

Upcoming Events

Retail and Restaurant Summit | November 10, 2016 | Renaissance Patriot Place Hotel
RIW Attorney Chris Agostino will be moderating a panel.

Taste of Boston | November 15, 2016 | Boston Children's Museum
RIW is a co-sponsor of this event.

Restaurant Finance & Development Conference | November 14-16 | Las Vegas
RIW Attorneys Lou Katz & Russ Stein will be presenting.

MASSACHUSETTS EQUAL PAY ACT INCREASING EMPLOYER LIABILITY FOR GENDER BASED PAY INEQUITIES



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In August, Governor Charlie Baker signed the comprehensive pay equity bill into law which was unanimously passed by both the Massachusetts House and Senate (the "Equal Pay Act"). The new law amends Massachusetts' equal pay law, which was originally passed in 1945. The bill is designed to better define comparable work and to ensure that men and women receive equal pay for comparable work. The new law will go into effect January 1, 2018.

The new law defines "comparable work" as work that is "substantially similar" in terms of skill, responsibility, and working condition. Pay may be different under certain circumstances, including but not limited to seniority, geographic location, experience, education, training, or a pay formula based on sales. However, employers must look at the tasks performed by the employees rather than merely relying on job descriptions in order to

determine comparability of work. Employers who discover pay disparities between employees of different genders engaging in comparable work are barred from reducing the higher-paid employee's salary to comply with the new law.

The new law prohibits employers from asking prospective employees or their current or former employers to provide prospective employee's salary histories. The Equal Pay Act also prohibits policies preventing employees from discussing their salaries. Employers cannot fire or retaliate against employees who inquire about other employee's pay. However, employers are not required to disclose employees' wages to other employees.

Employees that are discriminated against on the basis of gender in the payment of wages for comparable work are entitled to double damages (i.e., twice the difference in wages), plus attorney's fees and costs.

Unlike other claims of discrimination, employees are not required to file a charge of discrimination with the Massachusetts Commission Against Discrimination as a prerequisite to bring a claim. The lookback period for wages is three years and each pay-check is considered a new claim. Employees are permitted to sue on behalf of themselves or other "similarly situated" employees. Additionally, an enforcement action can be brought by the Attorney General against an employer.

However, the Equal Pay Act provides an employer a "safe harbor" affirmative defense if it (1) conducts self-evaluations of their pay practices and (2) demonstrates reasonable progress in eliminating pay disparities based on gender for comparable work. This affirmative defense does not apply to claims based on pay secrecy and salary history, pay discrimination under federal law, or pay equity violations in other states. Employers have a three-year exemption from liability subsequent to the completion of their self-evaluations. Employees cannot use their employers' self-evaluation and any steps taken by the employer to close a gap in pay as evidence of a violation of pay equity. The new law does not provide guidance as to how self-evaluations must be conducted other than stating that self-evaluations must be reasonable in detail and scope or consistent with forms issued by the Attorney General.

MASSACHUSETTS EQUAL PAY ACT Cont.

Although the law does not go into effect until January 1, 2018, it is critical for employers to start now in evaluating their pay practices and make the required changes to comply with the new law. Similar to other employment statutes, Employers are required to notify employees of the new law by placing copies of it in conspicuous areas in the workplace similar to other employment notices.

Employers should also take advantage of the Act's "safe harbor" provision by conducting a comprehensive self-evaluation to identify and work toward eliminating any pay disparities between employees who perform comparable work, which, if executed properly, will provide a three-year immunity to claims.

Dave Robinson is an attorney and member of RIW's Litigation, Employment, and Hospitality & Retail Services Groups. He can be reached at dwr@riw.com.

RIW Events and Participation

Email med@riw.com to request more information, or copies of any event presentation materials.

Stacey C. Friends will be speaking at the Business Globalization Forum on November 4th.

www.businessglobalizationforum.org

Kelly Caralis moderated the panel at Boston Magazine's Top New Restaurants event on October 25th. Lou Katz, Howie Altholtz, Michael Rosen, Stacey Friends, Chris Agostino, Kevin Freytag, and Adam Barnosky were in attendance.

Russ Stein and John Cohan spoke at the Neptune Advisors Pathway to Platinum®: *Maximizing the Value of Your Company* Conference on October 5th. Lou Katz was in attendance. RIW was a platinum sponsor for this event.

Lou Katz, Kelly Caralis, and Dave Robinson spoke at the National Retail Tenants Association *Expanding Knowledge* Conference, September 18-21st.

RIW co-sponsored the annual Battle of the Burger event on August 10th, hosted by Boston Magazine. In attendance from RIW was Michael Rosen, Lou Katz, Brad Croft, Kevin Freytag, Chris Agostino, and Howie Altholtz.

The 24th Annual Restaurant Trends Seminar – GUESS WHO'S COMING TO DINNER... *Setting the table for a winning concept*, took place on June 6, 2016 at the Revere Hotel in Boston. This event is put on by RIW, The Boston Restaurant Group, and Cafco Construction. The event was sponsored by USI, Cambridge Savings Bank, and Boston Magazine. Speakers included Charlie Perkins from The Boston Restaurant Group, Donna Hood Crecca, Associate Principal at Technomic Inc., and John Buchanan, President and Founding Partner at Lettuce Consulting Group.

www.rtseminar.com

RIW Client News

Congratulations to RIW client Casa Verde on the opening of their location in Jamaica Plain. This new Jamaica Plain taqueria was launched by restaurateurs David Doyle, Mari Perez-Alers, and Keith Harmon, who are also behind Tres Gatos and Centre Street Cafe.

Congratulations to RIW clients Jeremy Kean and Philip Kruta on the opening of Brassica Kitchen + Cafe in Jamaica Plain.

Industry Trends

A new kind of food truck will train cooks, help fill workforce gap

<http://www.bizjournals.com/boston/news/2016/10/04/a-new-kind-of-food-truck-will-train-cooks-help>

Amazon cooking up a new strategy on groceries

www.bostonglobe.com/business/2016/10/11/amazon-cooking-new-strategy-groceries

RESTAURANTS and TRADEMARKS

A Lesson from the Real World



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There have been two intriguing local trademark cases involving restaurants lately, both of which provide a useful lesson in trademark law.

First, there was the Milk Street Café v. Milk Street Kitchen dispute. Celebrity chef Christopher Kimball plans to use the mark “Milk Street Kitchen” for cooking classes, a television show and a magazine. Milk Street Café, in business since 1981, worried about consumer confusion, filed a complaint.

The second case involves local chain Tasty Burger and Chipotle. Chipotle is launching a burger restaurant they plan to call “Tasty Made.” The proposed Tasty Made logo and other elements of the Tasty Made branding also have a similar look and feel to those of Tasty Burger, as can be seen here:

Both complaints, in my opinion, are valid. Both challenged marks are similar enough to the senior mark to create a likelihood of confusion amongst consumers, which is the legal standard (not actual confusion, which can be a persuasive factor, but is not necessary).

Now, the lesson:

Choose distinctive marks. Milk Street Café is a descriptive mark – a café on Milk Street (geographically descriptive). Milk Street Café has trademark rights only because of its long use – the mark has acquired distinctiveness. A more fanciful, arbitrary or suggestive mark, such as RIW clients, Douzo, Papagayo, Blue Ox, Piattini, or b.good , provides more protection without the long and arduous task of acquiring distinctiveness over time. I am sure you can see how much easier it would be to enforce against, say, Dozo, Green Ox, Papagato, or UGood, using the examples above. In other words, because the marks are inherently more distinctive, they are to enforce. In addition, people are less likely to even choose similar marks when the mark is distinct, so the uniqueness of the mark does some of the enforcement for you. In this case, Milk Street Kitchen may argue that they should be able to name their proposed kitchen on Milk Street, “Milk Street Kitchen,” and but for the long use by Milk Street Café, they would be correct. This is why trademark law does not favor descriptive marks, and the USPTO will not register such marks absent a showing of long and exclusive use resulting in the requisite acquired distinctiveness. Otherwise, the result is like having a monopoly on words that others may need to legitimately describe their own goods or services.



Tasty Burger has the same issue. “Burger” is obviously descriptive. “Tasty” is arguably also descriptive, but the chain has been around for six (6) years and has acquired distinctiveness in this mark. Without the acquired distinctiveness claim, Tasty Burger would have to tolerate all kinds of similar marks, because absent that, one cannot claim exclusive rights to words which describe their goods or services. Compare this situation to that of another RIW client, Wahlburgers. Although the “burgers” portion of the mark is descriptive, it is an inseparable part of the mark, coupled with the distinctive, “Wahl.” With this inherent distinctiveness, another company would be hard-pressed to say it should be allowed to use, for example, Wallyburgers, or Waburgers, or anything similar, because the Wahlburgers mark is strong from the start. It doesn’t even need acquired distinctiveness.

So, I know it is tempting to name your new establishment something that tells consumers instantly what it is. Trust me though - this is a short cut that is not worth it. The headache (and cost) of trying to register and enforce a descriptive mark greatly outweighs the immediate gratification. Focus on fanciful, made up marks (i.e. TreyLa), arbitrary marks (Book Store) or suggestive marks (Cozy). The more distinctive mark requires a bit more marketing to build up brand recognition with customers, but in the end, you will have a strong, distinctive, recognizable, registerable and enforceable mark. So listen to your trademark attorney – get your creative juices flowing and choose your marks wisely.

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Marketing Corner



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The Last Straw

On a recent Mexican vacation, while standing in the buffet line for some food and drink I noticed a sign: *Due to concerns about environmental pollution, straws will be provided on request only.*

This piqued my interest and I did a little research on the subject. Turns out straws, which are almost always made of plastic are a real pollution problem. They take decades and more to degrade, and millions of them end up in landfills and floating around our oceans. Establishments often reflexively provide them to customers, who may not even want them. Ultimately, both those that are used and even those unopened get thrown away.

They end up in our landfills and oceans. Consider a, *'straws on request policy only'*. It will send a great message to your customers about a commitment to the environment, as well as save you money in the long run.

Additional Subject Information: <http://www.plasticpollutioncoalition.org/no-straw-please/>
<http://thelastplasticstraw.org/about-us/>
<http://www.diveplanit.com/2015/10/plastic-pollution-and-why-straws-seriously-suck/>

Firm Announcement



Adam Barnosky
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Adam Barnosky Joins the Firm

Adam has joined the firm in the Commercial Real Estate, and Hospitality & Retail Services groups.

His practice is concentrated in representation of restaurateurs, hotels, real estate developers, and hospitality industry clients in Boston, Greater-Boston & New England. Adam represents clients in all phases of operations including: acquisitions, dispositions, financing, negotiating leases, land use and zoning matters, licensing and negotiation of management contracts.

Ruberto, Israel & Weiner attorneys have comprehensive knowledge and expertise in the areas of law in which they practice and the industries served. Attorneys in RIW's Hospitality and Retail Services Group have provided legal services to industry clients for over 30 years.

Additionally, our attorneys organize seminars, lecture, write articles, participate in trade associations, and serve on Boards of Advisors for retail, food and hospitality industry companies.

For a full description of our Hospitality and Retail Services Group, including a list of representative clients, please visit our website at www.riw.com.

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