

Hospitality Legislation And Regulation To Watch In 2016

By **Matthew Perlman**

Law360, New York (December 24, 2015, 8:38 PM ET) -- Developments surrounding Airbnb Inc. and the nontraditional competition it brings, changes to traditional employment rules that could hit midyear, and widespread challenges to daily fantasy sports will grab the hospitality and gaming industries attention in 2016.

Here is the legislation and regulation to keep tabs on.

Airbnb Faces Piecemeal Challenges From U.S. Cities

It's been a busy year for Airbnb, the online marketplace for short-term apartment rentals. While the service isn't exactly threatening to upend the hospitality industry, experts are watching developments in certain key markets to see how Airbnb might impact competition for hotels down the road.

Airbnb's popularity is easy to understand, and it becomes easier when you look at the cities where regulatory or legislative efforts have been made to curtail the marketplace's use by tenants and tourists, according to Alexander Lycoyannis, an attorney with Rosenberg & Estis PC. The two biggest battlegrounds in 2015 were New York and San Francisco, cities with high rents and hotel rates.

"It's very expensive to stay in a hotel in certain cities, and unsurprisingly, it's very expensive to rent an apartment in those same cities," Lycoyannis said of Airbnb's popularity. "It's kind of an economic sweet spot."

This localized adoption of Airbnb has led to different approaches to handling its use. In some cities, officials have found that Airbnb's business model butts up against local laws, like in New York, where lawmakers announced an increase in enforcing rules on short-term rentals. Lycoyannis said that tensions between local laws and Airbnb are a persistent issue, no matter how much the economics make sense for users.

"You have fire safety and public health laws, and no matter what financial arrangements are made as to short-term rentals, the underlying issues will still be there," Lycoyannis said. "There are laws on the books, and there are reasons that those laws are there."

He said that it's unlikely we'll see these occupancy laws changed so Airbnb can operate more freely because they're necessary to ensure people's safety.

"You don't necessarily have to change laws simply because someone has a website that makes it easier to do something. There are still important interests that led to those laws being passed," Lycoyannis said.

In San Francisco, Airbnb's hometown, the issue is playing out differently. There, voters shot down a referendum in November that would have curbed the site's operation in the city by limiting the number of nights a resident is allowed to rent out their apartment. The rule changes also would have provided neighbors of short-term rentals an easier path to file lawsuits when they suspect violations.

Notably, Airbnb engaged in an \$8.5 million marketing campaign ahead of the vote, and later announced the company would form 100 guilds comprising Airbnb members in 100 cities nationwide by the end of 2016, to promote the services' interests. Lycoyannis said these efforts may well pay off.

"Money and politics can never be discounted as a galvanizing force," he said.

Heading into 2016, there are likely to be more localized issues that crop up around Airbnb as municipalities try to figure out what to do about the service. Lycoyannis cautioned that each city and region has its own set of competing interests that will impact the outcome, and that people trying to see where the industry is heading have to understand the forces at play in that specific place.

"If you're interested in the issue, you really have to look at the locale," Lycoyannis said. "Because New York and San Francisco and other locales are going to have their own dynamics, and you really have to dive into who the players are there, and what the local issues are, and what's important to the electorate there."

"You can't draw any sweeping conclusions nationally," he added.

FLSA Changes Coming Midyear

The U.S. Department of Labor was expected to implement changes to the Fair Labor Standards Act in 2015 that would alter regulations covering overtime exemptions for executive, administrative and professional employees. The changes were finally proposed in June, and the DOL is now expecting to implement them by the middle of 2016.

The biggest change for the hospitality industry would be a near doubling of the minimum salary for certain exempt employees from the current level. The change also provides for an indexed increase in the threshold moving forward.

"This is a big change in the landscape, and it has huge economic and practical impacts for employers, and for everybody," Michael Abcarian, an attorney with Fisher & Phillips LLP, told Law360.

The DOL took public comments after releasing its proposed rules, and is currently weeding through them and considering revising its proposal. Abcarian said that until the final rules are announced, employers should proceed as if the rules will be enacted as proposed.

"If you're prepared for it, the way it's been formulated up to this point, you probably aren't going to be too far off in having to make any changes, if tweaking has been done," Abcarian said.

He recommends that businesses take a hard look now at their employment policies for exempt workers

to see if there's anything that can be done to improve the process. This could mean changing some employees' exempt status, converting some to hourly employees or increasing salaries to meet the new thresholds.

"There's any number of approaches, but all of them implicate some fairly fundamental changes to your business model," Abcarian said.

He added that businesses should use this opportunity to really assess their employment practices and not limit their assessments to the scope of the regulatory rule changes.

"It's a good time for all employers, and certainly the hospitality industry, to take a fresh and informed look at our exemption methodology," Abcarian said. "Not just with an eye towards what little things we'll have to change if the new rules come into place, but also to look at the whole picture."

Daily Fantasy Sports Becomes a Hot Issue

The rise of daily fantasy sports is a hard thing to ignore, especially for traditional gaming industry operators. Until earlier in 2015, the DFS sites — DraftKings Inc. and FanDuel Inc. are the largest — have been able to run their games largely outside of any regulatory framework. But there are many indications the status quo won't last.

The companies are currently facing problems on several fronts, including lawsuits, new regulatory requirements and questions about the industry's legality on the whole.

New York Attorney General Eric Schneiderman conducted a probe into DFS in 2015, which eventually led his office to issue cease-and-desist letters to DraftKings and FanDuel, saying they were operating illegal gambling operations in violation of state law. In October, Nevada gaming regulators decided that DFS constituted gambling and that operators would need to obtain licenses to operate in the state. And Massachusetts Attorney General Maura Healey proposed sweeping consumer protection-oriented regulations for the industry in November.

"I don't think the view is that the industry should be shut down," Mark N.G. Hichar of Hinckley Allen & Snyder LLP told Law360. "There's a view that there should be some consumer protection regulation, which is certainly the view that the attorney general of Massachusetts took, and I think that view is shared by others."

The Massachusetts regulations cover issues including the age of DFS participants, advertising restrictions and a \$1,000-per-month cap on deposits from most players. Hichar said the rules were comprehensive and could serve as a basis for regulations in other states.

"Massachusetts has proposed some regulations that are robust, but would not mean the death of the industry. What comes out of that process will be a starting point for other states," Hichar said.

Meanwhile, he said, the different approach taken in Nevada, where regulators are trying to include DFS under the auspices of the state's existing gaming commission, may be related to the high concentration of traditional gaming operators located there.

Marc Dunbar of Jones Walker LLP said these traditional companies are watching the debates closely, though they don't necessarily mind the competition. He said they want to see DFS regulated the way

other forms of gambling already are.

"Let's just call it gambling and have it regulated like the rest of us," Dunbar said.

Hichar noted that some of these operators might be interested in entering the DFS market themselves at some point, but said that would have to wait until uncertainty around the industry has dissipated.

"When you're a casino, you're under very strict regulation, and if your regulator advises you that fantasy sports are gray, or anything other than clearly legal, then you would do nothing to put your license at risk," Hichar said.

Seasonal Guest Worker Program Cap Restrictions Eased

Parts of the hospitality industry, including resorts and other seasonal operations, rely heavily on the nation's H-2B guest worker program to find employees. The program has faced a number of issues in recent years, including lawsuits challenging three sets of proposed rules issued by the DOL.

While no comprehensive overhaul is underway, some tweaks to the program were made with the omnibus spending bill that Congress passed in December, and hospitality employers should be aware of the changes heading into next year.

The modification with the biggest impact has to do with the cap put on the number of H-2B visas that are issued each season. U.S. Citizenship and Immigration Services currently processes up to 33,000 petitions twice each year, and hit the cap for the first period in 2015.

The new changes to the program will mean that returning guest workers won't count toward the quotas, which should help alleviate some of the crunch, said Dan Kowalski of The Fowler Law Firm.

"We're hoping that now that the returning worker exemption has been put into play, that the cap won't be an issue, or at least not as much of an issue," Kowalski told Law360.

The other important change involves the prevailing wage determination. Employers utilizing the H-2B program are required to pay workers the prevailing wage for the occupational classification in the workers' area of employment, and in the past the DOL exclusively determined what that wage was.

Employers complained that this process was overly time-consuming and that the data used by the DOL was inaccurate, according to Enrique Gonzalez, an attorney with Fragomen Worldwide. He said that when it lacked the data it needed to make a determination, the DOL simply averaged in wages that were not necessarily applicable, skewing the numbers.

The new changes will allow employers to submit private prevailing wage determinations compiled by an outside company, which Gonzalez said would smooth the process and make the determinations more accurate.

"Unfortunately, the data that [the DOL] uses is notoriously inaccurate, because they average out numbers," Gonzalez said. "You're having to live and die by their statistical averaging, where a private survey will pull more information that the Department of Labor won't necessarily be able to get."

The changes to H-2B are considered another part of a stream of stop-gap measures, experts say. Users

of the program ultimately want to see it revamped in a more holistic way. Kowalski said that hasn't happened yet because of political inertia in Washington, and suggested that businesses urge their lawmakers to do something about it.

"People in Congress view anything having to do with visas or immigration as radioactive," Kowalski said. "It's difficult to get them to enact reforms, even if they're beneficial to the economy, because it's perceived as being weak on immigration."

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