

TAKING STOCK

WITH SPOTLIGHT ON EPL AND WAGE AND HOUR, RETAILERS AND RESTAURANTS MUST BE VIGILANT



In legislatures, courtrooms, and boardrooms, sexual harassment, violations of state and federal wage and hour laws, and pay equity are topics that have recently been given significant attention. Given their unique business models, employment practices liability (EPL) and wage and hour (W&H) claims related to these issues can be especially concerning for restaurant and retail businesses. While risk management and insurance purchasing practices can help them avoid or minimize workplace litigation claims, retailers and restaurant operators must identify and understand these risks to ensure these strategies are effective.

SEXUAL HARASSMENT

The #MeToo and #TimesUp movements have shed new light on sexual harassment in the workplace by raising awareness of the issue and empowering victims to come forward. As more people — predominantly women — speak out, the number of actual claims and formal complaints are expected to rise. This is a true concern for the restaurant and retail industries: According to [an analysis of EEOC data by the Center for American Progress](#), more than a quarter of all sexual harassment claims from fiscal years 2005 to 2015 stemmed from the accommodation and food services and retail trade industries. Harassment claims cost US companies more than \$160 million in EEOC settlements in 2016 — before the #MeToo and #TimesUp movements. We can only expect this number to grow in the coming years, which could have devastating financial consequences for some retail and restaurant businesses.

WAGE AND HOUR

Retail and restaurant businesses often unintentionally fail to comply with federal and state wage and hour laws, leading to significant financial exposure. Damages are often doubled if a wage and hour violation is discovered. Such violations include misclassification issues and noncompliance with complicated state and federal requirements regarding, among other items:

- Overtime calculation.
- Lawfulness of compensatory time off.
- Meal and rest breaks.
- Tip pooling.
- Minimum wage violations.
- Predictive scheduling.
- “Off the clock” work.



ADA CLAIMS STILL TRENDING

While sexual harassment, pay equity, and wage and hour claims are gaining significant attention, claims for noncompliance with the American Disabilities Act (ADA) continue to mount against retailers and food industry companies that have allegedly failed to make their websites accessible to disabled persons. In June 2017, a federal court ruled that a grocery store violated Title III of the ADA because its website was not accessible to people with vision-related disabilities.

Although not binding in other courts, the decision is significant because it is the first decision to hold that a “public accommodation” violated Title III by having an inaccessible website, and because the court adopted the Web Content Accessibility Guidelines 2.0 as the accessibility standard that the grocer must meet, suggesting that this will be the de facto standard for website accessibility in the US. The court did not consider the \$250,000 cost of making the website accessible to be an undue burden, and held the grocer responsible for accessibility of its entire website, even those sections operated by third parties.

EPL policies that provide third-party liability coverage will typically provide at least defense expense coverage for these kinds of ADA website non-compliance claims. The costs incurred to bring a website into compliance, however, is generally not insurable. To date, settlement amounts for ADA website claims have been relatively small. But as more plaintiffs choose to pursue litigation, businesses will likely see total loss amounts in excess of policy retentions.

Across all industries, wage and hour claims are increasing in frequency and severity. Fair Labor Standards Act (FLSA) collective action filings have increased by more than 450% in the last fifteen years, according to [Seyfarth Shaw LLP](#), continuing to significantly outpace all other types of employment-related class action filings. The value of the top ten FLSA settlements in 2017 totaled almost \$525 million, a 13% increase over 2016, and more than double the total in 2014. The frequency of state claims in California and other states has also increased sharply.

Retail and restaurant industries have not been spared from this trend. In May 2018 alone, the Department of Labor’s Wage and Hour division fined at least five separate restaurant or retail businesses in excess of \$100,000 for back wages and penalties. And in June 2017, a national restaurant chain was fined \$1.45 million by the City of Los Angeles for failing to pay 37 employees minimum wage, in what the company maintains was a payroll error amounting to \$5,400 in back wages that it eventually paid once the error was discovered. The issues in all of these cases had a similar theme: failure to pay correct wages for all hours “worked.”

PAY EQUITY

As men generally continue to dominate managerial positions in the retail and restaurant industries, these businesses are not immune to pay equity claims. In the retail industry, female salespersons make 70% of the wage of their male counterparts, according to [Bureau of Labor Statistics data](#). In the restaurant industry, “women make less than men in every restaurant occupation except for dining room attendants/bartender helpers, where they make roughly the same,” according to the [Economic Policy Institute](#). Disparities also exist when race and ethnicity are taken into account, according to the same data.

The national conversation on pay equity stemming from the #TimesUp movement and the increase in claims relating to this issue have prompted a growing number of states and localities to take action. New York City, Maryland, Philadelphia, Massachusetts, Oregon, and California have all either passed laws or have bills currently pending which seek to eliminate pay differentials on the basis of sex and, in some instances, other protected categories. Many of these laws impose a “comparable work” (rather than “equal [or the same] work”) standard to ensure equal pay across different jobs and prohibit employers from inquiring about an applicant’s prior compensation history.

Litigation is swirling around these issues, too. For example, a class action consisting of female sales associates has been filed against a retailer with 22 US stores for allegedly requiring female sales associates to bear the cost for company-branded clothing to comply with the company's dress code. That same retailer allegedly provides male sales associates with a \$12,000 annual allowance to adhere to the dress code.

Laws and litigation aside, some retail and restaurant businesses are addressing pay equity as a corporate social responsibility initiative and to promote diversity and inclusion. Some have received positive news coverage recently for instituting transparent pay practices that ensure equal pay for equal jobs.

ADDRESSING AND MITIGATING EXPOSURES

Just as sexual harassment, wage and hour compliance, and pay equity are multifaceted challenges for the restaurant and retail industries, the approaches to identifying and addressing these challenges are also complex.

All employers should consider risk assessments and internal audits of their employment practices. In conducting audits, employers should consider the following:

- An audit should be a thoughtful process that puts the timely issues of today into context — highlighting how these issues affect business operations, and, at the same time, how business operations affect these issues.

- For pay equity audits, strongly consider involving an attorney so you can look at your organization's pay practices under the cloak of attorney-client privilege.
- When auditing wage and hour risks, consider the topics that plaintiff's attorneys are focusing on, including uniform requirements, misclassification issues, meal and rest break issues, tipping policies and practices, and other minimum wage issues.
- When addressing and preventing sexual harassment claims, employers should review existing policies to ensure they comply with legal requirements and reflect model policies. Closely review EEOC guidelines regarding harassment policies and training; these guidelines frequently drive legislation, so understanding them and following their recommendations are important. Also, management and non-management training regarding sexual harassment is recommended for all employers (and may even be required in some states). Such policies and training can help both prevent claims and serve as a defense in the event a claim is brought.
- Pay special attention to how your organization conducts investigations regarding employee complaints. Frequently, inadequate investigations are the subject of retaliation claims. Flawed or cursory workplace investigations can also reduce employees' faith in the process and prompt them to seek help from attorneys, fair employment practices agencies, or other outside entities.





While preventing claims is always the best course of action, insurance can enable retailers and restaurant owners to offset the financial burden brought by EPL and wage and hour claims. Increasingly, insureds are purchasing blended insurance solutions that include both EPL and wage and hour coverages. In addition to reducing costs, this helps reduce gaps in coverage, since wage and hour claims are generally fully excluded in EPL and directors and officers liability policies.

The retail and restaurant industries are laden with employment risks that are inherent to their business models. Ignoring or not fully understanding the financial and reputational implications of any of these risks could have devastating effects on your business. Be sure you're investing in the right services and products to protect your business from irreparable harm caused by EPL and wage and hour claims.

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