



WASHINGTON STATE HOSPITALITY LAW MANUAL Third Edition

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In 2012, the Washington Lodging Association published the *Washington State Hospitality Law Manual, Third Edition*, to help its members better understand the complex laws and regulations that govern lodging operations in Washington State. The edition was compiled under the leadership of Irv Sandman of Sandman Savrann PLLC in his role as editor-in-chief. It is the generosity of Irv Sandman and his team of authors and attorneys that has made it possible for the Washington Hospitality Association to provide this invaluable resource to its membership.

This Manual is intended to provide education and general understanding about some of the significant legal issues facing hotels and their operations. It is not intended as legal advice, and legal counsel should be consulted before making a legal decision impacting your business.

It is also important to note that federal, state and local laws and regulations are constantly changing. You and your legal counsel should make sure that you know and understand the most current laws and regulations that govern your operations and when considering your response to any legal issue.

The third edition builds upon the important work of Dennis McLaughlin, Dennis McLaughlin & Associates PS, whose first two editions of the Manual also served as important reference tools for Washington hoteliers and attorneys.

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Dennis McLaughlin, Dennis McLaughlin & Associates PS

Table of Contents

ABOUT THE EDITORS AND CONTRIBUTORS	1
USE OF THIS MANUAL	4
PREFACE	5
INTRODUCTION.....	7
PART I : THE INNKEEPER AND ITS GUEST.....	11
Chapter 1 : Innkeeper’s Duty To Receive Guests And Its Right To Refuse Guests	11
1.1. Duty to Receive Guests.....	11
1.2. Federal Law	11
1.3. Washington Law.....	12
1.4. Limited Right to Refuse Guests	15
1.5. Parties for Underage Guests.....	16
1.6. Summaries and Conclusions.....	18
Chapter 2 : Guest Reservations	20
2.1. Form and Effect of Agreement.....	20
2.2. Hotel Remedies.....	22
2.3. Guest Remedies	22
2.4. Overbooking.....	23
2.5. Catering, Banquet, Meeting and Convention Contracts	23
2.6. Gift Certificates and Cards	24
2.7. Summaries and Conclusions.....	24

Chapter 3 : The Innkeeper’s Right To Evict A Guest, Tenant, Patron Or Others	26
3.1. Distinction Between Guest and Tenant	26
3.2. Eviction Rights in General	26
3.3. Application of Criminal Laws.	27
3.4. Eviction for Violation of Hotel Policies	27
3.5. Eviction for Overstaying.....	28
3.6. Eviction Due To Illness	28
3.7. Eviction of Persons Other Than Guests.....	29
3.8. Summaries and Conclusions.....	30
Chapter 4 : Guest Rights To Privacy	31
4.1. The Innkeeper’s Right to Protect the Guest’s Privacy	31
4.2. The Innkeeper’s Obligation to Protect the Guest’s Privacy	33
4.3. Summary and Conclusions	34
Chapter 5 : The Innkeeper’s Duty to Protect Guests from Injury	35
5.1. Reasonable Care Rule	35
5.2. Contributory v. Comparative Negligence.....	36
5.3. Violation of Laws and Regulations—Negligence “ <i>Per se</i> ”	37
5.4. Cases: Fact Patterns and Decisions	38
5.5. Keys and Access Cards	44
5.6. Acts of Hotel Employees.....	45
5.7. Acts of Other Guests and Patrons	46
5.8. Use of Exculpatory Language	47
5.9. Hotel Security Tips	47

5.10.	Working with Insurers and Counsel.....	49
5.11.	Summaries and Conclusions	50
Chapter 6 : The Innkeeper’s Liability for Guest Property.....		52
6.1.	Washington State Statutes Limiting Liability	52
6.2.	“Valuables”	53
6.3.	Other Personal Property.....	55
6.4.	Unclaimed Property	55
6.5.	Handling Mail for Hotel Guests	56
6.6.	“Intangible Property”	56
6.7.	Liability for Guest Vehicles	57
6.8.	Training.....	57
6.9.	Statutes of Limitation	58
6.10.	Insurance	58
6.11.	Summaries and Conclusions	58
Chapter 7 : The Innkeeper’s Liability for Loss of Property of Persons Other Than Guests.....		60
7.1.	General Nature of Liability.....	60
7.2.	“Valuables”	61
7.3.	Liability for Other Personal Property	61
7.4.	Vehicles	62
7.5.	Training and Defenses	64
7.6.	Summary and Conclusions	64
Chapter 8 : Frauds Committed Against Innkeepers.....		65
8.1.	Criminal and Civil Statutes.....	65

8.2. Credit Card Fraud	65
8.3. Bad Checks	66
8.4. “Skips”	67
8.5. Collections of Delinquent Accounts	68
8.6. Lien Statutes.....	70
8.7. Theft of Hotel Property.....	70
8.8. Detention of Guests.....	72
8.9. Crime Prevention	72
8.10. Summary and Conclusions	73
Chapter 9 : Consumer Protection Laws Affecting Innkeepers	75
9.1. The Federal Truth-in-Lending Act.....	75
9.2. State Laws on Credit Reporting.....	75
9.3. Posting Rates.....	75
9.4. Truth-in-Menu and Labeling Laws.....	76
9.5. No-Smoking Laws.....	77
9.6. Summary and Conclusions	79
Chapter 10 : Deceased Guests.....	80
10.1. Who to Call—the Role of County Coroner and the Police	80
10.2. Inventory of the Property of the Deceased Guest	80
10.3. Release of Property and Tax Waiver.....	80
10.4. Summary and Conclusions	81
Chapter 11 : Hotel Rules, Policies, and Procedures.....	82
11.1. At Whom are Rules, Policies, and Procedures Directed?	82

11.2.	Sources of Rules, Policies and Procedures	82
11.3.	Crisis Management Policies	82
11.4.	Summary and Conclusions	83
PART II : THE INNKEEPER AND ITS EMPLOYEES.....		84
Chapter 1 : Wage And Hour Laws Applicable To Employees		85
1.1.	Coverage of Federal and State Laws	85
1.2.	Exemptions.....	86
1.3.	Minimum Wage Rates Under Federal and State Law	89
1.4.	Computing Hours Worked	90
1.5.	Computing the Regular Rate and Overtime Pay.....	94
1.6.	Child Labor Laws: Federal and Washington State	95
1.7.	Employment vs. Independent Contractors.....	99
1.8.	Employment vs. Volunteer Status.....	101
1.9.	Employment vs. Trainee Or Student Status.....	101
1.10.	Wage Payment	101
1.11.	Summary and Conclusions	103
Chapter 2 : FICA and FUTA Taxes, Meals and Lodging, Uniforms, Student Employees, Recordkeeping and Tip Credit, Reporting and Pooling		105
2.1.	Federal Social Security & Medicare and Federal Unemployment	105
2.2.	Meals and Lodging.....	105
2.3.	Uniform Maintenance	106
2.4.	Student Employees.....	107
2.5.	Record Keeping.....	108

2.6. Tip Reporting and Tip Credit.....	109
2.7. Summary and Conclusions	110
Chapter 3 : Laws Against Discrimination in Employment.....	112
3.1. Federal and State Laws: An Overview	112
3.2. Sex Discrimination.....	114
3.3. Sexual Harassment.....	116
3.4. Age Discrimination	122
3.5. Race and Color Discrimination	124
3.6. Religious Discrimination	125
3.7. National Origin Discrimination	126
3.8. Marital Status.....	126
3.9. Disability Discrimination	127
3.10. Affirmative Action	131
3.11. Discrimination in Advertising for Employment	131
3.12. The “Do’s and Don’ts” of the Employee Interview	132
3.13. Preventive Measures.....	135
3.14. Summary and Conclusions	137
Chapter 4 : Employment Testing	139
4.1. Use of Polygraphs	139
4.2. Substance Abuse Testing	140
4.3. Drug Addiction and Alcoholism	140
4.4. Medical Marijuana	141
4.5. Summary and Conclusions	142

Chapter 5 : Employee Termination	143
5.1. “At Will” Status	143
5.2. Documentation	144
5.3. Investigation and Documentation.....	144
5.4. Record Keeping	145
5.5. Review of Employee Files	145
5.6. Termination Interview	146
5.7. Notice of Termination.....	146
5.8. Exit Interviews.....	146
5.9. Severance Agreement and Release.....	148
5.10. Summary and Conclusions	149
PART III : GENERAL INNKEEPER OPERATION	150
Chapter 1 : Licensing And Regulation Of Hotels	151
1.1. State Regulation - Transient Accommodations	151
1.2. Maintenance of Guest Registers	151
1.3. License Requirements.....	152
1.4. Inspections by the Department of Health	156
1.5. Powers and Duties of Department.....	157
1.6. Local Regulation	158
1.7. Summary and Conclusions	158
Chapter 2 : Public Health And Safety Requirements	160
2.1. Building Codes.....	160
2.2. Laws, Regulations, and Liability Relating to Food.....	161

2.3.	WAC 246-360 Transient Accommodations	165
2.4.	Swimming Pools	166
2.5.	Contagious Diseases	166
2.6.	Laws Regarding Aid to Choking Victims	167
2.7.	Signage	167
2.8.	Summary and Conclusions	168
Chapter 3 : Fire Safety Laws		170
3.1.	Fire Safety Laws.....	170
3.2.	State and Local Fire Legislation	170
3.3.	Federal Fire And Emergency Legislation	171
3.4.	Court Cases.....	173
3.5.	Summary and Conclusions	175
Chapter 4 : Occupational Safety And Health Act (OSHA)		177
4.1.	Hotel Management Responsibilities	178
4.2.	Reporting and Record Keeping Requirements	180
4.3.	Posting Requirements.....	180
4.4.	Inspections and Citations: Employers’ and Employees’ Rights and Remedies.....	181
4.5.	Accident Prevention Programs.....	183
4.6.	Violence in the Workplace.....	183
4.7.	Ergonomics.....	184
4.8.	Summary and Conclusions	184
Chapter 5 : Antitrust Laws and the Operation and Marketing of Hotels.....		186
5.1.	General Overview of Antitrust Laws	186

5.2. Special Application to Certain Hotel Practices.....	188
5.3. Summary and Conclusions	192
Chapter 6 : Washington Law Relating To Alcoholic Beverages	194
6.1. General Nature of Control by State.....	194
6.2. Application for and Issuance of Licenses	194
6.3. Hotel License	195
6.4. Motel License	197
6.5. Initiative 1183	198
6.6. Public Safety.....	199
6.7. Liability for Serving Alcoholic Beverages to Minors.....	200
6.8. Liability for Serving Alcoholic Beverages to Intoxicated Persons.....	200
6.9. Books and Records.....	202
6.10. Summary and Conclusions	203
Chapter 7 : Americans With Disabilities Act—Title III	206
7.1. The ADA’s Application to Hotels	206
7.2. Enforcement.....	207
7.3. General Compliance Requirements for Facilities	208
7.4. The Pool Lift Controversy	211
7.5. Separately-Owned Hotel Rooms	211
7.6. Service Animals	212
7.7. Policies and Procedures: Reservations Systems	213
7.8. Effective Communication	214
7.9. Washington Law.....	214

7.10. Summary and Conclusions	216
Chapter 8 : USA Patriot Act.....	219
8.1. Access to Hotel Records	219
8.2. Money Laundering and Suspicious Financial Transactions	219
8.3. Office of Foreign Assets Control (OFAC)	220
8.4. Immunity for Hotels in Compliance	221
8.5. Patriot Act Renewal	221
8.6. Summary and Conclusions	222
Chapter 9 : Use and Protection of Music, Television Signals, and other Work	223
9.1. Music.	223
9.2. Unauthorized Interception of Cable Television Broadcasts	227
9.3. Vicarious Liability for Infringement by Guests (Downloading/Uploading) – The DMCA.....	227
9.4. Summary and Conclusions	229
Chapter 10 : New Media and Hotel Marketing—Hotel Websites, Use of Images, Social Media, OTAs and Online Review Sites.....	230
10.1. The Hotel’s Website: Liability Issues and Recommendations for Terms and Conditions.....	230
10.2. Publication of Photographic and Video Images—Ownership and Copyright Issues	238
10.3. Social Media.....	240
10.4. Online Travel Agents (OTAs)	244
10.5. Online Review Sites	247
10.6. Summary and Conclusions	252
Chapter 11 : Room Taxation In Washington State	254
11.1. State Retail Sales Taxes	254

11.2.	Implications of the Transient/Non-Transient Distinction	254
11.3.	General Local Option Sales Taxes	256
11.4.	Hotel-Specific Excise Taxes.....	256
11.5.	Business & Occupation Tax	257
11.6.	Tourism Promotion Areas	261
11.7.	Summary and Conclusions	262
Chapter 12 : Hotel Ownership Matters—an Overview		264
12.1.	The Players.....	264
12.2.	The Branded HMA	265
12.3.	Non-branded HMAs	267
12.4.	Franchise Agreements.....	268
12.5.	Asset Managers	270
12.6.	Equity Structures	270
12.7.	Debt Financing.....	271
12.8.	Manager-Lender Relationships.....	272
12.9.	Summary and Conclusions.....	273

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USE OF THIS MANUAL

This Manual discusses legal topics impacting hotels and hotel operations in Washington. It is intended to provide education and general understanding about some of the significant legal issues facing hotels and their operation. This Manual does not, however, discuss in detail, or from every possible perspective, all the laws and regulations affecting hotels in Washington.

Also, this Manual it is not legal advice. Before you make any legal decision impacting your business, you should consult with your counsel, who should be experienced in hotel matters, and any of this Manual's cited authority should be verified and updated. By using this Manual, you acknowledge and agree than none of the authors, contributors or editors are liable to you or to any other person for any action you take as a result of your use of this Manual.

Please also understand that the federal and state laws and regulations that impact hotels in Washington are constantly changing. Although the Washington Lodging Association intends to provide updates from time to time, care should be taken by you and your counsel to make sure that the most current laws are known and understood when you consider your response to any legal issue.

PREFACE

When Dennis McLaughlin finished the second edition of the Washington Hospitality Law Manual in 1999, the world was a different place. We had yet to experience the 9/11 attacks on the World Trade Center, and there was no Patriot Act. There was no Facebook, no Twitter, and no Social Media of any kind. Expedia was just a small division of Microsoft, and less than 2% of all travel trade was booked online.

Jan Simon, the president of the Washington Lodging Association (WLA), contacted me in 2011 and expressed her belief that the Washington Hospitality Law Manual should be brought into the 21st Century. I readily agreed, and when she asked me to take on the task, I accepted.

The value of Dennis McLaughlin's work on the first two editions of the Manual cannot be overstated. The Manual has been an important reference tool for Washington hoteliers and lawyers, and I personally have kept a copy of the Manual by my desk for many years.

Because I had received much positive feedback on the second edition, I felt that the third edition should follow the foundation and the tone Dennis set. The overall organization of the second edition and its easy-to-read style have been preserved.

I felt the creation of the third edition also presented a good opportunity for law firms in the legal community to work together to benefit the hotel industry. I'm pleased that my friends at four other law firms joined in the effort and served with diligence and skill as editors and contributors: Samantha Noonan (Williams Kastner), Sandip Soli (Cairncross & Hempelmann), Bryan Helfer and Nathan Luce (Foster Pepper), and Andria Ryan (Fisher & Phillips). Our effort was also greatly assisted by Janice Goh, our capable intern from the University of Washington School of Law.

The third edition adds new cases, analyzes many changes in the law, and includes several new sections and chapters. These additions address topics such as: gift cards; working with insurers when lawsuits arise; Washington's version of the National Food Code; no-smoking laws; updated wage and hour rules; tip pooling; the 2009 Lilly Ledbetter Fair Pay Act; sexual harassment; reductions in work force; medical marijuana; antitrust laws and "call arounds"; the hotel liquor license; Initiative 1183; the new ADA Title III laws and rules; the Patriot Act; music copyright issues arising from hotels' pervasive video screens; new media and hotel marketing; new B&O tax issues for hotels; and TPAs. A chapter on hotel ownership matters has also been added to give hotel managers an overview of the underlying structural and contractual context within which they operate and are judged.

The third edition also builds on Dennis's effort to make the Manual user-friendly. Section numbering has been added, appendices have been replaced with links to internet resources, and summaries have been included at the end of each chapter. We have also tried to save words,

when possible. For example, we use the word “hotel” to refer to both hotels and motels, since the law almost always treats these facilities the same way.

I hope the Third Edition of the Washington Hospitality Manual will provide you with new insights about your legal environment, strategies to help you avoid and prevent legal dangers, and a clearer path to success in our increasingly complex world.

Irv Sandman
Sandman Savrann PLLC

INTRODUCTION

Historical Underpinnings of Hospitality Law

The foundations of hospitality law began in England during the Middle Ages. The English common law, as it developed over several hundred years, imposed duties on the innkeeper that were strictly construed against the innkeeper and in favor of the guest of the inn.

During the Middle Ages, an innkeeper was considered to be part of a “lowly profession”. A quote from W.C. Firebaugh’s The Inns of the Middle Ages (Chicago: P. Covici, 1924, p. 12) states:

[I]n the eyes of the law, the innkeeper, the panderer, and others of like standing were on the same footing [I]nnkeepers were not admitted to military service, nor did they form a guild, as did other tradesmen. In past ages, the tavern and innkeeper have been guide, philosopher, and friend to all the evil reprobates in his neighborhood. His establishment was a sanctuary and base of operation for every cut-purse who stalked his quarry along the trade routes or in the rear guard of marching legions. He was their fence, and his commission was always paid.

In the Middle Ages, the typical “inn” consisted of one large room where meals were eaten, and at night the tables were moved to make way for the guests’ beds. If an inn became successful, additional rooms were added to offer sleeping rooms for the guests, separate and apart from the eating and drinking rooms.

The primary aim of English common law, as it developed over time, was to protect the guest and ensure that he was provided food, drink, shelter, and security. These services came to be considered “public services.” “Innkeeping” thus became a “public business” or “public calling” regulated by the King of England.

The early development of common law imposed certain duties on the innkeeper that still have legal significance today. These duties were based on the following principals:

- Public Service. The innkeeper has a public duty to supply food, drink, safety and shelter to traveler(s). The innkeeper is to serve the traveling public. The inn itself is a “Public House.”
- Duty to Receive Guests. The innkeeper has a duty to receive all guests who properly apply for admission to the inn.
- Duty to Provide Services and Facilities. The facility itself must be in good repair, and the staff of the innkeeper must be trained to provide *proper services* and protection to the traveling public.

- Duty to Charge in a Reasonable Manner. An innkeeper may not charge unreasonable fees for services and accommodations in order to exclude unwanted guests.
- Duty to Not discriminate. An innkeeper has a duty to the general public, and must serve the public without discrimination.
- Duty to Receive Strangers. An innkeeper has the duty to admit a stranger as a guest, but a person who is not a guest has no right to remain against the objection of the innkeeper.
- Duty to Protect Property of the Guest. An innkeeper is liable as an “insurer” for the loss of a guest’s property brought to the inn.

The Development of Hospitality Law in Washington

Washington’s hospitality law evolved from these early, basic common law duties. Washington was admitted as a state in 1890, and in the 1905 Legislative Session the legislature passed laws governing the rights and duties of the innkeeper.

These early laws softened some of the English common law duties of the innkeeper, particularly the duty to act as an “insurer” of guest property. See PART I, Chapter 6. Since the time this early legislation was enacted, the Washington courts have handed down only a handful of reported decisions that apply the legislation and the English common law principles that predate it.

Beginning in the 1960s, however, legislators, courts and regulators made up for lost time. Modern laws impacting the hospitality industry have burgeoned at the federal, state, and local levels. Hotels in Washington are now subject to numerous statutes governing a multitude of subjects never considered by the common law. Federal and Washington courts and administrative agencies have further defined and refined the dictates of statutory law as it applies to the hospitality industry.

Basic Legal Framework for Understanding “Applicable Law”

This Manual discusses different levels of statutory law, regulations, and court-made law. To understand this “applicable law,” it is helpful to be aware of the basic legal framework within which this law is created and becomes “applicable” to hotels in Washington.

The law in the United States, has two distinct sources: federal law and state law. Both federal and state law impact hotels in Washington.

Federal law is primarily based on federal statutes and the United States Constitution. Under the Constitution, the federal government has “limited” powers and jurisdiction. For example, Congress can only pass laws that are of the kind specifically permitted by the

Constitution. Jurisdiction over all other legal matters is reserved for the states. Over the years, the Constitutional underpinnings of federal power have been interpreted by the Supreme Court to allow quite expansive federal legislation. Many federal laws are based on Congress's Constitutional authority to pass laws that affect "interstate commerce." Early in our country's history, not much "interstate commerce" existed. In modern times, however, virtually all commerce is "interstate" in some respect. Accordingly, federal law can and does impact a wide variety of activities that occur in the operation of a hotel.

The courts in the federal court system, under the leadership of the United States Supreme Court, decide primarily "federal questions"—i.e., questions and issues arising under federal statutes, including the United States Constitution. The federal courts are divided into thirteen "circuits" nationwide. Each circuit includes the federal courts sitting in several states. For example, Oregon and Washington are both part of the Ninth Circuit Court of Appeals. As cases are decided across the nation, each circuit's Court of Appeals establishes federal law, or "case law" precedents within that particular circuit. When a circuit's Court of Appeals reviews an issue, the court may look to another circuit for guidance. But it is not obligated to follow what another circuit has decided. Each circuit follows its own precedents and the precedents established by the Supreme Court of the United States.

Washington State, like all states in the U.S., has "general jurisdiction" over all matters. The Washington legislature can enact any kind of legislation, with two primary exceptions: a state cannot enact legislation that is contrary to the United States Constitution (including the Bill of Rights); and a state cannot enact legislation that either contradicts properly enacted federal statutes or that legislates a subject that is completely "preempted" by extensive federal legislation on that subject.

Washington courts, similarly, are courts of general jurisdiction. They can hear and resolve any dispute on any matter, including cases arising under common law (such as the court-made law on torts) and under statutes. Thus, Washington has its own court system, develops its own case law, and thus creates judicial precedents on hospitality law and other issues. In Washington, a case may be appealed to the Washington State Court of Appeals or the Washington Supreme Court. If a federal question is involved, then the case can be transferred from a state court to a federal court or, if the case is allowed to go all the way to the Washington Supreme Court, a litigant can request review by the United States Supreme Court.

Just as federal "circuits" are independent of one another, our state courts are independent of other state jurisdictions. Thus, an Oregon state court decision involving a hospitality law issue is not binding on a Washington state court looking at the same issue. However, a Washington court may find an Oregon case "persuasive" in its consideration of a Washington matter, and so the Oregon decision may influence in the Washington court's determination of an matter.

Statutory References in this Manual

In this Manual, “RCW” refers to the Revised Code of Washington—the volumes in which Washington statutory law is found. All laws passed by the Washington State Legislature are available online at <http://apps.leg.wa.gov/rcw/default.aspx>.

The Washington statutes often authorize the executive branch of our state government (e.g., the Department of Revenue) to promulgate rules and regulations that supplement the statutes. These rules and regulations are contained in the Washington Administrative Code, cited in this manual as the “WAC.” This code is also available online at <http://apps.leg.wa.gov/wac>.

Federal statutes are found in the United States Code, cited in this Manual as “U.S.C.” Federal rules and regulations are found in the Code of Federal Regulations (CFR). These federal statutes and regulations are not as easy to find online as the Washington codes, but they are available in local law libraries.

PART I: THE INNKEEPER AND ITS GUEST

Chapter 1: Innkeeper's Duty To Receive Guests And Its Right To Refuse Guests

1.1. Duty to Receive Guests

As indicated in the Introduction, the innkeeper's duty to receive travelers is derived from the public nature of innkeeping. An innkeeper is under a general common law duty to serve every member of the public without discrimination.

Under Washington State law and federal law, an innkeeper's public duty to receive guests has been expanded and made more specific by the federal and state constitutions and civil rights laws. *See* 42 U.S.C. § 2000; RCW 49.60, *et seq.* These laws recognize that a hotel is a place of "public accommodation," and, as such, an innkeeper is obliged to provide service and accommodation without discrimination.

Anti-discrimination enforcement agencies in Washington State have overlapping jurisdiction. In Seattle, for example, a hotel is potentially subject to enforcement actions by the Equal Employment Opportunity Commission, the Washington State Human Rights Commission, and the Seattle Human Rights Commission.

1.2. Federal Law

The Federal Civil Rights Act of 1964 prohibits places of "public accommodation" from discriminating against any person on the grounds of race, color, religion, or national origin. Title II of the Act (42 U.S.C. § 2000a) states:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the grounds of race, color, religion, or national origin.

The Act defines a "place of public accommodation" to include hotels, motels, inns, taverns, roadhouses and bar-rooms, as well as many other places. Section § 201 of the Act (42 U.S.C. § 2000a(b)) states:

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce or if discrimination or segregation by it is supported by state action:

- (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building

which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

- (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

Under federal case law, hotels do affect interstate commerce and thus fall within the coverage of Act. See Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 261, 13 L.Ed. 2d 258 (1964).

A person who alleges discriminatory acts by a hotel or other “place of public accommodation” may bring a civil action in federal district court to seek “injunctive relief” or other order offering relief to the aggrieved party. *Id.* The court may award costs and attorneys fees, but the Act does not provide for monetary awards for damages.

In addition to any civil action brought by an individual, the United States Attorney General is authorized to bring a civil action on behalf of the general public as citizens of the United States if there is “reasonable cause to believe that any person, or group of persons, is engaged in a pattern or practice of resistance to the full enjoyment” of any of the rights provided to all citizens of the United States by Title II. *Id.* at 248-249.

The passage of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101, et seq.) has also impacted the ability of innkeepers to turn away guests. The ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation by any person who owns, leases, or operates a place of public accommodation. 42 U.S.C. § 121 (a). The ADA is discussed in more detail in Part II Chapter 7.

1.3. Washington Law

Washington’s Law Against Discrimination (RCW 49.60) states:

Freedom from discrimination – Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

... (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement....

RCW 49.60.030.

A person who alleges discriminatory acts in violation of RCW 49.60 may bring a civil action in state court to enjoin further violations, to recover actual damages, compensatory damages, and costs of suit (including reasonable attorneys' fees), or to obtain any other remedy authorized by the United States Civil Rights Act of 1964. RCW 49.60.030(2).

An illustrative case is Woodhouse v. Motel 6 G.P., Inc. (U.S. District Court, E. Wa.) Case No. CY-93-3008-AAM unpublished opinion-1993). On March 15, 1992, Woodhouse, an African-American male, sought to register at the Motel 6 in Yakima. The motel's desk clerk stated that no rooms were available. Woodhouse returned to his car and told his girlfriend, who was Caucasian, to try to get a room. The girlfriend proceeded back to the front desk and was granted accommodations for the night. Plaintiff's trial memorandum stated that the manager of the Motel 6 "had asked clerks to deny rooms to ethnic and racial groups because they were dirty and more likely to deal drugs." The memorandum also alleged a long history of complaints of racial and ethnic discrimination being sent to the national offices of Motel 6. Mr. Woodhouse's complaint alleged violations of 42 U.S.C. 1981, RCW 49.60.030, and Washington's Consumer Protection Act, RCW 19.86. He sought to recover general damages for humiliation, mental anguish, and distress as a result of intentional race discrimination by Motel 6's desk clerk. He also sought to recover punitive damages for the reckless disregard for federally protected civil rights or the intentional denial of civil rights. At trial, the jury awarded Mr. Woodhouse general damages in the amount of \$25,000 and punitive damages in the amount of \$150,000. The motel appealed to the 9th Circuit Court of Appeals and the 9th Circuit reversed the decision of the District Court and ordered a new trial based on issues of improper evidence being admitted during the jury trial. See 67 F. 3d. 310 (1995). After reversal, the case was settled by the parties to avoid a second trial.

The Washington statute now specifically protects against discrimination on the basis of military status (including the status of being an honorably discharged veteran). Accordingly, discrimination against military personnel and these veterans is put on the same footing as the other more traditionally prohibited forms of discrimination.

Hotel management in Washington State should have written policies and procedures as well as training programs for all personnel. They should emphasize the hotel's duty to provide services and accommodations without discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical disability. See also PART III, Chapter 7, for discussion of ADA requirements.

Note: Under Washington law, RCW 49.60.230, a grievant may file a complaint with the Washington Human Rights Commission and name supervisors and managers individually. The case may be heard by an administrative law judge, and under RCW 49.250(5) the judge may impose various remedies, including damages for humiliation and mental suffering up to \$20,000.

Washington's Law Against Discrimination also contains specific provisions that prohibit "rate" and other discriminatory activities by lodging facilities. RCW 49.60.215 states:

It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a person with a disability except as otherwise required by law: PROVIDED, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice.

This statute prohibits hotel management from charging any person, either directly or indirectly, a larger sum than the uniform rates charged other guests for its accommodations based on any "distinction, restriction, or discrimination." Hotel management cannot discriminate against unwanted travelers by demanding unreasonable compensation for accommodations. This statute also provides that hotel management may not refuse accommodations to an individual, *except for conditions and limitations established by law and applicable to all persons*, based on race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability.

Note: RCW 49.60.215 expressly provides that hotel management may refuse to provide accommodations to an individual whose behavior or actions would constitute a risk to property or other persons.

It would be an unfair practice, and thus illegal, for a hotel in its advertising, whether by circular or in newspapers, magazines, television or radio, to use any phrase or words indicating that the hotel is discriminating in the selection of its guests on the basis of race, creed, color, national origin, , sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability.

To prevent potential discrimination claims, a hotel refusing a guest should adequately document all reasons for refusing accommodations. Some states have laws that address circumstances in which a hotel may properly refuse to admit a prospective guest. Washington has not adopted such laws. Washington innkeepers are cautioned to consult with legal counsel to identify and analyze any civil or criminal statutes addressing refusal of guests.

1.4. Limited Right to Refuse Guests

There are circumstances when an innkeeper may lawfully refuse a traveler despite the duty to accept all persons who apply. In a variety of court decisions from different jurisdictions, courts have specified circumstances under which travelers can be refused accommodations without liability. Note, however, that the following list is not necessarily reflective of decisions made by our Washington courts. The right to refuse accommodations to persons may vary depending on the facts and circumstances of your particular situation.

An innkeeper may refuse service or accommodation if:

- The person requesting accommodation is under the influence of illegal drugs or alcohol, or is disorderly so as to create a public nuisance.
- The person requesting accommodation is suffering from a contagious disease (AIDS is not a legal basis of refusal).
- The person requesting accommodation is bringing property into the hotel which the hotel does not customarily receive, such as a non-service related animal, or if the person is bringing in property which may be dangerous to others or in violation of the law, such as illegal drugs.

Note: The Americans with Disabilities Act (ADA) affords protections against discrimination to Americans with disabilities. Under the ADA, a hotel may not refuse service to any guest with a disability. Disability is defined by the ADA as “a physical or mental impairment that substantially limits a major life activity” and may include blind, deaf-blind, or visually impaired guests. The use of a trained dog guide by a blind, deaf or physically disabled person cannot be a basis for denial of accommodations. *See* RCW 49.60.215 *supra*; *see also* 42 U.S.C. §§ 12111–12117. These issues are discussed further in Part III, Section Chapter 7.

- Persons who have previously defrauded the inn or engaged in disruptive or disorderly behavior.
- The person requesting accommodation is unwilling or unable to pay for hotel services.
- The hotel has no accommodation to offer a person (see Part One, Chapter 2 on the liability of a hotel if the person has a confirmed reservation).
- Non-conformance to reasonable, non-discriminatory hotel rules.
- The person requesting accommodation is exhibiting violent behavior.
- The person requesting accommodation refuses to complete a registration form.

Always have your staff document in writing the reasons for refusing to provide accommodations to any individual. Remember also that a hotel cannot refuse accommodations to a person merely because the person arrives at an unusual hour, such as the middle of the night. A hotel is presumed to be open for the reception of travelers at all times.

1.5. Parties for Underage Guests

Prom and graduation parties have always been a problem to Washington's hotel management, especially when underage persons seek accommodations for "after hours" parties. Washington State does not have a statute that specifically addresses the rights of innkeepers to restrict the renting of rooms to minors.

Some hotels in Washington State refuse accommodations to underage persons in an effort to avoid the disturbance of other guests due to drinking and late night parties. Other hotels in Washington, however, provide accommodations to underage persons subject to strict guidelines.

A hotel may refuse to provide service or accommodations to an individual under the age of 18 years under the theory that a minor has no capacity to enter into a contract. RCW 26.28.015(4). This conclusion makes sense because, among other things, if an underage person damages a hotel's premises, the hotel would not have an enforceable contract upon which to obtain contract damages from the guest.

Some legal authority indicates that refusing to provide accommodations to underage persons is discriminatory and in violation of state anti-discrimination laws. This theory has not been tested in a Washington court. Additionally, Washington's Law Against Discrimination only protects persons against age discrimination in an employment setting (see Part II, Chapter 3), but it does not protect against age discrimination generally.

Despite some legal ambiguity as to the enforcement of age discrimination laws, it is clear that hotel management *can* implement and enforce policies to protect guests from the harmful acts of underage persons. It is also clear that a hotel can enforce policies regarding noise after certain hours, alcohol in guest rooms, activities in hotel common areas after certain hours, and the number of persons who may occupy one room at any time. These policies can be enforced as long as they are reasonable, justified, and all guests are put on notice of the policies.

The following are tips on policies you should consider to protect your hotel's property and its guests:

- Adopt a written policy with respect to providing rooms for parties (prom and graduation) that hotel personnel can refer to when accepting reservations or applications for rooms from minors. This policy should also be added to the hotel website and/or emails confirming a guest reservation so that the policy is a part of the contract with the guest. A copy of hotel policy should be made available to guests upon check in.
- The written policy should outline the rules and regulations for staying in the hotel, including prohibition of illegal drugs and the underage possession of alcohol in the rooms or on the premises.
- Provide a copy of the rules to the guests and require the guest and the parents to sign a form stating the guest has read and understands the rules.
- Consider requiring a refundable cash deposit to offset any damages for the room.
- Consider asking for a driver's license and making a copy to place with the registration.
- Require at least one parent's signature during the registration process of a minor.
- Make it clear in the rules that if eviction occurs, the guest will not receive a refund on the room or the cash deposit if one has been received.
- Consider hiring extra security personnel if the size of the party warrants it. Some hotels have been sued because they have failed to have sufficient security personnel to control the abusive behavior that occurred.
- Check the rooms while the guests are leaving to substantiate any claims for damages.

Although an innkeeper may adopt a policy with respect to underage parties and take other precautionary steps, events can occur that require involvement by hotel personnel. Typically, other guests complain or the hotel management becomes aware of the undue noise and disturbances. Hotel management must respond promptly to complaints and disturbances. Often a warning is all that is required, but if hotel management discovers underage drinking, different measures must be taken. If alcohol and drugs are involved, hotel management should contact the underage occupants' parents and the police.

If ejection is the only alternative, hotel management may need police presence. Establish a relationship with the local police. Doing so can prevent various high-risk situations, including an intoxicated minor who is evicted getting into his or her car and driving off. The police and possibly the parents can help prevent these situations from occurring and relieve the hotel of potential liability if an accident occurs. Hotel management can also protect against liability by contractually requiring parents' signature(s) on the hotel registration card, or on a credit card slip, which makes the parent liable for the actions of the minor.

Washington law provides that a hotel can sue the parent of a minor for damages totaling less than \$5,000, plus costs and attorneys' fees, when the guest is a minor under 18 years of age, lives with a parent, and willfully and maliciously destroys property or injures another person. RCW 4.24.190.

1.6. Summaries and Conclusions

- The innkeeper's public duty to receive guests is subject to federal and state laws on freedom from discrimination.
- A hotel is a "place of public accommodation" under the federal Civil Rights Act of 1964 and, as such, may not discriminate against any person on the grounds of race, color, religion or national origin.
- The Washington Law Against Discrimination defines a civil right to include freedom from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability. It also prevents discrimination by hotels on the basis of status as a mother breastfeeding her child.

- Hotel management in Washington State should have written policies and procedures as well as training programs for all front desk personnel that emphasize the hotel's duty to provide services and accommodations without unlawful discrimination.
- Under Washington law, supervisors and managers of hotels may be sued as individuals and be individually liable for damages for violation of Washington's Law Against Discrimination.
- A hotel cannot discriminate against guests by charging excessive rates for accommodations on a discriminatory basis.
- RCW 49.60.215 expressly provides that hotel management may refuse to provide accommodations to an individual whose behavior or actions would constitute a risk to property or other persons.
- A hotel may refuse service or accommodation if:
 - The person is under the influence of alcohol, is under the influence or in possession of illegal drugs, or is creating a public nuisance.
 - The person has previously defrauded the inn or engaged in disruptive or disorderly behavior.
 - The person has a contagious disease.
 - The person is bringing property to the hotel that is dangerous to others or in violation of the law.
 - The person is unwilling or unable to pay for hotel services.
 - The hotel has no accommodations to offer a person.
 - Noncompliance with reasonable rules.
 - The person requesting accommodation is exhibiting violent behavior.
 - The person requesting accommodation refuses to complete a registration form.
- Hotels should make sure that the hotel's policies are part of the contract with the guest by incorporating an obligation to comply with the policies in the hotel's electronic and other methods of confirming reservations and the contract with the guest.
- A hotel may refuse to provide accommodations to a minor under the theory that, under Washington law, a minor has no capacity to enter into a contract for accommodation or services. It is a prudent practice for hotel management to require the parent's signature on the hotel registration card or credit card slip which makes the parent liable for the actions of a minor.
- Hotels should consider adoption of policies for prom and graduation parties.
- Document in writing the reasons for refusing to provide accommodations to any individual, and consult experienced counsel when issues and questions arise.

Chapter 2: Guest Reservations

2.1. Form and Effect of Agreement

A hotel and a guest enter into a contract at the time both parties specifically agree to the hotel's promise to reserve a room for a definite period of time for a specific price. This contract may be in oral or written form. A contract is binding when the intention of the parties is plain and the terms of the contract are agreed upon. Veith v. Xterra Wetsuits, LLC, 144 Wn. App. 362 (2008). Specific contract terms may include the dates of the reservation, the room rate, the number of rooms, the nature of the accommodation, the number of persons in each room, and the requirement that the guest accept and comply with the hotel's policies. Certain reservations use the guest's credit card or other form of deposit as security for performance by the guest.

Since a reservation is a contract, the following legal elements must exist:

- An offer;
- An acceptance;
- Consideration; and
- The capacity of the parties to contract.

Veith, 144 Wn. App. 362, 366.

Generally, the "offer" is the hotel's publication of the terms on which it will make a room available to a guest. With most reservations made online, these terms may be published on the hotel website, in a confirmation email, referenced in a confirmation telephone call or presented at the front desk. A guest "accepts" the offer by reserving a room and agreeing to use and pay for the room and, under certain circumstances, agreeing to pay a fee to the hotel if the guest does not use the room. The "consideration" inherent in establishing a reservation contract generally consists of the mutual promises of a hotel and its guest; in exchange for the room provided by the hotel, the guest will provide payment. The capacity of the parties to contract is also important. Capacity relates to the fact that a hotel may refuse to provide service or accommodations to an individual under the age of 18 years, under the theory that Washington Law states a minor has no capacity to enter into a contract. RCW 26.28.015(4).

Currently, many (if not most) hotel reservations are made on-line and confirmed by email. It is important that the reservation confirmation, or some other clear electronic record, contain all of the terms of the contract between the hotel and the guest. These terms should include the obvious—date and room rate—but should also include items such cancellation policies and the obligation that the guest must comply with the hotel's rules when at the hotel. Surprisingly,

many hotels, as part of the transition to ecommerce, have done away with the signing of any agreement during registration, but they have not replaced this process with an email or other process that sets out and confirms the contract between the parties. This problem can create difficulties if, for example, the hotel wants to remove a guest from the hotel for legitimate reasons. See, e.g., PART I, Section 3.2, below. See also PART III, Section 10.1(e) for suggested terms that can be incorporated in the hotel's website.

Hotel management should review all of its guest contracts and its reservation processes (including online reservations and emailed confirmations) to insure that:

- All rates and prices are clearly specified.
- The intent and expectations of both the guest and hotel regarding performance of obligations are clearly set forth.
- All deadlines are established and listed properly.
- The hotel is protected in writing against unexpected events.
- The hotel's policies respecting guest behavior and misconduct are referenced, and the guest is obligated to comply with them.
- In the event of a contract breach or default, the remedies of both the hotel and guest are clearly set forth.
- All contracts are legally sufficient, in both form and substance, to avoid future legal disputes.

2.2. Hotel Remedies

A confirmed reservation generally constitutes a binding agreement (a “reservation contract”) between the hotel and the guest. If a guest fails to use a reservation, then the hotel is generally entitled to damages, including: lost rent, incidental damages, and any commercially reasonable charges, expenses, or commissions incurred after the guest’s breach of contract.

As mentioned above, it is good practice to notify a guest, preferably in writing, of your hotel’s policy on confirmed reservations and no-shows. Hotel personnel can refer to the written policy when accepting reservations or applications for rooms. This policy should also be added to the hotel website and emails confirming guest reservations. A copy of hotel policies should be made available to guests upon check in. If the reservation and no-show policies are not in writing, then the hotel should have the policies on a card posted in plain view for employees, and the card should state that the employees must reiterate the policies orally during check in (this approach is not recommended because of the obvious difficulty in proving whether the policies were in fact orally communicated to the guest).

The following is a sample of a simple reservation and cancellation policy:

The hotel will confirm receipt of all reservation requests. Your reservation will be assured only when you have received written confirmation. Proper billing address information must be provided. Confirmed reservations are held until 8:00 a.m. the next day. If a guest does not cancel a confirmed reservation within 24 hours of the check-in date, then he/she will be billed for a one-night stay.

It is a common practice for hotels to reserve rooms subject to the agreement that, if the guest does not cancel by a certain date and time and the guest fails to arrive, the guest must pay for one night’s room charge. Such charges are commonly made to the credit card identified by the guest who is making the reservation. The terms of the reservation should be clearly spelled out so that guests understand they will be charged if they do not timely cancel the reservation or do not show up. This charge is an agreed-upon method of determining the amount of damages that a hotel will likely incur if the guest fails to honor the reservation contract. Some credit card companies may have a policy against these automatic charges. It is worthwhile to check the policies of the credit card companies whose cards you accept to make sure that they will honor cancellation or no-show charges.

2.3. Guest Remedies

As indicated above, when a hotel accepts a guest’s reservation, the hotel and the guest have entered into a contract. Accordingly, the hotel has the contractual obligation to honor the reservation. If a guest who holds a reservation arrives and the hotel does not have a room available, then the guest is entitled to have his/her reservations covered elsewhere “without

unreasonable delay.” It is in the hotel’s best interest to locate a replacement room for such guests in an effort to decrease the likelihood of a lawsuit by the guest. Damages that may be collected by a guest under breach of contract law include actual, incidental, and consequential damages. Any guest refused admittance after having a confirmed reservation with the hotel is entitled to the difference in cost of relocating to another hotel, if the room rates are higher, and may hold the hotel liable for expenses incurred while relocating (cab fare, garage expense, and the like). Although there is no case law in Washington State on this subject, other jurisdictions have addressed the issue. See, e.g., Wells v. Holiday Inn, 522 F. Supp. 1023 (W.D. Mo. 1981).

Most other states allow for punitive damages, and courts have imposed them for breach of a hotel reservation. See Dolo v. Outrigger Hotel, 54 Haw. 18, 501 P. 2d 368 (1972). Washington is one of a few states that does not allow punitive damages in contract or tort cases. However, judges and juries can be expected to provide more liberal awards when a party engages in an egregious or offensive behavior. Hotel managers should exercise all reasonable precautions to prevent a breach of a reservation contract, and, if a problem occurs, the hotel should assist its guests to attempt to mitigate their damages. That will help to minimize the risk of substantial damage awards.

2.4. Overbooking

Some hotels make a practice of overbooking available space and accommodations. These hotels operate on the assumption that overbooking ensures stronger sales overall—*but it can invite negative consequences*. In some instances, Washington courts have found the practice of overbooking room reservations to be so extreme as to constitute fraud.

In Rainbow Travel v. Hilton Hotels, 896 F.2d 1233 (10th Cir.1990), a tour operator sued Hilton Hotels, alleging breach of contract and fraud. The tour group had obtained confirmed reservations as a part of a football tour promotion. The hotel did not honor the reservation. The court ruled that the hotel had a regular policy of overbooking and awarded damages to the tour operator.

An argument can also be made that the practice of overbooking qualifies under Washington’s Consumer Protection Act as an “unfair or deceptive act or practice in conduct of any trade or commerce” and is unlawful. In addition to injunctive relief, a civil action brought by an aggrieved party under the Consumer Protection Act could also include the right to actual and treble damages, costs, and attorneys fees. See RCW 19.86.090.

2.5. Catering, Banquet, Meeting and Convention Contracts

Any contract created for the purpose of guaranteeing catering services, banquet, meeting, or convention facilities, should be reviewed by legal counsel. Washington contract law provides protection to both buyers and sellers of services for a breach of contract.

If a party contracts with a hotel for services or facilities and then breaches the contract, the hotel is entitled to contract damages. See Hotel Del Coronado Corp. v. Food Service Equipment Distributors Assoc., 783 F.2d 1323 (9th Cir. 1986). Damages may include the difference between the contract price and market price at the time of the breach, plus incidental damages such as commercially reasonable charges, expenses, or commissions incurred in stopping delivery or performance. If a party does not fulfill a contract with a hotel, the hotel must make commercially reasonable efforts to mitigate its damages. This includes making attempts to rent the banquet or meeting space and finding a use for any specially prepared food. It is important that the hotel keep detailed records of the efforts to mitigate damages. These records provide necessary evidence to show mitigation and good faith in court, if the hotel is forced to initiate a civil suit to recover the loss.

Contract law also protects the party who contracts with the hotel for services or facilities. If the hotel breaches the contract or fails to provide the contracted services or facilities, then the party is entitled to damages. Similarly, the party is also required to attempt to make efforts to mitigate the damages.

2.6. Gift Certificates and Cards

Many hotels sell gift certificates (including coded gift cards) that can be redeemed at the hotel by the holder of the certificate. Sometimes, the certificate is purchased, but the holder puts it in a back drawer and forgets about it. Applicable law used to require the hotel to remit the revenues from these unredeemed certificates to the State of Washington as unclaimed property.

In 2004, the WLA, with the help of other interested groups, succeed in obtaining passage of a Washington statute addressing this problem and otherwise regulating gift cards and certificates. See RCW 19.240. Under the statute, for certificates issued after July 1, 2004:

- You do not have to report or remit to the State any revenues from unredeemed certificates.
- In most cases, you cannot assess any dormancy, inactivity or service fees, and the certificate cannot have an expiration date.
- You must give customers the option of receiving a cash refund if the value of the certificate or the remaining balance is \$5 or less.

2.7. Summaries and Conclusions

- Washington's contract law controls the form and effect of a hotel's contract with its guest.

- Hotels should make sure their physical and electronic reservation procedures create a clear written contract with terms that disclose and include the hotel's hold-over, conduct, and other policies.
- A hotel and a guest each have rights and remedies in the event the other breaches a contract for accommodations and services.
- The practice of overbooking by a hotel could subject it to a charge of an unfair or deceptive act or practice in violation of Washington's Consumer Protection Act.
- Catering, banquet and convention contracts are subject to Washington's contract law. These agreements should be carefully reviewed by a hotel's legal counsel.
- Gift cards/certificates issued after July 1, 2004, usually can't have expiration dates, and you usually can't assess dormancy or service fees, but you no longer are required to report and remit revenues when the holder doesn't redeem them.

Chapter 3: The Innkeeper's Right To Evict A Guest, Tenant, Patron Or Others

3.1. Distinction Between Guest and Tenant

Washington, like most states, has detailed statutes that govern when and how a tenant can be evicted. These statutes are found in Washington's Residential Landlord-Tenant Act, RCW 19.48.010. They require that, before a tenant may be evicted, certain notices must be given and an action must be commenced in State court. If the Act does not apply to the relationship, however, then an owner can remove an unwanted person from his property by self-help measures or with the assistance of the police.

There had been some gray areas in determining whether a hotel guest is a "tenant" under the Act. *See, e.g., Smith v. Dorchester Hotel Co.*, 145 Wash. 344 (1927). Fortunately, however, RCW 59.18.040(3) currently states that "residence in a hotel, motel, or other transient lodging" is exempt from the Washington Residential Landlord-Tenant Act. The amended RCW 19.48.010 now defines a hotel as a facility "in which three or more rooms are used for the accommodation of such guests . . ." Accordingly, a person staying at a hotel is not subject to the eviction policies and procedures under the Act.

Sometimes, a hotel guest can stay at a hotel for several months at a time. Although this kind of residence at a hotel is probably still exempt from the Act, an expectation of certain rights might develop, and this can make removal of the guest more difficult. It is advisable to require extended stay guests to check out and check in at regular intervals. This practice provides a mechanism to ensure that a continued stay is subject to any changes in policies and rates and that the stay continues to be understood as a hotel/guest relationship that is governed by the hotel's normal guest contract. It also provides a helpful, additional occasion to enforce removal if a guest has violated policies and overstayed his or her welcome.

3.2. Eviction Rights in General

As indicated in Chapter 2, a guest's stay at a hotel is essentially a contract relationship. If, after a person has been admitted as a guest of the hotel, he or she breaches this contract by violating hotel policies, failing to pay charges, or overstaying the reserved period of time, then the hotel may evict the guest.

If, however, it is not clear whether the hotel's policies are part of the contract, the policies have been violated, or the guest is otherwise in breach of the contract, then the removal of the guest will be problematic and can even create liability. Accordingly, as stressed in Chapter 2, hotels should make sure their physical and electronic reservation procedures create a clear written contract with terms that disclose and include the hotel's hold-over, conduct, and other policies.

Any confrontation with a guest can potentially create legal liability for the hotel. As a result, the hotel should use every effort to remove a guest in a reasonable and respectful manner and without physical force. Such efforts may include quiet and courteous discussion, clearly stating what is requested, and providing appropriate assistance. Physical confrontation should be avoided—if injury results, claims are likely, regardless of who is at fault. If reasonable efforts fail, it is recommended that the hotel ask local law enforcement to assist.

Hotels should anticipate that these events may occur and prepare for them by training the hotel personnel and by having appropriate policies and procedures. Because local law enforcement is the best resource when physical force is needed, hotels should also establish and maintain close relationships with local law enforcement supervisors. The hotel should engage with these supervisors in advance of any problem arising and establish the role of law enforcement when problems occur.

3.3. Application of Criminal Laws.

RCW 9A.52.070 states:

- (1) A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building.
- (2) Criminal trespass in the first degree is a gross misdemeanor.

If a guest fails to leave when he is not entitled to remain at the hotel, then the guest is in violation of this statute. The police are required to enforce this law and remove the guest. The law is an important tool and should be part of your discussion with local law enforcement before any incident actually occurs.

If a guest fails to pay for his/her lodging, the hotel also may have remedies under RCW 19.48.110. This statute makes it a crime for any person to willfully obtain lodging without paying, with the intent to defraud the innkeeper. If the aggregate amount owed the innkeeper exceeds \$75.00, the person is guilty of a felony. Further, a guest may not remove his or her baggage or personal property without the permission of the hotel. Such removal or attempted removal of the property without paying is prima facie evidence of fraudulent intent.

3.4. Eviction for Violation of Hotel Policies

A guest may be evicted for violating hotel policies. As indicated above, however, if the policies are not clearly a part of your contract with the guest, then the hotel should take care to make sure the hotel's actions are on sound legal footing.

If a guest is evicted for violating hotel policies, then the hotel must make an effort to ensure that the policies apply equally to all persons without discrimination. A hotel's policies may include rules pertaining to moral conduct, drunkenness, or rules to ensure the peace and

reputation of the hotel. As a result, the rules may be susceptible to “judgment calls,” and these interpretations may open the hotel to claims of discrimination. Thus, proper training of staff is essential.

3.5. Eviction for Overstaying

Hotels have the right to evict a guest who has failed to pay the hotel bill when due under the contract with the guest.

If a guest fails to make payment by the contractually-specified hour, the guest may forfeit his/her accommodation privileges. A hotel is entitled to exclusive and complete control of the room including the option to enter the guest’s room and confiscate personal property for payment (see RCW 60.64.010), refusing to provide accommodation services, changing the locks to the doors of the room, and renting the room to another guest.

If a guest stays beyond the period stated in his reservation, the guest may be evicted.

As a practical matter, some hotels concerned about the problem of over-staying guests advise the guests at check-in of the absolute limited duration of their stay based on their originally booked departure. Some hotels post notices in rooms restating the end of the registration period. Most hotels send emails to guests confirming reservation details including arrival and departure dates. For the most part, these repeated notifications seem to overcome the problem guests who have overstayed their welcome.

3.6. Eviction Due To Illness

Innkeepers have both a responsibility and a duty to take reasonable care of their guests. This includes protecting all guests from “avoidable” danger and risk while in the care of the hotel. Restatement (Second) of Torts § 314A (1965).

In the case of a guest with a contagious disease, the innkeeper (after notifying the guest and requesting that the guest leave the premises) has the right to move the guest to a hospital or other medical facility, so long as this action does not endanger the guest’s life. Gingelkeski v. Westin Hotel Company, 145 F.3d 1337 (9th Cir. 1998). Precautions should be taken, such as notifying public health officials and/or reporting any mental illness cases to appropriate law enforcement and/or health officials.

The case of Gingelkeski v. Westin Hotel Company, 145 F.3d 1337 (9th Cir. 1998), illustrates the duty of care a hotel owes its guests. There, the court reaffirmed the rule set forth in the Restatement, stating:

§ 314 states that an innkeeper or common carrier must take reasonable steps to care for a patron, once it is known or there is reason to know of a patron’s illness.

Restatement (Second) of Torts § 314A. This includes the duty to take reasonable steps to “turn the sick man over to a physician.”

The major issue in the case related to whether the hotel followed its written procedures for the care of a sick man. In this instance, the desk clerk ignored the established procedures and evidence of this was used against the hotel.

3.7. Eviction of Persons Other Than Guests

In keeping with the hotel’s responsibility to ensure the privacy and peaceful residence of its guest(s), a hotel may restrict or remove a person who is not a guest of the hotel. Persons who are not guests do not have the same rights or privileges as hotel guests. A hotel may take action to evict visitors of guests who violate a hotel’s rules and/or regulations, or prohibiting solicitors or persons of questionable intent.

The case of United States v. Rambo, 789 F.2d 1289 (8th Cir. 1986), discusses a hotel’s right to protect its guests by evicting a naked man who was running through the hallways screaming and making noise. The court upheld the hotel’s right to evict persons who do not conform to normal standards of behavior.

How to evict prostitutes has always been a problem for hotel management. If hotel management can show that a guest, or an alleged prostitute, has offered to perform sexual acts for a fee, then this will serve as proof that prostitution is occurring at the hotel. Hotel management should ask the alleged prostitute to leave at the end of the night’s lodging and make it clear that the room will not be available again to that person. If “customers” are coming and going to and from the alleged prostitute’s room, then hotel management should threaten to call local law enforcement. If that does not terminate the activity, local law enforcement should be called for assistance.

Note: RCW 9A.88.130 provides that a person convicted of patronizing a prostitute must remain outside the geographical area, prescribed by the court, in which the person was arrested. RCW 9A.88.140 also allows the police to impound the car of the prostitute’s patron if that person has been previously convicted.

Hotel management has the right to terminate a guest relationship, or remove other persons, if the conduct of the guest or other person violates hotel regulations or is offensive to other guests of the hotel. See Kelly v. United States, 348 A.2d 884 (D.C. 1975)(involving prostitution) People v. Thorpe, 101 N.Y.S. 2d 986 (1950)(involving two Jehovah’s Witness Ministers); Larson v. MOA Hospitality, Inc., 118 Wn. App. 1023 (2006). See also Part I Chapter 4 on Rights of Privacy; Part I Chapter 5 on the Innkeeper’s Duty to Protect Guests.

Note: A hotel that does not address prostitution on the premises may create criminal liability for the hotel's owner or staff. RCW 9A.88.090 states that a person is guilty of permitting prostitution (a misdemeanor) if, having possession or control of premises which he or she knows are being used for prostitution purposes, he or she fails without lawful excuse to make reasonable effort to halt or abate such use.

3.8. Summaries and Conclusions

- Washington's Landlord Tenant Act does not normally apply to hotels. Care must be taken, however, to establish the contract with the guest so that breaches of the contract are clear and steps can then be taken to evict the guest.
- The hotel/guest relationship is essentially a contract relationship. If the contract's terms are not clear, or if it is not clear whether those terms have been violated, then the removal of the guest will be problematic and can even create liability.
- Hotels should establish relationships with local law enforcement supervisors so that the role of the police is understood before they are needed. Washington's criminal trespass statute is important when discussing police enforcement.
- After a guest is duly registered, he or she may normally may be evicted for:
 - Violation of hotel regulations.
 - Nonpayment of charges.
 - Overstaying the reserved period of time.
 - Illness.
- A hotel, when evicting a guest for policy infractions, should use the utmost caution to avoid any question of liability with regard to the civil rights of an individual.
- Practical solutions and notifications normally avoid problems arising from overstaying guests.
- An innkeeper must take reasonable steps to care for a patron, once there is knowledge of the patron's illness. This includes the duty to take reasonable steps to turn the sick patron over to a physician.
- A hotel may remove a person who is not a guest or patron in order to ensure the privacy and peaceful residence of its guests.

Chapter 4: Guest Rights To Privacy

4.1. The Innkeeper's Right to Protect the Guest's Privacy

An innkeeper has a right to protect its guests from interference from unwanted and unregistered third parties.

In Campbell v. Womack, 35 So.2d 96 (1977), the right of a hotel to exclude unregistered guests was confirmed even in the case of an unregistered spouse. In this case, a husband obtained a room on a month-to-month basis. When the wife, who was a frequent guest, requested a key, she was refused because she was not registered with the hotel. The Louisiana Court of Appeals affirmed that the hotel was under no duty to give an unregistered guest a key and noted that marriage alone did not imply a guest's authorization or consent for a spouse's access to the room.

A hotel also has significant (though not unlimited) rights to protect hotel guests' information from government searches. Article I, section 7 of the Washington State constitution states that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." The hotel's registry is, to some extent, the "private affairs" of the guest.

In State v. Jorden, 160 Wn.2d 121, 123 P.3d 893 (2007), the Washington Supreme Court held that law enforcement officers cannot conduct random, suspicionless searches of a guest registry. There, a Pierce County deputy sheriff conducted a random check of the Golden Lion Motel's guest registry and discovered Timothy Jorden's presence at the motel. Jorden had outstanding warrants for his arrest, and so officers entered his room to arrest him. The court held that the information contained in a motel registry—including one's whereabouts at the motel—is a private affair under our Washington's constitution and is therefore protected against a government trespass into that information. The court concluded that, absent a valid exception to the prohibition against warrantless searches, random viewing of a motel registry violates Article I, Section 7 of the Washington State Constitution.

The Washington Supreme Court in other cases has held, however, that guest registries are private affairs "only to a limited extent." In the personal restraint petition of In re Nichols, 171 Wn.2d 370, 256 P.3d 1131 (2011), the Court confirmed that the guest's right to keep registry information private is not as extensive as the right to privacy of, for example, one's home. There, the court held that police officers did not conduct an unconstitutional search of a registry when they had "individualized and particularized suspicion" about the guest.

Perhaps more importantly, however, a hotel's registry can be considered the "private affairs" of the hotel. As a result, the hotel itself is entitled to protection from a warrantless search of the registry, even though the guest's protection from a warrantless search by the state is limited. Because the hotel may have contractual or other duties to its guests to keep the guests'

affairs private, there is good reason to exercise the hotel's right to keep registry information private.

An important exception to the hotel's right to protect guest information from warrantless searches now exists, however, under the Patriot Act. Federal agents and governmental entities have the right to obtain guest information *without a warrant* under the Patriot Act. See PART III, Section 8.1.

Like police officers carrying a warrant to search guest information, officers of the court, including attorneys, who present an appropriate court order, in the form of a subpoena, can also review and receive information from a hotel's guest register. In these instances, a hotel is well advised to have its legal counsel involved with the request to review records of the hotel. Often an attorney requests permission to examine a hotel's register on behalf of a client, who may or may not be the guest in question. In such instances, the proper procedure is to require the attorney to obtain the guest's written consent to the examination of the register. The hotel should not divulge any information with respect to the guest's registration, except upon presentation of this consent and advice of the hotel's legal counsel.

Thus, except for warrantless searches permitted under the Patriot Act, usual practice is to open a hotel's registry for inspection by appropriate local law enforcement or court officials only when hotel management receives either a valid search warrant or an appropriate court order in the form of a subpoena. If an officer or duly authorized law enforcement official requests examination of hotel records, the hotel should consult with legal counsel before permitting the examination, especially if there is reason to believe that the hotel may be involved as a party in a civil or criminal lawsuit.

Hotel management also has significant legal basis for preventing the police from conducting a search of a guest's room without a lawful search warrant or without the consent of the guest. In State of Washington v. Debra Ferrier, 136 Wn.2d 103 (1998), the Supreme Court spelled out a new rule as to how police must behave when they knock on a door in hopes of winning a citizen's permission to search without a court-approved search warrant—an approach that police call a "knock and talk." Citing the state's guaranteed right to privacy (Article 1, Section 7 of the Washington State Constitution), the court in the *Ferrier* case ruled that police who have not obtained a warrant to conduct a search must tell the individual when attempting to obtain the individual's consent to search that:

- They have the right to refuse entry;
- They can limit the area that can be searched; and
- They can revoke the consent to search at any time.

State v. Ferrier, 136 Wn.2d 103, 118-19, 960 P.2d 927, 934 (1998)

Although the case was related to a person's home, the same principles can be applied directly to hotel rooms. In light of the Ferrier decision, hotels can, in the absence of a valid search warrant, lawfully refuse law enforcement officials the right to enter a guest's room, and those law enforcement officials who engage in the "knock and talk" technique of securing entry to hotel rooms must specifically inform the hotel desk clerk that the hotel "need not consent to the search."

A number of federal and state court decisions have refused to permit an unlawful police search of a hotel room without the consent of a hotel proprietor. See Lustig v. United States, 338 U.S. 74 (1949), United States v. Jeffers, 342 U.S. 48 (1951), and Stover v. California, 376 U.S. 889 (1964).

4.2. The Innkeeper's Obligation to Protect the Guest's Privacy

Some courts have indicated that a hotel has an obligation to protect the guest's right to privacy. For example, when a guest of a hotel has paid for a room, the hotel may not have authority to permit law enforcement officials to search the room during the guest's rental period without a valid search warrant. Doing so could constitute a violation by the hotel of the guest's right to privacy, and this violation could subject the hotel to a civil action for damages under Washington law. See State v. Jorden, 160 Wn.2d at 130, 156 P.3d at 898 (2007). This liability could potentially be reduced by addressing the issue in the hotel's contract with the guest. See Section 2.1, above. Because of this exposure, however, hotel management is cautioned against allowing the police to conduct a search of a guest's room without a lawful search warrant or without the consent of the guest, and hotel personnel should understand and exercise the rights to protect the guest's privacy, as set forth in the preceding Section 4.1.

The Patriot Act provides hotels with some immunity if a hotel provides voluntary registration information to a governmental entity because the hotel reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information. See PART III, Section 8.4.

To ensure a guest's privacy, the following are some tips for your front desk personnel:

- Never announce a room number to a guest within earshot of anyone else. Show the guest the room key and point out the room location on a map of the property or hand the guest a piece of paper with the room number on it.
- If someone comes to the front desk and asks for a guest's room number, do not give it out. Tell the person you will check to see if the guest is registered.
- If someone who appears to be a guest asks for an extra key, ask for identification and the room number. Then phone the guest room before issuing a key.
- Encourage guests to phone the front desk if someone comes to a guest room professing to be a staff member. Answer such calls politely and take them seriously.

4.3. Summary and Conclusions

- A hotel has a right to keep unwanted and unregistered third parties from interfering with the privacy of its registered guests.
- The right of privacy empowers any hotel to remove any unregistered guest from the premises and to refuse to provide any information about a hotel's guest.
- Hotel management is cautioned against allowing police officials to conduct a search of a guest's room without a lawful search warrant or without the consent of the guest.
- Hotel management has the right to refuse random viewing of a guest registry by law enforcement.
- While you always want to cooperate with local law enforcement officials, a hotel desk clerk should always insist that police obtain a valid search warrant before they enter a guest's room. Under Washington law, your desk clerk must now be informed by police that he/she need not consent to a warrantless search of a room.
- Violation of the rights of privacy could permit an aggrieved party to seek damages.
- Federal agents and governmental entities have the right to obtain guest information *without a warrant* under the Patriot Act. See PART III, Section 8.1.

Chapter 5: The Innkeeper's Duty to Protect Guests from Injury

The duty of an innkeeper to provide safety and security to its guests has been recognized for centuries and is derived from English common law. Today, however, it is becoming far more complicated to determine the extent to which hotel management is responsible for the safety and security of its guests.

It is fair to assume that a guest may sue a hotel for any type of injury that occurs on the hotel premises and, in some cases, on the public areas surrounding a hotel. Increased insurance premiums, bad publicity, and lawyers' fees are all factors to be considered by hotel management in attempting to provide a safe, secure environment for its guests.

A discussion of the facts and decisions of a number of jurisdictions concerning a hotel's liability for injury to a guest is featured in this chapter. An examination of this case law may be the best way to gain an understanding and appreciation for the types of proactive steps that can be taken to effectively minimize the potential liability of innkeepers.

5.1. Reasonable Care Rule

The general Washington rule regarding the protection of guests from harm caused by other guests or third parties is restated in Miller v. Staton, 58 Wn.2d 879, 365 P.2d 333 (1961):

An innkeeper or restaurant owner owes the duty to guests and third parties to exercise care to protect them from injury at the hands of a fellow guest or third party.

The scope of hotel management's duty to exercise "reasonable care" extends only to dangers that are within hotel management's actual knowledge or are foreseeable. Knott v. Liberty Jewelry and Loan, Inc., 50 Wn.App. 267, 748 P.2d 661 (1988). If hotel management can foresee a danger to any guest, he must take steps to address the danger and to protect guests and others who may be within the scope of protection.

The Washington State Court of Appeals, in Pearce v. Motel 6, Inc., 28 Wn. App. 474, (1981), stated:

A hotel operator is liable for physical harm caused to its guests by a condition of the premises if, but only if, it (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such guests, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Hotel management is not an insurer of a guest's safety, but it is under a duty to exercise reasonable care to protect a guest against dangerous conditions. In Holm v. Investment &

Securities Coll, 195 Wn. 52, 59, 79 P.2d 708 (1938), the Washington Supreme Court held that "the proprietor of a hotel is not an insurer of safety of persons who use hallways, but is only liable for his negligence, if any." This holding has been followed in subsequent decisions. In Brown v. Scharff, 42 Wn.2d 50, 51, 253 P.2d 426 (1953), the plaintiff was injured when the plaintiff opened a door, thinking it was an entrance to a shower room, and fell down a stairway. The court held that the manager gave plaintiff no reason to believe, and could not reasonably have known, that the plaintiff might think the door was for her use for any purpose. Similarly, in Knott v. Liberty Jewelry and Loan, Inc., 50 Wn. App. 267, 748 P.2d 661 (1988), the Court of Appeals held that the Publix Hotel did not fail to fulfill his duty to warn the plaintiff of a gunman's dangerous propensities or to protect him from injury. The court held that the manager of Publix Hotel had no legal duty to warn other guests of the danger presented by the gunman or to prevent him from carrying his weapon.

A hotel can be found liable for negligence, however, when management fails to exercise reasonable care. For example, the failure to maintain fixtures so that guests can use them in an ordinary manner without danger renders hotel management negligent. Brault by Brault v. Dunfey Hotel Corp., CIV. A. No. 87-6899 (1988); Early v. John A. Cooper Co., 435 F.2d 342 (8th Cir. 1970).

Negligence on the part of hotel management cannot be avoided by delegating responsibility for contracted services such as janitorial services or grounds-keeping services. Negligence that can be attributed to a hotel ranges from the safety of sliding glass doors, to the proper lighting of stairwells, parking lots, and walkways adjacent to a hotel.

5.2. Contributory v. Comparative Negligence

A basic understanding of the legal theories of contributory versus comparative negligence is helpful in evaluating potential litigation when both the hotel and the guest are potential parties to an accident.

Contributory negligence was the basic law in most states, including Washington State, until 35 years ago. Under this rule of law, if an injured party contributed to the accident in any way, then he was not able to recover any damages for his loss. Damages were precluded by this rule of law even if the injured party was only 1% responsible and the other party was 99% at fault. The reasoning behind this rule of law was that the accident would not have happened if the injured party did not act negligently. Therefore, negligent parties did not have to pay damages to another party who contributed to the accident.

Over a period of time, most state legislatures recognized the heavy burden that the contributory negligence rule placed on injured parties. Through legislative action, many states rejected the rule of contributory negligence in favor of a new rule known as "comparative negligence." Under this rule, the amount of damages would be scaled down based on the comparative fault of the respective parties involved.

Washington’s comparative negligence legislation was enacted in 1981 and is cited as RCW 4.22. RCW 4.22.005 provides, in part, “in an action based on fault seeking to recover damages for injury or death to person or harm to property, a contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery.” Thus, Washington law follows under the “Pure Comparative Negligence” theory set forth in the graph below.

A number of other states have modified the comparative negligence rule and require the plaintiff to be less than 50% at fault to recover any damages. Under this modified rule of comparative negligence, a plaintiff could only recover damages from a hotel if a jury found the plaintiff less than 50% at fault for the accident. These modified comparative negligence statutes can be complex when there is more than one defendant involved.

Contributory v. Comparative Negligence			
	Contributory Negligence	Pure Comparative Negligence	Modified Comparative Negligence
Plaintiff Not at Fault	Full recovery	Full recovery	Full recovery
Plaintiff 30% at Fault	No recovery	70% recovery	70% recovery
Plaintiff 70% at Fault	No recovery	30% recovery	No recovery

5.3. Violation of Laws and Regulations—Negligence “Per se”

A hotel can be liable to an injured party for negligence “*per se*” if (a) the injured party shows that the hotel violated a statute or regulation, (b) the law is intended to protect persons such as the injured party and to prevent the type of harm that occurred, and (c) the hotel can’t show some special justification for the hotel’s failure to comply with the law or prevent the injury. “*Per se*” negligence means that the plaintiff only needs to show a violation of the law in order to prove negligence.

For example, RCW 70.62 establishes the fire safety requirements for hotels in Washington State. If the hotel does not comply with these requirements, a fire occurs, and injury or death

results, the hotel can be found negligent *per se* and liable for resulting damages. See Herberg v. Swartz, 89 Wn.2d 916, 578 P.2d 17 (1978). See PART III, Chapter 3 for a discussion of fire safety laws and regulations.

PART III of this Manual discusses some of the many laws and regulations that apply to hotels and their operations. The concept of negligence "*per se*" adds extra urgency to the hotel's efforts to comply with these laws and regulations.

5.4. Cases: Fact Patterns and Decisions

(a) Hotel Rooms

1. Garzilli v. Howard Johnson Motor Lodges, 419 F. Supp. 1210 (E.D. NY 1976). In this New York case, the court found that room access through sliding glass doors must be secure. The singer-celebrity Connie Francis was criminally assaulted in her Howard Johnson motel room when a man entered through the room's sliding glass doors, which appeared to be locked from the inside of the room, but could be opened easily from the outside by an intruder. The court awarded Connie Francis the sum of \$2.5 million in damages.

2. Kveragas v. Scottish Inns, Inc., 733 F.2d 409 (6th Cir. 1984). In this Tennessee case, intruders kicked down a hollow-core door which was poorly fitted to the door frame and assaulted and robbed Kveragas. The only security features on the door were a door knob lock and a security chain, both of which failed. Evidence showed that better locks and a stronger door could have prevented the intrusion.

3. Mills v. Best Western Springdale, 2009 Ohio 2910, 2009 WL 1710765. Plaintiff alleged she contracted scabies during her hotel stay and sued Best Western Springdale for breach of contract, negligence, and violation of the Consumer Sales Practices Act. Plaintiffs argued that the hotel breached its duty to provide a clean, habitable hotel room and engaged in unfair and deceptive business practices. The court held, however, that there was no evidence of the mites themselves or any items infested with mites that were under the control of Best Western. There was also a lack of evidence to show that, absent negligence by Best Western, the Mills would not have contracted scabies.

4. Gass v. Marriot Hotel Services, Inc., 558 F.3d 419 (6th Cir. 2009). Hotel guests brought action against the Marriot in Maui alleging that the hotel negligently exposed them to pesticides in the hotel room. Plaintiff complained about a dead cockroach in the room, and when she left for the beach the next day, the hotel's exterminator entered her room and sprayed it with pesticides. When plaintiffs went back to the room, there was a "thick, horrid, acrid putrid odor" and plaintiffs became ill with various neurological symptoms afterward. The Sixth Circuit Court of Appeals held that it is unacceptable to enter a place where another is residing and fill the place with airborne poison without providing for evacuation, appropriate ventilation or taking other precautions.

(b) Premises Liability /Duty of Care

1. Brock v. Grand Palace Hotel, 27 Misc.3d 1210(A), 2010 NY Slip Op 50672. Plaintiffs sued Grand Palace for negligence when a window fell out of its frame onto plaintiff's head and on her daughter's leg. Plaintiff asserted that, on the day prior to the accident, she notified the hotel staff that the window in the room was open and that there was a problem. The court ruled that hotel owners have a duty to maintain their property in a reasonably safe condition, but that the plaintiff, to succeed, must establish that the owner had actual or constructive knowledge of the dangerous condition that caused the accident.

2. Spahr, et.al., v. Ferber Resorts, et al., 686 F.Supp. 2d 1214 (10th Cir. 2010). A customer brought action against Ferber Resorts for negligence and loss of consortium. The customer fell into a six foot concrete ditch when he walked across a darkened parking lot toward the hotel office. The court held that the risk presented by the ditch was not open and obvious to the customer and that Ferber Resorts owed him a duty of care. The court also held that the jury award of \$393,000 to plaintiff and \$42,000 for loss of consortium was not excessive.

3. Jung v. Marriott Hotel Services, 2010 WL 4703543. (E.D. Pa. Nov. 19, 2010) Plaintiff sued Marriott for injuries she sustained in an icy slip and fall accident that occurred on Marriott's premises in downtown Philadelphia. Plaintiff argued that a defendant may be held liable where there is a specific localized patch of ice about which defendant knew. Because there was testimony of several Marriot employees to support plaintiff's argument that a patch of ice existed at the rear entrance to the Marriot, the court rejected Marriott's motion for summary judgment.

4. Allen v. Boyd Tunica, Inc., 2009 WL 1162618 (N.D. Miss., April 28, 2009). Plaintiff brought suit against hotel when her six year old slipped and fell on the shower diverter knob that was engaged in a vertical position on top of the water faucet. The fall resulted in her rectum being impaled by the knob and required her getting a temporary colonoscopy. The court found no evidence that the hotel's bath unit was unreasonably dangerous; the tub had an anti-slip mat, the faucet was of common design and no such injuries had previously occurred at the hotel.

(c) Common Areas

1. Virginia D. v. Madesco Investment Corporation, 648 S.W.2d 881 (Mo. 1983). A hotel must establish procedures and policies to secure common areas and to deter criminal activity in such areas. In this case, a woman was assaulted while in the ladies room, located in the lower lobby of the hotel in an area containing hotel offices, meeting, and banquet rooms. Although the attack occurred after office hours, four hotel employees were still in their offices. No hotel employee was stationed in the lower lobby on a regular basis. Also, no television or video monitoring equipment was installed in the lower lobby. The lower lobby of the hotel was accessible by elevator and by stairs from the main lobby. The main lobby was

accessible by two sets of front doors, and a back door used by employees and vendors. One security guard had been assigned to monitor the entire hotel, but was not in the lower lobby at the time of the attack on the female patron. Evidence was presented to the court of previous criminal activity, including trespass, in the lower lobby. The entry of unauthorized persons was of concern to the hotel's security staff, but their recommendations that hotel management hire additional security guards were disregarded. The court held that access to the lower lobby was dangerously uncontrolled and guests were not adequately protected from foreseeable events, such as assault. Damages in the amount of \$100,000 were awarded to the plaintiff.

2. Orlando Executive Park, Inc. v. P.D.R., 402 So.2d 442 (Fla. 1981). If prior events demonstrate that a hotel property is vulnerable to criminal activity, it is imperative for the safety and security of the guests that safeguards and warnings be posted. In this case, the security of an internal hallway was at issue. A guest left her hotel room, went to her car, and was returning to her room on the first floor when she was criminally attacked in the hallway. The motel had a history of previous assaults on guests of the motel. The motel had no regular security force, no security devices (such as television or video monitors), no warnings were given to guests of previous criminal incidents, and no procedures were implemented for keeping unauthorized persons off of the premises. Damages in the amount of \$750,000 were awarded by the court.

3. Peters v. Holiday Inns, 278 N.W.2d 208 (Wis. 1979). The lack of secure common areas was again a breach of the motel's duty to protect guests from foreseeable events which can reasonably be expected to cause injury. An ex-employee entered the hotel at 3:00 a.m. and proceeded to the kitchen where he stole a shirt used by the hotel's room-service personnel. The perpetrator then walked to plaintiff Peters' guest room and knocked on the door. Peters saw what he believed to be a hotel employee through the peephole, and opened the door. Peters was assaulted, robbed, and forced to accompany the attacker to his car. An appellate court found the hotel negligent as a direct result of the hotel's lack of security in common areas. The hotel's security deficiencies included the following:

- Failure to lock the separate building in which the guest's room was located,
- Failure to monitor the common areas by closed circuit television or by security personnel, and
- Failure to link separate and remote parts of the hotel with a common lobby.

4. Taco Bell, Inc. v. Lannon, 744 P.2d 43 (Colo. 1987). A restaurant facility located in a high-crime area should take extra precautions for its patrons' safety. In this case, injury by an armed robber was held to be "foreseeable." A patron, upon entry to the restaurant, saw an armed robbery in progress, and fled the premises. The fleeing patron was shot by the robber. There had been ten armed robberies at this same restaurant facility over the last three

years, one occurring just two nights earlier. The restaurant took no responsive or effective security measures, such as the hiring of security guards or placing closed circuit television or video monitors in the restaurant. Damages in the amount of \$40,000 were awarded by the court to the plaintiff.

5. Harris v. Pizza Hut of Louisiana, Inc., 455 So.2d 1364 (La. 1984). The utilization of security personnel must include clear instructions as to what security personnel are expected to do in the regular course of their job and in the event of an emergency. In this case, a shooting occurred in a restaurant located in a high-crime area, which employed a security guard. The guard was ineffective. The guard could not view the outside of the restaurant, because he was blocked by a partition. The guard was sitting at a table, eating and conversing with a friend at the time of the event; and the guard moved to the side at the time of the shooting, exposing restaurant patrons to even greater danger. The court ruled that the restaurant should have had procedures that instruct the guard how to act during emergency situations in order to provide better safety and a greater deterrent to crime. Damages in the total amount of \$560,000 were awarded to the ten plaintiffs in this case.

6. Moore v. Whetstone, 82 Wn. App. 1061 (1996). Regularly scheduled inspections of the property by a specially designated employee can be helpful in avoiding a claim for damages. Whetstone sued the Nendell's Everett Inn regarding an alleged hazardous condition on its premises, *i.e.*, a defective floor mat. Under Washington law, a plaintiff bringing a claim for unsafe business premises must show that either "the unsafe condition was caused by the proprietor or its employees...or the proprietor had actual or constructive knowledge of the dangerous condition." On appeal, the appellate court noted that Whetstone had offered no evidence that the inn's schedule of inspecting the floor mat once in the morning and throughout the day was insufficient. The court ruled in favor of the inn because Whetstone could not show that the inn or its employees caused the hazard or the hazard was not discovered or corrected in a timely manner.

7. Maher v. Best Western Inn., 717 So.2d 97 (Fla. Dist. Ct. App. 1998). The Maher family chose the Best Western Inn because it advertised that pets were welcome. Debra Maher was legally blind and had a service dog named Ina. Another registered guest had two dogs—one a mixed-breed pit bull. When Debra Maher took Ina for a walk in the designated area on the hotel grounds, she met the other guest with her two dogs and the pit bull attacked Ina. When attempting to break up the fight, Debra Maher and her parents were injured and taken to the hospital. A lawsuit resulted against the hotel on the grounds that the Best Western Inn created a "foreseeable zone of risk" by inviting dogs and had no requirement that the dogs be leashed. The court remanded the case to determine whether the hotel's lack of rules for dog control constituted negligence.

8. Hill v. Charlie Club, Inc., 665 N.E.2d 321 (1996). The Illinois First District Appellate Court reversed a \$298,000.00 verdict against a hotel accused of failing to protect a young woman from a rapist who attacked her in the empty conference room at the hotel. The

court reversed the verdict, finding that Charlie Club owed no duty to protect Hill because (1) she was not a “business invitee”, and (2) the club had no duty to prevent the assault of Hill because it had never before had any violent crimes on its premises.

Note: Evidence of prior criminal acts at the hotel is often at the core of negligent security cases. It is important to check local crime records for reports of any violent crimes on the premises or in the neighborhood. If the history of criminal activity in the area is sufficient to indicate that police efforts alone will probably not be successful in preventing attacks, then hotel management should undertake security measures on its own, or incur the consequences of liability verdicts against it.

(d) Employee Training

1. Nordman v. National Hotel Company, 425 F.2d 1103 (5th Cir. 1970). Employees must be trained to respond to emergency situations. In this case, two guests at a 1,200-room hotel in New Orleans were returning to their rooms after attending a ball at the hotel. The guests were forced into their room(s) by a man carrying a gun. A guest in the room next door heard suspicious noises and called the hotel operator, requesting that the operator call the police. The operator waited a few minutes, then called the room clerk, who waited a few more minutes before looking for a security officer. Forty minutes later, the police were called. By this time, the gunman had left the hotel premises. The hotel was staffed by one security officer, one room clerk, and one bellhop at the time. The court ruled that the hotel had not established employee procedures for handling potential crimes in progress, and that the hotel failed to secure its halls and elevators. Damages in the amount of \$21,000 were awarded by the court.

2. Boles v. La Quinta Inns, 680 F.2d 1077 (5th Cir. 1982). Employees should also be trained to respond with sensitivity to injured guests. In this case, a female guest was attacked and robbed by an intruder who was inside of her room. When the guest opened the room door, she was gagged and bound by the intruder and left in the dark. The bound guest managed to kick the telephone receiver off the hook and “call” the front desk for assistance. A total of three hotel employees expressed little or no concern for the guest, but eventually called the police. One employee told the guest that they would not be coming to her room to provide assistance. Two assistant managers and the manager stood outside the room and listened to the guest’s screams, but did not attempt to help her. The court found the hotel negligent for not maintaining a well-lighted hallway. The court also found that the hotel was liable for the physical and psychological injuries caused by the employees’ failure to assist the guest, who was left bound and gagged in the darkness of her room, until police arrived. Damages in the amount of \$78,000 were awarded to the plaintiff.

4. Stahlin v. Hilton Hotels Corporation, 484 F.2d 580 (7th Cir. 1973). In this case, the plaintiff became entangled in his trousers while dressing, fell and suffered a head injury.

The hotel responded by sending a woman to offer medical assistance, although she was not medically trained or certified. As a result of the lack of medical or emergency training, the seriousness of the plaintiff's injuries went unnoticed and he suffered permanent brain damage. The hotel, in an effort to offer help, assumed a position of liability which could have been avoided had the initial response been to call certified independent medical help. The court ruled in favor of Stahlin, the plaintiff in this case. Damages in the amount of \$210,000 were awarded to the plaintiff.

5. Meade v. On the Ave Hotel, 907 N.Y.S.2d 185 (2010). Plaintiff, Gary Meade, was in an elevator that stalled midway between two floors in On the Ave (OTA) hotel. Plaintiff sued the elevator service company and the hotel for negligence. While plaintiff was not injured when the elevator stopped, he was injured after he attempted to exit the elevator and slid backward out of the elevator. Plaintiff's claim against the hotel was based on theories that its employees were not properly trained in the case of elevator evacuation. The court found that because the hotel owner had a nondelegable duty to maintain the elevators, its liability was irrefutable. The court added that it was not the "task of plaintiff, a guest at the hotel, to inform hotel employees as to hotel procedures in the event an elevator got stuck."

6. Basile v. Bogata Hotel Casino & Spa., Inc., 2009 WL 1286583 (N.J. Sup.Ct. App.Div. May 12, 2009). Plaintiffs sued the hotel claiming insufficient supervision, negligent hiring, and inadequate training when a hotel security guard entered their room uninvited. Plaintiffs were intoxicated when the security guard entered their room, attempted to kiss one of the women, and tried to remove a towel she was wearing. The guard was fired after the incident; he had worked as a security guard for three years at another hotel, although he had only received one day of training at Bogata. The court held that plaintiffs failed to prove that the training was improper or that the incident was caused by improper training. The hotel was also found not negligent in hiring the guard, given his clean record.

(e) Hotel Entrance and Parking Lot

1. Banks v. Hyatt Corporation, 722 F.2d 214 (5th Cir. 1984). This Louisiana case expanded the scope of a hotel operator's duty to provide guest security on public property adjacent to the hotel premises. A guest was fatally shot by two robbers in front of the hotel entrance. His body lay 30 feet from the curb and four feet from the hotel entrance. The hotel was located in a high-crime area, but had inadequate security patrols around the premises. The hotel staff did not warn guests of the potential dangers, in and around, or at the entrance to the hotel. The court held that hotel management can be liable for injuries caused to a guest while entering or exiting a hotel. Damages in the amount of \$975,000 were awarded in this case to the plaintiff.

2. Hollander v. Days Inn Motel, 705 So.2d. 1126 (1997). A guest who was jogging was attacked by an assailant 150 yards from the hotel's entrance. The court ruled that the innkeeper may be liable if the innkeeper has sufficient control over adjacent premises but

fails to take reasonable preventive action to protect guests. The Days Inn did not have sufficient control of the adjacent premises and, as a result, the Inn owed no duty to protect this guest on the public premises where he was attacked. See also, *Ventura v. Winegarden*, 357 SE 2d 764 (1997)).

3. Ford v. Red Lion Inns, 67 Wn. App. 766, 840 P.2d 198 (1992). A hotel has a duty to anticipate certain conditions on the premises and correct them before they become dangerous or harmful. In this case, Ford was working for a company who had contracted with the Red Lion Inn of Bellevue to use a designated portion of its parking facilities while its employees were working on a movie. Ford contended that he had slipped and fallen on the ice in the parking lot while helping to clear off other co-workers' vehicles. The court ruled in favor of the defendant, Red Lion Inns, on the basis that Ford knowingly placed himself in danger by offering to clear the snow off the other vehicles. The court stated, however, that:

... [A]n invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception, he is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation.

This Washington case emphasizes that a hotel has a responsibility to provide a safe environment. See also *Allingham v. Long-Bell Lumber Co.*, 136 Wash. 681 (1925), and *Sorenson v. Western Hotels, Inc.*, 55 Wn.2d 625 (1960).

5.5. Keys and Access Cards

Hotel management has been held liable for guest injuries that result from faulty room access control. As a result of these liability costs, most hotels provide room access by use of mechanical or electronic room access cards.

Access cards provide a high degree of room access security in that the security can be easily changed for each guest. Access cards are also used to limit access to hallways, conference rooms, recreation facilities or building entrances. The cost of replacing a key card is nominal compared to the cost of keys. An alternative solution is to locate a dependable locksmith and to utilize code numbers and not room numbers on room keys.

The following are recommendations for key controls:

- Guest room keys should be controlled in accordance with the hotel's guidelines and any guidelines of the lock manufacturer.
- Electronic locks (other than guest rooms) should be coded by department.
- The general manager and each department manager should determine the minimum number of keys for each lock and to whom they will be available.
- Any key cards made but not issued should be secured in a locked cabinet (under control of the department manager).
- Key cards issued to designated employees should be recorded by identification number. A copy of the receipt for the key with the employee's signature should be kept in their personnel folder.
- Department keys should be logged out/in each day.
- Department keys should be kept in a safe deposit box or a drop safe when not in use.
- Access for making grand master keys or executive staff keys should be limited to the general manager and chief engineer.
- Special recommendations for the front desk:
 - Never give a guest room key to anyone other than the registered guest.
 - If a guest is locked out of their room, require proper identification (picture identification) or verify signature on registration card and verify payment method for room.
- There should be two "E" keys in existence at the hotel at any given time. One should be kept by the general manager in the office safe. A second should be kept at the front desk for use in emergencies.
- If a room attendant, supervisor, or master type key card is lost, stolen or compromised, new key cards for the affected locks should be made and all locks in that section should be programmed to void the compromised cards.

5.6. Acts of Hotel Employees

Under the doctrine of *respondeat superior* a hotel may be held liable for the acts of its employees acting within the course of their employment.

In Washington, an employer is not liable for the misconduct of an employee acting outside the course of their employment. Other states, however, have ruled on the issue in different ways. In Massachusetts, the court ruled in McKee v. Sheraton-Russell, Inc., 268 F.2d 669

(2d Cir. 1959), that the advances of a bellboy after his shift were in breach of the agreement to provide decent and respectful treatment between the hotel and the guest.

Snakenberg v. Hartford Casualty Insurance Co., 383 S.E.2d 2 (1989), is one of a number of “peephole” cases in which hotel employees made secret peepholes designed for spying on the private activities of hotel guests. There, the South Carolina Court of Appeals established a four part test for determining whether an invasion of privacy has occurred in a “peephole” case. The elements included: (1) an intrusion, (2) into that which is private, (3) that is substantial and unreasonable enough to be legally cognizable, and (4) that is intentional. Under the test, plaintiff’s counsel has the burden of proving these peepholes were installed to allow spying on the private moments of others without their knowledge or consent. In some jurisdictions, when the intrusion is committed, the tort of invasion of privacy is complete (this eliminates the need to show that someone’s eyeball was next to the peephole). Other jurisdictions require establishing a plaintiff actually saw a person’s eyeball through a peephole before recovering damages for the invasion.

There appears to be no Washington cases on the subject of hotel peepers, but the case law demonstrates the potential risk for hotels who hire them. Verdicts against hotels in excess of one million dollars have been rendered. The exposure suggests that hotels are well-advised to regularly inspect rooms and make sure no peepholes are present. See also, Carter v. Innisfree Hotel, Supreme Court of Alabama (1995); Harkey v. Abate, 346 N.W. 2d 74 (1983); New Summit Associates Limited Partnership v. Nistle, 533 A. 2d 1350 (1987); and Ritz Carlton Hotel Co. v. Revel, 454 S.E. 2d 454 (1995).

Modern technology has provided criminal “peepers” new ways to invade privacy. “Spy cams” are available for purchase and can be installed wirelessly. The rationale of the peephole cases would suggest that hotels are well-advised to inspect every room to make sure these devices, as well, are not present.

5.7. Acts of Other Guests and Patrons

A hotel has an implied agreement with its guests to provide a decent, peaceful and safe environment. Under this implied agreement, guests not abiding by the regulations set forth by the hotel must promptly be confronted so as to reduce the likelihood of injury to third parties. In Chase v. Knabel, 46 Wash. 484, 488, 90 P. 642 (1907), the Court stated:

It is doubtless the duty of a restaurant keeper to accord protection to lady patrons from insult or annoyances while they are in his restaurant. If such a lady customer is insulted or annoyed, it is doubtless the duty of the proprietor or his waiters or servants to put a stop to such annoyance and, if necessary, to eject the person guilty of the offense; and in so doing they may use all necessary force and violence.

5.8. Use of Exculpatory Language

“Exculpatory language” is language found on a written notice or sign that states the hotel is excused or cleared of all liability for use by guests of certain facilities or equipment. Often this kind of language is posted at various locations in the hotel and their recreational facilities such as weight rooms, pools, and hot tubs. Use of this language, however, will not completely absolve hotel management of liability. A hotel offering recreational facilities for its guests should place warning signs and proper usage signs near and on such facilities in an effort to reduce liability in case of injury. Recognize, however, that such facilities necessarily create a measure of liability for the hotel. Exculpatory language will not completely absolve the hotel from potential liability.

5.9. Hotel Security Tips

For your review and consideration, the following hotel security tips are provided as general guidance for your hotel property.

Background Investigations: You should have a detailed reference check done on all employees when they are hired. Contact should be made not only with the former personnel director, but if possible, the immediate supervisor. Ask for performance related information. “Would you re-hire this person?”

Record Checks: A criminal conviction record check should be conducted on all new employees. Additionally, a driver’s license check should be conducted on all employees who drive a company vehicle.

Police Information and Contacts: Call the local police and ask for a list of previous police responses (if any) made to your hotel property and if possible, to surrounding properties and areas. Look for patterns and predictable or possible incidents. Develop a good relationship with the state, federal, and local law enforcement officers. A good relationship will often foster better response. Sometimes small gestures such as providing coffee and bakery items to patrolling police cars in the morning may be the cheapest security you can buy.

Lighting: Make sure the lighting in your parking garage or parking lot is sufficient. Lighting engineers will often survey your property and make recommendations for improvement at no charge.

Property Improvement: Trim the hedges and overhanging tree limbs. An unattended facility is likely to attract vandalism and crime.

Parking: Have a designated parking area for employees. Do not allow employees to park close to the hotel entrances and exits.

Fencing: Determine if a fence is needed around your property. If fenced, make sure there are no holes. Try to make your properties one way in and one way out. Even without fencing, gates for driveways on side and back entrances will help control access to your parking lot.

Key Control: All managers and employees should sign out/in keys. One person should be placed in charge of the key/lock system. Spare keys, locks, and records should be kept in a secure place. Audit keys and master key cards frequently to identify lost or missing keys. Front desk employees should be trained on the proper way to issue a key to a guest upon check-in (never announce the room number).

Employee Procedures: Housekeepers and other employees who are required to enter guest rooms should check locks, auxiliary locks, windows, sliding glass doors, connecting room locks and doors, and view ports. Rooms should be immediately placed “out of order” if any of the above is not working properly. Housekeeping employees should never clean more than one guest room at a time. The door to the guest room they are cleaning should be closed. They should not allow anyone to enter the guest room they are cleaning without checking their room key and identification. Individuals should be sent to the front desk if they do not have a key.

Hotel Incidents: Keep a record of all incidents which occur at the hotel. Review these incidents at each staff and employee meeting and try to develop ways to prevent them in the future. Most police departments have a crime prevention bureau which will conduct a crime survey and make recommendations at no cost.

Employee Training: Security training should be provided for all employees. Documentation of such training should be placed in the employee personnel file. Involve your employees by using them as your eyes and ears and encourage them to report suspicious individuals in the area.

Liaison: Network with surrounding hotels and businesses. Let them know if someone tries to improperly get past your security or if you see suspicious individuals in the area. Ask them to do the same for you.

Employee Involvement: Use an anonymous reporting system for your employees to report unsafe acts or incidents of other employees.

Protection of Hotel Assets: Inventory equipment and keep records of serial numbers. Lock equipment away when not in use. Train employees on what to do in case of an armed robbery. Keep cash low in drawers. Make frequent cash drops but vary the time and routes for each drop.

Access: Lock outside doors at a specific time each night. Place a sign on both sides of the door stating when the door will be locked. Remember, guests and employees must always be able to evacuate the hotel through designated exits in case of an emergency.

Specialized Equipment: The use of specialized equipment should be considered (*i.e.*, CCTV at entrances, elevator lobbies, front desk, and cash counting areas).

Corporate Resources: If you are part of a franchise, use the corporate resources available to you such as loss prevention or the security department.

5.10. Working with Insurers and Counsel

It is obvious that every hotel should carry adequate property and liability insurance. Often, insurers and brokers can help advise on ways to reduce liability risks. Hotel management should take advantage of any resources they may offer.

Many insurance policies have provisions that require the hotel to notify the carrier if a claim is made. Be sure you are familiar with these provisions and comply with them—a failure to notify may impair coverage rights.

Sometimes, hotels use the hotel address or another place of business as the hotel's registered agent for service of process. This approach is not advisable. If a complaint is served and isn't handled properly or promptly, important court deadlines can be missed, and this can prejudice your position. To avoid these missteps, hotels should consider engaging a reputable registered agent service and arranging for their regular attorney to receive a copy of any court papers that are served on the registered agent.

When a claim is asserted against a hotel, and especially when a claim has been filed in court and served on the hotel's registered agent, consider the following steps:

- Notify your insurance carrier promptly and in accordance with the policy's terms.
- Contact your usual attorney to make sure that no court deadline is missed and to consider any other preliminary steps that should be taken.
- Sometimes, insurers are slow to step in and provide representation. If a notice of appearance is not filed in time, a default judgment can be entered against the hotel, and this creates many procedural and substantive difficulties. If your insurer doesn't act promptly, your usual lawyer should file the notice of appearance and coordinate with your insurer to make sure you have proper representation.
- Insurers are notorious for using low-cost attorneys. These attorneys are often good or at least adequate, but in a high profile case, you may want to consider alternatives. Check your policy to see whether you have the discretion to select counsel. If not, consider whether you want to obtain this discretion when it comes time to renew the policy.

5.11. Summaries and Conclusions

- In today's society, it is fair to assume that a lawsuit may be brought against a hotel by a guest seeking damages for any type of injury incurred on a hotel's premises and on the public areas surrounding a hotel.
- Although not an insurer of a guest's safety, an innkeeper owes a duty to its guests or third parties to exercise care to protect them from injury at the hands of a fellow guest or third parties. The duty to exercise reasonable care normally extends only to dangers which are within hotel management's actual knowledge or which are foreseeable.
- Cases and lessons:
 - Hotel rooms:
 - * Room access through sliding doors must be secured.
 - * Adequate doors and locks can prevent an unauthorized intrusion.
 - Common areas:
 - * A hotel must establish procedures and policies to secure common areas and to deter criminal activity.
 - * If prior events demonstrate that a hotel property is vulnerable to criminal activity, it is imperative for the safety and security of guests that safeguards be in place and warnings be posted.
 - * The lack of secure, common areas may be a breach of a hotel's duty to protect guests from foreseeable events which cause injury.
 - * The utilization of security personnel must include clear instructions as to what do to in the event of an emergency.
 - * If a hotel allows dogs on the premises, the hotel should consider adopting rules for dog control. Otherwise, a hotel may be liable for injuries caused by the dogs.
 - Employee training:
 - * Employees must be trained to respond to emergency situations.
 - * Employees should also be trained to respond with sensitivity to injured guests.
 - Hotel entrance and parking:
 - * Some cases have expanded the scope of hotel management's duty to provide guest security to public property adjacent to a hotel's premises.
 - * A hotel has the duty to anticipate certain conditions on the premises, including entrances and parking lots, and to correct them before they become dangerous and harmful.

- Hotel management can be held liable for injuries caused to guests that result from faulty room access control. A hotel should ensure that keys and access cards do not compromise guest safety.
- Under the doctrine of *respondeat superior*, a hotel may be held liable for the acts of its employees acting within the course of their employment. To avoid actions for the tort of invasion of privacy, hotels should inspect every room and make sure no peepholes or “spy cams” are present.
- A hotel has an implied agreement with its guests to provide a decent, peaceful and safe environment. Guests or other patrons not abiding by hotel regulations need to be confronted and/or ejected so as to reduce the likelihood of injury and liability.
- A violation of Washington’s fire safety laws and regulations is negligence “*per se*.”
- Exculpatory language alone does not absolve a hotel management’s liability to its guests.
- Hotels should take advantage of loss prevention resources provided by insurance carriers and brokers.
- Some security measures to consider include, among others, conducting background checks, developing good relations with local police, ensuring adequate lighting in parking lots and other common areas, and eliminating landscaping that may attract vandalism and crime.
- The hotel should have a reputable registered agent to prevent served court papers from falling through the cracks. When a claim is made, hotel management should notify the carrier promptly, coordinate with the hotel’s regular counsel, and make sure that a timely appearance is made in the court action.

Chapter 6: The Innkeeper's Liability for Guest Property

6.1. Washington State Statutes Limiting Liability

Under English common law, an innkeeper was deemed responsible for the full value of any property of a guest or visitor. When a guest or visitor was robbed at an Inn, it was held in at least one case that the innkeeper was liable "for defect of the guard." Cunningham v. Bucky, 42 W. Va. 671, 26 S.E. 442, 443 (1896) ("an innkeeper is not only responsible for the misconduct of his wife, but also of all those connected with the hotel service; and no display of a guest's money will relieve the landlord from the dishonesty of his servant in stealing it, for, as heretofore shown, he is a guarantor of his honesty"); Kent, 2 Comm. 594. ("an innkeeper, like a common carrier, is an insurer of the goods of his guests, and he can only limit his liability by express agreement or notice"); Am. & Eng. Enc. Law, 11, 51 ("the common law, as is well known, upon grounds of public policy, for the protection of travelers, imposes an extraordinary liability upon an innkeeper for the goods of his guest, though they have been lost without his fault.")

The case law in a majority of states, including Washington, impose the common law liability of an insurer upon an innkeeper:

"An innkeeper is responsible for the safekeeping of property committed to his custody by a guest. He is an insurer against loss, unless caused by the negligence or fraud of the guest, or by the act of God or the public enemy. This liability is recognized in the common law as existing by the ancient custom of the realm ...

This custom, like that in the kindred case of the common carrier, had its origin in consideration of public policy. It was essential to the interests of the realm, that every facility should be furnished for secure and convenient intercourse between different portions of the kingdom. The safeguards, of which the law gave assurance to the wayfarer, were akin to those which invested each English home with the legal security of a castle. The traveler was peculiarly exposed to depredation and fraud. He was compelled to repose confidence in a host, who was subject to constant temptation, and favored with peculiar opportunities, if he chose to betray his trust."

Hulet v. Swift, 33 N.Y. 571, 572 (1865).

In 1909, the Washington State Supreme Court approved three exceptions to an innkeeper's common law liability of an insurer. The court ruled that an innkeeper is the insurer of the property of his guest, and liable for its loss from any cause unless such loss comes from an act of God or the public enemy or from the neglect of the guest himself. See Walt v. Kilbury, 53 Wash. 446, 102 P. 403 (1909).

This broad liability of an innkeeper for the property of guests was greatly limited in 1915 by the passage of RCW 19.48. The wording of this statute shows its age—it uses archaic language, and the limits of liability are somewhat quaint. Nevertheless, the statute remains on the books, and it provides hotels very significant protection against claims for loss of guest property. These statutes are discussed fully in the sections of this Chapter 6 and in Chapter 7

Note: The limitations on liability set forth in RCW 19.48.030 and RCW 19.48.070 currently apply to hotels with three or more rooms in Washington State. Formerly the statute applied only to hotels with fifteen or more rooms.

6.2. “Valuables”

RCW 19.48.030 applies to guests’ “money, bank notes, jewelry, precious stones, ornaments, railroad mileage books or ticket, negotiable securities or other valuable papers, bullion, or other valuable property of small compass.”

The statute provides a “safe harbor” that eliminates liability to guests for loss of these valuables in most cases. To qualify, the hotel must take two steps. First, the hotel must provide a safe or vault for the safekeeping of these valuables. And second, the hotel must give guests actual notice of the availability of the safe or vault by posting a notice in three or more public and conspicuous areas such as the office, elevators, public rooms, or lobbies. If the hotel fulfills these two conditions, and the guest nevertheless does not deposit his/her valuables in the safe or vault, then the hotel is not liable for any loss of the valuables for any reason whatsoever.

The case of Walls v. Cosmopolitan Hotels, Inc., 13 Wn. App. 427, 534 P. 2d 1373 (1975) confirms this “safe harbor.” In Walls, the guest left a wristwatch valued at \$3,685.00 on a nightstand and left his room. The guest returned to find the door to his hotel room damaged; although locked, the door had been easily compromised and his room entered. The wristwatch had been stolen. The guest alleged negligence due to the ease of the entry and the lack of proper hotel maintenance because of the condition of the door and lock. The hotel’s attorney argued that RCW 19.48.030 disposed of all of the issues. The court agreed, finding that the wristwatch constituted “valuable property of small compass” as defined in RCW 19.48.030, and was therefore subject to statutory provisions. The court then noted that strict compliance with the provisions of RCW 19.48 is essential in order for hotel properties to gain the statute’s protection against an innkeeper’s common law liability. The court ultimately found in favor of the hotel and relieved the hotel of all liability, regardless of the cause of the loss, because the hotel property strictly complied with the statute and the guest had elected not to deposit his valuables. See also Goodwin v. Georgian Hotel Co., 197 Wash. 173, 84 P.2d 681 (1938).

RCW 19.48.030 also has some important additional liability limitations. It states that if a guest deposits the valuables with the hotel, then the hotel (a) is not liable for the deposited

valuables unless the loss is caused by the theft or gross negligence of the hotel or its agents and (b) the liability is capped at \$1,000. Furthermore, the statute states the innkeeper is not obligated to receive any guest property that exceeds \$1,000 in value. The statute is not entirely clear whether, to qualify for these limitations, the hotel must satisfy the two conditions discussed above (i.e., provide a safe for guests and post the required notices). Accordingly, it is worthwhile to satisfy the conditions to make sure the hotel has the benefit of these additional liability limitations.

The Washington Lodging Association (WLA) has made it easy to comply with the notice provisions of the “safe harbor.” Innkeepers may purchase from WLA, for a nominal cost, notices that are in compliance with the statute and that are suitable for framing.

Recommendations:

- Be familiar with our state laws governing hotel liabilities for loss or theft of a guest’s property.
- Follow all of the requirements of RCW 19.48.030 by:
 - Providing a safe or vault facility for the deposit of guest’s valuables;
 - Purchasing the three notice cards from WLA; and
 - Posting these notices in three or more public and conspicuous areas in your hotel -- such as an office, elevators, public rooms, or lobbies.
- Know that RCW 19.48.030 also provides that a hotel is not obligated to receive any property of a guest that exceeds the value of \$1,000.00. If you do receive property of a guest with a value of \$1,000.00 or more, you are not liable for its loss or theft in excess of the \$1,000.00 limit unless you have made special arrangements with the guest prior to depositing this property in your safe or vault.
- If a guest presents items to be deposited in a safe or a vault, have specific procedures requiring the use of a signed receipt which states the value of each item and that an inventory was taken of the valuables in the presence of the guest.
- If valuables are unclaimed, follow the statutory procedures discussed in Section 6.6, below.

6.3. Other Personal Property

While RCW 19.48.030 provides hotels with protection from liability for specific kinds of “valuables,” RCW 19.48.070 provides protection from liability for property losses of all kinds. It states that a hotel is not liable for any guest property loss unless the loss is “occasioned by” the gross negligence of the hotel or its agents. It also limits the hotel’s liability to \$200 (unless the hotel enters into a written contract for more liability). If a person at the hotel is not a registered guest, then the liability for his property is further limited to \$50 for a “trunk,” \$10 for a suitcase, \$5 for a “box, bundle or package,” and \$10 for “wearing apparel and miscellaneous effects.” If the guest “pays more than fifty cents per day for lodging,” then the liability for his property is limited to \$100 for a “trunk,” \$50 for a suitcase, \$10 for a “box, bundle or package,” and \$50 for “wearing apparel and miscellaneous effects.” If a person sends property to the hotel “without becoming a guest”, or leaves property at the hotel after the guest checks out and “the relation” between the guest and the hotel “has ceased,” then the liability for the property is limited to \$100.

RCW 19.48.070 states that it is subject to the liability imposed for “valuables” as set forth in RCW 19.48.030. As discussed in Section 6.2, above, the effect of that statute is to limit a hotel’s liability for guest “valuables” to \$1,000, and then only to the extent that the hotel accepts the valuables for deposit and the valuables are lost due to the innkeeper’s gross negligence or employee theft. Arguably, however, if the hotel does not give the valuables to the hotel for deposit, then the limitations described in the previous paragraph would cap the liability for the valuables, even if the hotel doesn’t qualify for the “safe harbor” discussed in Section 6.2, above.

6.4. Unclaimed Property

It is common for a guest to unknowingly leave property at a hotel and for the hotel to place the property in the hotel’s lost and found facilities.

RCW 19.48.070 provides that, when belongings are left in the care of the hotel for at least six months after being received, then, upon written notice to the guest, the hotel may sell the property at public auction to pay for any unsettled account or storage fees incurred by the hotel. See RCW 60.64.040; See also Swanson v. White, 83 Wn.2d 175, 517 P.2d 959 (1973). Property sold must comply with the lien sale procedures in RCW 60.64, et seq. or RCW 60.66 et seq. The hotel must be certain it has no written agreement to hold property for a period of time *and* that a minimum of six months has elapsed. The procedures for a public auction, as provided in RCW 19.48.070 and RCW 60.64 or RCW 60.66, must be strictly followed and adhered to by the hotel.

If a hotel operator fails to strictly comply with RCW 19.48.070 and RCW 60.64 or RCW 60.66, then the hotel may be held liable if the owner of the property subsequently appears and asks for the return of his/her personal property. As indicated above, however, RCW 19.48.070 appears to limit the hotel’s liability for the property to the amount of \$100, so long as “the relation” between the guest and the hotel “has ceased.”

One other alternative to help protect the hotel from liability is to turn over all lost or mislaid property to appropriate law enforcement authorities—this should avoid problems relating to any potential failure to strictly comply with statute’s auction procedures. Be aware, however, that certain “intangibles” need to be specially treated—see Section 6.6, below.

6.5. Handling Mail for Hotel Guests

A guest may end her stay with a hotel and knowingly leave personal property in the care of a hotel. A good example of this is a hotel that agrees to hold mail for a guest. The United States Postal Service requires that the hotel hold the guest’s written permission to hold the guest’s mail. See USPS Conditions of Delivery Section 1.6.4, <http://pe.usps.com/text/dmm300/508.htm>. United States Postal Service Form 3801 is available for this purpose. See <http://about.usps.com/forms/ps3801a.pdf>. If a hotel is requested to hold mail for a guest, this written permission should include a specific period of time that the hotel will be responsible for the mail and a forwarding address for the guest. This agreement should always have a time limitation—otherwise, a guest may expect mail to be forwarded indefinitely. USPS Conditions of Delivery Section 1.6.4, entitled “Registered Mail Addressed to Hotel or Apartment House” states:

“Registered mail addressed to a person at a hotel or apartment house is delivered to the persons designated by the management of the hotel or apartment house in a written agreement with the USPS (Form 3801-A). If the sender restricts delivery of the registered mail, it may not be delivered to that designated person, unless the addressee authorized that person in writing to receive restricted-delivery mail.”

Innkeepers are not automatically authorized to receive “registered” mail. Innkeepers should be cognizant of the U.S. Postal Services Form 3801-A (“Agreement by the Hotel, Apartment House, or the like”). An agreement to receive registered mail must be executed by the hotel and the guest to be effective and, even then, certain limitations apply.

It is advisable for innkeepers to meet with a representative of the United States Postal Service in order to better understand the policies and procedures for handling guest mail and to obtain the forms mentioned above.

Mail sent by private overnight couriers, such as FedEx, are not subject to USPS regulations. The handling of this mail is governed by the agreements and procedures of the private couriers themselves.

6.6. “Intangible Property”

Washington’s Uniform Unclaimed Property Act, RCW 63.29, applies to “intangible property,” which is defined as including such items as money, checks, drafts, gift certificates,

security deposits, unpaid wages, unused airline tickets, stocks, etc. It also applies to tangible property held in a safe deposit box in the ordinary course of business.

This Washington law requires a hotel that holds unclaimed intangible property with a value of at least \$75.00, as defined by statute, must report the unclaimed property to the Washington State Department of Revenue. RCW 63.29.170. Within six months after filing this report, the hotel must, in good faith, turn over or pay the value of the unclaimed property to the Department of Revenue. RCW 63.29.190. Once the Department assumes custody and responsibility for the safekeeping of the property, the hotel is relieved of further liability from all further claims. Hotels should consult with their legal counsel to insure full compliance with this Act.

6.7. Liability for Guest Vehicles

Virtually every hotel or motel in Washington State provides parking for its guests. A hotel may operate its own garage or contract with an independent parking facilities operator.

As discussed in Section 6.3, above, RCW 19.48.070 provides for extensive liability limits for personal property that is brought “into a hotel.” It is possible that a car parked in a hotel’s parking structure or lot might be considered to have been brought “into a hotel.” If so, then the broad liability of a hotel for a guest’s property could well apply (see Section 7.1, above). If not, then a hotel may be liable for the guest’s vehicle under the broad common law liability of an insurer, described in Section 6.1, above. The liability may be more constrained, however, by the application of the law of bailment, which applies to non-guest property held by the hotel. See Goodwin v. Georgian Hotel Co., 197 Wash. 173, 84 P.2d 681 (1938) (applying bailment principles to a guest’s deposit of valuables at a hotel, without referencing Washington law that imposes on the innkeeper the duties of an insurer). These issues appear to be unsettled under Washington law.

It is probably best practice to treat all vehicles handled by the hotel, whether they are owned by guest or others, as if bailment law applies. See the discussion on this topic in Section 7.4, below.

6.8. Training

The protections of RCW 19.48 are substantial, but a particular situation may fall between the cracks of the protections. If sued, a hotel may bear the burden of proving that it followed and met the standards of care in safeguarding the personal property received or held. Because the initial burden of proof may fall on the hotel, the hotel should maintain clear procedures for handling personal property, and the hotel should train its personnel to follow these procedures. The procedures should produce a paper trail to provide proof that the hotel fulfilled its duty of care. Common sense should also be used to distinguish between garbage left behind and potentially valuable personal property.

Hotel management should consider adopting and implementing written procedures for handling all property belonging to others. For example, these procedures should include:

- Giving a receipt with a line item description of all property placed in a safe or other area under the control of the hotel;
- Obtaining written permission from each guest who requests that the hotel receive USPS mail on the guest's behalf;
- Providing a statement of the hotel's rights and duties with regard to guest items left in hotel storage; and
- Performing the obligations relating to abandoned property.

6.9. Statutes of Limitation

A statute of limitation is a law that bars claims after a specified time period elapses. It establishes a time limit for suing in a civil case, based on the date when the claim accrued (usually, the date when the injury occurred or was discovered). The purpose of these statutes is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.

Statutes of limitation vary according to the specific offense being sought. RCW 4.16.040 states the limitation is six years for action upon a contract in writing, or liability express or implied arising out of a written agreement. Under this statute, the specific conditions of the contract must be in writing and the two parties involved must be identified.

For oral contracts, injury to personal property or person and fraud, RCW 4.16.080 provides a statute of limitations of three years.

6.10. Insurance

Obviously, hotels should obtain insurance against liability for loss or damage to guest property. When dealing with insurance companies in a claims situation, consider the suggestions set forth in Section 5.13, above.

6.11. Summaries and Conclusions

➤ RCW 19.48 provides very beneficial limitations on a hotel's liability for personal property that is lost, stolen or damaged.

- RCW 19.48.030 provides a “safe harbor” for valuables if the hotel makes a safe available and gives certain specified notices. Hotels should follow all the requirements of the statute and take advantage of the limitations of liability.
- RCW 19.48.070 establishes additional limits for the loss of personal property as well as procedures for unclaimed property of a guest.
- Hotel operators should be aware of USPS regulations around handling guests’ mail delivered to the hotel.
- RCW 63.29 provides for the treatment of certain items left at the hotel, such as money, gift certificates, unused airline tickets, and the like.
- A hotel may assume varying degrees of liability to a guest for the use of parking facilities.
- Proper training and procedures for handling personal property can reduce claims and liability and help satisfy the hotel’s burden of proof when a claim arises.

Chapter 7: The Innkeeper's Liability for Loss of Property of Persons Other Than Guests

7.1. General Nature of Liability

The broad common law liability of an innkeeper as an insurer, discussed in Section 7.1, does not apply to persons who are not guests. Instead, a hotel's responsibility for the loss of property of a person who is not a guest is determined primarily by bailment principals.

A bailment is a contractual relationship. The bailment contract may be expressed orally or in writing or it may be implied or inferred by the actions of the parties. See 1 A.L.R. 394 (originally published in 1919), Goodwin v. Georgian Hotel Co., 197 Wash. 173, 84 P.2d 681, 685 (1938).

To legally constitute bailment, there must actually be a delivery of one's personal property to another for a special purpose. The other person must actually receive and accept the property involved. After the special purpose has been satisfied, the property must be returned in the same condition that it was in when it was turned over. The person who turns over his property, is called the *bailor*. The person, or the innkeeper in this instance, who receives and accepts the property to hold and safeguard for the bailor, is called the *bailee*. See 1 A.L.R. 394 (Originally published in 1919).

There are many variations in how the bailment relationship may arise, but what all bailments have in common is that the bailor must have intended that somebody would take control and possession of his property. A bailment may, or may not, involve the payment of money for the services provided.

Different bailment relationships can create different levels of responsibility. For example, a "gratuitous bailment" (one for which there is no payment), creates a lowered standard of care. But a "professional bailment" (one in which the bailee's business is to hold property for a fee) creates a higher degree of care, and if a professional bailee obtains a contractual waiver of liability for negligence, the waiver is not enforceable. See, e.g., Eifler v. Shurgard Capital Management Corp., 71 Wn. App. 684, 861 P.2d 1071 (1993). See also Hummingbird v. Schurich, 24 Cal. App. 2d Supp. 757, 68 P.2d 219 (App. Dep't Super. Ct. 1937); Baird v. Williams, 56 S.W.2d 893 (Tex. Civ. App. Dallas 1993); Watkins v. Hotel Tutwiler Co., 200 Ala. 386, 76 So. 302 (1917); Booth v. Litchfield, 201 N.Y. 466, 94 N.E. 1078 (1911); Goodwin v. Georgian Hotel Co., 197 Wn.173, 181, 84 P.2d 681 (1938).

Bailment principals can be somewhat arcane. Much of it is aimed at setting rules for determining who has to prove what. Under general bailment principals, a bailee is liable when his negligence results in damage to or loss of the bailor's property. Usually, the burden of proof to prove negligence is on the plaintiff. However, under bailment law, if a bailor proves he deposited

property with the bailee and that the bailee failed to return the property on demand, then the burden is on the bailee to show that the loss is *not* due to his negligence. The bailee may, however, rebut this presumption if the bailee shows that the loss resulted from burglary, larceny, fire, or from some other cause which, of itself, does not point to negligence on the bailee's part. If so, then the burden is back on the bailor to prove negligence. See Goodwin v. Georgian Hotel Co., 197 Wash. 173, 84 P.2d 681, 685 (1938).

A common bailment contract between the hotel and a visitor may include coat check, valet, or other services. The hotel assumes varying degrees of liability to the visitor under the law of bailment, depending, for example, on whether the hotel provides free or valet parking, or charges a fee for parking.

Because the law of bailment can be a moving target, it is valuable for the innkeeper to discuss with counsel the hotel's bailment activities and policies and ways to minimize liability risks.

As is the case with guest property, hotels should obtain insurance against liability for loss or damage to property of visitors. When dealing with insurance companies in a claims situation, consider the suggestions set forth in Section 5.13, above.

Note: Any time that a hotel employee implicitly or explicitly receives a person's personal property for care, the hotel assumes a certain degree of liability and risk.

7.2. "Valuables"

The helpful liability limitations in RCW 19.48.030 for "valuables", discussed in Section 6.2 above, only apply to "guests, boarders or lodgers." They do not, by the statute's terms, apply to other persons at the hotel. As a result, Washington law creates the somewhat anomalous result that a hotel has limited legal liability for its guests' valuables (as defined by the statute) but has more expansive liability for the valuables of the random individual that uses the hotel's storage facilities. Accordingly, it is probably good policy to accept only guests' valuables for deposit into the hotel's safe, assuming this service is provided at all.

7.3. Liability for Other Personal Property

Unlike RCW 19.48.030, the liability limitations of RCW 19.48.070 *do* appear to apply to the property of visitors. The statute states:

[In] no event shall the liability of the proprietor...exceed the following: ... *for a person who is not a guest...*the liability for loss, destruction, or damage [to any personal property brought or sent into such hotel], shall not exceed the sum of

fifty dollars for a trunk and contents, ten dollars for a suitcase or valise and contents, five dollars for a box, bundle, or package, and ten dollars for wearing apparel or miscellaneous effects. [Emphasis added.]

This statute certainly limits liability for property “brought into the hotel” and carried around by the visitor. Does it apply to property deposited with a bellman or a coat checker? This question is somewhat unsettled. Better practice is to assume that bailment principals apply whenever the hotel takes possession of the property of visitors and to take appropriate precautions.

The procedures for handling unclaimed “intangible” property of guests, described in Chapter 6.6, apply equally to property of other hotel visitors.

7.4. Vehicles

Given that bailment principals likely apply when a car is taken by the valet, the hotel should consider using a claim check, which should be provided to the owner each and every time they leave their car for parking. The following language constitutes a sample claim check for your consideration:

CLAIM CHECK

Parking Contract

This contract limits our liability. Please read it.

You acknowledge that our acceptance of your vehicle is governed by the limitations set forth in RCW 19.48.070. You waive all value of your vehicle exceeding \$200.00. We assume no liability for theft, collision, fire or damage, except to the extent that applicable law imposes liability for our gross negligence. If you assert that we are responsible for any damage to your vehicle, then you must demand that we make the repairs. We are then entitled to ourselves make repairs or arrange for them to be made. Your failure to demand repairs constitutes a waiver of your right to charge us for the costs thereof. In no case will our liability exceed actual damage and is expressly limited to \$200.00. Damage must be reported to us before the car is taken from the parking lot. In any claim or suit the burden of proof remains on you, and neither negligence nor conversion will be presumed. We are not responsible 1) for vehicles after closing; 2) for loss of use of any vehicle, or 3) articles left in vehicles. We reserve the right to remove any vehicle from our storage facilities. Please return this contract upon calling for cars.

Above is the full contract of bailment between you and us.

Your keys will be placed on the hotel front desk after closing hours. We close at _____ p.m.

A claim check of the kind set forth above is not be a “silver bullet,” but it stands a good chance of limiting liability or at least discouraging litigation in the event of a loss.

Innkeepers should recognize that providing parking services or facilities within your property can create liability risks with an array of outcomes depending on the circumstances. Because each case tends to be unique, it is wise to consult with your legal counsel before acting on any claim arising out of the use of parking services by a guest or other person at the hotel.

Note: A hotel-casino in Mississippi provided a secure parking lot for its employees. An employee of the hotel had her car stolen from the employee parking lot and she sued her employer. The Supreme Court of Mississippi ruled that, because the hotel required that the car be parked in a particular lot, a “bailee for hire” relationship was created and, thus, the hotel was liable to the employee for damages to the employee. See, Robinson Property Group Limited Partnership v. Rodman, No. 97-CA-00094-SCT (1998). Hotel management in Washington State should be careful when providing exclusive parking facilities for hotel employees in order to avoid this “bailee for hire” liability.

See also Ramsden v. Grimshaw, 23 Wn.2d 864, 867-68, 162 P.2d 901, 903 (1945). There, plaintiff’s car was stolen from a parking lot, and plaintiff brought suit for negligence against parking lot owner. Two sailors had entered the parking lot while the attendant was parking another car about 50 feet away. Plaintiff argued negligence based on the facts that 1) the lot was unfenced with the obvious result that the exit of cars was not limited to a main entrance, (2) the keys were left in the car to permit moving it, and 3) there was only one attendant available. The lower court held that the parking lot owner, as a bailee, was negligent and liable for the theft. The Washington Supreme Court, however, reversed, holding that the attendant’s effort to keep the lot under surveillance was not unreasonable, given that the nature of the theft was more characteristic of a robbery than of theft by stealth.

7.5. Training and Defenses

The concepts discussed in Sections 6.8 and 6.9 apply to personal property that belongs to persons other than guests.

7.6. Summary and Conclusions

- Any time a hotel employee receives a person’s personal property, the hotel assumes a degree of liability. Liability can arise in situations such as holding non-guests’ property in check rooms.
- RCW 19.48.070 limits recovery by a non-guest who sues the hotel for negligence.
- The hotel’s storage of vehicles belonging to guests or other persons potentially creates more open-ended liability. Policies and procedures, such as a claim check form and procedure, can help reduce claims.

Chapter 8: Frauds Committed Against Innkeepers

8.1. Criminal and Civil Statutes

Statutes enacted in Washington provide hotel management with both criminal and civil remedies to make a recovery from fraudulent guests.

Criminal statutes enable a hotel to involve local law enforcement officials in the prosecution of criminal offenses. See RCW Title 9A. These statutes outline what measures must be taken by a hotel to provide sufficient proof that a crime has been committed. Enforcement of these Washington laws serves as a deterrent against criminal activity in hotels.

Hotel management should periodically meet with their county prosecuting attorney and local law enforcement officials for current procedures used to identify stolen property by those agencies, and for local procedures in prosecution of the crimes discussed in this chapter. This is especially important when a new prosecutor is elected in your county. Personal contact with the local prosecutor is important. This person is an elected public official and he/she should be responsive to your problems. Local hotel associations can also help their members by conducting regular conferences with local prosecutor and law enforcement officials. By conducting these conferences, hotel management can learn what the problems and local procedures are, as well as establish a positive working relationship with enforcement officials. Working together can improve effectiveness in the prosecution of these crimes.

In a criminal case, the state must establish guilt beyond a reasonable doubt. As a result, criminal cases require clear evidence, and such evidence will be needed before a hotel can expect the State to prosecute a crime that impacts the hotel. Accordingly, good record-keeping by a hotel often is particularly valuable to allow the criminal justice system and its deterrent effect to protect the hotel.

Unlike criminal statutes, which are pursued by the State and result in criminal sentencing, civil statutes give hotels special remedies that they themselves can pursue in civil court. These remedies can include imposition of a penalty, attorneys' fees, and lien rights. In a civil case, the plaintiff must typically establish its case by a preponderance of the evidence, and so the burden of proof is not as stringent as in a criminal case.

8.2. Credit Card Fraud

Although there are no Washington State statutes that specifically address credit card misuse and fraud, there are certain criminal statutes that cover this subject.

Credit card fraud may arise in two ways. An individual may forge a signature to a stolen card or sign a credit card without permission of the owner. RCW 9A.56.140 defines the crime of possessing stolen property as "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner..." Possessing a stolen credit card is a Class C felony.

RCW 9A.56.160(2). Forgery under RCW 9A.60.020(2) is also a Class C felony and is described as “falsely making, completing, or altering a written instrument.”

Possession of stolen property and forgery (specifically related to credit cards) are not identical crimes. State v. Newton, 42 Wn. App. 718, 714 P.2d 684 (1986). Therefore, double jeopardy does not apply and a person may be prosecuted for both crimes. These laws are designed to protect businesses from credit card fraud, as well as provide the necessary legal basis for prosecution. See also State v. Sullivan, 28 Wn. App. 29, 621 P.2d 212 (1980).

Fraud is also addressed in RCW 19.48.110: any person who willfully obtains goods or services with the intent to defraud is guilty of a gross misdemeanor.

The federal government, pursuant to 15 U.S.C. § 1644, has also made the fraudulent use of credit cards a criminal offense. This federal statute involves transactions affecting interstate or foreign commerce to obtain goods or services worth \$1,000.00 or more within any one-year period.

8.3. Bad Checks

RCW 9A.56.060 states:

Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with the bank or other depository, to meet the check or draft, in full upon its presentation, is guilty of unlawful issuance of bank check.

Under RCW 9A.56.060(3), it is a gross misdemeanor if the sum of a series of transactions is less than or equal to \$250. A sum of over \$250 is classified as a Class C misdemeanor. Any stop payment demand issued to a depository is included as fraud in this statute if the issuer of the draft or check does not make any effort to arrange payment within 20 days of issuing the check or draft. RCW 9A.56.060(2). See also State v. Weir, 118 Wash. 493, 203 P 953 (1922); State v. Haynes, 71 Wn.2d 136, 426 P.2d 851 (1967); and State v. Bethneth, 34 Wn. App. 600, 663 P.2d 156 (1983).

RCW 62A.3-515 states that any holder of a dishonored check is entitled to collect a reasonable handling fee for each check and payment of interest, or collection cost and attorney fees prior to the end of the 15-day grace period. After the 15-day grace period, the holder of a dishonored check is entitled to reasonable attorney fees and three times the face value of the check, or \$300.00, whichever is less.

A standard "Notice of Dishonor of Check" is set forth in RCW 62A.3-520. It reads as follows:

The notice of dishonor shall be sent by mail to the drawer at his or her last known address, and said notice shall be substantially in the following form:

NOTICE OF DISHONOR OF CHECK

A check drawn by you and made payable by you to _____ in the amount of \$_____ has not been accepted for payment by _____, which is the drawee bank designated on your check. This check is dated _____, and it is numbered, No. _____.

You are **CAUTIONED** that unless you pay the amount of this check within 15 days after the date this letter is postmarked.

You are advised to make your payment to _____ at the following address _____.

8.4. "Skips"

Skips are the most common form of fraud committed against a hotel. In Washington, a "skip" occurs when a person departs a hotel room with baggage without paying or, in the case of a restaurant, a person leaves the restaurant without paying.

RCW 19.48.110 sets forth criminal sanctions, and RCW 4.24.230 sets forth civil remedies, against individuals guilty of defrauding a hotel by "skipping."

RCW 19.48.110(1)(a)-(b) states:

(1)(a) Any person who willfully obtains food, money, credit, use of ski area facilities, lodging or accommodation at any hotel, inn, restaurant, commercial ski area, boarding house or lodging house, without paying therefor, with intent to defraud the proprietor, owner, operator or keeper thereof; or who obtains food, money, credit, use of ski area facilities, lodging or accommodation at such hotel, inn, restaurant, commercial ski area, boarding house or lodging house, by the use of any false pretense; or who, after obtaining food, money, credit, use of ski area facilities, lodging, or accommodation at such hotel, inn, restaurant, commercial ski area, boarding house, or lodging house, removes or causes to be removed from such hotel, inn, restaurant, commercial ski area, boarding house or lodging house, his or her baggage, without the permission or consent of the proprietor, manager or authorized employee thereof, before paying for such food, money, credit, use of ski area facilities, lodging or accommodation, is guilty of a gross misdemeanor, except as provided in (b) of this subsection.

(b) If the aggregate amount of food, money, use of ski area facilities, lodging or accommodation, or credit so obtained is seventy-five dollars or more such person is guilty of a class B felony punishable according to chapter 9A.20 RCW.

Because the above statute imposes a criminal penalty, which can include jail time, the State must prove actual "intent to defraud" beyond a reasonable doubt. As indicated earlier in

this Chapter, the evidence must be well-developed to carry this burden. In State v. Higgins, 67 Wn.2d 147, 406 P.2d 784 (1965), the Washington Supreme Court outlined the procedures employed by a hotel to establish the evidence needed to convict the wrongdoer. There, the hotel had a detailed policy and procedure for keeping extensive records. The hotel maid was required to turn in daily written reports to the cashier showing which rooms had been vacated. The cashier then cross-referenced this list with the amounts paid by each guest, by guest room, and indicated those persons who had failed to check out. As a result of this policy, written records were routinely kept showing the amount of a potential defendant's hotel account, and written notices were sent to the address given by the defendant at registration. Because the hotel maintained such extensive records, the defendant was successfully convicted.

Currently, unlike the procedures noted in the Higgins case, most hotels have automated procedures. As indicated in PART I Section 2.1, however, some hotels have not adequately replaced the old paper trail with an effective electronic trail. Establishing procedures to produce such a trail is necessary to show a criminal intent and to obtain the protection of the criminal statutes.

RCW 4.24.230 provides a civil penalty for "skipping." It provides that a hotel can pursue, by civil suit, any adult or emancipated minor who leaves a restaurant or inn without paying for services rendered or goods received. This statute allows a claim for the cost of the merchandise or value of services (actual damages not to exceed \$2,850), plus an additional penalty between \$100 and \$650, and attorney fees and court costs expended by the owner or seller. The parents or legal guardian of an emancipated minor can also be pursued and made to pay up to \$1,425 of actual damages, plus an additional penalty between \$100 and \$650, plus reasonable attorney fees and court costs.

To pursue the claim under this statute, the hotel is required to give the following demand notice:

IMPORTANT NOTICE: The payment of any penalty demanded does not prevent criminal prosecution under a related criminal provision.

This notice must be boldly and conspicuously displayed, in at least the same size type as is used in the demand, and must be sent with the demand for payment of the penalty described in RCW 4.24.230 above. See State v. Higgins, 67 Wn.2d 147, 406 P.2d 784 (1965), and State v. Walls, 81 Wn.2d 618, 503 P.2d 1068 (1972).

8.5. Collections of Delinquent Accounts

Delinquent accounts can be a difficult problem for any business to curtail. The prevailing use of credit cards has substantially curtailed delinquent accounts in the hotel industry. Most hotels require valid identification and a major credit card as a condition to check-in. Doing so is also important for compliance with the Patriot Act. See PART III, Section 8.3.

If a hotel follows its procedures, but nevertheless finds that the guest is unable to pay at the time of checkout, it can be helpful to obtain, at least, a signed promissory note from the guest, stating the amount is owed and payable, for example, in one week. You can obtain a promissory note form from your attorney. Many stationery companies also have printed forms that can be useable.

If a hotel is owed a sum of money, then the hotel has the option of:

- Having a representative appear in small claims court (if the amount is less than \$5,000.00) or hiring a collection attorney. If you obtained a promissory note, obtaining a judgment in court will likely be easier and less expensive;
- Placing the account with a collection agency; or
- Using a mediation or dispute resolution agency.

Some practical tips on using Washington's small claims courts:

- District courts handle small claims in Washington State. Check with your district court clerk at your county court house for further information.
- Attorneys are not permitted in small claims court.
- Use the small claims court as a last resort. Try to work out the problem yourself.
- Consider mediation or dispute resolution as a faster option.
- Small claims courts provide information pamphlets outlining the rules and procedures - use them.
- Come to court prepared with all the relevant documents, such as receipts, contracts, letters, etc. Photographs might also help your case.
- Have a written chronological history of the events in point from so that you can clearly tell the judge the facts and not your opinions or emotions.
- If you are successful in obtaining a judgment, you then need to act to collect the money. Sometimes this is the most difficult and expensive part of the small claims process. You may have to return to the court for a garnishment order or other relief.

8.6. Lien Statutes

RCW 60.64.010 states that a hotel has the right to place a lien on a guest's property for payment of services. The "Lien of Hotels, Lodging and Boarding Houses Act of 1915" outlines the procedures which must be taken if a hotel is to hold a lien on a guest's property.

Summarized, RCW 60.64.010 provides that if a lien and all charges are not paid within 60 days from the time the charges were due, a hotel has the right to sell a guest's property at public auction. The hotel must give 10 days notice of the time and place of the sale by posting the notice in three public places within the town, and by mailing a similar notice to the guest whose property is held by the lien. After the sale has occurred and all charges have been covered, any excess monies from the sale must be payable, on demand, to the guest for one year from the date of the sale.

The requirements for properly placing a lien on a guest's property and executing a sale of goods are straightforward. By strictly following such rules, a hotel is absolved of any liability from such sale of goods.

8.7. Theft of Hotel Property

Basically, a "theft" is committed when a person, with intent to deprive another of his/her property, takes or withholds the property from the rightful owner. RCW 9A.56.020; State v. George, 132 Wn. App. 654, 133 P.3d 487 (2006). Determination of criminal intent is very important to any criminal prosecution for an alleged theft. For example, this intent can be clearly established where a thief is caught with a hotel's television set in his possession outside the hotel room. Identification of stolen property is important, and property of a hotel (such as television sets) should be marked with hotel identification marks and/or logos.

The theft of smaller items, such as towels, ashtrays, lamps, pictures, linens, and the like present a greater problem in establishing intent, unless the property is found outside the hotel room and in the possession of the accused. Without the consent of the guest, it is not possible for hotel management to conduct a legal search of a guest's automobile or baggage and belongings. Hotel management is advised **not** to attempt to physically restrain a guest, or to attempt to verbally restrain a guest by threats or otherwise.

Where a guest is in fact not in possession of stolen property, a hotel can avoid liability for wrongful accusations if hotel management does not restrain the guest. If a guest believes she/he is being restrained, there could be a charge for false imprisonment, which exposes the hotel to potential liability and damages. Unless hotel management is positive of the discovery of stolen goods in possession of the accused, it should seek the guest's consent to a search (preferably in writing). If the guest refuses permission to conduct a search, hotel management is advised not to press the matter and to contact local law enforcement.

Hotel management should pursue theft of hotel property by using all legal remedies available and, more importantly, implementing loss prevention programs. As to your legal remedies, you can seek to press criminal charges or file a civil lawsuit against the person who allegedly stole hotel property. Pressing criminal charges may be difficult because a prosecutor will want to know what the evidence is so he can determine how he will prove the case in court. To encourage a prosecutor to file charges, you will need evidence, such as a witness who saw the guest carrying the property out of the hotel. Some guests live out-of-state which may discourage prosecution because costs of prosecution could greatly exceed the value of the stolen property.

As indicated earlier, in a civil suit by the hotel against the suspect, the burden of proof is lower than in a criminal case, but issues of evidence are much the same. Also the costs of collection (including attorneys' fees) must be weighed.

A loss prevention program is a cost effective alternative to litigation and/or criminal prosecution.

Some tips to be considered for an effective loss prevention program include:

- Make your security measures more visible.
- Increase surveillance in parking areas. In large-scale thefts, it is unlikely that stolen items are leaving your site in suitcases.
- Alert all employees to the nature of the problem, stressing the importance of their watchfulness and involvement in prevention.
- Have a plan of action. Include what staff should do when a suspect (guest or not) is leaving with hotel property. Check a suspected guest's room immediately.
- Inform local police of each incident. Where a certain location may have been targeted numerous times, the police are likely to be more interested in working with area innkeepers on surveillance and prevention. They may also have a suspect they are already pursuing.
- Post place cards discouraging theft in each guest room.
- If key control and access is not yet installed, consider them.
- There is debate about whether items with logos are more popular targets. Some hoteliers say that plain towels, ashtrays, and other items without logos reduce thefts. Since this suggests that "souvenir shopping" may be occurring, some hotels address the issue by providing a card in the room that states the articles are available for purchase. This helps stimulate a desire to do the right thing and also clarifies that the items are not free souvenirs.
- Since guests frequently wrap wet swim wear in hotel towels before packing them, provide plastic bags for swim wear to cut towel loss.

8.8. Detention of Guests

RCW 4.24.220 states that an innkeeper may detain a guest or person for a reasonable amount of time for investigation if there is a reasonable belief that person is guilty of theft and failure to pay for property or services rendered. Under this statute, “reasonable grounds” includes knowledge that a person has concealed possession of unpurchased merchandise, and a “reasonable time” includes the time for the detained person to make a statement, or refuse to make a statement, and to check all pertinent records with regard to the ownership of the merchandise.

A hotel should be extremely cautious when attempting to detain a person for questioning because of the issues of potential liability for “false arrest” and discrimination. Any utterance of wrongdoing in the presence of witnesses can be construed as slander by the person being detained. It is best to politely request the private attention of the person in the presence of a witness rather than create a public disturbance. Again, the hotel must take all necessary precautions to reduce the likelihood of potential liability.

8.9. Crime Prevention

The benefits of crime prevention are obvious. When innkeepers practice effective crime prevention and work to attract good clientele, problem guests become scarce, desirable guests check-in more often, vacancy rates go down, and profits go up.

Prevention steps are both easier to carry out, and less expensive, than the steps required for crisis control. Many of the following steps make good sense for any establishment, while some may be appropriate for only those establishments with a history of problems.

In 2006, Campbell DeLong Resources, Inc. published an online guide entitled “Crime Prevention in Overnight Lodging.” This guide was later adopted by the Portland Police. A copy of the national version of this guide may be found at:

<http://www.portlandonline.com/police/index.cfm?a=31556&c=29869> .

This guide provides:

- warning signs at registration and after move-in,
- information about clandestine drug labs,
- suggested house rules to discourage and combat illegal activities,
- registration procedures to combat crime, and
- enforcement guidelines.

The guide contains valuable tools and suggestions for your hotel and security staff to review and implement.

RCW 64.44 addresses decontamination of illegal drug manufacturing sites (clandestine lab sites), posting and notification of contaminated property, and training and certification of cleanup workers. When this statute was initially adopted in 1990, clandestine drug manufacturing created hazardous waste sites with high risk to peoples' health. These manufacturing methods are still in use, requiring site cleanup by certified contractors. However, now there are also other methods of illegally manufacturing drugs that present significantly lower health risks. In some instances, the site can be safely cleaned up by the property owner. Under the statute, local health jurisdictions have the discretion to determine if it is appropriate to require property owners to hire a non-certified contractor to cleanup the site, thereby saving property owners the added and unnecessary expense of a certified contractor.

8.10. Summary and Conclusions

- Hotel management should be familiar with Washington's criminal statutes in RCW 9A to deter criminal activities and to be aware of measures that can demonstrate proof of a crime.
- Hotel management should meet with local prosecutors and law enforcement officials periodically to discuss and confirm the identification of any stolen property and the criminal prosecution procedures that are being employed.
- Credit card fraud appears in two ways: An individual may forge a signature to a stolen credit card or sign a credit card without permission of the owner. Washington law provides for criminal sanctions for these crimes under RCW 9A.56.160.
- Hotel management should be familiar with Washington law regarding bad checks and the legal procedures for collection of a dishonored check. RCW 9A.56.060; RCW 62A.3-515.
- Washington law provides criminal sanctions and civil remedies regarding individuals guilty of defrauding the hotel via the "skip," i.e., a person who has departed a hotel room with baggage without paying. RCW 19.48.110; RCW 4.24.230.
- Hotel management should be familiar with Washington's lien statute premise (RCW 60.64 and RCW 60.66) and its procedures relative to the action of a hotel to hold a lien on a guest's personal property.
- Hotels should consider adoption of an effective loss prevention program to curtail the theft of hotel's property.
- Action by a hotel to detain a guest for investigation of a wrongdoing is controlled by statute. The issues of potential liability for "false arrest" and discrimination must be considered by a hotel when attempting to detain a guest.

- Hotel management and innkeepers need to implement effective crime prevention programs to curtail prostitution, drug activity, and other criminal behavior.

Chapter 9: Consumer Protection Laws Affecting Innkeepers

The scope of consumer protection laws extends far beyond the hospitality industry and the scope of this manual. This Chapter discusses only those federal and state laws that have particular application to the hospitality industry. Be aware that that other consumer protection laws apply generally to all businesses and may therefore have general application to hotels.

9.1. The Federal Truth-in-Lending Act

The Federal Consumer Credit Protection Act and the regulations established by the Federal Reserve Board address the procedures for handling credit card and credit account billing errors. *See* 15 U.S.C. § 1601. With regard to a hotel credit account, when a customer has an outstanding debt of more than one dollar at the close of any billing cycle and the debt remains unpaid for six months thereafter, the hotel must print the following notice on its customer billing statements:

NOTICE: See accompanying statement for important information regarding your rights to dispute billing errors.

A statement outlining the procedures for disputing billing errors must also accompany the above notice.

9.2. State Laws on Credit Reporting

The Fair Credit Reporting Act of Washington (RCW 19.134) serves both to protect the person applying for credit and any person likely to grant credit. Creditors also gain protection from false representation under RCW 9.38.010, which criminalizes false statements. That statute states:

Every person who, with intent thereby to obtain credit or financial rating, shall willfully make any false statement in writing of his assets or liabilities to any person with whom he may be either actually or prospectively engaged in any business transaction or to any commercial agency or other person engaged in the business of collecting or disseminating information concerning financial or commercial ratings, shall be guilty of a misdemeanor.

9.3. Posting Rates

Washington law, unlike other states, does not require the posting of room rates and it is not a present practice of hotels in Washington to post their room rates.

9.4. Truth-in-Menu and Labeling Laws

“Truth-in-Menu” laws provide one arena where a restaurant patron may find any discrepancies enticing enough to file a lawsuit. Menu items such as kosher foods, organic foods and special recipes must follow the guidelines set forth by state statutes.

RCW 15.86.035 addresses the topic of organic foods stating, “a producer or vendor shall not sell or offer for sale any food product with the representation of [organic] if the vendor knows or has reason to know that the food product [is not organic].”

Likewise, RCW 69.90 (Sale of Kosher Food Products Act of 1985) states that no person shall offer for sale any kosher food product when that person knows the food product is not kosher.

Violation of both of these state statutes is a violation of the Consumer Protection Act (RCW 19.86) and constitutes a gross misdemeanor as well. Under the provisions of Washington’s Consumer Protection Act, any person injured by a violation of the above statutes may bring a civil action in superior court to recover actual damages, the costs of lawsuit, and reasonable attorney fees. The court may also choose to increase the amount to three times the actual damages sustained, i.e., “treble damages.” Aside from potential civil actions, any establishment having a misleading advertisement or labeling of food products can be fined up to \$200.00 for a first offense. RCW 69.04.060 and RCW 69.04.070 set forth the penalties from a monetary fines of up to \$1,000 and imprisonment for up to 90 days.

Washington State’s adopted version of the National Food Code (WAC 246-215) contains additional requirements for menu “warnings” when a restaurant offers unpasteurized juices or feeds of animal origin that are served raw or undercooked. Such warnings should be provided at the point where the food is selected by the consumer, which is often the menu, but in other cases may be on a placard or order board.

If your restaurant serves the types of food for which warnings are required, then you need to provide a two-prong warning containing a “Disclosure” and a “Reminder.”

A **Disclosure** may provide as follows:

The menu description provides the cooking status:

- Oysters on the half-shell (raw oysters)
- Raw-egg Caesar salad
- Our steaks are cooked to order; or

A footnote (with asterisk or other indicator) states that the marked items:

- Are served raw or undercooked, or

- Contain (or may contain) raw or undercooked ingredients.

The **Reminder** may provide as follows:

- Consuming raw or undercooked meats, poultry, seafood, shellfish or eggs may increase your risk of food borne illness.
- Unpasteurized juice may increase the risk of food borne disease to people with certain medical conditions.

The Disclaimer and Reminder should be in close proximity to each other and, on menus, must be typed using 11 point font.

See PART III, Section 2.2(b) for additional laws and discussion about liability relating to food.

9.5. No-Smoking Laws

RCW Chapter 70.160, entitled “Smoking in Public Places,” was approved by voters in 2005. It is a comprehensive ban on public smoking.

The law prohibits smoking in all “public places,” meaning, essentially, “any building or vehicle used by and open to the public.” More broadly, however, the law also prohibits smoking in any “place of employment.” This term includes any area, public or private, that “employees are required to pass through during the course of employment.” The term picks up all areas of even private clubs where employees “pass through.” Accordingly, the law is, to a great extent, a regulation of the workplace environment. See American Legion Post #149 v. Washington State Department of Health, 164 Wn.2d 570, 581 (2008)(holding that RCW 70.160 prohibits smoking in private clubs that is a “place of employment,” and that such prohibition is constitutional).

The law further expands “public places” and “places of employment” by covering areas around doors and windows. Specifically, it prohibits smoking “within a presumptively reasonable minimum distance of twenty-five feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited so as to ensure that tobacco smoke does not enter the area through entrances, exits, open window, or other means.” RCW 70.160.075.

The law also requires posting of “No Smoking” signs. These signs must be clearly visible at each entrance and in other “prominent locations throughout the place.” RCW 70.160.050.

Hotels are given special treatment. The law states that “public places” include “no less than 75% percent of the sleeping quarters within a hotel or motel that are rented to guests.” RCW 70.160.020(2). Does a hotel need to post “no smoking” signs in the nonsmoking room? The law doesn’t appear to specifically require this, though the point may be arguable.

If a hotel fails to post the signs or prohibit smoking as the law requires, the hotel is subject to a warning for the first violation. Subsequent violations are subject to civil fines of up to one hundred dollars per violation. See RCW 70.160.070.

Your local health department is charged with enforcing the law as it applies to business owners' obligations. The local health department may itself serve a violation notice, or it may call on the city or county attorney to enjoin a violation and assess the civil penalty. Local health departments are also entitled to adopt regulations to implement the law. See RCW 70.160.080. Accordingly, each hotel should check applicable local jurisdictions to see if special regulations apply. See, e.g., Tacoma/Pierce County Board of Health regulation, "Environmental Health Code, Chapter 8: Smoking in Public Places."

There are open enforcement questions, and here is one hypothetical example: After a hotel receives a prior warning, the hotel allows five people to smoke in its cocktail lounge. Is the hotel subject to a fine of \$100, \$200, \$500, or \$600? Under the law, "each day upon which a violation occurs or is permitted to continue constitutes a separate violation." Depending on how the law is interpreted by local officials, the hotel may be liable for (a) just \$100 because of the violation on that day, (b) \$200, one violation for allowing the smokers *and* one violation for the "day", (c) \$500 for five violations (one for each smoker), or (d) \$600, one violation for each smoker *and* for the "day."

The following is a brief summary of hotels should do to comply with the law:

- **Post Signs.** Conspicuously and liberally post signs prohibiting smoking. Post the signs "at each building entrance" of any building where there are employees or patrons (essentially, any building other than a private residence). Within the hotel's retail areas, post signs in "other prominent locations throughout the [retail] place."
- **Make sure that you prohibit smoking in at least 75% of the rooms in your hotel or motel.** Seventy-five percent of the rentable sleeping quarters within your hotel must be nonsmoking rooms. Consider posting a sign in the room. Have policies that describe reasonable steps to enforce the nonsmoking requirement and follow them.
- **"Police" the 25-foot areas.** Identify the areas that are within 25 feet of doors, windows that open, and other ventilation intakes. Take reasonable steps to prohibit smoking there. If the opening is a door, post a "no-smoking" sign there. Although the law doesn't explicitly require signs by windows and ventilation intakes, the law does require you to prohibit smoking there. To show that you did so, signs would be helpful.
- **Consider prohibiting smoking in any outdoor dining areas.** Your local health department may, or may not, consider any outdoor dining area (even outside of 25 feet of any door, etc.) a "place of employment" where smoking must be prohibited.

Check with your local health department. To be safe, prohibit smoking in any outdoor area that your employees work and post signs accordingly.

- **Train your Staff.** Educate your hotel and restaurant employees on the law's requirements and what they are expected to do to enforce the smoking ban. Consider a written policy as follows: If an employee sees a person smoking in violation of the law, the employee (or a designated employee) should inform the person that smoking is not allowed. If the smoker persists, a designated employee should call the police. Keep records of your enforcement activities.

RCW 70.160.070 makes it unlawful for a person to intentionally violate the law by smoking in a public place or place of employment (which would include the hotel's no-smoking rooms). Local law enforcement can enforce this prohibition by issuing, essentially, a ticket to the violator. The fact that smoking in a no smoking area is unlawful likely gives a hotel the right to sue a guest for any cleaning damages resulting from smoking by a guest in a no-smoking room.

Recommendation: Include your no smoking policy in your hotel's rules. Also consider including your right to impose a charge if a guest violates the no-smoking policy. Make sure that these rules are incorporated into your contract with the guest. (See PART I Section 3.4.) Doing so will give you the right to charge the guest to cover cleaning expenses or even evict the guest for repeated or egregious violations.

9.6. Summary and Conclusions

- The Federal Consumer Credit Protection Act addresses the legal procedures for handling credit card and credit account billing errors.
- Washington law does not require a hotel to post room rates.
- Washington's Truth-in-Menu laws provide patrons an avenue for bringing suit for misleading advertising or mislabeling of food products.
- Washington's no-smoking law (RCW 70.160) sets forth necessary requirements, which must be adhered to by a hotel regarding smoking in public places and places of employment.

Chapter 10: Deceased Guests

The death of a guest or hotel visitor can be a shocking and confusing occurrence for a hotel's staff. Often, misunderstandings occur because a hotel is not aware of who should be contacted, who should possess control of the body, and how the deceased's personal property should be cared for and handled.

The hotel should establish a formal procedure in case of a death of a guest. The procedure should include, among other things, the legal items outlined in this Chapter.

10.1. Who to Call—the Role of County Coroner and the Police

Under RCW 68.50.010, the County Coroner or medical examiner is vested with jurisdiction over the bodies of "all deceased persons who come to their death suddenly when in apparently good health without medical attendance within the thirty-six hours preceding death ... or where the circumstances of death indicate death was caused by unnatural or unlawful means... or... is caused by any violence whatsoever...whether self-induced or otherwise...."

Virtually any death occurring at a hotel is controlled by RCW 68.50.010, and so the first course of action by a hotel is to contact your County Coroner or a medical examiner. Any person knowing of the existence of a dead body and who fails to give notice to the Coroner is be guilty of a misdemeanor. See RCW 68.50.020.

As a matter of practice and common sense, a hotel should also immediately call 911 to contact appropriate local law enforcement offices for assistance. In most cases, it is advisable to preserve and protect the scene from contamination until law enforcement authorities can arrive and determine whether the premise is a crime scene.

10.2. Inventory of the Property of the Deceased Guest

If local law enforcement determines that no crime has been committed or otherwise gives you clearance to return the area to its normal condition, then the hotel next needs to address the disposition of the deceased's personal effects. The first step is to comply with RCW 68.50.040, which requires that duplicate lists of all personal property of the deceased be made in the presence of the County Coroner or their assistants. The County Coroner can help with the inventory of the decedent's personal property.

10.3. Release of Property and Tax Waiver

The hotel should next take steps to determine the decedent's next of kin. Do not, however, release the name of the deceased. RCW 68.50.300 provides that the County Coroner, medical examiner, or prosecuting attorney has jurisdiction to release any information at their discretion.

Contact the State Department of Revenue for a tax waiver before transferring property to the deceased's estate. If the hotel delivers the property to an unauthorized person who later disposes of the property without paying tax states that, then the hotel may be at risk of paying an estate tax. See RCW 83.100.120 (The Estate and Transfer Tax of 1988). Because of this risk, it is necessary to contact the State Department of Revenue to file a tax waiver. This action serves to absolve the hotel of any tax liability.

10.4. Summary and Conclusions

- A hotel should establish a formal procedure in case of a death on the premises.
- The procedure should address (at least) the following:
 - Call 911 and contact the local County Coroner—in virtually every case, the Coroner will initially assume jurisdiction until the next of kin is notified.
 - In most cases, it is advisable to preserve and protect the scene from contamination (“don’t touch anything”) until law enforcement authorities determine that the area is not a crime scene under investigation.
 - Upon arrival of law enforcement authorities or the County Coroner, establish a duplicate list of personal effects.
 - Determine who is the decedent’s next of kin. Do not release the name of the deceased.
 - Before releasing the decedent’s property, obtain a tax waiver under RCW 83.100.120.

Chapter 11: Hotel Rules, Policies, and Procedures

11.1. At Whom are Rules, Policies, and Procedures Directed?

Some of a hotel's rules, policies and procedures are directed at the hotel's guests and visitors.

As discussed in PART I, Section 2.1, each rental of a room creates a legal contract between the innkeeper and the guest. As further indicated in PART I, Section 3.2, it is important to make the hotel's rules and policies part of that contract with the guest. If so, then the hotel can enforce the rules and policies, by eviction if necessary, when a guest violates them. If not, then enforcement of the rules against a guest will be more problematic.

Because patrons and visitors, other than guests, do not normally have a contract with the hotel, enforcement of the hotel's rules and policies against them is somewhat easier and can be backed up with ejection. Still, to protect against claims (such as claims of discrimination), the rules should be clear, written down, available, and supported by staff training. *See also*, PART I, Section 3.4 and 3.7.

The vast majority of the hotel's rules, policies and procedures, however, are for the purpose of providing direction to the hotel's staff. They form the basis on which the hotel's staff conducts the hotel's operation and business.

11.2. Sources of Rules, Policies and Procedures

Most national brands under which hotels operate have manuals that contain detailed policies and procedures for the hotel's operation. These manuals are obviously a primary source for the hotel's rules, policies and procedures.

These brand manuals are usually not exclusive, however, and each hotel can supplement them. The innkeeper should draw on the contents of this Manual to help supplement the brand manuals. Virtually every chapter in this Manual can evoke beneficial rules, policies and procedures that can help the hotel's operations and protect the hotel from unnecessary legal exposure.

11.3. Crisis Management Policies

Crisis management policies deserve special mention here. Over the last decade, the need to be prepared for natural and intentionally-caused disaster has become essential to reduce damages, protect the hotel's reputation, and save lives.

Federal law requires emergency plans. Under C.F.R § 1910.38-.39, OSHA requires all employers to have both an “emergency action plan” and a separate “fire prevention plan.” See additional discussion on this topic in PART III Section 3.3.

Compliance with the federal requirement should be considered only a starting point. Each hotel should have detailed policies that address specifically who will do what in the case of each kind of disaster. The internet has many resources to inform this effort. Hotels should also access insurance carriers, insurance brokers, and appropriate consultants to formulate disaster plans. These plans should not be left in a drawer. Regular training is important, and plans should change as risks change.

11.4. Summary and Conclusions

- Have appropriate rules and policies for guests, and make sure they are a part of the contract between the hotel and the guest.
- Apply rules and policies to guests and other patrons consistently and without discrimination.
- Draw on brand manuals for appropriate rules, policies and procedures. Supplement them with knowledge gained from the chapters in this Manual.
- Detailed crisis management plans are essential to reduce damages, protect the hotel’s reputation, and save lives. Prepare them, practice them, and modify them as the risks change.

PART II: THE INNKEEPER AND ITS EMPLOYEES

Chapter 1: Wage And Hour Laws Applicable To Employees

1.1. Coverage of Federal and State Laws

As a preface to this chapter, hotel management must recognize that they must comply with the applicable state or local law if that statute is more favorable to employees than the federal law. See RCW 49.46.120. In essence, federal law does not preempt state or local law. Although most hotel employees are covered by the federal law and implementing regulations, hotel management may have to comply with both federal and state laws and regulations with respect to particular employees.

The federal law is cited as the Fair Labor Standards Act (FLSA) and is found in 29 U.S.C. § 201, et seq. This federal law sets forth standards concerning minimum wages, equal pay, overtime pay for work in excess of 40 hours during a work week, and record keeping, and restricts child labor. The Equal Pay Act of 1963 (29 U.S.C. § 206(d)) amends the FLSA and forbids unequal pay on the basis of sex between males and females performing equal work.

FLSA does not require vacation or severance pay or notice of discharge. It does not set any limit on the number of hours of work for persons 16 years of age and over. It does not require an employer to give employees the day off on holidays. If an employee does work on a holiday, neither time-and-one-half nor any other premium rate is required. Under the FLSA, holidays, like Saturdays and Sundays, are treated like any other day. Whether time off is granted or premium rates paid depends on your hotel's policies.

The FLSA is administered by the U.S. Department of Labor's Wage and Hour Division through its District Office in Seattle. Wage and hour investigators conduct investigations when complaints have been made, and they make inspections in the absence of employee complaints to determine whether violations of the FLSA are occurring.

Washington's wage and hour laws are set forth in RCW 49.46, 49.48 and 49.52, et seq. The implementing regulations are cited as WAC 296-128-001, et seq. Washington's statutes cover employees that are not covered by FLSA.

Enforcement of Washington's minimum wage and hour laws is by the Department of Labor and Industries Employment Standards Division. It has the authority to conduct audits and impose penalties.

An employee may sue for his/her minimum wages and overtime owed. If an employee is successful, he or she is entitled to costs and attorney fees, as well as civil money penalties (up to \$20,000.00 for willful violations).

The following tests apply in determining whether the FLSA or Washington State's minimum wage and hour laws are applicable to hotel employees:

FLSA: Broadly stated, employees are covered if they work for an "enterprise" which has 1) employees who handle, sell or otherwise work on goods or materials that have been moved in or produced for interstate commerce; and 2) an annual business dollar volume of at least \$500,000. Alternatively, employees can be covered individually if they themselves engage in interstate commerce or engage in the production of goods for interstate commerce or to meet the needs of interstate commerce. Most hotels are covered by this broad definition.

Washington Law: The Washington Minimum Wage Act covers any individual employed by an employer, with a few exceptions to be discussed below. An "employer" is any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee (RCW 49.46.010).

1.2. Exemptions

The FLSA and the Washington law exempt certain types of employees from some or all of their requirements. The U.S. Labor Department and the courts apply these exemptions very narrowly. If an exemption is challenged, it is the employer's burden to prove that every element of a claimed FLSA exemption applies to the employee for whom it is asserted. There are many misconceptions about how exemptions work, and improperly applied exemptions are among the most-common FLSA violations.

Here is a summary of the exemptions most frequently relied upon—and most often in dispute.

(a) The "White Collar" Exemptions

The so-called "white collar" exemptions from the FLSA's minimum wage, overtime, and timekeeping provisions apply (i) to those employed in a bona fide executive, administrative, or professional capacity, (ii) to certain computer employees, and (iii) to "outside" salespersons. Whether these exemptions apply to a particular person depends in part upon what kind of work he or she actually performs, rather than whether the employee is well-paid, well-educated, well-thought-of or highly skilled, or whether the employee has a high-sounding job title or is in a position covered by an impressive-looking job description.

Whether a person is an exempt “white collar” employee also depends upon how he or she is paid, with few exceptions. Exempt individuals generally must be paid on a “salary basis,” (described below) at a rate of at least \$455 per week. But the reverse is not true: Salaried employees are *not* necessarily exempt.

(b) Executive Employees

Generally, an executive employee’s primary duty (as a rule of thumb, more than 50% of his or her time) must be managing the organization or a customarily recognized department or other subdivision of the organization. “Management” can mean lots of different things, but it generally includes activities such as: being involved in hiring, directing, evaluating, disciplining, and firing employees; deciding what work will be done; planning, assigning, and prioritizing work; determining what materials will be used, bought, stocked, or sold; and so on.

The executive must customarily and regularly direct the work of at least two or more other full-time employees or the equivalent (“full-time” usually means 40 hours a week but can be less in particular instances). The executive must also have the authority to hire or fire, or must at least make suggestions and recommendations that are given particular weight as to the hiring, firing, advancement, promotion, or any other significant change of status of other employees.

(c) Administrative Employees

A person whose primary duty is performing office or non-manual work directly related to the employer’s management or general business operations (or to the management or general business operations of the employer’s customers) can be an administrative employee.

This work might include things like advising management, being responsible for long-term planning, consulting, negotiating, participating in the formulation of business policy, making decisions affecting business policy, executing or carrying out business policy, and the like. The work must affect matters of consequence or of substantial importance.

The administrative employee’s work must also include the exercise of discretion and independent judgment with respect to matters of significance. This is usually said to consist of evaluating possible courses of action and then, free from immediate direction, taking or effectively recommending one of those actions. Judgment and discretion must involve more than simply applying well-established techniques, clear procedures, or specific or set standards.

(d) Professional Employees

The professional exemption applies to an employee who has as his or her primary duty (i) work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (the “learned” professional), or (ii) work requiring invention, imagination, originality, or talent in a recognized field of artistic or

creative endeavor (the “creative” professional). The work of a learned professional must be predominantly intellectual and must include the consistent exercise of discretion and judgment.

(e) Computer Employees

This exemption applies to computer systems analysts, computer programmers, software engineers, or similarly skilled employees whose primary duty consists of certain kinds of work.

The primary duty of such an employee must be:

- the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- a combination of the above duties, the performance of which requires the same level of skills.

Exempt computer employees generally must be paid on a “salary basis” or on an hourly basis, if their hourly rate is at least \$27.63 per hour.

(f) Outside Sales Employees

To be an exempt outside salesperson within the FLSA’s meaning, an employee’s primary duty must be making sales or obtaining orders or contracts either for services or for the use of facilities for which a client or customer will pay. The employee must also be customarily and regularly engaged away from the employer’s place(s) of business in doing those things.

The exemption relates only to *outside* selling. It generally does not include inside selling, telemarketing, sales made through the mail, sales made through the Internet, and so on. Generally, sales managers in hotels are not eligible as exempt outside salespersons.

An outside salesperson may engage in activities directly related to his or her own sales or solicitations, such as drawing up sales contracts in the office, telephoning customers to schedule sales visits, or making incidental deliveries and collections, without affecting the exemption. However, the exemption typically does not apply to employees who are delivering things someone else has sold, or to employees who are either promoting sales from a general standpoint or promoting sales to be made by other people.

Application of these exemptions to specific employees may prove to be difficult. In those instances you should contact legal counsel to discuss the applicable exemptions.

Note: Maintaining your employee's exempt status may be jeopardized unknowingly and lost if the exempt employee's "primary duty" (as a rule of thumb, more than 50% of his or her time) is not exempt work or the exempt employee's salary is subject to reduction for the quality or quantity of work performed.

1.3. Minimum Wage Rates Under Federal and State Law

(a) Federal Law

The current federal minimum wage is \$7.25 per hour effective July 24, 2009. 29 U.S.C. § 206. Under the FLSA, persons under 20 years of age may be paid an opportunity wage of \$4.25 per hour (effective September 1, 1997) during their first 90 days calendar of employment. The law has limitations in that a maximum of 25% of any employer's work force can be paid this opportunity wage and that the employer may not lay off existing employees to hire teenagers for this opportunity wage.

Note: Since Initiative 688 was approved by the voters in November of 1998, effective January 1, 1999, Washington's minimum wage laws are more favorable to employees and any employees covered by the federal law must be paid Washington State's minimum wage.

(b) Washington Law

Initiative 688, relating to the state's minimum wage, was approved by the state's voters in November of 1998.

Initiative 688 increased the state minimum wage for employees eighteen years old or older. Beginning January 1, 2001, the minimum wage is adjusted each year by the State Department of Labor and Industries by increasing the previous year's minimum wage by the rate of inflation. On September 30 of each year, the Department will calculate the minimum wage for the following year. The rate of inflation will be based on the consumer price index for urban wage earners and clerical workers, or a successor index, for the twelve months prior to September 1st each year as calculated by the United States Department of Labor.

Under the provisions of Initiative 688, the State Department of Labor and Industries is authorized to set the minimum wage for workers less than eighteen years old.

1.4. Computing Hours Worked

Except for the FLSA's child labor provisions (see Section 1.6, below), the FLSA does not regulate how many hours an employee can work. It *does* regulate which hours must be paid at the regular rate or time and one-half. In general, the FLSA provides that hours in excess of 40 hours in a work week must be compensated at time and one-half the employee's "regular rate."

The FLSA never actually defines the phrase "hours worked"; the closest it comes is describing the term "employ" to include "to suffer or permit to work." The U.S. Supreme Court has filled this gap to some extent with a two-point test for determining what qualifies as work:

- whether the activity is controlled or required by the employer; and
- whether the activity is pursued necessarily and primarily for the benefit of the employer's business.

The Labor Department and the courts have construed "hours worked" to include all time which an employer knows or has reason to know an employee spends in activities which are "work" under the Supreme Court's definition. At a minimum, this includes all the time you require an employee to be on your premises, on duty, or at a prescribed workplace.

Understanding the method for computing the hours worked by an employee is necessary in order to determine how much compensation an employee should receive both for regular time and overtime under the provisions of FLSA and the Washington wage and hour laws. For example:

- (1) *Travel Time.* Time spent "traveling to or from the actual place of performance of the principal activity" or time spent on activities which are preliminary to or after the employees principal duties are **not** compensable unless payment is required by a written contract (such as a collective bargaining agreement or individual employment agreement) or a custom or tradition not inconsistent with such a contract.
- (2) *Principal and Incidental Activities.* "Principal Activities" has been defined as activities which the employee is required to perform, including any work of consequence performed for the employer, regardless of when it is performed. Specifically, this includes activities which are necessary and integral to the principal activities of the employee. This may include maintenance of tools and machines, or cleaning a work site before a shift change.

- (3) *Homework.* Homework must be included in hours worked. However, by adhering to a strict policy prohibiting homework, an employer may avoid liability.
- (4) *Meal Periods.* A bona fide meal period must be at least 30 minutes. An employer must compensate an employee for meal time if it is less than 30 minutes and the employee is not permitted to leave the premises, or his or her work station. (See WAC 296-126-092 for the Washington law regarding meal and rest periods.)
- (5) *Waiting, "on call" and sleeping time:*

- (a) **Waiting Time**

An employee's time spent waiting for something to happen or for something to do can be compensable work time. One must look at all the facts to decide whether an employee is "engaged to wait" (which is compensable) or is "waiting to be engaged" (which is not). For example, unpredictable periods of inactivity while an employee is "on duty," such as standing by for another assignment during a shift, are usually regarded as being "engaged to wait." On the other hand, casual "pick-up" workers who show up on their own at a job site in the hope of being hired for the day are usually "waiting to be engaged" and need not be paid for this time.

- (b) **On-Call Time**

Questions sometimes arise as to how to categorize time an employee spends in on-call status. Naturally, all work an employee does while on-call must be treated as compensable. Whether an employer has to record and pay for time the employee spends waiting but not working while on-call depends upon how restricted the employee is in using the time for his or her own purposes. An employee who is not required to remain on your premises and who can use the "idle" on-call time predominantly for his or her own benefit (even if required to carry a cell phone or pager) generally need not be compensated for that time.

- (c) **Sleeping Time**

An employee can be "working" throughout a period of time even though he or she spends some of the time sleeping or engaging in non-work activities. An employee required to be on duty for *less than 24 hours* is working even if permitted to rest or sleep when not busy. If an employee is on duty for *24 hours or more*, the time he or she spends in a regularly scheduled sleeping period may be deducted from his or her hours worked under certain circumstances. There are detailed rules which

must be consulted in deciding whether and to what extent an employer may deduct sleep time.

(6) *Attending Meetings, Training, Or Similar Activities.* Attending meetings, training programs, and similar activities is not compensable work if *each* of four conditions is met:

- the attendance is outside of the employee's regular working hours;
- the attendance is voluntary;
- the meeting, training, or other such activity is not directly related to the employee's current job; *and*
- the employee does not perform any productive work during the attendance.

Attendance is not considered voluntary if the employer either expressly or by implication requires the attendance. Attendance is directly related to an employee's job if it is intended to make the employee better at his or her regular job, as distinguished, for example, from training that a person undertakes in order to be eligible to be considered for a promotion. There are certain exceptions to these general training-time principles, and they must be considered on a case-by-case basis.

(7) *Commuting And Travel Time.* Travel-time problems can be among the most-complex of all hours-worked issues. Whether and to what extent travel must be counted as hours worked frequently can be evaluated only in the context of specific facts and circumstances.

Normal commuting to and from work generally is not compensable work time (although different rules might apply if an employee commutes in the employer's vehicle). However, travel between a "normal" workplace, such as an office, and another place of assignment usually is counted as hours worked, as is travel between one assignment and another during a workday.

Travel between home and the place of assignment on a one-day trip to another city by an employee who normally has a fixed place of work is considered hours worked. If the employee leaves from the normal place of work rather than from home, the travel between home and the normal place of work need not be counted as hours worked. If the travel is by public transportation, the time spent traveling between home and the departure point, such as an airport, may be deducted.

Overnight out-of-town travel by public transportation must be counted as hours worked to the extent that it occurs during normal working hours, even if the traveling is done on weekends and holidays. Overnight out-of-town travel as a passenger outside normal working hours does not have to be counted as hours worked, if the employee is not otherwise working while traveling. If the employee is required to drive a vehicle in connection with this travel, *all* of the travel time must be considered hours worked (except for bona fide meal periods).

If the employee is allowed to use public transportation for the trip but instead uses an automobile for personal reasons, the employer may count as hours worked either 1) the time spent driving to the destination; or 2) the time that would have been considered hours worked if the employee had used public transportation.

- (8) *Time Awaiting Medical Treatment.* Time spent by an employee waiting for medical treatment for an injury sustained while on duty is considered time worked.
- (9) *Time for Grievances.* Time spent in adjusting grievances between the employer and its employees during the time the employees are required to be on the premises is considered hours work.
- (10) *Break Time for Nursing Mothers.*

Effective March 23, 2010, an employer must provide reasonable break time for a nonexempt employee to express breast milk for her nursing child (for one year after the child's birth) each time such employee has need to express the milk. The employer must provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, to be used by the employee for such purpose.

The employer is not required to compensate the employee for any work time spent for such purpose. These break time requirements are not applicable to employees who are completely exempt from the FLSA's overtime requirement.

An employer that employs fewer than 50 employees is not subject to these requirements if the requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

1.5. Computing the Regular Rate and Overtime Pay

(a) Work Week

In most cases, the basis for determining overtime is the employee's workweek. A "workweek" is a fixed and regularly-recurring interval of seven, consecutive, 24-hour periods. The workweek does not have to coincide with a calendar week and can begin on any day and at any time of day. Different workweeks can be established for each employee or group of employees. Generally, you may not average an employee's hours over two or more workweeks to see whether any overtime pay is due. For instance, a nonexempt employee who has workweeks of 45 hours and 35 hours in a bi-weekly pay period is due 5 hours of overtime pay for the first week, even though the hours worked average 40 each week.

(b) Regular Rate and Overtime

The regular rate used to calculate overtime must be an hourly rate regardless of how the employee's pay is otherwise computed. It is generally determined by dividing an employee's total compensation (except for certain exclusions summarized below) for any workweek by the total number of hours he or she worked in that workweek which the compensation was intended to cover. If an employee is paid *solely* at one hourly rate of pay, then that is the individual's "regular rate."

Remember, the FLSA does not require a nonexempt employee to be paid at an hourly rate. You may pay your employee a salary, commissions, piece-rates, day-rates or a number of other ways. But regardless of how the employee is paid, the FLSA *does* require that those earnings be converted to a regular hourly rate in order to figure overtime pay.

The regular rate includes all forms of compensation of employment except:

- Gifts, discretionary bonuses and profit sharing;
- Payment for time not worked such as vacation, holiday and illness;
- Reimbursement of expenses;
- Employer contributions to welfare and pension plans;
- Premium pay for hours worked in excess of eight per day or 40 hours per week or for hours worked in excess of daily or weekly standards or for the sixth or seventh days worked in the workweek;
- Discretionary payments; and

- Talent fees paid to performers.

An employer must include in the regular rate the lesser of the reasonable cost or fair value of meals, lodging, or similar facilities provided primarily for the employee's benefit and convenience. For example, if an employer furnishes lodging to an employee, the employer might be required to take the reasonable cost or fair value of the lodging into account for overtime purposes. On the other hand, it is sometimes possible to exclude these sums from the regular rate. Whether it is necessary to include these amounts in particular situations, and how one should approach the calculations if it is, should be assessed on a case-by-case basis.

(c) Compensatory Time Off

Notwithstanding widespread misconceptions to the contrary, private sector employers cannot compensate nonexempt employees for working overtime in a workweek by giving them time off in another week instead of overtime pay.

However, it *is* legal to control or rearrange an employee's hours *within* a workweek to prevent overtime from being worked. As an illustration, an employee who works 40 hours during the first four days of her five-day schedule can be told to take the fifth day off so as to avoid having her work any overtime hours that workweek.

In contrast to the FLSA, Washington's law permits employers to provide employees time off in lieu of overtime pay if the employee specifically agrees to it. In most circumstances, Washington's law on this point is preempted by the federal FLSA, which is more restrictive on the issue. Hotel employers should consult legal counsel before implementing or maintaining a comp time policy.

1.6. Child Labor Laws: Federal and Washington State

(a) Federal Law

Protective standards of child labor have been in effect under federal law since 1938 and under Washington law since 1909. Federal law differs substantially from Washington State law, and hotel management must comply with both.

The FLSA's child-labor limitations regulate the employment of individuals under 18 years of age. For example, there is an age-18 limit for numerous jobs falling within seventeen "Hazardous Occupations Orders" issued by the U.S. Secretary of Labor. These activities include, among others: operating power-driven meat slicers; work relating to power-driven hoisting devices; work involving power-driven woodworking machines, saws, or metal-working equipment; and operating scrap-paper balers and paper-box compactors. As another example, persons under 17 may not drive vehicles on public roads, and 17-year-olds may do so only under restricted circumstances.

Fourteen- and 15-year-olds may work in limited occupations in retail, food service, and gasoline service operations, such as restricted work in offices or in sales, clerical, cleaning, or delivery occupations. Even then, they may work only within strict hours and times-of-day limitations:

- they cannot work during school hours;
- they can work no more than three hours on a school day and eight hours on a non-school day;
- they can work no more than 18 hours in a week when school is in session and no more than 40 hours in a week when school is not in session; and
- they cannot work before 7 a.m. or after 7 p.m., except that they can work until 9 p.m. from June 1 until Labor Day.

Persons under the age of 14 generally cannot be employed.

Some child-labor exemptions or exceptions exist. They include, for example, work involving certain kinds of agricultural employment, the delivery of newspapers to the consumer, certain government-sponsored programs, and employment by a parent or someone standing in the place of a parent. However, these exemptions are very strictly construed, and you should not rely upon them without carefully ensuring that the relevant exception applies to the particular situation at hand.

(b) Washington Law

WAC 296-125, made effective by the Department of Labor and Industries on July 1, 1993, regulates the employment of minors (anyone 14 to 18 years of age). This regulation outlines what an employer must do to legally employ a minor. To employ a minor, you must (among other things):

- Obtain, maintain, and post a valid minor work permit from the Department of Labor and Industries for each work place at which minors will be employed before the minor is allowed to work.
- Obtain and keep on file at the minor's work place(s) a completed parent/school authorization form for each minor.

After a permit has been issued, an employer must renew each permit on a yearly basis, and renew the parent/school authorization forms before September 30 of each year.

The Department of Labor and Industries has promulgated detailed rules restricting the hours of minors' employment. (See WAC 296-125-027). Minors may not work any overtime. Like all employees, minors are entitled to 30 minute rest periods for every five hours worked and a scheduled 10 minute rest period every four hours under most circumstances. Minors employed past 8:00 p.m. in service occupations must be supervised by a responsible adult who must be on the premises. Specific regulations and restrictions include also the following:

- (1) When school is in session:
 - (a) for ages 14 and 15:
 - (i) working hours are 7 a.m. to 7 p.m. Sunday through Thursday and 7 a.m. to 9 p.m. Friday through Saturday.
 - (ii) maximum hours per day are three hours Monday through Thursday and six hours Friday through Sunday.
 - (iii) maximum hours per week are 16.
 - (iv) maximum days per week are six.
 - (b) for ages 16 and 17:
 - (i) working hours are 7 a.m. to 10 p.m. Sunday through Thursday and 7 a.m. to midnight Friday and Saturday.
 - (ii) maximum hours per day are four hours Monday through Thursday and eight hours Friday through Sunday.
 - (iii) maximum hours per week are 20.
 - (iv) maximum days per week are six.
- (2) When school is not in session:
 - (a) for ages 14 and 15:
 - (i) working hours are 7 a.m. to 9 p.m.
 - (ii) maximum hours per day are eight.
 - (iii) maximum hours per week are 40.
 - (iv) maximum days per week are six.

- (b) for ages 16 and 17:
 - (i) working hours are 5 a.m. to midnight.
 - (ii) maximum hours per day are eight.
 - (iii) maximum hours per week are 40.
 - (iv) maximum days per week are six.
- (3) Meal and rest breaks:
 - (a) minor employees shall not work more than four hours without being provided a meal period of at least 30 minutes (not to be scheduled near the beginning or end of a minor's shift).
 - (b) minors shall be given at least ten minutes of rest for each four hours of time worked (to be paid by the employer) and shall not work more than two hours without a rest period or meal break.
- (4) Minimum wage for minors:
 - (a) Effective January 1, 1999, employees aged 14 and 15 shall be paid a minimum wage of 85% of the adult minimum wage as set forth in Initiative 688.
 - (b) Effective in January 1, 1999, employees 16 years of age or older shall receive the adult hourly rates as set forth in Initiative 688.
- (5) Proof of age by a copy of birth certificate, together with a copy of:
 - (a) Social Security card;
 - (b) baptismal record; and
 - (c) notarized statement of parent or legal guardian.

Washington State law also contains other prohibits on hazardous employment. Hospitality employers should be familiar with those restrictions when employing any minors.

Note: Minors working in the hospitality industry must not work in “service occupations” such as bellmen and housekeepers unless accompanied by a responsible adult who is on the premises at all times. This is to avoid placing a minor in close private quarters alone with the general public. All minors are prohibited from working in any place where intoxicating liquor is served in the same room.

An employer may request a variance from the Department’s regulations by petition to the director of the Department of Labor and Industries. For example, a special variance may be obtained that permits minors aged 16 and 17 to work a maximum of 28 hours per week and six hours per day during school weeks. These variances require a showing of good cause and signatures by the minor’s parents, school, and employer. Further information regarding variances should be sought from a local representative of the Department.

The regulations set forth above pertain specifically to the hospitality industry. Other regulations exist for other types of businesses employing minors and should be reviewed with a representative of the Department of Labor and Industries.

1.7. Employment vs. Independent Contractors

Hotels can have legal problems by misclassifying their employees as independent contractors. Under WAC 162-16-170, a worker is considered an employee, and not an independent contractor, if the employer controls the “manner and means of performance of the work,” if the worker is paid on the basis of time worked (i.e., monthly, weekly, etc.), or if the worker is treated as an employee for tax purposes. The FLSA has in effect a similar definition for an independent contractor but the IRS definition is different, with emphasis on the employer’s right to control the employee. (The IRS publishes a pamphlet on their definition of an independent contractor, citing several qualifying factors and specific examples of employee determinations). Because of the distinctions set forth in these three laws, it is important for hotel management to clearly define the conditions of employment in the contract with any performers, entertainers, or other independent contractors.

The following tips should help hotels increase the likelihood that their workers will be viewed as independent contractors, not employees, and thereby protect the hotel from potential liability.

First, you should develop a written contract which clearly lays out the terms of the independent contractor relationship:

- State explicitly that the worker is an independent contractor, not an employee.

- Make the independent contractor's company the party to the contract, even if the worker is the sole proprietor of his/her own company.
- Specify that the hotel will pay a lump sum amount for the work performed, rather than on an hourly, daily, or weekly basis.
- Specify that the worker is not entitled to receive any benefits from the hotel or participate in any employee benefit plans.
- Specify that the hotel will not directly pay for or reimburse expenses such as supplies, equipment, office space, staff or assistants.
- Do not limit the worker's ability to provide services to other businesses.
- Specify that the contract is for a limited period of time.
- Provide for termination of the contract by either or both parties, with a defined period of notice or for cause.

In addition, hotels should take care to treat workers as independent contractors, not as employees:

- Avoid instructions regarding how the finished product should be assembled or the services provided.
- Do not provide the worker with an office, name plate, business cards, or uniforms (unless necessary for security reasons).
- Do not offer the worker "perks" such as employee discounts.
- Do not include the worker in hotel sponsored events or activities, such as hotel picnics and parties.
- Pay the worker as an outside vendor and issue a Form 1099; do not issue a Form W-2.
- Do not provide training in addition to general orientation, and do not include the worker in any employee training programs.

Hotels must be very careful to ensure that they do not run afoul of the law and misclassify employees as independent contractors. Hotels should scrutinize their practices with the above guidelines in mind, periodically audit their independent contractor relationships, and consult with a professional if they have any concern that they may be misclassifying their independent contractors.

1.8. Employment vs. Volunteer Status

People who volunteer their time for humanitarian, charitable, religious, or civic purposes might not be FLSA employees. However, the relationship must, among other things, be truly voluntary and without contemplation of pay. Employees generally cannot volunteer to their employer to perform work similar to what they do in their regular jobs. The U.S. Labor Department and the courts typically scrutinize employee “volunteerism” where the employees’ day-to-day employer is somehow involved in the arrangement.

1.9. Employment vs. Trainee Or Student Status

The U.S. Supreme Court has said that people who voluntarily work for their own advantage on the premises of another in order to learn a skill or trade, and who do so without any expectation of compensation for the work, are not necessarily FLSA “employees.” Thus, it is at least possible that people functioning as “students” or “interns” or holding some other, similar status will not be deemed to be employees.

Several criteria are considered in deciding this question, but generally the nonemployee status of a trainee or student is likely to be challenged if: (a) the person is doing work similar to that which the business would receive from an employee; (b) on balance, the relationship is more for the business’s benefit than the learner’s; or (c) the person is being paid. For example, most new hires have to learn how to do their jobs, but this does not mean that they can be handled as nonemployees during that time.

Overall, *never* treat trainees or students as nonemployees without carefully analyzing their status in advance.

1.10. Wage Payment

Wages must be paid to employees at least monthly, on regularly established paydays. Wage payments to employees leaving the company must be made at the end of the established pay period. The employer must deduct federal tax withholding and FICA. In addition, the employer may withhold, upon an employee’s written request, credit union contributions, union dues, savings, insurance premiums, and the like if the employer then applies the funds as directed by the employee. For wage assignments, the employee’s spouse must also sign the request for a deduction.

It is unlawful for an employer to deduct for: (a) cash shortages, breakage, customer walkout or loss of equipment, unless the employer can show it was caused by the dishonest, willful act of the employee; (b) acceptance of bad checks, unless done in violation of procedures made known to the employee by the employer; or (c) any cash shortage from a register or drawer, unless the employee had sole access to it and participated in counting the cash both at

the beginning and end of a shift. See WAC 296-126-025. The violation of the wage statutes and regulations can result in liability for double damages, plus the employee's costs and attorneys fees. Accordingly, employers should seek advice of counsel before "docking" an employee's pay for reasons other than those authorized by the employee.

Hotel management in Washington State should also be familiar with RCW 49.52.050, .060, and .070 – some of which have criminal penalties. They are as follows:

RCW 49.52.050 - Rebates of Wages - False Records – Penalty.

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who:

- 1) shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or
- 2) willfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or
- 3) shall willfully make or cause another to make any false entry in any employer's books or records purporting to show payment or more wages to an employee than such employee received; or
- 4) Being an employer or a person charged with the duty of keeping any employer's books or records shall willfully fail or cause another to fail to show openly and clearly in due course in such employer's books and records any rebate of or deduction from any employee's wages; or
- 5) shall willfully receive or accept from an employee any false receipt for wages

shall be guilty of a misdemeanor."

RCW 49-52-060 - Authorized Withholding.

The provisions of RCW 49.52.050 shall not make it unlawful for an employer to withhold or divert any portion of an employee's wages when required or empowered so to do by state or federal law or when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee nor shall the provisions of RCW 49.52.050 make it unlawful for an employer to withhold deductions for medical,

surgical, or hospital care or service, pursuant to any rule or regulation: provided, that the employer derives no financial benefit from such deduction and the same is openly, clearly, and in due course recorded in the employer's books.

RCW 49.52.070 - Civil Liability for Double Damages

Any employer and any officer, vice principal, or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: Provided, however, that the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

Financial hardship is not a defense to "willful withholding of wages" under RCW 49.52.070. *Schilling v. Radio Holdings, Inc.*, No. 63730-0 (Wn. Sup. Ct., September 3, 1998).

1.11. Summary and Conclusions

- Under the Federal Labor Standards Act (FLSA) employers must comply with applicable state or local law if that statute is more favorable to employees.
- Most hotel employees in Washington State are covered by the FLSA and its implementing regulations. However, hotel management may have to comply with both Federal and State laws and regulations with respect to particular employees.
- FLSA sets forth standards concerning minimum wages, equal pay, overtime pay for work over 40 hours during a work week, record keeping and restricts child labor. The FLSA is administered by the U.S. Department of Labor's Wage and Hour Division.
- Washington's minimum wage and hour laws are set forth in RCW 49.46; 49.48; and 49.52, *et seq.* Its implementing regulations are found in WAC 296-128-001, *et seq.* Washington statutes cover employees that are not covered by the FLSA. Washington's wage and hour laws are enforced by the Department of Labor and Industries Employment Standards Division.
- Hotel management should be familiar with the exemptions under the FLSA and Washington's wage and hour laws. It may be that certain hotel employees may be exempt from the minimum wage, overtime and/or recordkeeping requirements of these laws. Exempt status should be carefully evaluated in consultation with legal counsel.
- Washington's minimum wage law is often more favorable to employees, and so any employees covered by Washington's law must be paid our state's minimum wage.

- The FLSA does not regulate how many hours a non-minor employee can work. It *does* regulate which hours must be paid at the regular rate or at overtime an overtime rate. FLSA is on a work week basis, and in general provides that hours in excess of 40 hours in a work week must be compensated at time and one-half the employee’s regular rate, which can include amounts paid in addition to the employee’s hourly rate, such as shift differentials and certain bonuses.
- Hotel management must be familiar with which activities are considered “hours worked” for which an employee must be paid and which must be counted for purposes of determining overtime due.
- State and federal law restrict the employment of minors in terms of working hours and the types of position and duties a minor may perform. Hotel management in Washington State should be familiar with the provisions of both federal and Washington State law as it relates to employment of minors.
- Minors working in the hospitality industry cannot work as bellhops, maids, or in a service operation unless accompanied by a responsible adult. All minors are prohibited from working in any place where intoxicating liquor is served in the same room.
- Hotel management frequently will hire independent contractors or entertainers and therefore should be familiar with the state and federal regulations that determine whether a worker is deemed an independent contractor or an employee.
- Hotel management should be familiar with the criminal exposure imposed by RCW 49.52 regarding the improper withholding or handling of wage payments.

Chapter 2: FICA and FUTA Taxes, Meals and Lodging, Uniforms, Student Employees, Recordkeeping and Tip Credit, Reporting and Pooling

2.1. Federal Social Security & Medicare and Federal Unemployment

In the hospitality industry, all employees, including temporary or casual employees, must be included on a hotel's employment records for payroll tax withholding purposes.

For FUTA and Federal Income Tax Withholding purposes, the cash remuneration can be exempt from these provisions if the work is performed outside of the normal course of the employer's trade or business, can be exempt from these provisions. To fall within the exemption, the following conditions must be satisfied:

- The cash paid, without consideration to non-cash remuneration, is less than \$50.00 during the calendar quarter, and
- The person to which the cash is paid is not regularly employed by the employer paying the wages.

For FICA purposes, cash paid to employees engaged in services that are not in the normal course of their employer's trade or business is not covered under FICA unless the cash paid to them in a calendar year is more than \$100.00. There is no requirement that the employee be regularly employed as is required under FUTA & Federal Income Tax Withholding. Any non-cash remuneration is not subject to the FICA tax.

Hotels employers should consult with a tax professional for specific advice related to withholding and payment of state and federal taxes.

2.2. Meals and Lodging

FLSA (§ 3(m)) states that "wages" includes the reasonable cost incurred by the employer for providing the employee with "board, lodging, or other facilities." An employer must include in the regular rate the lesser of the reasonable cost or fair value of meals, lodging, or similar facilities provided primarily for the employee's benefit and convenience. For example, if an employer furnishes lodging to an employee, the employer might be required to take the reasonable cost or fair value of the lodging into account for overtime purposes. See Section 1.5, above. On the other hand, it is sometimes possible to exclude these sums from the regular rate. Whether it is necessary to include these amounts in particular situations, and how one should approach the calculations if it is, should be assessed on a case-by-case basis.

Washington State does not recognize a meal credit.

In *State ex rel. Hagan v. Chinook Hotel*, 65 Wn.2d 573 (1965), in view of the repeal of RCW 49.46.050 by the legislature in 1961 (which permitted the meal credit), the Washington State Supreme Court held that deductions from the minimum wage for uniforms, laundry allowance, health and welfare, and pension contributions and the like are not permitted by the wage and hour statute.

2.3. Uniform Maintenance

Employers who require employees to furnish uniforms or clothing with an employer designated logo, style, or color (with no other color options allowed) must reimburse employees for apparel when the cost of the clothing reduces the employee's wage below the state minimum wage in any payroll week. In addition, employer's must pay the costs to maintain (professionally clean or repair) uniforms when such costs would reduce the employee's wage below the state minimum wage. This provision does not apply to uniforms that are "wash and wear."

RCW 49.12.450 (the so-called "Black and White" law) clarifies the circumstances under which an employer must pay for its employees' wearing apparel. It provides:

- If an employer requires an employee to wear a uniform, the employer must furnish or compensate the employee for such apparel.
- A uniform is defined as: apparel of a distinctive style and quality that when working outside the workplace clearly identifies the person as an employee of a specific employer; apparel that is marked with an employer's logo; unique apparel representing a historical time period or ethnic tradition; or formal apparel.
- An employer is not required to furnish or compensate an employee for wearing apparel of a common color that conforms to a general dress code or style. "Common colors" are defined and are limited to the following colors or light or dark variations of such colors: white, tan, or blue for tops; and tan, black, blue, or gray for bottoms. An employer is permitted to require an employee to obtain two sets of wearing apparel to reflect the seasonal changes in weather that necessitate a change in wearing apparel.
- If an employer changes the color(s) of the apparel required to be worn by any of his or her employees during a two-year period of time, the employer must furnish or compensate the affected employee(s) for the wearing apparel.

- Personal protective equipment required for employee protection under the Washington Industrial Safety and Health Act (WISHA) is not defined as employee wearing apparel.

2.4. Student Employees

A “student employee” is a person who is receiving instruction in an accredited school, college or university, and who is employed on a part-time basis in a bona fide vocational training program, or in a job training program established by an accredited school and approved by the director of the Department of Labor and Industries. WAC 296-126-002 (6).

A “student learner” under age 16 may be paid 85% of the minimum wage rate. Whenever an employer will employ a student learner at a wage rate lower than the minimum wage, however, the employer must apply for a special certificate authorizing the employment of a student learner at sub-minimum wages. A certificate will only be issued by the Department of Labor and Industries if the following conditions are satisfied:

- Any training program under which the student learner will be employed must be a bona fide vocational training program as defined in WAC 296-126-002(6) or be a part of a job-training program established by the governing body of the school and approved by the director of the department of labor and industries.
- The employment of the student learner at subminimum wages must be necessary to prevent curtailment of opportunities for employment.
- The occupation for which the student learner is receiving preparatory training must require a sufficient degree of skill to necessitate a substantial learning period.
- The employment of a student learner must not have the effect of displacing a worker employed in the establishment in which the student learner is to be employed.
- The employment of the student learner at subminimum wages must not tend to impair or depress the wage rates or working standards established for experienced workers for work of a like or comparable nature.
- The issuance of such a certificate must not tend to prevent the development of apprenticeships or must not impair established apprenticeship standards in the occupation or industry involved.

A student learner’s hours are subject to restriction. When school is in session, the student cannot work more than 40 hours per week—to calculate these hours, the time of school instruction is added to the hours worked. When school is not in session, the student cannot work

more than 40 hours in a week or 8 hours per day. In either event the student cannot work more than the time authorized in the Department's approval certificate. (See also Section 1.9, above, regarding volunteers and interns.)

2.5. Record Keeping

U.S. Labor Department regulations adopted under the FLSA impose recordkeeping obligations that are too numerous and detailed to be reproduced here. As an example, with respect to an employee subject to both the FLSA's minimum wage and overtime provisions, an employer must maintain the following information:

- personal information, including the employee's name, home address, occupation, sex, and birth date (if under 19 years of age);
- the hour and day when the workweek begins;
- total hours worked each workday and each workweek;
- the total daily or weekly straight-time earnings;
- the regular hourly pay rate for any workweek or work period when overtime is worked;
- the total overtime pay for the workweek or work period;
- any deductions from or additions to wages;
- total wages paid each pay period; and
- the date of payment and pay period covered.

Special provisions also exist, such as those applying to employees who are exempt in one way or another, or who work in certain occupations (such as homeworkers, for instance), or who work under particular kinds of pay arrangements, or who receive room or board.

The FLSA requires employers to keep the following records for three years: individual employment contracts; collective bargaining agreements; records on employees' wages and hours; and records showing the employee's sales and purchases.

Employers must keep the following for two years: basic employment and earnings records; wage-rate records; order, billing and shipping records; and records of deductions from or additions to wages paid. You generally do not have to keep records in any particular form.

Under Washington law, WAC 296-128-010 requires hotel management to keep and preserve payroll or other records containing:

- Name in full and social security number;
- Home address;
- Occupation in which employed;
- Date of birth if under 18;
- Time of day and day of the employee's work week begins or a notation of differing work week;
- Hours worked each workday and total hours worked each work week;
- Total daily or weekly straight-time earnings or wages;
- Total overtime excess compensation for the work week;
- Total additions to or deductions from wages paid each period;
- Total wages paid each period; and
- Date of payment and pay period covered by payment.

WAC 296-128-020 specifies that all records mentioned above, as well as union contracts, individual employment contracts, child labor permits and student learner permits, are to be kept for a period of at least three years.

2.6. Tip Reporting and Tip Credit

(a) Federal Law

The first and most basic fact concerning tips is that all tips are income and thus are subject to income taxation. An employee who receives only a "de minimis" level of tips (up to \$20 per month) has no obligation with regard to his or her tips other than to include them on a tax return and pay the applicable tax.

When tips exceed \$20 per month, additional responsibilities are imposed on both the hotel and employee. Tips in excess of \$20 a month are considered wages and must be reported to the hotel by the employee by the 10th day of the month after the tips are received. IRS Form 4070 (*Report of Tips to Employer*) is available for this purpose. The employee has the obligation of keeping records of his or her tips. The IRS has made available Form 4070A (*Employee's Daily*

Record of Tips) to assist tipped employees. Although use of Form 4070A is not required, a tipped employee being audited by the IRS is expected to verify the correctness of tips with written record of tips received.

The employer to whom tips are reported has an obligation to withhold income taxes on the tips and wages and must pay FUTA (unemployment tax). In addition, the employer must withhold Social Security taxes for the employee on wages and all reported tips. Since 1988, the employer has been required to match the employee share of tips only to the extent used to satisfy minimum wage.

(b) Washington Law

While federal law allows employers to credit tips against the minimum wage obligations, Washington law does not, and hotel employers are not permitted to use tip credits towards the minimum wage. The federal wage-hour law is not preemptive: a hotel subject to federal law must satisfy whichever standard—state or federal—provides the greatest benefit to an employee.

State law, as set forth in WAC 296-126-022, does not allow tips to be a credit by the employer as part of the minimum wage, nor would tips be part of the “regular hourly rate” on which overtime is computed.

2.7 Tip Pooling

Employees must be allowed to keep all their tips, except that they can be required to contribute to a pool participated in only by other employees who also customarily and regularly receive tips. However, DOL takes the position that an employer “must notify its employees of any required tip pool contribution amount.” Recent court decisions in the 9th Circuit (which covers Washington employers) have upheld tip pooling arrangements in several circumstances. As a general rule, hotel employers in Washington who want to create a valid tip pooling arrangement should:

- Put the tip pooling agreement in writing;
- Pay the higher of the federal or state mandated minimum wage;
- Prohibit distribution of tips in the tip pool to owners or managers; and
- Have your tip pooling policy reviewed by legal counsel.

2.7. Summary and Conclusions

➤ Under Federal law payment of minimum wages and overtime may be satisfied by such non-cash items as housing and meals (unless excluded under an applicable union contract).

Washington State law *does not* recognize these credits. Under Washington law, hotels that are subject to both Federal and State law must pay employees the state minimum hourly wage, even though a lesser wage could be paid under the Federal Act because of credits for tips, board and lodging allowed under FLSA.

- Under State law, if a hotel requires an employee to wear a uniform, the hotel must provide the apparel and cleaning free of charge to the employee. Hotel management needs to be familiar with the provisions of the so called “Black and White” wearing apparel law, RCW 49.12.450, which allows some standard dress to be excluded from the definition of “uniform.”
- When employing a student learner at a wage rate lower than the minimum wage, a hotel must obtain a certificate from the Department of Labor and Industries.
- Both the FLSA and State law mandate that hotel management keep certain records if their employees are covered by Federal or State wage and hour rules.
- Federal law recognizes tip credit; however, the Federal law is not preemptive. Therefore, a hotel subject to Federal law must satisfy whichever standard—state or federal—provides the greatest benefit to an employee. Under State law, Washington does not allow tips to be a credit by the employer as a part of the minimum wage, nor are tips part of the regular hourly rate on which overtime is computed.
- “Tip-back agreements” are illegal in Washington. Hotel management is advised to carefully review “tip pooling” and “tip-back agreements” with legal counsel for compliance with federal and state wage and hour laws.

Chapter 3: Laws Against Discrimination in Employment

3.1. Federal and State Laws: An Overview

Employment discrimination law is covered by federal, state and municipal laws. Federal law includes Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963 (29 U.S.C. § 206(d)), the Age Discrimination in Employment Act (29 U.S.C. § 621, et seq.), the Americans with Disabilities Act (42 U.S.C. § 12101, et seq.) and the affirmative action requirements for federal contractors.

The Washington State law is referred to as the Washington Law Against Discrimination (RCW 49.60) and includes protection against discrimination on the basis of race, color, sex, national origin, religion, age, marital status or the presence of any sensory, mental or physical handicap. Currently, King County and the cities of Seattle, Spokane, and Tacoma have their own anti-discrimination ordinances.

It is important to have an understanding of the underlying theories that dictate how a discrimination law may be approached. Title VII of the Civil Rights Act of 1964 lists the theories as Disparate Treatment, Disparate Impact, and Reasonable Accommodation. Hotel management must be able to analyze a potentially discriminatory policy, practice or adverse employment decision to decide if it discriminates against a specific individual or against a class of people.

Disparate Treatment is the different treatment of an individual or individuals because of their race, gender, pregnancy, age or other category protected by federal, state or local law. A disparate treatment discrimination case would include examples such as firing a racial minority employee for the same offense committed by a non-minority employee who was only given a warning.

Disparate Impact is the consequence of an employment policy, rather than the motive of the employer. The emphasis is not on individual discrimination, but how an employer's policies, whether intentional or not, discriminate against a protected class of people. Policies requiring specific education levels that are not job related, "English only", or height and weight requirements, all may be challenged as having a disparate impact on a protected class of people.

Reasonable Accommodation is applied to employees with specific religious beliefs and those who are disabled. An employer must reasonably accommodate an employee's sincerely held religious beliefs or disability unless to do so would impose an undue hardship.

Federal, state and local laws against discrimination carry with them a prohibition against two forms of retaliation: (1) retaliation against persons for filing a charge of discrimination, giving testimony or otherwise participating in the enforcement agency's process; and (2) retaliation against persons who speak out or otherwise oppose discriminatory practices.

(a) Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination in employment because of race, color, religion, sex, or national origin. This law applies to businesses affecting commerce with 15 or more employees. The Act requires that all aspects of the employment relationship be conducted in a nondiscriminatory fashion, including hiring, compensation, promotion, discharge, and the allocation of non-monetary opportunities or benefits.

In rare cases, a hospitality employer will have no choice but to discriminate against certain groups. For instance, a hospitality employer may choose to discriminate based on gender in hiring a locker room attendant for a women's locker room based on privacy concerns. In such very limited cases, Congress created a limited exception, called the bona fide occupational qualification (**BFOQ**) defense, which applies both to Title VII and age-based claims. To state a successful BFOQ defense, an employer must demonstrate that all or substantially all of the members of the excluded class cannot perform *essential* job duties.

A BFOQ cannot be based on customer preference or even on concern for the welfare of the employee (unless the injury to the employee affects the safety of others). On the other hand, customer privacy may be relevant in the BFOQ defense. The BFOQ defense is rarely successful, however, and you should not rely on it except in the most limited circumstances.

Title VII is enforced by the Equal Employment Opportunity Commission (EEOC) through its implementing regulations and guidelines.

(b) Washington State Law Against Discrimination

RCW 49.60.030 provides that people have the right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service dog by a disabled person.

RCW 49.60.180 states it is unlawful to refuse to hire, discharge, or bar any person from employment, discriminate in compensation, or to distribute any printed employment-related statement or advertisement which expresses limitations based on improperly discriminatory factors. These laws and the provisions of the WAC 162-04-010, et seq., apply to all employers employing eight or more persons in the state of Washington. This law and its implemented regulations are enforceable by the Washington State Human Rights Commission or by any person adversely affected who files suit in state court.

Hotels located in Seattle should be familiar with Seattle's Anti Discrimination Ordinance, (Ordinance 14.04.040), which is enforced by the Seattle Department of Human Rights. This ordinance applies to all employers having four or more employees within the City of Seattle. It prohibits employment discrimination based on race, color, sex, marital status, sexual

orientation, gender identity, genetic information, political ideology, age, creed, religion, ancestry, national origin, honorably discharged veteran or military status or the presence of any sensory, mental or physical handicap.

The City of Tacoma has a similar ordinance and a human rights department to enforce it. The ordinance prohibits discrimination based on age, ancestry, color, disability, marital status, national origin, parental/family status, race, religion, retaliation, sex, gender identity and sexual orientation.

The City of Spokane also has a similar anti-discrimination ordinance. It applies to employers with 8 employees.

(c) Burden of Proof

Both federal law and Washington State law require that the aggrieved party assume the burden of proof when filing suit against an employer. An employee claiming discrimination must first prove a prima facie case of discrimination and, if the employee does so, the burden then shifts to the employer to present evidence which articulates that it has a legitimate, nondiscriminatory reason for its actions. If the employer sustains that burden, the burden shifts back to the employee and the employee must then demonstrate that the reasons given by the employer are pretext for discrimination.

Although the plaintiff bears the burden of proof in employment discrimination cases, the charging party or plaintiff has numerous resources available to assist in his/her their case, such as the EEOC, the Washington State Human Rights Commission (WSHRC), or a local municipality's human rights task force. Another factor is the hotel's cost of litigation which includes expenses and attorney's fees, diversion of management of time and resources, and public relations problems. If a plaintiff prevails in a discrimination suit, he or she may recover attorney's fees and costs. These costs of litigation can be substantial. Some employees report that their direct litigation costs and attorney's fees can exceed \$200,000 in cases through trial. These costs do not include the monetary amounts awarded if the plaintiff prevails. Given the potential costs and exposure arising from these claims, hotel management should make considerable effort to avoid discrimination claims by following the guidelines set forth in the federal and state laws.

3.2. Sex Discrimination

(a) Federal Law

It is obviously unlawful for a company to generally favor men over women (or *vice versa*) in its employment decisions. Less obviously, perhaps, it is unlawful to evaluate a potential or current employee by measuring that person's performance against stereotyped expectations of behavior. For instance, it would be unlawful sex discrimination for an employer to describe a

female candidate or employee as “macho,” “overcompensating for being a woman,” or “a lady using foul language,” and then make an employment-related decision based upon this perception, or to advise her to “walk more femininely, wear make-up, have her hair styled, and wear jewelry” in order to improve her chances for hire or promotion.

Similarly, it is unlawful sex discrimination to refuse to hire women who, for example, have children or are of childbearing age because of the employer’s belief that these women will not be able to work as hard due to their family commitments.

Sex-based discrimination in compensation is also outlawed by the Equal Pay Act of 1963, which generally applies to employers of two or more persons with annual sales volumes exceeding \$500,000. This statute prohibits sex-based pay differentials for substantially equivalent work requiring equal skill, effort, and responsibility under similar working conditions.

In January 2009, Congress passed the Lilly Ledbetter Fair Pay Act, which amended the Civil Rights Act of 1964. This amendment states that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new discriminatory paycheck. This law was a direct response to *Ledbetter v. Goodyear Tire & Rubber Co.*, a U.S. Supreme Court decision, which held that the statute of limitations for presenting an equal-pay lawsuit begins at the date the pay was agreed upon, not at the date of the most recent paycheck.

Generally, sexual harassment has been the most common type of Title VII harassment claim. While harassment based on race, religion, national origin, and other characteristics is also actionable, the area of sexual harassment has received the most national attention. This type of claim and exposure is treated more specifically in Section 3.3, below.

(b) Washington Law

WAC 162-30-010 states that Washington State follows the laws of discrimination set forth in Title VII of the federal law on employment discrimination and cites the EEOC’s opinions on sex discrimination as the opinions of the Washington State Human Rights Commission. In addition, RCW 49.12.200 states:

[I]n this state, every avenue of employment shall be open to women; and any business, vocation, profession and calling followed and pursued by men may be followed and pursued by women, and no person shall be disqualified from engaging in or pursuing any business, vocation, profession, calling, or employment or excluded from any premises or place of work or employment on account of sex.

If a person feels he or she has been discriminated against because of his or her sex, that person may file a civil suit and seek damages for the full amount of compensation that he/she would have received if he/she had not been discriminated against.

The issues involving disability due to pregnancy deserve mention under sex discrimination. Under the 1979 amendment to Title VII, disability due to pregnancy must be treated like any other medical disability, with no special standards imposed. Employers may not require pregnant employees to stop working unless they are no longer able to perform their job duties as determined by a physician. With very few exceptions, it is unlawful sex discrimination to reject a woman because she is pregnant, and it is unlawful to reject a woman because she has secured, or refuses to secure, an abortion. In addition, benefits must be provided to pregnant women on the same terms as to employees having other temporary disabilities.

Under Washington law (WAC 162-30-020), employers must allow employees to take time off for the actual period of maternity disability, and must allow them to return to the same or a similar job if the only time they have taken is for actual disability connected with childbirth.

Washington's Family Leave Law (RCW 49.78) is consistent with the requirements of the Federal Family and Medical Leave Act of 1993 ("FMLA"). *See* 29 U.S.C. 2612. This statute has specific requirements relating to leaves taken for the birth of a child or other maternity disabilities. Depending on the number of employees you have at your hotel or motel, the following requirements should be reviewed:

- *Hotels employing eight or more employees.* In general, hotels employing eight or more employees should allow pregnant employees to take leave for any period of maternity disability, in accordance with the Human Rights Commission's Maternity Disability Regulation (WAC 162-30-020).
- *Hotels employing fifty or more employees.* Such hotels should review whether the hotel is subject to the provisions of the Washington Family and Medical Leave Law and the federal Family and Medical Leave Act. If the hotel is covered, then such leave should be granted pursuant to those laws.

3.3. Sexual Harassment

There is hardly a workplace left today where managers are not at least aware of the complicated and costly problems that can be created by even a single incident of sexual harassment. Despite the large numbers of policies and preventive measures in place, plaintiffs continue to sue employers for harassment in ever increasing numbers. The majority of these cases now involve employers who have adequate sexual harassment policies but have not properly educated their supervisors or employees on how to enforce these policies effectively.

While this increased sensitivity to sexual harassment is welcome news for those employees who are, in fact, subjected to unwanted sexual advances in the workplace, it does represent potential risks for employers. Even the most cautious and concerned business may find itself the target of sexual harassment lawsuits. These suits are now more costly to defend, and juries have been awarding ever increasing judgments against employers.

Legal liability for sexual harassment is usually very fact specific, and no brief discussion, such as is presented here, can cover every nuance of this complicated area. This Section outlines the basic law pertaining to sexual harassment and provides practical advice to help prevent, recognize, and resolve claims of harassment.

Essentially, there are two general categories of sexual harassment claims: those where harassment culminates in a tangible adverse employment action (such as discharge, demotion, or undesirable reassignment) and harassment which is not accompanied by an adverse employment action.

The Supreme Court's rulings specifically target supervisors as the greatest source of potential liability for employers. The employer is strictly liable to a victimized employee if the harassment is created by a supervisor with immediate or higher authority over the employee, and the harassment results in a tangible job detriment. There generally is no defense in this situation, and the only issue will be the extent of the damages. Thus, all employers should take affirmative steps to properly train their supervisors to help prevent such situations.

In contrast, in harassment claims against supervisors where there is no corresponding adverse employment action, an employer is afforded an affirmative defense. According to the Supreme Court, this defense consists of two elements: (1) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior and (2) that the victimized employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

This affirmative defense is a compelling reason for establishing an effective internal complaint handling procedure to minimize your potential liability in these harassment actions. But just as important is the need to regularly train supervisors and employees on the anti-harassment policy and the complaint procedure that should be used if employees feel that they have been harassed.

If the accused harasser is not a supervisor, then the employer can be still be liable if there is unwelcome sexual conduct so severe or pervasive that it unreasonably interferes with the individual's work performance. Once again, your best defense to such claims includes maintaining a policy prohibiting unlawful harassment in a manner that meets the above criteria.

In 1986 the United States Supreme Court identified two specific types of sexual harassment: *quid pro quo* ("this for that") and *hostile working environment*. Since then, the EEOC and the lower courts have wrestled with (1) defining what behavior will be considered sexual harassment; (2) identifying who can be liable for harassment and under what circumstances; and (3) determining the potential scope of liability.

(a) What Is Considered To Be Sexual Harassment

The EEOC defines sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- submission to such conduct is made either implicitly or explicitly a term or condition of employment;
- submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- such conduct has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment.

In 1998, the Supreme Court recognized that Title VII also prohibits "same sex" sexual harassment. It is important to remember that neither the harasser nor the victim needs to be homosexual in order for same sex harassment to exist. Although these claims are not as prevalent as opposite sex harassment, they are becoming more common. Therefore, prudent employers will treat all harassment complaints seriously.

(b) Examples of Conduct That Could Constitute Sexual Harassment

Determining whether particular actions constitute sexual harassment can be extremely difficult. The EEOC regulations do not make clear whether it takes one, two, or ten sexually offensive comments or actions to constitute harassment. The Supreme Court has stated that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." In other words, there is a certain amount of horseplay or simply annoying behavior that people must accept without legal redress.

Because of that, courts will look at several factors to determine if actionable harassment has occurred including: (1) the frequency of the discriminatory conduct; (2) the severity; (3) whether the conduct is physically threatening, or a mere offensive utterance; (4) whether the conduct unreasonably interferes with an employee's work performance; and (5) the conduct's effect on the employee's psychological well-being.

Unfortunately, the line between actionable harassment and merely boorish behavior is drawn on a case-by-case basis and often left to a jury. One federal judge likened the difficulty of performing the analysis to “attempting to nail a jellyfish to a wall.” It is clear that the range of actions that could constitute sexual harassment is enormous and leaving such a determination to a jury is risky and expensive. Some common examples of conduct that might be deemed harassment include:

Physical actions:

- giving a neck or shoulder massage;
- touching a person’s body, hair, or clothing;
- hugging, kissing, or patting another;
- standing close to, or brushing up against, a person;
- touching or rubbing oneself in a private area or with sexual overtones near another person;
- touching, leaning over, cornering, or pinching someone; or

Verbal actions:

- using intimate or inappropriate nicknames;
- whistling or making cat-calls at another;
- making comments about a person’s body, clothes, looks, anatomy, or manner of walking;
- turning work discussions into sexual topics;
- telling sexual jokes or stories;
- discussing one’s love life;
- asking about sexual fantasies, preferences, or history;
- repeatedly asking a person for a date who clearly is not interested;
- making kissing sounds, howling, or smacking lips; or

- telling lies or spreading rumors about a person's sex life.

Non-Verbal actions:

- looking a person up and down (elevator eyes);
- staring at someone;
- blocking a person's path;
- making sexual gestures with one's tongue or hands or other body movements;
- following a person around;
- giving unwanted personal gifts;
- displaying sexually-suggestive visuals (calendars, pictures, comics,);
- making facial expressions such as winking, throwing kisses, or licking lips; or
- requiring an employee to wear provocative clothing.

Whether any of these or other possibly sexually-related actions constitutes sexual harassment depends not only on their severity and whether they were isolated or repeated, but also on whether or not they were "welcomed" by the recipient.

(c) Was the Conduct "Welcome"

To be actionable harassment, the sexual behavior must have been "unwelcome." Thus, determining whether the perpetrator's actions were welcomed by the recipient becomes a critical issue in determining whether behavior has gone from mutually consensual behavior to actionable sexual harassment. The Supreme Court has made it clear that submission to a sexual advance does not prove that the advance itself was welcomed. The Court recognized that a subordinate may "voluntarily" participate in a sexual act that is actually unwelcome, because of the supervisor's threat (explicit or implicit) of adverse employment consequences. The correct inquiry is whether the recipient's *conduct* indicated that the sexual advances were unwelcome, not whether participation was voluntary.

(d) Guidelines for Preventive Action

There are several proactive measures hotel employers can and should implement to help prevent sexual harassment from occurring and to reduce exposure when it does occur. Probably

the most important measure is the adoption, communication, and consistent enforcement of a written policy prohibiting all forms of harassment. This policy should:

- Define harassment;
- Prohibit any level of harassment;
- State that supervisors do not have the authority to engage in harassment;
- Outline responsibilities of employees to report violations of the policy;
- Provide for discipline for violations of the policy;
- Encourage complaints;
- Provide a specific reporting procedure and a by-pass reporting procedure;
- Assure no retaliation;
- Require employees to acknowledge receipt of the policy.

(e) A Common Sense Approach to Preventing Lawsuits

No employer enjoys listening to employees complain about the working environment. However, hearing complaints, especially about sexual harassment, is very important. First, complaints offer employers a chance to take remedial action before a more severe or pervasive environment can develop. Second, complaints allow employers a means to discover and eliminate employees who are disruptive to others through their harassing conduct. This not only saves money in the long run but improves the morale of the entire work force.

Finally, experience has shown that sexual harassment occurs in all sizes and types of companies. An employee experiencing sexual harassment has many options in today's world. She can quit, tolerate the conduct, file a charge with a state or federal agency, or sue you to list a few of the options. The best case is for the complaining employee to come to you so you can resolve the problem and thereby ensure that your work environment remains a place where employees can work without improper and illegal demands or pressure on them.

The best advice for preventing lawsuits of all types, including sexual harassment, is to develop and implement an effective procedure for handling complaints, publicize the procedure and then encourage your employees to use it.

3.4. Age Discrimination

(a) Federal Law

Generally speaking, the Age Discrimination in Employment Act (**ADEA**) (29 U.S.C. § 621, et seq.) protects employees 40 years old or older from discrimination based on age. Its definition of covered “employer” is identical to Title VII except that the ADEA has a 20-employee requirement, rather than Title VII’s 15-employee requirement.

The ADEA is also similar to Title VII in that it allows mixed-motive cases, but unlike Title VII in such situations, the burden of persuasion does not shift to the employer. Rather, in a mixed-motive ADEA claim, the plaintiff must prove by a preponderance of the evidence that “but for” the employees age, the employee would not have suffered the challenged adverse employment action. Some courts have found certain company policies invalid because of their effect upon older workers, such as:

- not hiring teachers with more than 5 years of experience;
- denying severance to employees who are eligible for retirement benefits;
- setting different standards for lateral applicants and entry-level applicants;
- using a computer program to measure performance that led to the termination of 10 of 27 older workers but only 1 of 25 younger ones; and
- selecting employees for demotion on the basis of their higher seniority.

The ADEA is enforced by the EEOC. Individuals alleging violations of the ADEA may file suit in federal court.

(b) Washington Law

RCW 49.60.205 states that “no person shall be considered to have committed an unfair practice on the basis of age discrimination unless the practice discriminates against a person over the age of 40 and violates RCW 49.44.090.” RCW 49.44.090 relates to unfair practices in employment because of age of the employee or applicant. This statute reflects the language of Title VII of the federal law describing unfair practices in employment with regard to employees and applicants over the age of 40. The protections of RCW 49.44.090 cover employers of any size.

(c) Burden of Proof

While it is sometimes possible to prove an ADEA disparate treatment claim by direct evidence, most plaintiffs try to prove discrimination indirectly by using pattern evidence similar to that used under Title VII. An ADEA plaintiff must prove that he or she was:

- 40 years old or older;
- qualified for the position in question;
- subjected to an adverse employment action; and
- the person hired, promoted, or retained was younger than the plaintiff.

With respect to the fourth element, the person hired, promoted, or retained need not be under 40 for a plaintiff to plead a valid ADEA claim, but only “substantially younger” than the plaintiff. As in Title VII cases, once the plaintiff states a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the plaintiff’s treatment. The plaintiff can then try to show that the employer’s proffered justification is a pretext.

(d) Reductions in Force

Claims of age discrimination are more likely when businesses dramatically scale back the work force. Employers sometimes target higher wage earners in a reduction in force. Often these higher wage earners tend to be older workers. Plaintiffs in these cases have problems meeting the four-element test mentioned above because their positions are normally eliminated and they are not replaced by anyone, much less by a younger employee. Courts have dealt with this fact by establishing different elements for reduction in force cases. In such cases, the plaintiff must show that he or she:

- is a member of the protected age group;
- was performing according to the employer’s legitimate expectations;
- was terminated; and
- others not in the protected class were treated more favorably.

In support of this indirect evidence of discrimination, plaintiffs in reduction in force cases also rely on such factors as: the number of people fired who were over 40 compared to those under 40; performance evaluations of a discharged employee compared with those of younger employees who were retained; the percentage of employees over 40 who were terminated; and

direct age-related statements by decision makers. Generally, plaintiffs need to show that younger employees were treated more favorably than older ones in the reduction in force.

(e) Early Retirement Plans

While you are generally prohibited from forcing older workers to retire, you may offer early retirement plans as long as the plans are voluntary and “consistent with the relevant purposes” of the ADEA.

In assessing whether a plan is voluntary, courts normally consider the following factors:

- Whether the employee has had sufficient time to consider his or her options;
- whether *accurate and complete* information has been provided regarding the benefits available under the early separation plan; and
- whether there have been threats, intimidation, or coercion by the employer.

Generally speaking, you cannot offer an employee a “choice” between early separation or termination. On the other hand, offering an employee a plan so generous it is “too good to refuse” will not be considered involuntary. In between those two extreme examples, courts have reached differing conclusions. This suggests that you should exercise caution before offering early separation incentives, and your decision should be well thought out.

See Chapter 5, below, for discussion about the federal requirements for obtaining a written release of an age discrimination claim.

3.5. Race and Color Discrimination

(a) Federal Law

The prohibition against discrimination on the basis of race is well known—you cannot discriminate against people because of their race.

An infrequently used provision of Title VII is its prohibition against discrimination based on color. Typically, color discrimination is synonymous with race discrimination. There are, however, cases extending Title VII protection to situations where, for instance, light-skinned African-Americans are preferred over those with darker complexions.

In addition to the provisions set forth in Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1871 prohibit racial discrimination. Primarily enacted to give support to the 13th and 14th Amendments, the Civil Rights Acts are often used in employment discrimination cases. Under § 1981, the phrase “Equal Rights Under the Law [to all persons] as

enjoyed by white persons” has been used to support racial discrimination suits in employment. The Civil Rights Acts of 1866 and 1871 apply to all private employers, not just those with more than 15 employees.

(b) Washington Law

RCW 49.60.030 mirrors the federal law prohibitions, sets forth a Declaration of Civil Rights, and states the “right to be free from discrimination because of race, creed, color . . .”

3.6. Religious Discrimination

(a) Federal Law

The prohibition against religious discrimination is similar to the other types of discrimination prohibitions with one important difference—employers have a duty to reasonably accommodate employee’s sincerely held religious beliefs that conflict with an employment requirement. While this may appear to create a substantial economic burden for your business, it need not.

An employer has no duty to accommodate religious needs if the accommodation creates an undue hardship, which the Supreme Court has defined as anything that has “more than a *de minimis* cost.” For example, a hotel is generally not obligated to change work schedules to accommodate an employee’s religious practices if it would violate collectively bargained seniority rules or require excessive scheduling of overtime. On the other hand, allowing an employee to solicit another employee to switch work days voluntarily could be a reasonable accommodation.

While an attempt at reasonable accommodation includes inviting the individual to offer proposed solutions, you are not required to choose the accommodation preferred by the employee. An employer should seek an accommodation that effectively eliminates any religious conflict and reasonably preserves the person’s employment status. In the hotel industry, providing reasonable accommodations to an employee with a religious conviction can pose a problem with work scheduling. Under EEOC guidelines, § 1605.2(b), alternatives to a religious conflict involving work scheduling may be resolved by voluntary substitutes and swaps, flexible scheduling and lateral transfer, or change of job assignment. The guidelines presented by the EEOC do not assume that all conflicts can be resolved—they merely state which course of action must be followed before that determination can be made.

As in all businesses, there will be some instances where an employee cannot be reasonably accommodated. If this instance occurs, a full review by legal counsel before any action is taken is warranted.

(b) Washington Law

The right to be free from religious discrimination is set forth in RCW 49.60.030 entitled “Declaration of Civil Rights.”

3.7. National Origin Discrimination

(a) Federal Law

Generally, national origin refers to the country from which a person or his or her ancestors originated. Consequently, discrimination against someone because of his or her heritage is prohibited. For example, you may not discriminate against someone because they are originally from Mexico, Asia or Libya or because their parents or grandparents were from Russia.

Title VII’s ban on national origin discrimination also extends to bias based on ethnic backgrounds, even if the persons involved are not associated with a particular nation (such as Gypsies) or are associated with groups that are clearly Americans (such as Cajuns).

EEOC guidelines which need specific mention are “English only rules” and harassment (29 C.F.R. § 1606). The EEOC considers “English only rules” to be a discriminatory practice. The guidelines state that “prohibiting employees at all times, in the work place, from speaking their primary language or the language they speak most comfortably, disadvantages an individual’s employment opportunities on the basis of national origin.” Hospitality employers can establish policies that require employees to speak English in certain circumstances, such as in the presence of guests or for safety reasons. Such policies should be carefully crafted and communicated to employees.

(b) Washington Law

The right to be free from national origin discrimination is set forth in RCW 49.60.030 entitled “Declaration of Civil Rights.”

3.8. Marital Status

(a) Federal Law

Title VII does not address discrimination based on marital status except to bring it within the confines of sex discrimination.

(b) Washington Law

Washington law prohibits employment discrimination based on marital status. (See RCW 49.60.180.) Examples of prohibited marital status discrimination include refusing to hire a single

or divorced applicant because of a presumption that “married persons are more stable” or refusing to promote a married employee because of a presumption that he or she “will be less willing to work late and travel.”

3.9. Disability Discrimination

(a) Federal Law

The Americans With Disabilities (**ADA**) prohibits employers with 15 or more employees from discriminating on the basis of disability. The limited exemptions from coverage are confined to such entities as Native American tribes and private clubs. Enforcement of the employment-related provisions is administered by the Equal Employment Opportunity Commission (EEOC) which investigates charges and makes determinations. As with the other types of discrimination it investigates, the EEOC will issue a Notice of Right to Sue to a charging party at the completion of its investigation, whether or not it has found evidence of discrimination. Thereafter, plaintiffs may pursue their claims in court. The remedies available in court include orders of reinstatement, back pay, attorneys’ fees, compensatory and—if the discrimination has been carried out with “malice” or “reckless indifference”—punitive damages.

The ADA prohibits an employer from discriminating against disabled individuals in regard to the terms or conditions of employment if the individual is qualified to perform the essential functions of the job with or without reasonable accommodation. The accommodation cannot be an undue hardship on the employer or create a direct threat of harm to the employee or others.

This prohibition is construed quite broadly and includes more than the obvious concerns such as who is hired, and at what rate of pay. It also extends to training programs, attendance at professional seminars, participation in company sponsored social events, and who gets the office with the window. In short, every employment decision can be affected by the terms of the ADA.

In analyzing Title I situations, you should consider the following six questions:

1. Does the individual meet your *qualification standards*?
2. Is the individual *disabled*?
3. Can he/she perform the *essential functions* of the job in question?
4. If not, could they be performed with some *accommodation*?
5. Would the accommodation cause an *undue hardship* on your hotel?

6. Would placement of this person on the job, with or without accommodation, pose a *direct threat of harm* to the individual or others?

The ADA and its regulations contain very specific definitions related to all of the above bullet points. Hotels should take great care in making these determinations and seek legal counsel before making a final decision related to a disabled applicant or employee.

- (1) Applications and Interviews

It is important not to make any pre-employment inquiries about the existence, nature, or severity of an applicant's disabilities prior to a conditional offer of employment. Employment applications should be carefully reviewed to ensure they do not inadvertently violate the law by asking questions relating to prior injuries, diseases, disabilities and so on.

Pre-offer inquiries about the ability of an applicant to perform job-related functions are permitted, however. For example, if a job requires working outdoors, climbing ladders, or pushing heavy carts, then a hotel employer may ask whether the applicant can perform that function, with or without reasonable accommodations.

Additional recommendations about the interview process are discussed in Section 3.12, below.

- (2) Physical Examinations

The ADA permits physical examinations but only under fairly limited circumstances. A physical examination may not be used to pre-screen applicants for employment. Only after a conditional offer of employment has been made will a physical examination be allowed.

The offer of employment may be contingent upon passing the physical but, obviously, if a conditional offer is withdrawn, then this immediately raises questions of whether or not a reasonable accommodation was possible. Further, if a job offer is withdrawn and challenged, then the hotel will have to show that its decision was job related and consistent with business necessity.

- (3) Drug and Alcohol Screens

A pre-employment drug screen is not considered to be a "physical examination" and is therefore permissible under the Act. If you do pre-offer drug testing, then an inquiry concerning prescription medication should be made only if the applicant tests positive. The medical review officer can then ask if the applicant has a valid prescription to explain the result. Alcohol screens, however, are medical examinations and are prohibited at the pre-employment stage.

(4) Other Medical Exams/Fitness for Duty Exams

Once the hurdles of a conditional offer and a pre-placement physical examination are cleared, you may conduct examinations required by other laws (DOT physicals for example) and offer voluntary wellness programs. You are restricted in requiring your employees to undergo additional physical examinations, however, to those which are job-related and consistent with business necessity. A physical examination is job-related and consistent with business necessity when the employee:

- Is having difficulty performing his or her job effectively;
- Becomes disabled; or
- Requests an accommodation on the basis of a disability.

All results of such pre- or post-employment physical examinations—indeed all medical information gathered on employees—must be kept confidential and stored in a medical file separate from the employee’s regular personnel file. Access to such records should be controlled and limited to those who have a genuine “need to know.”

With a law as complex as the ADA, it is not sufficient merely to be in good faith, nor to try and treat disabled individuals with courtesy and respect, although this is obviously common sense. It is also strongly recommended that hotels:

- review and revise applications for employment;
- update internal policies;
- consider carefully the use of pre-employment physicals;
- institute (or change if necessary) a safe and effective substance abuse policy;
- educate supervisors on the need to accommodate qualified disabled individuals;
- adopt a formal policy announcing compliance with the law;
- and review, and update if necessary, all written job descriptions, carefully delineating essential job functions.

(b) Washington Law

RCW 49.60.030 enforces the right of people to be free of discrimination because of any sensory, mental or physical disability. The Washington State Human Rights Commission has

adopted WAC 162-22, entitled “Employment—Handicapped Persons”, to implement Washington’s law.

WAC 162-22-025 provides that it is an unfair practice for any employer, employment agency, labor union, or other person to:

- Refuse to hire, discharge, bar from employment, or otherwise discriminate against an able worker with a disability or because of the use of a trained dog guide or service animal by an able worker with a disability; or
- Fail or refuse to make reasonable accommodation for an able worker with a disability or the use of a trained dog guide or service animal by an able worker with a disability, unless to do so would impose an undue hardship; or
- Refuse to hire or otherwise discriminate against an able worker with a disability because the employer would be subject to the requirements of this chapter if the person were hired, promoted, etc.

Washington law also protects employees who are infected with HIV and Hepatitis C. RCW 49.60.172 “Unfair Practices With Respect to HIV or Hepatitis C Infection.” This law states:

(1) No person may require an individual to take an HIV test or hepatitis C test as a condition of hiring, promotion, or continued employment unless the absence of HIV or hepatitis C infection is a bona fide occupational qualification for the job in question.

(2) No person may discharge or fail or refuse to hire any individual, or segregate or classify any individual in any way which would deprive or tend to deprive that individual of employment opportunities or adversely affect his or her status as an employee, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis of the results of an HIV test or hepatitis C test unless the absence of HIV or hepatitis C infection is a bona fide occupational qualification of the job in question.

State law provides that a bona fide occupation qualification exists when performance of a particular job can be shown to present a significant risk, as defined by the Board of Health, of transmitting HIV or Hepatitis C infection to other persons, and there is no way to eliminate risk by restructuring the job. This issue is a legal area that is developing rapidly, and so counsel should be consulted at all times.

Note: The application of the Americans With Disabilities Act and the Washington Law with regard to public accommodations is discussed in PART III, Chapter 7.

3.10. Affirmative Action

No employer in the private sector needs to fulfill any requirements of an affirmative action plan. Nothing in Title VII or Washington law requires affirmative action.

The federal government, however, through Executive Orders 11246 and 11375, requires that all nonexempt federal government contracts over \$10,000 impose upon government contractors and sub-contractors the obligation: (1) not to discriminate on the basis of race, color, religion, sex, or national origin and (2) "to take affirmative action" to ensure that applicants and employees are employed without regard to such factors. Furthermore, federal contractors with contracts of at least \$50,000 and with 50 or more employees are also required to adopt formal written affirmative action programs and to set goals for minorities and women in job categories where they are "under-utilized" in comparison to their "availability" in the labor market. These affirmative action obligations are enforced by the Office of Federal Contract Compliance Programs (OFCCP) within the U.S. Department of Labor.

3.11. Discrimination in Advertising for Employment

Advertising for employment is covered by RCW 49.60.180 and 49.60.200, as well as WAC 162-12-140. The Washington State Law Against Discrimination (RCW 49.60.030, et seq.) states it is an unfair business practice for any employer:

to print, or circulate ... any statement, advertisement, or publication or to use any form of application for employment... which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

Hotels are not permitted to publish help-wanted advertisements which indicate a preference or limitation for or against applicants in any of the above-referenced protected categories. Separate "help-wanted - male" and "help-wanted - female" listings (unless sex is a "bona fide occupational requirement") are unlawful. Hotels should avoid the use of sex-preferring job titles, such as: "bellboy" (use "bellhop," "luggage handler," "hotel assistant"); "barmaid" (use "bar helper," "cocktail server," "table server"); "busboy" (use "busser," "dish busser," "cafeteria worker"); "doorman" (use "door attendant"); "janitor" or "janitress" (use "custodian," "maintenance worker"); "maid" (use "housekeeper" or "room cleaner") and other "ess" or "ette" job title such as "waitress" and "hostess." "Meal attendant," "table server," "meal server" are preferred. Washington's Human Rights Commission discourages the use of "male or female" in help-wanted advertisements, to counteract stereotype connotations of sex preference

for woman applicants for traditional “women’s work” and male applicants for jobs that have come to be known as “men’s work.” See WAC 162-16-080, 090.

3.12. The “Do’s and Don’ts” of the Employee Interview

Hotel management should be familiar with the Americans with Disabilities Act and with similar Washington State laws. These laws prohibit discrimination against a disabled applicant who can, with or without reasonable accommodations, perform the essential functions of a job. While the ADA and Washington law require a careful analysis of the exact needs of each disabled person, it is improper to inquire whether an applicant has a disability, or about the nature or severity of a disability.

It is important not to make any pre-employment inquiries about the existence, nature, or severity of an applicant’s disabilities prior to a conditional offer of employment. Your employment applications should be carefully reviewed to ensure they do not inadvertently violate the law by asking questions relating to prior injuries, diseases, disabilities and so on.

Pre-offer inquiries about the ability of an applicant to perform job-related functions are permitted, however. You may also state, before making a conditional offer of employment, the requirements of your company’s attendance policy, and ask whether the applicant can meet them. On the other hand, do not ask an applicant how often he will need to take leave for treatment because of incapacity resulting from a disability. Questions about an applicant’s general attendance record on other jobs, however, and inquiries designed to determine if he or she abused leave (such as asking how many Mondays or Fridays he or she was absent from work) are legitimate.

The ADA permits physical examinations but only under fairly limited circumstances. A physical examination may not be used to pre-screen applicants for employment. Only after a conditional offer of employment has been made will a physical examination be allowed.

The offer of employment may be contingent upon passing the physical but, obviously, if a conditional offer is withdrawn this immediately raises questions of whether or not a reasonable accommodation was possible. Further, if a job offer is withdrawn and challenged, the hotel will have to show that its decision was job related and consistent with business necessity.

Hotel management should **not** ask the following questions in the pre-conditional offer stage :

- Are you disabled? Do you have a disability?
- List any diseases for which you have been treated in the past.
- List any reason for which you have been hospitalized.

- Have you ever been treated by a psychiatrist or a psychologist?
- Are you taking any prescribed drugs?
- Have you been treated for any addiction or alcoholism?
- Have you ever filed a worker's compensation claim?
- Is there any health related reason why you might not be able to perform the job for which you are applying?

Hotel management **may** ask about the ability of prospective employees to perform the work in the following ways:

- Can you perform the duties listed in the job description?
- Can you type and answer the telephone?
- Can you drive a van? Climb a ladder? Lift heavy boxes over your head?
- Can you stand on concrete continuously for eight hours each day?

Note: RCW 69.06.030 forbids the hiring of any person afflicted with any contagious or infectious disease to work in or about any place where unwrapped or unpackaged food and/or beverage products are prepared or sold. Hotel management, when hiring for positions within the food and beverage department, would be allowed to ask a prospective applicant if he or she has suffered from a contagious or infectious disease.

In addition to questions regarding disabilities, hotel management should not ask questions regarding gender, age, sexual orientation, marital status, race and religion because they tend to elicit information that would allow the employer to discriminate against the applicant based on such protected status.

Hotel management should also be cautious when asking questions about criminal records. The EEOC has issued strict guidance on the use of criminal conviction records in employment. Though it is not unlawful to ask about conviction of a felony, you should not inquire into arrest records. Refusing employment on the basis of criminal background may be considered unlawful discrimination against minorities if it can be demonstrated that such minorities are arrested in disproportionate numbers to non-minorities.

“Helpful hints” for employers are outlined below, and, although not comprehensive, they enable hotel management to understand the kinds of questions that should *not* be asked in order to avoid charges of discrimination:

- **Age.** A prospective employee may be asked if he/she meets the lawful minimum age to accept employment. Otherwise questions regarding age should be avoided.
- **Religion.** Employers should not ask about an applicant’s religion. However, employers may ask if an applicant can work on given days if work on such days is necessary for the job.
- **Citizenship.** Employers should ask only if the applicant is able to demonstrate that he/she has a legal right to be employed in the United States.
- **Gender and Race.** Questions regarding gender and race should always be avoided.
- **Height and Weight.** Questions regarding height and weight unless they are directly relevant to the job should be avoided.
- **Education.** Questions regarding educational background should be job related.
- **Financial Status and Residence.** Questions that inquire into financial status, the length of residency, or whether the applicant owns or rents a home should be avoided.
- **Children and Child Care.** Questions regarding children and child care or the ability to obtain such care can be considered to be discriminatory against women. Such questions should be avoided.

Hotel management should be trained to be aware of discrimination laws and to apply objective standards in the hiring process. Often a “script” of lawful questions is helpful, not only to assist the interviewer in avoiding sensitive questions, but also as a record of questions asked to defend the hotel in subsequent litigation if necessary.

Hotel management should review the information they seek in the hiring process and avoid those areas that may lead to charges of discrimination. Hotel management who are unsure of their current interviewing process should consult with legal counsel for an analysis of their legal exposure and recommendations for improvement in their hiring processes.

3.13. Preventive Measures

Virtually all employees are potentially in some protected class, and since the courts have generally made it easy for a plaintiff to assert a discrimination claim, it is essential that employers proceed cautiously when making all employment decisions. Here are some practical steps you can take to minimize your company's liability from these suits.

(a) Performance Evaluations

It is quite common for employers to terminate an employee for "poor performance," even though the employee had repeatedly received "satisfactory" or "good" performance evaluations. Frequently, "satisfactory" is the worst rating a business gives. If the employee is eventually terminated because of performance deficiencies and then files a discrimination suit, you could be placed in the difficult position of having to convince a judge or jury that a "good" evaluation actually means "bad." To avoid this problem, candid and accurate evaluations are essential. If someone is not performing satisfactorily, he or she should be clearly informed of the deficiencies. To the extent written forms are used, it is better if they are filled out in narrative form rather than relying on an arbitrary numbering system.

(b) Supervisor Training

As noted earlier, the sheer volume of anti-discrimination statutes makes it difficult for even the most well-intentioned employer or supervisor to avoid discrimination claims. Because supervisors may simply not be aware of their statutory obligations, one way to minimize the potential for claims of discrimination is to provide them with regular training and information on new developments in anti-discrimination laws. Regular supervisory training on general management practices is also a wise investment.

(c) Procedure for Handling Complaints

A hotel can help immunize itself from liability for most harassment claims by instituting a complaint procedure for its employees. Such a policy is a good idea for complaints of all kinds. To be effective, the policy should include, at a minimum, a strongly-worded prohibition of harassment and a clear description of the reporting steps an employee is to take when harassment occurs, including a by-pass procedure so that an employee can report a complaint outside his/her chain of command and a mechanism for prompt, remedial action.

Once you become aware of an employee complaint, it is imperative that an investigation be conducted, and, where appropriate, remedial action be taken quickly. The severity of the company's action should mirror the severity of the harassment or other concern. For instance, if an employee is repeatedly touching fellow workers in an inappropriate and offensive manner, the hotel would not likely immunize itself from liability by merely transferring the offending

employee to a new department. In such an extreme situation, immediate suspension or dismissal may be the only appropriate action.

It is a good idea not only to include the policy in any employee handbook, but to post it separately, as well, on bulletin boards. The policy should be discussed in detail during new hire employee orientation. Requiring employees and supervisors to sign acknowledgments that they have received a copy of the policy or training concerning its provision is also advisable. In addition, re-distribution of the policy on an annual basis (such as including it with the first paycheck of every year) is also a good way to demonstrate the importance of this policy.

(d) Employment Policies

Because many of the anti-discrimination statutes allow adverse impact challenges, it is important for you to reevaluate the standards used when making hiring, promotion, or discharge decisions. Make certain that your current requirements are job-related, and eliminate those that are only marginally related to important functions of the job or that do a poor job of predicting a person's ability to accomplish defined essential tasks.

(e) Hiring and Firing

Hiring and firing top the list of employment actions most likely to result in a discrimination claim. Clear and consistent procedures for screening, interviewing, and hiring can reduce your risk significantly. Exercising care in the termination process is even more important.

Your policies should be flexible enough to allow for immediate termination in unusual or egregious cases, but in more typical discharges – such as those involving unsatisfactory performance or poor attendance – you should follow a progressive approach to discipline, documenting problems along the way. Employees who are shocked and surprised at being discharged are far more likely to react with anger and file a claim than those who have received advance counseling and warning.

Even where serious misconduct appears to warrant immediate termination, try never to fire an employee “on-the-spot” or in anger. Investigate carefully, identifying and securing key documents and interviewing both the accused and others who may have pertinent information. Where the facts, if true, would likely result in termination, it is often wise to suspend the employee without pay pending completion of your investigation. Allowing an individual to continue working after being accused of serious misconduct raises questions about whether the hotel really considers the conduct a sufficient basis for discharge.

The discharge interview should be conducted in private, with dignity, and with an extra management representative present. Assume that your conduct and statements in the interview will eventually be related in court. All of this is, of course, a kind of “due process.” These approaches will certainly reduce the likelihood of litigation, and if you should nevertheless get

sued, any legalities in the case will be far less important to the outcome than whether, in the minds of the jurors, you treated the employee fairly.

3.14. Summary and Conclusions

- Hotel employers must comply with all applicable federal, state and local laws relating to employment discrimination and harassment.
- Generally, those laws prohibit discrimination and harassment on the basis of an applicant's or employee's race, color, sex, sexual orientation, national origin, religion, age, citizenship status, military service obligations, genetic information, marital status and disability. Some local ordinances add sexual orientation, gender identity, and political ideology among others to the list of protected characteristics.
- In addition to the prohibitions on discrimination and harassment, federal and state laws require an employer to reasonably accommodate an applicant's or employee's *sincerely held religious beliefs* to the extent they conflict with a requirement of employment (unless the employer can prove an undue hardship) and a qualified applicant's or employee's *disability* (unless the employer can prove an undue hardship). Hospitality employers should take care to identify these situation and comply with these stringent requirements.
- Under the laws prohibiting disability discrimination there are very specific prohibitions and requirements related to medical inquiries and physical exams of applicants and employees, and the maintenance of medical records for employees, among other things. Hotel management should be familiar with the requirements of the Americans with Disabilities Act and the Washington law on employment of persons with handicaps and consult with legal counsel to discuss compliance with these laws.
- Hotels that have contracts with the federal government should be familiar with the requirements of the various Executive Orders which may require the hotel to maintain affirmative action plans.
- Hotel management must take seriously the issue of sexual and other forms of harassment. Prudent employers will establish and enforce a no-harassment policy, which defines harassment, includes a complaint procedure and provides for discipline in the event of a violation of the policy. Supervisors and managers should be trained to recognize violations of the policy and on how to respond to complaints of harassment.
- Establish good human resources practices to include: a legal and effective hiring process (applications, reference checks, background checks and interviews), property-wide and departmental policies and procedures, a policy for handling complaints, a meaningful performance management program (with annual evaluations and follow up), a disciplinary

procedure that aims to correct performance and behavior problems, a legally defensible discharge procedure and supervisory training on how to implement these best practices.

Chapter 4: Employment Testing

4.1. Use of Polygraphs

In 1988, the federal Employee Polygraph Protection Act (29 U.S.C. § 2001, et seq.) became effective. This law does not completely prohibit the use of lie detector tests, but it does establish severe restrictions on when and how such tests may be used.

The Act prohibits most private employers from requiring, requesting, causing or suggesting that any employee or applicant submit to a lie detector test. Employers may not take any adverse employment action against a current or prospective employee either (1) because the employee refuses to submit to a lie detector test, or (2) because of the test's results. "Adverse employment action" includes discharge, discipline, or denial of employment or promotion.

Employers may request, but may not require, an employee to submit to a lie detector test as part of an investigation of work place theft or other incident that causes economic loss to the employer's business. However, several restrictions apply.

- the employee must have access to the property;
- the employer must have a reasonable suspicion that the employee was involved in the incident under investigation;
- before the test, the employer must provide the employee with a signed, written statement of the specific reasons for requiring the test;
- after the test, the employer may not discipline or discharge the employee on the basis of the test results without additional supporting evidence.

The Act also creates detailed procedures which must be followed before, during, and after any lie detector test. For instance, the employee or prospective employee must have an opportunity to review the test questions and be permitted to terminate the test at any time. The examiner may not ask any question that was not presented in writing for the employee's review before the test and may not ask any questions concerning the employee's religious, political or union beliefs, opinions regarding racial matters, or any matter relating to sexual behavior.

Employers who violate the Employee Polygraph Protection Act are subjected to civil fines of up to \$10,000 and civil suits by the Secretary of Labor, employees, or job applicants. Employees or job applicants who prevail against the employer in such a suit may recover damages, attorney fees, and job reinstatement.

An employer's use of lie detectors is also severely restricted under Washington law. RCW 49.44.120 states:

It shall be unlawful for any person, firm, corporation or the State of Washington ... to require, directly or indirectly, that any employee or prospective employee take or be subjected to any lie detector or similar tests as a condition of employment.

The few exceptions to this law are prospective employees of state law enforcement agencies, positions where national security is involved, and persons who may administer controlled substances. Any employer subjecting persons to lie detector tests may be charged with a misdemeanor and may be liable for \$500 plus actual damages and reasonable attorney fees.

With the above restrictions and risks in mind, it is very difficult for a hotel to justify and conduct polygraph testing in the employment context.

4.2. Substance Abuse Testing

There are currently no federal laws or regulations governing pre-employment drug testing for private employers. Similarly, in Washington, there are no statutes that specifically bar employment related alcohol or drug screening for private employers. Washington hotel management will want to take steps, however, to guard against invasion of privacy claims and to prevent the unauthorized disclosure of test results. Hotel management should carefully review with legal counsel to determine the extent to which pre-employment testing is permissible

If a hotel conducts pre-employment, “reasonable suspicion”, or other types of drug testing, the employer should prepare a written drug and alcohol policy, which provides notice to applicants and employees of the intent to test in certain circumstances, lists prohibited conduct, and states the consequences of violating the policy, failing the test or refusing to cooperate in the test. Hotel employers should consult with legal counsel to prepare a legally compliant drug and alcohol testing policy.

For pre-employment testing, a hotel employer may want to consider conducting the drug test after a conditional offer of employment has been made to the applicant. The applicant or employee should consent to testing before the testing occurs and the employer should ensure that records of the tests are kept in a confidential location so that only authorized personnel will have access to the results.

Before a hotel considers establishing a drug or alcohol testing program for its employees, it should be aware of the federal and state laws which may be applicable, as well as union contracts.

4.3. Drug Addiction and Alcoholism

Under the Americans with Disabilities Act, 42 U.S.C. § 12101 (ADA), an alcoholic is considered to be “disabled.” While a hotel employer may prohibit an alcoholic employee from

reporting to work impaired by alcohol, it is unlawful to discriminate against that employee on the basis of his or her “disability.” Individuals who are addicted to illegal drugs are not considered “disabled” under the ADA, although a recovered drug addict would be considered “disabled.” The ADA is discussed in more detail in Section 3.9, above.

Washington law generally parallels the approaches developed under federal discrimination laws. With respect to alcoholism, however, Washington law has departed from the federal law. Although people with a history of alcohol abuse are considered disabled under the ADA, they are not necessarily handicapped under a 1989 decision by the Washington Supreme Court interpreting the Washington Law Against Discrimination. In *Phillips v. Seattle*, 111 Wn.2d 903 (1989), the court held that the issue of whether alcoholism is a disability is factual in nature and must be left for the trier of fact to decide in each case.

Attendance at a drug or alcohol treatment program would generally qualify an eligible employee for leave under the federal Family and Medical Leave Act (for those hospitality employers subject to the FMLA).

The State of Washington offers a discount on workers’ compensation premiums for employers who participate in the state fund and who implement a comprehensive drug and alcohol policy. To qualify, an employer must have a policy (including pre-employment and post-accident testing) and a employee assistance program, and must conduct certain employee and supervisor training.

4.4. Medical Marijuana

The issues related to the use of medical marijuana are often confusing to employers. Marijuana possession is generally illegal in Washington. The medical marijuana law, RCW 69.51, provides protection from arrest or other criminal sanctions for qualified patients and designated caregivers who are complying with the law. People who qualify have a valid reason to possess a 60-day supply of marijuana. However, medical marijuana is not legal under federal law. There is no protection for people who are arrested or charged under federal law.

In a victory for employers, the Washington Supreme Court ruled in *Roe v. Teletech Customer Care Management*, 216 P. 3d. 1055 (2009), that Washington’s Medical Use of Marijuana Act does not protect medical marijuana users from adverse hiring or disciplinary decisions based on an employer’s drug test policy. The Supreme Court ruled in favor of the employer in that case, holding that the medical marijuana law provides an affirmative defense to state criminal prosecutions of qualified medical marijuana users, but “does not provide a private cause of action for discharge of an employee who uses medical marijuana . . . nor does [the law] create a clear public policy that would support a claim for wrongful discharge in violation of such a policy.” The Court’s holding applies regardless of whether the employee’s marijuana use was while working or while off-site during non-work time.

The implications of medical marijuana continue to be a developing area in many states, including Washington. Hotel employers should be certain to consult legal counsel to properly develop and implement a substance abuse policy and when enforcing the policy.

4.5. Summary and Conclusions

- The Federal Employment Polygraph Protection Act prohibits most private employers from requiring, requesting, causing or suggesting that any employee or applicant submit to a lie detector test.
- Under the Federal Act an employer may request, but may not require, an employee to submit to a lie detector test as part of an investigation of work place theft or other incident that causes economic loss to the employer's business. There are, however, significant restrictions and requirements for such testing.
- Washington law makes it unlawful "to require, directly or indirectly, that any employee or prospective employee make or be subjected to any lie detector test as a condition of employment."
- Drug and alcohol testing of employees must be conducted in compliance with federal and state law. In addition, issues related to the treatment of alcoholics and recovering drug addicts under the Americans with Disabilities Act should be carefully reviewed with legal counsel.

Chapter 5: Employee Termination

No hotel manager enjoys the employee termination process. No matter how justified the termination is, the experience is never a pleasant one for either party.

Even beyond the actual experience of employee termination, there can be additional negative factors. The number of administrative claims and lawsuits filed by employees who believe they have been wrongfully terminated has grown dramatically in Washington State, as have the costs and damages associated with such cases. If an employee successfully challenges his or her termination, the hotel employer may be liable for back pay, punitive damages, possible reinstatement and attorney's fees, not to mention the related injuries to Hotel reputation and general employee morale.

Over the years, the United States Congress, the Washington State Legislature, and our courts have established a complicated and confusing web of employee rights and remedies. Hotel employers should examine and refine their termination practices. They need to ensure that employee terminations are carried out in a manner that will not only avoid liability but also avoid claims for damages.

Fortunately for the hospitality industry, there are many policies and practices that can be implemented to reduce the likelihood of claims by disgruntled, terminated employees. It is the purpose of this chapter to provide hotels with a checklist of procedures to use in processing an employee termination.

5.1. "At Will" Status

Washington State is an "at-will" state.

At-will employment means that unless an employee is otherwise protected by law or contract, either party—the hotel or the employee—may terminate the employment relationship for a good reason, a bad reason, or no reason at all, with or without cause and without prior notice. *See Cole v. Red Lion*, 91 Wn. App. 1038 (1998). Some hotels, by contract or by its policies, may opt to give up their "at-will" status and enter into an agreement that they will terminate their employees only for good cause. If a hotel has waived its "at-will" status, it must be able to demonstrate "good cause" for termination of an employee.

Even where a hotel has retained its "at-will" status, it is nevertheless a good practice to have a good reason to terminate an employee. Juries, judges, arbitrators and hearing examiners expect that employers generally will terminate employees for good reason and after notice has been given to the employee of his or her deficiencies. Therefore it is highly advisable that a hotel

carefully investigate the reasons for termination to ensure that grounds exist for termination and that these reasons are sufficient to survive a challenge by an otherwise protected employee.

Virtually all employees are potentially in some protected class, and since the courts have generally made it easy for a plaintiff to assert a wrongful discharge or discrimination claim, it is essential that employers proceed cautiously when making all employment decisions. Below are some practical steps you can take to minimize your hotel's liability from these suits.

5.2. Documentation

(a) Performance Evaluations

Candid and accurate evaluations are important. Employers too often engage in "grade inflation." If an employee repeatedly receives "satisfactory" or "good" performance evaluations and is then terminated for performance, the employer could later be placed in a difficult position: the employer may have to convince a judge or jury that a "good" evaluation actually means "bad." Avoid this problem by conducting candid and accurate evaluations. If someone is not performing satisfactorily, inform him or her of the deficiencies and suggest a timeline for improvement. Make clear records of these evaluation events. To the extent written forms are used, it is better if they are filled out in narrative form rather than relying on an arbitrary numbering system.

(b) Job Descriptions

Job descriptions should contain current requirements (both mental and physical) that are job-related. Eliminate those that are only marginally related to important functions of the job or that do a poor job of predicting a person's ability to accomplish defined essential tasks.

(c) Employment Policies

Make certain that your handbook and other policies are lawful, up-to-date and relevant. Your policies should be flexible enough to allow for immediate termination in unusual or egregious cases, but in more typical discharges—such as those involving unsatisfactory performance or poor attendance—you should follow a progressive approach to discipline, documenting problems along the way. Employees who are shocked and surprised at being discharged are far more likely to react with anger and file a claim than those who have received advance counseling and warning.

5.3. Investigation and Documentation

Successfully defending a wrongful termination case may depend on the documents supporting the reasons and facts supporting the decision. Even when serious misconduct appears

to warrant immediate termination, resist the urge to fire an employee “on-the-spot” or in anger. Investigate carefully, identifying and securing key documents and interviewing both the accused and others who may have pertinent information. When the facts, if true, would likely result in termination, it is often wise to suspend the employee without pay pending completion of your investigation. Allowing an individual to continue working after being accused of serious misconduct raises questions about whether the company really considers the conduct a sufficient basis for discharge.

Hotels should train their managers to properly investigate employee misconduct before a final decision is made about discipline or termination. A manager charged with the responsibility of anticipating the lawfulness of a prospective termination should be able to identify potential claims and appropriately handle the termination process. This manager should be given the authority to assure both accountability and supervision of the termination process.

A determination should also be made whether the employee is in a protected status (based upon race, gender, disability, age, etc.). Such protected status makes any termination complicated, and the existence of such status will often precipitate litigation regardless of the actual reason for the termination. If an employee to be terminated is in a protected status, the termination must be handled carefully, must be supported by documentation of the actual reason for the termination and must be consistent with discipline/termination in other similar situations. You should involve legal counsel if you have concerns about a possible wrongful termination claim.

5.4. Record Keeping

Federal and state laws dictate the required record retention periods for many personnel records/personnel files—payroll records, immigration records, pension and welfare plan administration, and records regarding job injuries. All such records will be necessary to defend a wrongful termination claim.

5.5. Review of Employee Files

Before termination occurs the employee files should be reviewed. Under Washington State law employees have access to inspect their personnel files on an annual basis. See RCW 49.12.240. The Washington Department of Labor and Industries interprets this provision to include former employees, who retain the right to inspect their personnel files after termination.

It is particularly necessary to review files regarding employee performance, evaluations and compensation to ensure the documents are both current and accurate. It is also necessary to compare the proposed termination with other disciplinary actions in other similar cases to ensure that discipline is being applied consistently and fairly. Disparities in treatment between employees for the same relative conduct may become grounds for a discrimination claim.

5.6. Termination Interview

The termination interview should be conducted in private, with dignity, and with an extra management representative present. Assume that your conduct and statements in the interview will eventually be related in court. These approaches will certainly reduce the likelihood of litigation, and if you should nevertheless get sued, any legal issues in the case will be far less important to the outcome than whether, in the minds of the jurors, you treated the employee fairly.

5.7. Notice of Termination

Consider providing employees written notice of termination. Oral notices can be misconstrued and can lead to a debate over what was said. A written notice, on the other hand, can clearly state the reason for termination and demonstrate to the employee that the termination was lawful.

The written notice should express the following:

- the effective date of termination;
- a description of reason for the termination; and
- any expectations of the employee up to and following the termination date.

When providing notice of termination, hotels should first check their personnel policies or labor agreements to determine if the policies include any required notification procedures. If such notification procedures exist, they should be followed to avoid a wrongful termination suit.

5.8. Exit Interviews

Along with notification of termination, it is advisable to conduct exit interviews in writing to elicit employee responses to the termination. Often, in such an interview, an employee will volunteer a reaction to the termination and express reasons for dissatisfaction with the manner in which the termination was handled. Those reasons can be used to analyze whether the concerns raised by the exiting employee are legitimate. If it is, the hotel has the opportunity at that time to resolve the issues raised by the employee and ward off potential litigation.

Also, exit interviews will allow employees to express their concerns about their employment. It helps the employee feel that they have had a fair opportunity to discuss issues.

Finally, hotel employers should use the exit interview to conclude its business with the employee. Consider using an exit checklist that addresses the following:

- Vacation Due
- Arrangements for Last Paycheck
- Paycheck for all earned but unused vacation pay
- Unemployment Filing Procedures and Separation Notice
- COBRA Information
- Life Insurance Conversion
- Retirement/Savings Payout Options
- Outstanding Expense Payments/Requests

The exit checklist should also cover return of the following items:

- ID Card/Badge
- Door Key(s) or Electronic Cards
- Locker Key
- Credit Cards
- Uniform(s)
- Company Records or Manuals
- Computer Privileges/Passwords Deleted

Terminated employees should also be assured that accrued benefits will be paid. For example, questions regarding payment of the last pay check, accrued vacation, and overtime should be resolved at the time of termination. See RCW 49.52.060 and 070. The continuation of health benefits should be carefully explained, as well as the disposition of pension/retirement plan accounts or proceeds. Resolution of outstanding fringe benefit issues can go along away in preventing a lawsuit.

5.9. Severance Agreement and Release

Finally, when the likelihood of a legal challenge is high, hotels should consider incentives in exchange for a promise from the employee to release claims. Such a release, in written form, is subject to close scrutiny by Washington courts and will be enforced only if it is clear that the employee understood and agreed to its contents. Some claims, however, may not be subject to release. For example, workers compensation laws preclude the release of claims regarding work relating injuries. All releases should be carefully reviewed by your legal counsel.

Federal law requires specific provisions for the release of an age discrimination claim (when the employee is over the age of 40):

- The release must contain a specific statement that the employee is releasing the hotel from an age discrimination claim and reference the specific federal law
- The employee must be informed that he/she is entitled to see an attorney at his/her own cost to review the release.
- An employee must be provided 21 days to consider the offer and release and 7 days to revoke it.

There are additional requirements for releases obtained from employees in connection with a group termination or reduction in force.

If hotel management feels that a termination decision is likely subject to challenge by the employee, then hotel management should consult with legal counsel to analyze the claim and consider whether a release should be obtained that complies completely with state and federal law.

The termination of employees can be difficult and it will not get easier. Careful analysis and processing of disciplinary action leading up to and terminations are fundamental to the continuing operation of a hotel or motel.

The key is to use common sense. *Always:*

- Investigate the reasons for termination;
- Maintain your employee personnel files;
- Make sure the disciplinary actions are fair and consistent; and
- Always follow your own policies and procedures governing employee discipline, as well as laws governing the employment relationship.

5.10. Summary and Conclusions

- Hotel management needs to ensure that the decision to terminate an employee and the manner in which the termination is carried out can be defended if challenged.
- Washington State is an “at will” state. In other words, unless an employee is otherwise protected by law or contract, the hotel may terminate an employee with or without reason and with or without notice.
- Hotels should train their management to properly investigate and handle disciplinary actions and terminations.
- The key to successfully defending a wrongful termination case is a collection and maintenance of records documenting the reasons and facts supporting a termination.
- Under Washington law, employees have access to their personnel files on an annual basis.
- It is advisable to conduct exit interviews in writing to elicit employee responses to the termination and collect company property.
- Terminated employees should be assured that all accrued benefits will be delivered.
- Written releases should be considered with terminated employees when their is likelihood of a claim being filed. You should obtain the advice of legal counsel when utilizing a written release of claims -- especially when the employee is over the age of 40.
- Always:
 - Investigate carefully before making the decision to terminate an employee;
 - Maintain your employee personnel files;
 - Make sure the disciplinary actions are consistent within the hotel; and
 - Always follow your internal policies and procedures on discipline and discharge.
 - Be familiar with and follow all laws governing the employment relationship.

PART III: GENERAL INNKEEPER OPERATION

Chapter 1: Licensing And Regulation Of Hotels

1.1. State Regulation - Transient Accommodations

RCW 70.62, et seq., is the specific governing law for the regulation of transient accommodations. Hotel management in Washington should be familiar with its provisions.

The statute defines “transient accommodation” to include any facility such as a hotel, motel, condominium, resort, or any other facility or place offering three or more lodging units to travelers and transient guests. RCW 70.62.200 states,

“The purpose of this chapter is to provide for the development, establishment, and enforcement of standards for the maintenance and operation of transient accommodations through a licensing program to promote the protection of the health and safety of individuals using such accommodations in this state.”

The statute and its implementing regulations are administered by the Washington State Department of Health, and specifically the secretary of the Washington State Department of Health.

1.2. Maintenance of Guest Registers

Although RCW 70.62 et seq. provides a specific framework for the regulation of hotels, special provisions applicable to the hotel’s guest registry are also found under the “miscellaneous” business regulations of Title 19 of Washington’s Revised Code. Under RCW 19.48.020, every hotel must keep a record of the arrival and departure of its guests “in such a manner that the record will be a permanent one for at least one year from the date of departure.” This statute is very old and predates computers, but presumably electronic records are sufficient to satisfy its requirements.

As stated in PART I, Section 4.1, the guest register is “private” under our State’s constitution. It therefore has certain protections against unreasonable searches by government officials, and the hotel may also be required to protect it from disclosure. See PART I, Section 4.2. See also PART III, Section 8.3 for compliance with the Patriot Act in the registration of guests.

1.3. License Requirements

RCW 70.62.220 requires that each hotel must secure an annual operating license from the Facilities and Services Licensing Division of the Washington State Department of Health. A hotel is required to pay a fee for its annual license and inspection as set forth in WAC 246-360-990. Fees are subject to change, so be sure to check the current fee schedule before filing an application.

The regulation states as follows:

(1) The license or applicant must submit:

(a) An annual fee according to the following schedule:

Number of Lodging Units	Fee
3-10	\$164.10
11-49	\$326.30
50-over	\$657.00

(b) A late fee of \$54.60, in addition to the full license renewal fee, if the full license renewal fee is not received by the department on the expiration date (see RCW 70.62.260)

(c) An additional fee of \$54.60 for an amended license due to changing the number of lodging units of the name of the transient accommodation

(2) The department shall refund fees paid by the applicant as follows:

(a) If an application has been received but no on-site survey or technical assistance has been performed by the department, the applicant gets a refund of 2/3 the fees paid, minus a fifty dollar processing fee.

(b) If an application has been received and an on-site survey has been performed by the department, the applicant gets a refund 1/3 the fees paid, less a fifty dollar processing fee.

(c) No fees paid by the applicant will be refunded if any of the following applies:

(i) More than one on-site visit for any purpose has been performed by the department;

(ii) One year has elapsed since an initial licensure application is received by the department, but no license is issued because applicant failed to complete requirements for licensure; or

(iii) The amount to be refunded as calculated by (a) or (b) of this subsection is ten dollars or less

Note: It appears that the licensing fees of WAC 246-360-990 are tipped against the small hotel operator because the marginal cost of inspection and administration as the number of units increases is negligible. The following chart shows the proportional impact of the fee on hotels of various sizes:

Number of units		Fee	Cost Per Unit	
<u>Minimum</u>	<u>Maximum</u>		<u>Minimum</u>	<u>Maximum</u>
3	10	164.00	54.67	16.40
11	49	326.30	29.66	6.67
50	100	657.00	13.14	6.57
	200	657.00		3.29
	300	657.00		2.19
	400	657.00		1.64
	500	657.00		1.31
	600	657.00		1.09
	700	657.00		0.94
	800	657.00		0.82

WAC 246-360-020 provides further information and requirements for licensing of “transient accommodations.” It states:

- (1) A person must have a current license issued by the department before operating or advertising a transient accommodation. A license is effective for one year from date of issuance
- (2) An applicant for initial licensure shall submit to the department, sixty days or more before commencing business, an application which shall include the following:
 - (a) A completed application on a form provided by the department;
 - (b) A completed self-inspection on a form provided by the department;
 - (c) The fee specified in WAC 246-360-990;
 - (d) A completed uniform business identifier number form provided by the department; and
 - (e) Other information as required by the department.
- (3) A licensee must apply for license renewal annually on or before the expiration date of the current license by submitting to the department, by mail postmarked no later than midnight on the license expiration date, or by presenting to the department personally or electronically no later than 5:00 p.m. on the expiration date, a renewal application which shall include the following:
 - (a) A completed application on a form provided by the department;
 - (b) A completed self-inspection on a form provided by the department;
 - (c) The fee specified in WAC 246-360-990;
 - (d) A completed uniform business identifier number form, provided by the department; and
 - (e) Other information as required by the department.
- (4) An applicant must pass, to the satisfaction of the department, an on-site survey prior to the department issuing an initial license or reinstating an invalid license.

- (5) If the licensee fails to submit a complete renewal application meeting the requirements of subsection (3) of this section by the license expiration date, the license shall become invalid on the thirty-fifth day after the license expiration date unless:
- (a) All deficiencies in the renewal have been corrected; and
 - (b) The applicable penalty or late fee as specified in WAC 246-360-990 has been received by the department, in each case prior to the thirty-fifth day following the expiration date. In the event the license becomes invalid, the transient accommodation is no longer authorized to operate.
- (6) An invalid license may be reinstated upon reapplication for a license under subsections (2) and (4) of this section.
- (7) At least fifteen days prior to a transfer of ownership or change in the Uniform Business Identifier number of a transient accommodation the current licensee must submit to the department:
- (a) The full name of the current licensee and prospective licensee;
 - (b) The name and address of the currently licensed transient accommodation, and the name under which the transferred transient accommodation will operate;
 - (c) The date of the proposed change; and
 - (d) Other information as required by the department.
- (8) At least fifteen days prior to a transfer of ownership or a change in the Uniform Business Identifier number of a transient accommodation, the prospective new licensee must apply for licensure by submitting to the department:
- (a) A completed application on a form provided by the department;
 - (b) A completed self-inspection on a form provided by the department
 - (c) The fee specified in WAC 246-360-990 for an amended license;
 - (d) A completed Uniform Business Identifier Number Form provided by the department; and
 - (c) Other information as required by the department.

- (9) The licensee must notify the department when changing the number of lodging units or the name of the transient accommodation by submitting:
 - (a) A letter describing the intended change;
 - (b) The fee specified in WAC 246-360-990 for an amended license; and
 - (c) Other information as required by the department.

- (10) The licensee must notify the department prior to construction as defined in WAC 246-360-010(8) by submitting:
 - (a) A description of the construction
 - (b) A description of how the construction will be used;
 - (c) A description of any changes in the functional use of existing construction;
 - (d) Documentation of approvals issued by local authorities having jurisdiction; and
 - (e) Other information as required by the department.

1.4. Inspections by the Department of Health

RCW 70.62.220 requires that a person operating a hotel, in addition to paying the annual license fee, must also pay an annual inspection fee for any inspection made during the course of the year. WAC 246-360-990, set forth above, establishes the annual fees for inspection and survey of a hotel property by, in essence, calling for refunds of parts of the annual fee, depending on, e.g., whether the Department conducted a survey was accomplished during the year. See WAC 246-360-990(2).

The Department of Health has the broad authority to inspect hotels, but the authority is not unlimited. RCW 70.62.250 states that the Department has the power and authority:

to enter and inspect at any reasonable time, any transient accommodation and to make such investigations as are reasonably necessary to carry out the provisions of this chapter and any rules and regulations promulgated thereunder: Provided, that no room or suite shall be entered for inspection unless said room or suite is not occupied by any patron or guest of the transient accommodation at the time of entry. (Emphasis added).

Under the above statute, the Department has attempted to take the position that “occupied” means that the guest must be physically present. Accordingly, the Department has been known to demand access to a rented room if the guest is not present in the room. The Department has also been known to demand that hotel management knock on a rented room’s door and, if the guest is present, request the guest’s permission to let the Department conduct the inspection. Hotels and their counsel have contended that an “occupied” room under the above statute means a rented room, and so the statute prevents the Department from entering an occupied guest room, whether or not the guest is present or consents to the inspection.

State Representative Dave Upthegrove (District 33) sought to clear up this issue for the benefit of the hotel industry. He requested an opinion from the State Attorney General on the issue. As a result of this request, Attorney General Rob McKenna’s office issued an opinion on February 9, 2012. In it, he concludes:

The Department of Health is precluded by statute from inspecting occupied rooms when conducting inspections of transient accommodations, without regard to presence or consent of the occupant.”

Although it is possible that a successor to Rob McKenna might have a different view, this opinion currently gives hotels a good basis to deny a Department request to gain access to a rented room. Representative Upthegrove deserves the industry’s thanks for his work to resolve the issue in favor of the industry.

1.5. Powers and Duties of Department

The Powers and Duties of the Department of Health, as they pertain to licensing transient accommodations, are defined in RCW 70.62.250. Such powers include:

- The authority to develop rules and regulations for proposed adoption,
- The authority to enter and inspect a transient accommodation at any reasonable time, provided the room entered is not occupied by a guest, and
- The authority to administer and enforce the provisions of RCW 70.62

The State Department of Health, pursuant to RCW 70.62.270, has the authority to suspend or revoke licenses upon the failure or refusal of the person operating the transient accommodation to comply with the provisions of this chapter or any rules and regulations adopted by the Department. The State Department of Health also has the authority to impose civil fines. Any violation of this chapter or the rules and regulations adopted by the Department is a misdemeanor and punishable as such. Each day of operation of a transient accommodation in violation of this chapter constitutes a separate offense (RCW 70.62.280).

Hotels that have their license as a transient accommodation revoked or suspended by the Department have certain defined rights to appeal the Department's decision. These rights and procedures are set forth in WAC 246-10 et seq.

Note: RCW 70.62.290 authorizes the Director of Commerce, through the Director of Fire Protection, to promulgate rules and regulations establishing fire and life safety requirements. See PART III, Chapter 3.

1.6. Local Regulation

Hotels in Washington State are also subject to county and municipal regulations with regard to annual business license requirements. Hotel management must also comply with the requirements of county public health rules and regulations.

1.7. Summary and Conclusions

- RCW 70.62, et seq., governs state regulation of transient accommodations in Washington State. This statute and its implementing regulations are administered by the Washington State Department of Health, specifically, the secretary of the Washington State Department of Health.
- Under RCW 19.48.020, hotels must keep and maintain guest registers and preserve the records for a minimum of one year. Law enforcement officers with a valid warrant, attorneys with a valid subpoena, and other officers of the court may examine a hotel's register under certain circumstances. It is advisable to seek advice and direction of legal counsel before permitting the examination.
- Hotels in Washington State must secure an annual operating license from the Facilities and Services Licensing Division of the Washington State Department of Health. A hotel is required to pay a fee for its annual license and inspection of the premises. The fee schedule is set forth in WAC 246-360-990.
- Pursuant to RCW 70.62.250, the Department of Health has the power and authority to enter and inspect at any reasonable time, any transient accommodation and to make such investigations as are reasonably necessary to carry out the provisions. Currently, the Department does not have the authority to enter a rented room, whether or not the guest is present or consents to the entry.
- The State Department of Health, pursuant to RCW 70.62.270, has the authority to suspend or revoke licenses upon the failure or refusal of the person operating the transient accommodation to comply with the provisions of this law or any rules and regulations adopted by the Department.

- Hotels in Washington State are subject to county and municipal regulations with regard to annual business license requirements. Hotel management must also comply with the requirements of county public health rules and regulations.

Chapter 2: Public Health And Safety Requirements

Hotels in Washington State have numerous obligations to the general public because of federal, state, and local statutes enacted to protect the public's safety and health, such as a state's building and fire code, sanitation codes, and health laws. Hotels may also be subject to state laws and administrative rules regulating the preparation and service of food, prevention of contagious diseases, hotel water supplies, sewage systems, signage, and swimming pool operations. To comply with these laws and regulations, the hotel must take affirmative steps that are in addition to actions needed to comply with the common law duty of reasonable care.

2.1. Building Codes

In Washington State, hotels are subject to building codes that are enforced and administered by state and local agencies.

WAC 246-360-080, promulgated under authority granted by RCW 43.20.050, states that hotels in Washington State must:

- (1) Ensure all transient accommodations, including any construction, buildings, facilities, fixtures, furnishings and surroundings meet the requirements of:
 - a) Chapter 70.62 RCW and this chapter;
 - b) The State building code;
 - c) All other applicable municipal and county codes and ordinances.
- (2) Provide documentation of compliance with WAC 246-360-080(1)(b) and (c) under the following conditions
 - a) For construction that is on-going or has been completed since the last survey; or
 - b) For existing buildings, facilities and conditions that appear to pose an imminent hazard to life or property
- (3) Ensure that all buildings, facilities, fixtures, common areas such as exercise rooms, public bathrooms, kitchens, utility sinks and guest laundry rooms and furnishings are structurally sound, safe, clean, cleanable, sanitary, and in good repair.

Hotel management, when dealing with issues involving state or local building codes, would be well advised to meet with state and local building officials. Special attention must be given to compliance with those codes dealing with fire safety laws (See PART III, Chapter 3) and with handicap accessibility requirements (See PART III, Chapter 7).

As stated in PART I Section 5.3, a violation of Washington’s building and fire codes may result in a conclusive finding of negligence “*per se*”. That is, a violation of the code may itself be conclusive with respect to a hotel’s breach of the standard of care, rather than requiring the aggrieved individual to prove negligence. The concept of negligence “*per se*” adds extra urgency to the hotel’s efforts to comply with these laws and regulations.

2.2. Laws, Regulations, and Liability Relating to Food.

(a) Federal Laws Regarding Food

Federal laws relating to food service are contained in the federal Food, Drug and Cosmetic Act (21 U.S.C. §331, et seq.). Section (k) of this act prohibits, for example:

[t]he alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to food ..., if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

The purpose of this statute is to safeguard the consumer from the time the food enters the channels of interstate commerce until the time it is delivered to the ultimate consumer. Washington hotels come within the statute’s purpose because a guest can arguably be considered an ultimate consumer. The act defines adulterated food in § 342(a), which states, in part, that “food shall be deemed adulterated if it has been prepared, packed, or *held* under unsanitary conditions whereby it *may* have become contaminated with filth” (emphasis added). Thus, for example, any food a hotel holds in anywhere from the kitchen to the minibar is subject to these laws.

In addition, the U.S. Department of Agriculture has adopted regulations requiring labels on packages of all raw and partially cooked meat and poultry products with instructions for safe handling to minimize the chance of bacterial illness. These regulations became effective October 15, 1993. The hospitality industry should monitor these decisions carefully and would be

well-advised to review all policies and procedures involved with food and beverage services. See 9 C.F.R. § 317.1 et seq.

(b) State and Local Laws Regarding Food

Washington hotels are subject to state laws and regulations relating to health and sanitary conditions in handling food and drink. In addition, hotels are also subject to regulations established and enforced by county and city health departments.

The state and local health laws, as well as the federal Occupational Safety and Health Administration (OSHA) and the Washington Industrial Safety and Health Act (WISHA), cover subjects such as: cleanliness in preparing and serving food; regulations as to the sale and service of milk, meats, and desserts; regulations as to adulterated or misbranded food; restrictions on the sale of margarine; and the care and cleaning of silverware, dishes, and drinking cups. For more information on OSHA standards, see <http://www.osha.gov/SLTC/foodbornedisease/index.html>.

Hotel management should be familiar with: WAC 246-360-160 relative to food and beverage services; WAC 246-215 et seq. relative to State Department of Health Standards for food service, sanitation, and local ordinances; WAC 246-217 et seq. relative to State Department of Health Standards for food and beverage service workers permits; and WAC 246-217 et seq. relative to State Department of Health Standards for food workers.

Local city and county regulations may differ, and thus hotel management should be familiar with those regulations in effect in their community. The Washington Department of Health and other agencies provide guidelines on how to best comply with food safety regulations. Measures to ensure the safe preparation, storage, and service of foods include:

- Ensuring that all food service workers obtain a food worker card within fourteen calendar days from the beginning of employment at a food service establishment. WAC 246-217.
- Ensuring that food employees do not work in or around any place where unwrapped or unpackaged food or beverage products are prepared, sold, or offered for sale if the employees are known to have (WAC 245-215-251): Gastrointestinal symptoms such as diarrhea, vomiting, or jaundice; a contagious infection that can be transmitted through food, such as Hepatitis A, Salmonella; or a lesion that appears inflamed or contains pus, that is not covered with a glove or bandage.
- Enforcing personal cleanliness among employees, such as: requiring food employees to clean their hands and exposed portions of their arms for at least 20 seconds (WAC 246-301-12); and ensuring food employees keep their nails trimmed and do not wear fingernail polish or artificial polish while preparing food (WAC 246-215-031)

- Ensuring food is cooked to or held at correct temperatures, ([see http://www.foodsafety.gov/keep/charts/mintemp.html](http://www.foodsafety.gov/keep/charts/mintemp.html) for a table of safe cooking temperatures)
- Ensuring that cross-contamination is avoided.

There are numerous food borne diseases that management should be aware of and prevent through proper food handling policies. One way to protect customers and avoid liability for food safety violations is to stay abreast of food product recalls. [See http://www.doh.wa.gov/ehp/food/recall.htm](http://www.doh.wa.gov/ehp/food/recall.htm). Common agents causing foodborne diseases include E. coli, Salmonella, Hepatitis A, and viral agents. [See http://www.fsis.usda.gov/Fact_Sheets/Foodborne_Illness_&_Disease_Fact_Sheets/index.asp](http://www.fsis.usda.gov/Fact_Sheets/Foodborne_Illness_&_Disease_Fact_Sheets/index.asp)

Salmonella is one of the most common causes of food poisoning in the United States. <http://www.cdc.gov/salmonella/general/index.html>. Most people infected with Salmonella develop diarrhea, fever, and abdominal cramps 12 to 72 hours after infection. There is no vaccine to prevent salmonella, but prevention steps can be taken to reduce the chances of contamination. [See http://www.cdc.gov/salmonella/general/prevention.html](http://www.cdc.gov/salmonella/general/prevention.html). To prevent Salmonella, meats, milk and eggs should be cooked thoroughly. Produce should be thoroughly washed. Cross contamination of foods should be avoided. Uncooked meats should be kept separate from produce, cooked foods, and ready to eat foods. Hands, cutting boards, counters, knives, and other utensils should be washed thoroughly after touching uncooked foods. [See http://www.cdc.gov/salmonella/general/prevention.html](http://www.cdc.gov/salmonella/general/prevention.html).

E-Coli, like salmonella, is generally transmitted through undercooked meats, unpasteurized dairy products, and contaminated produce. Signs and symptoms of the infection include severe and acute bloody diarrhea and abdominal cramps not accompanied by a fever. Prevention measures include proper hand washing, thoroughly cooking meats, thoroughly washing produce, and preventing cross contamination in food preparation.

Hepatitis A is a contagious liver disease that results from infection with the Hepatitis A virus. Hepatitis A is often spread when an infected person does not observe proper sanitary practices before handling food. According to local health officials, the overwhelming majority of cases of Hepatitis A appear to have begun in the home. Still, the media focus has been on the state's restaurant industry and the potential for exposure while dining out. Hotel management must work with their local health departments to meet the highest standards for food handling, storage, and preparation. In addition, hotels must also have on-going training programs to address health and safety in the workplace.

To combat Hepatitis A, you must stress the following to your employees:

- wash your hands thoroughly with warm water and soap after going to the bathroom and anytime before handling, preparing, or serving food;
- clean and sanitize your food preparation area and cooking utensils; and
- wash all raw vegetables, fruit, and produce that is ready to eat.

Another method of preventing Hepatitis A is to receive the Hepatitis A vaccine. The vaccine consists of two shots given six months apart. These shots will provide long-term immunity from the virus. Employees sometimes choose to eat at work while on breaks or before or after shifts. Therefore, an employee who is infected may infect other employees who eat the food. To help prevent the spread of the virus, employees should have an Immune Globulin shot within 14 days of exposure. This shot will only provide short-term immunity and is not the same as receiving the vaccine.

If you have any questions about what you can do to stop a food borne outbreak at your hotel property, call your local health district, the Washington State University Cooperative Extension, or the Washington Restaurant Association. You can also consult the WA Department of Health for more information or to report a food borne disease outbreak, 2009 (www.doh.wa.gov/notify/guidelines/foodborne.pdf).

See also PART I, Section 9.4 for Washington statutes and regulations relating to “truth in menu” and labeling.

(c) Food Allergies

Another issue to be aware of is that of guests with food allergies. Foods that cause the most allergies include milk, soy, eggs, wheat, peanuts, nuts, fish, and shellfish. Even a small amount of the food can make the person very ill. Symptoms of an allergic reaction include hives, tingling sensations, swelling of the mouth and throat, difficulty breathing and loss of consciousness. The person in charge must be contacted when food allergies occur. *Washington State Food and Beverage Workers’ Manual*, p. 22, 2010. An excellent resource is the National Restaurant Association and Food Allergy & Anaphylaxis Network, who have put together a publication that instructs on how to safely prepare and serve food to guests who have food allergies. *See* <http://www.foodallergy.org/files/WelcomingGuests2010.pdf>.

(d) Liability for Unwholesome Food

Hotels may be liable for illness or other personal injury resulting from serving unwholesome or improperly prepared food. The potential liability may arise from several theories.

Liability can be established under the Washington Product Liability Act (RCW 7.72 et seq.). For example, in Almquist v. Finley School District. No. 53, 57 P.3d 1191 (Wash.App.2002), a school district prepared and served a taco lunch for its students using frozen ground beef supplied by Northern States Beef. The court held that the district processing frozen hamburger in a cooked taco filling made it a “manufacturer” under the Act. *Id.* at 1194. As a result, under RCW 7.72.030, the district was subject to strict liability upon proof that the product was not reasonably safe.

Liability can also be established under a theory of breach of warranty and the implied warranty of fitness of human consumption. See, e.g., Mezetti v. Armour & Co., 135 P.2d 633 (1913); Baum v. Murray, 162 P.2d 801, 805 (Wash. 1945); Gates v. Standard Brands Incorporated, 719 P.2d 130, 134 (Wash.App.1986).

Liability can also be established under a negligence and a “reasonable expectation test”. See, e.g., Shaffer v. Victoria Station, 91 Wn.2d 295 (1979), Jeffries v. Clark’s Restaurant Enterprises, Inc., 20 Wn. App. 428 (1978), 580 P.2d 1103, 1104 (1978); Pulley v. Pacific Coca Cola Bottling Co., 415 P.2d 636 (1966). In this respect, Washington courts have adopted the Restatement (Second) of Torts § 402A. See Seattle-First National Bank v. Tabert, 542 P.2d 774 (1975), (holding that the concept of “defect” in Washington is based on “consumer’s reasonable expectation of buying a product which is reasonably safe”).

Liability can further be established by negligence “*per se.*” If, for example, a health law or regulation is not followed, and injury results, the defendant can be deemed to be negligent “*per se.*” See PART I, Section 5.3.

2.3. WAC 246-360 Transient Accommodations

WAC 246-360 establishes the Washington State Department of Health minimum health and sanitation requirements for transient accommodations and implements RCW 70.62 (Transient Accommodations Licensing Inspections) to protect and promote the health and welfare of individuals using such accommodations. WAC 246-360 establishes uniform, statewide standards for maintenance and operation, including light, heat, ventilation, cleanliness, and sanitation. Hotel management in Washington State should be familiar with the provisions of WAC 246-. The titles and subject matter of these regulations established by the Washington State Department of Health are as follows:

- 246-360-001 Purpose
- 246-360-010 Definitions
- 246-360-020 Licensure
- 246-360-030 Responsibilities and rights – Licensee.
- 246-360-035 Authority of the department
- 246-360-040 Water supply and temperature control
- 246-360-050 Sewage and liquid waste disposal
- 246-360-070 Refuse and solid waste
- 246-360-080 Construction and maintenance

246-360-090	Lodging units
246-360-100	Bathrooms, water closets, and handwashing sinks
246-360-110	Lodging unit kitchens
246-360-120	Heating and cooling
246-360-130	Lighting
246-360-140	Ventilation
246-360-150	Beds and bedding
246-360-160	Food and beverage services
246-360-170	Travel trailers and mobile homes
246-360-180	Laundry
246-360-200	Safety, chemical, and physical hazards
246-360-220	Fire Safety
246-360-230	Rustic resorts
246-360-500	Exemptions
246-360-990	Fees

These regulations arise out of the licensing and inspection provisions of RCW 70.62 et seq. See PART III, Sections 1.3 and 1.4 for additional discussion on these topics.

2.4. Swimming Pools

RCW 70.90 et seq. regulates water recreation facilities, such as swimming pools, and defines “water recreation facilities” as “any artificial basin or other structure containing water used, or intended to be used, for recreation, bathing, relaxation, or swimming, where body contact with the water occurs, or is intended to occur, and includes auxiliary buildings and appurtenances.” The State Department of Health has established rules and regulations governing safety, sanitation, and water quality for water recreation facilities, including requirements for design, operation, injury and illness reporting, and water quality monitoring.

WAC 246-260, et seq. sets forth the administrative regulations for public water recreation facilities. Hotel management with swimming pools, wading pools, spray pools, spas, or the like, must be familiar with the comprehensive provisions of WAC 246-260.

WAC 246-260-101 requires that *any person* operating public pool facilities must obtain an annual operating permit from the Department or the local health officer. An operating permit may be obtained by establishing that water quality, pool design, and record keeping are in compliance with these regulations.

2.5. Contagious Diseases

RCW 70.05.060(4) provides that each local Board of Health has the duty to provide for the control and prevention of any dangerous, contagious, or infectious disease within the jurisdiction of the local health department.

In addition, RCW 69.06.030 forbids the hiring of any person afflicted with any contagious or infectious disease to work in or about any place where unwrapped or unpackaged food and/or beverage products are prepared or sold.

Food establishments are legally required to notify public health authorities of suspected or confirmed cases of selected diseases or conditions. These conditions are known as “notifiable conditions.” For a list of notifiable conditions, see WAC 246-101. The following link to the DOH provides general information, reporting forms, and guidelines for investigations: <http://www.doh.wa.gov/notify/forms/default.htm>

2.6. Laws Regarding Aid to Choking Victims

The laws of some states and municipalities require that operators of dining facilities post in a conspicuous place diagrams and instructions on how to save a choking victim. Washington State does not have laws regarding aid to choking victims. Hotels should work closely with their legal counsel before establishing and implementing any policies for choking emergencies.

Washington State has enacted a “Good Samaritan” law (RCW 4.24.300 and 4.24.310). It provides protection to individuals who render emergency care at the scene of an emergency, or participate in transporting, not for compensation, an injured person. This statute provides for immunity from civil damage for rendering such emergency care, but it does not include immunity from acts or omissions constituting gross negligence or willful or wanton misconduct. Thus, a person who renders assistance should have some idea of what he or she is doing—gross negligence in rendering aid may not be protected. The “gross negligence” limitation of this statute suggests that hotel personnel should have adequate training before encouraging them to provide emergency care to guests.

2.7. Signage

The regulation of off-premise and on-premise signage for hotels in Washington State is found in county and city zoning ordinances. These ordinances govern the size, height, spacing, and location of signage on hotel properties. Typically, local sign codes do not regulate signage located within the interior of a hotel. The Uniform Building Code and the Uniform Electrical Code impact the construction and maintenance of all signage.

Washington State’s Scenic Vistas Act (RCW 47.42 et seq., Scenic Vistas Act) regulates signage located on the federal interstate highway system, the federal and primary highway system, and the state scenic highway system. Of specific interest to the hospitality industry are the provisions of RCW 47.36.310 , 47.36.320, and 47.36.330 regarding “motorist information signs” to give the traveling public specific information as to “gas, food, or lodging” available on a crossroad or near an interchange. These statutes permit a hotel or motel to place its business sign or logo on the State Department of Transportation “motorist information signs” adjacent to the highway, provided that they meet the standards and pay the fees for such signage as are prescribed in the statute. See the administrative regulations cited as WAC 468-70. See also

<http://www.wsdot.wa.gov/Operations/Traffic/Signs/requirements.htm> (eligibility) and http://www.wsdot.wa.gov/Operations/Traffic/Signs/region_contact.htm (contact information)

Hotels and motels in Washington State seeking to qualify for “motorist information signs” should contact the nearest office of the State Department of Transportation.

2.8. Summary and Conclusions

- Hotels in Washington State have numerous obligations to the general public because of federal, state, and local statutes enacted to protect the public’s safety and health, such as a state’s building and fire code, sanitation codes, and health laws. Hotels are also subject to various state laws and administrative rules and regulations concerning the preparation and service of food, laws regarding contagious diseases, and laws regulating hotel water supplies, sewage systems, signage, and swimming pool operations.
- All new construction activities involving hotels in Washington State are subject to RCW 70.62, which regulates transient accommodations in Washington state; RCW 19.27, which is the state building code; and, all applicable city and county building codes and ordinances.
- Violation of Washington’s laws and regulations may be conclusive with respect to a hotel’s liability for a claim of negligence, rather than requiring the aggrieved individual to prove that the hotel violated the common law duty of reasonable care.
- The federal Food, Drug and Cosmetic Act (21 U.S.C. § 331, et seq.) is intended to safeguard the consumer from adulterated food. Hotel management should also be familiar with WAC 246-360-160 relative to food and beverage services; WAC 246-215 relative to State Board of Health Standards for food service, sanitation, and local ordinances; WAC 246-217 relative to State Board of Health Standards for food and beverage service workers permits; and WAC 246-217 relative to State Board of Health Standards for food workers. In addition, city and county regulations may be different and thus, hotel management should be familiar with those regulations in effect in their community.
- Hotel management must exercise care and prudence in purchasing, preparing, and serving food to guests and patrons. If a claimant can show that unwholesome food was served and illness or injury resulted, then liability will likely result.
- WAC 246-360 establishes the Washington State Board of Health minimum health and sanitation requirements for transient accommodations in order to protect and promote the health and welfare of individuals using such accommodations. These administrative regulations establish uniform, statewide standards for maintenance and operation, including light, heat, ventilation, cleanliness, and sanitation.
- The provisions of RCW 70.90, et seq., govern the safety, sanitation, and water quality for “water recreation facilities” in Washington. Hotel management should be familiar with WAC 246-

260, which implements regulations for swimming pools, wading pools, spray pools, spas, or the like.

- RCW 69.06.030 forbids the hiring of any person afflicted with any contagious disease to work in or about any place where unwrapped or unpackaged food and/or products are prepared or sold.
- Washington does not have laws regarding aid to choking victims. Accordingly, hotel management should work closely with their legal counsel before establishing and implementing any policies for choking emergencies. Washington does have a “good Samaritan” law for those rendering emergency assistance, but the statute does not protect against gross negligence. As a result, proper training should be given to any personnel expected to provide any assistance beyond that which is obvious and safe.
- The regulation of off-premise and on-premise signage in Washington State is found primarily in county and city zoning ordinances. Specifically, these sign codes govern the size, height, spacing, and location of signage on hotel properties.
- Washington State’s Scenic Vistas Act regulates signage located on the federal interstate highway system, the Federal Aid Primary Highway System, and the State Scenic Highway System. These statutes, in part, provide for hotels to place their business signs or logos on “motorist information signs” in order to provide the traveling public with specific information as to food or lodging. This type of signage is subject to specific regulation and limitations and it is advised that hotel management contact the nearest office of the State Department of Transportation in order to qualify for advertising on these “motorist information signs”.

Chapter 3: Fire Safety Laws

3.1. Fire Safety Laws

Hotels in Washington State are subject to a multitude of federal, state, and local laws, codes, and regulations relating to fire safety. Fire safety requirements are found in building codes, fire codes, licensing laws, public assembly laws, labor laws, occupational health and safety laws, as well as the so-called general business laws of the state. Covering all these codes is beyond the scope of this Manual, but an effort is made to identify the significant sources of applicable law.

Hotel management is well-advised to consult with local fire officials for steps that should be taken by a particular property to comply with federal, state, and local fire laws and codes in effect in your community. Your legal counsel can assist in verifying the laws that apply.

3.2. State and Local Fire Legislation

RCW 70.62.290 provides as follows:

Rules establishing fire and life safety requirements, not inconsistent with the provisions of this chapter, shall continue to be adopted by the director of commerce, through the Director of Fire Protection.

Under WAC 212-12-010, the Director of Fire Protection adopted, with certain exceptions, the International Building Code and the International Fire Code. Accordingly, transient accommodation facilities in Washington State are controlled primarily by provisions of the International Building Code and the International Fire Code Standards. These codes, along with other local ordinances adopted to establish fire safety standards in transient accommodations, are enforced by local officials.

The International Building Code and International Fire Code Standards are, in theory, compatible, even though conflicts may arise as to their enforcement between state and local jurisdictions. The International Building Code establishes fire endurance, building elements, exit design, and installation of fire protection equipment in hotel structures. The International Fire Code Standards ensure that these basic fire safety elements and systems built into hotel structures are maintained and that the processes and uses conducted within a building are consistent with recommended safe practices. The International Building Code and the International Fire Code Standards are examples of compatible documents which separate construction and maintenance, yet utilize compatible and consistent terminology and requirements to ensure that the life safety features and designs in transient accommodation facilities are adequately maintained. In essence, the International Building Code is viewed as a

“construction” code while the International Fire Code Standards are “maintenance and operation” codes.

Hotels constructed in this state in the early 1900s were constructed under local codes and not under the Uniform Building Code. Many municipalities, during the 1950s, adopted the Uniform Building Code for enforcement within their jurisdictions. In 1974, the Washington State legislature initially adopted the state Building Code Act (RCW 19.27), effective January 1, 1975, which mandated enforcement of the Uniform Building Code by all cities, towns, and counties. Under the provisions of the 2009 International Existing Building Code, as adopted under WAC 51-5- *et. seq.*, buildings which existed before the adoption of the code are permitted to continue without change. Therefore, unless a building is scheduled to be altered, repaired, or have an addition constructed, hotels are generally not required to update the building to meet present day code standards *unless* changes are necessary to mitigate an “unsafe” building (note that “unsafe building” is specifically *not* to be construed as a mere lack of compliance with the current code). This is a common practice by building officials throughout Washington State, as well as throughout the nation.

Enforcement procedures at the local level provide for flexibility and adjustment to the strict letter of the law, especially when hardship is shown. Most local building code ordinances provide for an appeal in which the local building official, or designated appeals board, after a hearing, may grant, subject to such terms and conditions as are advisable, an adjustment from the strict letter of a specific provision of the International Building Code.

The Building Department of each city, town, or county is the authority with jurisdiction and is responsible to ensure compliance with building standards through the plan-checking and inspection process, up to and including the issuance of a certificate of occupancy. Then, compliance enforcement becomes the responsibility of the Fire Prevention Bureau of the local fire department. The Bureau makes inspections as necessary for the purpose of ascertaining, and causing to be corrected, any conditions liable to cause fire, endanger life from fire, or any other violations of the state and local fire codes.

Hotel owners and management, when planning a new construction or major remodeling, must work closely with local building officials with regard to the application of the Uniform Building Code as enforced in their local area.

3.3. Federal Fire And Emergency Legislation

Under C.F.R § 1910.38-.39, the Occupational Safety and Health Administration (OSHA) requires all employers to have both an “emergency action plan” and a separate “fire prevention plan.” Emergency Action plans must contain, at a minimum:

- Procedures for emergency evacuation (including exit route assignments).

- Procedures to be followed by employees who remain to operate critical operations.
- Procedures to account for all employees after evacuation.
- Procedures to be followed by employees performing rescue and/or medical duties.
- The name or job title of every employee who may be contacted by employees who need more information about the plan or duties under it.

In addition to having a plan in writing, the employer is required to train the individual persons with duties in the plan and review the plan with the employee at the time the plan is implemented, when the employee's duties under the plan change, and whenever the plan itself changes.

Fire prevention plans, on the other hand, require:

- A list of all major fire hazards, proper handling and storage procedures for hazardous materials, information about potential ignition sources, and the type of fire protection equipment necessary to control each hazard.
- Procedures to control accumulations of flammable or combustible waste.
- Procedures for regular maintenance of safeguards installed on heat producing equipment to prevent accidental fires.
- The name or job title of employees responsible for maintaining equipment to control potential sources of ignition.
- The name or job title of employees responsible for the control of fuel source hazards.

Other requirements set forth by OSHA pertain to fire extinguishers and fire alarm systems. OSHA states that an employer shall provide portable fire extinguishers and shall mount, locate, and identify them so that they are readily accessible to employees without subjecting the employees to possible injury. The fire extinguishers must be fully charged, checked annually, and set in an area so that an employee only has 75 feet to travel before finding a class A extinguisher and 50 feet for class B extinguishers. OSHA's only requirement for alarm systems stipulates that the alarm must be capable of being perceived above ambient noise or light levels by all employees in the affected portions of the work place.

The Federal Hotel and Motel Fire Safety Act of 1990, cited as 15 U.S.C. §§ 2224-2226, requires all federally funded meetings be held in properties that comply with the guidelines set forth in Section 2225. To be included on the list of complying hotels, one must ensure that each guest room contains a hard-wired (not battery powered) smoke detector. Any hotel or motel

over three stories must maintain a sprinkler system. Hotels should ensure compliance with these guidelines, or risk the loss of federal travel business.

These laws, like all other laws designed for life safety, create exposure for *per se* negligence. See PART I, Section 5.3. As indicated earlier, the concept of negligence “*per se*” adds extra urgency to the hotel’s efforts to comply with these laws and regulations.

3.4. Court Cases

In *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978), the Chiefton Hotel in Yakima caught fire. The fire fighting efforts and aftermath resulted in the demolition of the hotel. During those efforts, an adjacent store, owned by Harlan Herberg, was damaged. Herberg sued Russell Swartz, the hotel’s owner, for damages. The hotel’s guests also sued Swartz for loss of their personal belongings. Swartz, in turn, sued the city and the demolition company for indemnification against these claims, asserting negligence in the firefighting and demolition activities. On motions for summary judgment, the trial court found Swartz to be in violation of RCW 70.62, the state statute requiring inspection and license. Accordingly, the court held that Swartz was negligent *per se*. The indemnity claims against the city and the demolition company were dismissed. The Washington Supreme Court upheld the trial court’s ruling, holding that the defendant’s violations of numerous safety regulations rendered him *per se* negligent and that his negligence precluded his assertion of common law indemnity theories.

The additional facts in the Herberg case show the importance of compliance with life safety laws and the ineffectiveness of excuses when injury results. Swartz purchased the hotel in August 1973. That same month, on August 19, 1973, the hotel was inspected for compliance with the state’s minimum fire and life safety standards applicable to transient accommodations. Approximately twenty-three state fire code violations were discovered. Swartz was given five and a half months to correct them. Two months later on December 19, 1993, the fire started on the first floor as a result of arson. At that time, most of the fire code deficiencies, as cited by the State Fire Marshall, had not yet been corrected.

The hotel promptly evacuated the guests and called the Yakima Fire Department. Before the fire department could arrive, the fire had spread throughout the hotel. The fire’s rapid spread was caused by at least five, and potentially as many as twenty, of the uncorrected fire code deficiencies. One serious deficiency, in particular, was the existence of open pipe chases that ran both vertically and horizontally throughout the building. Acting as a series of chimney flues, they rapidly accelerated and spread the fire.

The major issue before the court was the determination as to whether fire and life safety standards were intended to protect either or both the hotel occupants and Herberg. The court discussed the legislative intent of the Transient Accommodations Act and the State Fire Marshall’s regulatory power:

RCW 70.62.200 provides that the purpose of the act is to “promote the protection of the health and welfare of the individuals using such accommodations ...”

Further, the Fire Marshall is specifically directed to promulgate rules and regulations and to enforce the fire and life safety standards. See RCW 70.62.290; WAC 248-144-035; WAC 212-12-010(1)(g). These standards were adopted to provide the “highest degree of public safety from fire” consistent with normal use and occupancy of the building. WAC 212-12-010(2).

Each of the applicable standards is mandatory. Tenants who are residents of the transient accommodation were harmed by the very danger sought to be prevented. Given the legislature’s clear statement of purpose to protect such persons, we hold the trial court properly adopted the statutory and regulatory standards as the appropriate duty owed these tenants by the appellant.

The court further ruled that the trial court was correct in adopting the standards of RCW 70.62 as the duty owed by Swartz to Herberg, and that the legislature intended the same protective policy to extend to land owners in the immediate vicinity of the danger, based on the act, on the regulatory standards, and on common sense.

It is important to recognize that a hotel’s potential liability is extended to all members of the public likely to be injured, not just hotel guests or patrons. The *Herberg* court stated that the mandate of RCW 70.62 is not expressly limited to mere protection of persons actually “occupying such accommodations.” Rather, in considering other statutory duties of the Fire Marshall, the court noted that the Marshall is authorized to enter:

... upon all premises and into all buildings, except private dwellings, for the purpose of inspection to ascertain if any fire hazard exists and to require conformance with minimum standards for the prevention of fire and for the protection of life and property against fire and panic as to use of the premises.

The court found that when the State Fire Marshall finds any fire hazard “dangerous to the safety of the building premises or to the public” he must order such condition remedied. The court concluded that:

... the Transient Accommodation Act was not intended merely to protect transient occupants, but was also intended to protect the public reasonably expected to be endangered by the fire hazard. A review of the State Fire Marshall’s regulations reveal that they too are designed to promote the highest degree of public safety from fire. WAC 212-12-010(2). In fact, several of the statutory and regulatory standards violated therein were concerned exclusively with preventing the spread of fire, thus clearly evidencing an intent to protect those reasonably expected to be within the zone of danger from such spread ... it is evident that these safety

standards were designed to prevent the precise harm which occurred here. Safety legislation is to be liberally construed, and for good reason.

In Herberg, the hotel owner had recently acquired the hotel and was in the process of making corrections within the time set forth by the authorities. The case shows that the avenue to the owner's liability is direct and subject to few defenses or excuses. See also *Seattle v. Hinckley*, 40 Wn. 468 (1905); *Coffin v. Blackwell*, 116 Wn. 281 (1921); and *Sorenson v. Western Hotels, Inc.*, 155 Wn.2d 625 (1960).

Hotel management must recognize that the laws affecting fire and safety standards are ever-changing and represent an increasing cost in order to maintain compliance. In addition, hotel management is presently confronted with an ever-growing public awareness of fire safety codes, and with regulations, codes, and standards at every level of government, many of which are not consistently enforced due to budget constraints, and are often conflicting in interpretation. Nevertheless, liability for any injury or damage that is connected to a violation is direct and, in the event of catastrophic injury, can quickly exceed insurance limits. Hotel owners and management should work closely with its legal counsel and with local and state fire officials for a thorough understanding of all applicable standards and for compliance with them.

3.5. Summary and Conclusions

- Hotels in Washington State are subject to a multitude of federal, state, and local laws, codes, and regulations relating to fire safety. Fire safety requirements are found in building codes, fire codes, licensing laws, public assembly laws, labor laws, occupational health and safety laws, as well as the so-called general business laws of the state.
- Hotels in Washington State should work closely with their legal counsel and local fire officials to ensure that each property complies with federal, state, and local fire laws and codes in effect.
- Pursuant to the authority set forth in RCW 70.62.290 and WAC 212-12-010, cities and counties enforce uniform building and fire safety codes and standards within all transient accommodations in Washington State.
- Hotel management, when planning a new construction or major remodeling, should work closely with local building officials to ensure compliance with applicable building codes. See WAC 51-50, which adopts the 2009 edition of the International Building Code and the International Fire Code Standards as administered by local officials having jurisdiction (usually the local fire department).

- The International Building Code and International Fire Code Standards are, in theory, compatible even though conflicts may arise as to their enforcement between state and local jurisdictions.
- OSHA requires all employers to have a written emergency action plan covering certain conditions related to fire hazards and emergency procedures. The employer is also required to train the individual persons with duties in the plan and to review the plan with the employees at the time the plan is implemented, when the employees' duties under the plan change, and whenever the plan itself changes.
- The Washington Supreme Court decision in the *Herberg* case is a striking example of the importance of compliance, the liability that can result from failing to do so, and the ineffectiveness of excuses. The hotel's owner was found negligent *per se*, and the owner's liability extended to all members of the public likely to be injured, not just to hotel guests. The court also found that when the State Fire Marshall finds any fire hazard "dangerous to the safety of the building premises or to the public," he must order such condition remedied.
- Hotel owners and management should work closely with legal counsel and with local and state fire officials for a thorough understanding of all applicable standards and for compliance with them.

Chapter 4: Occupational Safety And Health Act (OSHA)

The Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 , et seq.) created the Occupational and Health Administration (OSHA) of the U.S. Department of Labor to administer and carry out the purpose of the legislation. The purpose of the Act and of OSHA is, “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources ...” The Act states the duty of each employer is to furnish a “place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

OSHA establishes standards to protect employees from safety and health hazards, conducts inspections of work places to check compliance with safety standards, requires that certain records of work-related injuries be kept, and enforces its regulations by citations and fines for violations.

OSHA has jurisdiction over any employer of one or more employees engaged in business “affecting commerce.” OSHA provides that states may enact and administer their own occupational and health programs provided that such programs are “at least as effective” as the OSHA program. If such state programs are approved by OSHA, then, in that event, OSHA provides funding for 50% of the cost of such state programs. Washington State’s program is known as the Washington Industrial Safety and Health Act (WISHA) (RCW 49.17 et seq.) and has been approved by OSHA. It is administered by the Washington State Department of Labor and Industries. The purpose of WISHA is “to create, maintain, continue and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970” (RCW 49.17.010). See WAC 296-800-100.

Note: WISHA is monitored and reviewed by OSHA on a regular basis. OSHA has, in Washington State, exclusive jurisdiction over navigable waters, military reservations, mining and natural forests. WISHA, through the Department of Labor and Industries, has jurisdiction over all other areas of the state. Thus, most hotels in Washington State are subject to WISHA and the standards and procedures established by its implementing regulations.

For specific details of health and safety requirements as they impact a specific hotel property, consult your legal counsel or contact your local offices of the Department of Labor and Industries.

The safety and health standards set forth by WISHA include such subjects as safeguards for walking and working surfaces, safeguards for stairs, doors and exits, personal protective equipment and clothing, laundry equipment, maintenance shops and equipment, machine and

fan guards, the use of appliances and electrical equipment, hazardous and flammable materials, environmental safeguards (ventilation, noise, etc.), storage conditions and materials-handling rules, parking garages, rodent and vermin controls, drinking water safety, rest rooms, medical and first aid requirements. Hotel management must inspect the premises to ensure compliance with WISHA regulations and to alleviate any hazardous condition that may develop. If any potential hazards to employees exist, then posters, labels, or signs must warn employees of this potential danger. Hotel management must establish or update any procedure required by WISHA and must also communicate this to employees.

Hotel management must recognize that WISHA is broad in scope and will include all workers lawfully on the premises and not just its own employees.

4.1. Hotel Management Responsibilities

It is the responsibility of hotel management to:

- Establish and supervise a safe and healthful environment;
- Establish and supervise an accident prevention program as is required by WISHA standards;
- Prominently post a notice of employer responsibility and employee rights (the WISHA poster contains all the required notices); and
- Establish and supervise training programs to improve the skill and competency of all employees.

Hotel management must conduct a preliminary investigation of accidents that cause serious injuries. Fatal or multiple hospitalization accidents must be reported within eight hours after the occurrence to the nearest office of the Department of Labor & Industries. WAC 296-800-32005. The reporting may be by telephone or telegraph and must convey the circumstances of the accident, the number of fatalities and the extent of any injuries. The OSHA toll free hotline number is 1-800-321-6742. Equipment involved in an accident resulting in an immediate or probable fatality must not be moved until a representative of the Division of Industrial Safety and Health investigates the accident and releases such equipment, except where removal is essential to prevent further accidents. See <http://www.lni.wa.gov/wisha/rules/corerules/HTML/296-800-320.htm>

Hotel management must maintain records of occupational injuries and illnesses. Recordable cases include:

- Every occupational death;

- Every industrial illness;
- Every occupational injury that involves one of the following:
 - Unconsciousness;
 - Inability to work full-time on the regular job;
 - Temporary assignment to another job; or
 - Medical treatment beyond first-aid.

The following brief rules may assist hotel management in satisfying the general duty obligation under WISHA:

- Promulgate adequate safety rules;
- Enforce those rules with reasonable sanctions sufficient to deter noncompliance;
- Provide adequate instruction and training to all employees exposed to any hazardous conditions.
- Supervise employees adequately in light of their experience and degree of work-related danger;
- Provide protective gear where necessary, and insist to the point of discipline or discharge that employees use such equipment

4.2. Reporting and Record Keeping Requirements

The Washington State Department of Labor and Industries serves as the administrator for the federal Occupational Safety and Health Act and requires specific record keeping standards and procedures for reporting injuries. See <http://www.lni.wa.gov/wisha/rules/recordkeeping/default.htm>.

The reporting system requires the following:

- **Log:** An employer must maintain on an annual basis, a log noting every occupational injury and illness on Form OSHA No. 300, Log of Work-Related Injuries and Illnesses, Form 300-A, Summary of Work-Related Injuries, and Form 301, Injury and Illness Incident Report, or equivalent forms. An equivalent form is one that has the same information, is as readable and understandable, and is completed using the same instructions as the OSHA form it replaces. Some employers use an insurance form instead of the OSHA 301 Incident report. Injuries of a minor nature, where first aid was required, need not be recorded. See WAC 296-27-01119.
- **Supplementary Records:** If a business employs more than 10 employees, a complete supplementary record on each individual accident is required. Form OSHA No. 301 should be used and must contain the employee's name and the exact details of the accident.
- **Annual Summary:** An employer with more than 10 employees is required to summarize all of the occupational injuries and illnesses and to post a copy of that summary in an employee work area (Form OSHA No. 301).
- **Reporting:** Employers are required to report any work accident which results in a fatality, or hospitalization of one or more employee(s), within eight hours.

All WISHA records must be made available upon request of WISHA, OSHA, or U.S. Department of Labor. The log or summary must be made available to employees and employee representatives. An injured employee is provided a legal right to a copy of any investigative report of an industrial accident, fatality, or catastrophe the employee is involved in.

4.3. Posting Requirements

WISHA requires employers to post a notice, furnished by WISHA that informs all employees of their protections and obligations under the act and directs them to their employer or the nearest office of the Department of Labor and Industries for assistance. For an employer to have violated this obligation, WISHA must first have furnished the proper posters. In addition to the WISHA regulation poster, employers are required to post citations, immediately upon receipt, at the location where the violation occurred. If this is not possible, the employer is to

post the citation in a prominent area. A citation is to be posted for three days, or until the violation is abated, whichever is longer. See <http://www.lni.wa.gov/IPUB/101-054-000.asp>

4.4. Inspections and Citations: Employers' and Employees' Rights and Remedies

WISHA authorizes an agency representative:

- to enter “without delay” at all reasonable times any place of employment;
- to inspect and investigate during regular working hours and at any other reasonable time and in any other reasonable manner, any place of employment and all pertinent conditions, structures, equipment, and materials therein; and
- to privately question an employer, owner, operator, agent, or employee

The employer is entitled, however, to require the investigating agent to produce a search warrant. If the agent inspects a work place without a warrant and without the employer's consent, all evidence obtained during the search can be excluded as evidence in a later court action. See Marshall v. Barlow's, Inc., 436 U.S. 307 (1978);

Hotel management may contest a warrant by refusing admittance to a compliance officer and immediately file a Notice to Quash this warrant on the grounds of lack of probable cause or for procedural irregularities. The requirements for lack of probable cause are somewhat less strict than in a criminal case, but be mindful that certain requirements do exist. Beyond contesting a warrant, hotel management, upon inspection, may require the agent to show his/her credentials and wait until verification can be made. See State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007).

The warrant itself should be inspected by hotel management. If the compliance officer is not carrying a warrant, hotel management may deny the inspection (you have the right to refuse a warrantless inspection). However, hotel management must demand to see the warrant before the hotel consents to the search. Once consent is given, the right to object is waived. Precisely for this reason, hotel management should properly train all managerial employees as to procedures and policies in dealing with inspectors. Consent may be granted by any employee in a supervisory or senior position on site at the time of the inspection. Hotel management should also read the warrant carefully. An investigator is not allowed to speak to employees (unless expressly stated in warrant), however, a union representative is allowed to accompany the investigator during the investigation. It is also advised that hotel management should request from the investigator that all information, including a list of complaints, be presented for examination, *prior* to the beginning of the on-site inspection.

During the inspection, hotel management should pay close attention to the information gathered by the investigator, such as photos or chemical samples, so as to be prepared to defend

any allegations. You have the right to take your own photos or chemical samples to assist you in defending any allegations. Before the investigator leaves the premises, hotel management should request a closing interview. At this time, any possible violations should be discussed with the investigator.

An inspector is required to list all possible violations and issue citations whenever he/she believes a hotel has violated a WISHA standard or regulation. Each citation must be in writing and describe the nature of the violation, including a reference to the provisions of the statute, standard, rule, regulation, or order allegedly violated, as well as to be fixed or abated with the reasonable time established for the abatement of these violations.

Hotel management has 15 working days to contest a citation with the Department of Labor and Industries. Management must submit a written appeal that includes the business name, address, and telephone number, the citation number, what management believes is wrong with the citation and any related facts, what management believes should be changed and why, a signature, and the date. See WAC 296-900-17005. After 15 days, the citation becomes a final order and may not be reviewed by a court or agency. In the event a penalty is assessed, hotel management has 15 days to appeal the assessed penalty, or the same conditions for failure to appeal apply. In Washington State, the procedure for appeal is to file an appropriate appeal with the Department of Labor and Industries. After the decision is rendered by the Department of Labor and Industries, hotel management may further appeal its case to the State Board of Industrial Insurance Appeals.

WISHA recognizes the right of an employee to refuse to perform a task when the employee has reasonable grounds to believe that the employee will risk serious injury or death due to a hazardous condition at the work place. If an employee chooses to leave the work site, then the hotel is not obligated to pay the employee for time lost. Washington's discrimination laws and public policy, however, prohibit the hotel from terminating the employee for refusing to work on these reasonable grounds.

A fact sheet on OSHA Inspections can be found at:
[http://www.osha.gov/OshDoc/data General Facts/factsheet-inspections.pdf](http://www.osha.gov/OshDoc/data%20General%20Facts/factsheet-inspections.pdf).

4.5. Accident Prevention Programs

Each hotel must develop a formal accident prevention program, tailored to the needs of the particular property and to the type(s) of hazards involved. The following is a minimal program for all hotels:

- A safety orientation program describing hotel management's safety program including:
 - How to and when to report injuries, including instructions as to the location of first-aid facilities.
 - How to report unsafe conditions and practices.
 - The use and care of required personal protective equipment.
 - The proper actions to take in the event of emergencies, including the exit routes from the area during emergencies.
 - Identification of hazardous gases, chemicals, or materials involved along with instructions on the safe use and emergency action following accidental exposure.
 - A description of hotel management's total safety program.
 - An on-the-job review of the practice necessary to perform the initial job in a safe manner.
- A designated Safety and Health Committee consisting of management and employee representatives being elected or appointed by fellow employees (if there are 11 or more employees).
- A safety bulletin board at each establishment employing eight or more persons to display and post safety bulletins, newsletters, posters, accident statistics, and other safety educational materials.

4.6. Violence in the Workplace

Because of the public attention focused on workplace violence, hotel management is well-advised to consider appropriate preventive and emergency response measures as part of the hotel's written accident prevention plan. Hotel management should also have mechanisms for conducting background checks, investigating suspicious on-the-job behavior, and properly supervising employees who engage in any form of threatening behavior. Finally, hotel management should consider a drug free workplace program, training employees in emergency

phone lines, and retaining rights to search lockers, cars, desks, and other areas on the hotel's property.

4.7. Ergonomics

Ergonomics is defined as an applied science concerned with designing and arranging things people use so that the people and things interact most efficiently and safely. It is also called "human engineering." The Washington State Department of Labor and Industries has developed industry guidelines, online training materials and publications to educate employers on how to enforce ergonomics in the workplace.

See <http://www.lni.wa.gov/Safety/Topics/Ergonomics/default.asp>.

Presently, there is no specific standard under either OSHA or WISHA regarding ergonomic or musculoskeletal disorders. The proposed WA State ergonomics regulations, filed on May 26, 2000, codified as WAC 296-62-05101 through 296-62-05176 were repealed in 2004. Nevertheless, both OSHA and the Department of Labor and Industries have written numerous citations related to ergonomics by invoking the "general duty" clause that requires employers to maintain a workplace that is safe and healthy. In general, compliance inspectors are looking at whether an employer's written accident prevention program and the employer's training effectively address ergonomic issues, particularly in those industries where repetitive stress injuries are frequently reported. Compliance inspectors also focus on the history of reported injuries at a particular work site.

4.8. Summary and Conclusions

- The purpose of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, et seq.) is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources" The Act states the duty of each employer is to furnish a "place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."
- Washington State's program is known as the Washington Industrial Safety and Health Act (WISHA) (RCW 49.17, et seq.) and has been approved by the federal OSHA. It is administered by the Washington State Department of Labor and Industries.
- Because WISHA has been approved by its federal counterpart (OSHA), most hotels in Washington State are subject to WISHA and the standards and procedures established by its implementing regulations.
- Hotel management must inspect the premises to ensure compliance with WISHA regulations and to alleviate any hazardous condition that may develop. If any potential hazards to employees exist, posters, labels, or signs must warn them of this potential danger. Hotel

management must establish or update any procedure required by WISHA and must also communicate this to employees.

- It is the responsibility of hotel management to establish and supervise:
 - A safe and healthful environment;
 - An accident preventing program as is required by WISHA standards; and
 - Training programs to improve the skill and competency of all employees.
- WISHA requires employers to post a notice, furnished by WISHA, that informs all employees of their protections and obligations under the act and directs them to their employer or to the nearest office of the Department of Labor and Industries for assistance.
- WISHA authorizes a representative of the Washington State Department of Labor and Industries to enter “without delay” at all reasonable times and inspect any place of employment and to privately question an employer, owner, operator, or agent, or employee.
- A WISHA investigator must possess a valid search warrant obtained by probable cause. Hotel management may contest a warrant by refusing admittance to a compliance officer and immediately seek to “quash” the warrant on the grounds of lack of probable cause or for procedural irregularities.
- Hotel management, with the advice and guidance of its legal counsel, should have in place, policies and procedures, for dealing with WISHA compliance officers.
- Hotel management has certain rights of appeal of a citation, and/or an assessed penalty, with the Washington State Department of Labor and Industries.
- An employee has the right to refuse to work when the employee has reasonable grounds to believe that he/she will be risking serious injury or death due to a hazardous condition at the work place.
- Hotel management must develop a formal accident prevention program, tailored to the needs of the particular property and to the type(s) of hazards involved. This program should, among other elements, include an established safety and health committee, for the purpose of developing and implementing a total safety program.

Chapter 5: Antitrust Laws and the Operation and Marketing of Hotels

5.1. General Overview of Antitrust Laws

Antitrust laws are intended to promote or maintain market competition by regulating anticompetitive conduct.

There are four basic federal antitrust laws:

- The Sherman Act contains broad general rules and policies. In general, it prohibits “every contract, combination or conspiracy” that unreasonably restrains trade. It also prohibits monopolizing, or attempting or conspiring to monopolize, any part of trade or commerce.
- The Clayton Act prohibits conduct that may be “anti-competitive” or may “unreasonably restrain trade.” This conduct includes exclusive dealing arrangements, “requirements” contracts and “tying” arrangements with distributors, retailers or customers.
- The Robinson-Patman Act generally prohibits discrimination in prices or terms of sale between competing purchasers, including when purchasers induce discrimination in favor of themselves.
- The Federal Trade Commission Act prohibits “unfair methods of competition in or affecting interstate commerce and unfair or deceptive acts or practices in or affecting interstate commerce.” The Act also authorizes the Federal Trade Commission to issue rules regulating competitive conduct.

Washington State has enacted its own antitrust laws. These laws substantially track the federal antitrust laws. See RCW 19.86 et seq.

Much of the antitrust statutory law is written in rather general and broad terms. This means that substantial interpretation has been left to the courts. Through case law developed over many years, the antitrust laws have been interpreted to prohibit a variety of activities. Some are so clearly anti-competitive that they are deemed “*per se*” violations. These violations include such things as:

- *Price fixing* among competitors, such as agreements to raise, lower or otherwise affect the price (or any other competitive term) that will be offered for products or services;
- *Bid rigging*, such as when two bidders agree among them as to who will win the bid;

- *Market or customer allocations*, such as agreements among companies not to compete for customers (there are some contexts when limited non-compete agreements may be permissible, such as in the context of the sale of a business when the seller of the business agrees not to compete with the buyer after the sale);
- *Group boycotts* among competitors, such as an agreement not to do business with a targeted business, or only on certain agreed-upon terms; and
- *Tying arrangements* used by a company that has particular strength in a market to harm competition, such as a company that uses its market position to force a customer to buy two separate products by refusing to allow the customer to buy only one of the products (*a la* the Microsoft suits over the sale of its browser and its office software).

Other agreements among businesses may not be so clearly anticompetitive as to be “*per se*” violations. In these situations, the case law directs that the conduct be evaluated under an approach known as “the rule of reason.” This test requires a full consideration and balancing of the harms and benefits of the conduct. If a court determines that the competitive harms outweigh the benefits, the court may find that the conduct is prohibited by the antitrust laws. One example of this kind of conduct is what is known as “vertical restraints.” Vertical restraints are agreements made between companies within a supply chain. For example, a manufacturer might want to require a dealer to maintain a certain price for the manufacturer’s product. Historically, this kind of restriction would have been considered a “*per se*” violation. However, at the federal level, the Supreme Court in 2007 changed this long-standing rule and held that “resale price maintenance” activities were subject, instead to the “rule of reason” approach—in other words the practice is illegal only if it unreasonably restrains competition based on all of the facts and circumstances. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007). If conduct is subject only to the “rule of reason” approach, then it is comparatively much more difficult and expensive to prove that the conduct violates the antitrust laws.

Because antitrust laws are codified at both the federal and state level, the same laws can be enforced by two federal agencies—the US Department of Justice (DOJ) and the FTC—and also by the Washington State Attorney General’s Antitrust Division.

At the state level, the Washington State Attorney General (AG) may investigate any action that the Attorney General believes is in violation of the antitrust laws. RCW 19.86.085. The AG may also sue to enjoin or restrain prohibited acts and recover attorneys’ fees. RCW 19.86.080; RCW 19.86.095. The AG can seek restitution for those injured by the violators. RCW 19.86.080. Violators are subject to civil penalties of up to \$100,000 per violation (for individuals), or up to \$500,000 per violation (for corporations). RCW 18.86.140. The AG can also sue for damages incurred by the state of Washington itself. RCW 19.86.090.

At the federal level, the DOJ can pursue similar remedies under federal law, but the DOJ does not have the power to extract civil fines from antitrust violators. If a government entity itself has suffered loss a result of injury, the government entity may recover damages. 15 U.S.C. § 15(a). The typical federal remedy available to federal enforcers is injunctive relief. The DOJ also has jurisdiction to criminally prosecute hard-core violations. Criminal prosecution can result in a felony conviction and up to 10 years in prison. Fines can include \$1 million for individuals. Corporate fines can be up to \$100 million or twice the gain or loss caused by the violations, whichever is greater. 18 U.S.C. §3571(d).

Additionally, private parties can sue under the antitrust laws. Under both the federal and state antitrust laws, any person who is “injured in his business or property” may sue for a violation of antitrust laws. Private parties can seek an injunction to stop prohibited conduct, can sue for damages, can recover attorneys’ fees, and can also seek a discretionary penalty of treble damages of up to \$25,000. RCW 19.86.090; 15 U.S.C. §15(a).

As indicated in the above discussion, the antitrust laws are broad and leave room for interpretation. Federal and state investigations and actions can be brought, and private lawsuits can also be maintained. Additionally, the stakes involved can be very high and can even threaten to break a company. As a result of all of these attributes, the antitrust laws can result in complex, drawn-out, contentious, and very expensive investigations and litigation.

5.2. Special Application to Certain Hotel Practices

The antitrust laws impact the hotel business in the same general ways that they impact other industries. For example, in general, hotel management should decline to discuss or make agreements with competitors on matters that might increase rates for the hotel, force down prices for suppliers, or otherwise have anti-competitive consequences.

There are three contexts, discussed below, where the application of the antitrust laws has somewhat unique application to the hotel industry.

(a) Collusion Among Hotels That Are Separately Owned But Jointly Managed, or Separately Managed and Jointly Owned

As indicated above, agreements among competitors to fix prices, allocate customers, or collude in bidding are generally “*per se*” antitrust violations. What if, however, two legally separate companies are actually under common ownership? If they conspire to set prices, etc., is the behavior prohibited?

Guidance on this question is found in the Supreme Court case of Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), and its progeny. Under the Sherman Act, a conspiracy requires a plurality of actors. These cases state that legally separate entities that are

within a “single enterprise” do not constitute a plurality of actors and therefore cannot be deemed to violate the antitrust laws when they make agreements among themselves—they are considered legally “incapable of conspiring with each other” for purposes of the antitrust laws. A “single enterprise” clearly includes a corporation and its wholly owned subsidiaries, its own officers or employees, and usually any entity owned by the corporation’s parent company.

Under Copperweld, courts first determine whether defendants are legitimately a single enterprise by examining the degree to which the economic interests of defendants converge. This is guided by the premise that economic interests, not corporate form, control the decision of whether related entities can conspire. City of Mt. Pleasant v. Associated Elec. Coop., 838 F.2d 268, 277 (8th Cir. 1988). For example, the 9th Circuit has held that the interests of a hospital and its anesthesiologists, who were independent contractors, were sufficiently independent to permit a finding of conspiracy. Otiz v. St. Peters Cmty.Hosp., 861 F.2d 1440, 1450 (9th Cir. 1988).

As fact variations occur, the application of Copperweld begins to get muddy. For example, the courts are split on whether partially owned subsidiaries and parent companies are a “single enterprise.” Some courts, for example, have held that a corporation is incapable of conspiring with a subsidiary only if it is essentially a wholly owned subsidiary. See Aspen Title & Escrow, Inc. v. Jeld-wen, Inc., 677 F. Supp. 1477 (D. Or. 1987); see also Scandinavian Satellite Sys., v. Prime TV Ltd., 291 F.3d 839, 846 (D.C.Cir. 2002) (holding that ownership of capital stock in one corporation by another does not create a sufficient identity of corporate interest between two companies to invoke Copperweld); Bascom Food Prods. Corp. v. Reese Finer Foods, Inc., 715 F.Supp. 616, 630 (holding that a subsidiary and its parent corporation would not be considered a single entity when the subsidiary is not wholly owned by the parent). By comparison, other courts have held that a corporation can be held incapable of conspiring with a subsidiary even though the subsidiary is only partially owned. See, e.g., Direct Media Corp. V. Camden Tel. & Tel., 998 F. Supp. 1211, 1217 (S.D. Ga. 1977) (holding that a corporation’s 51% ownership in a company renders corporation incapable of conspiring with the company).

In the hotel world, it is common for hotels to be managed by independent management companies. Often, a management company can manage two or more hotels in the same market, and each of those hotels can be separately owned. Can the staff of one hotel’s staff talk to the other hotels’ staff about pricing and bidding on group business? Since they are both employees of the same management company, they might assume that these conversations are safely permitted.

This assumption, however, would be incorrect. If two hotels are separately owned, but are managed by the same management company, the AG (or the DOJ or a complaining customer) may argue that the two hotel owners are not a “single enterprise” and that, accordingly, the Copperweld exception does not apply.

For example, beginning in November 1999, the Washington State AG began investigating Starwood Hotels & Resorts Worldwide Inc. Starwood managed two separately-owned hotels in Seattle—the Sheraton Seattle Hotel & Towers and the Westin Seattle. See Puget Sound Business Journal (PBSJ) report by Rami Grunbaum, August 4, 2002, www.atg.wa.gov/pressrelease.aspx?&id=5126. The investigation involved allegations of price fixing by the hotels. *Id.* According to the PBSJ report, from the period between November 1999 and July 2002, the attorney general collected more than 1 million pages of documents from the hotels and took depositions from 12 employees.

On July 18, 2002, Starwood filed suit against the state in U.S. District Court, seeking a judicial ruling that its role in setting prices was lawful. Nine months later, on March 7, 2003, the AG announced that it and Starwood had settled the case. The AG’s report of the settlement states:

The Seattle Sheraton and Seattle Westin hotels, which are managed by Starwood, have agreed to notify large groups and convention customers that they can request separate bids, quotes and prices from each hotel. Starwood also agreed the two hotels will only share between themselves pricing and availability information relating to negotiations with those customers when such information is also available to the industry or the public.

See <http://www.atg.wa.gov/pressrelease.aspx?&id=5126> .

A similar concern can be raised if two hotels are owned by the *same* owner, but each hotel is managed by a *different* management company. A management company is usually considered an agent of the hotel owner, and cases have held that the “unified economic interest between principal and agent may prevent conspiracy.” See *R.W. Int’l Corp. v. Welch Food, Inc.*, 13 F.3d 478 (1st Cir. 1994). However, a hotel management company, and especially a branded management company, usually has independent interests, such as its interest in management fees that are based on a percentage of the hotel’s gross revenues or gross operating profit. Most courts have recognized that two agents of a single principal *are* capable of conspiring with each other in violation of the antitrust laws if the agent has an “independent personal stake.” See *Seigel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1135 (3d Cir. 1995). Arguably, therefore, two separate management companies that manage different hotels in the same market for the same owner should carefully consider whether they are permitted, for example, to discuss prices with each other or cooperate when bidding on the same piece of business.

(b) “Call Arounds”

The hospitality industry is a very congenial, close-knit community, and hoteliers do like to help each other. Some hotels have taken the cooperation too far, and have run into difficulty under the antitrust laws, by participating in “call arounds.”

A “call around” is a practice in which a hotel calls or otherwise contacts hotels within a market to collect or share nonpublic information about current room rates and occupancy. The hotel then uses the information to set the hotel’s room rates. For example, if the hotel notes that occupancy rates at other hotels are dropping, the hotel may choose to increase its room rates.

If, during a “call around,” an agreement is made on rates, then a “*per se*” violation of the Sherman Act has likely occurred. If the only agreement is to share information, then the courts apply the “rule of reason” to determine whether the agreement, on balance, would have pro-competitive or anti-competitive consequences. See *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d. Cir. 2001)

Although the ultimate answer might be unclear under the case law, it is clear that the “call around” practice is dangerous. For example, on August 11, 2011, the AG for the State of Connecticut announced and made public a settlement reached in its investigation of McSam Hotel Group LLC, Metro Ten Hotel LLC, and Jamsan Hotel Management, Inc., the owners and operators of the Holiday Inn Express in Waterbury Connecticut. The AG alleged that the hotel’s personnel had been engaging daily in “call arounds” and that this activity violated Connecticut’s counterpart of the Sherman Act. Under the settlement, the companies were required to pay the state a \$50,000 civil penalty. They were also compelled to stop “call-arounds” at their Connecticut hotels, as well as at the other hotels they own and operate in other states.

Similarly, in 2010, the AGI for the State of Connecticut revealed that certain competitors of La Quinta used “call around” information to raise prices on a regular basis. La Quinta and the AG reached an agreement with the La Quinta hotel chain to nationally cease “call arounds.” See <http://www.ct.gov/AG/cwp/view.asp?A=2341&Q=458186>.

(c) Price Fixing Within the Rooms Distribution System

As indicated in Section 5.1, the Supreme Court in 2007 held in the Leegin case that the practice of “resale price maintenance” (RPM) is no longer considered a “*per se*” antitrust violation. Instead, under federal law RPM is subject to the “rule of reason” approach. In other words the practice is illegal only if it unreasonably restrains competition based on all of the facts and circumstances.

The Leegin case, however, is only binding on the interpretation of federal law. Even though most state laws echo federal antitrust laws, state courts are free to interpret the state laws differently. Various states, including California, still maintain that RPMs are *per se* violations of their state antitrust laws.

An example of RPM in the hotel world is when a hotel franchisor seeks to require its franchisees to maintain a certain room rate. This practice doesn’t occur frequently, and, because only one brand is involved, the practice might survive the “rule of reason” test.

However, the RPM practices of online travel agents (OTMs) and their agreements with hotel chains have recently come under attack. On August 21, 2012, two individuals (Nikita Turik and Eric Balk) filed a class action lawsuit in California court against high-profile names in the hotel industry, including Expedia, Sabre, Priceline, Hilton, Starwood and Marriott. At issue is apparently the practice among large OTA's to require chains to maintain price levels, and require other sellers of their rooms to maintain price levels, so that the OTA's prices wouldn't be undercut. Presumably, the plaintiff will argue that these RPMs are *per se* violations of California antitrust law, and will attempt to avoid or reduce factually-intensive litigation over whether the practice fails the "rule of reason" test.

Just three weeks before this lawsuit was filed, a UK regulator issued a "statement of objections", attacking RPM agreements entered into by Expedia and Booking.com with InterContinental. The probe began when Skoosh, another OTA, was pressured by chains to stop offering bookings at lower prices than those offered by the larger OTAs.

See <http://www.tnooz.com/2012/07/31/news/regulator-accuses-expedia-booking-com-and-ihg-in-hotel-competition-infringement-probe/>.

Will these high-level corporate battles affect decisions or practices at the hotel level? By keeping abreast of these developments, hotel managers may gain insights or even an advantage when negotiating their contracts with OTAs.

5.3. Summary and Conclusions

- The antitrust laws are intended to promote market competition by regulating anti-competitive conduct. They prohibit such things as price fixing among competitors and bid rigging.
- The antitrust laws are broad and leave room for interpretation. Federal and state investigations and actions can be brought, and private lawsuits can also be maintained. Additionally, the stakes involved can be very high and can even threaten to break a company. As a result of all of these attributes, the antitrust laws can result in complex, drawn-out, and contentious and very expensive investigations and litigation.
- Hotel management should decline to discuss or make agreements with competitors on matters that might increase rates for the hotel, force down prices for suppliers, or otherwise have anti-competitive consequences.
- Employees of a hotel management company that manages a separately owned hotel in the same market should treat the other hotel as a competing hotel. For example, discussions about pricing and bidding should not occur between these hotels.
- When two management companies manage different hotels in the same market, but the hotels are owned by the same owner, legal analysis is needed before the management companies share competitive information or cooperate on pricing and bidding.

- “Call around” practices have been attacked by at least one attorney general in another state. These practices are not safe and can subject a hotel to investigation, litigation, and fines.
- OTAs and chains are under attack for agreeing to maintain prices and keeping smaller OTAs and others from offering lower prices. Hotel managers should keep abreast of these developments and evaluate the impact on, for example, their contract negotiations with OTAs.
- Because of the risks involved when antitrust laws are arguably triggered, hotel management should be very sensitive to any activity that may even begin to approach the feel of price fixing, price manipulation, bid rigging, or other anticompetitive behavior. When these concerns are raised in any way, legal counsel should be consulted.

Chapter 6: Washington Law Relating To Alcoholic Beverages

6.1. General Nature of Control by State

Under the Twenty-first Amendment to the U.S. Constitution, each state has the right to control the sale of alcoholic beverages within that state. The Washington State Liquor Control Board (LCB), under the provisions of Title 66 of RCW, governs the issuance of licenses to sell alcoholic beverages and reviews of all establishments serving, manufacturing, or distributing alcoholic beverages in Washington State. The LCB has adopted extensive regulations to interpret and clarify these laws. These regulations are found in WAC 314. Hotels in Washington State generally fall under hotel and motel licenses, as established under RCW 66.24.590 and RCW 66.24.540, respectively, for licensing and regulation purposes (*See also*, WAC 314-02-041).

More recently, the passage of Initiative 1183 (I-1183) has changed the landscape for liquor distribution and sales in the State of Washington. I-1183 generally focuses on the LCB's ceasing its state liquor store and liquor distribution operations by June 1, 2012. However, these changes also affect liquor laws for the hospitality industry, as further addressed in this Chapter.

6.2. Application for and Issuance of Licenses

The liquor license application process can be long and tedious. The Business License Services division of the Department of Revenue (BLS) is a useful resource to any hotel or motel initially seeking to obtain a liquor license. *See* <http://bls.dor.wa.gov/index.aspx>. The BLS serves as a clearinghouse for the filing of applications, the collection of fees, and the issuance of licenses. The BLS issues a Master Business License and coordinates the issuance of special liquor endorsements by the LCB. In essence, the decision of whether to issue a liquor license is made by the LCB, but BLS mails out the license. The LCB's website details the application process for a liquor license, *see* <http://liq.wa.gov/licensing/apply-liquor-license>.

The Master Business License Application packet, available through the BLS or the LCB, contains the majority of forms necessary to obtain a liquor license, as well as requirements of local jurisdictions. After the application has followed the course through the BLS and the LCB, a liquor control agent is assigned to investigate the premises and the applicants. The agent's investigation will be a thorough and complete investigation of site, floor plan, financial interest, and criminal records, and all findings and a recommendation will then be presented to the LCB.

Requirements other than the filing of an application include posting a notification on the premises for public review and notification to local officials and entities. The LCB itself must notify local officials of any applications for a liquor license within their jurisdiction. RCW 66.24.010(8). The LCB must also give written notice of the application to schools, churches, and

public institutions that are within 500 feet of the licensed premises. RCW 66.24.010 (9)(a). Any objection by a public school within 500 feet will force the LCB to deny the license. RCW 66.24.010(9). Input or requests by local officials is strongly followed by the LCB as well, due to the unique perspective of local officials. In addition to notification of local authorities, the person applying for the license must post for thirty days a notice of application to notify the public of the application and the procedures for filing any objections.

6.3. Hotel License

RCW Title 66 covers the majority of licensing requirements for establishments wishing to dispense alcoholic beverages. Because of the efforts of the WLA and its members, in 2007 a law was passed that provides hotels with its own liquor license category. The law is codified in RCW 66.24.590. The hotel license fee is \$2,000 per year.

The hotel license is available only to a “hotel”, which is defined in RCW 66.040.010(22) as follows:

“Hotel” means buildings, structures, and grounds, having facilities for preparing, cooking, and serving food, that are kept, used, maintained, advertised, or held out to the public to be a place where food is served and sleeping accommodations are offered for pay to transient guests, in which twenty or more rooms are used for the sleeping accommodation of such transient guests. The buildings, structures, and grounds must be located on adjacent property either owned or leased by the same person or persons

The hotel license gives hotels significant flexibility in serving alcoholic beverages. It entitles the hotel to sell:

- spirituous liquor by the individual glass, beer and wine, at retail, for consumption on the premises, including mixed drinks and cocktails compounded or mixed on the premises;
- at retail, from locked honor bars, in individual units, spirits not to exceed fifty milliliters, beer in individual units not to exceed twelve ounces, and wine in individual bottles not to exceed three hundred eighty-five milliliters, to registered guests of the hotel for consumption in guest rooms. The licensee must require proof of age from the guest renting a guest room and requesting the use of an honor bar. The guest must also execute an affidavit verifying that no one under twenty-one years of age will have access to the spirits, beer, and wine in the honor bar;

- without additional charge, to overnight guests, spirits, beer, and wine by the individual serving for on-premises consumption at a specified regular date, time, and place as may be fixed by the LCB. Self-service by attendees is prohibited;
- beer, including strong beer, wine, or spirits, in the manufacturer's sealed container or by the individual drink to guests through room service, or through service to occupants of private residential units which are part of the buildings or complex of buildings that include the hotel;
- beer, including strong beer, spirits (see discussion in Section 6.5(a), below), or wine, in the manufacturer's sealed container at retail sales locations within the hotel premises;
- beer to a purchaser in a sanitary container brought to the premises by the purchaser or furnished by the licensee and filled at the tap in the restaurant area by the licensee at the time of sale; and
- for on or off-premises consumption, including through room service and service to occupants of private residential units managed by the hotel, wine carrying a label exclusive to the hotel license holder.

The hotel license also allows a hotel to place in guest rooms at check-in a complimentary bottle of liquor in a manufacturer-sealed container.

Any food service provided for by room service, banquets or conferences, or restaurant operation under this license must meet the requirements of rules adopted by the LCB. These rules provide that the hotel licensee must serve at least eight complete meals to hotel guests, or any other patron of the hotel who is offered alcohol service for on-premises consumption at a food outlet, on the hotel premises for a minimum of 5 hours per day between the hours of 11:00 a.m. and 2:00 p.m. (See WAC 314-02-0411, et seq.)

To apply for a hotel license the establishment must commence operating as a hotel and may not offer rooms to its guests on an hourly basis. See RCW 66.24.590. All on-premise alcoholic beverage service must be by an alcohol server as defined in RCW 66.20.300 and must comply with RCW 66.20.310. All employers, owners, and managers must have a Mandatory Alcohol Server Training (MAST) permit if they pour or serve alcohol. RCW 66.20.310; WAC 314-17-030. Minors may be allowed in all areas of the hotel where liquor may be consumed; however, the consumption must be incidental to the primary use of the area. These areas include, but are not limited to, tennis courts, hotel lobbies, and swimming pool areas. If an area is not a mixed use area, and is primarily used for alcohol service, then the area must be designated and restricted to access by persons of lawful age to purchase liquor.

The issuance of a liquor license is strictly at the discretion of the LCB, and the LCB is authorized to inquire into “all matters in connection with the construction and operation of the premises,” as well as the criminal background of the applicant. RCW 66.24.010(2) restricts the LCB from granting a license unless the following requirements are met:

- A person must reside in the state at least one month prior to making application;
- All members of a co-partnership must be eligible for license;
- An establishment managed by a person other than the licensee must have an eligible manager; and
- A corporation or a limited liability company must have a license to conduct business in the state of Washington.

The LCB may in its discretion, subject to the provisions of RCW 66.08.150, suspend or cancel any license. All sales of must stop if a suspension or termination occurs.

The inquiries to which a licensee is subjected also include the applicant’s criminal background, financial backing, and a 10% rule. In short, the 10% rule requires that any person receiving more than 10% of the net profits of the licensed business must be named on the liquor license. WAC 314-12-030. Because of the language of this 10% rule, some landlords or other interested persons such as key employees may also be considered a party of interest.

If a hotel facility that serves alcohol is operated under contract or joint venture agreement, then the operator of the facility may hold a license separate from the hotel’s license. Food and beverage inventory used in separately licensed operations at the hotel may not be shared and must be separately owned and stored by the separate licensees. In order to provide catering services, a hotel facility must apply for an added caterers endorsement, which allows the facility to take beer and wine off the licensed premises to cater events at approved locations.

6.4. Motel License

RCW 66.24.540 provides for a motel license. “Motel” means, for purposes of this license, “a transient accommodation licensed under chapter 70.62 RCW.” In other words, “motel” in this context includes any hotel, motel, condominium or other facility offering three or more lodging units to transient guests. See RCW 70.62.210. If a facility qualifies as a “hotel” and can obtain a hotel license (discussed in Section 6.3, above), then the facility will likely desire to obtain that license. If not, then the motel license is valuable fallback for the lodging facility. No license may be issued, however, to “a motel offering rooms to its guests on an hourly basis.”

The motel license is a retailer’s license that allows the facility to “sell at retail, in locked honor bars that also contain snack foods, spirits in individual bottles not to exceed fifty milliliters,

beer in individual cans or bottles not to exceed twelve ounces, and wine in individual bottles not to exceed one hundred eighty-seven milliliters, to registered guests of the motel for consumption in guest rooms.” Each honor bar must contain snack foods, and no more than one-half of the guest rooms may have honor bars. The licensee must require proof of age from the guest renting a guest room and requesting the use of an honor bar. The guest must also execute an affidavit verifying that no one under twenty-one years of age has access to the spirits, beer, and wine in the honor bar.

The annual fee for such Motel license is \$500.00.

6.5. Initiative 1183

I-1183 directed the LCB to end state liquor store and liquor distribution operations by June 1, 2012, in the State of Washington and to transition these activities to the private sector. Two aspects of I-1183 are particularly noteworthy for hotels.

(a) Hotel Licensee’s Right to Sell Spirits by the Bottle

As part of the initiative, private retail locations for liquor sales are required to have a minimum of 10,000 square feet of enclosed retail space, with certain exceptions. One of these exceptions benefits hotels. The holder of a hotel license is now permitted to sell “spirits” at retail locations on-site as an exception under I-1183 without having to comply with the 10,000 square foot requirement. The term “spirits” is defined in RCW 66.04.010 as “any beverage which contains alcohol obtained by distillation, except flavored malt beverages, but including wines exceeding twenty-four percent of alcohol by volume.”

(b) Changes to Spirits Taxes

I-1183 also redefined the tax structure for the Department of Revenue’s administration of spirits taxes (previously the LCB administered the spirits taxes). This new tax structure is dependent on whether the spirits are sold for on-premises consumption by the drink or for sale in retail stores for off-premises consumption. Hotels pay these taxes to the vendor selling the spirits. To help the vendor apply spirits taxes appropriately, the hotel needs to inform the vendor the category for which the spirits are purchased. Hotels must keep accurate documentation showing payment of proper spirits taxes in case of an audit by the Department of Revenue.

(1) Spirits for On-Premises Consumption by the Drink

Hotels are taxed in the same manner as on-premises licensees when purchasing spirits in the original container for sale. When purchasing these spirits, hotels must pay the spirits taxes as follows:

- Spirits sales tax at the rate of 13.7% of the purchase price; and

- Spirits liter tax at the rate of \$2.4408 per liter.

Hotels selling spirits by the drink must collect and remit retail sales tax and pay retailing business and occupation (B&O) tax on those sales. Hotels providing spirits to guests without charge still have to pay the use tax on those spirits based on the comparable retail selling price of the same spirits (see RCW 82.12.020).

(2) Spirits Sale In Retail Stores

As indicated in Section 6.5(a), above, hotels with retail locations and the proper LCB license are allowed to sell spirits in their original container for off-premises consumption. Hotels are treated as off-premises licensees when purchasing spirits in their original container for off-premises consumption and such purchases from the vendor are tax exempt. Hotel retail stores selling spirits at retail sales locations must collect and remit the spirits taxes on their sales of spirits in the original container to the general public as follows:

- Spirits sales tax at the rate of 20.5% of the selling price; and
- Spirits liter tax at the rate of \$3.7708 per liter.

The state retail B&O tax applies to sales of spirits in their original container at retail store locations. However, the general retail sales tax does not apply on such sales.

6.6. Public Safety

There are four public safety issues that are of significant importance to the LCB and are also significant liability concerns for hotels. They are:

- Minors
 - Selling, furnishing, allowing possession or consumption of alcohol by a minor (under age 21)
 - Selling or furnishing tobacco to a minor (under age 18)
 - Allowing minors to frequent an age restricted area or premises
- Over Service
 - Sales to apparently intoxicated persons (RCW 66.44.200, WAC 314-16-150)
 - Allowing possession of alcohol by apparently intoxicated persons
 - Allowing consumption of alcohol by apparently intoxicated persons

- Disorderly Conduct: see WAC 314-11-015, WAC 314-11-050.
 - Allowing fights or not calling the police
 - Owners or employees intoxicated on premises
- Violations of RCW 69, 69A or 70: criminal conduct of owner, employees and/or patrons

6.7. Liability for Serving Alcoholic Beverages to Minors

Under RCW 66.44.270, it is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years or permit any person under that age to consume liquor on his or her premises or on any premises under his or her control. “Premises” includes real property, houses, buildings, and other structures, and motor vehicles and watercraft, hotels fall under the definition of “premises.” The statute imposes statutory penalties. Like other statutes that prohibit conduct, a violation of this statute may create “*per se*” negligence liability to anyone injured as a result of the prohibited service. See PART I, Section 5.3.

If a hotel has a Washington Liquor Control Board age restricted area, no one under 21 years of age is allowed to frequent that area 24 hours a day. However, employees of 18-20 years of age can enter the restricted area to complete their duties. Employees can also place orders and pick up drinks for service outside restricted areas, clean up, set up and arrange tables, serve food and seat patrons. See RCW 66.44.310, RCW 66.44.350.

To determine that public safety is not compromised, LCB, Police Departments and Health Departments can perform compliance checks on your premises. A hotel may also test its own employees by conducting a spot check with underage “patrons”, but the hotel must first obtain written approval from LCB. WAC 314-21.015

Washington State law prohibits the sale of alcohol between 2 a.m. and 6 a.m. Local municipalities, however, may fix more restrictive hours. See WAC 314-11-070. For all practical purposes, a hotel should claim “last call” in a sufficient amount of time for patrons to finish their drinks before 2 a.m.

6.8. Liability for Serving Alcoholic Beverages to Intoxicated Persons

Hotels that furnish alcohol to their guests are potentially liable for the actions of their guests and any resulting injuries to third parties when a guest becomes intoxicated on the premises. The potential for legal liability is always increased with regard to commercial servers of alcohol. Washington courts assume that a host has a duty to foresee the harmful consequences of excessive drinking by its patrons.

The general common law rule in Washington is that a person who furnishes alcohol is not liable for the acts of their patrons. There are two significant exceptions to this general rule. A server *is* liable for a patron's acts if:

- The patron served is “apparently under the influence” and the acts of the patron are “reasonably foreseeable,” or
- The patron is in a special relationship to the person serving the alcohol.

The “apparently under the influence” rule is relatively recent. Before 2004, courts only held a server liable if the patron was “obviously intoxicated.” See Christen v. Lee, 113 Wn.2d 479 (1989). In Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 96 P.3d 386 (2004), however, the court softened this requirement, holding that a server is liable if the patron served is “apparently under the influence.”

Whether a person is “apparently under the influence” is determined by the person's appearance to others at the time the alcohol was sold, served or furnished to the person. Proving obvious or apparent intoxication must be based on firsthand observations, not assumptions. Faust v. Albertson, 167 Wn.2d 531, 222 P.3d 1208 (2009). At trial, a juror is not allowed to infer intoxication based on the person's blood alcohol content alone, but must be judged at the time of service. The rationale for this principle is that “underlying physiological science reflects that not all drinkers will appear drunk at certain levels of alcohol consumption...” *Id.*, 167 Wn.2d at 541.

The above cases point out the necessity for hotel staff to brief shift changes on the sobriety and appearance of patrons.

Washington State courts have also based commercial host liability on the premise that these servers of alcohol have a special relationship with their customers and a duty to protect the public from dangers caused by their patrons' level of intoxication. Washington case law on host liability include: Ensley v. Mollman, 155 Wn.App. 744, 230 P.3d 599 (2010); Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 96 P.3d 386 (2004), Barrie v. Hosts of America, 94 Wn.2d 640 (1980); Dickinson v. Edwards, 105 Wn.2d 457 (1986); Christen v. Lee, 113 Wn.2d 479 (1989); Williams v. Kingston Inn, Inc., 58 Wn. App. 348 (1990); Estate of Kelly v. Falin, 127 Wn.2d 31 (1995); Schooley v. Pinch's Deli Market, 134 Wn.2d 468 (1998); Cox v. The Keg Restaurants, Inc., 86 Wn. App. 239 (1997).

A server of alcohol is liable for those acts which are reasonably foreseeable.

It is almost always foreseeable that an intoxicated patron will commit alcohol induced errors while driving a vehicle

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There is no Washington “dram shop” law that explicitly imposes liability for injury to third parties on commercial hosts. RCW 66.44.200, however, prohibits the sale of alcoholic beverages to “a person apparently under the influence of liquor.” A first-offense violation of this statute is a misdemeanor (see RCW 66.44.180) and can result in a fine of up to \$500 and imprisonment. Moreover, a violation of the statute may create “*per se*” negligence liability to anyone injured as a result of the prohibited service. See PART I, Section 5.3.

Given the various grounds for establishing liability on a server, hotels should understand that the potential for injury and a lawsuit arises virtually any time a hotel furnishes liquor to guests or patrons. Commercial servers are well advised to assume the worst-case scenario when deciding the level of intoxication of a patron. The potential liability of a commercial server is increased dramatically if the server neglects his duty to protect the public from a patron “apparently under the influence.”

Any person engaged in the sale or service of liquor must receive certain mandated training and obtain a permit. See WAC 314-17 et seq. The determination of patron’s level of intoxication requires skill and judgment. The difficulty in making this determination is one reason why Washington regulations now require the training and certification of servers.

Regular training sessions for hotel staff and the implementation of written policies and procedures may further reduce the likelihood of a lawsuit. Other than keeping a watchful eye on patrons, offering a cab service or other means of alternative transportation is strongly advised.

I-1183, Sec 103(8)(a), required the LCB to adopt a “responsible vendor program.” The program is described in WAC 314-02-108. It provides an additional opportunity for training. A spirits retail licensee who holds a “responsible vendor certificate” is eligible for reduced sanctions on their first sign violation within any period of twelve calendar months.

6.9. Books and Records

Under WAC 314-16-095, a commercial server must comply with certain record-keeping and reporting requirements. A commercial server must keep the original copies of all purchase invoices and other memoranda covering all purchases of liquor by retail licensees for a period of two years. The records must show:

- Purchase invoices and supporting documents, with items and/or services purchased, from whom the items were purchased, and the date of purchase;

- Bank statements and cancelled checks for any accounts relating to the licensed business;
- Accounting and tax records related to the licensed business and each true party of interest in the liquor license;
- Records of all financial transactions related to the licensed business, including contracts and/or agreements for services performed or received that relate to the licensed business;
- Records of all items, services, and moneys' worth furnished to and received by a retailer and of all items, services, and moneys' worth provided to a retailer and purchased by a retailer at fair market value;
- Records of all industry member financial ownership or interests in a retailer and of all retailer financial ownership interests in an industry member; and
- Business entertainment records of industry members or their employees.

In addition to the invoice records, all hotel licensees must maintain records of all purchases on the premises, including liquor, food, and supplies, and must maintain records of all sales on the premises from all sources including liquor, food and miscellaneous items, and service. Individual sales are to be recorded on sales slips or cash register tape in such a manner to indicate the source of revenue. These records must be kept for a period of two years as well.

Hotel management in Washington State with bars or lounges on their premises, must be fully aware of the fact that liquor laws and the rules and regulations of the LCB must be strictly adhered to in order to avoid the loss of their liquor license and the severe civil and/or criminal penalties. Washington's law relating to alcoholic beverages is complex and it is advised that hotels work closely with their legal counsel in order to assure compliance with these laws.

Additionally, with the passage of I-1183, the liquor laws are in flux. Hotels should keep alert for changes in the laws.

6.10. Summary and Conclusions

➤ The Washington State Liquor Control Board (LCB), under the provisions of Title 66 of RCW, governs the issuance of licenses to and review of all establishments serving, manufacturing, or distributing alcoholic beverages in Washington State.

- Hotels seeking a liquor license may contact the Business License Services division of the Department of Licensing (BLS), which issues Master Business Licenses and coordinates the issuance of special liquor endorsements by the Liquor Control Board.
- The LCB will not issue a license until such time as a thorough and complete investigation of the site, floor plan, financial interest, and criminal record of the applicant has been completed. In addition, Washington law requires that the filing of an application include posting a notification on the premises for public review and notification to local officials and entities.
- To apply for a hotel license, the establishment must commence as a hotel and may not offer rooms to its guests on an hourly basis. All on-premise alcoholic beverage service must be done by an alcohol server as defined in RCW 66.20.300 and must comply with RCW 66.20.310. All employers, owners, and managers must have a Mandatory Alcohol Server Training (MAST) permit if they pour or serve alcohol. RCW 66.20.310; WAC 314-17-030.
- As part of I-1183, private retail locations for liquor sales are required to have a minimum of 10,000 square feet of enclosed retail space, with certain exceptions. I-1183 also amended the hotel licensee provisions to allow the licensee the right to sell “spirits” in bottles at retail sales locations within the hotel premises (as noted above). The 10,000 square foot limit doesn’t apply to hotel license holders.
- An innkeeper who furnishes alcohol to its patrons is potentially liable for the actions of the guest and any resulting injuries to third parties when the guest becomes intoxicated on the premises. A server of alcohol is liable for the patrons acts that are “reasonably foreseeable” when it neglects its duty to protect the public from a patron who is “apparently under the influence” of alcohol.
- Washington State courts have based commercial host liability on the premise that “servers” of alcohol have a special relationship with their customers and a duty to protect the public from dangers caused by their patrons’ level of intoxication.
- There is no “dram shop” law in Washington, but there are statutory penalties for serving patrons who are “apparently under the influence” or who are under age. If a hotel violates these statutes and injury results, “*per se*” negligence liability can result.
- I-1183 requires the LCB to adopt a “responsible vendor program.” The LCB has done so, and it provides an additional opportunity for training and for reduced sanctions for license violations. In any event, continuous training of hotel staff is well-advised, given the inherent risks in serving alcoholic beverages.
- Liquor Control Board must be strictly adhered to. The consequences of failing to do so can include the loss of liquor license and severe civil and criminal penalties and liability. The law

relating to alcoholic beverages is complex, and it is advised that hotels work closely with their legal counsel to assure compliance with these laws.

Chapter 7: Americans With Disabilities Act—Title III

Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq., prohibits discrimination against individuals with disabilities in privately operated places of public accommodation. The fundamental objective of the ADA is to ensure that persons with disabilities have the opportunity to experience the full and equal enjoyment of goods, services, facilities, privileges, and advantages as persons without disabilities.

The ADA was first enacted in 1990. To implement the application of the ADA, the U.S. Access Board and Department of Justice (DOJ) issued ADA accessibility standards in 1991 (the “1991 Standards”). More recently, Congress amended the ADA to broaden its coverage by enacting the Americans with Disabilities Act Amendments Act of 2008. Additionally, on September 15, 2010, the U.S. Access Board and Department of Justice issued long-awaited, new regulations for accessibility, including standards for accessible design (the “2010 Standards”). The 2010 Standards were intended to clarify and refine the many compliance issues that arose during two decades under the ADA. They took effect on March 15, 2012.

7.1. The ADA’s Application to Hotels

The ADA states that the prohibition against discrimination applies to “any person who owns, leases or leases to, or operates a place of public accommodations.” This includes sublessees, management companies, and any other entities that own, lease, lease to, or operate a “place of public accommodation,” even if the operation is only for a short time.

The definition of a “place of public accommodation” is very broad under the regulations, and incorporates 12 categories of facilities. These categories include, very squarely, hotels and their guest and public facilities. The hotel-related categories include:

- places of lodging,
- establishments serving food or drink,
- service establishments,
- places of exhibition or entertainment,
- places of public gathering,
- sales or rental establishments,
- and places of exercise or recreation.”

The ADA applies only to the site over which the private entity exercises control, and does not apply, for example, to adjacent roads or walks controlled by a public entity.

The 2010 Standards provide more detail regarding what it means to be a “place of lodging.” First, the 2010 Standards carve out a specific exception for what are essentially traditional bed and breakfast-style lodgings – places that do not contain more than five rooms for rent, and where the proprietor also lives. Lodgings of that sort are not considered “places of public accommodation.” Second, the definition has been updated to specifically refer to inns, hotels, and motels, rather than doing so indirectly, as under the prior version of the rules. Third, the definition has been expanded to include extended-stay type lodgings—more specifically, facilities that provide short-term lodging (30 days or less) where the occupant does not have the right to return to a specific room or unit after the conclusion of the stay and that have off-site management, walk-up or call-in reservations, housekeeping, and reservations without specific room assignments. The expanded definition picks up, for example, many timeshare resorts and condo hotel operations.

Obviously, hotels in Washington State (but not most traditional bed-and-breakfast facilities) are subject to the ADA regulations as “places of public accommodation.”

7.2. Enforcement

Persons who have reasonable grounds for believing that they have been subjected to discrimination in violation of the ADA may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other court order. In addition, if the DOJ has reason to believe that there may be a violation of the ADA, then the DOJ may initiate a compliance review, following which the DOJ may commence a civil action in the public interest. In a civil action, the court may award equitable relief, monetary damages, and/or civil penalties. Civil penalties may not exceed \$50,000 for the first violation, and \$100,000 for any subsequent violation. Further, the prevailing party may, at the court’s discretion, recover attorneys’ fees and litigation costs.

The private right of action under the ADA has inspired what are known as “drive-by” lawsuits. A person goes to a hotel to with the intent of finding ADA violations in order to file an individual action or a class action to enforce the ADA’s requirements. This tactic has been prevalent in California and other states, but has not been as frequent in Washington. Legal strategies can be employed to minimize the costs associated with these sometimes frivolous lawsuits.

To avoid litigation, hotels should comply with ADA regulations to the best extent possible, plan for accessibility for new projects, provide reasonable accommodations where strict compliance is not possible, appoint an accessibility officer or manager (lawsuits often occur

because employees are unable to handle a conflict situation), and respond to demands for accessibility, especially written demands.

7.3. General Compliance Requirements for Facilities

(a) New Construction and Alterations

When a new facility is built, it must comply with the regulations then in place. When alterations to an existing facility are made, they must comply with the standards then in place. Only altered portions of a building must comply, except that if the alteration affects access to an area containing a primary function (*i.e.*, major activity for which the facility is intended), then the “path of travel” to the altered area and to the rest rooms, telephones, and drinking fountains serving the altered area must comply. These “path of travel” improvements are not required, however, to the extent they exceed 20% of the cost of overall alterations.

(b) Requirement to Affirmatively Remove Barriers from Existing Facilities

The ADA regulations require the actual removal of architectural barriers and communication barriers that are structural in nature in existing facilities, when such removal is “readily achievable.” This obligation exists even when the facility is not undergoing any construction or alteration.

Typical efforts to remove barriers might include:

- installing ramps, flashing alarm lights, offset hinges to widen doorways as well as accessible door hardware, and an accessible paper cup dispenser at an existing inaccessible water fountain;
- in bathrooms installing full-length mirrors, repositioning paper towel dispensers, insulating pipes under sinks to prevent burns, and rearranging toilet partitions to increase maneuvering space with grab bars in toilet stalls and a raised toilet seat;
- making curb cuts in sidewalks and entrances;
- repositioning shelves and telephones;
- rearranging tables, chairs, vending machines, display racks, and other furniture;
- adding raised markings on elevator control buttons;
- eliminating a turn-style or providing an alternative accessible path;
- creating designated accessible parking spaces;

- removing high pile, low density carpeting;
- and installing vehicle hand controls.

Whether any of the barrier removal measures set forth above would be required depends on whether they are “readily achievable.” The “readily achievable” analysis is a factually intensive, multi-factor test that varies from business to business, and even from year to year for individual businesses depending on economic conditions. Some considerations in assessing whether a barrier removal is “readily achievable” include the following:

- A “not readily achievable” defense is primarily based on how much money there is to fix the non-compliant elements. Use of the defense can result in required disclosure of financial information.
- An ADA accessibility survey by a competent professional can help quantify the issues and costs to fix violations. Depending on the complexity of the elements and size of the facility, these surveys currently range from about \$2,000 to \$15,000. The hotel can then implement a barrier removal plan based on the survey. This isn’t an absolute defense, but it helps show good faith and helps make the hotel’s position more defensible.
- The barrier removal may be technically infeasible, such as when the removal has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing structure or because the removal would be prohibited by site constraints.
- The barrier removal might be structurally impractical, such as when the unique characteristics of the terrain prevent compliance.
- There may be an equivalent way to facilitate access, other than the required solution. Alternative designs, products or technologies may be shown to provide substantially equivalent or greater accessibility and usability.
- What is not readily achievable today might become readily achievable tomorrow, based on the funds available to the owner and changes in the costs due to new technology or products.

When a hotel can demonstrate that removal of a barrier is not readily achievable, the hotel must make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods. For example, if it is not readily achievable for a gift shop within a hotel to raise, lower, or remove shelves to rearrange display racks to provide accessible aisles, then the shop must, if it is readily achievable, provide a clerk or take other alternative measures to retrieve inaccessible merchandise. Similarly, if it is not readily achievable to ramp a

long flight of stairs leading to the front door of a hotel, then the responsible party must take alternative measures, such as providing curb service.

(c) “Safe Harbor” from the Obligation to Remove Barriers

There is a “safe harbor” from the obligation to remove barriers and the “readily achievable” analysis. If new construction or alterations occurred before March 15, 2012, and the work complies with either the 1991 Standards or the 2010 Standards, then there is no obligation to remove any barriers in those buildings or areas of alteration—they are safe from that obligation and from the application of the “reasonably achievable” analysis. If new construction or alterations occur after March 15, 2012, then the work must comply with the 2010 Standards to come within the “safe harbor.”

The above “safe harbor” does have an area of danger in it. The 1991 Standards did not address or contain requirements for some common public accommodation facilities. These omitted facilities included:

- Fishing piers and platforms
- Golf facilities
- Miniature golf facilities
- Play areas
- Saunas and steam rooms
- Swimming pools, wading pools, and spas.

The 2010 Standards *do* address these facilities. The DOJ has taken the position that, as a result, all these types of facilities that were built or altered after the ADA became effective in 1990 must now comply with the 2010 Standards, if “readily achievable.” See 28 C.F.R. §36.304(d)(2)(iii).

The 2010 Standards are extensive and have many applications and considerations. Additionally, the DOJ continues to develop new ADA regulations, and so compliance will be a moving target.

A selection of some of the ADA compliance aspects that have particular application to hotels is included in this Chapter, below. This treatment is by no means exhaustive.

The Mid-Atlantic ADA Center and the Northwest ADA Center, together with the National Network of ADA Centers have recently developed two online resources to promote accessibility

and opportunity for people with disabilities within the hospitality industry. Visit <http://www.adahospitality.org> and <http://www.blue-path.com> for more information.

7.4. The Pool Lift Controversy

As indicated above, a pool is an example of a facility that was not covered by the 1991. As a result, every existing pool will need to comply with the 2010 Standards or be subject to the “readily achievable” test.

The 2010 Standards created significant controversy over their treatment of pools. Some read the standards to mean that a portable lift was sufficient. The DOJ took the position that they required a fixed, permanent lift at every pool. Thus, the DOJ stated that, whenever “readily achievable,” pool operators must install a fixed pool lift by May 15, 2012, and that a portable lift is not sufficient.

The hotel industry worked to obtain relief from this requirement. On May 24, 2012, the DOJ partially relented and issued revised requirements for pools. Under the revised rules:

- Existing pools must comply with the fixed-lift requirement beginning on January 3, 2013 (rather than the March 15, 2012 deadline in effect for compliance with all other aspects of public accommodations).
- If, before March 15, 2012, you purchased a non-fixed lift that otherwise complies with the 2010 Standards for pool lifts (such as seat size, etc.), then you may use it, as long as you keep it in position for use at the pool and operational during all times the pool is open to guests.
- Generally, lifts purchased after March 15, 2012, must be fixed lifts, if “readily achievable.”

This issue is likely to remain in flux in the coming months.

7.5. Separately-Owned Hotel Rooms

In one notable change, the 2010 Standards address the barrier removal requirements for condo hotels and similar facilities (i.e., facilities where some guest rooms are owned or leased by private individuals). The 2010 Standards carve out a specific exception to the barrier removal requirements, explicitly stating that hotel operators are *not* required to remove barriers in rooms that are owned by someone else. This amendment is apparently intended to avoid the somewhat awkward situation that might have arisen under the 1991 Standards—for example, one reading of the prior regulations would have required hotel management to update all “guest rooms” even if some of the guest rooms in the facility were owned by private parties. The 2010

Standards eliminate this problem, and it should no longer be a source of concern for hotel management.

7.6. Service Animals

A hotel must “modify policies, practices and procedures to permit the use of a service animal by an individual with a disability.”

Fortunately, the 2010 Standards restrict the definition of service animals to dogs. “Service boa constrictors” no longer can qualify for service animals. The only other animal that can qualify as a service animal, other than a dog, is a miniature horse. A hotel is allowed to consider certain factors in determining whether a miniature horse can be appropriately accommodated within the hotel facility. These factors include:

- The type, size, and weight of the miniature horse and whether the facility can accommodate these features;
- Whether the handler has sufficient control of the miniature horse;
- Whether the miniature horse is housebroken; and
- Whether the miniature horse’s presence in the facility compromises legitimate safety requirements that are necessary for safe operation.

28 C.F.R. §36.302(c)(9).

Service animals must be trained to actually do work. For example “psychiatric service animals” are allowed to detect and prevent or interrupt impulsive or self-destructive behaviors. By comparison, a dog that provides only “emotional support” or “comfort” is not a service animal.

Under the 2010 Standards, when staff members do not know whether a guest is using an animal as a service animal, the staff member’s conduct comes within very specific constraints:

- The staff member may make *only two inquires*. The staff member may ask:
 - Whether the animal is needed because of a disability, and
 - About the tasks that the animal is trained to do to assist the person with the disability.
- No inquires should be made at all if the answers are readily apparent (such as a guide dog leading a person who is blind).
- No inquires are allowed about the nature or extent of the person’s disability.

- A service animal user cannot be required to produce documentation that proves the animal is certified or trained. (In fact, there is no requirement in the ADA for a service animal to be certified or go through any specified training program.) No special markings on the animal are required.

See 28 C.F.R. §36.302(c)(6).

Once the staff member determines that the guest is using a service animal, the guest should be allowed access to any area of the hotel that other people without disabilities are allowed to go. The staff does, however, have certain tools available to help make the use of the service animal reasonable:

- The service animal handler must have control over the animal. Normally, this means a “harness, leash or other tether.” However, if the handler’s disability does not allow for the use of these restraints or the restraints interfere with the service animal’s work tasks, then other methods of control can be used, such as “voice control, signals, or other effective means.”
- The staff may ask the handler to remove the animal if it is out of control and the owner can’t bring it under control.
- The service animal may be removed if it is not housebroken.
- If the animal is removed for a proper reason, the handler must still be given the opportunity to obtain full, ordinary service at the hotel without the service animal on the premises.
- A hotel is not responsible for any care of the service animal.
- No deposit, fee or surcharge can be assessed for the service animal, even if the hotel routinely charges a pet fee.
- If the hotel normally charges for damages caused by pets, then the hotel may charge for any damage caused by the service animal.

See 28 C.F.R. §36.302(c)(2), (4), (5), (7), and (8).

7.7. Policies and Procedures: Reservations Systems

The ADA requires that hotels make “reasonable modifications” to their usual ways of doing things when serving people with disabilities.

The 2010 Standards address specifically the reservation process as it applies to individuals with disabilities. The hotel must modify their reservation policies and procedures to ensure that individuals with disabilities are able to make reservations for accessible rooms during the same hours and in the same manner as individuals who do not need accessible rooms. The 2010 Standards also require hotel management to provide enough information about accessibility features to allow persons with disabilities to make a reasonable assessment of whether the guest room meets his or her needs. Additionally, the 2010 Standards require that operators hold accessible rooms for individuals with disabilities and refrain from renting them to persons without disabilities until all other rooms have been rented. If an accessible room is reserved by a person with a disability, that room *must* be held for the reserving customer. 28 C.F.R. §36.302(e)(1).

7.8. Effective Communication

The 2010 Standards require that hotels provide auxiliary aids and services whenever necessary to ensure effective communication with people with disabilities. 28 C.F.R. §36.303(c). This might typically involve, for example:

- Providing assistance to help a vision-impaired guest to complete a registration form at reception,
- Providing alternative menu formats, such as Braille or large print, or
- Provide a hearing-impaired guest with an interface device that allows the use of telephones by keyboard and display.

The 2010 Standards add specific examples of auxiliary aids and services that are now available as a result of advances in technology. 28 C.F.R. §36.303(b)

The obligation to provide auxiliary aids also extends to guests' visitors who have disabilities. 28 C.F.R. §36.303(c)(1)(i).

7.9. Washington Law

Although Washington State regulations cover some of the requirements of the ADA, the ADA is more specific in some areas. When the Washington State regulations exceed the requirements of the federal regulations, the state standard must be followed. When the federal standards exceed the Washington State regulatory requirements, the federal requirements must be followed.

RCW 49.60.215 prohibits discrimination "based on the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That this section shall not be construed to require structural changes,

modifications, or additions to make any place accessible to a person with a disability except as otherwise required by law.”

RCW 49.60.215 has been enhanced by WAC 162-26, regarding public accommodations - disability discrimination. See also, *Fell v. Spokane Transit Authority*, 128 Wn.2d 618 (1996).

RCW 49.60 also contains specific provisions for service animals. RCW 49.60.218 provides:

(1) It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any food establishment, except for conditions and limitations established by law and applicable to all persons, on the basis of the use of a dog guide or service animal by a person with a disability: PROVIDED, That this section shall not be construed to require structural changes, modifications, or additions to make any place accessible to a person with a disability except as otherwise required by law: PROVIDED, That behavior or actions constituting a risk to property or other persons can be grounds for refusal and shall not constitute an unfair practice.

The statute then goes on to require certain modifications for “service horses.” It states:

(2) A food establishment shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability in accordance with subsection (1) of this section if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a facility, a food establishment shall act in accordance with all applicable laws and regulations.

The statute defines “service animal” as follows:

(a) "Service animal" means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Except as provided in subsection (2) of this section, other species of animals, whether wild or domestic, trained or untrained, are not service animals. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf

or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks.

These statutes appear to track the service animal requirements in the ADA and its accompanying regulations. See Section 7.6, above. Accordingly, compliance with the requirements of the ADA would appear to satisfy the above Washington statutes. The Washington statutes do provide, however, additional grounds on which litigants can base their lawsuits. See PART I, Section 1.3.

Pursuant to RCW 19.27 and RCW 70.92, WAC 51-50 adopts building codes that provide for accessibility. These building codes are in addition to the requirements of the ADA on these matters. For example, WAC 51-40-1103 is a new regulation relating to requirements for the number of accessible rooms, roll in showers and accessible rooms for persons with hearing impairments. See also discussion regarding the adoption of the International Building Code in PART III, Section 3.2.

7.10. Summary and Conclusions

- The ADA's objective, with respect to hotels (and other public accommodations), is to ensure that persons with disabilities have the opportunity to experience the full and equal enjoyment of the goods, services, facilities, privileges, and advantages of your hotel.
- The ADA was first enacted in 1990. The 1991 Standards applied before March 15, 2012. The new 2010 Standards took effect on March 15, 2012
- The ADA applies to hotels, but not to facilities that are, essentially, traditional bed and breakfast-style lodgings. The ADA now also applies to condo hotels and extended-stay lodging.
- The ADA can be enforced by the DOJ. Additionally, private parties, individually or in class actions, can also sue to enforce the ADA. "Drive-by" lawsuits can be brought by activists and others. Legal strategies can be employed to reduce the costs of these sometimes frivolous lawsuits.
- When a new facility is built, it must comply with the ADA regulations then in place. When a facility is altered, the altered portions of a building must comply, and there are also obligations to make compliant the "path of travel" to the altered area.

- Hotels must affirmatively remove barriers from *existing facilities* when the removal is “readily achievable.” This application of this concept is factually intensive and many considerations apply.
- There is an ADA “safe harbor” from the barrier removal obligation and its attendant “readily achievable” test. If new construction or alterations occurred before March 15, 2012, and the work complies with either the 1991 Standards or the 2010 Standards, then there is no obligation to remove any barriers in those buildings or areas of alteration. However, there is no safe harbor for facilities that are addressed for the first time by the 2010 Standards, such as swimming pools.
- As a result of confusion and lobbying efforts, the “fixed lift” requirement for swimming pools has been postponed until January 2, 2013.
- Managers of separately owned condo hotel units do not have to force the unit owner to comply with new requirements.
- Service animals now include only dogs and, with some limitations, miniature horses. The ADA has very specific directions that govern, for example, what inquiries can be made about service animals and the extent to which they must be accommodated.
- The ADA generally requires that hotels make “reasonable modifications” to their usual ways of doing things when serving people with disabilities. The 2010 Standards specifically address reservation procedures.
- The 2010 Standards require that hotels provide auxiliary aids and services whenever necessary to ensure effective communication with people with disabilities and technology.
- The ADA and the regulations implementing it are extensive and specific. This Chapter addresses some of the aspects that apply in a unique way to hotels. The treatment, however, is not exhaustive.
- When the Washington State regulations exceed the requirements of the federal regulations, the state standard must be followed. When the federal standards exceed the Washington State regulatory requirements, the federal requirements must be followed.

➤ Washington statutes and regulations set forth state requirements regarding handicap discrimination in public accommodations. The statutes also cover service dogs and miniature horses. In addition to these laws and regulations, WAC 51-50 deals with public accommodations as part of the state's adoption of the 2009 edition of the International Building Code. WAC 51-40-1103 is a new regulation relating to requirements for the number of accessible rooms and roll in showers and accessible rooms for persons with hearing impairments.

Chapter 8: USA Patriot Act

The USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept Terrorism Act) was passed in October of 2001 as a response to the terrorist attacks on September 11, 2001 (P.L. 107-56, 115 Stat. 272 (2001)). The law expands the federal government's ability, among other things, to deter and punish terrorist acts in the United States, enhance law enforcement investigatory tools and surveillance, and prevent money laundering and other financial crimes. *See* http://www.fincen.gov/statutes_regs/patriot/

8.1. Access to Hotel Records

The Patriot Act provides the federal government with increased access to private records. Its application affects the hospitality industry in several ways, including:

- providing for the use of undisclosed emergency warrants to search hotel rooms or to obtain guest information;
- allowing federal agents of the U.S. government to obtain, with a search warrant, tangible records from a hotel (including books, papers and records) relating to guests that registered at the hotel;
- allowing federal agents to obtain access, *without a warrant*, to registration records of a hotel guest, provided that proper law enforcement identification is produced and shown to hotel management; and
- requiring that records of all electronic transactions relating to a guest at the hotel be produced *without a warrant* if requested by a governmental entity (such records to include telephone records, e-mail correspondence, and transactions involving more than \$10,000 in cash).

8.2. Money Laundering and Suspicious Financial Transactions

Money laundering regulations are administered by a government agency known as the Financial Crimes Enforcement Network (FinCEN), which applies specific regulations if a hotel hits certain limits on cash advances. FinCEN administers the Bank Secrecy Act of 1970 (BSA) (otherwise known as the Currency and Foreign Transactions Reporting Act), which regulates Money Service Businesses (MSB).

A hotel can be an MSB, for example, if:

- The hotel offers check cashing to guests (or offers money orders, traveler's checks, currency dealing or exchange);
- The hotel conducts more than \$10,000 in money services business activity with the same person (in one type of activity) on the same day.

See

http://www.fincen.gov/financial_institutions/msb/materials/en/prevention_guide.html#Introduction. 31 CFR §561.317; 31 CFR 103.11(uu)(1) through (uu)(5).

If a hotel is an MSB, then the hotel is required to register with the Department of the Treasury and complete a list of agents. The agent list is not filed with registration but must be maintained at a location in the United States reported on the registration form. Upon request, the MSB must make such list available to FinCEN and/or the Internal Revenue Service. The list of agents must be revised annually and retained for a period of 5 years, with civil and criminal penalties imposed for willful violation of this requirement.

An MSB is required to report suspicious activity when dealing with money orders, traveler's checks or monetary transmissions. A transaction is considered suspicious if the MSB knows, suspects or has reason to suspect that the transaction (i) involves funds derived from illegal activity, (ii) is intended to, or conducted in order to, hide or disguise funds or assets derived from illegal activity, (iii) is designed to evade the requirements of the Bank Secrecy Act, whether through structuring or other means, or (iv) serves no business purpose or apparent lawful purpose, and the reporting business knows of no reasonable explanation for the transaction after examining all available facts.

In view of the above, it may be advisable for hotels to steer clear of these regulations by refraining from cashing checks altogether. With the prevalence of ATMs, it is probable that hotels can now leave these services to banks without significantly impacting guest expectations.

8.3. Office of Foreign Assets Control (OFAC)

Under the Patriot Act, U.S. persons are generally prohibited from dealing with "Specially Designated Nationals" or "SDNs." Those who deal with SDNs may face civil and criminal penalties, fines or prison sentences.

The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury publishes a list of SDNs (see: <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>). How can a hotel be certain that its guests are not SDNs? The Treasury Department has been unclear as to exactly how hotels are

expected to comply with the law. It would certainly be extremely difficult to vet each guest against OFAC's then-current list before check-in.

A practical answer reached by many lodging companies has been to "piggy-back" on the financial industry. OFAC has focused much of its efforts on making sure that financial institutions do not deal with SDNs. As a result, a person who is the valid holder of a major credit card has necessarily passed financial industry scrutiny. As a result, most hotels ask for valid identification and a major credit card at or before check-in as a short-cut way to help assure compliance. A hotel that regularly accepts cash without identification or major credit cards may be taking significant risks of violating federal law.

If a hotel is contacted by or suspects it has transacted with a listed person, contact with OFAC for verification is recommended (ofac_feedback@do.treas.gov; 1-800-540-6322).

For more information, *see* <http://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>.

8.4. Immunity for Hotels in Compliance

The Patriot Act grants immunity to hotels that provide voluntary registration information to a governmental entity if the hotel reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information. In addition, the Patriot Act provides criminal liabilities for individuals that harbor or conceal a person known, or believed with reasonable grounds, to have committed or is about to commit an offense of terrorism. If a hotel reports in good faith a suspected terrorist directly to the federal government or federal agency (such as the FBI), the hotel will not be subject to liability under the Patriot Act.

8.5. Patriot Act Renewal

It should be noted that while the USA Patriot Act is permanent law, there are certain provisions that must be periodically renewed. Certain provisions, including the authority to listen in on conversations of foreign suspects after they change phones and court-ordered searches of business records, were most recently extended for four years in May of 2011. Mascaro, Lisa (May 27, 2011). "[Congress votes in time to extend key Patriot Act provisions](#)". [Los Angeles Times](#). The USA PATRIOT Act has been challenged as being unconstitutional as a limitation on civil liberties, and review should be made to ensure what provisions might be applicable to the hotel industry at any given time.

If a hotel is contacted by or suspects it has transacted with a listed person, or if a hotel reasonably believes that an emergency involving immediate danger of death or serious physical

injury to any person justifies such disclosure, contact with a governmental entity or OFAC (ofac_feedback@do.treas.gov; 1-800-540-6322) is recommended.

8.6. Summary and Conclusions

- The USA Patriot Act was passed in October 2011 as a response to the terrorist attacks on September 11, 2001. The law expands the federal government's ability to monitor and deter terrorist acts and prevent money laundering (and other financial crimes) in the United States.
- The Patriot Act affects the hotel industry as it expands the federal government's access to private records. This may include the use of emergency search warrants for hotel rooms, obtaining, without a warrant, guest information, registration records, and electronic transactions of guests.
- Hotels should be cautious when advancing money, exchanging currency, or cashing traveler's checks for guests and should consider eliminating the service to avoid being considered a Money Service Business (MSB).
- A hotel, like all U.S. persons, is generally prohibited from dealing with SDNs. By requiring a valid ID and a major credit card, the hotel can likely "piggyback" on the financial industry and avoid the need to verify that its guests are not SDNs.
- The Patriot Acts grants immunity to hotels that provide voluntary registration information to a government entity when the hotel reasonably believes that an emergency involving immediate danger of death or serious injury exists. On the other hand, harboring a person that is known to have committed, or is about to commit, an offense of terrorism creates criminal liability.
- If a hotel is contacted by or suspects it has transacted with a listed person, or if a hotel reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies such disclosure, contact with a governmental entity or OFAC (ofac_feedback@do.treas.gov; 1-800-540-6322) is recommended.
- Certain provisions of the Patriot Act must be periodically renewed and review should be made to ensure compliance with applicable provisions.

Chapter 9: Use and Protection of Music, Television Signals, and other Work

9.1. Music.

(a) The Copyright Act – General Application to Music and Consequences of Violation

The Copyright Act of 1976 (17 U.S.C. § 101, *et seq.*) protects “original works of authorship fixed in any tangible medium of expression.” Music is an “original work of authorship” and, accordingly, is protected by the Act.

Under the Act, the owner of a copyright of a musical work has the exclusive right “to perform the copyrighted work publicly” or to “display the copyrighted work publicly.” 17 U.S.C. §106(4). As a result, any unauthorized public display of the music violates the Act, *unless* an exception under the Act applies.

The overall effect of the Act is that a hotel cannot “publicly perform” or “publicly display” copyrighted music, unless an exemption under the Act applies or the hotel is licensed to do so by the copyright owner or an organization representing the owner.

A “public display or performance” would occur at a hotel when, for example, the hotel plays music by any of the following means:

- Ambient and lobby music;
- “On-hold” telephone music;
- Music performed by a band, piano player, karaoke, liver singer, or a DJ;
- Music that emanates from a TV set.

If a hotel violates the Act, then the copyright owner may sue to recover actual damages and any profits attributable to in infringement. 17 U.S.C. §504(a). The copyright owner can also elect to recover an award of statutory damages and avoid the effort of proving actual damages. The statutory damages for an infringement of a work are generally between \$750 and \$30,000 “as the court considers just.” If the infringement is “committed willfully,” then the court may increase the award of statutory damages to as much as \$150,000. On the other hand, if the infringer reasonably believed that the use of the copyrighted work was a “fair use” under the Act, then the court may reduce the award to not less than \$200. 17 U.S.C. §504(c). Additionally, if a “proprietor of an establishment” unreasonably claims as a defense that the activities were exempt under the Act, then the copyright owner is entitled to an additional award of two times the amount of the license fee that the proprietor should have had to pay for the use “during the preceding period of up to 3 years.” 17 U.S.C. §504(d). The court may also award attorneys fees

to the prevailing party in the suit. 17 U.S.C. §505. Willful violations can also result in criminal offenses. 17 U.S.C. §506.

(b) Music Copyright Associations

Owners of music copyrights do not usually exercise their rights in an individual capacity. In general, they have joined together in various organizations, the function of which is to protect the copyright owner and to collect revenue for the music being performed. Although there are a number of organizations in this field, the most noteworthy are the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the Society of European Stage Authors and Composers (SESAC). These organizations (“**Music Organizations**”) act as agents for their members. Together, the three Music Organizations control practically all copyrighted music.

Each of the Music Organizations has its own license agreement. A hotel entering into such an agreement with a Music Organization is given the authority to perform the copyrighted music in that organization’s portfolio. It is commonplace for representatives of each of the Music Organizations to contact hotels and demand that they enter into a license agreement to pay copyright royalty fees. The Music Organization typically contends that, in the absence of a license agreement, the hotel is publicly performing or displaying the organization’s copyrighted music in the common areas of the hotel and that, as a result, the hotel is infringing in violation of the Act. If the Music Organization is correct, then the hotel must stop displaying the material or must enter into the license—otherwise, the hotel has substantial exposure under the Act.

Hotel management should be advised that they often can negotiate for better terms under the licensing agreement presented to them by the Music Organizations.

A common question is whether a hotel would need separate licenses from each of the Music Organizations or whether one will suffice. Each Music Organization represents different songwriters. Therefore, if, for example, a hotel publicly plays radio music, then the hotel would need a license from all of the Music Organizations.

Note: The American Hotel & Lodging Association (AHLA) negotiates separately with Music Organizations to arrive at agreements those organizations would, in turn, offer to individual hotels. The rationale is that a committee of industry participants would have a better chance of striking a fair deal than hotels negotiating individually. The “contracts” arrived at between AHLA and the Music Organizations are not binding. Any hotel and hotel company may negotiate separately, if it wishes, and none is obligated to sign the so-called “master” contracts.

(c) Ambient Music

There are many “ambient music providers” that provide background music, such as music for lobbies, public spaces, and telephones placed “on hold.” These vendors (such as Muzak and Prescriptive) package the public performance license together with the music that they provide.

When a hotel obtains music from one of these vendors, the hotel does not need to obtain its own licenses for the music. The vendor’s license, however, only covers the music that *the vendor* supplies—the hotel can’t add music to the system without obtaining its own licenses.

Coin-operated juke boxes are not exempt. The Jukebox License Office (JLO) is a joint venture of the Music Organizations. It provides a license known as the Jukebox License Agreement for use with jukeboxes so that jukebox owners don’t have to obtain a separate license with each of the Music Organizations. *See also* 17 U.S.C. §116. If the Hotel already has licenses with each of the Music Organizations, then those licenses probably cover any jukebox operated by the hotel (the hotel should check to make sure that this is the case).

(d) Display of Copyrighted Music Over Television Monitors

In the last twenty years, televisions have become ubiquitous in the public areas of hotels. Televisions frequently play copyrighted music that is protected by all three of the Music Organizations. The broadcasters or cable providers have established their rights to transmit the signals containing the copyrighted material. However, those rights do not extend to the hotel. As a result, if a hotel has a television in a public area of the hotel, then the question arises whether the hotel is publicly performing copyrighted music in violation of the Act.

The answer to this question is usually “yes.” As explained below, if a hotel uses televisions in its public areas, it is likely that the hotel will need to obtain licenses from all of the Music Organizations.

Under the Act, a hotel is performing or displaying a work “publicly” if the hotel is transmitting it to “a place open to the public” or “to the public” or “at any place where a substantial number of persons outside the normal circle of a family and its social acquaintances is

gathered.” 17 U.S.C. §101. Accordingly, a public display arguably includes transmission over any television in any of the hotel’s public areas, including in bars, lobbies, restaurants, hallways, and workout facilities. This is the position that is usually taken by the Music Organizations.

There is a limited exemption that applies to an “establishment,” which is defined as a store, shop, or “any similar place of business open to the general public for the primary purpose of selling goods or services.” Under this exception, the televisions in an establishment will not trigger the need for a license if all of the following conditions are met:

- The establishment doesn’t have more than four televisions in all of its public spaces; and
- No single public room has more than one television;
- None of the public space televisions has a screen that is larger than 55 inches (diagonal); and
- The audio portion is communicated by no more than 6 loudspeakers, of which not more than four loudspeakers are located in any one room or adjoining outdoor space.

17 U.S.C. §110(5)((a)(B).

An uncertainty arises when this exemption is applied to hotels. A hotel often has many different kinds businesses within its walls—there may be a lobby bar (a drinking “establishment”), a restaurant (a food “establishment”), a lobby (an “establishment” selling rooms), a workout facility (a gym “establishment”), etc. Can each “establishment” be treated separately for purposes of the exemption? At least one major hotel brand has advised its franchisees that the entire hotel should be considered a single establishment for purposes of the exemption. This is a conservative view of the Act’s exemption. If this view is correct, then most hotels will not qualify for the exemption because most hotels have more than four televisions in the public areas.

Another concern arises with respect to workout facilities. Many aerobic workout stations have a small television screen built into the equipment. If a small hotel has two of these in a single room, then, automatically, the hotel will be unable to qualify for the exemption.

Often, hotels have television screens turned on for the purposes of providing visual ambiance. If the sound volume on these televisions are always turned off, then there is likely no “public display” of the music. However, as indicated above, if two workout stations have a television screen that guests watch and listen to, then the hotel will fail to qualify for the exemption.

9.2. Unauthorized Interception of Cable Television Broadcasts

Hotels often obtain television signals through cable providers, internet services, “free-to-guest” and “pay-per-view” providers. Each of these providers has its own contract that is negotiated between the provider and the hotel.

One would guess that any unauthorized reception of television signals would be unlawful, and this guess would be correct. Section 605 of the Communications Act of 1934 prohibits any unauthorized interception of cable television broadcasts by use of a “satellite signal” receivers and the subsequent transmission of the broadcast to guest rooms. In addition, any unauthorized interception, decoding, and re-transmission of a copyrighted broadcast may also result in a copyright infringement under the Copyright Act of 1976.

All radio and television broadcasts, except broadcasts intended for the general public, are protected by the Federal Communications Act of 1934 (§ 605). In the case of Chartwell Communications v. Westbrook, 637 F.2d 459 (6th Cir. 1980), the Court of Appeals for the sixth circuit ruled that the scrambled microwave broadcast of a subscription television service was not intended to be broadcast to the general public and therefore violated § 605 of the Communications Act of 1934. Because the microwave transmissions are scrambled and subscribers must use decoding devices to unscramble the broadcast, the court concluded that the plaintiff did not intend the general public to use the broadcast without paying the subscription fee.

Accordingly, under the Chartwell decision, a hotel’s unauthorized interception of a broadcast could be held to be a violation of § 605 of the Communications Act of 1934 and subject the hotel to a lawsuit for damages.

Additionally, a hotel that utilizes an unauthorized interception of a television service’s broadcast by satellite signal receivers, decodes the scrambled radio waves, and re-transmits the broadcast to guest rooms can also constitute a separate violation of the Copyright Act of 1976. Section 111(b) of the Act provides that a secondary transmission made to the public constitutes infringement if the primary transmission is “not made for reception by the public at large but is controlled and limited to reception by particular members of the public.”

9.3. Vicarious Liability for Infringement by Guests (Downloading/Uploading) – The DMCA

Internet connectivity is commonplace in most hotels. Although the availability of high-speed internet access provides significant convenience to guests, it also brings with it a new source of potential copyright liability for hotel operators. Careful attention to the laws governing copyright infringement, and implementation of an appropriate internet usage policy can help operators avoid any issues.

Copyright law provides for several forms of “indirect liability.” Notably, these forms of liability do not arise directly from the Copyright Act itself – rather, they have evolved over a number of years via court decisions, most notably the Supreme Court of the United States. See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930-931 (2005). Among these forms of liability are “contributory” infringement, “vicarious” infringement, and “inducement” infringement. Hotel operators are most likely to be impacted by the doctrine of “contributory” infringement. Generally speaking, under this form of liability, anyone who materially contributes to the infringing conduct of another may be liable for the infringing conduct.

A guest can easily download or upload copyrighted materials while using the hotel’s network connection. Is indirect liability a real possibility for a hotel?

Fortunately, there are a number of protections or “safe harbors” provided in the Digital Millennium Copyright Act (**DMCA**). Under the DMCA, a hotel as a “service provider” (an entity offering the “transmission, routing, or providing of connections for digital online communications”) is not liable for activities on the hotel’s network if (1) the transmission is not initiated by the hotel, (2) the transmission is automatic (i.e., “without selection of the material by the service provider”), (3) the hotel does not “select” who receives what material, (4) the hotel does not maintain copies of the transmitted material, and (5) the hotel transmits its material without modifying its content.

Those qualifications may sound rather complex at first. However, they are, in essence, a basic description of a “hands off” network. In other words, they are aimed at providing a safe harbor for entities that provide access to the internet, but do not control or regulate what flows through it. Thus, most hotels offering internet access are likely to qualify for this safe harbor.

However, §512(i) contains additional “conditions for eligibility” that hotels must take *positive steps* to comply with. These rules are aimed at providing certain accountability measures for access providers. Under the terms of the statute, the safe harbor described above is only available if the service provider “has adopted and reasonably implemented” a policy that blocks access for individuals who are “repeat infringers” and “accommodates and does not interfere with standard technical measures.” The hotel must also inform guests of this policy. Generally, much of this is achieved through a standard “terms of use” policy that guests must agree to before accessing the hotel network. Of course, hotels should also be cognizant of the requirements regarding “accommodation of technology” – in other words, hotel networks should implement generally accepted technical measures aimed at preventing the improper dissemination of copyrighted material. The technical details of these measures are beyond the scope of this manual, but most IT professionals or third-party contractors qualified to operate a hotel network should be familiar with their implementation and use, and hotel operators should ensure that they are put in place.

9.4. Summary and Conclusions

- The Copyright Act of 1976 prohibits any public performance or display of copyrighted music unless an exemption under the Act applies or the hotel is licensed to do so by the copyright owner or an organization representing the owner.
- A “public performance or display” includes a hotel’s use of ambient music, “on-hold” telephone music, music performed by a live signer or a DJ, and music that emanates from televisions.
- For the most part, there are three Music Organizations that have been formed to protect copyright owners and collect revenue for the music being performed: ASCAP, BMI, and SESAC. Once a hotel enters into an appropriate agreement with such a Music Organization, the hotel has the authority to perform the copyrighted music in that organization’s portfolio.
- The liability for violating the Act is substantial.
- Ambient music can be licensed from one of several ambient music providers.
- Jukeboxes are not exempt—a JLO license is required, or the use of the jukebox must be permitted under other licenses held by the hotel.
- If a hotel has more than one television on display in any one room (including screens imbedded in cardio equipment), then the hotel needs to consider whether licenses from all three Music Organizations will be required.
- Any unauthorized interception of cable television broadcasts by use of a “satellite signal” receivers and the subsequent transmission of the broadcast to guest rooms, violates § 605 of the Communications Act of 1934. In addition, any unauthorized interception, decoding, and re-transmission of a copyrighted broadcast may also result in a copyright infringement under the Copyright Act of 1976.
- Hotels should work closely with Internet Service Providers and network administrators to ensure that reasonable steps are taken to prevent misuse of hotel-provided Internet Access, and to block the dissemination of copyrighted material over the hotel’s network. Check with your ISP and network administrators to ensure proper measures are taken.

Chapter 10: New Media and Hotel Marketing—Hotel Websites, Use of Images, Social Media, OTAs and Online Review Sites

The electronic age has brought vast changes in the way business is conducted. This Chapter focuses on the impact of some of these changes on the hotel industry. The Chapter discusses risks and recommendations relating to the hotel's website, the publication of photographic and video images, several of the many aspects of "social media," the use of OTAs, and online review sites.

10.1. The Hotel's Website: Liability Issues and Recommendations for Terms and Conditions

The hotel's website is a tool that continues to change and grow in importance. The use of the website now can include reservations, and so the website's functionality can include the creation of, and the terms included in, the contract between the guest and the hotel. *See* PART I, Section 2.1. This Section provides some considerations and provisions that will help put your website on sound legal footing.

(a) Acceptance

An essential feature of booking online is to require the end user to "accept" the hotel's terms and conditions. Following is a typical example of language that requires the end user to "accept" the website terms and conditions prior to making bookings through the website:

PLEASE READ THESE TERMS AND CONDITIONS CAREFULLY BEFORE USING THIS SITE.

This Website is offered to you conditioned upon your acceptance without modification of all the terms, conditions, and notices set forth below (collectively, the "Agreement"). By clicking "I accept" below, accessing or using this Website in any manner, you agree to be bound by the Agreement.

Please read this Agreement carefully. If you do not accept all of these terms and conditions, please do not use this Website or make bookings through this Website.

The website itself should have functionality that requires the end user to "click" a box or a "button" on the screen to accept the terms and conditions prior to making the booking.

(b) Use Of The Website

Website terms and conditions should also provide a limited, non-transferable license to the end user to use the website for making bookings, prohibit activities that copy the website for a third party's commercial use and provide the hotel with rights to deny access to the website. Some sample terms are below:

License

Hotel grants you a limited, non-transferable license to access and make use of the Website in accordance with the terms and conditions of this Agreement. You may only use the Website to make legitimate travel arrangements, reservations or purchases.

Prohibited Activities

The content and information on this Website (including, but not limited to, price and availability of travel services), as well as the infrastructure used to provide such content and information, is proprietary to us or our suppliers and providers.

While you may make limited copies of your travel itinerary (and related documents) for travel or services booked through this Website, you agree not to otherwise copy, reproduce, transfer, or sell or re-sell any information, obtained from or through this Website.

Additionally, you agree not to:

(iii) access, monitor or copy any content or information of this Website, or authorize or permit any third party on your behalf, to use any robot, spider, scraper or other automated means or any manual process for any purpose;
(vi) deep-link to any portion of this Website (including, without limitation, the purchase path for any travel services) for any purpose without our express written permission;

(vii) use any device, software or routine to interfere or attempt to interfere with the proper working of the Website,

(vii) “utilize any algorithm, application, or software, whether integrated in a browser or otherwise, that frames, modifies or adds content to the content, design, or layout of any web page or application making a part of the Website,

The terms and conditions should also include the hotel’s right to terminate access, as shown in the following sample language:

Termination.

We retain the right at our sole discretion to deny access to anyone to this Website and the services we offer, at any time and for any reason, including, but not limited to, for violation of this Agreement. We may discontinue, terminate, suspend or shut down the services offered through the Website at any time and for any or no reason. We may give notice of such discontinuation, termination, suspension or shut-down through any means, including, but not limited to, making such notice available on or through the Website or otherwise publicly proclaiming such discontinuation, termination, suspension or shut-down.

(c) Information

(1) Account Security

It is imperative that the website terms and conditions place responsibility for account security concerning identification and passwords with the end user, and limit liability for the end user’s failure to secure such information from identify theft:

You are responsible for maintaining the confidentiality of your account credentials and for all activities, charges and/or liabilities that occur from your Account, whether or not authorized by you. We will not be liable for any loss or damage arising from your failure to comply with this section.

(2) Third Party Log-In

Similarly, it is now common for end users to access a hotel’s website through third party search engines and social media. This means the hotel may need to access information received from such services:

If you log-in using your credentials for another service such as Facebook, Google, Microsoft, Yahoo!, you will be re-directed to a sign-in request page hosted by that third-party service. By signing-in using your credentials for that service, you agree that Hotel may access certain information received from that service, as specified in the sign-in process, and use such information to facilitate your log-in and to provide the Services to you.

(3) Privacy Policy

One of the most important items to implement to avoid liability is to publish a privacy policy. Often, the privacy policy is a separate document from the website's terms and conditions. They are detailed and provide provisions necessary to allow you to use information in accordance with your intent, while putting your customers on notice of your intended uses.

(d) Liability Disclaimers and Limitations.

(1) Liability Disclaimer

Another common provision that any hotel website should include is a disclaimer of liability for errors or other inaccuracies, particularly with respect to pricing and hotel amenities, with a reservation of right to make corrections when the error is discovered:

THE INFORMATION, SOFTWARE, PRODUCTS, AND SERVICES PUBLISHED ON THIS WEBSITE MAY INCLUDE INACCURACIES OR ERRORS, INCLUDING PRICING ERRORS. IN PARTICULAR, THE COMPANY AND ITS AFFILIATES DO NOT GUARANTEE THE ACCURACY OF, AND DISCLAIM ALL LIABILITY FOR ANY ERRORS OR OTHER INACCURACIES RELATING TO THE INFORMATION AND DESCRIPTION OF THE HOTEL, AIR, CRUISE, CAR AND OTHER TRAVEL PRODUCTS AND SERVICES DISPLAYED ON THIS WEBSITE (INCLUDING, WITHOUT LIMITATION, THE PRICING, PHOTOGRAPHS, LIST OF HOTEL AMENITIES, GENERAL PRODUCT DESCRIPTIONS, ETC.). IN ADDITION, COMPANY EXPRESSLY RESERVES THE RIGHT TO CORRECT ANY PRICING ERRORS ON OUR WEBSITE OR ON PENDING RESERVATIONS MADE UNDER AN INCORRECT PRICE. IN SUCH EVENT, IF AVAILABLE, WE WILL OFFER YOU THE OPPORTUNITY TO KEEP YOUR PENDING RESERVATION AT THE CORRECT PRICE OR WE WILL CANCEL YOUR RESERVATION WITHOUT PENALTY.

The disclaimer can also include liability associated with cancellations, overbooking, strikes and force majeure events that make it impossible or impractical to honor the booking:

THE HOTEL COMPANIES AND THE HOTEL AFFILIATES HAVE NO LIABILITY AND WILL MAKE NO REFUND IN THE EVENT OF ANY DELAY, CANCELLATION, OVERBOOKING, STRIKE, FORCE MAJEURE OR OTHER CAUSES BEYOND THEIR DIRECT CONTROL, AND THEY HAVE NO RESPONSIBILITY FOR ANY ADDITIONAL EXPENSE, OMISSIONS, DELAYS, RE-ROUTING OR ACTS OF ANY GOVERNMENT OR AUTHORITY.

The language can also include more generic “as is” disclaimers and waivers of express and implied warranties.

Of course, how you treat your guests is a different issue. The above language suggestions are a way to reduce exposure to the unreasonable guest—one that may be inclined to bring a lawsuit for frivolous reasons.

(2) Limitation on Liability

A useful and enforceable tool to avoid liability is to include a disclaimer of consequential and other damages, and to limit damages to the amounts paid by the user or to an amount certain:

IN NO EVENT ARE THE HOTEL COMPANIES, THE HOTEL AFFILIATES, OR THEIR RESPECTIVE SUPPLIERS LIABLE TO YOU FOR ANY DIRECT, INDIRECT, PUNITIVE, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF, OR IN ANY WAY CONNECTED WITH, YOUR ACCESS TO OR, DISPLAY OF OR USE OF THIS WEBSITE OR WITH THE DELAY OR INABILITY TO ACCESS, DISPLAY OR USE THIS WEBSITE, INCLUDING SUCH DAMAGES THAT MAY ARISE OUT OF YOUR RELIANCE ON OPINIONS APPEARING ON THIS WEB SITE, ANY COMPUTER VIRUSES, INFORMATION, SOFTWARE, LINKED SITES, PRODUCTS, AND SERVICES OBTAINED THROUGH THIS WEBSITE, OR OTHERWISE ARISING OUT OF THE ACCESS TO, DISPLAY OF OR USE OF THIS WEBSITE, WHETHER BASED ON A THEORY OF NEGLIGENCE, CONTRACT, TORT, STRICT LIABILITY, OR OTHERWISE, AND EVEN IF THE HOTEL COMPANIES, THE HOTEL AFFILIATES OR THEIR RESPECTIVE SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

If, despite the above limitations, the Hotel Companies, the Hotel Affiliates or their respective suppliers are found liable for any loss or damage which arises out of or in any way connected with any of the occurrences described above, then the liability of the Hotel Companies, the Hotel Affiliates and their respective suppliers will in no event exceed, in the aggregate, the greater of (a) the service fees you paid to

Company in connection with such transaction(s) on this Website, or (b) One-Hundred Dollars (US\$100.00) or the equivalent in local currency.

Again, the above language is a way to reduce exposure to the unreasonable guest that might be looking for a chance to sue. How you treat your guests as a matter of your business practices is a different issue.

(e) Reservation and Cancellation Policies

As indicated in PART I, Sections 2.2, 2.3 and 2.4, it is important that the contract with the guest set forth cancellation policies. This is especially true if the reservation is prepaid. The website can contain these provisions. Here is some sample language:

You may cancel or change your prepaid hotel reservation, but you will be charged the cancellation or change fee indicated in the rules and restrictions for the hotel reservation. If you do not cancel or change your reservation before the cancellation policy period applicable to the hotel you reserved, which varies by hotel (usually 24 to 72 hours) prior to your date of arrival, you will be subject to a charge of applicable nightly rates, tax recovery charges and service fees. In the event you do not show for the first night of the reservation and plan to check-in for subsequent nights in your reservation, you must confirm the reservation changes with us no later than the date of the first night of the reservation to prevent cancellation of your reservation. You must make refund requests for no-shows or early checkouts within 60 days after checkout.

You agree to pay any cancellation or change fees that you incur. In limited cases, some hotels do not permit changes to or cancellations of reservations after they are made, as indicated in the rules and restrictions for the hotel reservation. You agree to abide by the terms and conditions imposed with respect to your prepaid hotel reservations.

(f) Bank and Credit Card Fees

A charge item that concerns international travelers is the fee imposed by banks and credit card companies for currency conversions or international transactions, which may be addressed as follows:

Some banks and credit cards impose fees for international transactions. If you are making a booking from outside of the

United States on a U.S. credit card, your bank may convert the payment amount to your local currency and charge you a conversion fee. This means that the amount listed on your credit or bank card statement may be in your local currency and therefore a different figure than the figure shown on the billing summary page for a reservation booked on the Website. In addition, a foreign transaction fee may be assessed if the bank that issued your credit card is located outside of the United States. Booking international travel may be considered to be an international transaction by the bank or card company, since Company may pass on your payment to an international travel supplier. The currency exchange rate and foreign transaction fee is determined solely by your bank on the day that they process the transaction. If you have any questions about these fees or the exchange rate applied to your booking, please contact your bank.

(g) General Terms and Conditions

(1) Copyright and Trademark Notices

To prevent unauthorized reproduction of the hotel's intellectual property, it is standard practice to provide copyright and trademark notices throughout the website:

All contents of this Website are © 2012 [Hotel]. All rights reserved. Company is not responsible for content on websites operated by parties. Other logos and product and company names mentioned herein may be the trademarks of their respective owners.

If you are aware of an infringement of our brand, please let us know by e-mailing us at _____@_____. We only address messages concerning brand infringement at this email address.

(2) Claims of Copyright Infringement & Counter-Notification

To resolve claims that the hotel may have infringed on another's copyright, it is helpful to provide the procedure in which to process and mitigate such claims. The following is a sample preamble to these kinds of provisions:

If you are a person who is a copyright owner or an agent thereof and believes that any materials hosted by us infringe your copyright, you (or your agent) may submit a written notification pursuant to the Digital Millennium Copyright Act ("DMCA") by

providing Hotel's Copyright Agent with the following information in writing (see 17 U.S.C. 512(c)(3) for further detail):

- A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;
- Clear identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site;
- Clear identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled and information reasonably sufficient to permit Hotel to locate the material;
- Information reasonably sufficient to permit Hotel to contact you, such as an address, telephone number, and, if available, an electronic mail;
- A statement that the person has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and
- A statement that the information in the notification is accurate, and under penalty of perjury, that the person submitting the notice is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

For the fastest resolution, notices with respect to this Website should be sent by email to _____@Hotel.com. Hotel's designated Copyright Agent to receive notifications of claimed infringement is: _____.

(3) Governing Law; Venue; Time Limitation

As with most contracts, the electronic terms and conditions should state the governing law over the transaction, and the venue in which dispute resolution shall occur:

This Website is operated by a U.S. entity and this Agreement is governed by the laws of the State of Washington, United States. Venue of any suit to enforce the provisions of this Agreement will lie

in King County, Washington, and you hereby consent to personal jurisdiction within King County, Washington. You shall not commence or prosecute any suit or action except in the foregoing courts. In any litigation or arbitration relating to this Agreement, the substantially prevailing party will be entitled to its reasonable attorneys' fees and costs. Use of this Website is unauthorized in any jurisdiction that does not give effect to all provisions of these terms and conditions, including, without limitation, this paragraph.

To mitigate claims, it is also helpful to impose a limitations period, such as two years from the date of transaction that gave rise to the claim:

To the extent allowed by applicable law, you agree that you will bring any claim or cause of action arising from or relating to your access or use of this Website within two (2) years from the date on which such claim or action arose or accrued, regardless of discovery, or such claim or cause of action will be irrevocably waived.

10.2. Publication of Photographic and Video Images—Ownership and Copyright Issues

A hotel may distinguish itself through the use of select images of its product, services, events, guests and employees. Photography and video, whether on websites, television, or other sources, can be important tools that help to communicate your hotel's image and standards.

Many national hotel brands have specific guidelines that outline the types of images that are consistent with the brand's voice, and they may have a catalogue of photographs and videos for use. Other hotels may make arrangements directly with photographers or videographers to meet their needs. No matter the source, adherence to copyright laws and standards is important. The hotel should ensure that it owns the images and videos that it uses, or that it has permission to do so. Likewise, third parties must also obtain permission to use images of your property. Paper documentation will help to guard against claims of copyright infringement, or aid you in enforcing your rights when others use your images without proper authorization.

(a) Obtaining Appropriate Contract Rights and Releases

When contracting directly with the person or entity producing your images, the hotel should make sure that a written agreement stipulates the hotel's ownership rights. Here is an example of a contract provision:

If the work or material you produce under this Agreement is copyrightable subject matter, then the work and material is deemed work-made-for-hire and the property of the Hotel. If the work and material is not copyrightable subject matter, or for any reason is determined not to be a work-made-for-hire, then you hereby grant all right, title and interest to the work and material to the Hotel, and you will promptly execute and deliver such documents as may be requested by the Hotel in order to accomplish the transfer of all such right, title and interest.

Be aware that, unless you obtain ownership rights or permission for broad use, you might be limited in how often you may use the image. Be certain that the agreement provides broad license, as illustrated above, or you will need to obtain permission for additional usage should your needs change from the original agreement. This could also include additional costs or usage fees.

It is also advisable to take steps to ensure that persons who are captured in the photos or videos have authorized the use of their images in the materials for commercial purposes. A release agreement that provides such authorization is recommended. Your photographer or videographer may be familiar with and accustomed to obtaining a release agreement, but you are encouraged to make certain that your hotel is listed as the party who has been provided permission for usage. A typical release agreement should include language similar to the following:

I grant to the Hotel and its legal representatives, assigns and licensees the irrevocable and unrestricted right to use and publish [*photographs or videos*] of me, or in which I may be included, for editorial trade, advertising and any other purpose in the context of community decency standards and in any manner and medium and to alter the same without restriction. I waive any right to inspect or approve the finished product, including written copy that may be created in connection therewith. I release the above named party and its legal representatives and assigns from all claims and liability relating to said [*photographs or videos*].

The agreements terms should, preferably, identify specifically the photographs or videos that are authorized. Because there are consent issues when minors or persons with mental impairments are involved, the agreement should also include an attestation that the person is of proper age to provide consent and has authority to do so, such as: "I am at least 18 years of age, or I am the legal guardian of the minor subject to this release, and have read this release and fully understand its contents." It is also valuable to include contact information for the person providing the authorization, and, if available, the signature of a witness.

(b) Claims of Copyright Infringement

If a hotel fails to obtain proper permission to use certain photos in its printed materials or videos in television and commercial productions, then traditional copyright laws may apply under the Copyright Act of 1976. The copyright owner of the images could seek profits you earned through the use of the materials, or seek statutory or other damages for infringement. See 17 USC §501; see also PART III, 9.1(a).

(c) Unauthorized Use of Photos and Videos by Third Parties

If a hotel is the rightful owner of a photo or video that has been used without permission, then the hotel may also pursue a claim of copyright infringement against the unauthorized user. However, it may be more likely that the infringer is a vendor or business with whom the hotel has collaborated. If it is valuable to preserve the relationship with the vendor, then the hotel may offer to provide the images with permission and attempt to influence how they are used.

Images and videos posted on websites are particularly susceptible to improper usage by third parties. The inclusion of suggested copyright and trademark language on your website will serve to notify others of your rights and warn against infringement. See Section 10.1(g), above. Under the guidelines of the Digital Millennium Copyright Act (“**DMCA**”), you may provide an opportunity for offending sites to remove your images by giving notice that you own the materials. You will not be able to pursue damages for an infringement action if the offending party responds quickly to remove the images. The same is applicable if your hotel is the offending party. For more details, you should consult with your legal counsel.

10.3. Social Media

(a) What is “Social Media” and How Does it Impact Hotels?

The term “social media” refers to interactive forms of digital social communication, including web-based and mobile technologies. It may include online magazines, books, internet forums, blogs, tweets, podcasts, and videos and often encourages some form of user-generated content. Social media uses a blend of technology and social interaction to create value to the user. According to a Nielsen Survey in 2009, it is more popular than email in terms of internet usage.

Current social media examples include Facebook, Twitter, LinkedIn, Myspace, Foursquare, Google Plus, TripAdvisor, Tumblr, Yelp, and Pinterest. The phenomenon continues to change rapidly, and the future of the phenomenon will continue to be difficult to predict.

Like most industries, the hospitality industry has seized the opportunity to use social media as a significant marketing resource and tool. Hotels and restaurants not only promote deals and specials on their online websites, but through emails, tweeting and Foursquare. Social

media marketing can be “up close and personal,” often in the palm of a guest’s hand or just a click away.

Despite its many perceived benefits, social media can create conflict and legal risks. While there are some statutes that afford protection against legal liability, such as the Communications Decency Act (CD) and the Digital Millennium Copyright Act (DMCA), the law treats advertising and marketing through social media essentially in the same way that it treats traditional forms of media. This Section highlights general legal standards that apply to social media marketing and identifies some areas of risk.

(b) Copyright/Trademark Infringement

Social media may additional risks to a hotel’s intellectual property. It is extremely easy, for example, for a customer to copy content from the hotel’s website and use it in the customer’s blogs and social media sites. Below is a list of how a hotel or restaurant property can stay aware of how its intellectual property is being used.

- Monitor third party social media platforms to ensure intellectual property is not being misused (see also, ORM suggestions in Section 10.5(d), below).
- Be aware of terms and conditions on social media sites that prohibit trademark and copyright infringement and determine whether there are rules regarding business or individual impersonation.
- Be aware of certain social media outlets’ procedures that allow users to report trademark or copyright abuse (for example, specific instructions for how to post a take-down notice).
- Make sure your hotel or restaurant has terms and conditions for your own social media usage with provisions specifying how to properly use company and/or third party intellectual property.

See also Section 10.1(g) and Section 10.2(c), above.

(c) Privacy Concerns

Invasion of privacy is a tort—a basis for recovering damages. Invasion of privacy is, essentially, the intentional intrusion into a person’s seclusion or private affairs such that the intrusion would be offensive to a reasonable person and cause damage to the person. Liability for invasion of privacy can only arise when there is a reasonable expectation of privacy.

Hotels collect data from guests, especially if the guest books a room through the hotel website or through direct contact with the hotel. The data can include credit card information, name and address, length of the guest’s stay, calls made and food and beverage orders. Because

this information is private and sensitive, the hotel has the responsibility to manage the security of the data. Misuse of such information could constitute an invasion of privacy.

The first step to avoiding liability is to have a policy. A good policy covers what data is collected, how much data is used and stored, and any third party responsibilities with regard to privacy and data security. The second step is to follow that policy. The FTC and some states have targeted companies who fail to follow their own data security policies and protocols.

If a hotel uses third-party social media platforms, then its marketers should make sure that the property's marketing campaign does not misuse or otherwise encourage the misuse of personal information so as to violate the privacy policy of a third-party social media company.

With the widespread accessibility of internet usage on cell phones, hotels should also be sensitive to privacy restrictions and data security with regard to all guests, and especially minors. The Children's Online Privacy Protection Act ("COPPA") governs the collection of personal information from children under 13. The Children's Advertising Review ("CARU") is an industry funded self-regulatory body that has guidelines consistent with COPPA about the collection of personal information from children.

(d) Deceptive Advertising

Advertising must be truthful and accurate, and a company must have substantiation for advertising claims before disseminating them. The FTC declares that unfair or deceptive acts or practices are unlawful. 15 USC § 45. Washington State has a statute that mirrors the FTC. See RCW 19.86, entitled "Unfair Business Practices/Consumer Protection."

(e) Employment Issues

Social media may create a clash between an employee's right to privacy in a virtual realm and an employer's right to access information and monitor employee activities. The Stored Communications Act protects users whose electronic communications are in electronic storage with an ISP or other electronic communications facility. See 18 U.S.C. § 2701.

Invasion of privacy issues abound in the employment context. For example, in City of Ontario v. Quon, 560 U.S. ___, 130 S. Ct. 2619 (2010), a city provided pagers to employees for official use without a specific policy covering text messages. The wireless company disclosed the content of the text messages to the city without consent of the employees. The city then used the text messages to discipline the employees. The Ninth Circuit ruled that the city had conducted a search in violation of the Fourth Amendment. The Supreme Court, however, reversed, holding that the city's review of the text messages was a reasonable search under the Fourth Amendment. The Court, however, declined to more broadly address the privacy expectations of employees when using employer-provided communications devices. Although Quon involved a government employer, private-sector employers should take note. The

importance of employment policies that clearly eliminate expectations of privacy in communications made on employer-owned devices or systems is equally applicable to private-sector employers.

In Peitrylo v. Hillstone Restaurant Group, 2009 WL 3128420 (D.N.J. Sept. 25, 2009)(unpublished), after managers obtained access to a password protected MySpace page with another employee's password, employees were fired for posting comments critical of managers on the page. The jury awarded damages to the fired employees, finding that the employer had violated the Stored Communications Act. Id.

There exist a number of recent court opinions that discuss how to (and how not to) manage blogging by employees. Hotel and restaurant owners should be aware of this growing area of case law. For example, in Simonetti v. Delta Air Lines Inc., No. 5-cv-2321 (N.D. Ga. 2005)(unpublished), a Delta airline attendant, known as "Queen of the Sky" on her blog site, was fired for publishing provocative pictures of herself in a Delta Airlines uniform. After much media fanfare, the case settled out of court for an undisclosed amount. Even more recently in the news, a Google employee was fired after writing about the company's financial statements before they were made public. And in Richerson v. Beckon, a school district administrator was fired after blogging that a job candidate "comes across as a smug know it all creep. And he's white. And male." 337 Fed. Appx. 637; 2009 U.S. App. LEXIS 12870 (unpublished).

A social networking policy for employees should clearly articulate the following:

- There is no expectation of privacy
- The employer has a right to access employer provided cell phones, computers, and other electronic devices
- Anything that can be viewed on a public page may be accessed by the employer
- Social networking activities should be private
- Employees must adhere to the company's code of conduct as it relates to social networking activities
- Employees should identify themselves, especially if discussing the business and should use a disclaimer
- Employees will not violate copyright laws
- Employees will not disclose confidential or proprietary information
- Employees will not use derogatory or discriminatory language
- Employees will not mention customer names without consent

As previously mentioned, social networking sites can be effective marketing tools for hotels and restaurants. By implementing strong privacy and social media policies that minimize exposure to liability, hotels can navigate the social media jungle while avoiding legal pitfalls.

10.4. Online Travel Agents (OTAs)

A significant percentage of bookings are made through online travel agents (OTAs). An OTA impacts the relationship between the hotel and its guest because the OTA, in essence, intervenes as a “middle man.” This section describes this impact and also discusses some key provisions of the typical agreement between the OTA and the hotel.

(a) Online Travel Agents and the Hotel-Guest Relationship

As noted in PART I, Section 2.1, the hotel-guest relationship is a contractual one. Once both parties agree to the hotel’s promise to reserve a room for a definite period of time and at a specified price, a contract is formed. The basic contractual elements of offer, acceptance, consideration, and capacity must all be present.

But what happens when a guest makes a reservation with an OTA? There are two basic legal models that OTAs have used, and the models have somewhat different implications.

The first is a “merchant model.” Under this model, the OTA is a “merchant.” The OTA “buys” rooms from the hotel at a certain room rate and “sells” them to guests (with a markup that the OTA keeps). Under this model, the reservation agreement is between the OTA and the guest. The hotel doesn’t have a direct agreement with the guest; instead, the hotel has a separate agreement with the OTA to accommodate the “OTA’s guest.” This model has created problems for OTAs under various laws. For example, under this model the hotel will receive from the OTA the room rate agreed upon between the OTA and the hotel. The hotel will pay state and local room taxes on that amount. However, the OTA will receive *more* than that amount from the guest. Does the OTA pay room taxes on the OTA’s markup? If the OTA is truly a “merchant”, then the OTA arguably owes the full tax on the room it sold to the OTA’s “guest.” Because the OTAs haven’t paid state and local room taxes on their markup, the taxing authorities have sued them for the taxes that are “missing” on the markup.

The second model is an “agent” model. In essence, the OTA (as its name suggests) is simply an agent of the hotel. This model likely solves the OTA’s tax problem, but the model makes it somewhat more difficult for the OTA to manage rooms in a flexible way and behave like a “merchant.” The agency model also creates fiduciary duties that the OTA may want to avoid.

From the hotel’s perspective, it may not make much difference whether the OTA uses the merchant model or the agent model. In either event, most of the practical issues that concern the hotel are largely determined by the agreement between the hotel and the OTA. See Section 10.4(c), below.

(b) Online Travel Agents and the Duty to Receive Guests

Regardless of whether the OTA is using a “merchant model” or an “agent model,” the hotel is likely still bound by the same basic principles that are discussed in Part I, Chapter 1, (The Innkeeper’s Duty to Receive Guests and Its Right to Refuse Guests.) Federal law prohibits places of “public accommodation” (such as hotels) from discriminating against any person on the grounds of race, color, religion, or national origin. Washington State law imposes similar restrictions, arising mainly out of Washington’s declaration of civil rights at RCW 49.60.030.

One concern for hotels that utilize online travel services revolves around the limited right to refuse guests. As discussed in Part I, Chapter I, Section 1.4, hotels may refuse service to particular guests for a number of legitimate reasons, including inability to pay, danger to other guests arising from contagious disease, violent or disorderly conduct, non-conformance to reasonable rules like dress codes, and others. Although a hotel’s right to refuse guests on these grounds is certainly not *limited* by its relationship with an online travel service, the decision to exercise this right may trigger certain provisions of the particular online travel agreement at issue. Thus, although a hotel may still exercise its right to refuse a guest who made a reservation through an online travel service, that decision will likely trigger contractual duties that hotels should familiarize themselves with. A closer look at these duties is discussed below.

(c) Issues Arising from Online Travel Agreements

Online travel companies are sophisticated commercial parties, each with their own unique interests. That being the case, most online travel companies will have their own individualized agreements that hotels will be asked to enter into before listing rooms on their site. Each of these agreements will differ in certain material respects, and hotels should always seek advice from counsel before entering into a new online travel listing agreement. However, there are a few key issues which are likely to arise in most online travel agreements—those issues are summarized briefly here.

(1) Room Availability and Pricing.

A typical online travel agreement will demand that the hotel treat the online travel service equally in nearly all respects. This means, essentially, that hotels will be required to offer the same number and type of rooms on the online travel agent’s site as they do on their own website (assuming the hotel operates one). Hotels should also watch out for rate and pricing provisions which, in many cases, not only demand rates that are at least as favorable as those offered by the hotel itself, *but also a discount off of the best available rate offered anywhere else*. This may come as little surprise, as online travel agents have a clear interest in being able to offer the “lowest rates” available. However, hotels *must* review each online travel agreement that they enter into to ensure that these agreements do not give rise to conflicting duties – a hotel would

not want to find itself in a position where it has agreed to offer two different services the “best available rate” at the same time.

The OTAs’ efforts to prevent anyone from undercutting their prices have exposed them to suits for antitrust violations. See PART III, Section 5.2(c). It is possible that this exposure may improve a hotel’s ability to soften the “lowest rate” contractual demands of the OTAs.

(2) Reservation Logistics.

Most online travel agreements impose strict requirements concerning the procedures for confirmations and cancellations. Many of these agreements require a hotel to reserve a room immediately upon receiving electronic notification from the online travel service. And, sometimes, these agreements impose a corresponding positive duty on hotels to send their *own* confirmation back to the online travel agency within a particular period of time after receiving the notice. Many of these logistical issues are now handled automatically through in-house or proprietary third-party software. However, hotels must ensure that they review their online travel agreements so that they understand their particular duties when it comes to reservations and confirmations.

(3) Cancellations, Overbooking, and Refusing Guests.

As noted above, hotels retain their right to refuse guests for legitimate reasons. However, exercising this right may give rise to certain contractual duties imposed by online travel agreements, to the extent that those guests used those services when making their reservations. For example, some online travel agreements impose a duty on the hotel to relocate guests when the hotel is unable to honor a reservation, waive certain fees, and absolve the online travel agency of any responsibility, among other things. Again, hotels should review their individual agreements carefully and discuss whether the duties imposed apply *only* to overbooking or accidental failure to reserve rooms, *or* whether those duties also arise when a hotel exercises its discretionary right to refuse guests at check-in.

(4) Indemnification.

Most online travel agreements will contain “indemnification” agreements attempting to absolve the OTA of liability for harms arising out of the relationship between the hotel and the online service. The extent of such indemnification (for example, whether the indemnity purports to protect the online travel agency for acts arising from its own or sole negligence) is vitally important, and enforceability of these clauses is always a matter of state law. In Washington, for example, a party may contractually indemnify against losses resulting from their own negligence unless prohibited from doing so by statute (such as RCW 4.24.115, governing construction/alterations to real estate) or public policy. Agreements of this type are strictly construed and, as the Washington Supreme Court recently noted in Snohomish County Public Transp. Benefit Area Corp. v. First America, Inc., 271 P.3d 850 (2012), indemnity provisions will

not be effective to indemnify a party from their own negligence “unless this intention is expressed in clear and unequivocal terms.”

Given the current antitrust problems of the OTAs, hotels should consider excepting these claims from the hotel’s obligation to indemnify the OTA and requiring the OTA to indemnify the hotel for any liability arising out of them. See PART III, Section 5.2(c).

(5) Insurance.

Many online travel agencies will insist that hotels who list rooms on their site also carry comprehensive insurance coverage. While the hotel’s decision to carry insurance is likely a given, hotels should be aware that some online travel agreements may require that the hotel list the online travel agency as an additional insured on their policy, and this may affect premium costs.

(6) Choice of Law Provisions.

Because online travel agreements are governed by contract law (which varies slightly from state to state), hotels must be aware of the particular choice of law provisions contained in their agreements. As “sophisticated commercial parties” hotels will almost always be bound by the choice of law provisions that they agree to. And, in light of the variation amongst states in contract law principles, hotels would be wise to review their particular choice of law provisions and consult with an attorney regarding the practical impact of agreeing to be governed by the laws of a particular state (note, for example, Washington’s specific approach to indemnification provisions in commercial contracts discussed above).

10.5. Online Review Sites

Online communities have changed the landscape of marketing and business in the hospitality industry. Notably, the proliferation of online review sites allows individuals to share their experiences and information about particular hotels. By facilitating the exchange of information and experiences, customers increasingly rely on online review sites to make decisions about their travel plans.

Online review sites work in different ways. Some are solely user generated, allowing anybody on the Internet to post reviews of hotels. Others employ “experts” to review hotels. Frommer and Oyster are examples of online review sites that use investigators to visit, photograph, review, and rate hotels. See www.oyster.com and www.frommers.com. Frommer only lists the hotels it recommends on its website. Hotels reviewed on the website are then ranked based on quality, value, service, and amenities. Oyster, on the other hand, has a team of “investigators” who take photographs and write reviews on hotels that list the pros and cons of every hotel reviewed. See <http://www.oyster.com/about/reporters/>. Unlike Frommer and Oyster, review sites such as TripAdvisor and booking sites like Orbitz solicit reviews from anyone and then rank based on cumulative hotel reviews.

Travelers increasingly rely on online review sites to make purchasing decisions. For example, TripAdvisor attracts 40 million monthly visitors across 21 countries. See www.bbc.co.uk/news/magazine-11419183. This can be a double-edged sword for hotels. On one hand, good reviews can serve as an excellent marketing tool for hotels. On the other hand, bad reviews can damage the reputation of hotels. Competing hotels might also improperly manipulate reviews to “stack the deck,” by generating positive reviews of their own hotels or by generating bad reviews of their competitors. Because customer reviews can significantly affect a hotel’s reputation, hotel owners should constantly monitor online review sites to ensure accuracy in reviews.

(a) Taking Advantage Of Online Review Sites

Online review sites can be excellent marketing tools because of their accessibility, popularity, and travelers’ increasing reliance on them. These websites can further promote a hotel through ranking systems, such as Orbitz’s Top Ten Spring Break Destinations on Orbitz, or TripAdvisor’s annual Best Hotels list. Alternatively, hotels can also purchase advertising space on online review sites. Purchasing advertising space on online review sites can be a good marketing strategy. With advertising on review sites, potential guests are exposed to the advertising as they browse the site for hotels. See, e.g., <http://www.orbitz.com/App/advertise/hotels.jsp>; <http://www.tripadvisor.com/MediaKit?c=standardmedia>.

Hotels can also use customer feedback to make positive changes to their businesses. For example, Mission Bay Foods prints every online review and brings them to meetings. The reviews are then redlined and constructively discussed as potential ideas for improvement to the business. See *San Francisco Chronicle*, September 3 2006, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/09/03/BUG45KT0RH1.DTL&hw=amateur%20reviews&ao=all>. Hotel owners can also encourage patrons to post reviews, particularly if they are satisfied with the quality of their stay.

(b) Responding To Negative Posts

Although online review sites can help with advertising and marketing, they can also plague a hotel’s reputation with negative reviews. Some negative reviews may not be entirely accurate and, in worst case scenarios, are downright untrue. An aggressive competitor can falsely generate them, or an angry patron can post a bad review without any basis. Regardless of accuracy, once a negative review is posted and seen by others, it can adversely affect a hotel’s reputation and result in a loss of business. This is particularly true with reviews alleging bed bug infestation or other unsanitary conditions. Such allegations may permanently damage a hotel or restaurant’s image. For example, in the 1993 Jack in the Box E. Coli outbreak, Jack in the Box garnered bad publicity and faced numerous lawsuits. See <http://www.nytimes.com/1993/02/06/business/company-news-jack-in-the-box-s-worst-nightmare.html>. To date, people still remember the Jack in the Box E. Coli outbreak. In addition

to raising negative attention to an establishment, defamatory reviews also remain in cyberspace when they are indexed by search engines such as Google, Yahoo, MSN, or Bing. Even if litigation ensues against the alleged reviewer, the media attention around litigation can draw unnecessary attention to the hotel. Thus, it is important to work with an attorney to quickly remove the defamatory statements.

When an online review site has a negative post or bad review, hotels can bring suit against the reviewer and the online review site. Some legal issues hotels should be aware of are defamation, libel, and negligence. In Washington, the plaintiff or person bringing suit for defamation must show the existence of (1) a false statement; (2) lack of privilege; (3) fault; and (4) damages. Herron v. KING Broadcasting Co., 112 Wn.2d 762, 768, 776 P.2d 98 (1989).

An example of a hotel that pursued litigation in response to a negative post is the case of Gumbo Limbo in Florida. In 2010, Gumbo Limbo sued Mr. Jonathan Nicholls when he posted a negative review of Gumbo Limbo on TripAdvisor. In Nicholls' review, he described Gumbo Limbo as "horrifically disgusting," saying the bed had a ton of pubic hairs and dead flies in the sheets. Gumbo Limbo sued Nichols for libel and listed TripAdvisor as co-defendant because they published the alleged false review. See 2010 WLNR 10190491. The case was subsequently dismissed in November 2010. See Docket 2010CA000462NC.

Similarly, the Carleton at Oak Park hotel is currently engaged in an ongoing lawsuit against two customers for posting a negative review on trip advisor. Carleton Hotel LLC v. Gladstone, 2011-L-006256. The two customers posted a review on TripAdvisor alleging that there were bedbugs at The Carleton. Carleton hotel sued in Illinois District Court, arguing that the hotel paid for an inspection that revealed no evidence of bed bugs and Carleton also seeks damages for defamation. Carleton Hotel LLC v. Gladstone, 2011-L-006256.

Litigation however, is not an optimal strategy for hotel owners because online review sites have legal defenses to defamation, and litigation may not necessarily be the most effective means of protecting one's reputation. Third party review sites such as TripAdvisor, can employ legal mechanisms such as Section 230 of the Communications Decency Act, and Washington's Anti-SLAPP laws. See 47 U.S.C. § 230; RCW 4.24.525. Section 230 of the Communications Decency Act grants online review sites immunity as online publishers of user generated material, with the exception that an online review site can be liable if the site knew of the possible defamation or illegal content and refused to act. 47 U.S.C. § 230. Under 47 U.S.C. 230(c)(2), "no provider or user of an interactive computer service shall be held liable on account of... any action taken to enable or make available to information content providers or others ..." If a hotel chooses litigation and a website raises the Communications Decency Act, the important thing to do is to submit any evidence of libel or defamation and keep copies of any damages from the date the website was informed of libel or defamation.

In addition to the Communications Decency Act, publishers are also protected by Washington's Anti-SLAPP Laws. The legislation protects the public from "Strategic Lawsuits Against Public Participation," or SLAPPs. SLAPPs are lawsuits or counterclaims filed to deter or punish statements on issues of public interest. RCW 4.24.525. SLAPPs typically include claims such as defamation, malicious prosecution, and interference with contracts, with the goal of discouraging the defendant from engaging in public debate. RCW 4.24.525. The law allows a defendant to bring a motion to defeat SLAPP claims, and to recover fines and attorneys' fees for the cost of defending against the SLAPP claim. RCW 4.24.525 (6). For example, in Davis v. Avvo, Inc., 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012) (slip copy), Davis, a lawyer, sued Avvo, an online website that lists profiles of attorneys and doctors. Avvo.com listed Davis as a lawyer who had "been disciplined by a state licensing authority" and Avvo also mislabeled his practice area. Davis sued Avvo for libel, alleging that he saw his ratings decrease since he participated in the website. In response, Avvo filed a motion to strike pursuant to RCW 4.24.525 (WA's anti-SLAPP laws). The court granted Avvo's motion to strike under Washington's Anti-SLAPP laws, finding that Avvo.com was "an action involving public participation" and that Davis was unable to show direct damage. Davis v. Avvo, Inc., 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012) (slip copy).

Given the availability of legal protection afforded to review sites, litigation is not a sure-win strategy for hotels. Further, litigation is expensive and time consuming. It is also important to note that bringing a defamation suit against a famous online review site such as TripAdvisor is likely to heighten public awareness about the lawsuit, and this may further damage the hotel's reputation regardless of the outcome.

Most on-line review sites have procedures to handle inaccurate, fraudulent, or defamatory posts. These procedures may be effective in removing offending materials. Hotels should know the procedures used by the most influential review sites.

Another issue hotels should also be aware of in the context of online review sites is the potential for patrons to sue on the basis of negligence. The issue of negligence came up in Bin Hu and Remy Hu v. Regency Hotels LLC Individually and d/b/a Regency Hospitality and d/b/a Regency Inn and Suites Hotel, and 34th Street Penn Association, LLC, and Suites Hotel, 2009 WL 5512750 (N.Y.Sup.) Plaintiffs Bin and Remy Hu sued Regency Hotels for negligence, claiming they sustained bedbug bites that caused lesions, rashes, and itchiness. The Hus argued that the hotel knew or should have known about the bugs' presence because online review sites had posted about bed bugs at the hotel. The parties ultimately reached a settlement of \$60,000 and the hotel at issue eventually closed. As this settlement indicates, hotels should constantly police review sites to ensure the accuracy of reviews, and to manage guest expectations.

(c) Stacking The Deck

Although online review sites are generally used as marketing tools, they can also be manipulated to give industry competitors an unfair advantage in the market. Competitors in the

hotel industry might “stack the deck” by generating positive reviews of their own hotels, or posting negative reviews of their competitors. In a recent NBC Today Show investigation, Jeff Rossen revealed that hotels increasingly post “bogus customer reviews” on sites like TripAdvisor to boost business. <http://today.msnbc.msn.com/id/26184891/vp/41755033#41755033>. The documentary showed that hotel owners trashed their competition by writing negative reviews of competitors and good reviews of their own business by creating fake accounts, email addresses, or hiring advertising agencies to do the “dirty work” for them.

Hotels should be fully aware that posting fake reviews is illegal, and under the Federal Trade Commission (FTC) Act, the FTC can take action. *See* 16 C.F.R. 255. Also, under RCW 9.04.010, it is unlawful for any person to “publish, disseminate or display ... any false, deceptive or misleading advertising, with knowledge of the facts which render the advertising false, misleading”The American Hotel & Lodging Association (AH&LA) stated that misleading potential guests minimizes the chance for repeat business and positive online reviews. AH&LA recommends hoteliers respond and address negative online comments to ensure guest satisfaction and long term success.

(d) Online Reputation Management

Because a hotel’s reputation can be significantly impacted by online reviews, it is important to build online reputation management (ORM) into a daily routine. Some steps to consider are:

- Develop a daily plan that is simple to follow, such as making sure staff can easily identify guests’ needs. Providing good customer service and offering prompt solutions to guests’ problems can help generate positive online reviews.
- Create a list of online review sites to monitor, including popular online review sites, such as TripAdvisor, Expedia, Frommers etc.
- Reply to both positive and negative reviews. Ignoring negative reviews can indicate that your management does not care about their experience.
- Ensure your staff is aware and ready to execute your action plan. Make sure your staff is aware of the impact they may have on the guest experience.
- Ask guests for reviews upon checkout to keep the stream of reviews fresh.

See www.hospitalitynet.org/news/4054905.html.

10.6. Summary and Conclusions

- The hotel's website is a tool that continues to change and grow in importance. Several provisions should be included in your website to place the website on sound legal footing.
- Make sure that you have authority to use all of the images and materials published on your website and otherwise. When contracting with vendors that produce your images, make sure that a written agreement stipulates your ownership rights. Also, make sure that the persons who are captured in the images have authorized the commercial use of them and that they are of proper age to provide the consent.
- If a hotel fails to obtain proper permission to use the images, then the copyright owner has significant rights against the hotel under the Copyright Act of 1976.
- Social media creates additional risks to a hotel's intellectual property. It is valuable to monitor social media platforms to ensure the hotel's intellectual property is not being misused.
- Hotels must ensure that they protect private data collected from guests. Have a policy that covers guest data and follow that policy.
- Advertising through social media must be truthful and accurate.
- To protect the hotel and its reputation, hotels should have a social networking policy for employees. The policy should include, among other things, that the employer has the right to access cell phones, computers and other devices supported by the hotel, that anything viewable on a public page may be accessed by the employer, and that employee activities on social media must adhere to the company's code of conduct.
- The advent of online travel agent websites adds a layer of complexity to the traditional contractual relationship between an innkeeper and its guest. Review all online travel agreements closely and make sure that your duties with respect to each guest are clear.
- Online travel agencies often demand favorable treatment with regard to room availability and pricing. Hotels should familiarize themselves with each online travel agency's requirements and be sure that their obligations do not conflict.
- Nearly all sophisticated commercial contracts contain indemnity clauses, which may limit the liability of online travel agencies and/or require the hotel to defend the online travel agency from claims asserted by guests who use the service. These provisions are governed by state law, and their enforceability may vary depending on the "choice of law" provision in each agreement.
- Hotels should be aware that online travel agreements may require the hotel to list the online travel agency as an additional insured, which may increase premium costs.

- Hotels should review their online travel agreement carefully and ensure strict compliance with the reservation booking logistics required of them. Do not rely solely on in-house or proprietary third-party software—there may be additional duties imposed, and it is the hotel’s responsibility to ensure compliance.
- Hotels should also consider how the OTA’s antitrust problems may impact the negotiations of OTA agreements.
- Online review sites have changed the landscape of hotel marketing and business.
- When faced with defamatory posts, hotels can bring suit. However, there are significant limitations on the practical effectiveness of lawsuits in this context. Hotels should use the review site’s procedures for handling defamatory posts, should respond to legitimate customer concerns, and should build online reputation management into a daily routine.

Chapter 11: Room Taxation In Washington State

There are two primary categories of taxes that affect hotel operators in Washington State: (1) state sales tax and (2) business and occupation (B&O) tax. The state sales tax is paid by the customer—it is collected on all “retail sales”, including things like lodging charges, food service, and various other fees. The B&O tax, on the other hand, is paid by the business—it is a gross receipts tax collected on gross business income from certain activities. Both of these types of taxes are discussed more fully below.

11.1. State Retail Sales Taxes

Under the authority of RCW 82.08.020, the state sales tax is imposed on the sale of all lodging, because it is considered a “sale at retail.” This tax is one of the more common—and generally more familiar—taxes imposed in Washington. Hotel operators—as the “seller”—must collect the tax from consumers and pay the tax to the Department of Revenue. The retail sales tax applies to, among other things, transient lodging charges (discussed in more detail below), charges for meeting rooms, no show charges, attrition fees, sales of goods to guests (souvenirs etc.), telephone calls, parking, food service, and in-room entertainment services like video and game rentals.

11.2. Implications of the Transient/Non-Transient Distinction

There is an exception to the requirement to impose sales tax on room rentals. The Washington State Department of Revenue has adopted administrative regulations which relate to the sales tax charged to transients versus charging no state sales tax to nontransients. In essence, if the guest stays more than 30 days, the transaction is considered a “rental of real estate” and sales tax is not required. The key provisions are as follows:

WAC 458-20-118:

A lease of rental of real property conveys as estate or **interest in a certain designated area of real property** with an exclusive right in the lessee of continuous possession against the world, including the owner, and grants to the lessee the absolute right of control and occupancy during the term of the lease or rental agreement ... It is presumed that the sale of lodging by a hotel, motel, tourist court, etc., **for a continuous period of thirty days or more** is a rental of real estate. (Emphasis added.)

WAC 458-20-166 (2):

The term “transient” as used in this section means any guest, resident, or other occupant to whom lodging and other services are furnished under a

license to use real property for less than one month, or less than thirty continuous days if the rental period does not begin on the first day of the month. The furnishing of lodging for a continuous period of one month or more to a guest, resident, or other occupant is a rental or lease of real property. It is presumed that when lodging is furnished for a continuous period of one month or more, or thirty continuous days or more if the rental period does not begin on the first day of the month, the guest, resident, or other **occupant purchasing the lodging is a nontransient upon the thirtieth day without regard to a specific lodging unit occupied throughout the continuous thirty-day period.** An occupant who contracts in advance and does remain in continuous occupancy for the initial thirty days will be considered a nontransient from the first day of occupancy provided in the contract. (Emphasis added.)

Note that in order for sales tax not to apply, the guest must agree *up front* to stay for a period of thirty continuous days or more. In other words, if the guest does not agree at check-in to a period of 30 days or more, sales tax must be applied – the guest will not be entitled to a refund. If the guest ends up staying more than 29 days, the remainder of the stay will not be subject to sales tax.

Many hotels contract with companies to provide rooms for crews. The most common example is a contract with an airline for rooms to accommodate the layover for their crews. Under rules from the Washington State Department of Revenue cited above, a hotel is not obligated to charge sales tax on the contracted rooms if the airline was paying for them for a period of at least thirty days.

The previous edition of this Manual discussed some confusion that arose when contracting with airlines. Department auditors had at one time concluded that if the hotel did not give the exact same rooms to crews, then the hotel should have been charging the airline (or other contract client) room tax on the rooms used. Hotels cannot always assign the same rooms to a particular airline's crew for many reasons. For example, crew room assignments may be changed if something is not working in a room (*e.g.*, a plumbing problem) or a crew member wants a smoking room. Some Department auditors claimed that any reassignment for any reason caused the entire block of rooms to become subject to tax. This, of course, resulted in substantial taxes being owed by some hotels.

At the request of the WLA, the Department clarified its position, and eventually adopted what is now 458-20-166 (2), quoted above. The amended version of the rule makes it clear that any sale of lodging for a period of thirty or more days will be considered non-transient (and therefore exempt from retail sales tax), without regard to the specific units occupied during the period.

Note: When negotiating contracts with airlines, hotel operators should consider using language that would permit the hotel to pass on to the airline any and all excise tax obligations. This will avoid any risk that the department's rule or its interpretation might change again.

11.3. General Local Option Sales Taxes

Localities also have the authority to apply their own individual “local option tax” on top of the state sales tax. The local option taxes include those for city, county, juvenile justice, and transit needs. The rates vary throughout Washington—the result being that the total sales tax ranges anywhere from 7% to 9.5%. Hotel operators should consult with the Department of Revenue to get the most current information available on tax rates in their area.

Hotels offering food and beverage service should review with local taxing authorities the rate of any additional excise taxes imposed on the hotel's food and beverage service to benefit local or regional transit programs.

11.4. Hotel-Specific Excise Taxes

There are basically two kinds of room taxes in Washington State. First, a city or county can essentially claim a part of the state sales tax collected on the sale of rooms. The state then credits this portion of the sales tax to the local jurisdiction where the hotel is located. This shared portion of the state sales tax is often called the “basic” hotel tax. Second, there are add-on excise taxes that are specific to certain local jurisdictions. These taxes are often called “special” hotel taxes.

(a) “Basic” Hotel Tax - RCW 67.28.180

RCW 67.28.180 authorizes cities and counties to levy a “basic” hotel tax (not to exceed 2%), which is credited against the state retail sales tax. Thus, the tax does not impact the final bill paid by each guest.

This tax was originally enacted to help fund the Kingdome in Seattle, but has since been expanded to apply to virtually any tourism-related purpose. Today, it is imposed by a number of cities and counties throughout Washington State.

As noted above, this tax can be applied *either* by cities or counties. Usually, the tax is not applied twice—that is, it is not applied by *both* the city and county. The statute specifically requires a county tax credit for any tax levied by cities within the county (thereby preventing the city and county from claiming the same tax). However, if the county collecting the tax has

pledged those revenues towards the payment of general obligation bonds issued prior to June 26, 1975, then the county may apply the 2% tax in addition to the 2% tax already applied by the city. The City of Yakima, and Yakima County, for example, are both currently authorized to charge their own 2% taxes on room rentals. However, the tax still does not impact the hotel or the guest—even if the city and county each apply their own 2% tax, a matching state sales tax credit still applies.

(b) “Special” Hotel Taxes

RCW 67.28.181 authorizes another unique local lodging tax in Washington State: the “special” hotel tax. This special hotel tax is an additional excise tax, not to exceed two percent (with a few exceptions based on when the municipality was originally authorized to impose the tax and the size of the city and county etc.). Note that this tax is *not* credited against the state sales tax, meaning that unlike the “basic” tax authorized under 67.28.180, the special hotel tax places the additional tax burden on the guest. Previous versions of this law authorized the special hotel tax on a jurisdiction-by-jurisdiction basis. However, these individual authorizations have since been repealed and replaced with a generic authorization for any municipality, subject to certain limitations.

These special taxes will vary from municipality to municipality, so hotel operators should check their local ordinance to see whether the tax applies. Hotel operators should also note that some local jurisdictions exempt smaller hotel properties from charging special taxes. Thus, a “smaller hotel” should always check with its city and county taxing authorities to see if these special taxes are applicable to its particular situation.

The Washington State Department of Revenue publishes a document entitled “Lodging Information Rates and Changes” every quarter. The document is typically posted on the Department of Revenue website. Hotel management should reference this document and the 4-digit codes for lodging tax rates in your community. These rates are always subject to change. The document is currently available at:

<http://dor.wa.gov/content/doingbusiness/business/types/industry/lodging/default.aspx>

Other lodging information at the Department of Revenue is located at:

http://dor.wa.gov/content/getaformorpublication/formbysubject/forms_lodgingflyer.aspx

11.5. Business & Occupation Tax

(a) B&O Tax—General

Unlike many states, Washington does not have an income tax for corporations or individuals. Instead, Washington has what is known as a “Business & Occupation Tax” or “B&O” tax, as it is commonly known. The B&O tax is a tax on gross business income, and affects nearly every hotel operator in the state. RCW 82.04 et seq.

Every business operating in Washington must file a Master Business Application with the Department of Licensing. Once registered with the Department of Licensing, the Department of Revenue assigns an excise (B&O) tax reporting period on a monthly, quarterly, or annual basis, depending on the particular business. At the end of each reporting period, the business must complete the Department of Revenue's Combined Excise Tax Return Form.

(b) Primary B&O Tax Classifications

There are a total of four "major" B&O tax classifications and 24 "specialized" B&O tax classifications, each with its own unique rate. It is possible for businesses to be subject to more than one B&O tax rate, depending on the source of income. In the case of hotels, two classifications will typically apply: "retailing" (at a rate of .00471) and "service and other activities" (at a rate of .018). All gross income derived from these activities is subject to the applicable tax rates of .00471 or .018.

The .00471 "retailing" B&O tax rate applies to all revenues derived from retail sales. As noted above, retail sales include but are not limited to transient lodging charges, charges for meeting rooms, no show charges, attrition fees, sales of goods to guests (souvenirs etc.), telephone calls, parking, food service, and in-room entertainment services like video and game rentals. In other words, all gross business income derived from transactions of this sort is subject to a .00471 tax.

The second B&O tax classification that applies to most hotels is the "service and other activities" classification. This classification is essentially a "catch-all" provision, and applies to all personal and professional services not otherwise defined in RCW 82.04. As an example, this .018 tax rate applies to income categories such as commissions from vending machine providers, long distance telephone providers, Laundromats etc., and fees for allowing satellites to be installed on the premises.

(c) Special Current Issue—B&O Tax Triggered by Payment of Management Company Payroll

Hotel Owners often engage management companies (branded or nonbranded) to manage all aspects of day-to-day hotel operations. This owner-manager relationship is normally set forth in a detailed hotel management agreement (HMA). The relationship is normally an agency relationship—the owner owns the hotel and the income it produces, and the management company, as the owner's agent, manages the hotel and the income for the owner. See PART III, Chapter 12.

Under the HMA it is common for the management company to employ all of the hotel's on-site employees. The owner and the management company may have several reasons to structure the hotel employment relationships this way. Sometimes the owner is the type of entity (such as a REIT) that is unable to employ these employees. More frequently, the

management company is simply the more logical choice to employ the employees—the management company often has employees at a number of hotels and can provide better benefits, scale, or experience ratings than the owner.

Even though the management company serves as the employer on paper, the payroll expenses are almost always considered the owner’s responsibility and an expense of the hotel. Most frequently, the payroll expenses are paid directly out of the hotel’s operating accounts; the management company almost never pays the expenses out of its own funds and almost never receives reimbursement of the expenses from the owner.

Under this scenario, however, the management company arguably must pay a B&O tax when the Owner pays (or reimburses) the payroll costs. This issue arises because of the nature of the B&O tax and the effect of the Department of Revenue’s regulations.

The B&O tax is a tax on gross income. RCW 82.04.220. If a taxpayer earns a fee from a customer, the taxpayer cannot avoid taxable gross income from the fee just by telling the customer to pay off a debt owed by the taxpayer, rather than paying the fee directly to the taxpayer. When the customer pays off a taxpayer’s debt, the taxpayer is considered to have received gross income for B&O tax purposes.

This general concept can be applied to the owner/management company scenario. The management company is the employer of the hotel’s personnel. The management company has direct liability to the employees for the payroll. Thus, when the owner pays for the hotel’s payroll, the owner has paid off a liability owed by the management company to the employees. The DOR can argue that the management company has received gross income.

WAC 458-20-111 has application to this issue. The regulation states that a taxpayer can exclude from gross income “amounts representing money or credit received by a taxpayer as reimbursement of an advance.” If, for example, a management company advances money to pay a hotel vendor’s invoice, then the reimbursement of the advance isn’t taxable. The regulation makes clear, however, that the rule *only* applies if the hotel “*alone is liable*” for the invoice. If the management company is itself liable to pay the vendor, then the management company can’t claim it “advanced” the money when it paid the invoice. In essence, the management company, in that event, is deemed to have paid its own expense, and the “reimbursement” from the owner is essentially gross income to the management company.

Thus, the regulation works against the hotel management company when it comes to payment of payroll. Because the management company is the employer, the management company is liable to the employees for the payment of payroll. Accordingly, the DOR can argue that, under WAC 458-20-111, the payment of the payroll is not an “advance” by the management company, and the payment creates taxable income to the management company.

There are two ways to avoid this result. First, the parties can agree to make owner the employer of the hotel personnel, rather than the management company. Then, when the payroll is paid or reimbursed, there is no management company debt that has been paid and the problem is solved. However, most owners want the management company to be the employer for the reasons stated above.

The second solution is for the management company to attempt to qualify as a “Professional Employer Organization” (PEO) under RCW 82.04.540. *See also* DOR Special Notice, June 2, 2006. To qualify, the following conditions (among others) must be met:

- the management company and the owner must be “co-employers”,
- the employees must receive written notice of the “co-employment”,
- the management company and the owner must enter into a “professional employer agreement”, and
- the management company can’t “assume responsibility for the ... service employed by” the employees.

This solution requires some documentation and isn’t risk free. Perhaps the more significant problem with the solution is that it makes the owner a “co-employer.” “Co-employment” can allow the parties to realize some of desired advantages—as the co-employer, the management company can provide better benefits, scale, or experience ratings sought by the owner. But a “co-employment” will be unacceptable to those owners (such as REITs) who are unable to employ employees.

Until recently, the DOR auditors, in practice, declined to impose a tax on the payment of payroll if the money came from the owner’s payroll account. The DOR apparently found a basis for this favorable practice in RCW 82.040.394. That statute had provided that no B&O tax would be imposed on “a property management company” who pays payroll “on behalf of on-site personnel from property management trust accounts....” The statute had also stated, however, that a property manager would only qualify for the exclusion if “the property manager is liable for [the payroll] *only as agent of the owner.*” Because the hotel management company, as the actual employer, is directly liable to the employees, and not “only as agent,” the statute arguably did not protect the management company. All doubt under this statute was erased, however, when it was entirely repealed in 2010.

In the wake of the repeal of RCW 82.040.394, the DOR has circulated a draft Excise Tax Advisory called “Paymasters and Employers of Record.” If this advisory becomes the DOR’s policy, then the DOR will impose a B&O tax on a management company whenever hotel revenues are used to pay the payroll of hotel employees employed by the management company.

11.6. Tourism Promotion Areas

The 2003 State Legislature passed Senate Bill 6026 which authorized counties and cities to establish Tourism Promotion Areas (TPAs) within their jurisdictions and to levy special assessments to fund tourism promotion. This law is codified as RCW 35.101. Key provisions of this law are as follows:

- “Tourism promotion” means activities and expenditures designed to increase tourism and convention business, including advertising, publicizing, or otherwise distributing information for the purpose of attracting and welcoming tourists, and operating tourism destination marketing organizations.
- “Lodging business” means a person that furnishes lodging taxable by the state under chapter 82.08 RCW that has forty or more lodging units.
- “Legislative authority” means the legislative authority of any county with a population greater than forty thousand, or of any city or town within such a county, including unclassified cities or towns operating under special charters. However, in King County, the legislative authority is comprised of two or more jurisdictions acting jointly as the legislative authority under an interlocal agreement for the joint establishment and operation of a tourism promotion area.
- A TPA can be established by a legislative authority only by an initiation petition which is signed by persons who operate lodging businesses in the proposed area who would pay sixty percent or more of the proposed charges. A city or county cannot establish a TPA on its own. The process of establishing a TPA can only be started by hoteliers. An initiation petition must follow certain guidelines as set forth in RCW 35.101.020 which includes a description of the proposed uses and projects to which the proposed revenue from the charge shall be put.
- TPA’s can be established by interlocal agreements between two or more jurisdictions. As an example, the first TPA established in the State is by an interlocal agreement between Spokane County, the City of Spokane and the City of Spokane Valley. An interlocal agreement was also used to establish a TPA in the Tri-Cities. Several cities (within a county of 40,000 population) have established a TPA within their city limits. They include Walla Walla, Wenatchee, Vancouver, and Yakima.
- RCW 35.101.050 sets forth certain limitations on the charges for furnishing lodging within the TPA. It states:
 - (1) There shall not be more than six classifications upon which a charge can be imposed.

(2) Classifications can be based upon the number of rooms, room revenue, or location within the area.

(3) Each classification may have its own rate, which shall be expressed in terms of nights of stay.

(4) In no case may the rate under this section be in excess of two dollars per night of stay.

- The collection of TPA assessments is by the Washington State Department of Revenue which then returns the revenue to the legislative authority. This Department does not charge for the administration and collection of TPA assessments with one exception. That exception relates only to legislative authorities within King County. See RCW 35.101.052.
- The legislative authority at its discretion may appoint an advisory board or commission to make recommendations as to the annual budget and the use of the TPA assessments for tourism promotion. In Spokane there is a hotel commission consisting of eight hotel operators who have been nominated by Spokane County, the City of Spokane and the City of Spokane Valley.
- The legislative authority may contract with a local CVB or other similar organization to administer the day to day operation of the TPA.
- The legislative authority by ordinance may disestablish a TPA. See RCW 35.101.140. This is an important feature which enables hoteliers to terminate the TPA in the event the legislative authority decides to use the revenues for purposes other than tourism promotion.

Since 2004, a number of counties and cities have adopted TPA ordinances. The revenues derived from the TPA assessments have provided considerable new revenues to local CVB's and sports commissions. A number of other local jurisdictions are now considering the formation of a TPA.

Many believe the creation and implementation of TPAs throughout the State of Washington have revitalized local tourism promotion and economic development. The TPAs have provided considerable funding for tourism promotion at a time when the State of Washington has terminated its tourism office and provides no funding for tourism promotion.

11.7. Summary and Conclusions

➤ Under the authority of RCW 82.08.020, the state sales tax is imposed on the sale of all lodging, because it is considered a "sale at retail."

- Any sale of lodging for a period of thirty or more days is considered non-transient and therefore exempt from retail sales tax. The guest must agree *up front* to stay for a period of thirty continuous days or more. This rule can apply to contracts for crew rooms.
- There are two kinds of room taxes in Washington State. First, a city or county can essentially claim a part of the state sales tax. This shared portion of the state sales tax is often called the “basic” hotel tax. Second, there are add-on excise taxes that are specific to certain local jurisdictions. These are often referred to as “special” hotel taxes.
- The “basic” hotel tax does not impact the final bill paid by each guest. “Special” hotel taxes are taxes that are added on by a city or county, and so they do impact the final bill paid by each guest.
- Hotels must pay a B&O tax on gross business income. Two different classifications (“Retailing” and “service and other activities”) typically apply to hotel operations.
- In many hotels, a management company employs the on-site personnel. If so, then, under current law, the payment of the hotel payroll from funds by the hotel owner likely triggers a B&O tax against the management company.
- Tourism Promotion Area legislation allows counties and cities to establish TPAs within their jurisdictions to levy special assessments to fund tourism promotion. TPAs provide considerable funding for tourism promotion at a time when the State of Washington has terminated its tourism office and provides no funding for tourism promotion.

Chapter 12: Hotel Ownership Matters—an Overview

In a smaller hotel owned and run by a single owner, the hotel's ownership structure is usually fully understood by the hotel's managers and staff. In larger hotels, however, the ownership and contractual structures can be complex and involve several constituents. Often, the hotel's managers are not fully aware of these structures that underlie a hotel. The structures are the context within which hotel management operates, and this context can affect how hotel management and its performance are viewed. This Chapter gives an overview of these structures and the relationship they create.

12.1. The Players

There are several different companies and entities that are typically involved in a larger hotel:

- *The Ownership Entity.* The owner of a hotel (**Owner**) is normally a separate, single-purpose entity that is formed to own and hold the hotel assets.
- *Management Company (Branded or Unbranded).* The hotel is usually managed by a separate company that serves as the hotel management company (**Manager**). The Manager is responsible for the management of the hotel under a detailed, often long-term hotel management agreement (**HMA**). There are two kinds of Managers: a **Branded Manager** and a **Non-branded Manager**. In either case, the Manager operates the Owner's hotel as, essentially, the Owner's agent. *See, e.g., Woolley v. Embassy Suites, Inc.*, 227 Cal. App. 3d 1520 (1991).
- *Equity Investor.* The equity ownership of the Owner is owned by one or multiple investors (**Equity Investors**).
- *Franchisor.* If the Manager is not a Branded Manager, and the Owner still wants the hotel to run under a recognized flag, then the Owner may enter into a **Franchise Agreement** with a **Franchisor**.
- *Asset Manager.* Sometimes the Owner engages an **Asset Manager** to serve as the Owner's representative.

These players, their roles, and the structures surrounding them are discussed in more detail in the rest of this Chapter.

12.2. The Branded HMA

The branded HMA creates a relationship that is rather unique to the hospitality industry. Under the HMA, the Branded Manager brings with it an established brand that it owns, and it operates all aspects of the hotel in accordance with **brand standards** that the Branded Manager has established. To the guest, the hotel appears as though it is owned by the Branded Manager, not the Owner. The Branded Manager uses many programs to drive guests to the hotel, such as frequent guest rewards programs and branded marketing programs. Accordingly, most Branded Managers believe that they, not the Owner, “own” the guests and their goodwill.

This relationship creates a natural tension between the Owner and the Branded Manager. The Owner wants to save money and take advantage of the Branded Manager’s existing brand equity. The Branded Manager wants to spend the Owner’s money to improve the product, ensure good service, and thereby increase brand equity. The tension is not unlike the tension between a franchisor and franchisee. The typical branded HMA reflects this: it can be as long and detailed as a hotel franchise agreement and a non-branded HMA combined.

Some key topics and provisions of the typical branded HMA include the following:

- *PIP.* If the hotel is changing from one Branded Manager to another, the HMA will usually require a property improvement plan (**PIP**) to bring the hotel within the new Branded Manager’s brand standards. Because a PIP can result in significant costs, the PIP can be the subject of careful negotiation between the Branded Manager and the Owner.
- *Fees.* The branded HMA usually provides that the Branded Manager will receive a **base fee**. The base fee is normally a percentage of the hotel’s gross revenue (usually between 2% and 4%). Also, the Branded Manager usually receives an **incentive fee**. The incentive fee is typically a percentage of gross operating profit. Sometimes, the incentive fee is triggered only when gross operating profit exceeds a certain hurdle (often called the **owner’s return**)—the hurdle is negotiated and determined based on a return the Owner expects to receive on the Owner’s invested capital, as well as on the anticipated cash needed to pay debt service for the hotel’s acquisition financing. The Owner usually attempts to negotiate and structure the base fee and incentive so that the Branded Manager’s incentives are more aligned with the Owner’s interests.
- *Term of Agreement.* A branded HMA usually covers a long period of time—between 10 and 40 years. Most Branded Managers are primarily in the business of managing hotels for Owners, rather than owning hotels. As a result, the Branded Manager’s portfolio of branded HMA’s constitutes a primary asset of the Branded Manager. HMAs with long terms create more asset value for Branded Managers. Thus, a Branded Manager seeks to have term lengths that are as long as possible.

- *Key Money.* Because a long-term branded HMA can be of great value to a Branded Manager, sometimes the Owner obtains the Branded Manager's commitment to provide up-front financial enhancements to the Owner. For example, the HMA may call for the Branded Manager to pay a significant lump-sum amount to the Owner at the time the hotel opens under the HMA. The obligation to repay this **Key Money** is reduced, or **burned down**, over the term of the HMA. Thus, if the HMA is not terminated before its expiration, then, typically, the Owner does not have to repay any of the Key Money.
- *Budget Process.* The tension between the Owner and the Branded Manager (discussed above) is played out primarily in the budgeting process. The Branded Manager proposes an annual budget, usually in the fall of each year. The Owner has the right to approve the budget, but this right is limited—for example, if a budget item is required to maintain the Branded Manager's brand standards, then the Owner might not have the right to disapprove of the budget item. The Branded Manager usually wants the Owner to liberally invest in improvements to the property—more investment in the hotel's facilities helps drive up the hotel's gross revenue and gross operating profit (and therefore the Manager's fees) and also helps the Branded Manager's brand image. The Manager might also want the budget to be more conservative so that there is less chance of failing the performance test (*see* next bullet). In contrast, the Owner wants the highest possible return on the Owner's investment and wants the Branded Manager to stretch to reach higher budget goals and do more with less. Given these tensions, the branded HMA may have arbitration provisions for quick resolution if the Owner and Branded Manager can't agree on aspects of the budget.
- *Right to Terminate for Performance.* Usually the Owner has a limited right to terminate the HMA if the Branded Manager fails a **performance test**. The test is usually two-pronged: the Owner is allowed to terminate if, during two consecutive years, (a) the hotel fails, by a certain percentage, to meet the annual budget, and (b) the hotel's RevPAR index, in comparison to a set of other competitive hotels, drops below a certain number.
- *Hotel Expenses/Employment of Hotel Personnel.* Because the Manager operates the hotel for the Owner and as the Owner's agent, virtually all expenses incurred at the hotel are the Owner's responsibility and are paid out of the hotel's revenues. Nevertheless, the Branded HMA usually calls for the Branded Manager to serve as the named employer for all of the hotel's on-site employees. Sometimes, this arrangement is required by the Owner's corporate form (some companies, such as REITs, are unable to employ hotel employees). More frequently, the Manager is simply the more logical choice to serve as the employer because the Manager can provide better benefits, scale, or experience ratings than the Owner. Even though the

management company serves as the employer on paper, the payroll expenses (along with all other hotel expenses) are almost always considered the owner's responsibility and an expense of the hotel. This anomaly can create issues, such as the B&O tax issue discussed in PART III, Section 11.5(c).

- *Indemnity Provisions.* Most HMAs state that the Owner must indemnify the Manager for all claims arising from the operation of the hotel, unless the claim arises from the Manager's "gross negligence or willful misconduct." Both the Owner and the Manager usually recognize that hotels are complex businesses, and that claims by guests and others arise and are to be expected as a cost of doing business. As a result, even if hotel employee negligence causes a claim to arise, the Manager HMA's indemnity provisions usually still protect the Manager. The risk of the claims is then covered by insurance (which is an expense of the hotel).

12.3. Non-branded HMAs

The Non-branded Manager may be very well-known to hotel owners, but is usually not known at all by hotel guests. This is because the Non-branded Manager does not own a flag that is known to guests. In a boutique hotel, the Non-branded Manager may operate the hotel under a location-specific brand owned by the Owner. More often, the Owner has obtained a franchise from a Franchisor, and this franchise establishes the flag under which the hotel operates (see below). The HMA then calls for the Non-branded Manager to operate the hotel for the Owner under this franchised flag.

Because the Non-branded Manager does not have its own hotel brand to protect, the Owner-Manager relationship does not have the same degree of tension (discussed in the previous Section) that naturally exists in the relationship between the Branded Manager and the Owner. The tension between the brand and the Owner is played out, instead, in the Franchise Agreement between the Owner and the Franchisor.

Nevertheless, some natural tension does still exist between the Owner and the Non-branded Manager. The Non-branded manager does have a reputation to protect—the reputation it holds among Owners. The hotel industry is very tightly knit, and Owners are quite aware of Non-branded Managers and their reputations. The Non-branded Manager's reputation is how the Non-branded Manager obtains new engagements and attempts to grow. Thus, a Non-branded Manager may have a greater concern than the Owner about the professionalism shown at the hotel. And if the Non-branded Manager desires to move up the market class ladder, then the Non-branded Manager might have an extra incentive to increase service levels or improve the facility's attributes. By comparison, the Owner usually is interested almost exclusively in return on investment.

The fact that the Non-branded Manager does not bring its own flag to the hotel also impacts the relationship in another way. Because the Non-branded Manager is not known to the guests and is not readily identifiable with a property, the Owner may think of the Non-branded Manager as somewhat more fungible and interchangeable than a Branded Manager.

These factors work to make the non-branded HMA more Owner-friendly. For example:

- *PIP.* The Non-branded Manager is not concerned about its own brand standards. As a result, any PIP is usually the subject of the Owner's negotiations primarily with the Franchisor, and not with the Non-branded Manager.
- *Fees.* The fees in the non-branded HMA include the same fees as are found in a Branded HMA—usually a base fee (a percentage of GOR) and an incentive fee (a percentage of GOP that exceeds a pre-determined hurdle). The percentage used to calculate the fees, however, is typically lower than in a Branded HMA. This is to be expected because, for example, the Owner normally has to pay fees under the Franchise Agreement—those extra fees aren't needed when a Branded Manager is engaged.
- *Term of Agreement.* A branded HMA usually covers a shorter period of time—typically between 5 and 15 years.
- *Budget Process.* The provisions of the HMA that govern the budget process are usually comparable to the Branded HMA. For the reasons set forth above, however, less controversy tends to arise during the budgeting process in practice.
- *Right to Terminate for Performance or Other Reasons.* Usually the Owner has more expansive rights to terminate a non-branded HMA. The rights include a similar performance test, but also may include other termination rights, such as the right to terminate, without a termination fee, upon a sale of the hotel.
- *Hotel Expenses/Employment of Hotel Personnel/Indemnity.* These terms are the same in the non-branded HMA. Virtually all expenses incurred at the hotel are the Owner's responsibility and are paid out of the hotel's revenues. Most Non-branded Managers also employ the hotel employees, but sometimes the Owner may serve as the employer. Most non-branded HMAs, like branded HMAs, state that the Owner must indemnify the Manager for all claims arising from the operation of the hotel, unless the claim arises from the Manager's "gross negligence or willful misconduct."

12.4. Franchise Agreements

The Franchise Agreement is very detailed and requires the hotel to be run in accordance with **Brand Standards** that are set forth in detailed and confidential manuals. These manuals

govern virtually every aspect of the hotel's physical attributes and the manner in which the hotel is operated.

Like the relationship between the Owner and Branded Manager, the relationship between the Owner and the Franchisor creates a natural tension. The Owner wants to take advantage of the Franchisor's brand and obtain the highest return on investment. The Franchisor wants the Owner to spend money to improve the hotel's facility and service, and thereby increase the guest experience and the value of the Franchisor's brand.

Some key topics and provisions of the typical branded HMA include the following:

- *PIP.* If the hotel is changing brands, the Franchise Agreement will call for a PIP that is scrutinized by both the Owner and the Franchisor.
- *Fees.* The Franchise Agreement usually calls for a license fee that is based exclusively on the hotel's room revenue. This basis for the fee creates some additional misalignment of the interests of the Franchisor and the Owner: The Franchisor wants to increase room revenue, while the Owner is primarily concerned with net income.
- *Key Money.* In recent years, some Franchisors have shown a willingness to provide an Owner with Key Money or other financial incentives. This is a relatively recent phenomenon and reflects the dearth of new hotel development after the beginning of the Great Recession.
- *Term of Agreement.* A Franchise Agreement's term length is usually between five and 15 years. If the Franchisor provides Key Money, then the term can go as long as 25 years.
- *LDs.* Usually the Franchise Agreement requires the Owner to pay liquidated damages (**LDs**) if the Franchise Agreement is prematurely terminated. LDs can be as high as five times the annual franchise fees payable under the Franchise Agreement.
- *Brand Standards.* The Franchise Agreement is often very heavy handed about the requirement of the Owner to comply with existing Brand Standards and even new Brand Standards that the Franchisor may develop in the future. Unlike the Branded Manager, the Franchisor has no hands-on control over the hotel or its operation. As a result, the Franchise Agreement is the Franchisor's only way to ensure that guest expectations for the brand are met at the hotel. This is why the Franchise Agreement's terms on Brand Standard compliance are so extensive.

12.5. Asset Managers

Sometimes the Owner and the primary Equity Investor do not have substantial hotel expertise. In these situations—especially when the Equity Investor is an institutional investor—it is common for the Owner to engage an **Asset Manager**.

The Asset Manager is, in essence, the representative of the Owner. The Asset Manager interfaces with the Manager and the Franchisor and enforces the terms of the HMA and the Franchise Agreement on behalf of the Owner.

As discussed above, the interests of the Owner and the Branded Manager (or Franchisor) are not always aligned. The Branded Manager and the Franchisor are true hotel experts, especially with respect to the brands they own. If the Owner lacks hotel experience, then the Owner can be at a serious disadvantage when discussing the budget, Brand Standards, and operational efficiencies. In these situations (and others), the Owner may have difficulty determining whether the dictates of the Brand Manager (or Franchisor) are beneficial or justified. These circumstances can create the need for an Asset Manager.

The Asset Management Agreement is usually a relatively straight-forward agency agreement, consisting essentially of an agreement to provide consulting services for a fee. Sometimes the Asset Manager is in the business of also providing hotel management. In that event, most reputable Asset Managers will make clear that, once they become an Asset Manager, they will not consider taking over as Manager. Without that stipulation, it can be very difficult for the Asset Manager to be effective in its dealings with the Manager—the Manager may feel that any criticism by the Asset Manager is motivated by the Asset Manager’s desire to remove the Manager and take over as the new Manager for the hotel.

12.6. Equity Structures

As indicated above, the Owner is normally a separate, single purpose entity that is formed to own and hold the hotel. Often, this entity is a limited liability company. This structure helps insulate the Equity Investors from liability that arises in the hotel’s ownership, financing, and operations.

The equity ownership of the Owner is often complex and can include a number of Equity Investors. The primary Equity Investor can be an institutional investor (such as a life insurance company), a Real Estate Investment Trust or **REIT** (a publicly traded company that invests in real estate), or a group of private investors. The Primary Equity Investor usually controls the Owner.

Not infrequently, the Manager initially finds the hotel opportunity for the primary Equity Investor. For example, the Manager may have a long-standing relationship with a life insurance company. The Manager knows the kind of hotel investment that the life insurance company is

looking for. The Manager finds an acquisition opportunity and presents the opportunity to the life insurance company. If the opportunity meets the life insurance company's needs, then the acquisition may occur. Because the Manager brought the life insurance company "to the party," the life insurance company engages the Manager to manage the hotel under an HMA.

In this scenario, sometimes the life insurance company may require the Manager to invest money into the Owner entity, so that the interests of the primary Equity Investor and the Manager are more aligned. This investment by the Manager is often called a **Sliver Interest**. To raise the money for this Sliver Interest, Managers sometimes form their own Equity Investor entity by reaching out to "friends and family" for private equity. Typically, the Manager then operates and controls the entity that holds the Sliver Interest.

The internal operation of the Owner entity is usually governed (in the case of a limited liability company) by a limited liability company agreement (**LLC Agreement**). The LLC Agreement determines how the Equity Investors will make decisions and when the consent of a majority of the Equity Investors (or more than a majority) is needed to make a given decision.

The LLC Agreement also dictates how the hotel's cash flow (whether from hotel operations or from liquidity events) will be distributed to the Equity Investors. Normally, cash flow is distributed pro rata to the Equity Investors, based on their cash investments. If the Manager found the opportunity and invests in a Sliver Interest, then the Manager may also receive a **Promote**. A Promote, typically, provides the Manager with a higher-than-pro-rata return that kicks in after the primary Equity Investor has received a *return of* its investment and a predetermined *return on* its investment.

Sometimes, the equity structure may also involve one or more Equity Investors that obtain a preferred return—i.e., a return that allows the investor to obtain the first dollars out, up to a certain return. Usually, the investor with a preferred return then reduces his share of the upside if the hotel investment does very well. These preferred investments of equity are often called **Mezzanine Financing**—the return on the Mezzanine Financing comes "in between" the payments to secured creditors but before the payments to other Equity Investors.

When the LLC Agreement has different kinds of Equity Investors, the LLC Agreement usually has **Waterfall** provisions. The Waterfall provisions state how much one class of investors must receive in their "bucket" before the next class's "bucket" begins to be "filled," and so on. These provisions can be quite complex.

12.7. Debt Financing

Most larger hotels are acquired with **Secured Debt Financing** from a **Secured Lender**. This financing requires payment, over a specified period of time, of principal and interest at a specified rate (floating or fixed). If a default occurs, then the Secured Lender can foreclose on the hotel.

Sometimes, the Secured Debt Financing is intended to be sold into a pool of other similar loans. The pool sponsor buys the Secured Debt from the lender, pools them, and packages them for sale to the public. The securities sold by the sponsor are called **Commercial Mortgage-Backed Securities** or **CMBS**.

Many of these pools in the hotel world were pooled into Real Estate Mortgage Investment Conduits (**REMIC**). The CMBS instruments issued by REMICs are often in multiple classes or **tranches**. The relationship between the tranches is much like that of junior and senior lienholder—one gets paid before the other.

Between 2003 and 2008, much of the hotel industry (roughly one in three hotels in the nation) took financing from the REMIC world. These loans seemed like normal loans, and few Owners “looked under the hood” to find out how REMICs might behave in times of trouble.

Since the Great Recession began in 2008, those in the hotel industry have had to learn about the REMIC world. Each REMIC is run by a Master Servicer under a Pooling and Servicing Agreement (**PSA**). Under the typical PSA, a Master Servicer can’t do much to modify a loan held by the REMIC. If there is a default, a maturity, or “an imminent risk of an event of default,” then the Master Servicer transfers the loan to the Special Servicer. The Special Servicer then has the authority to restructure the loan, do a workout, foreclose, etc.

12.8. Manager-Lender Relationships

Secured Lenders usually require the Manager to negotiate and sign a document that is often called a “subordination and nondisturbance agreement” (**SNDA**). Secured Lenders and Managers often start from completely different perspectives in negotiating the SNDA. The Secured Lender often thinks of the Manager as just another unsecured creditor that can be brushed aside by foreclosure. The Manager, however, usually believes that it is more in the position of a trustee because all of its actions under the HMA benefit the value of the hotel. The Manager therefore concludes that it should make no difference if the Secured Lender has become the owner of the hotel—the Secured Lender should still pay for the branded manager’s work, all of which benefits the Secured Lender’s property.

After negotiations over the SNDA by the Secured Lender and the Manager, it is typical for the SNDA to resolve these differing perspectives along the following lines:

- Upon foreclosure, the Secured Lender (or the purchaser at foreclosure) has a right to terminate the HMA without paying a termination fee.
- The Secured Lender must exercise the termination right within a fixed period of time after foreclosure. This way, the Manager is not left in limbo indefinitely. If the termination right isn’t exercised on time, then the Secured Lender (or the purchaser at foreclosure) must assume the HMA.

- The Secured Lender must allow the use of the hotel's revenues to pay the Manager and the hotel's expenses for so long as the Manager is managing the hotel under the HMA. This is because the Manager can be liable for such things as the hotel's payroll, and it isn't appropriate to put the Manager in the position of having to pay these hotel expenses (all of which benefit the value of the Secured Lender's collateral). Also, the hotel's revenues must be used to pay the Manager's fees.
- If the terms of the HMA are not performed by the Owner or the Secured Lender, then the Manager can terminate the HMA.

The above terms (which can vary from one hotel deal to the next) are intended to give the Secured Lender the ability to get the highest value for its collateral, while protecting the Manager from unfair risks, such as the risk of being targeted by hotel creditors or the risk of nonpayment of the Manager's fees.

12.9. Summary and Conclusions.

- In larger hotels, the hotel's ownership and contractual structures can be complex and involve several constituents. These structures and the context they create can affect how hotel management and its performance are viewed.
- The branded HMA creates a relationship that is rather unique to the hospitality industry. The branded manager owns the brand under which the hotel operates. This creates a natural tension between the Owner and the Branded Manager. The tension plays out in the terms of the typical HMA and the parties' performance under those terms.
- The Non-branded Manager does not own a brand recognized by the hotel's guests. Usually, the Owner has franchised a brand from a Franchisor, and the Non-branded Manager manages the hotel under that franchised brand. This relieves some of the tension between the Owner and the Manager, though some tension does remain. The non-branded HMA reflect this different context. The terms of the non-branded HMA are usually more favorable and flexible for the Owner because the hotel's identity is not as closely intertwined with the Non-branded Manager.
- The Franchise Agreement is very detailed and requires the hotel to be operated in accordance with Brand Standards that are set forth in detailed and confidential manuals. Like the relationship between the Owner and the Branded Manager, the relationship between the Owner and the Franchise creates tension because the enhancement of the brand's value and the enhancement of the property's value are not always the same thing. The terms of the Franchise Agreement reflect this context.
- An Owner sometimes engages an Asset Manager when the Owner does not have sufficient hotel expertise in-house. It is common for institutional investors to engage Asset

Managers. An Asset Manager helps the Owner navigate the issues arising from the fact that the interests of the Branded Manager and the Franchisor are not always aligned with the Owner's interests.

- Hotel equity ownership can be complex. It can involve a primary Equity Investor (such as a life insurance company, a REIT, or a private equity fund), a Sliver Interest Holder, a Promote, and Mezzanine Financing. The financial interests of the Equity Investors are reflected, typically, in a Waterfall described in the LLC Agreement that governs the Owner's internal operation.
- Usually, a hotel acquisition is financed with Secured Debt Financing, which gives the Secured Lender the right to foreclose on the hotel in the event of a default.
- Between 2003 and 2008, much of the industry (roughly one in three hotels in the nation) took financing from the REMIC world. These loans seemed like normal loans, and few Owners "looked under the hood" to find out how REMICs might behave in times of trouble. The hotel industry has had to learn about the REMIC world, and this learning process is continuing.
- The Secured Lender's and the Manager's rights, as against each other, are usually set forth in an SNDA. The SNDA's terms typically give the Secured Lender the right to terminate the HMA upon foreclosure, while protecting the Manager from unfair risks, such as the risk of being targeted by hotel creditors or the risk of nonpayment of the Manager's fees.