



[CLICK HERE FOR THE FREE IDC WHITE PAPER:](#)  
"Optimizing Resources, Lowering Costs  
in a Challenging Economy"



## Hotel Business Review

A weekly online journal of best practices in hotel management and operations

### Hospitality Law

#### Top Five Hazards of a Hotel's Economy-driven Employment Decisions

By [Michael C. Schmidt](#), Partner, Cozen O'Connor



Michael C. Schmidt

Times are tough. Employers in the hotel and hospitality industries are not immune from the impact that the weakened economy has on their personnel issues. In order to minimize the legal tsunami that can result from economy-driven employment decisions that are made, it is critical for hotel and hospitality employers to take appropriate steps to minimize potential legal exposure.

##### 1. The Trade Secret and Unfair Competition Dilemma

Hotel management and other key employees may leave in increasing numbers during an economic downturn, either voluntarily or involuntarily. Among the critical issues to be addressed is the fear that such former employees might unfairly compete or disclose trade secrets to the outside world, such as programs in development or hotel expansion forecasts. Employers should consider whether to seek the enforcement of non-compete and non-disclosure agreements, or, alternatively, whether to request that employees who remain with the company sign such agreements. On the flip side, in the event an individual who is hired has recently left another hotel, a prospective employer should determine whether the new hire is subject to any restrictive covenants with his or her former employer, and perhaps ask the new hire to certify in writing that no restrictions exist.

In many states, restraints on an employee's ability to compete remain disfavored except in certain circumstances when enforcement would prevent unfair competition. In a smaller group of states, restrictive covenants are statutorily prohibited. Before determining whether to bind an employee to a restrictive covenant, or to seek the enforcement of an already-existing agreement, an employer should:

- understand that restrictions generally will not be enforced against an employee involuntarily terminated without cause;
- make sure that all trade secrets are treated as such internally;
- tailor any restrictions to the particular position of the employee, demonstrating that a business need exists which justifies restrictions being placed on that particular position, rather than using a boilerplate agreement for clerical employees and senior hotel executives alike;
- include time and geographic restrictions that are reasonable and necessary to the hotel industry based on competitive concerns; and
- consider "safeguards" such as additional severance to be paid during the restriction period.

##### 2. The Medical Leave Dilemma

The stress caused by the troubled economy may lead to an increase in the number of employees whose productivity diminishes and who may seek a leave of absence. While workplace stress and anxiety may not be a protected condition alone, stress can manifest itself in other conditions that are protected under the various laws that govern leave-related issues, such as the Family and Medical Leave Act, and the Americans with Disabilities Act. Indeed, recent amendments and interpretive regulations will likely expand the number of employees that might have the right to take a medical leave. Hotel employers need to be particularly sensitive to leave issues as stress and related conditions of the workforce can in turn impact employee-guest relations.

Therefore, an employer should:

- understand the nature of its obligations under these laws, and particularly the expansive definitions under the law. One should not dismiss an employee's statements about a particular condition simply because of prejudice or an unsubstantiated belief that the condition is not "real";
- maintain and regularly communicate policies that set forth the employee's rights and obligations with respect to employment leave;
- engage in a dialogue with an employee who expresses a need for an accommodation due to a condition; and
- document the history of discussions with the employee, and any accommodations that are requested or offered.

##### 3. The Mass Layoff Dilemma

In the event of a large scale termination, or even the closure of one of several hotel locations, certain notice obligations may be triggered. The federal Worker Adjustment and Retraining Notification Act ("WARN") requires that 60-days notice of a mass layoff or plant closing be given in certain circumstances. WARN applies to hotels that employ 100 or more full-time employees, and generally requires that 60-days notice be provided of a mass layoff or hotel/facility closing, particularly when 50 full-time employees lose their positions and constitute at least 33% of the workforce at a single site.

States such as California, New York, Illinois and New Jersey have adopted their own version of WARN, and may be more expansive than the federal WARN in terms of the circumstances triggering notice requirements, and to whom the obligations apply. Therefore, hotels considering a large reduction-in-force, the closing of a particular location, or even certain types of relocations, should determine whether the planned event requires compliance with federal or state notification laws, including whether any recognized exceptions apply. Additionally, the reasons for the planned event should be documented, particularly from a timing standpoint, and all covered employees, whether temporary or permanent, part-time or full-time, should receive the proper notification.

##### 4. The Individual Layoff Dilemma

Where economic troubles may not warrant mass layoffs and full operational shut downs, the prospect of terminations on a smaller scale remains. Title VII of the Civil Rights Act, among other statutes, provides redress for individuals who claim discrimination, as well as retaliation as a result of an employer's decision.

The hotel employer should take certain steps when determining to terminate an individual's employment, particularly if that termination is part of a larger company-wide plan. Hotels should:

- perform an impact analysis to determine any effect on a particular protected group more negatively, documenting the reasons that certain individuals, positions, or departments have been chosen for elimination;
- comply with all COBRA-related requirements, and determine any state law obligations relating to the timing of final paychecks, and payment of accrued but unused sick or vacation time; and
- consider offering severance or other post-termination benefits to terminated individuals in exchange for a full release of potential claims, to the extent it is permitted under applicable law.

##### 5. The Expanded Workplace Boundary Dilemma

Occasionally, hotels may look to cut costs and reduce work schedules through measures other than individual or mass layoffs. For example, an employer may offer telecommuting and Blackberries as options to certain employees who will then no longer have to commute to the traditional "office."

One area of concern is with misclassifying hotel employees and failing to pay the required overtime premium for hours worked in excess of 40 hours per week. For example, the hours worked by an employee working from home or traveling with the benefit of a Blackberry or similar PDA, can no longer be monitored from a company standpoint, leaving the company susceptible to claims that the employee performed work in a given workweek for which he or she is entitled to overtime pay. While an employer may discipline an employee for violating policy relating to unauthorized overtime, an employee must nevertheless be paid for all work performed for the benefit of the company.

A hotel employer should be pro-active by:

- creating a well-defined overtime policy that is distributed and communicated effectively;
- saying what it means and meaning what it says. If the employer maintains a strict policy that employees cannot work after hours, then it should not create a "wink-wink" culture where employees feel as if they are expected to "check in" at all hours through their home computers or Blackberries, and are frowned upon for not immediately responding to an e-mail sent at 10:00 p.m.;
- verifying that the appropriate classifications are made and that the appropriate records are maintained supporting the proper wage classifications for employees; and
- considering instituting a supplemental documentation procedure for non-exempt employees, so that it can better account for the number of hours an employee later claims he or she worked.

Additional consideration should be given when giving hotel employees a Blackberry. Hotels might consider giving out Blackberries only to exempt employees, so there is less concern over the number of hours worked. Hotels could establish a policy that employees are not required or permitted to use the Blackberry outside normal working hours, and that the employee may be required to return the device if it is determined that the employee is using it contrary to the policy. What's more, the employer may want to evaluate whether to monitor, not the content of employee e-mail, but the amount of usage during certain hours.

*Michael C. Schmidt is a member of Cozen O'Connor and practices in the firm's Labor & Employment Practice Group. He concentrates in representing management in all facets of employment law. A substantial portion of Mr. Schmidt's practice is devoted to advising large and small businesses on how to avoid litigation and minimize potential exposure for claims that are made. He has specifically represented clients in the hospitality and restaurant industry in matters involving wage and hour, discrimination and employment contract disputes. Mr. Schmidt is an Adjunct Professor of Law at Touro Law School in Central Islip, N.Y., where he teaches a course on employment law. He frequently lectures and conducts seminars for human resources professionals, corporate executives, and lawyers. Mr. Schmidt can be contacted at 212-453-3937 or [mschmidt@cozen.com](mailto:mschmidt@cozen.com).*

Hotel Business Review

Hotel Newswire

Executive Meeting Place

Industry Events

Search

More articles by this author: