

## Trending Issues in Hospitality Regulation

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The session will discuss information on short-term rentals (STRs) and implications for both the lodging industry and local governments; firearms legislation and recent regulation; police activity and request for hotel records in hotels in light of *Patel v. Los Angeles*; FTC regulation of resort fees and other hotel charges; and trends in hotel taxes usage and economic development.

### Short Term Rental (STR) Regulation

The rapid proliferation of residential short term rental activity is creating new challenges for the hotel industry, neighborhoods, and entire cities. While STRs are themselves nothing new, the rising popularity of property listing platforms is changing the lodging business, while simultaneously prompting calls for additional regulation from residents and locally elected officials.

For the lodging industry, concerns associated with increased STR activity abound. Airbnb's market valuation exceeds many large hotel chains. The leisure travel market is most at-risk to supply-side pressure from STRs, as many STRs remain niche options for housing for business travelers. For example, Airbnb states that 76% of its listings are outside "main hotel districts." Meanwhile, corporate markets remain the stalwart of profitability in the mainstream lodging sector. However, Airbnb and other players have rolled out corporate and business travel programs to lure more travelers from this lucrative sector. Some experts (and Airbnb itself) argue that STR activities merely make the pie larger by facilitating more travel opportunities. Airbnb points to its own study indicating that 30-40% of Airbnb guests would not have made the trip had the traveler not been able to stay in an STR. But, even if the pie is getting larger, STRs relieve demand compression, driving down ADR and RevPAR.

This biggest pushback against increased STR activity has not come from the hotel industry at all, but rather from neighborhood groups and locally elected officials who are objecting to STR activity occurring nearby, citing safety concerns and rising housing costs. In November, San Francisco went through a highly publicized debate over whether STRs should be allowed to continue to operate in the city. Known as "Prop F," many residents were angered over what they perceived as STR investors coming into the city and turning long-term residential rental units into short-term lodging units. Airbnb spent \$8 million to defeat Prop F, potentially foreshadowing the future of PR campaigns the STR industry may be forced to run in other cities.

In Austin, the city's first STR ordinance went into effect in 2012. Pushed by neighborhood groups, the original STR ordinance was aimed at regulating the density of STRs, particularly non-owner occupied STRs. To comply, STR operators are required to pay an annual fee of \$285, provide proof of property insurance, provide proof of payment of hotel occupancy taxes, and notify neighbors of the unit's operation. The ordinance also split STR into several varieties (Types) based on type of occupancy.

Yet compliance with the Austin ordinance remains very low. Taxes are not enforced consistently, and the City has difficulty regulating the operators. Even where properties are licensed, neighbors continued to complain of “party houses,” owned by speculative investors and rented out to large groups. Recently, Austin enacted a temporary moratorium on licensing new non-owner occupied STRs. But, the issue is being lobbied vigorously by the STR groups, and whether the moratorium should be extended indefinitely is still pending before city council.

In 2015, the Texas Legislature debated a bill that would have provided minimal regulation of STRs in large Texas cities. The committee version of Texas HB 1792 would have required the STR property to meet basic health standards such as keeping the property free from pests and rodents, providing clean linens and potable water, and smoke alarms. The bill also contained a tax payment facilitation provision that would have required STR website operators such as Airbnb to ensure the property owner is registered to collect and pay taxes. However, the bill went virtually nowhere, with conservative lawmakers concerned about even basic governmental regulation.

Predictions for the future seem to portend more local regulation of STRs, particularly in areas of the nation where housing costs are increasing. Particularly, non-owner-occupied STR units will likely draw the ire of housing advocates and progressive policymakers. Additionally, we can surely expect to see increased tax enforcement with additional legislative efforts to ensure STRs are playing by the same rules.

### Firearms Legislation

Increasingly, conservative lawmakers are passing more gun-friendly legislation in response to perceived federal restrictions on certain types of gun ownership. For example, in Texas, college “campus carry” and open-carry became the law of the land in the 2015 legislative session. Hospitality operators are now scrambling to adopt policies to keep guests and employees safe, while also trying to keep their businesses from becoming PR targets from groups on either side of the issue.

It is not easy for a hotelier to stay above the fray. In Texas, a state lawmaker threatened to engage in a public campaign to inform his constituents to boycott a hotel brand because of the hotel brand’s policy of prohibiting firearms. Meanwhile, that same brand is feeling pressure from gun control advocacy groups to maintain policies that provide for meetings and other events to be gun-free.

Additionally, we have seen publicly owned buildings such municipally owned convention centers lose their ability to control firearms on the premises. And there are rumors that pro-gun groups are going to push for a concept known as “constitutional carry,” and limit the ability of public accommodations to prohibit firearms. We are working to ensure hotels continue to have the ability to have a policy to restrict a guest's ability to bring a firearm into their properties, whether concealed or openly carried, at the hotel's option. We expect this may be under threat in the future.

## Police Requests for Records

The scene is a common one in hotels across the nation: A police officer is standing at the front desk, asking the clerk whether a particular guest checked in. The officer wants to see a list of guests' names, and even asks for a copy of the security camera footage. The clerk summons the front office manager, and the police officer points out that the city ordinance regulating hotel operations requires hotel compliance with requests to review hotel records. Should the manager turn over the information? What are the hotel's obligations to the guest?

Lodging operators find themselves in a predicament when it comes to balancing guest privacy, business records integrity, and proprietary information against requests from law enforcement and local inspectors. A recent Supreme Court case has given hotels a new tool in our understanding of a hotel's rights against official demands for information. However, we depend on our law enforcement officers to assist us in preventing and investigating criminal activities at the property, and we must simultaneously protect both the business and the guest's privacy.

With three attorneys on staff representing thousands of lodging properties, our office regularly gets calls from hotel managers who are face-to-face with a law enforcement officer requesting information on a guest. The sheer breadth of law enforcement requests is staggering. In the last few months alone, hoteliers have called us regarding requests from the local police and sheriffs, the FBI, Border Patrol, military police, the Judge Advocate General's Corps, state police, a game warden, not to mention local inspectors and auditors. Most of the time, the law enforcement officers want a copy of the hotel's registry and a guest's identifying information, with the hope of finding a wanted individual staying at the hotel. Sometimes these requests go much deeper, such as asking for copies of security camera footage, guest occupancy patterns, guest payment data, or even requesting to enter and search a guest's hotel room. One Department of Defense investigator recently requested parking lot security footage to determine if an employee was using a Department vehicle to sneak off in the middle of the night to drink at a local bar.

The issue of hotel property record requests has been aggravated over the years as many cities have passed local ordinances requiring a hotel operator to turn over guest information or other lodging property records at the request of a law enforcement officer or a city inspector. Usually, these city ordinances come with criminal penalties for non-compliance, essentially demanding that the hotelier turn over records or information at any time of day or night, or face fines or even jail time.

A typical ordinance reads something like this: "It shall be the duty of the owner or operator of any hotel to keep the name of the guest registered the type of official photo identification presented and any other personal identification. Such record or register shall be available at all times for inspection by any officer of the police department of the city. Any person who shall violate any provision of this section shall be guilty of a class C misdemeanor." Many of us practicing hotel law have long protested that these local ordinances violate the Fourth Amendment to the U.S. Constitution, and a few months ago, the Supreme Court agreed with us.

Why does it matter? Are the records the property of the hotel business? In most situations, data on business customers belongs to the business, and it is the business that is in the position to resist access to this information without a warrant or subpoena, rather than the customer. In the hotel context, this is particularly important because hotel guests have an expectation of privacy when staying at lodging

properties. Hotel operators have a duty to take reasonable precautions to both protect that privacy, and also ensure that guest-related data does not fall into the hands of an unauthorized entity. This is true even when the third-party requesting the information is wearing a uniform with a badge.

By now, we are all familiar with the credit card data breaches at Target, Home Depot, and countless other businesses. Those of us in the hotel industry of course face the same concerns about guest data, only with greater consequences at stake. Customers staying at a hotel are not necessarily the same as customers shopping in a grocery store when it comes to privacy and personal protections: A hotel room comes with a door that the guest locks. Hotel guests have an additional expectation of privacy that is more closely attuned to what one would find in a domicile such as a home or apartment, and the hotel has a duty to provide a secure environment.

Additionally, some jurisdictions have additional privacy protections that come into play. Certain state constitutions guarantee a right of privacy that extends to private actors, a protection that extends beyond the U.S. constitution. Even where a state constitution does not provide additional privacy protections, common law principles enshrine a hotel guest's right to have his or her privacy shielded from certain prying eyes.

For example, a hotel client approached us for advice on an issue involving a guest's expectation to privacy. A police officer approached the front desk clerk and asked to see a print-out of all guests currently registered at the hotel. The clerk complied with the officer's request, and the officer went on his way with the print-out in hand. Months later, the hotel's management company found itself dragged into the middle of a nasty divorce proceeding, with the wife's attorney threatening the hotel with a lawsuit for violating his client's privacy by disclosing the registry to the police officer. It turned out that the officer who requested the registry from the front desk clerk was doing a favor for a buddy, who had suspected his wife of having an affair. We worked out a compromise on that case, but the event left the hotel's credibility and reputation damaged.

Aside from safeguarding guest privacy, hotels also have a vested interest in ensuring valuable business records are not released to third parties. A hotel's policies and procedures are proprietary, and this includes security protocols. And of course, pricing data, sales leads, employee records, payment card information, and contracts become very valuable when placed in the wrong hands. Hotel lawyers have used these arguments with courts to challenge law enforcement or city officials who want access to this information without a warrant or subpoena. In June 2016, the U.S. Supreme Court gave hotels a valuable tool when it comes to dealing with requests for hotel and guest data.

In *City of Los Angeles, CA v. Patel, et. al.*, the Supreme Court held that a business, and specifically a hotel, cannot be compelled to turn over data or guest records without a valid warrant or subpoena, despite any local ordinances stating otherwise. The Court clarified that hotels have Fourth Amendment protection against unreasonable search and seizure, and a city ordinance cannot undo that protection. In the Patel case, the Court noted that it is not difficult or cumbersome for a law enforcement officer or other city official to get a warrant or subpoena, and the hotel is entitled to "precompliance review" by a judicial magistrate in order to protect the hotel's rights. This precompliance review allows a neutral decision-maker to review the request for information before the hotel is compelled to turn it over to the law enforcement officer. In fact, in Patel, the Court noted that often, police officers can have a magistrate issue a warrant or subpoena in the field through a process known as an "administrative subpoena."

In addition to safeguarding the hotel's Fourth Amendment rights, precompliance review has an additional benefit for the hotel: Precompliance review gives a hotel an affirmative defense if challenged on the hotel's decision to turn the data over. If challenged, the hotel will be able to rely on the defense that it had no choice, and the hotel was ordered to turn the data over to law enforcement.

Real-World Practices - Hoteliers should train managers on the issue of dealing with official requests for records, access to guest rooms, copies of security camera footage, etc. It is imperative to understand not only the hotelier's rights in these situations, but also act in a manner consistent with a guest's expectation to privacy. At the same time, hotel managers must hold onto the notion of the balance. When dealing with law enforcement, it is important to show the officer respect and deference. After all, we depend on these same law enforcement personnel to safeguard our guests and our property, and agitating the authorities benefits no one.

With this in mind, we suggest a calm, nuanced approach. Returning to the scene with the police officer standing at the front desk, when faced with a request for data or information, we recommend the manager on duty first ask if the request relates to an emergency or another exigent circumstance. There is a long-standing exception to warrant and subpoena requirements when time is of the essence and public safety is in jeopardy. Assuming there is not an emergency or other exigent circumstance, we recommend carefully explaining to the officer the hotel's duty to protect and safeguard guest privacy, as well as the hotel's need to protect proprietary information. It has been our experience that often, simply explaining to the officer that guests have gone after hotels in civil court over disclosing their information, creates a level of understanding regarding the hotel's predicament. When communicating with the officer, emphasize the hotel's desire to cooperate in the investigation, but the hotel needs to ensure both the guest and the businesses are protected from harm. Then, politely ask the officer for a warrant or subpoena before complying with the information request.

We also recommend avoiding confronting the law enforcement officer with the specific citation of the Patel case, unless the officer continues to insist that a local ordinance gives the officer the right to access the information at any time. At that point, the hotelier should carefully explain the holdings in Patel, and note that the Supreme Court case makes the local ordinance invalid on its face. Again repeat the request that the officer obtain a warrant or subpoena, to both protect the guest and the hotel property.

Finally, a hotelier should never hesitate to involve the hotel's own legal counsel. Many times, counsel can communicate directly with the officer and assist in resolving the issue quickly.

Remember, balance is the key. The Patel case gave us in the hotel industry more weight to our argument. However, we live and work in the community where our hotel stands, and maintaining long-term relationships with law enforcement is a necessity.