Steps help hotels minimize joint employment liability issues

BY ARTHUR CHINSKI AND RUTH L. SEROUSSI
HM COLUMNISTS

As discussed in our article in the Dec. 19 issue, a significant issue facing the hospitality industry is who is the employer—is it the owner or the manager, the franchisor or the franchisee, the client or the contractor—and thus, who has the liability for employment claims? Many hotel owners these days are real estate investment trusts, private funds, insurance companies and other institutional owners that muddy the dividing lines—and it's changing the legal landscape.

The trend is to hold multiple parties accountable, not only for their own employees, but also for the employees of their contractors, franchisees and others with whom they do business. This increased accountability results from an apparent shift in public policy, and the corresponding expanding definition of and greater reliance on "joint employer liability."

Previously, we discussed recent National Labor Relations Board decisions holding that if an employer exercises "indirect control" over working conditions or if it has "reserved authority" to do so, it is the joint employer, even over a staffing agency's employees. We also mentioned new statutes like California Labor Code Section 2810.3, which essentially holds employers strictly liable for the wages and workers compensation coverage of its labor contractor's employees.

There are steps, however, that hotel owners, franchisors and managers can take in the face of expanded joint employer liability.

For example, owners, franchisors and managers may consider the feasibility of reducing their control over the employees of their contractors and franchisees. They may review and revise contracts to establish the requisite separation between entities, and provide for indemnification in the event of a finding of joint employment and resultant liability, in accordance with applicable law.

Owners, franchisors and managers may also wish to limit direction to product and brand quality protection to ensure "a standardized product and customer experience," while steering clear of codetermining matters governing the wages, hours and essential terms and conditions of employment for the employees of contractors and franchisees.

Avoiding the exercise of direct or indirect control over wages, hours or working conditions and staying away from providing directives to the contractor's and franchisee's employees concerning day-to-day operations, as opposed to overall general concepts, may also be key considerations.

Finally, a review of any "reservation of authority" or right to exercise direct or indirect control over wages, hours or working conditions should be undertaken with the object of operational eschewal, or at least softening or limiting any mandatory requirement that contractors or franchisees strictly follow your rules on employment practices or policies. **HM**

Arthur Chinski and Ruth L. Seroussi are attorneys with Buchalter Nemer in Los Angeles.