

Changing Restaurant Staff to Drivers? Adapting to COVID-19 Restrictions Requires Attention to Liability and Employment Laws

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With coronavirus effectively shutting down normal operations for many stores and restaurants, owners have begun to transform their business model to include a significant delivery service component; turning hosts, servers, and bartenders into delivery drivers. In most instances this is perfectly legal, provided employers consider and address some issues. While impossible to address all of the issues, this article discusses some general considerations.

Insurance

A standard business insurance policy (e.g., a CGL or similar policy) usually does not automatically provide coverage for business-owned or privately owned vehicles used for business purposes. Conversely, insurance covering a privately owned vehicle usually does not provide coverage for routine business use. Crime insurance policies and workers' compensation policies also do not automatically cover all business models.

To ensure proper coverage, it is essential to contact your insurance broker and have a conversation about coverages and premiums. Be prepared for your insurer to require employee-drivers to consent to a review of their driving records before you can obtain coverage for them.

Minimum Wage Laws

A food service establishment with tipped employees that is planning to convert them into delivery drivers must consider minimum wage laws (i.e., the federal Fair Labor Standard Act and Florida's minimum wage law). If a tipped employee is to remain a tipped employee as a driver, you must verify that the tips the newly minted driver receives are sufficient for your company to continue claiming a tip credit. Drivers may need to be paid the full minimum wage for all hours worked.

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If a driver is working two jobs at the restaurant, the driver may need to be paid the full minimum wage for the restaurant-based work while still qualifying for the tipped minimum wage for hours spent in the car delivering food for tips. Maintaining complete and accurate time and payroll records record not only is required by law but is a prudent business move in the event you must defend against an unpaid wage claim.

Safety

Since a highly contagious disease is the reason for this job transformation, thought should be given to safety. Personal protections, such as training, gloves, hand sanitizer, and other general safety practices, are wise, but also consider going cashless. A cashless system allows for purchased items to be left by the front door, with a text notification of delivery. With all payments and tips made by credit card, the risk from human interactions between drivers and patrons—or even actions as simple as touching the doorbell—is greatly reduced.

Employees should also be instructed on food safety and proper handwashing techniques regarding the coronavirus, as well as reminded when to stay home from work because of illness. Specific to coronavirus, employers should consider reducing the density of staff in the kitchen and other areas of the establishment to maintain safe social distances.

Likewise, employers should consider pre-screening employees before permitting them to work. For example, does the employee have a fever and a cough? Has the employee been in contact with a person who is ill with the virus? Be careful, of course, only to inquire into the absolute necessary issues.

Workers' Compensation

The application of Florida's workers' compensation law to "injuries" arising from the coronavirus is somewhat murky. The general rule, ignoring all the nuance, exceptions, and caveats, is that a worker is not able to obtain workers' compensation benefits due to a disease that is just as common in the public domain as in the occupation.

The problem here is that the various emergency shutdown orders seem to suggest that coronavirus will be less prevalent in the public domain and more prevalent in occupations that remain open. This also gives rise to the question of tort liability being available in lieu of workers' compensation insurance.

The details of this issue are beyond the scope of this article, but employers nevertheless should be aware of potential claims in this area.