KATONA & MIR

ATTORNEYS AT LAW

WINTER NEWSLETTER

Issue #30 | January 2011

49 W 37th St | 7th Fl | New York, NY 10018 | P: 212.944.1529 | F: 212.553.7370

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BUSINESS & EMPLOYMENT LAW

New York State Department of Labor Issues New Regulations Imposing Systems for Sharing of Tips

The NYS Department of Labor (DOL) recently issued new regulations affecting employers and workers in the restaurant and hotel industries. Among other things, the new regulations, for the first time ever, address how restaurants should handle tips. Under the new rules, employers may require food service workers, including waiters, bartenders and bussers, as well as sommeliers and hosts (provided they are not managers), to participate in tip sharing or pooling. Employers may also set the percentage of tips to be distributed to each occupation. In addition, employers must provide written notice to workers of the establishment's tip policies. If an employer mandates tip sharing or pooling, they must keep records of the tips received and distributed and the records must be available to participants for review. The new rules also raise the minimum wage for tipped employees, from $4.65 to $5.00 an hour for food service workers and from $4.90 to $5.65 for service workers, such as coat check workers in restaurants or porters in hotels. A separate minimum wage applies to workers in resort hotels. Further, the new rules also require non-exempt employees (except commissioned salespersons) to be paid hourly rates of pay.

The new regulations went into effect on January 1, 2011. Employers have until February 28, 2011 in which to make the necessary changes, but the changes must be retroactive to January 1, 2011.

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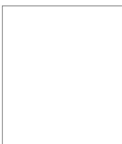

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BUSINESS & EMPLOYMENT LAW

RELIGIOUS DISCRIMINATION CASES ON THE RISE

Although Muslims represent less than 2 percent of the U.S. population, they accounted for approximately one-quarter of the religious discrimination claims filed with the Equal Employment Opportunity Commission (EEOC) in 2009. According to federal data, Muslim workers filed a record 803 claims in 2009, which is up by 20% from 2008 and up nearly 60% from 2005. The number of complaints filed with the EEOC in 2010 will not be announced until January, but it is expected that the number of complaints filed by Muslims will increase again. The EEOC has determined that many of the complaints filed by Muslim workers in 2010 have merit and have filed several noteworthy lawsuits on behalf of the workers. In August 2010, the EEOC filed a lawsuit against JBS Swift, a meatpacking company, on behalf of 160 employees who claimed that their supervisors and workers cursed them for being Muslim, they had blood, meat and bones thrown at them, and they were interrupted during their prayer breaks. The EEOC also sued the popular clothing retailer, Abercrombie & Fitch, in September 2010, for refusing to hire an 18-year old Muslim female because she wore a head scarf. In addition, the US Justice Department sued a suburban Chicago school district in December 2010 for denying a Muslim middle school teacher unpaid leave to perform a religious pilgrimage called Hajj. This case was forwarded to the Justice Department by the EEOC after it found reasonable cause that discrimination had occurred. For more information on religious discrimination in the workplace, please contact our office.

IMMIGRATION LAW

H-1B PORTABILITY RULE ONLY APPLIES TO NONIMMIGRANTS ALREADY IN VALID H-1B STATUS

The H-1B portability provisions of INA § 214(n) permit a beneficiary who "was previously issued" an H-1B visa to accept new employment once the prospective employer files a new H-1B petition on the beneficiary's behalf without having to wait for USCIS to approve the petition. Until recently, it was widely understood that this rule applied even in situations in which the foreign national previously held H-1B status, them switched to another visa status and was seeking to change back to H-1B status. At the end of 2010, however, USCIS clarified its position is that the H-1B portability rule only allows workers who hold valid H-1B visas at the time they seek to change employers. As such, employees who are not in H-1B status when an H-1B visa petition is filed on their behalf are not work authorized until USCIS approves their petition.

CIVIL RIGHTS LAW

ICE AGENTS MAY BE SUED FOR IMMIGRATION RAID

On December 16, 2010, a Connecticut federal judge ruled that Immigration and Customs Enforcement (ICE) agents and their supervisors can be sued for civil damages. The case stems from a series of raids conducted in Fair Haven, CT by ICE agents in the summer of 2007. The 11 plaintiffs in this case sued the federal government, the ICE agents who conducted the raid, and the agents' supervisors, claiming that ICE agents entered their homes without permission and arrested them without probable cause or arrest warrants, violating their 4th and 5th Amendment rights, as well as for state law tort violations, such as negligent hiring, training and supervision. The plaintiffs also claimed that they were targeted because they were Latino. In his decision, Judge Stefan Underhill denied a motion by the U.S. government that argued that ICE supervisors and directors could not be held responsible for the actions of ICE agents. This decision was part of a larger ruling in response to several motions filed by the government, which sought to have the plaintiffs' case dismissed. While some of the government's arguments were successful, Judge Underhill upheld the 5th Amendment equal protection claims and the 4th Amendment charges against four of the supervisors. In addition, the judge ruled that the plaintiffs can obtain additional discovery to support their claims for negligent training and supervision.

K&M HIGHLIGHTS FROM 2010

- K&M won a motion dismissing a lawsuit filed by a former consultant against one of our fashion industry clients. The consultant claimed that he was misclassified as an independent contractor, and thus should be paid back taxes and benefits received by employees. We succesfully argued that the consultant was unable to state a claim under the NYS Labor Law.
- K&M assisted companies in the restaurant industry who were prosecuted by the NYS Department of Labor for violations of the Wage and Hour law.
- K&M won a judgment on behalf of our client, a clothing manufacturing company, who sued a retail store in NYC for failing to pay for merchandise the retail store had received.
- K&M obtained an acquittal for our client in a criminal jury trial where our client was charged with various offenses under the Penal Law.
- K&M obtained a waiver under INA section 212(c) on behalf of our client, a longtime legal permanent resident, who was placed in removal proceedings following an aggregated felony conviction for drug trafficking.
- K&M obtained cancellation of removal under INA section 240A for multiple clients in removal proceedings. In one case, we requested that our client be placed in removal proceedings and then successfully argued that his deportation would result in hardship to his USC mother.
- K&M assisted a client, who was placed in removal proceedings due to three felony convictions, adjust her status to a permanent resident. We successfully argued that our client was eligible to adjust her status based on an approved Form I-130 petition filed by her USC spouse, who she was separated from, almost 15 years ago, and obtained a waiver under INA section 212(h) on her behalf.

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We are a New York City based law firm focusing on personalized, cost-efficient service for our clients. Our clients include entrepreneurs, corporations, mid- and small-size companies, restaurants, and individuals from all over the world. Our primary practice areas are Immigration, Business and Employment, Criminal Defense, and Litigation.

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49 WEST 37TH STREET | 7TH FL | NEW YORK, NY 10018
P: 212.944.1529 | F: 212.553.7370
WWW.KATONAMIR.COM