Hospitalitas

News and Views for Your Hospitality and Franchise Business

BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

Winter 2014

Marriott Fined $600,000 For Wi-Fi Jamming

Kris Anderson, 205.250.8324, kanderson@bakerdonelson.com

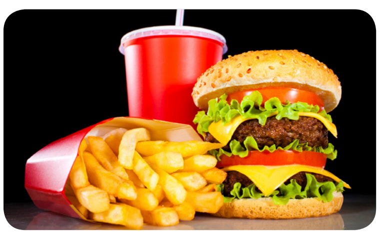
On October 3, 2014, Marriott International entered into a consent decree with the Federal Communications Commission (FCC) where Marriott agreed to pay a $600,000 fine for jamming conference guests' Wi-Fi hotspots at the Gaylord Opryland in Nashville, Tennessee.

Continued on page 2

Franchisor Liability for Franchisee Employment Decisions:

The NLRB's General Counsel Addresses the Move to Expand the Joint-Employer Standard, and Advice from the California Supreme Court on Avoiding Liability for Franchisee Employment Decisions

Adam Gates, 601.969.4661, agates@bakerdonelson.com



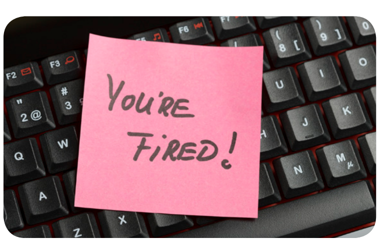
McDonald's and the Joint-Employer Standard

In July 2014, the National Labor Relations Board (NLRB) took the unexpected step of authorizing complaints against McDonald's USA, LLC and some of its franchisees for the franchisees' responses to employee protests. The Board took the position that McDonald's, as a franchisor, was a joint employer of the employees and could therefore be liable for the franchisees' employment decisions. (See more on this here.) The move riled many in Congress, several of whom wrote the NLRB's general counsel, Richard Griffin, demanding an explanation of the Board's position.

Continued on page 3

When Failure is Not An Option…Fire

Martha L. Boyd, 615.726.5652, mboyd@bakerdonelson.com



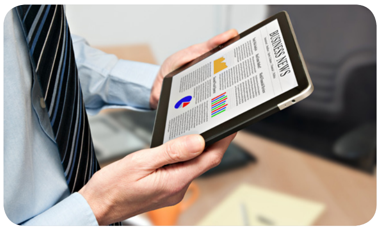
One of the riskiest things you do as an employer is terminate employees. Another one of the riskiest things you do as an employer is NOT terminate employees. And the latter can actually be riskier than the former.

Continued on page 7

Greetings From Hospitalitas

Hospitalitas is the Baker Donelson newsletter for our clients and friends in the hospitality industry – hotels, restaurants and their suppliers. It is published several times a year when we believe we can deliver first-class, useful information for your business. Please send us your feedback and ideas for topics you would like to know more about. True to our Southern heritage of hospitality, we'll work hard to make each visit with us something special and worth repeating.

Marriott Fined $600,000 For Wi-Fi Jamming, *continued*



In the consent decree, Marriott acknowledged that "one or more of its employees used containment features of a Wi-Fi monitoring system at the Gaylord Opryland to prevent consumers from connecting to the Internet via their own personal Wi-Fi networks." While employees were using these containment features to block guests' personal Wi-Fi, the FCC says that Marriott was charging consumers, businesses and exhibitors in the conference center rates ranging from $250 to $1,000 per device to access Marriott's own Wi-Fi network.

Travis LeBlanc, chief of the FCC's enforcement bureau, stated that "Consumers who purchase cellular data plans should be able to use them without fear that their personal internet connection will be blocked by their hotel or conference center. It is unacceptable for any hotel to intentionally disable personal hotspots while also charging consumers and small businesses high fees to use the hotel's own Wi-Fi network."

When asked by the press to explain whether its actions were the result of a rogue employee or an official policy, Marriott offered the following explanation: "Marriott has a strong interest in ensuring that when our guests use our Wi-Fi service, they will be protected from rogue wireless hotspots that can cause degraded service, insidious cyber-attacks and identity theft. Like many other institutions and companies in a wide variety of industries, the Gaylord Opryland protected its Wi-Fi network by using FCC-authorized equipment provided by well-known, reputable manufacturers. We believe that the Gaylord Opryland's actions were lawful. We will continue to encourage the FCC to pursue a rulemaking in order to eliminate the ongoing confusion resulting from today's action and to assess the merits of its underlying policy."

Although it is not immediately apparent which Wi-Fi management system was in use at the Gaylord Opryland, Ruckus Wireless lists Marriott as one of several major hotel systems that employs Ruckus's Zoneflex Wi-fi Management System. Zoneflex, like similar products produced by Cisco, Aptilo, Meru Networks, Antamedia and Aruba Networks, has the capability to interfere with "rogue" network access points. In general, rogue devices are defined as those that share a network operator's Wi-Fi spectrum but are not managed by the Wi-Fi network operator.

Cisco's documentation on rogue device management notes that "Containment is a method of using over-the-air packets to temporarily interrupt service on a rogue device until it can physically be removed. Containment works by spoofing de-authenticated packets with the spoofed source address of the rogue AP so that any clients associated are kicked off." Essentially, this capability works like a distributed denial of service (DDoS) attack. DDoS attacks in other contexts were one of the original reasons for the creation of the Computer Fraud and Abuse Act (CFAA), and remain one of the chief sources of liability under that statute today. Cisco notes in its Wi-Fi management documentation that rogue containment "can have legal implications when launched against neighboring networks. Ensure that the rogue device is within your network and poses a security risk before you launch the containment."

Continued on page 3

Marriott Fined $600,000 For Wi-Fi Jamming, *continued*

The Marriott consent decree noted that Marriott's liability arose under Section 333 of the Communications Act of 1934, which prohibits "willful or malicious interference with radio network signals," which the FCC has interpreted to include Wi-Fi networks. The commission has made enforcement of Section 333 a top priority in recent years, particularly against manufacturers and users of jamming devices. Two years ago, the FCC set up a tip line for people to report the sale of any type of signal jammers. The potential penalties are severe, including a $16,000 per day fine for continuing violations; and up to $112,500 for a single violation, seizure of the jamming equipment and even possible imprisonment.

Given the FCC's enhanced enforcement, as well as the potential for heavy fines under Section 333 and civil suits under the CFAA, operators of Wi-Fi networks like those in hotels need to be especially careful balancing network security issues with ensuring that security measures do not interfere with neighboring networks, as Marriott's did. It very well may be that Marriott's position is correct and the FCC is overreaching its enforcement mandate. Even if that is true, however, such a position is not worth the risk of an adverse enforcement action or a CFAA lawsuit, which could be brought as a civil class action. Hotel Wi-Fi operators should work hand-in-hand with their software providers and attorneys to ensure that any rogue device containment avoids legal liability.

Franchisor Liability for Franchisee Employment Decisions, *continued*

On November 4, Griffin responded to House Representatives John Kline (R-MN) and Phil Roe (R-TN) (here), and on November 10, he wrote Representative Todd Rokita (R-IN) (here), attempting to explain – and perhaps walk back – the Board's position. Both letters sent the same message: The Board asked whether it should continue to use the existing joint-employer standard or adopt a new one, and the general counsel's office responded with a proposed new test in an amicus brief. But there are currently no open cases in which Griffin's office is alleging "that an entity is a joint-employer solely under the test" proposed in the amicus brief. Griffin continued his attempt to placate the congressmen, assuring Kline and Roe that "my office is not seeking to have the Board overturn the line of cases that stand for the proposition that, where franchisors' indirect control over employee working conditions is merely related to the franchisors' legitimate interest in protecting the quality of their brand or product, such indirect control is insufficient to make the franchisors joint employers with their franchisees."

Griffin's description makes the Board's position seem more reasonable than its actions have indicated. But this could simply be lip service to calm a political storm. Only time will tell whether the Board will continue to follow established precedent or attempt to radically expand the joint-employer standard during the last two years of President Obama's second term in a way that implicates franchises across the country.

Continued on page 4

Franchisor Liability for Franchisee Employment Decisions, *continued*

Patterson v. Domino's Pizza, LLC

The California Supreme Court recently had an opportunity in *Patterson v. Domino's Pizza, LLC* to follow the Board and expand the joint-employer standard in the franchisor/franchisee context. It instead reached a very different result, and issued an opinion that provides a logical response to the Board's position and guidance for franchisors to avoid liability – either vicariously or as a joint employer – for franchisees' employment decisions.

Man Behaving Badly (Allegedly)

In September 2008, Sui Juris, LLC signed an agreement with Domino's Pizza Franchising, LLC to operate a Domino's franchise in Southern California. A couple of months later, a young woman named Taylor Patterson was hired at the store. Soon after she started, she reported that a male assistant manager was sexually harassing her each time they worked together. Patterson reported the harassment to the franchise owner and her father, who called the police and a Domino's customer service line. Patterson resigned soon after because she felt that her hours had been cut in retaliation for complaining about the harassment.

Patterson then sued the assistant manager, the franchise and Domino's for sexual harassment, retaliation and constructive termination under California's Fair Employment and Housing Act (FEHA), along with other claims. She claimed that Domino's was both her and the assistant manager's employer, that each defendant was an agent of the other, and that they all acted with each other's permission and approval to commit these violations.

The Trial Court Says Not Enough Control to Hold Domino's Liable

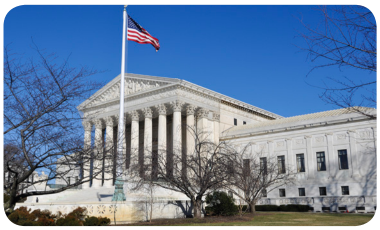
The trial court didn't buy it. Domino's moved for summary judgment arguing that it did not have an agency or employment relationship with the franchisee and thus could not be held liable for the assistant manager's conduct. Domino's did not downplay its involvement in operations or brand management, but instead argued that it had no input into the selection, management or discipline of the franchise's employees. The trial court agreed and found that Domino's did not exercise sufficient control over the day-to-day operations of the franchise to establish an agency relationship or to be the offending assistant-manager's employer.

The Appeals Court Says, "Not So Fast, My Friend..."

Though the Court of Appeals applied the same legal principles as the trial court, it reached the opposite decision. It decided that the franchise agreement and guidance provided by Domino's showed that the franchise lacked sufficient "managerial independence" to dismiss Domino's without a trial. According to the appeals court, a reasonable jury could conclude that Domino's had liability because, in sum, its standards addressed far more than food preparation, and Domino's Area Leader (the liaison between the company and the store) told the franchise owner: "You've got [to] get rid of this guy."

Continued on page 5

Franchisor Liability for Franchisee Employment Decisions, *continued*



The Supreme Court Provides Clarity: The Court's Holding
In a refreshingly direct and clear opinion, the California Supreme Court concluded that Domino's could not be held liable for the alleged harassment under either a joint employer or vicarious liability theory. The reason was this: "Domino's lacked the general control of an 'employer' or 'principal' over relevant day-to-day aspects of the employment and workplace behavior of [the franchisee's] employees."

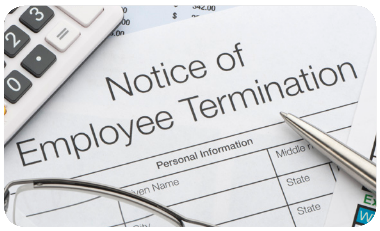
Before conducting its analysis, the court defended the franchise business model and its economic and societal benefits, providing a historical context that framed the decision well. (The opinion is well worth reading.) The court explained that appellate courts have historically focused on "the degree to which a particular franchisor exercised general "control" over the means and manner of the franchisee's operations." It then defined those boundaries, recognizing that a franchisor may impose "comprehensive and meticulous standards for marketing its trademarked brand and operating its franchises in a uniform way," so that, "[to] this extent, [it] controls the enterprise." But the court made the important distinction that, at the same time, the "franchisee retains autonomy as a manager and employer...It is the franchisee who implements the operational standards on a day-to-day basis, hires and fires store employees, and regulates workplace behavior." Thus, strict control over operations and brand management does not necessarily result in vicarious liability. It is the implementation and application of the franchisor's standards on a day-to-day basis that counts.

The Franchise Agreement
With the groundwork laid, the court looked to the franchise agreement. The agreement, as it should, disclaimed any agency relationship between Domino's and the franchisee. In fact, the franchisee had agreed to act as an "independent contractor," regardless of the training, support or oversight Domino's provided. The agreement also disclaimed any employment relationship between Domino's and the franchisee's employees. All employee-related responsibilities and duties were allocated to the franchisee. And, the court noted, "[N]othing in the contract granted Domino's any of the functions commonly performed by employers." Domino's had no right or duty to operate the store or manage the employees.

The Parties' Conduct
The court then turned to the parties' conduct to see just how involved Domino's was in operating the franchise. Though the evidence indicated that the parties had not followed the franchise agreement to the letter (Domino's had provided training materials on store operations, safety, driving and even orientation materials), the court found that the franchisee had sole control over hiring decisions and training regarding how employees should "treat each other at work." In fact, the franchisee had implemented his own sexual harassment policy and training, and he alone had "the authority to impose discipline for any violations."

Continued on page 6

Franchisor Liability for Franchisee Employment Decisions, *continued*



Domino's, on the other hand, did not have a procedure for monitoring or reporting sexual harassment complaints, and was not involved in addressing Patterson's allegations of harassment. The court also did not put as much stock as the appeals court did in the Domino's Area Leader's remark that the franchisee should get rid of the assistant manager. The court reasoned that the timing of the statement was not clear and that there was no accompanying threat if the franchisee did not do as the Area Leader suggested.

The Dissent

The court's opinion was only the majority opinion by one vote, with three of the seven justices disagreeing. The dissent focused on the position of strength held by Domino's over the franchisee, explaining that the "retention of control by the franchisor, enforced by regular inspections and the threat that a noncompliant franchisee will be placed in default, presents occasions for the franchisor to act as an employer by forcing the termination of problematic employees." They argued that this power, in effect, results in the franchisor having control over day-to-day personnel decisions, and a jury should have been allowed to determine whether Domino's exercised such power through its Area Leader.

Patterson's Practical Guidance

Patterson provides several reminders that will help franchisors avoid unnecessary exposure:

- First, critically review the franchise agreement.
  - Ensure that the franchisee retains the right to hire, fire, discipline and otherwise manage the store's employees.
  - Ensure that the agreement disclaims any employment relationship with the franchisee's employees.
  - Ensure that the agreement disclaims any agency relationship with the franchisee and its employees.

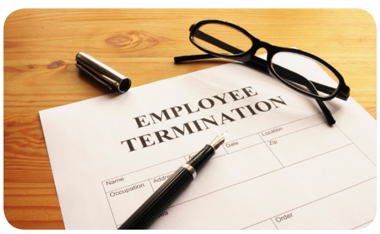
- Second, remember that control is everything.
  - Train franchisor employees who interact with the franchisee to stay out of personnel decisions. They should avoid any comments or correspondence related to a specific employee's performance, discipline or complaints.
  - Take a hard look at any training that the franchisor is providing directly to the franchisee's employees. Does it go beyond the brand promise of product uniformity and customer experience? Is the extension absolutely necessary? If not, consider modifying the training to limit its scope.
  - Critically consider all training provided to the franchise owner. Does it stray into managing employees? Are you imposing employment practices or policies that the franchisee must follow at the peril of the franchise, or are you creating an atmosphere where the franchisee subjectively believes they must be followed at the peril of the franchise?

Continued on page 7

Franchisor Liability for Franchisee Employment Decisions, *continued*

- Third, it may be better to terminate a franchise agreement or buy it out rather than to attempt to exercise more control of the franchise.
  - Carefully consider whether any documentation provided to the franchisee could be construed as imposing control over employment decisions. Careful management of a brand and business model does not make a franchisor liable; but demanding certain employment practices in the franchised workplace could open the door to liability exposure.
  - Train franchisor employees, particularly field representatives, to focus on compliance with standards related to performance and representation of the brand instead of getting involved in managing the franchisor's employees. Find an exemplary franchisee for workplace management and employment practices, and use them at franchisee events or on-line as a resource for other franchisees.

When Failure is Not An Option…Fire, *continued*



Underperforming employees and those who do not follow your rules and policies can be a drain on your entire organization. They can damage morale (because their co-workers see them getting away with bad behavior and emulate them); they can hurt your reputation (because of poor customer service); and they can undermine your middle managers (who may feel challenged and unsupported by a senior management reluctant to act). More importantly, allowing one employee to flaunt your rules or to consistently perform in an unsatisfactory manner sets a bad precedent: it's hard to discipline one employee when you don't discipline another, without giving the disciplined employee a reason to allege discrimination.

But how do you terminate without risking a lawsuit? You can't – employees can always sue. But there are ways to set yourself up for success, so employees will be less likely to sue, and if they sue, you are more likely to win. The steps you should take depend on the reason for the termination.

Terminating for Performance Issues

There are generally two reasons to discharge an employee: poor performance, or violation of a rule/policy. Performance terminations are trickier because performance is generally subjective. But they can be defensible as long as you have built a record that shows that you counseled the employee (ideally, on multiple occasions) and made clear to the employee that failure to improve would result in his or her discharge. If you're planning to terminate an employee for performance issues, oral counseling probably isn't sufficient. You want a written record – something that shows an outsider (like, say, the EEOC or a jury) that you told the employee how his performance was substandard, you told him how it had to improve, and you warned him of the consequences if it didn't. Employers frequently indicate that, despite

Continued on page 8

When Failure is Not An Option...Fire, *continued*

having no written discipline in an employee's personnel file, that the employee "knew" that his performance was bad. That may very well be true, but if there's nothing in writing, that employee is going to selectively forget the 15 very stern but undocumented discussions you had with him and claim he was terminated with no warning.

Avoid these difficulties by making sure that before you terminate an employee, you have written documentation indicating that you counseled the employee, that the employee acknowledged the counseling (i.e., have the employee sign the counseling statement), and that the last written counseling clearly communicated to the employee that continued lack of improvement would result in termination. Should a lawsuit make it that far, what you want to present to a jury is that you clearly communicated to the employee the expectations for his job, that you clearly communicated his failings in the job, that you clearly communicated the need to improve, and that the employee did not seize the opportunity to do so within a reasonable time. Thus, for a performance-based termination, documentation is key.

Terminating for Rules Violations

Successfully terminating for a rule/policy violation requires making sure you've conducted a thorough investigation into the incident without pre-judging the result. Let's say you own a hotel, and your front desk clerk/night auditor was reportedly asleep when a guest came to the desk to ask for towels. Would you fire the employee based solely on the guest's accusation? Of course not – instead, you'd investigate the situation. You'd pull footage from the security cameras to see if the desk clerk was asleep, or if the cameras weren't focused on the desk clerk, to see if other cameras picked up areas where the desk clerk should have been patrolling and wasn't. You'd speak to other employees on the same shift. You'd check the desk clerk logbook to see if there are long periods of no entries where you would expect to see some entries. And you would talk to the desk clerk himself and ask him if he was asleep. Sometimes an employee will make a damning admission and sometimes he will tell such a fantastical story that he cannot be believed, but either way, asking the accused employee for his side of the story is always desirable and often helpful.

Let's say at the end of the investigation, you still aren't sure, but you strongly feel that the desk clerk was asleep. The desk clerk didn't admit to being asleep, and the camera over the front desk was broken. You can still reach a reasonable conclusion that he was asleep based on other factors, but you need to be able to articulate why it is you credited the hotel guest's story over the employee's. That way, if you ever have to explain (to a jury, for example) why you terminated, your reasoning makes sense. In the hotel story, you might explain:

> The hotel guest who reported the desk clerk asleep was well known to us; he stays with us regularly and has on several occasions been a reliable witness to incidents with other guests and other employees. He said the desk clerk was asleep when he came into the hotel at 1:24 a.m. Although the video camera over the desk that night was broken, footage from other cameras in the lobby show no sign of the desk clerk between 12:30 and 1:40 a.m., and he is supposed to walk to other areas to do checks

Continued on page 9

When Failure is Not An Option…Fire, *continued*

> during those hours. When I asked the desk clerk if he was sleeping, he said he was not, but stated that he may have 'closed his eyes' for a few minutes because he had a headache that night. The front desk log had no entries between 12:15 and 1:40, and that was the only period when there were no entries on an otherwise very busy night.

A solid investigation and a well-reasoned decision will go a long way toward a defense for wrongful termination.

In addition to conducting an investigation that includes talking to the accused employee, make sure that termination is consistently imposed for the infraction. If you terminate for sleeping on the job only on some occasions and not on all, you're going to have a hard time explaining to the jury why it was a terminable offense in this case but not in others.

And finally, if you're going to terminate for a rule/policy violation, that means that the violation was, by definition, serious. A serious violation warrants immediate action. You cannot allow someone to violate a rule that you believe is a terminable offense and not act for two weeks while you're trying to fill their position. If it's serious enough to warrant termination, then you should carry out the termination swiftly. Don't forget that you can always put the offending employee on a paid leave while you're investigating – that way, even if it takes you a few days to investigate, the employee who is accused of, say, molesting a hotel guest isn't given the opportunity to continue the misconduct or to intimidate a potential witness while you investigate.

Terminating an employee is never pleasant but making these simple, but important, steps a consistent part of your policies and procedures can minimize your legal risk if you are ever sued after a termination, whatever the reason.

See You at the IFA Conference in Las Vegas!

We look forward to seeing you at the IFA 2015 Annual Conference February 15 – 18 in Las Vegas. Come see Baker Donelson at booth **#722** for a sweet treat and a sneak peak at our new Franchisor Toolkit. The Toolkit automates the transaction document drafting, compliance and franchise sales communication processes, giving franchisors an easy way to track transaction documents and communications, and to assure that records demonstrate compliance with regulatory requirements. That way, your management team can focus on running and expanding your franchise business.

This cost-efficient tool automates record-keeping as well as organizing and storing all the franchise documents as they are created. The system links all related files in an easy-to-access and shareable environment. No matter where team members reside or work, key documents are available in a virtual world, for instant review in a password-controlled access system. In addition, the toolkit does not require any investment in specialized hardware or software.

Continued on page 10

See You at the IFA Conference in Las Vegas!, *continued*

Acting as a "virtual" franchise administration resource, the Franchisor Toolkit will help you:

- Track and maintain state filing disclosure documents and Item 23 receipts
- Access real-time updates on registration status and maps of go/no-go states
- Create, store, track and quickly retrieve transaction documents and franchise forms
- Avoid missing important compliance deadlines (through email reminders)
- Reduce the cost of document assembly and production in the event of litigation or sale
- Avoid the surprise of a forgotten document that affects the outcome of a dispute or a decision

Whether you are an established, large-scale franchisor, a mid-sized brand hitting a growth spurt or a start-up concern, the Franchisor Toolkit is scalable to meet your unique needs and can free up internal resources so your management and legal team can concentrate elsewhere. Multi-system franchisors will appreciate the record standardization the ToolKit provides, so all systems use the same platform.

To schedule an appointment for a private demonstration of the Toolkit, either at the IFA convention or another convenient time, please contact Meredith Williams at mlwilliams@bakerdonelson.com or 901.577.2353.