

Hospitality Legislation And Regulation To Watch In 2017

By **Matthew Perlman**

Law360, New York (January 2, 2017, 1:03 PM EST) -- Heading into 2017, the hospitality industry will continue to keep a close eye on new forms of technology-driven competition that have emerged in recent years, as well as an incoming presidential administration whose potential impact on labor and gaming policies is uncertain.

Here are some legislative and regulatory issues worth watching.

Labor Law Limbo

As President-elect Donald Trump transitions into office, the hospitality industry will watch for indications of how his Cabinet will influence employment issues that could have wide-ranging impacts on the sector's workforce.

Lara Shortz, a partner in Michelman & Robinson LLP's labor and employment practice, said much of Trump's rhetoric suggests his policies will benefit hospitality operators on issues including minimum wage and the National Labor Relations Board's revised standard for determining joint employers. She also pointed to Trump's pick of Andrew Puzder as U.S. secretary of labor, the CEO of CKE Restaurants Inc., which owns the Carl's Jr. and Hardee's fast-food chains.

Puzder "is a very outspoken critic of a lot of changes that have occurred during the Obama administration, particularly with respect to increased federal minimum wage, and certain things like joint employment," Shortz said. "That indicates there could be a big peel-back of activism."

Policy changes could effectively kill the joint employer doctrine, she said, as well as efforts by U.S. Department of Labor to overhaul its overtime rules. Detailed in May, the DOL changes would more than double the salary threshold for exempting certain workers from overtime pay. But 21 states sued to block the agency from implementing the new rules, and a Texas federal judge issued a nationwide injunction against the Labor Department in November.

Shortz said the new administration could simply stop defending the overtime suit, and could also stop putting resources behind initiatives seen as anti-business or pro-labor.

"Even if they don't actually repeal all of the laws, you're not going to see a lot of activism; you're not going to see money put behind the enforcement of those laws," she said.

Corresponding with a pullback from the federal government on employment issues, Shortz said, the hospitality industry can likely expect more activism and legislation from states and local municipalities, which may try to fill the void. This could pose challenges for operators as they try to keep tabs on the different rules in different jurisdictions where they do business.

“They need to make sure that they're buttoned up on the state and local level, because the plaintiffs bar looks at what's going on at the local level when they look to file lawsuits for noncompliance,” Shortz said.

For issues affecting both employment and immigration, like the H-2B guest-worker program, which is used by some resorts and other hospitality operators for seasonal staffing, the anticipated impact of the Trump administration is less clear. While Trump himself has taken a strong stance, including with his talk of a U.S.-Mexico border wall, Shortz noted that Puzder is actually more moderate on immigration issues.

“So, we'll have to see how that shakes out,” she said.

Another Airbnb Year

Home-sharing website Airbnb Inc. continued catching headlines in 2016, as local jurisdictions across the U.S. and abroad took different approaches to handling the short-term apartment rental market. Experts say that the company is facing harsher opposition in larger markets, like in New York, due to established interests that raise concerns over issues such as safety and the availability of affordable housing.

Smaller cities, on the other hand, are often more amenable to working with Airbnb, according to Alexander Lycoyannis, an attorney with Rosenberg & Estis PC.

“Certain municipalities are making peace with Airbnb, because there's a chance of increased tax revenues,” Lycoyannis said. “When they see a big, well-capitalized company that wants to do business in their city, they're going to look for a way to make it happen.”

New York state has taken one of the harder lines against short-term rentals, with Gov. Andrew Cuomo signing a new law in October outlawing the advertising of the accommodations and imposing fines against hosts ranging from \$1,000 to \$7,500. New York City has long claimed that rentals for shorter than 30 days are illegal under its local ordinances.

“Before, it was the act of renting them out, but now, merely advertising for doing so became offensive by fines of up \$7,500,” Lycoyannis said.

At first, Airbnb had proposed concessions aimed at alleviating concerns expressed by lawmakers over the home-sharing economy's impact on the housing supply, saying it would limit New York hosts to one rented apartment. The proposal also included regulatory changes that would authorize Airbnb to collect and remit taxes on behalf of the hosts, as well as set up an online platform where hosts can register and a hotline to log complaints from neighbors of hosts.

But when the advertising bill was signed into law, the company sued to stop its enforcement. Airbnb settled with the state in November, after it agreed not to bring action against the company for violations, and with the city in December. The agreements, however, have no effect on Airbnb hosts — only the company, said Todd Soloway, head of the real estate litigation practice at Pryor Cashman LLP.

“On the face of the statute, it makes no distinction between hosts and the company itself,” Soloway said. “But the resolution of that case was to give injunctive relief to Airbnb themselves from direct enforcement of the statute.”

Moving into 2017, enforcement of the new law against hosts will be something the hospitality industry and others will watch closely, since the statute could greatly dampen Airbnb’s popularity in New York.

“The statute is meaningless without enforcement,” Soloway noted.

Jay A. Neveloff, chair of Kramer Levin Naftalis & Frankel LLP’s real estate practice, said he expects New York City and its Mayor Bill de Blasio to come down hard on violators given the political climate.

“I think it's clear that this administration is going to take a hard line, and the city is going to be vigilant about enforcing the current law,” Neveloff said. “I don't see Mayor de Blasio and the city administration giving up on that. Politically, that's what people want, and I think it's the right thing.”

Airbnb will likely continue to face challenges in certain jurisdictions in 2017, Lycoyannis said, but the amount of resources at the company’s disposal means it’s going to succeed in most of the places where it tries to do business.

“They're doing so well, they're growing so exponentially, that they'll take their lumps in some places in exchange for their successes elsewhere,” Lycoyannis said.

Electronic Sports

The gaming industry has seen a lot of change in recent years, with internet gambling and daily fantasy sports emerging as alternatives to traditional casinos and tracks. But experts say another growing competitive event, electronic sports, could help the industry win back some players.

Electronic sports, or e-sports, are video game competitions played for cash or prizes and have started attracting large crowds at live events and viewers who stream the contests from home. E-sports are particularly popular with millennials, whom the casinos need to start viewing more as a target demographic, according to Genova Burns LLC attorney Nicholas R. Amato.

“Electronic sports, or video sports, is probably the hottest thing happening now,” Amato said. “It's growing bigger and bigger.”

Amato, who is a former executive director of the New Jersey Casino Reinvestment Development Authority and a past president of the Casino Association of New Jersey, said casinos have had trouble bringing in millennials because traditional slot machines and table games don’t interest them as much as past generations. Hosting e-sports contests would be one way of getting millennials in the door.

“This is their sport,” Amato said.

A Las Vegas casino, the Downtown Grand Hotel & Casino, recently opened a dedicated e-sports lounge to host events and offer prizes to competitors. It also allowed wagering by spectators at an event earlier this year.

In New Jersey, the Division of Gaming Enforcement issued a letter urging casinos in struggling Atlantic

City to start hosting the events, saying they could help bring in crowds and provide publicity. The regulator said current rules would allow for the events, but Amato said a good next step would be changes to allow onlookers to wager on the outcomes of those competitions as well.

"I'd like to see the division, just like they drafted regulations to allow e-sports, let's go to the second stage and allow spectators to wage on them," Amato said. "To me, that would be one of the most important pieces of legislation that could happen."

The next step, he added, would be to allow spectators to bet on e-sports contests over the internet.

"That would be a tremendous business-getter for Atlantic City," Amato said.

Internet Gaming

A piece of proposed legislation to watch in New Jersey is a bill from Assemblyman Ronald Dancer, R-Monmouth, that would allow racetracks in the state to offer internet gaming. New Jersey-based casinos can currently offer online gambling, but the new law would allow the Garden State's three racetracks to enter into partnerships with existing casinos to allow online gamblers to place bets at the tracks.

"It would be helpful to the racetracks, because they would get a piece of the pie, and it would also bring more business to the casinos," Amato said.

The bill comes after the November defeat of a ballot measure that would have paved the way for two casinos to operate outside Atlantic City. Under the proposal, the two operations would have had to be in separate counties at least 72 miles from Atlantic City, and to contribute a portion of their gambling proceeds to Atlantic City's economic development and senior programs. But critics feared the competition would hurt Atlantic City's remaining casinos and called the plan vague for not designating an exact tax rate or specifying locations for the casinos.

New Jersey is also still fighting in federal court over the state's most recent effort to legalize sports betting at its struggling casinos and racetracks. The legislation has been blocked thus far under the Professional and Amateur Sports Protection Act, a federal law that prohibits states from authorizing sports betting. New Jersey has asked the U.S. Supreme Court to review the decision, in a petition that has gained the support of five other states.

But Amato said changes to federal policy could potentially impact the outcome of the case.

"It's a different political climate," he said. "The president-elect has an understanding of gaming better than any other president that we know in modern times."

--Additional reporting by Zachary Zagger, Jeannie O'Sullivan, Rick Archer, Fola Akinnibi, Braden Campbell, Y. Peter Kang, Vin Gurrieri and Ben James. Editing by Edrienne Su.