Duff on Hospitality Law

Initiative I-124: Look Beyond the Title

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On Monday, July 25, 2016, the Seattle City Council unanimously voted to place Initiative 124 ("I-124"), entitled the "Seattle Hotel Employees Health and Safety Initiative," on the November 2016 ballot. Many voters will likely not even bother to look beyond the title before casting their vote. But they should. There is much more to this initiative than the title suggests.

I-124 is comprised of five substantive parts, plus definitions and a "miscellaneous" section (containing perhaps the most important piece of the entire initiative - more on that in the following paragraph). Each of these parts has an admirable statement of purpose (e.g., "Protecting Hotel Employees from Violent Assault and Sexual Harassment"), and a slew of requirements that are allegedly aimed at achieving that purpose. But, as with the title of the entire initiative, each part contains language that prompts countervailing concerns.

Surprisingly, despite levying significant requirements on hotel employers across a number of operational areas (which will be discussed in detail below), the initiative also provides hotel employers with a "loophole," buried in the "Miscellaneous" section, which would allow them to avoid the majority of these requirements. All they have to do is enter into a collective bargaining agreement with a union, and they can waive most of the law's burdensome requirements. Tellingly, this initiative is sponsored not by an altruistic disinterested party, but rather by hotel union Unite Here Local 8, which seeks to increase its membership (and receipt of dues) by betting that hotel employers would rather allow their properties to become unionized than satisfy I-124's onerous requirements.

But even here the initiative fails in its purpose. Under its language, the employer and the union must agree on all terms of a collective bargaining agreement for the waiver of I-124's requirements to be effective. If, after the parties determine that they are unable to reach agreement on all terms and conditions of employment (a situation called "impasse" under labor law), the employer seeks to lawfully implement terms and conditions, then the waiver dissolves and I-124's full requirements apply. This hamstrings employers and goes far beyond the checks and balances established by the Federal National Labor Relations Act.

Part 1 – Preventing sexual assault and harassment

This section would require hotel employers to provide panic buttons to employees providing in-room services (many hotels already do this, or provide more-effective high-decibel alarm devices), to notify guests of the law through a posting in each room, and to give employees paid time off to contact the police and seek help in the event of an act of violence. But this section would also require hotels to, in the event of any accusation that a guest has committed an act of violence (including sexual harassment), record the

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guest's name (or, if the name is unknown, any identifying information) on a list to be maintained by the hotel for the next *five years*, and to warn employees of the guest's presence if the guest stays in the hotel in the future. The initiative does not require any reliable source for the accusation, or that any evidence be provided apart from the accusation itself, before the guest's reputation is potentially tarnished by inclusion on the list. Nor does it give the accused any opportunity to respond to the accusation (or even to know about it). Although preventing violence and sexual harassment is obviously laudable, the lack of due process and opportunities for false accusation (as well as profiling on appearance, should the hotel not have a name for an accused patron and thereafter have to warn employees based on identifiable characteristics alone) presented by this part of the initiative encroach on some of our most basic civil liberties.

Part 2 – Protecting hotel employees from injury

In addition to compelling safety measures already required by federal and/or state law, this part purports to limit the square footage of guest rooms that hotel housekeepers must clean in an eight-hour workday. The theory behind this limitation appears to be that employers can prevent injuries to housekeepers by restricting the amount of work that they perform. The basic premise of this theory is questionable, as it is not clear how many housekeeper injuries are caused by accidents (preventable through training) rather than by the absolute amount of work performed. Moreover, I-124 does not actually limit the amount of work performed; it only requires that hotel employers provide employees working in excess of the "limits" with pay at 50% above their normal wage. This clause, very similar to requirements in collective bargaining agreements at unionized hotels, casts doubt on the alleged aim of the initiative to prevent injuries altogether.

Part 3 – Medical care for hotel employees

Effectively, this part requires hotel employers to either provide the equivalent of a gold-level health insurance policy to employees at a cost of no more than five percent of their earnings, or to provide them with a monthly subsidy of at least $200 to be used to purchase coverage. Ironically, that subsidy (which is taxed) may make it more difficult for employees to qualify for the same level of healthcare coverage that they could obtain without the subsidy. This requirement also creates confusion for employers who must already offer medical care coverage under the Federal Affordable Care Act (a.k.a. Obamacare).

Part 4 – Preventing disruptions in the hotel industry

Hotel sales are often delicate transactions, with privacy of the parties a paramount consideration, and many do not close despite the parties entering into agreements of the type that would trigger notice under I-124. Accordingly, the notice requirement alone may dissuade parties from buying or selling hotel properties, and thus impeding free trade. Moreover, employee morale generally suffers during the period when their employer is for sale; the notice requirement risks increasing employee stress and decreasing employee satisfaction around transactions that may ultimately fall apart.

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If a sale does close, this part also requires a buyer to retain existing employees for at least 90 days unless such employees are terminated for "just cause." Although "just cause" is a common term in union agreements, it is undefined in the initiative, leaving employers unsure of how to comply with the law. Given this uncertainty, a new employer may choose not to terminate any employees during the 90 day period after a sale, regardless of the employees' level of performance during that time or, ironically, whether they pose a risk of violence or sexual harassment to other employees.

Part 5 – Enforcement of the initiative's requirements

Although the Seattle Office of Civil Rights can enforce the law, the initiative also establishes a private right of action whereby anyone (even someone not impacted by a violation) can sue for violations of the law. A plaintiff can collect 25% of applicable penalties for violations (between $100-$1,000 per day per employee), the same amount that will go to aggrieved employees, as well as his or her attorneys' fees, *even if he or she was not damaged at all*.

The initiative also establishes presumptions of guilt against employers that are unfairly difficult to overcome. Specifically, it creates a presumption that if an employer takes any negative action against an employee within 90 days of that employee exercising any rights under the initiative (even something as simple as asking about the rights protected under I-124), that action is retaliatory and unlawful. The employer can rebut the presumption, but only by presenting *clear and convincing evidence* (the highest level of proof required in any non-criminal matter) that the employee's exercise of rights was not a motivating factor in the adverse action against the employee. So, hypothetically, if an employee insults a hotel guest almost three months after asking his manager what rights are protected under I-124, and is disciplined as a result, the employer is still presumed to be in the wrong unless it can show *by the highest burden of proof in non-criminal cases* that its decision had nothing to do with the employee's question.

Conclusion

To summarize, Initiative 124 has much more going on under the surface than appears from reading its title (or the bold-font titles of its various parts.) The initiative has worthy goals, but is quick to abandon the majority of them if hotel employers will enter into business with unions (one of which is the main sponsor of the initiative). And even if hotel employers refuse to consider that option, the initiative undermines its goals with undefined terms and requirements that may not actually solve identified problems, and attacks on basic civil liberties.

Posted in Employment Law, Hotels

Tagged as agreements, collective bargaining agreement, decreasing employee satisfaction, employee morale, employer, Enforcement of the initiative's requirements, false accusation, Federal Affordable Care Act, Federal National Labor Relations Act, health insurance policy, highest burden of proof in non-criminal cases, hotel employers, hotel housekeepers, housekeeper, I-124, impasse, in-room services, Initiative I124, injuries, just cause, labor law, lack of due process and opportunities, Medical care for hotel employees,

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