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For restaurants, more lawsuits on the menu

Improper payments, other infractions make them easy targets; some look to open outside New York.

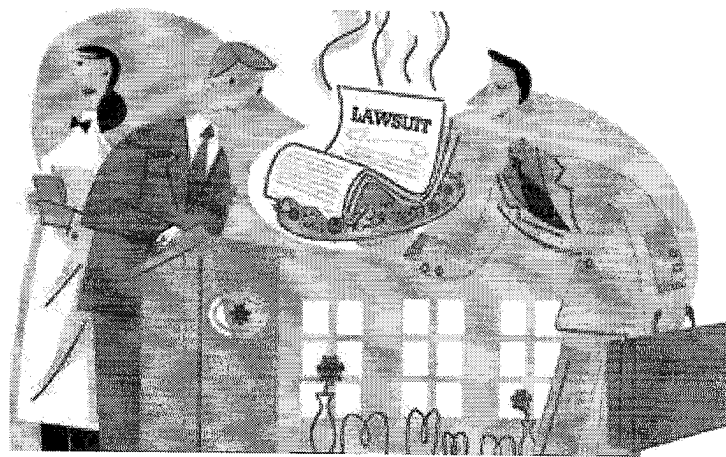
By [Lisa Fickenscher](#)

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D. Maimon Kirschenbaum is hardly a household name, but that's not true of the chefs and restaurants he regularly sues.

Jean-Georges Vongerichten, BLT, Nobu and Red Lobster, to name a few, have collectively forked over millions of dollars to the lawyer and his clients, who are restaurant workers.

Mr. Kirschenbaum has filed more than 100 lawsuits—mostly over how restaurants pay out tips to employees and calculate wages. In the process, he has carved a lucrative niche for himself and his six-attorney firm, Joseph Herzfeld Hester & Kirschenbaum, garnering more than \$20 million in settlements.



Dave Klug

SERVING PAPERS: Over the past five years, restaurant lawsuits have become one of the hottest areas of labor law.

"I was very lucky," said the 2005 Fordham Law School graduate. These cases "landed on my doorstep."

They also played a role in the New York Department of Labor's new Hospitality Wage Order, which went into effect in January and requires restaurants to keep extensive records of their employees' pay, including tips.

Over the past five years, restaurant lawsuits have become one of the hottest areas of labor law, once seen as a sleepy backwater of the legal community. New York City restaurants have shelled out tens of millions in out-of-court settlements since 2005, making the city a harder place for them to do business, experts say.

Restaurants are easy targets, since many are not paying their workers properly. This is partly because there were ambiguities in the law, according to attorney Carolyn Richmond, a partner in Fox Rothschild who represents many restaurant owners.

Restaurants are also targets because their guilt can be easy to establish and the cases are profitable for the lawyers who file them. They typically get a third of the settlement, said Mr. Kirschenbaum.

"These restaurant cases are easy money. If there is a violation, it's simple to prove," said Louis Pechman, a labor law attorney who sued Sparks—the infamous chop house where a mobster was shot dead—winning a record \$3.2 million settlement in 2009. Waiters at Sparks alleged that their tips were shared with managers and other workers who were not legally entitled to gratuities.

"IT'S A SCAM"

Lawyers who defend restaurant owners spare no vitriol in describing the cases filed against their clients, which they believe are fueled by a gold-rush mentality.

"You see the plaintiffs' bar tripping over themselves to file the same case," said Ms. Richmond. "From our perspective, it's a scam."

Some restaurateurs are opting to open businesses in other cities because of the "litigious atmosphere in New York," according to Andrew Rigie, executive vice president of the city chapter of the New York State Restaurant Association.

The counterargument, of course, is that restaurant owners who don't pay their employees correctly deserve to be sued.

"We've gone through the pay records of companies that have gone out of their way to evade labor law," said Joe Fitapelli of Fitapelli & Schaffer, who represents employees.

While a growing number of attorneys are targeting restaurants, about half a dozen have been the most prolific. They include Mr. Pechman, who has filed 30 lawsuits.

SHRINKING POOL

TOP FIVE VIOLATIONS

When New York City restaurants get sued, it is typically for one or more of these infractions.

1. Failure to pay overtime

Restaurants that pay their servers per shift or pay a weekly salary get into trouble when they neglect to pay their workers overtime if they exceed 40 hours in a week.

2. Failure to provide "spread-of-hours" pay

Local restaurants are vulnerable to lawsuits when they ignore the requirement to pay workers for an extra hour when the workday exceeds 10 hours.

3. Theft of tips by management

This refers to owners and managers who improperly take a share of tips for themselves, even though New York law states that this money belongs to the service staff only.

4. Misappropriation of service charges

These charges are tips meant for the waitstaff. Restaurant managers who pocket fixed gratuities or customer service charges are violating the law.

5. Minimum wage violations

Eateries will find themselves in trouble for ignoring the requirement that they pay their waitstaff either a straight \$7.25-per-hour minimum wage or \$5.00 per hour if they give a "tip credit."

—*Lisa Fickenschner*

Source: [Waiterpay.com](http://waiterpay.com)

Their success put the industry on notice, with each case against a celebrity chef making a splash in the media. Plaintiffs' attorneys concede, however, that they have just about exhausted the pool of high-profile and deep-pocketed operators—most of whom have been sued. They are now shifting their attention to lesser-known, smaller businesses.

Some attorneys raise the question of whether this area of litigation will remain as hot as it has been. For one thing, more eateries appear to be complying with labor laws.

"Workers come to my office wanting to bring a case because they are mad about something, and I'll see that there isn't one," said Mr. Kirschenbaum.

Mr. Fitapelli said he also recently turned away potential clients because they presented weak evidence of wrongdoings.

The new Hospitality Wage Order will force restaurants to be more vigilant about how they pay their employees, which may reduce the number of suits. Employers, for example, are required to maintain a list of job descriptions and track workers' tips each day, issues that have tripped up many restaurant owners.

"The new wage order should result in less litigation because it forces employers to be more thoughtful about what they are doing, to write something down and give it to their workers," said Ken Kimerling, legal director of the Asian American Legal Defense and Education Fund.

There is a significant catch. Restaurants that are in compliance now but were not over the past six years are still at risk of being sued.

"The financial damages are enormous, because these are mostly class-action lawsuits that cover all workers over a six-year period," said Felice Ekelman, a partner with Jackson Lewis who represents restaurant owners.

For example, according to court records, there were 645 class members in a lawsuit filed by Mr. Kirschenbaum against Keith McNally's bistros Pastis and Balthazar. The settlement was \$1.5 million.

As for whether the stream of wayward eateries will dry up as big restaurant groups continue to improve their employment practices, Mr. Pechman said, "I'd suspect that the big-name places have run their course, but you are always going to have issues with smaller restaurants cheating."

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