

The Year Ahead 2024: Hospitality

By Joanne Braddock Lambert & Stephanie M. Cerasano

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Transcript

Alitia Faccone:

Welcome to We get work™ and The Year Ahead 2024 podcast series. Covering workplace issues from both subject matter and industry perspectives, the 19 episodes in our series provide both big picture trends and detailed tactics that can help employers achieve their workplace ideal, while remaining real about regulations, compliance challenges, and more in 2024. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, JacksonLewis.com, or listen to the podcast series on whichever platform you turn to for compelling content.

Melanie Paul:

Good morning or afternoon, depending on what time of day you're listening to this. Thank you for joining us for the special episode of We get work™ for The Year Ahead, 2024, report. Today we are talking about some very interesting issues for the hospitality industry to look toward in 2024. I am Melanie Paul. I am co-leader of the Workplace Safety and Health Practice Group. And joining me today are Joanne Lambert and Stephanie Cerasano. And some of the topics you're going to hear about today are service animals, babies, and robotic arms. Yes, I did say service animals, babies, and robotic arms. So with that Joanne, why don't you tell us about what the service animal issue is for the hospitality industry this year?

Joanne Lambert:

Thank you, Melanie. I'm Joanne Lambert. I'm in the Orlando, Florida, office and I am active in our disability leave and management health practice group as well as our real estate industry group. And in both of those capacities, I deal with service animals. So service animals, the topic of that spans so many different industries, so many different practice areas and so many different laws. We've got federal laws, we have state and local laws, but for the hospitality industry in particular, those employers, and I guess businesses, need to really make sure they're complying with what we call Title III of the Americans with Disabilities Act. So that's the part of the federal ADA that allows individuals to access places of public accommodation, which pretty

much every hospitality business is going to fall under with their service animal. There's a little bit of a difference here and there's a lot of confusion because the standard under the public access of service animals is much different than it is for employee accommodations.

Joanne Lambert:

So for public access, meaning hospitality businesses, your customers are permitted to come into your establishment with their service animal. Now, that means a service animal. It does not include an emotional support animal, a therapy animal, or a comfort animal or a pet. Even though there are some hospitality establishments, my dog enjoys to go and sit on your patios with your water bowls. We're talking about working animals. And so the definition of service animal under Title III of the ADA is pretty specific, and it is an animal that is individually trained to do work or perform a task for the benefit of an individual with a disability. Disability of course, includes not just physical disabilities, but sensory, intellectual or psychiatric disabilities as well. You're not entitled to any kind of documentation.

Joanne Lambert:

People don't have to walk around with any kind of card or certificate, no such thing actually exist. But hospitality businesses can request of the customers who come in with an animal, they can ask two questions. And this is conversational, no paper required. Is this animal required because of a disability? And if the answer to that question is no, the animal does not have to be admitted, can be refused. And if the answer is yes, the next question is, has it been trained to perform a specific task to assist you with this disability? And that's it. That's all you can ask. Some of the bigger questions that I get about hospitality, especially restaurants and even in hotels, their restaurants or food service areas, do we have to let the dog sit in the chair at the table? No. The service animal, by the way, under federal law can only be a dog or a miniature horse under a hundred pounds.

Joanne Lambert:

There could be state or local laws that might actually include other types of animals in this definition, but under federal law, it's dogs and miniature horses. But the animal needs to be on the floor. It should not be eating off of the table. It should not be in the chair, because obviously you have competing health codes that need to be followed as well. You are not required to allow your customers to bring their service animals into the kitchen, in places like that, that obviously for safety and security reasons as well. So those are the big issues when it comes to hospitality and access by the public with their service animals.

Melanie Paul:

So Joanne, what I'm hearing you say is that it's unlikely that somebody could bring their "service parrot" with them to dine in a restaurant, right?

Joanne Lambert:

This is true, and I'm in Orlando, Florida, where we have the service peacock at the airport, the service crocodile at the airport. And I think also in Florida, someone brought their service squirrel in their carry-on and put it through the detector at the airport, through TSA, ran it through the X-ray machine. Can you believe that?

Melanie Paul:

Yowza.

Joanne Lambert:

Yep, but that's really in a nutshell, pun intended, what hospitality establishments need to be prepared for with regard to service animals. And with that, I'd like to introduce everyone to Stephanie Cerasano, in our Arizona office, to talk to you about the baby piece of our presentation today.

Stephanie Cerasano:

Hi, I'm Stephanie Cerasano. I'm in the Phoenix office and I am active in the disability and leave management groups. I also am a member of our national advice and counsel group. I'm here to speak with you all about the Pregnant Workers Fairness Act. We call it the PWFA. That is a new law that was enacted this past summer, so it was enacted in June, 2023. The EEOC is supposed to be coming out with some regulations that will fill in lots of big gaps in that statute about the definitions and the nitty-gritty of what employers are required to do. The EEOC came out with some proposed regulations in August, 2023. We have been waiting, waiting, waiting. They've had a deadline of the end of 2023 to actually finalize those regulations. Literally any day, as we're doing this podcast, those regulations could come out and help employers really wade through the morass of this law. But I think the most significant aspect of the PWFA that will impact hospitality employers is the accommodation piece, because it's really different from the ADA.

Stephanie Cerasano:

It goes even further than what you might need to provide as accommodations to someone with a non-pregnancy related disability. So under the PWFA, covered employers, and that means employers with 15 or more employees, have to provide... And here's the long legal sentence, but I'll break it down for you. Covered employers have to provide reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions for a qualified employee, unless doing so would impose an undue hardship on the employer. Sounds very ADA like, but it's actually really different. Known limitations can be something that would not meet the ADA disability standard. So a very minor limitation related to pregnancy, that would not otherwise rise to the level of being an ADA disability, can be something that as an employer, you will have to provide a reasonable accommodation for.

Stephanie Cerasano:

So remember, under the ADA, disabilities are health conditions that

substantially limit the person in performing major life activities. A known limitation under the PWFA is a much lower standard. It can be something very minor, like a minor lifting restriction that might not, for example, reach the level of being an ADA disability.

The other thing that's really a game changer is that, in order to be entitled to get an accommodation or be provided an accommodation under the PWFA, the employee does not necessarily need to be able to perform the essential job functions as a result of receiving that accommodation. There are caveats to that, depending on factors like the length of time and reasonableness, but the thinking is pregnancy is self-limiting. It is necessarily a temporary condition. And so this law was written such that even though the accommodation might still not allow the employee to perform the essential job functions, you may still have to provide it. Really different from the ADA. Really a game changer in that regard.

Now, we always have undue hardship hanging in the background, but undue hardship is a really hard, high standard for employers to meet. So I expect hospitality, particularly restaurant clients, to be having a real struggle addressing this situation because they have a lot of positions that have physical requirements. Servers in restaurants have to lift fairly heavy trays. There's a lot of standing and walking and physical activity related to those types of jobs. And so the big thing to remember about this law is don't go down the ADA path if someone is asking for an accommodation related to a limitation as a result of pregnancy or childbirth or a medical condition as a result of pregnancy or childbirth. You can't go down the essential job functions route the same way you would for the ADA in terms of determining whether the accommodation must be allowed. So that's a real changer.

We're hoping that the regulations come out soon. Hopefully by the time you hear this, they may have come out. But they address a lot of big holes in the law about what is a covered, known limitation. And again, based on the proposed regulations, it looks like that standard's really low. So we expect there to be a lot of challenges for employers in this space. So with that, I will turn us over to Melanie to talk about robotic arms.

Melanie Paul:

Right, so who even thought robotic arms would be a thing in hospitality? But obviously this industry wants in on the technological front, as more and more companies are becoming hybrid companies of whatever they are in their industry and technology companies. So what we're seeing is an increase in employers trying to use the technology to become more efficient, particularly as different state and local labor and wage hour laws increase requirements for employers and costs. Employers are looking for ways to reduce those costs and some of the challenges that come along with having a human workforce. So we're seeing the use of robotic arms in food preparation, things like that, for serving customers, but although there's no OSHA standards specifically for robotic arms, it is a piece of equipment that would be subject to lockout-tagout and machine guarding requirements like other pieces of equipment. And so

this industry may not really be prepared for those requirements, simply because they are not accustomed to using that type of machinery. But it is important to become versed in those particular standards and safeguard the work area for the employees that you do have, especially when it comes time for servicing and maintenance of robotic arms.

Melanie Paul:

Often robotic arms are going to be found with inside a contained cell. And so that cell itself is going to provide guarding for when the robotic arm is in operation, and that should protect employees on the outside. But then what do you do if there's a spill, or a jam, or there needs to be some kind of servicing or maintenance, or overnight sanitation because you're dealing with food safety guidelines and good manufacturing practices. And so these are all areas that really haven't been addressed in the OSHA standards, except under lockout-tagout. Lockout-tagout is a really antiquated standard that hasn't been updated in the decades since it was enacted. It is on OSHA's regulatory agenda that recently came out in December for the fall of 2023. And on that agenda is a potential update to the lockout-tagout standard that, according to OSHA, is coming in August of 2024, a notice of proposed rulemaking to update that standard.

Melanie Paul:

There's a lot of technological advancement that's been made in the last several decades, including in the area of robotics, that employers are now taking advantage of. And it's difficult to determine sometimes what compliance looks like because the type of safety measures that currently exists in today's world did not exist when the standard was enacted. And you may be using those alternative safety of devices, like interlocks or light curtains, and those things aren't necessarily accounted for in the lockout-tagout standard. So you could be using those safety devices and it could provide adequate safety for employees working on equipment, but it may not technically comply with the lockout-tagout standard, and the employer may have to have the burden of proving an exception to that standard to allow them to use those alternative type devices.

Melanie Paul:

So very complex area, very interesting area with technological development, and stay tuned for more to come on that from the Occupational Safety and Health Administration. And maybe with an updated lockout-tagout standard, they may address robotics at this point in time. We don't know, but we're going to keep watching it and keep you all apprised. So with that, thank you so much for joining us on this hospitality 2024 trend update. Thanks so much Joanne and Stephanie. It's all very interesting, and if anyone out there needs assistance or has questions in these areas, please do not hesitate to contact one of us or the regular Jackson Lewis attorney with whom you work.

Alitia Faccone:

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