

TAKING STOCK

RISK MANAGEMENT INSIGHTS FOR THE RETAIL/WHOLESALE INDUSTRY



EMPLOYMENT PRACTICES LIABILITY: RISK MANAGEMENT PERSPECTIVES FOR RETAILERS AND RESTAURANTS

The recent 2015 US Supreme Court decision involving a discrimination charge regarding the use of religious headwear is an example of how susceptible retailers are to discrimination risks and employment practices liability (EPL). In that case, a female applicant who routinely wore a headscarf for religious reasons was allegedly not hired because the retailer had a “look policy” that prohibited the wearing of caps, note legal commentators. The Court ruled that employers must essentially discern whether a religious accommodation may be needed, even when the applicant does not raise the issue him/herself. The case highlights one of the many employment-related risks retailers and restaurant owners face today, along with wage and hour and regulatory concerns.

EMPLOYMENT PRACTICES EXPOSURES

Retailers and restaurant owners routinely have a barrage of discrimination, wage and hour, and other employment practices exposures involving religious preferences, disabilities, race, and age that can have a direct impact on a company’s brand, image, reputation, and by association, its bottom line.

Even the most sophisticated employers can be held liable for not adhering to discrimination or wage and hour laws. To help reduce exposures, retailers should be aware of exactly what constitutes discrimination. The Equal Employment Opportunity Commission (EEOC) describes discrimination as falling into the following categories:

- Age.
- Disability.
- Equal pay/compensation.
- Genetic information.
- Harassment.
- National origin.
- Pregnancy.
- Race/color.

- Religion.
- Retaliation.
- Sex.
- Sexual harassment.

Retailers and restaurant owners also should be aware of changes in employment practice laws and regulations, including changes in various state minimum wages; know how to consult with third-party or outside legal counsel to conduct regular wage and hour audits; and be careful to use the proper classification of all employees and independent contractors. They should also properly train their employees regarding these practices.

MORE REGULATORY ENFORCEMENT

A host of federal and state employment laws, as enforced by the Department of Labor (DOL), can impact retailers' and restaurant owners' employment liability, such as misclassifications of employees as independent contractors. According to Thomas E. Perez, US Secretary of Labor, misclassification deprives workers of earned wages and undercuts law-abiding businesses.

Several developments in 2015 include the DOL signing agreements with:

- The Rhode Island Department of Labor and Training to protect misclassified workers.
- The Wisconsin Department of Workforce Development to reduce misclassification of employees.
- The Florida Department of Revenue to reduce misclassification of employees.

The DOL has also increased its enforcement in recent years of the Fair Labor Standards Act (FLSA) as it relates to retailers and other industries. The impending revised FLSA regulations, which are expected to expand the number of nonexempt jobs entitled to overtime pay and likely create a considerable increase in the salary level threshold for exempt employees, could have a significant effect on retailers and restaurant owners. Companies should review job descriptions for accuracy, identifying "gray area" jobs that may be improperly classified, and analyze the business impact.

Similarly, the DOL has stepped up enforcement efforts on other labor laws regarding wage payment. These include the Walsh-Healey Public Contracts Act, which requires payment of minimum wage rates and overtime pay on federal contracts to manufacture or provide goods to the federal government, and the Service Contract Act, which demands payment of prevailing wage rates and fringe benefits on contracts to provide services to the federal government.

CLAIM COSTS

The stakes for retailers and restaurant owners hit with wage and hour or other discrimination charges can be high. A national restaurant chain that allegedly fired a waitress over changing her hairstyle recently settled its case for \$250,000. Countless other settlements range from the low thousands to millions of dollars. For example, a NERA Economic Consulting wage and hour study shows that some of the highest settlements in retail cases in the first three quarters of 2013 (which do not include defense costs) included:

- A fitness chain settling for \$17.5 million. More than 850 plaintiffs alleged that they were misclassified and denied overtime.
- A home service retailer settling for \$14.3 million. Plaintiffs maintained that the company violated both state and FLSA laws. They also asserted they were not paid minimum wage, were denied overtime, and that the company took improper deductions.
- A home remodeling company settling for \$12 million. Approximately 1,100 current and former employees allegedly were denied overtime, did not receive the proper meal and rest breaks, and were required to work off-the-clock during a six-year period.

Since 2008, the median settlement to resolve wage and hour cases has increased for all industries, including the retail sector, according to the NERA study. Although the average 2013 payment of approximately \$4.5 million was slightly below the average in 2012 and in line with the average in 2011, the median settlement during that time period rose. At \$2.8 million, the 2013 median settlement is the highest observed in any year since 2008, the report noted. The overall median for the January 2007 to December 2012 period was \$2.0 million. These costs, however, do not include defense costs, which can be substantial.

INSURANCE COVERAGE CONSIDERATIONS

Although companies will not be able to erase all of their EPL and wage and hour risk exposure, they can reduce some of the financial impact if they have effective risk management strategies in place. Risk transfer solutions, such as insurance, can help retailers and restaurant owners offset the financial burden brought by EPL and wage and hour claims.

Broad EPL policies will help to protect companies for claims alleging discrimination, harassment, and wrongful termination. However, wage and hour claims are generally fully excluded in EPL and directors and officers (D&O) liability policies.



There are new standalone insurance policies specifically designed to cover wage and hour liability. These generally include coverage for violations of federal (for example FLSA) and state wage and hour laws, such as:

- Failure to pay overtime.
- Failure to provide or pay for meal breaks and rest periods.
- Misclassification of employees brought under the FLSA.
- Violations of state wage and hour laws.

Standalone insurance policies reimburse companies for defense costs, settlements, and judgments for actual or alleged violations of the FLSA or similar laws. Several Bermuda markets can provide primary and excess capacity, and some additional capacity may also be available in London.

Another approach that may be appealing to retailers and restaurant owners is a blended insurance solution of EPL and wage and hour coverages. Increasingly, insureds have pursued this approach to address their EPL and wage and hour insurance needs and reduce the cost of purchasing both coverages separately.

Risk management tools are also available that can help companies identify and address areas of potential exposure under the FLSA. Specifically, the solutions can provide a roadmap for assessing classification of exempt versus non-exempt status under the FLSA. Assessing employee classifications and self-correcting errors and inconsistencies can significantly reduce compliance risks and ultimate penalties, especially in light of impending amendments to FLSA regulations.

For more information on this ongoing exposure for retailers and restaurant owners, contact your Marsh representative.

This briefing was prepared by Marsh's Retail/Wholesale, Food & Beverage Practice, in conjunction with Marsh's FINPRO Practice, and Mercer, a Marsh & McLennan Company.



Marsh is one of the Marsh & McLennan Companies, together with Guy Carpenter, Mercer, and Oliver Wyman.

This document and any recommendations, analysis, or advice provided by Marsh (collectively, the "Marsh Analysis" are not intended to be taken as advice regarding any individual situation and should not be relied upon as such. The information contained herein is based on sources we believe reliable, but we make no representation or warranty as to its accuracy. Marsh shall have no obligation to update the Marsh Analysis and shall have no liability to you or any other party arising out of this publication or any matter contained herein. Any statements concerning actuarial, tax, accounting, or legal matters are based solely on our experience as insurance brokers and risk consultants and are not to be relied upon as actuarial, tax, accounting, or legal advice, for which you should consult your own professional advisors. Any modeling, analytics, or projections are subject to inherent uncertainty, and the Marsh Analysis could be materially affected if any underlying assumptions, conditions, information, or factors are inaccurate or incomplete or should change. Marsh makes no representation or warranty concerning the application of policy wording or the financial condition or solvency of insurers or reinsurers. Marsh makes no assurances regarding the availability, cost, or terms of insurance coverage. Although Marsh may provide advice and recommendations, all decisions regarding the amount, type or terms of coverage are the ultimate responsibility of the insurance purchaser, who must decide on the specific coverage that is appropriate to its particular circumstances and financial position.

Copyright © 2015 Marsh LLC. All rights reserved. MA15-13536 18477