

Employment Laws Update

Understanding these five issues will ensure your business' labor force is within federal compliance.

BY JAMIE ADAMS, IAN MACDONALD AND CHUCK BIRENBAUM

A strong workforce — in the vineyard, cellar and tasting room — is one of the most important aspects of running a winery. Workers help provide customers with a unique experience, including an outstanding product and first-rate service. But labor and employment issues can cause headaches and liabilities for an unsuspecting winery owner. Employment laws are constantly changing, both at the federal level and in heavily regulated states like California. Wine industry businesses should consider the following five common issues to decide whether to seek additional guidance on current workplace regulations.

WHITE COLLAR EXEMPTIONS

Many wineries assume their managers and various salaried employees are exempt from overtime requirements, but that isn't necessarily true. Determining if an employee is exempt isn't as simple as asking whether he or she is "salaried" or "hourly." If an employer is classifying employees as exempt, it must make sure the employees' job duties and salary levels actually qualify for the "white collar" exemption claimed under federal and state law. For example, to qualify for the administrative exemption under the Fair Labor Standards Act (FLSA), the

AT A GLANCE

- + Labor and employment issues can cause headaches and liabilities for an unsuspecting winery owner.
- + Being up to date on labor laws is of utmost importance.
- + You must comply with federal, state and local laws when it comes to your workforce.
- + Don't get caught unprepared for an audit.

worker must meet certain salary requirements, perform office or non-manual work directly related to management or general business operations, and exercise discretion and independent judgment with respect to significant matters.

The Department of Labor (DOL) recently issued new salary requirements under the FLSA. These new federal salary thresholds are higher than some state requirements — for example, California requires the employee to be paid twice the state minimum wage to qualify for most exemptions. Effective December 1, 2016, the salary threshold for the federal executive, administrative and professional exemptions increased from \$23,660 to \$47,476. The total annual compensation requirement for “highly compensated employees” increased from \$100,000 to \$134,004. These thresholds will be automatically updated every three years.

These changes will affect a significant number of currently exempt workers. Companies should consider how to reclassify workers who will not qualify for the exemptions and how reclassifications will affect the company. Failing to plan for this transition could lead to lawsuits for wage and hour violations, including unpaid overtime.

REQUIREMENTS FOR MIGRANT OR SEASONAL WORKERS

Companies that use migrant or seasonal workers to pick or process fruit during harvest must comply with the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Some states, such as California and Oregon, have similar state statutes that provide more stringent requirements. Wine industry businesses should be familiar with these statutes — including their recordkeeping requirements.

For example, under the MSPA, companies that use farm labor contractors to obtain workers must take reasonable steps to determine if the contractor has a valid license. Unless an exemption applies, the contractor must have a certificate of registration from the DOL specifying the activities the contractor is permitted to perform, like recruiting, soliciting, hiring, employing, furnishing or transporting any migrant or seasonal agricultural worker. To verify the license, a company may rely on a certificate issued by the DOL or on independent confirmation from the DOL. The company should also obtain a copy of the contractor’s payroll records, such as pay statements the contractor provides to workers each pay period.

The MSPA requires every person who recruits a migrant worker (those who are employed on a seasonal or temporary basis and required to be away from home

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overnight) to disclose terms and conditions of employment to the worker in writing at the time the worker is recruited. The disclosure must include the employment location, type of crop, employment period, wages and benefits, and cost to be charged for such benefits, among other things. This disclosure need only be given to seasonal workers (those who are not required to be away from home overnight) upon request.

Companies should ensure compliance with these requirements and keep adequate records to fend off DOL investigations or federal lawsuits for alleged violations of the MSPA.

CONTRACT OR TEMPORARY WORKERS

Companies that use contract or temporary workers during peak times should be especially careful. Joint employer laws are rapidly changing. Federal agencies such as the National Labor Relations Board (NLRB) and DOL have recently declared that a business may be liable for exercising indirect control over workers, or reserving the authority to do so.

Prior to the NLRB's *Browning-Ferris* decision in fall 2015, administrative agencies and courts generally found that, to be considered a joint employer, a company must exercise actual, direct and substantial control over the staff-

ing company's workers. Since that decision, administrative agencies and courts have taken the position that far less control is required. The NLRB now considers whether a company has authority over workers' terms and conditions of employment, either directly or indirectly.

The DOL has followed suit. In January 2016, the DOL clarified that, under the FLSA and MSPA, joint employment exists when a worker has an employment relationship with one employer (such as a staffing agency) and economic realities show that the worker is economically dependent on another entity involved in the work. This "vertical" joint employment analysis doesn't focus only on control. The MSPA regulation describes seven "economic realities" factors, and asks whether a company is directing, controlling or supervising — even indirectly — the work performed; controlling employment conditions including the power to hire or fire the worker, modify employment conditions or determine the rate or method of pay; maintaining an indefinite, permanent, full-time or long-term relationship with the workers; hiring workers to perform repetitive and unskilled work; hiring workers to perform work that's integral to the business; requiring work to be performed on its premises; and performing administrative functions for workers, such as han-

dling payroll, providing workers' compensation insurance or providing tools and materials required for the work.

Companies that fit some or all of these criteria may be found jointly liable in a lawsuit or administrative proceeding regarding these workers' wages, hours and working conditions. Companies should review staffing company contracts, consider how much control they have over the staffing company's workers, and determine whether they can lessen or eliminate any of these factors.

IMMIGRATION AND E-VERIFY REGULATIONS

The Immigration Reform and Control Act (IRCA) makes it illegal for an employer to hire or continue to employ a worker if the employer knows the worker is not legally authorized to work in the United States. Employers must review documents for each new employee and complete an I-9 form within three days of hire to confirm the worker's identity and authorization to work in the United States. Companies should confirm that workers meet I-9 employment eligibility requirements, whether hired directly or through a staffing company, because a company may be held responsible for its staffing company's noncompliance.

Companies that employ foreign workers with visas through the H-2A guest worker program should also confirm that U.S. Citizenship and Immigration Services (USCIS) has approved a petition for each worker, along with any change of status or extension of stay request. The date on which a worker is permitted to start work will depend, in part, on whether the employer is an E-Verify employer in good standing.

Currently, use of the E-Verify system is voluntary for most private employers, except those located in Alabama, Arizona, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee or Utah, and those that are required to use E-Verify because of past non-compliance with I-9 requirements.

Employers using E-Verify must submit workers' I-9 data to the system, which searches databases of the Social Security Administration and the USCIS. If the data matches, employers are notified that the worker is confirmed. In the case of a mismatch, employers receive a tentative nonconfirmation (TNC). Employers are required to follow specific procedures designed to protect workers' rights during the verification process. If a worker fails to appeal the TNC within eight working days, or if an appeal is unsuccessful, the employer receives a final nonconfirmation (FNC), which cannot be appealed further, and the employee must be terminated immediately.

When an employer assists a worker with the I-9 or E-Verify process, the worker may confide in the employer, giving the employer actual knowledge that it's employing an unauthorized worker. Similar-

ly, when an employer receives an FNC through E-Verify, the employer is presumed to know that it's employing an unauthorized worker. A company that finds itself in either of these situations must let the worker go or risk severe penalties.

BE AUDIT-READY

In recent years, government agencies like the DOL have targeted agricultural industries, such as the wine industry, for workplace audits. Audits are often triggered through a disgruntled employee or a targeted initiative for certain types of businesses. The wine industry is a "red flag" industry, because it's considered to have a high probability of employing unauthorized or misclassified workers. An audit may include a verification of whether a company is complying with the laws discussed in this article. Taking preventive steps to

comply with current law and keep good records increases the chance that a company will survive an audit without an enforcement action.

We strongly suggest seeking counsel to review current employment and immigration procedures, to avoid potential litigation and ensure compliance with current laws.

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Jamie R Adams, Ian Macdonald and Charles S. Birenbaum are with Greenberg Traurig, LLP (www.gtlaw.com). Adams focuses her practice on all aspects of labor and employment law. Macdonald is a national practice group leader with the firm's business immigration and compliance practice. Birenbaum serves as the firm's chair of Northern California and is an experienced labor and employment attorney.

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