

Initiative 77 Repealed: At Cost of Extensive New Training and Compliance Requirements

By James Hammerschmidt

It's not over -- the District of Columbia's restaurant, leisure and hospitality industry must continue to pay close attention to Initiative 77. While many in the industry may have been busy high-fiving and celebrating its repeal, the D.C. Council tacked some whopping new regulations on businesses in this sector in exchange for the wage relief they sought. Additionally, there is a movement to call for a public referendum to "repeal the repeal." If the referendum fails and the repeal holds, all employers in D.C. who employ tipped workers must be prepared to get granular on the new law and brace themselves for more burdensome regulatory requirements.

On June 19, 2018, District of Columbia voters approved by a 56% to 44% margin Initiative 77, which eliminated the "tip credit" that allowed employers to apply some of the tips received by certain employees from customers to the employer's minimum wage obligation. Initiative 77 was hotly contested and its immediate, double-digit increases in labor costs (which would escalate over the next several years) were viewed as an existential threat to D.C. restaurants and other employers, such as hotels and bars, who rely on the tip credit.

In a victory for restaurant employers, Mayor Muriel Bowser on October 23, 2018 signed the Tipped Wage Workers Fairness Amendment Act of 2018, which repeals Initiative 77 and restores the availability of the tip credit. This relief for restaurants from Initiative 77 comes at a price, however, as the new act imposes significant new training, notice, and reporting requirements, which are likely to be costly and burdensome to the most of restaurants that dot the D.C. dining scene, as well as other employers in the leisure and hospitality business in the District.

There are over 2,200 restaurants and food service establishments in the District of Columbia that employ an estimated 68,900 workers, of which approximately 10,500 are tipped restaurant servers and bartenders plus an additional number of other workers such as bussers and barbacks who also receive tips. About two-thirds of the D.C. tipped workforce is made up of food servers and bartenders; nationally, there are approximately 4.3 million tipped workers in the United States, and roughly 2.5 million are servers and bartenders. With Initiative 77's repeal, tipped employees in D.C. can be paid a wage of \$3.89 per hour (increasing incrementally to \$5.00 per hour by 2020), with the remainder of the \$13.25 per hour minimum wage (increasing incrementally to \$15.00 per hour by 2020) paid through tips the employee receives from customers. If the employee does not receive sufficient tips to make up the difference between the tipped minimum wage and the full minimum wage, then the employer must pay the difference between the full minimum wage and the amount the employee actually received. Had Initiative 77 gone into effect, the employer's wage obligation would have immediately increased by 15.6%, with double-digit percentage increases mandated every following year through 2025.

Most of the media coverage has focused on restoration of the tipped minimum wage to the pre-Initiative 77 status quo, which is undoubtedly a major victory for restaurants and other employers who employ a tipped workforce. However, far less attention has been devoted to new workplace regulations that were included in the repeal bill as an attempt to address some of the arguments cited in support of Initiative 77. Specifically, supporters of Initiative 77 had argued that the tipped minimum wage promoted wage theft as employers purportedly pressured employees to over-report the amount of tips received to avoid paying the minimum wage, and also encouraged sexual harassment as employees purportedly felt compelled to succumb to inappropriate customer actions in order to ensure they received tips. The Tipped Wage Workers Fairness Amendment Act of 2018 seeks to address these concerns by imposing extensive new regulations on employers like restaurants and bars that take advantage of the tip credit.

[New Training Requirements Concerning Sexual Harassment and Wage Payment](#)

The most significant and burdensome of the repeal bill's new mandates are that all employees of employers using the tip credit – even employees who do not themselves receive tips – undergo sexual harassment training, and that owner/operators and managers undergo training on D.C.'s minimum wage and wage payment laws. Under the bill, any new employee must receive approved in-person or online sexual harassment training within 90 days of hire, and existing employees must receive training by 2020. While the training is a one-time obligation for line employees, owner/operators and managers must attend sexual harassment training every 2 years, with the training for managers required to take place in-person. Owner/operators and managers must also undergo training on the requirements of D.C.'s wage payment and collection laws on an annual basis, with managers again being required to attend the training in-person. While non-management employees are not required to attend this training, they must be given the opportunity to do so annually. Given the high level of turnover in restaurants and other tipped businesses, the requirement that every employee, even ones working in non-tipped occupations, management, and administration with a restaurant, restaurant group, hotel, or hotel group, receive sexual harassment training could prove to be a financial and administrative burden.

New Sexual Harassment Policies and Posting and Reporting Requirements

And, there's more - - while the intention of reducing sexual harassment in the restaurant industry is laudable, the repeal bill also imposes a labyrinth of requirements and policies that employers must put in place to encourage employees to report instances of sexual harassment. Restaurants and other tipped employers must submit to the D.C. Office of Human Rights by July 1, 2019 "a policy outlining how employees can report instances of sexual harassment to management and to the Office," and also distribute the policy to employees and post it in a conspicuous place at the employer's premises. Complaints of sexual harassment must be documented by the employer, including a notation of whether the reported harasser is a non-managerial employee, a manager, or an owner/operator. These are policies and practices that employers should have in place anyway to ensure sexual harassment issues are prevented and addressed, but now they are legal requirements for D.C. employers who have tipped workforce. The bill also requires that such employers report to the D.C. Office of Human Rights by July 1, 2019, and annually after that date, the number of reported instances of sexual harassment and the number of harassers who fit into each category of non-managerial employee, manager, or owner/operator.

New Wage Payment Policies and Notice Requirements

It keeps going - - employers who use the tip credit will also be required to provide additional information to tipped employees. Employees must be provided with written notice about their minimum wage rights, the employer's tip-sharing and pooling policy (if any), and whether credit card fees are deducted from tips. Given that the Department of Labor is changing its tip-sharing and pooling regulations, the new bill presents a good opportunity for restaurant employers to review and update their policies. Employees must also be provided with additional information on payday. Beyond the current information required to be provided (date of payment, gross wages paid, deductions from and additions to wages, net wages paid, and hours worked during the pay period) employers must also provide a "tip-declaration form." This form must outline the total tips received by the employee, the amount of tips shared pursuant to a tip pool arrangement, and the calculation of any amount shared pursuant to a tip pool arrangement.

New Payroll Reporting Requirements

Not done yet - - the bill also enacts changes to how some restaurant employers will have to do payroll. Beginning in 2020, tipped employers will be required to prepare their payroll using a third-party payroll service. The payroll service will be required to certify on a quarterly basis to the D.C. government that the employer's tipped employees were paid the minimum wage. Until 2020, employers must submit this quarterly certification themselves.

And, More New General Posting Requirements

Finally -- the repeal bill also changes the posting requirements under several D.C. employment laws. Under the act, the mayor is required to create and maintain a website that details employees' rights and benefits under several D.C. laws and provide a poster that informs employees about the website's existence. Employers must post this poster at their premises, and also post a copy in any breakroom or at any time clock on site. Employers are also required to print the information contained on the website, compile the print-outs in a single location such as a binder, and place the compiled information at every location that a poster is required to be posted. This binder must be updated monthly, and the failure to do so can result in a \$100 per day fine.

"Repeal the Repeal"

The repeal bill may not be the end of the story. Many of the same activists who originally pushed for Initiative 77 are now seeking to "repeal the repeal" by calling a public referendum to reject the repeal bill. If these activists can obtain enough signatures (estimated to be approximately 25,000) before the repeal

bill completes the 30-day congressional review period required for it to officially go into effect, then another popular vote would be held on the fate of Initiative 77.

While the tip credit is restored for now, the new training, reporting, and notice obligations the repeal bill imposes on D.C. employers in the restaurant, leisure and hospitality industry are significant. Taken together with other recent changes to the federal regulations governing tipped employees and the increased sensitivity towards sexual harassment that has been ushered in by the #MeToo movement, the repeal bill's passage means restaurant and other tipped employers need to start getting busy if they want to ensure compliance and avoid costly fines and litigation.

Jim Hammerschmidt is Co-President of Paley Rothman and Chair of the firm's Employment Law practice group. Jack Blum is an associate in the firm's Litigation and Employment Law practice groups.

The explanations and discussions of legal principles herein are intended to be used for informational purposes and are not to be relied upon as legal advice. Situations may vary and nothing included herein is intended by the author to be used as the principal basis for specific action without first obtaining the review and advice of an attorney.