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Are You Unwittingly Bound By An AFL-CIO Agreement?

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Midway through 2012, the Hotel Association of New York City (HANYC) and the New York Hotel & Motel Trades Council, AFL-CIO (the "union"), renewed a seven-year collective bargaining agreement known as the Industry Wide Agreement, or IWA. While the IWA controls nearly all aspects of the employer-employee relationship for covered hospitality organizations, it does much more and can potentially bind the unsuspecting.

One important part of the IWA that hospitality owners and managers must heed is the "accretion clause," because, as explained below, it has the potential to bind nonsignatory parties to the potentially onerous labor costs required by the terms of the IWA. An already powerful document, the renewed IWA increased the reach of the accretion clause to not only signatory corporations and individuals, but also to related companies and entities. The expanded accretion clause can complicate an already multilayered industry whose members often use third parties to manage or operate their businesses — as well as potentially increase the labor costs exponentially for those businesses.

Two recent federal cases in New York demonstrate the potential effect the accretion clause can have. In Chelsea Grand LLC v. N.Y. Hotel & Motel Trades Council, AFL-CIO, No. 07 Civ. 2614 (PAC) (S.D.N.Y. Sept. 29, 2014), Judge Paul Crotty of the United States District Court for the Southern District of New York affirmed a 2008 arbitration award, which found that Chelsea Grand LLC, owner of a Four Points by Sheraton hotel in Manhattan, was bound by certain terms of the IWA because it had hired a third-party company,Interstate Hotels & Resorts, to manage the hotel.

Interstate Hotels & Resorts had preexisting agreements with the union when it was hired by Chelsea Grand, and, in fact, HANYC had previously confirmed with Interstate that the accretion clause would follow a management company that first worked for an IWA-bound hotel when it next started to work for a nonbound hotel. As such, the second hotel, even if operated by an owner that never agreed to the IWA, would also become bound by the IWA by virtue of its association with Interstate.

The language of the accretion clause, found in a 2001 memorandum of understanding entered into between the union and HANY, provides: "A Hotel that becomes the ... manager of a hotel in New York City will be required to apply the IWA to that property on the basis of the legal doctrine of accretion."[1]

Interstate Hotels & Resorts wanted to know if the language applied to managers of hotels in the same way, and HANYC said yes.[2] Interestingly, the accretion clause is separate and apart from the neutrality provisions (discussed in further detail below), which may still be applied to a new, non-IWA-bound property, even if accretion is found "inappropriate."[3]

Chelsea Grand had argued that it could not be bound by the arbitration clause in the agreement because it never consented to the IWA and, further, Interstate Hotels & Resorts was not a joint employer of the Chelsea Grand employees. Judge Crotty did not find Chelsea Grand's arguments availing, holding that the two entities were joint employers, and alternatively, that the third-party management company had the authority to bind Chelsea Grand to the IWA.

Less than one month later, the ownership of 12 nonunion hotels — whose owners are members of the same family that owns the Chelsea Four Points — brought suit in response to the union's assertion of rights under the IWA to organize employees in its nonunion hotels. In Brooklyn Downtown Hotel LLC v. N.Y. Hotel & Motel Trades Council, AFL-CIO, No. 1:14-CV-06067 (E.D.N.Y.) (filed Oct. 16, 2014; amended complaint filed Nov. 7, 2014), plaintiffs claim that the union is using the Chelsea Grand decision as a springboard to organize their 12 nonunion hotels under the IWA — asserting that because Chelsea Grand was found a joint employer with the IWA signatory, all other hotels owned by Chelsea Grand — or any affiliates thereof — would also be bound by the IWA.

Plaintiffs' complaint states clearly the risk of this "'viral' theory of offer and acceptance": if these hotels are bound by the IWA, then in turn any management company or third party they hire could also become bound by the IWA, and again in turn, any client hotels of those third parties could become party to the terms of the IWA — "and so on forever."[4]

Plaintiffs in Brooklyn Downtown Hotel also believe fair election procedures are being circumvented by the language of the IWA, arguing that "[t]he Union is using secret dealings with Interstate [Hotels & Resorts] and this backdoor scheme as subterfuge to avoid a fair election process ...."[5] Plaintiffs claim that following the decision in Chelsea Grand, the union sent each of the plaintiffs' hotels a series of letters detailing its intent to organize there. The union is looking to assert the card check and neutrality clauses of the IWA over all of the plaintiffs' properties using the accretion clause.

Neutrality and card check clauses were made part of collective bargaining agreements in an effort to secure labor peace. "Neutrality" agreements generally bind an employer to its agreement not to campaign or speak negatively against union organization efforts. Layered into neutrality agreements is generally a commitment to a card check arrangement and, often, they allow access to employees' personal information and the employer's premises.

Card check arrangements permit a union to avoid holding a secret ballot to determine interest in organizing, instead allowing it to collect cards from workers, which indicate whether they want a union or not. The employer then agrees to automatically recognize the union if a majority of employees sign a card.

Access agreements give the union access to details about the hotels' employees, including job titles, wages and benefits, names and contact information. Employers may also be required to give the union organizers access to the premises during working hours to collect authorization cards. This is contrary to standard National Labor Relations Board guidelines, which do not obligate employers to give unions such open access to their facilities and employees.

It is argued that entering into neutrality agreements save employers the business disruption and harm associated with picketing and striking when organizing campaigns are resisted. And unions prefer these arrangements because they clearly aid in organizing ability.

The value of these agreements, however, is not so clear: such open provision of employee personal data has resulted in allegations of employees being coerced into signing authorization cards by home visits from union organizers. Similarly, employees can be misled on their job site by organizers who claim the cards are requests for an election, or nonbinding "statements of interest," rather than the authorization cards for a union that the employers would be obligated to recognize.

While it is unlikely that, absent the joint employer or agency indicators present in Chelsea Grand, each of the hotels owned by the plaintiffs in Brooklyn Downtown Hotel will be brought under the IWA's umbrella, the matter is still pending in front of Judge I. Leo Glasser in the United States District Court for the Eastern District of New York. In any event, however, to avoid the potential impact of exponentially increased labor costs, owners and managers should review closely the language of the IWA and ensure that any new management companies interviewed disclose any prior assent to the IWA before hiring them, lest the owners also become unwittingly bound by it.

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[1] Chelsea Grand LLC v. N.Y. Hotel & Motel Trades Council, AFL-CIO, No. 07 Civ. 2614 (PAC), at *4 (S.D.N.Y. Sept. 29, 2014).

[2] Id. at *5.

[3] Id. at *4.

[4] Amended Complaint, Brooklyn Downtown Hotel LLC v. N.Y. Hotel & Motel Trades Council, AFL-CIO, No.1:14-CV-06067, at *20 (E.D.N.Y. Nov. 7, 2014).

[5] Id. at *19.
