TOP 7 EMPLOYMENT LAWS YOU ARE PROBABLY BREAKING

(or you are about to!)

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sculpture hospitality

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Employment law is dangerously complex. Managing a business with locations in multiple states means you have to follow different rules in different locations. The complexity is enormous and is compounded by the fact that these laws are constantly changing. **Let's take a look at some of the most commonly violated laws.**

Overtime laws

In most countries, a higher rate of "overtime pay" applies for any time worked in excess of eight hours. **In the United Kingdom,** however, the employer does not need to pay overtime pay and **in Germany,** overtime is compensated for with additional time off (extra pay is possible but it is not required). **In most Canadian provinces,** employers must pay 1.5 times the regular rate of pay when employees work more than 8 hours a day or a total of 44 hours in a week (but this varies depending on the province – it's only 40 hours a week in B.C.). **In the U.S.,** employers are required to pay at least 1.5 times the regular rate of pay for overtime. Overtime kicks in as soon as an employee works more than 40 hours in any given week.

Management vs. Non-management

However, U.S. law includes an important distinction between **management and non-management employees**. This rule is widely misunderstood and, as a result, many (maybe most) employers often violate this law. If you are paying your managers a salary **above $23,600 per year** (a proposed increase to $47,456 is currently being reviewed by the courts), you don't have to pay them overtime if they put in more than 40 hours/week. But you can't just call someone a "manager" and assume they will qualify. **The rules are quite specific about a number of requirements:**

- The **manager's primary duty must be managing**. Their primary duties must require their independent judgement about significant issues. For example, if you can boil their job description down to a checklist, they would not qualify
- They have to **direct the work of at least two other full-time employees** (or enough part-time employees that their hours add up to 80+ per week)
- The manager **must have a key role in hiring, promoting and firing other employees**

> *"**Unfortunately I've become all too familiar with this issue,"** states Karl Blatt, who runs the Sculpture Hospitality office in Hollywood, California. **"I would advise drawing up a written agreement, with their managerial duties clearly delineated, and more importantly, clearly distinguished from the job an hourly employee does (particularly if a promotion is involved).** If there is too much overlap with hourly duties, and they regularly work overtime, you're leaving yourself legally exposed (just ask Starbucks – or me!). The law calls for the majority of a salaried employees' work to be of an executive, supervisory nature and it can be very difficult to prove that's the case. **I'd also advise that if it becomes clear that your salaried employee is not performing up to standard, demote them back to hourly quickly and decisively;** otherwise he/she may actually start to contrive a misclassification claim, which regardless of the actual facts involved, will likely prove an expensive nuisance suit to deal with later".*

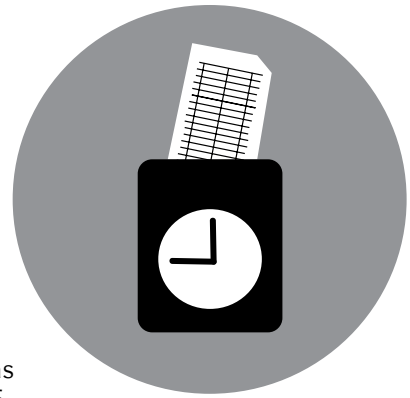
Owners and Managers are not allowed to take tips

In most jurisdictions owners and managers are **not allowed to share from tips earned by employees** serving customers. Sometimes establishments have a tip sharing policy whereby tips are shared between servers, kitchen staff, bussers and other employees who provided service to customers. In some jurisdictions, if a manager performs the same duties as a waiter or busboy for the entire shift, they could share the tip pool (but not if they also performed management duties during that shift).

Furthermore, employers who allow tips to be paid by credit card may not deduct any fees or cost associated with the credit card transaction. All **credit card tips must be paid not later than the next payday** after the date the customer authorized the credit card payment.

In California, there is a loophole to this law. If a restaurant adds a mandatory "service charge" to a bill, that is **not considered a tip** and this law doesn't apply. The restaurant can do whatever they want with the service charge. The owner can keep it all, give it to the wait staff, or share it with managers. The rationale is that the customer has a choice whether or not to tip for good service with the expectation that the tip will go to the serving staff. A service charge, on the other hand, is a mandatory fee that the customer has to pay regardless of service levels.

Employer must provide meals and rest periods



Usually requirements for breaks also exclude management (see "Overtime" above) and, again, **laws vary from place to place**. In California, for example, the requirements are very precise. Workers get a **thirty minute meal break for every five hours worked**; which has to be taken before the end of the fifth work hour; and must be paid if the worker is not permitted to leave the workplace. In addition, for every four hours of work, **employees get a 10-minute paid rest break**. Requiring your employees to check out for their rest break is illegal in California. Employers often get into trouble when their employees skip their breaks. In California, the employer is required to pay the employee an extra hour of pay for every day that this happened – even if the employee "forgot" or neglected to take a break without the employer's consent.

In 2012, "Brinker Restaurant Corp. v. Superior Court" ruled that the employer doesn't actually have to police their employees to make sure they take their breaks. **The employer has an obligation to provide uninterrupted meal and rest periods to their employees**," explains Todd Kinnear, an attorney at the Southern California firm of Gresham Savage, PC, who focuses on labor and employment law, "but they are not obligated to police their employee to ensure they take their breaks. The problem is that the employee can claim that they never got their breaks so I recommend that the employer requires its employees to at least clock-out for their meal period."

"If the employer knows an employee is working through their breaks, the employer does have an obligation to either stop it or pay the employee the extra hour of premium pay on top of the hours they worked. They can't just turn a blind eye to it," noted Kinnear.

Break requirements vary widely. For example Massachusetts only requires a half-hour meal break for shifts over six hours, but it is unpaid. And Texas doesn't require the employer to provide any rest breaks at all.

Employees must be paid for all hours worked

In most jurisdictions, that means **you have to pay employees for pre-shift meetings and prep, staff meetings, any training sessions**, even the process of clocking-out. Under federal law, attendance at training events or other meetings must be paid, unless all four of the following conditions are met: 1) the event must occur outside of the employee's normal work hours; 2) attendance must be voluntary; 3) the event must not be related to the employee's current job; and 4) the employee must not perform any work at the event.

You must pay employees for a minimum number of hours

This applies even if you send them home early. In California and British Columbia, for example, if an employee is sent home early, **they must be paid for half the scheduled hours but in no event for less than two hours** (one hour in Oregon). So if you had scheduled them for an 8-hour shift and you have to send them home because of a power-outage, you are required to pay them 4-hours.

In some places there is a simple 1-hour (New Jersey), 2-hour (Connecticut, New Hampshire, Rhode Island), 3-hour minimum (Massachusetts, Alberta).

In New York, employees shall be paid at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage.

And in some states there is no minimum hour requirement at all (Washington State).

Employers cannot make employees pay for business-related losses

In the restaurant business, that would mean that **you cannot make any pay deduction for customer walk-outs, register shortage, order mistakes and other business related losses**. It also includes breakage, or loss of equipment. "You are also required to reimburse an employee for mileage if they are required to drive somewhere as part of their work duties an issue that is coming up more and more often", notes Kinnear.

There is an **exception if the employer can prove that the employee was dishonest or negligent.** For example, a bartender's pay could be reduced if the bartender stole the proceeds from a drink, and the employer can prove it, or if the bartender used the open liquor to ring up every drink in violation of the bar's policies. But if the bartender's register is short because of an honest mistake, or a customer walking out a check, he cannot be made responsible for the shortfall.

Employer must pay for uniform and its maintenance

In many states/provinces, if you require your employees to wear a uniform, then **you must pay for the uniform and the cost of maintaining it if it requires special care**, such as ironing or dry cleaning. A uniform is usually defined as "apparel and accessories of distinctive design or color" (California Industrial Commission). So employers would not have to pay anything if they require wait staff to wear jeans and a plain white shirt. But they would have to pay for the shirt if they require one with the restaurant's logo.

Future Laws: Minimum Wage/Scheduling

Seattle seems to be at the forefront of two ominous developments. In 2014, Seattle slated a minimum wage that will reach **$15/hour by 2021**. This year Seattle **implemented a new worker scheduling law that requires employers to post schedules two-weeks in advance and pay additional** "predictability" wages when schedules are changed. Employers must also **maintain three years' worth of records documenting their responses** to employee requests for scheduling changes. Right now the law only applies to employers with 500+ workers.

Both $15 minimum wages and inflexible scheduling laws are uniquely challenging to the hospitality industry. Most hope that Seattle's mayor is wrong when he calls them a "model for the rest of the nation to follow".

About the Author: Ian Foster joined Sculpture Hospitality in 1991, and has spent the past two decades helping his clients eliminate over-pouring, mis-ringing and theft from their bar operations.

He has written extensively about improving bar profitability for industry publications such as Santé magazine, The Publican, numerous restaurant association publications from coast-to-coast as well as Robert Plotkin's Bar Profits newsletter. Ian is also the publisher of Sculpture's Booz Nooz.

Together Ian and the California Restaurant Association (CRA) successfully fought to change California's sales tax laws which the CRA estimates will result in "yearly savings of $3 million to $4 million dollars for CRA members"

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BONUS An exclusive interview conducted by Ian Foster

Termination – Interview with Todd Kinnear

Perhaps no other issue is as dangerous as termination. Complex laws and disgruntled ex-employees can be a legal mine-field. We asked Todd Kinnear, an attorney at the Southern California firm of Gresham Savage, PC, who focuses on labor and employment law, for some advice on how a restaurant or bar owner can avoid legal trouble when terminating an employee.

Todd Kinnear serves as senior counsel in Gresham Savage's labor & employment and litigation practice groups. He has broad and extensive experience advising and representing companies and corporate officers, directors and other individuals in complex employment and business related disputes. He represents clients before state, federal and appellate courts, and in a variety of arbitration and administrative forums.

Ian Foster, Sculpture Hospitality (SH): Where do owners get themselves into trouble when firing an employee?

Todd Kinnear (TK): They get into trouble when dealing with an employee who is a member of a protected class. That means that they are legally protected from discrimination based on race, color, religion, age (over 40), sex, pregnancy, citizenship/origin, family status, disability, or they are a veteran. I often see problems when that employee has been given a series of positive performance reviews and then is suddenly terminated. When I get a case where an employee is claiming they have been improperly terminated, the first thing I want to see is their employment file. What is in there that shows that this employee was a problem?

Employers get into trouble when there is an "adverse employment action" (meaning, for example, a termination, suspension, or demotion) within a relatively short time of some form of "protective activity" (such as pregnancy or disability leave, complaints regarding harassment or working conditions, etc). For example, problems can arise if you fire an employee for tardiness shortly after she returns from pregnancy or disability leave. This is especially troublesome when there is no documentation in the employee's file demonstrating there were issues before the protective activity. . A plaintiff's lawyer will say, "the employee was never told there was a problem until they returned from pregnancy/disability leave so, clearly, the leave was the real reason they were fired."

Nine times out of ten I get an employment file that has absolutely nothing in it except medical leave and, two months later, a termination - that makes it hard for the employer to say "no, this guy has been a problem forever." Then it comes down to who does a jury like or believe and very often it's not the employer; juries are generally very pro-employee. Its David vs Goliath with the employer as Goliath – and juries want to cheer for David.

SH: Most bars or restaurants don't have formal employment files. Is that necessary?

TK: It doesn't need to be formal. Even if you just have a discussion with an employee about an issue, I would still recommend writing yourself a memo with the date and the details and sticking that in the employee's file.

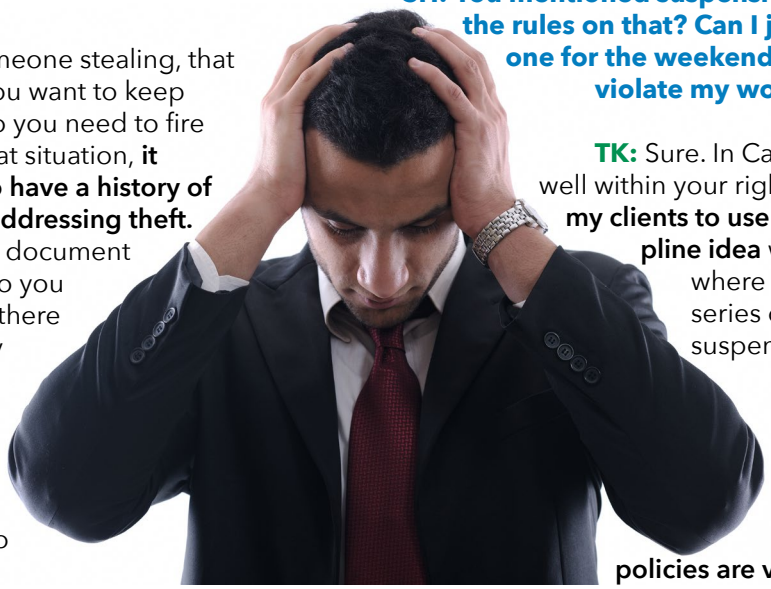
I recommend using a **"progressive discipline" approach and documenting those steps.** That means that when there is a problem, the first step is to give the employee a verbal warning (and note it in their employment file). If the problem continues, then a written warning would follow (which you get the employee to sign). The third step might be a suspension. That way there is a clear understanding that there is a problem, and appropriate documentation. The final step would be termination if the problem continues.

At the same time, however, I do not recommend employers, commit to always following a progressive discipline approach in any handbooks or other policy documents because certain workplace rules, such as stealing or threating violence, may require immediate termination.

If we have documented evidence going back months or years where we can show that the employer worked with the employee to give him or her a chance to correct any issues prior to termination, that takes a whole lot of wind out of the plaintiff's sails. We can show that, look, she wasn't terminated because she is pregnant, or because she complained about her working conditions, it is because of something that the employee did that we have been trying to help her correct for a year.

SH: What if the owner catches an employee stealing? Do we have to have months of documentation?

TK: If you've caught someone stealing, that isn't usually someone you want to keep around your business so you need to fire them immediately. In that situation, **it wouldn't make sense to have a history of progressive discipline addressing theft.** The key is being able to document the theft. Who saw it? Do you have video cameras? Is there independent third-party evidence? The more evidence you have that can corroborate the legitimate basis of the termination, then the easier my job is going to be if there is a lawsuit.



SH: What if the owner sees them not ring up a drink or take money from the register but there is nobody else that saw it?

TK: The advice I would give to the owner is to document it. Write a memo to the file saying here is what I saw and when it happened; and here is who was around and what they said about it. You want to be able to say "here is a document I created right after this happened", I called the employee in and they denied it but I saw it with my own two eyes.

In many states, employment is "at-will," meaning that anyone can be fired for any reason, or no reason, just as long as it is not an illegal reason. So you cannot fire someone just because they are pregnant or Latino or because they complained about unsafe working conditions, or another protected activity. But you can fire somebody for, example, doing a poor job.

SH: When you add something to an employee's file, do you have them sign it?

TK: Usually yes. When I create forms or disciplinary documents for my clients, I always include a spot for the employee to sign along with a section where they can add comments. So they might write "yes, I was late again and I am taking the following steps to make sure it doesn't happen again…" **It's a good idea to give them the opportunity to tell their side of the story** but the bottom line is that you have that in a file in the event of a lawsuit at a later date.

SH: You mentioned suspension earlier. What are the rules on that? Can I just suspend someone for the weekend if they continually violate my workplace policies?

TK: Sure. In California at least, that is well within your rights. **I would counsel my clients to use the progressive discipline idea** we spoke about earlier where you start out with a series of warnings. But a suspension is legal, again as long it is not based on protective activity.

I write or revise a lot of **employee hand books so that the policies are very clear.** Employers sometimes get in trouble when their handbook says that they follow a progressive discipline policy but then they fire an employee immediately for whatever reason without following the steps. The employee then points out that they didn't get a written warning first or suspension and the employee claims that the company is violating their own internal written policy. When I write an employee handbook, I am very careful about those kinds of things to make sure that the employer has some flexibility if there is a serious issue.

SH: Does an employee handbook limit your ability to fire someone on at "at-will" basis?

TK: No, not if you draft the handbook the right way. My handbooks always include a section where the employee specifically signs confirming they are at "at-will" employee and that nothing in the handbook changes that employment relationship. The handbook is not creating a contract – as long as it is drafted properly.

SH: So age discrimination is illegal but what if the job entails some physical activity, like climbing a ladder to reach a stockroom shelf, and an employee becomes physically unable to do that?

TK: If they are unable to perform an essential function of their job, **you can terminate them as a result of that inability.** You aren't terminating because of their age; you are terminating them because they have to be able to climb the ladder to do their job. But the law requires that an employer make a "reasonable accommodation" for the employee, if possible. If the accommodation creates "an undue hardship" for the employer, it isn't required. For example, if an older employee can't climb the ladder because of his or her age, is there someone else in the workplace that could easily climb the ladder from time-to-time? If so, doing so would likely be a required accommodation. On the other hand, if ladder climbing is so important that you'd have to hire an additional employee to do it, then that would likely be an undue hardship and probably would not be required.

SH: If I am thinking of terminating an employee, is it necessary to call my lawyer before-hand?

TK: No, but I am always happy if my clients give me a call to let me know so I can address these issues with them before it creates a problem. **We can often avoid a lawsuit, or be better prepared for one if the employee does sue, if we speak beforehand.** If the plaintiff manages to find a lawyer to take their case, even if the employer thinks they have a weak case, you never know what a jury is going to decide. And the liability risk can be really high because, even if the plaintiff is only able to get a small judgment, that makes them the "prevailing party." And under California and most federal laws a prevailing plaintiff is entitled to their attorney's fees. (Unfortunately, even if the employer wins, it usually isn't entitled to recover its legal fees). So all of a sudden an employer might face a bill for the plaintiff's legal costs. And I can tell you that plaintiff's attorneys often bill at $500-$600 per hour and can say they spend a thousand hours taking a case to trial. Now all of a sudden the employer has to pay half a million dollars for the employee's legal fees, plus the employee's damages (which can include back pay, future pay, emotional distress, and even punitive damages), and it still has to pay its own legal fees as well. That's why so many of these cases get settled early.

SH: Can I give a poor employee the worse shifts or do I have to treat everyone equally?

TK: That's a good question. **The fact is that an employer can get into legal trouble even if they don't actually terminate someone.** The law talks about "adverse employment actions" which can be anything from moving an employee to a less desirable office to a change in hours to a pay-cut. And if the employee can convince a jury that the adverse employment action was done because of a protected activity, that's where an employee can get themselves into trouble. You do not have to treat everyone equally as long as you are not differentiating based on the protected categories.

SH: Another tricky area for the hospitality industry is the whole issue of sexual harassment. What advice do you have for restaurant and bar owners?

TK: There are different types of sexual harassment. There is "quid pro quo" where a manager says, for example, I'll give you this job or this shift if you go out on a date with me. That's illegal under California and federal law. There is another type of sexual harassment, referred to as a "hostile work environment." For example, telling sexual or racial jokes in the office may suffice. Hanging an obscene or sexually provocative calendar in the manager's office could also create a hostile work environment.

What I think a lot of employers don't know is that it doesn't have to be a manager or owner harassing an employee. It could be one server harassing another and still create a hostile work environment, for which the employer can be held legally accountable. The company could still be on the hook for it if they knew about it (or should have known about it) and failed to take immediate steps to prevent it. The same thing is true if one of your customers is harassing one of your employees by touching him or her or continually asking them to go out on a date – the company could be at risk of a hostile environment if they knew about it, and failed to correct it.

SH: Where is the line between flirting and harassing?

TK: There is no bright line rule. The question is whether it is unwelcome behavior of a sexual nature. If the server is happy flirting with a customer to get a larger tip, then it is not unwelcome and does not constitute a hostile work environment. The question of whether it is welcome or not is usually left up to a jury to decide. Sometimes a bar or restaurant owner may be better off asking a customer not to return than fighting a sexual harassment lawsuit.