and Texas were found to violate the First Amendment. And 2019 may see the removal of additional state surcharging prohibitions.

Details

Although the Visa and Mastercard rules no longer prohibit surcharging, state laws continued to limit the right of merchants to impose surcharges. In *Expressions Hair Design v. Schneiderman*, a 2017 case, the Supreme Court ruled that New York's anti-surcharging statute was a regulation of speech and remanded to the Second Circuit for further consideration in light of that finding. While the Second Circuit has not yet ruled, federal appellate courts in California and Texas have overturned their states' anti-surcharging laws on First Amendment grounds. While such laws remain on the books in Colorado, Connecticut, Kansas, Maine, Massachusetts, and Oklahoma, given the *Expressions* decision, they are vulnerable to challenge on First Amendment grounds.

More information

The Supreme Court decision: *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

The Ninth Circuit's decision overturning the California statute: *Italian Colors Restaurant, et al. v. Becerra*, No. 15-15873 (2018).

The Texas litigation is *Rowell v. Pettijohn*, and the district court's decision enjoining the enforcement of its anti-surcharge statute (following remand from the Fifth Circuit) was entered as *Rowell v. Paxton*, No. 1:14-cv-00190 (W.D. Tex. 2018).

Amex Anti-Steering Rules Maintained – For Now

In mid-2018, the Supreme Court ruled that American Express's anti-steering rules do not violate U.S. antitrust law, which means that merchants that accept American Express cannot encourage customers to use lower-cost credit cards. However, on January 30, 2019, a group of individuals filed a class action alleging that the anti-steering provisions result in higher prices for consumers that use Visa and Mastercard products. And so the fate of the Amex anti-steering rules remains unclear.

Details

The U.S. Department of Justice pursued a series of antitrust actions against the payment networks relating to the anti-steering rules, resulting in settlements with Visa and Mastercard in 2011. As a result of those settlements, the Visa and Mastercard rules were removed, allowing merchants to encourage consumers to pay via cheaper means. American Express, however, did not settle. The Eastern District of New York enjoined Amex from enforcing the anti-steering rules. However, in 2016, the Second Circuit reversed the lower court ruling, found in favor of Amex, and lifted the injunction. In a ruling issued in June 2018, the Supreme Court found for American Express, holding that in order to prevail, the plaintiffs must demonstrate negative effects on both merchants and consumers. While the plaintiffs had showed negative impacts on merchants, they had failed, the Court wrote, to demonstrate such impacts on consumers. At first blush, it appears that the newly filed class action, in which the purported class is made up of individual cardholders, will likely turn on whether the plaintiffs can successfully demonstrate consumer harm.

More information

The Supreme Court's decision: *Ohio v. American Express*, No. 16-1454.

The plaintiffs' complaint in the consumer class action, *Oliver v. American Express*, No. 1:19-cv-00566 (E.D.N.Y. January 29, 2019). ■

Cybersecurity and Retail

by Kim Peretti, Larry Sommerfeld, and Nameir Abbas

The retail industry continues to confront significant threats from the cyber threat landscape. Although retailers' ongoing implementation of EMV technology has successfully stemmed certain traditional types of payment card frauds, payment card breaches and skimming activity remain common. Both point-of-sale malware (for use in attempted intrusions) and stolen payment card data (for use in fraudulent transactions) are readily available for sale in underground forums, and the theft of payment card data is big business for some of the most sophisticated and active cybercrime groups. According to the 2018 Verizon Data Breach Incident Report, point-of-sale and skimming incidents account for a significant portion of incidents in the retail sector and for over 90% of all incidents within the related accommodation and food services sector.

In addition to continuing to target physical retailers, cybercriminals are targeting e-commerce websites. This includes attacks that focus not only on using malware to steal payment card data used in transactions made through the website but also on obtaining consumer credentials to access online retailer consumer accounts and steal personal information or items of financial value (e.g., loyalty points). Access to online consumer accounts can occur, for example, via credential stuffing attacks or attempts to reuse account credentials stolen from one platform on another platform. These attacks build on the tendency of consumers to reuse credentials across multiple consumer-facing retail platforms. Also common are denial of service attacks, which the Verizon Data Breach Incident Report highlights as the most frequent pattern of attack in the retail sector, and attacks that compromise web applications.

Like many cyber intrusions, payment card breaches may begin with well-known hacking techniques: spear phishing, credential escalation, and installation of backdoors and malware. Nevertheless, payment card breaches tend to attract a disproportionate amount of public and regulatory scrutiny and litigation. Particularly given the attention paid to breaches in this sector, retailers should keep pace with changes in the threat landscape and take pains to maintain a high level of breach preparedness. As just one example, properly resourced and administered vulnerability and patch management programs can go a long way toward preventing a costly and damaging breach. Likewise, establishing and practicing response plans and procedures can promote effective teamwork and collaboration in case of a breach, minimizing financial and reputational harm to the company and its customers. ■

California Shows the Potential Pitfalls of Consumer Arbitration Provisions

by David Carpenter and Gavin Reinke

As we head into 2019, one key legal issue that could greatly impact businesses in the retail sphere is how courts may enforce broad "poison pill" arbitration provisions in a company's terms and conditions. These poison pill provisions state that the entire arbitration agreement is invalid if certain portions of it are held by a court or an arbitrator to be unenforceable. Arbitration provisions and class action waivers are invaluable tools for retail businesses, but a pending Ninth Circuit case could result in arbitration agreements and class action waivers being invalidated.

In *McArdle v. AT&T Mobility LLC*, No. 4:09-cv-01117, the district court refused to require the plaintiff to arbitrate any of his claims even though the plaintiff had signed an arbitration agreement with the defendant. The court did so because it concluded that one particular component of the arbitration clause—specifically, a waiver of the right to obtain a public injunction on behalf of a putative class—was unenforceable under California law. The defendants in that case first argued that agreements to resolve disputes individually at the exclusion of public injunctive relief are enforceable. They then argued that the court should not disregard the entire arbitration clause but should instead address the request for a public injunction *after* an arbitration on all of the other issues in the dispute.

But the court rejected both arguments, concluding that the class action waiver was unenforceable under California law and that the agreement to arbitrate was "null and void" under the plain language of the agreement's poison pill provision. The court therefore concluded that the defendant was not entitled to compel arbitration of *any* of the plaintiff's claims. Another federal judge reached the same result in *Roberts v. AT&T Mobility*, No. 3:15-cv-03418.

Notably, in both *McArdle* and *Roberts*, the arbitration provisions at issue were fully enforceable at the time the contracts were signed (and at the time that each of the lawsuits were filed) and were made unenforceable only by a later decision of the California Supreme Court (regarding the unwaivability of public injunction claims).

In fact, in both cases, the district court had originally concluded that the plaintiffs were required to arbitrate their disputes, only to reverse course after the intervening change in law. This is significant because, regardless of how carefully an arbitration agreement is drafted to ensure that it is fully enforceable, there is always a risk that an intervening change in the law may make a component of the arbitration agreement invalid. That risk is compounded by the inclusion of a broad poison pill provision in the arbitration agreement, which can result in an entire agreement to arbitrate being held unenforceable based on an unforeseen intervening change in the law.

The parties have nearly completed the briefing in the *McArdle* case in the Ninth Circuit, where AT&T seeks to overturn the trial court's ruling under the Federal Arbitration Act. In the meantime, and in order to mitigate the risk of an unenforceable arbitration provision, companies should draft poison pill provisions carefully and as narrowly as possible. For example, if a company wants to include such a provision to ensure that it cannot be subjected to classwide arbitration, it should consider limiting the poison pill provision to apply only to any claims for which a court or arbitrator concludes that the class action waiver is unenforceable. The company should also expressly clarify that, in such a circumstance, the class action waiver and arbitration agreement will continue to apply to all other claims not subject to the court's or arbitrator's ruling. ■

Maximizing Liquidity in Retail ABL Credit Facilities

by Jordan Myers

While the retail world is coming off one of its most successful holiday seasons in recent memory, many potential stumbling blocks remain. Appropriately managing liquidity throughout the year in the face of numerous demands, including inventory management initiatives, e-commerce, brick-and-mortar and pop-up store investments, and day-to-day capital needs, can be a challenging task for retail management. An asset-based revolving credit facility, which has become ubiquitous among retailers, is a common tool at a retailer's disposal for the provision of liquidity. Under an asset-based lending (ABL) facility, a retailer can borrow against the value of its receivables, inventory, and other assets. Whether managing a seasonal liquidity shortfall, a prolonged downturn, or a period of growth, liquidity under an ABL facility can be expanded in several different ways.

Exercise of Incremental Facility

Most middle and upper market credit facilities include an option to increase borrowing capacity up to a predetermined cap through the exercise of an incremental facility option. An incremental facility is an extension of new loan commitments by existing or new lenders under an existing credit facility upon the satisfaction of certain conditions, including no default or event of default and accuracy of representations and warranties in the credit agreement. An incremental facility is uncommitted; therefore, the existing lenders do not have an obligation to extend new commitments, and their consent is not required if other lenders are willing to provide the commitments, although existing lenders frequently negotiate for a right of first offer to extend the new commitments. Importantly, the borrower must have the borrowing base capacity (i.e., unencumbered assets of a particular type) to support the increased borrowing capacity because liquidity will remain limited by the borrowing base notwithstanding the option to increase the loan commitments. A retailer can benefit from the efficiency and low costs associated with adding liquidity under existing credit documentation via an incremental facility.

Adjustment of Advance Rates

While a retailer may exert a certain amount of control in increasing liquidity through an incremental facility upon satisfaction of certain conditions, the remaining options require the consent of some or all of the existing lenders. A borrower may request increased advance rates in an effort to allow the retailer to maximize the borrowing capacity of its assets by borrowing against a higher percentage of the value of the applicable assets. An adjustment to the advance rates in the borrowing base can take the form of either a permanent adjustment to the advance rates or a "seasonable overadvance" that permits the borrower to borrow more than the borrowing base when the retailer's seasonal cycle demands the additional liquidity. Such seasonal overadvances are then required to be repaid at the end of the overadvance period, which is commonly a 90- to 150-day period during each calendar year.

Addition of New Class of Assets to Borrowing Base

While a typical retail borrowing base is composed of credit card receivables and inventory, a retailer should consider whether the introduction of other assets into the borrowing base is an option. This could include an expansion of the types of assets already included in the borrowing base, such as the introduction of in-transit inventory, which is typically otherwise excluded under standard eligibility criteria in a credit agreement. Other examples of potential borrowing base assets include non-credit-card accounts receivable, equipment, cash, real estate, and intellectual property. This approach requires the consent of the existing lenders as well as the existence of the applicable unencumbered assets.

First-In, Last-Out Loans

Finally, retailers can expand their borrowing capacity through first-in, last-out (FILO) loans. FILO loans are additional loans based on the incremental asset value above the traditional ABL lending limits (e.g., a loan made against 5% of the retailer's credit card receivables and inventory in addition to the separate revolving loans made based on customary advance rates). In exchange for being repaid after the ABL revolving loans, FILO loans carry higher pricing. A retailer must obtain the consent of existing lenders to introduce the FILO tranche, and the introduction of new lenders in a separate tranche of debt can sometimes complicate a workout and requires additional consents for many types of amendments. FILO loans do not require an expansion of the existing borrower base, can be made in the form of a new revolving or term-loan tranche, and can be documented in the same credit agreement.

A retailer has a variety of options to increase liquidity. Each option should be weighed carefully based on the retailer's specific situation, credit profile, and goals. ■

Unclaimed Property Issues

by Kendall Houghton and Michael Giovannini

The multistate unclaimed property landscape continued to evolve rapidly in 2018, and we expect more of the same in 2019. For retailers, perhaps the most noteworthy developments were those impacting gift card programs.

At a high level, all 50 states (plus the District of Columbia, Puerto Rico, and U.S. Virgin Islands) have adopted an unclaimed property or "escheat" law that requires unclaimed intangible property to be turned over to the state by the "holder" after the specified dormancy period (usually three or five years). In addition to property such as bank accounts, checks, shares of stock, and insurance proceeds, a handful of states expressly require the escheat of funds associated with unredeemed gift cards. Chief among these states are Delaware, Georgia, New Jersey, and New York. Delaware is of particular significance given its status as the state of domicile of much of corporate America; in this capacity, Delaware is entitled to escheat property for which the holder (i.e., the gift card issuer) lacks a last known address for the owner. For gift cards, this could be a significant population.

On the other hand, a majority of states exempt gift cards from escheatment, though many of these states premise the exemption on the cards not expiring. This often leads to some confusion about whether a particular type of instrument is exempt or escheatable, including most notably loyalty/award/promotional cards.

Holder vs. State Disputes

Of particular note is the much-anticipated jury verdict that was reached in Delaware Superior Court in a long-running qui tam lawsuit. In early 2014, Delaware intervened in a False Claims Act case (*Delaware ex rel. French v. Card Compliant LLC, et al.*), claiming that the use of a non-Delaware third-party gift card entity to issue gift cards and assume the liabilities for preexisting cards effectively constituted fraud subject to treble damages and other penalties under the Delaware False Claims and Reporting Act. After all defendants but one (Overstock.com) settled out of the lawsuit, the case went to trial in November 2018, and the state prevailed against the remaining defendant in a jury verdict. The jury found that the defendant was liable under the Delaware Escheats Law for $7.13 million in unreported gift cards plus treble damages. We expect Overstock to appeal.

As a result of this jury verdict, Delaware's treatment of gift card structures for unclaimed property purposes has been significantly muddied. Certainly, it is clear that the state believes that the *third-party* gift card structures at issue in the qui tam litigation are not effective to transfer unclaimed property liability. However, it is not clear whether this can be accomplished through *intercompany* gift card structures, which are common forms of planning in the industry. Delaware has begun to audit those structures more aggressively in recent years, and the Third Circuit held in late 2017 in the *Marathon Petroleum Corp.* litigation that the state had authority to request information about these structures to determine which entity is the proper "holder" of the liability. We anticipate this issue will continue to be a moving target in 2019.

Legislative Updates: Modernization? "Reform"? Something Else Entirely?

In 2018, two states—Illinois and Kentucky—implemented a version of the 2016 Revised Uniform Unclaimed Property Act (RUUPA), joining the two states that previously did so in 2017 (Tennessee and Utah). We expect a number of other states will consider and adopt RUUPA in 2019, as well. In a nutshell, RUUPA represents a complete rewrite of the 1995 Uniform Unclaimed Property Act. Unfortunately, RUUPA provides states the option of whether to escheat exempt unredeemed gift cards. The good news, however, is that all four states that have adopted a version of RUUPA have gone the exemption route, which reflects the clear majority of states nationwide. The states that have adopted RUUPA have also included an express exemption for in-store credit for returned merchandise, as well as for loyalty cards that cannot be monetized.

Two other positive developments are worth mentioning. First, Ohio broadened its existing exemption for gift cards and added a few other related exemptions to its law, including for closed-loop electronic payment devices that do not expire, open-loop prepaid cards that do not expire (and are not redeemable for cash), and rewards cards. In addition, New Jersey (which escheats stored-value cards but exempts promotional stored-value cards) adopted regulations clarifying that the promotional-card exemption does apply to a card given after the consumer purchases a minimum amount of goods or services. There was some concern, based on the initial draft of the regulations, that the state would interpret its law in the opposite manner, but that has been resolved in the final adopted regulations.

Stay tuned in 2019 for what is sure to be another year of fast-paced developments. Retailers would be well-advised to take a close look at their gift card programs to determine whether any opportunities exist to make improvements in order to adapt to these developments. Retailers should also review their unclaimed property compliance function more generally as state audits of retailers focus not just on gift card issues but also on property types such as payroll, refunds, accounts payable, and benefits, to name a few. ■

Farm Bill Opens "Pathways" but Doesn't Greenlight Sale of CBD-Containing Foods and Dietary Supplements

by Angela Spivey, Andrew Phillips, and Troy Stram

The Agriculture Improvement Act of 2018 ("2018 Farm Bill") legalized the commercial cultivation of hemp and hemp products in the U.S. Hemp is defined as cannabis (*Cannabis sativa L.*) and derivatives of cannabis with extremely low (less than 0.3% on a dry-weight basis) concentrations of the psychoactive compound delta-9-tetrahydrocannabinol (THC). The Farm Bill removes hemp and its derivatives, including hemp-derived cannabidiol (hemp-derived CBD) from the Controlled Substances Act, meaning it will no longer be classified as an illegal substance under federal law.

While many see this as an important first step in opening the door to selling CBD-infused products in interstate commerce, the Farm Bill does not loosen the FDA's regulatory grip over this burgeoning market. Just hours after President Trump signed the 2018 Farm Bill into law, FDA commissioner Scott Gottlieb, M.D., issued a lengthy statement detailing what the new Farm Bill "*didn't* change," namely that it remains unlawful "to introduce food containing added CBD or THC into interstate commerce, or to market CBD or THC products as, or in, dietary supplements."

The FDA maintains its regulatory authority over CBD-infused foods, beverages, and supplements under the Federal Food, Drug, and Cosmetic Act (FDCA) and Section 351 of the Public Health Service Act. Absent modification of the FDCA or other regulatory action by the FDA, companies that use CBD as an ingredient in foods, supplements, and cosmetics may face regulatory enforcement and exposure to liability in civil lawsuits. Thus far, FDA enforcement against unapproved CBD-containing products has been limited to sending warning letters, mainly to companies promoting unapproved products with unproven medical claims.

The FDA's statement signals that one of its primary concerns with this growing market is the number of drug claims being made about non-FDA-approved products that contain CBD. The FDA must still approve any CBD-containing product that is marketed with a claim of therapeutic benefit before that product can be sold across state lines. But because CBD is an active ingredient in some FDA-approved drugs (like Epidiolex), its prohibition in foods and cosmetics is not limited to products with therapeutic claims. The FDCA prohibits the introduction of any active drug ingredient, like CBD, into foods, beverages, dietary supplements, or cosmetics.

While the FDA came out strong in reasserting its regulatory authority over the industry, it also expressed its desire to pave the way for the lawful marketing of CBD-containing products by making "pathways" to legalization "more efficient." Pathways already exist for companies to seek approval from the FDA to market cannabis-derived drugs with therapeutic claims. In June 2018, the FDA approved Epidiolex, a drug containing cannabis-derived CBD for the treatment of seizures associated with two rare and severe forms of epilepsy. Other pathways to legalization also remain open, as the FDA has authority to issue a regulation that would allow the use of CBD in foods or dietary supplements—provided all other requirements in the FDCA are met.

It appears evident that, despite its muscle flexing, the FDA is quite alert to the growing public interest surrounding this industry. In its statement, the FDA expressed its desire to hold a public meeting for stakeholders, in part to "gather additional input relevant to the lawful pathways by which products containing cannabis or cannabis-derived compounds can be marketed, and how [the FDA] can make these legal pathways more predictable and efficient." The FDA also recognized the significant potential opportunities that cannabis-derived compounds could offer, opportunities that some business groups estimate could turn into a $22 billion industry in just a few years.

The bottom line: the 2018 Farm Bill is an important first step toward legalizing the commercialization of CBD-containing foods and dietary supplements, but absent additional regulatory action by the FDA, selling CBD-infused products in interstate commerce remains illegal and carries a risk of regulatory enforcement activity. ■

How Counterfeiters Have Taken Advantage of Brand Owners Through the Amazon Brand Registry

by Michele Glessner and Caitlin Smith

As the world's largest Internet-based retailer by total sales and market capitalization, Amazon is viewed by many as offering a convenient and accessible marketplace platform for the sale of goods and services, with over 2 million manufacturers, wholesalers, and retailers, as well as other third-party sellers, worldwide using Amazon to promote the sale of their products. Amazon's growth, however, has also attracted the attentions of millions of unauthorized resellers and counterfeiters, whose activities not only displace the sales volumes of brand owners but can also harm the overall reputation and goodwill of the brands they target.

To address unauthorized and counterfeit sales, Amazon has a strict anti-counterfeiting policy, which allows Amazon to "immediately suspend or terminate ... selling privileges and destroy inventory in [its] fulfillment centers without reimbursement" when a seller supplies or sells counterfeit goods. Amazon also offers brand owners infringement reporting forms and procedures for reporting and removing infringing products from its site. More recently, in 2017, Amazon launched Amazon Brand Registry 2.0, which aims to provide brand owners with more comprehensive tools for reporting infringements and controlling the quality of goods sold under their trademarks.

To enroll in the Amazon Brand Registry, a company must demonstrate that it owns a registered trademark that matches the brand name printed on its products and packaging (where applicable). The trademark owner must have a trademark registered in the United States, Canada, Mexico, Brazil, United Kingdom, Germany, France, Italy, Spain, Japan, India, or Australia. Amazon verifies this information by sending an authorization code to the primary email address of record at the U.S. Patent and Trademark Office (USPTO) for the registered trademark, which the brand owner must obtain from the correspondent of record and submit to Amazon to complete its enrollment in the Brand Registry.

Once enrolled, trademark owners can submit product information for their Amazon listings to ensure that product descriptions and images are accurate. Enrollees also can add "enhanced brand content" to their product listings. With this brand information, the Amazon Brand Registry performs automated predictive protections and removes suspected infringing or inaccurate content. The registry also promises to review infringement notices within eight hours of submission and provides customized searching and reporting tools that assist enrollees in identifying potential infringers.

Unfortunately, counterfeiters have devised methods for falsely registering accounts with the Amazon Brand Registry to gain access to brand owners' store pages and product listings. According to an announcement issued by the USPTO on October 18, 2018, rogue users are submitting unauthorized requests to change the primary email addresses of record at the USPTO to reflect an email address the counterfeiter has access to so that the counterfeiter can directly receive authorization codes to register the brands of others on the Amazon Brand Registry. At the time, there was no mechanism in place for the true correspondent of record to know when such a change had been made, and so unauthorized changes were going unnoticed. In the four months preceding the USPTO's announcement, there was an 11,000% increase in suspected or confirmed trademark correspondence fraud at the USPTO.

The USPTO is currently investigating long-term resolutions to this problem. In the meantime, the USPTO has now started to send email alerts to the correspondent of record whenever a request to change the primary email address has been filed for a trademark application or registration. As a part of this notification, the USPTO requests owners to review the new primary email address to confirm that the change is legitimate and authorized and provides instructions for reporting an unauthorized change to the USPTO.

Given the opportunity for online counterfeiters and bad actors to gain control of brand owners' accounts, trademark owners must be vigilant about monitoring the email accounts associated with their trademark registrations and keeping primary email accounts up to date in the USPTO records. Keeping outside counsel informed of changes in the brand owner's contact information and notifying counsel of the brand owner's legitimate Amazon Brand Registry activity is a good first step to keeping product listings and store pages, and the benefits that can be reaped through use of the Amazon Brand Registry, in the hands and pockets of the rightful brand owner. ■

Labor & Employment

by Charlie Morgan and Martha Doty

Labor and employment issues continue to present challenges for retail employers, particularly with a growing numbers of cities passing their own ordinances that provide retail employees with even greater protections than state or federal law mandates. Staying up to date with this growing web of regulations to avoid wage-and-hour class actions by employees or enforcement actions by state and local governments is ever more important.

Minimum Wage

The "Fight for $15" continues in 2019 with Sen. Bernie Sanders introducing the "Raise the Wage Act" this month seeking to raise the federal minimum wage from $7.25 to $15. Meanwhile, three states including New York have committed to increasing their minimum wage to $15 an hour. In Massachusetts, one of the states that is increasing its minimum wage to $15 over the next five years, the minimum wage increase goes hand-in-hand with a decrease and ultimate elimination of premium pay on Sundays and holidays for retail workers over the five-year period. Further, many municipalities are forging ahead with their own minimum wage increases. In California, at least 25 cities have passed minimum wage ordinances.

Making matters especially complicated for retail employers, these ordinances are inconsistent; they vary in the minimum wage rate, the employer size required to trigger a particular minimum wage, the timing of the onset of new rates, and the basis for determining whether the rate will go up. Certain California cities even provide for a lower minimum wage if the employer provides health care benefits. Some of these municipal laws are even specific to workers in particular industries. For example, voters in the city of Oakland passed a ballot initiative requiring the city to amend its Municipal Code to raise the minimum wage for hotel workers. Similarly, Seattle's Domestic Workers Ordinance provides minimum wage increases to domestic workers beginning July 2019. While most employers are alert to wage increases at the beginning of each year, it is also critical that retail employers regularly monitor these ordinances with a key review point in June/July of each year since many rate increases go into effect mid-year.

Tip Credits/Tip Pooling

Tipping is one of the wage-and-hour areas that retail/hospitality industry employers should be most keenly attuned to in 2019, with particular focus on tip credits and tip pooling. Employers in various hospitality industries use "tip credits" to augment some employees' hourly rates by crediting tips an employee earns toward their hourly compensation. Therefore, retail employers in states that permit tip credits must determine whether it is necessary to adjust their tip credit minimums to any of the minimum wage changes.

Moreover, tip credit laws are currently in flux following a late 2018 Ninth Circuit decision (*Alec Marsh v. J. Alexander's LLC*) that adopted the "20 percent rule" and ruled that an employer could only take the tip credit for hours worked by waitstaff when they spent no greater than 20% of their time on non-tip producing work. That ruling was consistent with a 2011 Eighth Circuit decision (*Fast v. Applebee's*), but it appeared to impose upon employers unmanageable obligations to closely monitor employees' activities to determine which duties / how much time was involved in non-tippable work.

Two months after *Marsh*, the Department of Labor (DOL) issued an opinion letter superseding and clarifying language in its Field Operations Handbook regarding the 20% rule. The DOL's opinion letter set a new guideline for tipped employees' duties, allowing application of the tip credit for pre- and post-shift non-tip producing duties that are performed contemporaneously with or a reasonable time before duties involving direct customer services (i.e., in conjunction with serving patrons). Despite the DOL's new guidance, the uncertainty about this issue (as well as ongoing legal developments regarding tip pooling) makes hospitality industry employers vulnerable to mistakes in this area; caution is warranted.

Predictive Scheduling

California led the way in "advanced scheduling" or "predictive scheduling" protection for retail employees with the city of San Francisco's 2014 Retail Employee Bill of Rights. A number of other cities and one state have followed suit (New York City; Seattle; Emeryville, CA; Oregon), and nearly 20 other states are considering doing the same. Among other things, these ordinances require retail schedules to be posted at least two weeks in advance, additional pay for last-minute schedule changes, offering existing employees additional shifts before hiring new workers, right to rest between shifts ("clopening" bans), and protection from retaliation for declining shifts. Although these ordinances are viewed as providing retail employees with greater stability and predictability in their work lives, some of the unintended consequences of these laws include less flexibility for employees to pick up additional shifts due to penalties imposed by the ordinances, stricter enforcement of workplace rules by employers, less hiring, and scheduling fewer workers

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per shift by implementing automated technology to replace employee positions.

Other Wage-and-Hour Issues

Retail employers also need to continue to keep a watch on the following wage-and-hour issues that remain the source of regulations, class action lawsuits, and a developing body of employee-friendly case law in certain states: no poach / no hire / noncompete and nonsolicit agreements, timekeeping practices involving rounding, security screening and bag checks, cell phone and other reimbursement issues, misclassification / independent contractors / gig economy workers, and union-organizing activity targeted against the retail industry. ■

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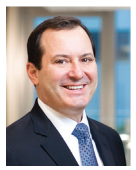

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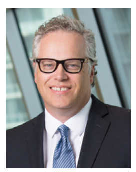

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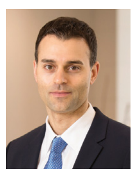

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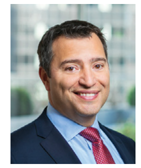

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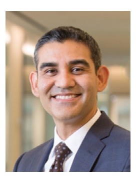

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