

hospitality law

managing legal issues in the hospitality industry

SECOND EDITION

Stephen Barth

HOSPITALITY LAW

HOSPITALITY LAW

Managing Legal Issues in the Hospitality Industry
Second Edition

STEPHEN BARTH, J.D.
Conrad N. Hilton College of Hotel and Restaurant Management
University of Houston
Attorney and Founder, HospitalityLawyer.com

DAVID K. HAYES, PH.D.
Consulting Author

JOHN WILEY & SONS, INC.

This book is printed on acid-free paper. ♾

Published by John Wiley & Sons, Inc., Hoboken, New Jersey

Published simultaneously in Canada

Library of Congress Cataloging-in-Publication Data:
Barth, Stephen C.
Hospitality law : managing legal issues in the hospitality industry / Stephen Barth ; David K. Hayes, consulting author.—2nd ed.
p. cm.
Includes index.
ISBN 0-471-46425-2 (cloth)
1. Hotels—Law and legislation—United States. 2. Hospitality industry—Law and legislation—United States. I. Hayes, David K. II. Title.
KF2042.H6H67 2005
343.73'07864794—dc22 2004007050

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

Contents

Preface

This textbook was written to help teach hospitality students what they need to know to manage a facility legally. It was not written for attorneys who wish to specialize in hospitality law.

In the day-to-day operation of a hospitality facility, it is the manager, not the company attorney, who will most influence the legal position of the operation. Rarely will you find a hospitality manager who is also a licensed attorney. However, professional hospitality managers (and, by extension, their staffs) make decisions every day based on their own interpretation of the law. The quality of these decisions will ultimately determine whether lawyers and the expense of fees, trials, and potential judgments may become necessary. A few examples will help illustrate this fact.

- A restaurant guest is unhappy with the quality of service provided during his meal. He complains to the manager and angrily demands his money back, but his meal has been eaten.

  Is the guest legally entitled to a refund?
- A hotel guest maintains that a $50 bill she had left on her bedside table was gone when she returned to her room after going out for lunch.

  Is the hotel required to replace the funds?
- A resort employee is arrested by the local police for driving under the influence of alcohol. He is employed by the hotel as a van driver, but was not on duty at the time of the arrest.

  Should the hotel suspend his employment?
- A hotel food and beverage director is presented with a bottle of rare and expensive wine as a Christmas gift from her linen vendor.

  Can she legally accept the gift without threatening her employment status?
- A franchise restaurant owner receives a letter from her franchisor stating that the "casual Friday" dress code policy recently adopted by the owner is in violation of the franchise agreement.

  Must the owner change her policy?

These examples are just a few of the thousands of legal issues that daily confront hospitality managers. Obviously, it would be very expensive to consult an attorney each time a legal issue arises. It is also true, however, that making the *wrong* decision in any of these cases could result in tremendous costs in legal fees and settlements, or in costly negative publicity. Because that is true, a hospitality student's and a professional manager's greatest need is to understand how they can act in ways to ensure that they are managing legally in the hospitality industry. This book will show them how.

THE CONCEPTUAL DEVELOPMENTAL PROCESS

The authors's years of teaching hospitality law at the undergraduate, graduate, and continuing professional education level have helped shape this textbook's content enormously. The result of these activities was a recognition of the need

for a different kind of resource that could be used to teach hospitality students what they need to know about managing in today's litigious environment.

Before developing the first edition of this book, a survey of attorneys and human resource directors at the top 100 U.S. hospitality organizations was completed. The participants were asked to identify the primary areas they felt were critical to a hospitality student's legal education and training. The most significant areas of interest focused on the ability to manage correctly and, thereby, reduce the potential for legal liability.

Thus, preventing liability through a proactive management of the law is the dominant theme of this textbook. In all cases, where issues of content, writing style, and design were involved, the touchstone for inclusion was simply: "Does this add to a student's ability to do the right thing?" That is, will this feature improve his or her ability to legally manage his or her own operation? If so, it was considered critical; if not, it was quickly deemed superfluous. For that reason, this book will look and read very differently from any other hospitality law textbook on the market. The legal information in it has been carefully selected and classroom-tested to be clear, understandable, and easy to apply.

NEW TO THIS EDITION

This second edition has new features that will further enhance the learning outcomes for your students.

First, a new chapter, 13, covers legal issues that arise in travel and tourism, including transportation, travel agents, tour operators, gaming, mixed use and time share, as well as amusement parks. This chapter also includes legal issues that can arise due to the Internet booking phenomenon. Of course, the continuing saga of supermanager Trisha Sangus is included.

Second, each of the Web exercises has been updated to ensure accuracy and to enrich the learning experience.

Third, we have added the International Snapshots feature to Chapters 2 through 12 to give the instructor and students a global perspective on legal issues. Each of these was contributed by practicing attorneys or professionals in their field and describe the differences between U.S. law and that in the international arena in general or as it compares to a particular foreign country.

Finally, summaries of actual legal cases have been included at the end of each chapter to further illustrate and practically apply the law. A brief Message to Management is included at the end of each summary to continue the emphasis on being proactive and to clearly identify the impact of the case.

CREATING AN INTERACTIVE LEARNING ENVIRONMENT

This textbook has been designed as a necessary tool for developing a hospitality law course that will foster within students an attitude of "compliance and prevention" in their work ethic and personal management philosophy. Compliance and prevention means teaching students ways to prevent or limit their legal liability by complying with legal norms. Instead of approaching the topic of hospitality law from a traditional case study viewpoint, this book provides an understanding of the basic foundations and principles of the laws affecting the hospitality industry. It then goes on to provide guidelines and techniques that show students how to manage preventively and apply a practical legal awareness to their actions.

Much of the book's effectiveness as a learning tool relies on having students participate in an interactive learning process. Several different types of learning features and exercises have been included that directly involve students, and are intended to help develop a pattern of behavior that will teach them to consider the legal implications of day-to-day management activities. Recognizing the im-

portance of technology, both in education and the industry, a number of activities were designed to showcase the value of the computer as a lifelong learning tool.

Chapter Outline. Each chapter begins with an outline that helps students see how topics fit together in the context of the overall subject they are learning about.

Opening Vignette. Students will follow the daily routine of fictional hotel manger Trisha Sangus as she grapples with challenges and dilemmas that demonstrate how an understanding of the chapter topic would be critical to a real-life hospitality manager's decision-making ability.

In This Chapter You Will Learn. More than just a list of learning objectives, this feature identifies concrete skills and necessary information that students will have gained after studying the chapter. Demonstrating how the information will be useful to them in their management careers will motivate students to learn.

Legalese. Legal definitions are provided, written in simple language to help students develop the vocabulary and understanding they need to follow the law.

Analyze the Situation. In these hypothetical but realistic scenarios, students will learn how a legal concept they have just encountered in the textbook is relevant to situations they will likely face in the hospitality industry. These situations—and the critical thinking questions that accompany them—may be assigned to students individually or discussed in a classroom setting. In many cases, we have intentionally made the facts ambiguous to challenge students to think through the situation and to foster discussion in the classroom.

Search the Web. Every chapter includes interactive Search the Web exercises. Students are directed to a carefully chosen collection of Internet sites that hospitality managers can use to find guidelines, access information, or learn more about the hospitality industry and the law. The questions that are part of every exercise are intended to guide students through a particular Web site and demonstrate how the computer can help them become better hospitality managers.

Legally Managing at Work. These sidebars contain practical legal guidelines for managers, covering a variety of situations that directly relate to restaurant and hotel operations. Topics range from recommended steps for managers when responding to guest injuries or health emergencies, to legal guidelines for drawing up contracts, and dealing with the media during an emergency situation. Using checklists, step-by-step procedures, and written forms, students will learn how to create policies and respond to situations in a manner that will help ensure compliance with the law and protect their business.

International Snapshot. An attorney or industry professional has compared U.S. legal practices with the same practices in the international community at large or a specific country. This section will create an enhanced perspective for your students.

What Would You Do? These realistic decision-making scenarios ask students to put themselves in a situation that requires them to apply the legal principles they have learned in the chapter. Many include a concrete activity, and all contain questions that require students to make a personal decision in a set of circumstances they may likely face in their future careers.

The Hospitality Industry in Court. Instructors often use actual legal cases as examples or learning tools in their hospitality law course. The challenge lies in selecting cases that effectively illustrate the topic being discussed. Many court cases that become famous are ultimately decided on the basis of

procedural issues or legal technicalities, rather than the facts of the case. Consequently, they are of interest to law students, but much less helpful to hospitality managers. Each chapter of the book includes summaries of real-life hospitality cases. The cases have been selected specifically to reinforce the "compliance and prevention" theme of the textbook. Professors are encouraged to have students look up the entire cases on their own or to use the summaries as springboards for assignments or class discussions.

What Did You Learn in This Chapter? The main ideas and objectives of each chapter are briefly summarized here. The summary can be used by students as a supplement to, but not as a substitution for, a thorough review of the chapter material.

Rapid Review. In addition to traditional end-of-chapter self-evaluation questions, each chapter's Rapid Review also includes specific exercises designed to build students' writing skills. For example, students may be asked to draft a policy for their staff, write a memo to their boss, or perhaps compose a letter to a local government official. Each chapter's Rapid Review also includes at least one assignment that requires students to use the World Wide Web.

Team Activity. Employers continue to stress the importance of working in teams. This is especially true for managers at every level, who may be called on to participate on committees or supervise projects with other groups of employees. This textbook provides you with classroom-tested activities that will stimulate thinking and discussion, while allowing students to practice the team-building and social skills they will need to succeed as hospitality managers.

INSTRUCTOR'S MANUAL

To help instructors manage the large number of exercises, activities, and discussion questions posed in this textbook, an Instructor's Manual (ISBN: 0-471-70863-1) is available. Please contact your Wiley sales representative for details. Or, to access an electronic copy of the Instructor's Manual, go to **www.wiley.com/college/barth**.

Acknowledgments

This edition, like the first edition, was truly a community effort. It would be impossible to thank everyone who, over the years, has provided me with insight or ideas that made this book possible. Accordingly, for those of you whom I fail to mention personally, please know that it was not an intentional oversight.

A special note of thanks goes to Clay Caldwell, for his assistance researching, identifying, and summarizing relevant cases for the chapters; to Melina Lombard and Caroline Goncalves, for their tireless administrative assistance; and, of course, to David Hayes, a prolific writer who "gets it."

Special thanks goes to those educational professionals whose experience in the classroom, insights, and encouragement served to illumine this text. Reviewers can do a remarkable job of keeping the needs of the student at the forefront of the writing effort, and the following individuals were tremendous in this regard. Truly, this book contains the collective teaching acumen of some of hospitality education's very best, and this second edition of the textbook is a testament to their skill, commitment, and wisdom.

Tom Atkinson, Columbus State Community College
Thomas F. Cannon, University of Texas at San Antonio
Edward H. Coon, University of South Carolina
Edward Doherty, Endicott College
Gary M. Donnelly, Casper College
Linda K. Enghagen, University of Massachusetts
William D. Frye, Niagara University
James M. Goldberg, Northern Virginia Community College
Christian E. Hardigree, University of Nevada at Las Vegas
Joseph W. Holland, University of Wisconsin–Stout
Barry R. Langford, University of Missouri–Columbia
Charla R. Long, Grand Valley State University
Brenda G. Montgomery, Arkansas Tech University
Robert Alan Palmer, California State Polytechnic University-Pomona
George J. Pastor, Hillsborough Community College
Walter Rapetski, Asheville-Buncombe Tech Community College
Denver E. Severt, Eastern Michigan University
John E. Taylor, Brigham Young University, Hawaii
James R. Turley, New York Institute of Technology
Bruce S. Urdang, Northern Arizona University
William B. Werner, University of Nevada at Las Vegas

Thanks also to the attorneys and industry professionals who devoted their time and expertise in providing the international snapshots. The book is much better due to their efforts.

Andrew Galeziowski
Caryn Pass
David Comeaux
Elizabeth Demaret
Frank Zaid
Irvin W. Sandman

James Eiler
Perrin Rynders
Richard Barrett-Cuetara
Robert Zarco
San San Lee
James Hassell
Patricia Ross

This edition is dedicated to two people who departed this life far too early: Pauline Caroli, whose courage and perseverance continues to inspire us daily, and Andrew Stewart, whose creative spirit lights our path. We miss you in our hearts and in our lives.

Stephen Barth
Houston, Texas

HOSPITALITY LAW

Chapter 1

Prevention Philosophy

Trisha Sangus was busy, and more than a little frustrated. As the general manager of a 275-room resort hotel, she knew the peak season was about to begin, and she had no front office manager to handle the supervision of her front desk staff, the reservationists, van drivers, night auditors, and other guest service employees. Without an experienced front office manager, the tourist season could be extremely difficult. She had spent the entire morning on the telephone attempting to do background checks on the three top applicants she had interviewed. Inevitably, she got the same response from all of the past employers she called. Either they would not give out any information about the candidates or they would only tell Trisha the person's name and employment dates. It seemed as if everyone was too cautious to say anything that she could use to help make a good hiring decision. She wondered if it was worth the effort of verifying the employment of her applicants at all.

Her thoughts were interrupted by the telephone. It was her human resources director, asking whether Trisha had made a decision about purchasing employee workbooks that explained the new tip-reporting requirements, which had changed again, making obsolete the current booklets that had been used for employee training. Trisha asked the director to get a cost estimate on the 75 booklets they would need and promised a decision in the next few days. As she hung up the telephone, Trisha wondered how many of her food and beverage employees were actually in compliance with the new reporting requirements. "It sure seemed easier when the government left people alone," she thought. On the other hand, it was only fair for employees to pay all the taxes they legally owed.

Trisha looked at her watch and jumped up from behind her desk. Her monthly safety meeting was about to start. The meeting was to be chaired by her director of security, and she knew how important it was to attend. "It sent the right message," Trisha thought, "for her employees on the Safety Committee to see her at the meetings." It let them know how she felt about the importance of safety and security training. Unfortunately, she had only had time to skim the article "Workplace Violence" that she knew was to make up the major topic of this week's meeting. Lately, it seemed there were too few hours in the day to accomplish all that she had to. Keeping up her own education in the field was getting harder and harder each month.

The last meeting of the day was the most difficult. Sanitation scores on the local Health Department inspections had been going down over the past few months. The violations were not serious, but the scores did tell Trisha that the managers in that department seemed to be letting the small things slip. A quick walk through the kitchen made Trisha aware that the problems remained unresolved. She wondered why the standards seemed to be slipping, despite the fact that her food and beverage director, and indeed most of the food and beverage staff, were long-time property employees.

As Trisha walked back to her office, she reflected on the issues of the day. She had worked hard to become a general manager. She was one of the youngest GMs in her company. The customer contact she so enjoyed, however, seemed to be less and less a part of her daily routine now. Rules, regulations, and paperwork seemed to consume most of her time. She needed to reprioritize her efforts, but so many issues were important that she was not quite sure where to start.

As she flipped through the afternoon mail, she noticed a headline on the front page of the local newspaper, "City Hotel Targeted in Lawsuit." She was familiar with the hotel. Its general manager was one of her friends and colleagues. Trisha knew that it was an important part of her job to minimize the chances of a lawsuit like the one in the paper from happening at her hotel. She wondered if her own efforts were enough, and if not, what she could do to improve them.

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. Why a study of laws related to hospitality is important.
2. The historical origins of the law and its evolutionary nature.
3. A philosophical framework to help prevent legal difficulties before they begin.
4. How to evaluate management actions on an ethical basis.

1.1 THE FUTURE HOSPITALITY MANAGER AND THE LEGAL ENVIRONMENT

Today more than ever before, hospitality managers must be multitalented individuals. In addition to knowledge of their own designated area of expertise, such as food and beverage, marketing, accounting, or rooms management, hospitality managers are often called upon to assume specialized roles, such as employee

counselor, interior designer, facility engineer, or computer systems analyst. Given the complexity of the modern business world, it is simply a fact that the skill level required for success today in this field is greater than it was in the past.

Hospitality management has always been a challenging profession. Whether in a casino, a school lunch program, a five-star hotel, a sports stadium concession program, or myriad other environments, hospitality managers are required to have a breadth of skill not found in many other areas of management. Hospitality managers are in charge of securing raw materials, and producing a product or service and selling it—all under the same roof. This makes them very different from their manufacturing counterparts (who are in charge of product production only) and from their retail counterparts (who sell, but do not manufacture, the product). Perhaps most important, the hospitality manager has direct contact with guests, the ultimate end users of the products and services supplied by the industry.

Additionally, hospitality managers are called upon frequently to make decisions that will, in one manner or another, impact the legal standing of their employers. Robert James, founder of one of the largest hotel contract management companies in the United States, once estimated that 60 to 70 percent of the decisions he made on a daily basis involved some type of legal dimension. This is not to say that hospitality managers need to be **attorneys**. They do not. However, the decisions that they make may or may not increase their organization's chances of needing the services of an attorney.

▶ **LEGALESE**

Attorney: Any person trained and legally authorized to act on behalf of others in matters of the law.

Consider the situation where a hospitality manager is informed that a guest has slipped and fallen in an area of the dining room containing a salad bar. It appears that the guest had been serving himself and slipped on a piece of lettuce dropped by a previous guest. Was this a simple accident? Could it have been prevented? Is the restaurant responsible? What medical attention, if any, should the manager be prepared to provide? What if the injuries are severe? Should the restaurant be held responsible? Can the restaurant manager be held personally responsible? Most important, what should the manager actually do when the incident is brought to his or her attention? What, if anything, should the employees do? Who is responsible if the employees were not trained in what to do?

From this example, it is clear that the hospitality manager is in a position to profoundly influence the legal position of the operation. Day after day, in hundreds of situations, the actions of hospitality managers will influence the likelihood of the business or the manager becoming the subject of **litigation**.

▶ **LEGALESE**

Litigation: The act of initiating and carrying on a lawsuit. Often, used to refer to the lawsuit itself.

There is a unique body of law relating to the food service, travel, and lodging industries. These laws have developed over time as society and the courts have sought to define the relationship between the individual or business serving as the host and the individual who is the guest. This textbook will give you up-to-date information on the most important of those special laws and relationships. That is not to imply, however, that this book is designed to make you a lawyer. What it will do, if you use it properly, is train you to *think* like one. It will teach you to consider carefully how the actions taken by you and those you work with will be viewed in a legal context. The industry's very best legal educators, hospitality managers, writers, and reviewers have created this book especially for you. They all speak with one voice when they say "Welcome!" to the world of hospitality management. As an industry, we need your skill, ability, and creativity. This textbook, if studied carefully, will help you become the hospitality manager you deserve to be and that our industry and guests require you to be.

1.2 THE HOSPITALITY MANAGER AND LEGAL MANAGEMENT

Jack P. Jefferies, who served for more than 20 years as legal counsel for the American Hotel and Lodging Association (AH&LA), has stated that: "Over 135,000 new federal and state **laws** are issued annually, as well as hundreds of thou-

▶ **LEGALESE**

Law: The rules of conduct and responsibility established and enforced by a society.

sands of federal and state administrative rules."[1] With this much change in the law, some believe that the topic is too complex to learn in an introductory course or from one book. In addition, they would argue that because the law is constantly changing, even if an individual learned the law today, his or her knowledge would be out of date in a very short time. While these positions are understandable, they argue for, not against, the future hospitality manager's study of legal management.

While the law is indeed complex, certain basic principles and procedures can be established that will minimize a manager's chances of encountering legal difficulty. Because that is true, it is less important to know, for example, the specific rules of food safety in every city than it is to know the basic principles of serving safe food. No one, not even the best lawyer, can be expected to know everything about every area of the law. In the same way, hospitality managers are not required to have a comprehensive knowledge of every law or lawsuit that impacts their industry. What they must know is how to effectively manage their legal environment. To begin this journey, it is important that they:

1. Know the historical origins of the law.
2. Recognize that laws have an evolutionary nature, based on changes in society.
3. Understand how to use a philosophy of preventative management to manage the legal environment and minimize the chances of litigation.

Historical Origins of the Law

▶ **LEGALESE**

Common law: Laws derived from the historical customs and usage of a society, and the decisions by courts when interpreting those customs and usages.

▶ **LEGALESE**

Civil law: The body of law (usually in the form of codes or statutes) created by governmental entities that are concerned with private rights and remedies, as opposed to criminal matters.

Common law and **civil law** are the two major systems of law in place in the Western world. Common law is the body of law that descended from that in Great Britain and is used in the United States and most countries in the British Commonwealth. Civil law descended from that in the Roman Empire and is used by most Western European countries, as well as Latin America, Asia, and Africa. While both legal systems certainly defy oversimplification, it can generally be said that common law comes from reviewing past litigation that has been decided by the courts. It is greatly interested in precedent, or what has been decided in previous court cases with similar situations or facts.

In civil law, decisions evolve based on written laws or codes. Judges in civil law feel less bound by what others have decided before them and more compelled by the law as it has been established by government bodies. Given the nearness of countries within Europe, and the influence of the British Empire, it is no wonder that these two great legal systems frequently operated in close proximity, thus often blurring their distinctions. Interestingly, the term civil law is actually used in the common law system to refer to private law (or private disputes), as opposed to public or criminal matters.

Common law developed in England following the Norman Conquest. Essentially, the purpose of the common law was to interpret and enforce rules related to the granting of land by the British monarchy to those subjects deemed worthy of such land grants. The barons who received this land would often grant parts of it to those they felt were deserving. The courts that were created at this time were charged with overseeing the peaceful resolution of disputes regarding land, inheritance, marriage, and other issues related to land grants.

Between 1765 and 1769, an Englishman, Sir William Blackstone, wrote four volumes he titled the *Commentaries*. In these books, Blackstone sought to compile a general overview of all the common law of his time. Blackstone's work

[1]Jefferies, Jack P. *Understanding Hospitality Law*, 3rd ed. The Educational Institute of the American Hotel and Lodging Association, East Lansing, MI, 1995.

formed the basis for much of the law in the New World, as his work migrated there with the English colonial settlers. Laws related to those in the hospitality industry were, of course, included.

Despite the anger against Britain that resulted in the Revolutionary War, the colonists of the soon-to-be United States embraced common law as their favored rules of conduct and responsibility. Blackstone's work was widely used as a textbook in the law schools of the new country, and it influenced many of its early law students, including Thomas Jefferson, John Marshall, James Monroe, and Henry Clay. Inevitably, succeeding generations throughout the history of the United States have taken the common law as they have found it and modified it to meet the needs of their ever changing society.

The Evolutionary Nature of Common Law

It should come as no surprise that a rapidly changing society will often revise its rules of conduct and responsibility. This is true in society as a whole and in how society views the hospitality industry. In the United States of the 1850s, obviously, one would not have been expected to find a law requiring a certain number of automobile parking spaces to be designated for disabled individuals seeking to enjoy an evening meal at the town's finest restaurant, because the world in that era contained neither the automobile nor the inclination of society to grant special parking privileges to those who were disabled. In today's society, we have both. What changed? First, the physical world changed. We now have automobiles, along with the necessity of parking them. More significant, however, is the fact that society's view of how disabled individuals should be treated has changed. Parking ordinances today require designated "disabled" parking spaces, generally located close to the main entrances of buildings to ensure easy access. Not only is it good business to have such spaces, current laws mandate that the hospitality manager provide them.

In this case, parking requirements grew out of a law created at the federal government level. The law is called the Americans with Disabilities Act (ADA). This act, and its many applications to hospitality, will be discussed in greater detail in Chapter 7, "Legally Selecting Employees." It is mentioned here to illustrate that laws evolve just as society evolves. Changes in society lead to changes in the law.

Laws in the United States may be enacted at the federal, state, and local levels (see Figure 1.1). At each of these levels, the laws reflect the changing desires of the citizens and their elected officials. Because society includes members who operate hospitality facilities, **hospitality-related laws** created and modified by society impact those who work in the hospitality industry.

▶ LEGALESE

Hospitality law: Those laws that relate to the industry involved with the provision of food, lodging, travel, and entertainment services to its guests and clients.

◀ SEARCH THE WEB 1.1 ▶

Log on to Internet and enter **www.findlaw.com**.

1. Select: U.S. State Resources.
2. Select: U.S. State Codes.
3. Select your state.
4. Search for categories related to laws regulating tobacco use and sales in your state.

Assignment: Draft a one-paragraph essay summarizing the laws governing tobacco use in your state. Are there any special stipulations that a hospitality manager would especially want to be aware of (such as the designation of smoking and nonsmoking areas in a restaurant or public lobby)?

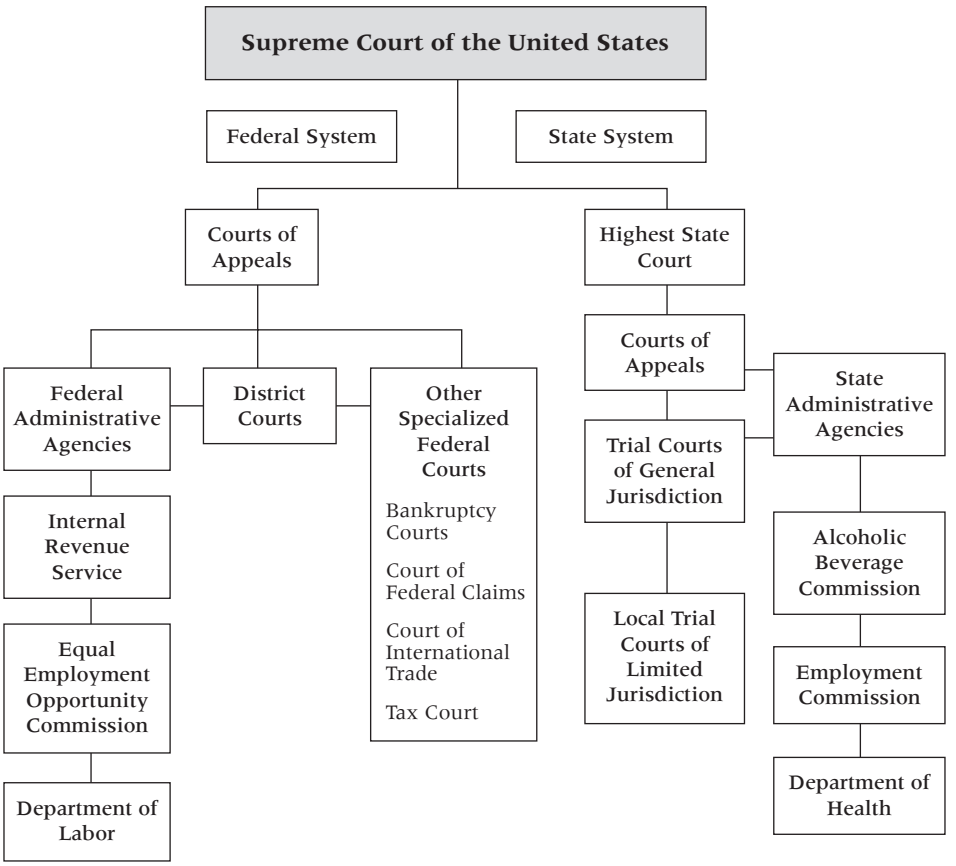


Figure 1.1 The U.S. legal system.

1.3 PREVENTATIVE LEGAL MANAGEMENT

Future hospitality managers will encounter laws that do not currently exist. How then can they be expected to operate their facilities in full compliance with the law throughout their career? Just as important, how can they be expected to manage these facilities in a way that will minimize their chances of doing something illegal? The answer is *not* to attempt to monitor every legislative body empowered to enact law. The answer is to operate hospitality facilities in a way that combines preventative legal management with sound ethical behavior.

In the medical field, it is widely agreed that it is better to prevent a serious illness beforehand than to treat it after the fact. For example, doctors would advise that it is preferable to prevent a heart attack through proper diet, exercise, and the cessation of smoking than to perform a bypass operation on a patient after a heart attack has occurred. In the case of prevention, the doctor advises the patient, but it is, in large measure, up to the patient to put into practice the recommendations of the physician. In a similar vein, it is far better for hospitality managers to operate their facilities in a way that minimizes the risk of litigation, rather than in a manner that exposes their operations to the threat of litigation.

As noted, the law is not static; in fact, it changes frequently. Managers must stay abreast of these changes so that ultimately, on a daily basis, they integrate their acquired knowledge and awareness of the law into a personal style of management and decision making. The acronym STEM was coined as an easy way to remember the steps in a decision-making process that can assist managers in getting started. It stands for: select, teach, educate, and manage. It is presented here as a way of beginning to "STEM" the tide of litigation. The details of how STEM works are included in the box on pages 7–8.

STEM the Tide of Litigation

On any given day, the general manager of a hotel or restaurant in the United States will make decisions about hiring, firing, and/or providing benefits to employees. Other daily tasks might include approving a meeting space contract for a major event to be held on the property, an event that involves the service of alcohol. Decisions regarding if and when to add a lifeguard to the pool area, whether to subcontract parking services to a local valet company, and even the uniform requirements of staff, will all be made by the manager. All of these seemingly independent decisions have a significant common denominator: their legal implications.

Whether it is opening a restaurant, operating a country club, or hiring a housekeeper, hospitality managers must be aware of the legal implications of each and every decision they make. It is of vital importance that managers resolve to be fair, to operate within the law, and to manage preventatively. On occasions when they do not, and a lawsuit results, the courts may hold managers **liable** for their inattentiveness.

▶ **LEGALESE**

Liable: To be legally responsible or obligated.

This philosophy of preventative management becomes even more important when one considers that a great many litigation matters encountered by hospitality operators have a common denominator: a poorly prepared employee. Injuries and the resulting damages, whether financial, physical, or mental, are usually a consequence of an employee who has not been sufficiently taught to perform his or her duties. He or she may make an omission, such as not cleaning up a spill near a salad bar, or he or she may pursue an activity outside the scope of his or her duties, such as sexual harassment or arguing with a customer.

The recent increasing number of lawsuits is not caused solely by employees, of course. The legal system and some attorneys certainly share the blame. Managers, however, bear most of the responsibility for what has been occurring. When an employee makes a mistake, often it is the result of management error. Either the wrong person was hired for the job, the duties for the job were not effectively communicated to the employee, the employee was not properly trained, or the employee was not effectively supervised or motivated to do the job properly.

LEGALLY MANAGING AT WORK:

Applying the STEM Process in Hospitality Management

A process can be implemented that will help reduce employee errors and omissions and, therefore, litigation and liability. The process is called STEM, for select, teach, educate, and manage. It works like this:

1. *Select.* Managers can begin reducing litigation by selecting the right employee for the right job. Managers cannot hire "just anyone" at the last minute. Employees must be selected based on specific job qualifications, written job specifications, and information derived from a thorough investigation of the candidate for the position, whether the employee to be hired is a busperson, waitperson, hostess, door supervisor, or line supervisor.
2. *Teach.* Managers must develop proper training methods for employees, including feedback devices such as competency testing, to ensure that the training is effective.
3. *Educate.* Managers must continuously educate themselves so that they know which topics and procedures must be passed on to employees through effective teaching methods.
4. *Manage.* Effective managers know that if you consistently do things the right way, the chances for mistakes—and therefore for litigation—will diminish. Management has been defined as consisting of four functions: planning, or-

ganizing, controlling, and motivating. While all four have legal implications, the STEM process focuses almost exclusively on the motivating function. A manager who creates a supportive work environment will gain the trust and respect of employees, who will then be motivated to do their best work, thus avoid making errors that could result in litigation. ◀

To create an environment conducive to motivation, you must first establish trust and respect. When managers make a commitment to employees or guests, they must follow through. They also must be willing to accept responsibility for their mistakes, and to apologize for them when appropriate. Managers must set an example: If a manager asks employees to be on time, then the manager must also be on time; if managers expect employees to pay for food, beverages, and services, then they must also pay for food, beverages, and services. In current parlance, managers must walk the talk!

Finally, all of the planning, organizing, controlling, and motivating in the world will not help if management cannot effectively communicate its vision and plan to the employees who will carry out that vision. The ability to communicate with skill and grace is a critical component of being a successful manager.

Today's culturally diverse workforce will require diverse motivating techniques. Remember that different people are motivated by different incentives. Money is a perfect example. To some, it is a strong motivating factor; others would prefer more time off instead of additional pay. Managers must know their employees, and determine—by asking them if need be—what would motivate them, both as individuals and as a work-team. Examples of possible motivational efforts include:

- A sales contest with a significant prize.
- A parking space with recognition for the employee of the month.
- A 50 percent discount on meals at the restaurant.
- A card on their birthday.
- A written "pat on the back" for a job well done.
- Taking the time to ask them how their day was.
- Involving employees in setting goals.
- Seeking employee input in developing work schedules.
- Listening to their concerns.

All of those listed and others are the types of activities a manager should undertake to build the trust and loyalty of employees. If a consensus can be reached on what to do and how to do it, the motivating task becomes much easier.

The goal of STEM is to reduce employee mistakes. By continually encouraging and rewarding good performance, managers can create an environment that will, in fact, reduce the number of times employees make mistakes. Remember that even though a goal may not be reached, the efforts of the individual or group still may merit praise. In other words, managers should try to catch their employees doing something right instead of trying to catch them doing something wrong.

It is not possible to manage effectively while sitting behind the desk. Effective managers know that "management by walking around" is alive and well, particularly in a service industry such as hospitality. Of course, an important part of managing is the ability to motivate employees. As much as managers would like all employees to come to the job every day brimming with enthusiasm, the fact is, too often, just the opposite is true. A significant number of employees may dislike coming to work, their jobs, their situation in life, and much more. They must be motivated to perform at the level management has targeted in order to exceed management's own expectations, and, more important, those of the guest.

To recap the STEM process: Select the right employee for the right job; teach employees while creating a training trail; educate management; motivate staff in a positive and nurturing manner. All these efforts will help foster loyalty and goodwill while reducing the likelihood of litigation.

ANALYZE THE SITUATION 1.1

A fellow supervisor confides in you that he has been arrested a second time in two years for driving under the influence of alcohol. His current case has not yet gone to trial. This supervisor is responsible for the late-night closing of the restaurant in which you both work. You know bars in your city close at 2:00 A.M., the same time the restaurant closes.

1. Should you discuss this situation with the restaurant's general manager?
2. Which aspect of STEM is relevant here?

1.4 ETHICS AND THE LAW

It may not always be clear whether a course of action is illegal or simply wrong. Put another way, an activity may be legal, but still be the wrong thing to do. As a future hospitality manager who seeks to manage his or her legal environment and that of other employees, it is important that you be able to make this distinction.

▶ **LEGALESE**

Ethics: Choices of proper conduct made by an individual in his or her relationships with others.

Ethics refers to the behavior of an individual toward another individual or group. Ethical behavior refers to behavior that is considered "right," or the "right thing to do." Consistently choosing ethical behavior over behavior that is not ethical will go a long way toward avoiding legal difficulty. This is true because hospitality managers often will not know what the law requires in a given situation. In cases of litigation, juries may have to make determinations of whether a manager's actions were intentionally ethical or unethical. How juries and judges decide these questions may well determine their view of a manager's liability for an action or inaction.

While it may sometimes be difficult to determine precisely what constitutes ethical behavior, the following seven guidelines can be very useful when evaluating a possible course of action:

1. Is it legal?
2. Does it hurt anyone?
3. Is it fair?
4. Am I being honest?
5. Would I care if it happened to me?
6. Would I publicize my action?
7. What if everyone did it?

Consider the hospitality manager who is responsible for a large wedding reception in a hotel. The bride and groom have selected a specific champagne from the hotel's wine list to be used for their champagne punch. The contract signed by the bride and groom lists the selling price per gallon of the punch, but does not specifically mention the name of the champagne selected by the couple. In the middle of the reception, the hotel runs out of that brand of champagne. A less costly substitute is used for the duration of the reception. Neither the bride and groom nor the guests notice the difference. Using the seven ethical guidelines just listed, a manager could evaluate whether he or she should reduce the bride and groom's final bill by the difference in selling price of the two champagnes.

How an individual determines what constitutes ethical behavior may be influenced by his or her cultural background, religious views, professional training, and personal moral code. A complete example of the way someone would actually use the seven ethical guidelines is demonstrated in the following hypothetical situation:

An Ethical Situation Assume that you are the food and beverage director of a large hotel. You are planning for your New Year's Eve gala, and require a large amount of wine and champagne. You conduct a competitive bidding process with

the purveyors in your area, and, based upon quality and price, you place a very large order (in excess of $20,000) with a single purveyor. One week later, you receive a case of very expensive champagne, delivered to your home with a nice note from the purveyor's representative stating how much they appreciated the order and that they are really looking forward to doing business with you in the years ahead. What do you do with the champagne?

Ethical Analysis Your first thought may be the most obvious one—that is, you drink it. But, hopefully, you will first ask yourself the seven questions of the ethical decision-making process.

1. Is it legal?

From your perspective, it may not be illegal for you to accept a case of champagne. However, there could be liquor laws in your state that prohibit the purveyor from gifting that amount of alcoholic beverage. You must also consider whether it is permissible within the guidelines established by the company for which you work. Many companies have established gift acceptance policies that limit the value of the gifts that employees are eligible to accept. In this case, violation of a stated or written company policy may subject you to disciplinary action or even the termination of your employment. Accordingly, you need to be extremely familiar with the ethics policy that has been adopted by the company you are working for. Assuming that it does not violate a law and/or company policy, go to question 2.

2. Does it hurt anyone?

Well, it probably would not hurt you, unless you drank all of the champagne at once; but, realistically, are you really going to be fair and objective when you evaluate next year's bids, or is your mind going to be thinking back to the case of champagne that you received? Assuming that you do not think that it is hurting anyone, go on to question 3.

3. Is it fair?

Before answering this question you have to recognize who the stakeholders are in this particular situation. How might others in your company feel about the gift you received? After all, you agreed to work for this firm at a set salary. If benefits are gained because of decisions you make while on duty, should those benefits accrue to the business or to you? Assuming that you have decided that it is fair for you to keep the champagne, go to question number 4.

4. Am I being honest?

This question gives you the opportunity to second-guess yourself when you are answering questions 2 and 3. Do you really believe that you can remain objective in the purchasing aspect of your job, and continue to seek out the best quality for the best price, knowing that one of the purveyors rewarded you handsomely for last year's choice and may be inclined to do so again?

5. Would I care if it happened to me?

If you owned the company you work for, and you knew that one of the managers you had hired was given a gift of this magnitude from a vendor, would you question the objectivity of that manager? Would you like to see all of your managers receive such gifts? Would you be concerned if they did?

6. Would I publicize my action?

If you have trouble remembering the other questions, try to remember this one. Would you choose to keep the champagne if you knew that tomorrow morning the headlines of your city newspaper would read: "Food and Beverage Director of Local Hotel Gets Case of Champagne after Placing Large Order with Purveyor"? Your general manager would see it, other employees

would see it, all of the other purveyors that you are going do business with would see it, and even potential future employers would see it.

7. What if everyone did it?

If you justify your choice of keeping the champagne, consider: Does this process ever stop? What would happen if the executive housekeeper had a bed delivered to her home every time she ordered new bedding for the hotel? What would happen if every time she ordered new washers and dryers, she received a matching set at home?

What are some of the realistic alternatives to keeping the champagne?

- Return it to the purveyor with a nice note stating how much you appreciate it, but that your company policy will not allow you to accept it.
- Turn the gift over to the general manager to be placed into the normal liquor inventory (assuming that the law will allow it to be used as such).
- Donate it to the employee Christmas party.

Use the seven questions to evaluate each of these three courses of action. Do you see any differences?

Some hospitality managers feel it is important to set their ethical beliefs down in a "code of ethics." Figure 1.2 is the code of ethics developed by the

Club Managers Association of America
Code of Ethics

We believe the management of clubs is an honorable calling. It shall be incumbent upon club managers to be knowledgeable in the application of sound principles in the management of clubs, with ample opportunity to keep abreast of current practices and procedures. We are convinced that the Club Managers Association of America best represents those interests, and as members thereof, subscribe to the following code of ethics:

We will uphold the best traditions of club management through adherence to sound business principles. By our behavior and demeanor, we shall set an example for our employees and will assist our club officers to secure the utmost in efficient and successful club operations.

We will consistently promote the recognition and esteem of club management as a professional and conduct our personal and business affairs in a manner to reflect capability and integrity. We will always honor our contractual employment obligations.

We shall promote community and civic affairs by maintaining good relations with the public sector to the extent possible within the limits of our club's demands.

We will strive to advance our knowledge and abilities as Club Managers, and willingly share with other Association members the lessons of our experience and knowledge gained by supporting and participating in our local chapter and National Association's educational meetings and seminars.

We will not permit ourselves to be subsidized or compromised by any interest doing business with our clubs.

We will refrain from initiating, directly or through an agent, any communications with a director, member or official of another club regarding its affairs without the prior knowledge of the Manager thereof, if it has a Manager.

We will advise the national Headquarters, whenever possible regarding managerial openings at clubs that come to our attention. We will do all within our power to assist our fellow club managers in pursuit of their professional goals.

We shall not be deterred from compliance with the Law, as it applies to our clubs. We shall provide our club officers and trustees with specifics of Federal, State and Local laws, statutes and regulations, to avoid punitive action and costly litigation.

We deem it our duty to report to local or national officers any willful violations of the CODE OF ETHICS.

Figure 1.2 CMAA Code of Ethics.

INTRODUCTION

The following statement is designed to reaffirm and further implement Hyatt Corporation's ("Hyatt") standing policy of strict observance of all laws and ethical standards applicable in jurisdictions in which the Corporation conducts its business. This statement is applicable to all of Hyatt's subsidiaries, affiliates and divisions, operating both inside and outside the United States (the "Corporation") and is applicable to all officers and employees of the Corporation. Unless amended by the Board of Directors of Hyatt, this statement and the compliance therewith is subject to no waivers or exceptions in the name of competitive or commercial demands, social traditions, or other local exigencies.

1. Policy Statement to Conduct Business in Accordance with all Laws and Complete Honesty
It is the policy of the Corporation to conduct its business in accordance with all applicable laws and regulations of the jurisdictions in which such business is conducted and to do so with complete honesty and integrity and in accordance with the highest moral and ethical standards.

2. Use of Corporate Assets
No corporate funds, assets, services or facilities (including, for the purposes hereof, without limitation, complimentary items, discounts and amenities), shall be used, directly or indirectly, for any unlawful or unethical purpose. Any question as to the legality or ethics of any contemplated use of corporate funds, assets, services or facilities shall be referred to Hyatt's general counsel.

3. Use of Corporate Assets for Political Purposes
No corporate funds, assets, services, or facilities shall be used, directly or indirectly, for the purpose of aiding, supporting or opposing any political party, association, organization or candidate where such use is illegal or improper under the laws or regulations of the relevant jurisdiction. This includes loans of corporate funds, assets, services or facilities and direct or indirect payments, including reimbursements of employees or third parties for political contributions or payments which they might personally have made. The use of corporate funds, assets, services or facilities for political purposes, in jurisdictions where the same are permitted by law shall not be prohibited if the use shall be with the specific prior written authorization of a senior officer of Hyatt and the advance written approval of Hyatt's general counsel after a determination by him that said use would be lawful and proper in all respects. Employees, may, of course, make personal political contributions as they choose, so long as such contribution is not in violation of any applicable laws, but no employee may be compensated or reimbursed, directly or indirectly, by the Corporation for any such personal contribution.

4. Use of Corporate Assets to Unlawfully Secure or Retain Business
No corporate funds, assets, services or facilities shall be used to secure or retain business where such use is in violation of any applicable law or regulation. Without limitation of the foregoing, no employee shall engage in any form of bribery or kickbacks and no corporate funds, assets, services or kickbacks and no corporate funds, assets, services or facilities shall be used to influence or corrupt the action of any government official, agent or employee, or of any private customer, supplier or other person. The foregoing includes direct and indirect payment (including payments through consultants, suppliers or other third parties) or use of corporate funds, assets, services or facilities in any form to or the benefit of governmental or non-governmental persons including the reimbursement of employees for payments or gifts which they might personally have made.

5. Use of Corporate Assets to Influence Decisions Affecting the Corporation
No corporate funds, assets, services or facilities shall be used in violation of any applicable law or regulation for the purpose of influencing any decision or action affecting the Corporation, including the performance or the timely performance of official duty or action or to ward off or postpone decisions on matters affecting the Corporation. The foregoing includes direct and indirect payments (including payments through consultants, suppliers or other third parties) or use of corporate funds, assets, services or facilities in any form to or for the benefit of governmental or non-governmental persons including the reimbursement of employees for payments or gifts which they might personally have made.

6. Use of Corporate Assets in Violation of Labor Laws
No corporate funds, assets, services or facilities shall be used in violation of any applicable law or regulation concerning labor unions. All labor unions must be dealt with as any normal customer and the extension of special courtesies outside the normal business context is illegal.

Figure 1.3 Hyatt Hotels corporate policy. (Reprinted with permission.)

7. Acceptance of Gifts, Payments, Fees or Privileges
Employees of the Corporation are not to solicit or accept gifts, payments, fees, services, special valuable privileges, pleasure or vacation trips or accommodations, loans (except on conventional terms from banks or loan institutions), or other special favors from any organization, person or group that does, or is seeking to do business with the Corporation without prior written approval of the President of Hyatt or the President of Hyatt Hotels Corporation. The foregoing shall not prohibit the acceptance of Christmas gifts (not in cash, bonds, or similar items) of nominal value (generally not exceeding $150.00) where the giving and accepting of such gifts are a normal practice in the business involved and the same is known to and approved by the employee's supervisor. No employees shall accept anything of value in exchange for referral of third parties to any such person, organization or group.

8. Entertainment of Customers, Suppliers, Employees and Business Associates
It is recognized that reasonable and proper entertainment of selected customers, suppliers, prospective employees and business associates, is, at times, in the best interest of the Corporation and is generally proper. However, such entertainment must at all times be in accordance with all applicable laws and regulations and in accordance with the approvals and reporting procedures established by the Corporation. It is further recognized that the furnishing of nominal gifts or the furnishing of corporate services or facilities on a complimentary basis are often in the best interests of the Corporation and are reasonable and proper. However, employees of the Corporation may furnish gifts, services or facilities at company expense, only if the same shall meet all of the following conditions:

a) Gifts in the form of cash, bonds (or similar items) shall not be given regardless of amount except for annual holiday gifts and the like where individual gifts do not exceed $150.00 per year;
b) The furnishing of gifts, services, or facilities are in accord with normally accepted business practices, and comply with the policies of the organization;
c) The practice would be considered reasonable and in accord with generally accepted ethical practices in all governing jurisdictions;
d) The subsequent public disclosure of all facts would not be embarrassing to the Corporation;
e) The practice must be in accordance with all applicable laws and regulations.

9. Use and Disclosure of Company Assets
No undisclosed fund or asset of the Corporation shall be established for any purpose.

10. Accurate Reporting of Financial Statements
No false, artificial or misstated entry shall be made in any of the books, records or financial statements of the Corporation for any reason, and no employee shall engage in any arrangement that results in such prohibited act. All entries on the books and records of the Corporation shall reflect the real nature or purpose of the transaction reported, and no corporate funds, assets, services or facilities shall be used with the intention or understanding that such use, in whole or in part, is for any purpose other than that described by the documents supporting the use in question. In addition, no one should knowingly supply false or artificial or misstated information in any non-financial record of the company.

11. Ownership Interest in Competing Businesses
No employee or member of his or her immediate family who has a key position at Hyatt shall be engaged in or shall have any ownership interest in any firm or business which is in competition with or does business with Hyatt, directly or indirectly, or is otherwise substantially engaged in the business of travel and entertainment.

12. Ownership of Materials, Techniques, Manuals, Systems, Programs, or Information
Training materials, techniques operating manuals, data processing systems, programs, procedures, data-bases, sales and marketing information, marketing strategies, financial information, personnel information, discoveries and inventions including processes, data, lists, systems, products, training materials, operating manuals, and other matters conceived or put into practice while an employee works for Hyatt are the property of Hyatt and not the employee. In addition, this information is not common public knowledge and is therefore considered "Confidential Information." Unauthorized use or disclosure of Confidential Information to a third party may cause irreparable harm to Hyatt. By executing this Disclosure Statement, the employee agrees to maintain the confidentiality of such proprietary information during the period of his/her employment and thereafter. In addition, upon breach of this condition of employment, the employee agrees that he/she shall forfeit any claim that he/she might have to incentive-type compensation of any kind upon such employee's termination from Hyatt. All Hyatt materials and possessions relating to any Confidential Information must be promptly returned upon termination from Hyatt.

Figure 1.3 *(Continued)*

13. Statements to Auditors
No employee shall make a false or misleading statement to the Corporation's independent auditors or internal auditors, nor shall any employee conceal or fail to reveal any information necessary to make the statements made to such auditors not misleading. In addition, no employee shall make a false or misleading statement to any investigator or other third party representative hired by the Company to investigate any internal or external complaint or business discrepancy.

14. Reporting Requirements and Procedures
Any employee obtaining information of knowledge of any violation of any of the foregoing prohibitions shall promptly report such matter to Hyatt's General Counsel.

15. Policy Questions
Any employee, who has any question regarding the interpretation of or compliance with this policy statement, should discuss the matter with his superior and/or Hyatt's General Counsel.

16. Disciplinary Action
Any employee participating in any violation of this policy statement shall be subject to appropriate disciplinary action.

17. Approval
Any question relating to specific provisions of this policy or any requests for advance-approval decisions with respect to this policy or representations concerning the establishment of funds should be directed to the attention of Hyatt's General Counsel.

Discrimination

Hyatt is committed to providing a work environment that is free of discrimination. In keeping with this commitment, we maintain a strict policy prohibiting unlawful harassment, including sexual harassment. This policy applies to all employees of Hyatt, including supervisors and nonsupervisory employees. It prohibits harassment in any form, including verbal and physical harassment.

Sexual harassment is a behavior which undermines the integrity of the employment relationship. All employees must be allowed to work in an environment free form unsolicited and unwelcomed sexual overtures. Sexual harassment does not refer occasional compliments. It refers to behavior which is not welcomed, which is personally offensive, which reduces morale, and which therefore interferes with employee effectiveness.

Sexual harassment may include actions such as:

- Unwelcomed or unwanted sexual advances. This could include any form of physical contact.
- Requests or demands for sexual favors. This could include subtle or blatant expectations. It also includes pressure or requests for any type of sexual favor accompanied by an implied or stated promise of preferential treatment or negative consequences concerning any aspect of one's employment status.
- Verbal abuse. Conversation that is sexually oriented and that may be expected to be unacceptable to another individual. This could include inappropriate comments about an individual's body or appearance where such comments go beyond a mere compliment; telling "dirty jokes" that may be expected to be offensive; or any other tasteless, sexually oriented comments, innuendoes or actions that offend others.
- Engaging in any type of sexually oriented conduct that interferes with another's work performance or the work environment. This includes extending unwanted sexual attention to someone.
- Creating a work environment that is intimidating, hostile or offensive because of sexually oriented conversation, suggestions, requests, demands, physical contacts or attention.

Normal, pleasant, courteous, mutually respectful and non-coercive interaction between employees is not considered to be sexual harassment. However, sexual harassment is an insidious practice which demeans individuals being treated in such a manner. Hyatt will not tolerate sexual harassment of its employees by anyone—supervisors, employees, clients and/or customers.

Employees who violate this policy are subject to termination. If you observe conduct which you believe is sexual harassment, or if you feel you have been the victim of sexual harassment, please advise you General Manager or Director of Human Resources or Divisional Director of Human Resources.

Figure 1.3 *(Continued)*

Employee Relations

Hyatt greatly appreciates the talent and dedication of employees. As thanks for your commitment, it is our daily practice to treat employees with dignity and respect. Hyatt's employee relations philosophy is extended by the following:

- Competitive wages and benefits
- A clean, pleasant and safe work environment
- A well-trained and knowledgeable management team to assure high quality supervision

We do not discriminate on the basis of race, color, creed, sex, national origin, age or handicap, or any other group protected by law.

To satisfy the diverse needs of our customers, we must function as a team whose goal is to provide our guests with the highest quality of service. As part of our teamwork philosophy, we have a policy of open communication at all times. We feel that it is the best way to effectively deal with the daily challenges and opportunities of our business.

I have read and understand this entire document containing the Hyatt Employee Relations Policy, Discrimination Policy and Corporate Ethics Policy Statement.

I understand that I am responsible as an employee to abide fully with all information contained herein.

If, at any time during my employment, I have a question about Hyatt's Ethics Policy or need to disclose knowledge of a violation or request an approval or waiver, I will promptly notify my General Manager.

_____

Print Name

_____

Signature

_____

Title

_____

Company Location

_____ _____

Date Social Security Number

Questions, Conflicts of Interest, Requests for Approval or Waivers

Figure 1.3 *(Continued)*

Club Managers Association of America (CMAA). These managers are involved primarily in the management of private and public country clubs, city clubs, and athletic clubs.

In some cases, a company president or other operating officer will relay the ethical philosophy of a company to its employees in a section of the employee handbook or, as Figure 1.3 illustrates, through a direct policy statement. The ethics statement in Figure 1.3 was created by Hyatt Hotels.

Notice that in both the CMAA's code of ethics and in Hyatt's corporate policy, reference is made to the importance of following the law. Laws do not exist, however, to cover every situation that future hospitality managers will encounter. Society's view of acceptable behavior, as well as of specific laws, are constantly changing. Ethical behavior, however, is always important to the successful guidance of responsible and profitable hospitality organizations.

WHAT WOULD YOU DO?

Assume that your local municipality is considering the passage of a law that would prohibit the sale of all tobacco products from the interiors of bars and restaurants, but not grocery stores. The restaurant you manage has a cocktail lounge, and cigarettes are both consumed and sold in that section of your restaurant. There is no current effort to prohibit smoking in cocktail lounges, such as the one you operate. You are considering whether to address the local government body charged with creating such legislation:

1. What are the major considerations you will think about before you decide to support or oppose the proposed legislation?
2. Will the fact that you do or do not smoke influence your position?
3. Which ethical issues are in play here?

▶ THE HOSPITALITY INDUSTRY IN COURT

At this point in the remainder of the book—Chapters 2 through 13—there are summaries of actual legal cases involving some component of the hospitality industry and the area of the law that is discussed in the chapter.

There are several ways that you can access the full cases:

1. Go to **www.HospitalityLawyer.com** and click on Academics, then Referenced Cases; then search by case name.
2. Go to the John Wiley & Sons, Inc. (the publisher of this book) Web site, at **www.wiley.com/college/Barth**.
3. If you have access to Lexis/Nexus, an online research tool, search for the cases there.
4. If you have access to a law library, ask the librarian for assistance in locating a hard copy of the case.
5. Search other Web sites such as **www.Findlaw.com** to see if they host it.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

As a manager, you will be called upon to make many decisions that have legal consequences. It is unrealistic to expect a manager to know all of the laws that could potentially impact his or her operation. Because litigation is prolific in the hospitality industry, and laws change frequently, it is imperative that you develop and practice a management philosophy of prevention, such as STEM.

Just because a law does not prohibit a particular activity, it still may not be the right thing to do. Accordingly, you should also follow a process that will assist you in determining the ethical implications of a decision, as well as the legal implications, such as the one described in the chapter.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Prepare a five-minute training session for your staff that emphasizes the importance of preventing, rather than reacting to, legal liability. Give an example of a situation where this might arise.
2. Give an example, other than the one mentioned in the text, of a recent change in federal, state, or local law that has impacted the hospitality industry. Explain why you believe the law was enacted and whether you believe it was good legislation.
3. Give a hospitality example of the importance that "selection" makes in the STEM process.
4. Give a hospitality example of the importance of "teaching" in the STEM process.
5. Give a hospitality example of the importance of "education" in the STEM process.

6. Give a hospitality example of the importance of "managing" in the STEM process.
7. A vendor has agreed to clean your hotel carpets at a very competitive price. In a telephone conversation with you, the vendor states that if it gets the contract, members of its staff will "do your home carpets once a year" as a thank you. Apply the seven criteria for ethical behavior to this situation.
8. Using the World Wide Web, locate a state law of any type that relates to business operations. Use your search engine to help. Keywords to use include: "state," "laws," and "business." Describe the law in a one-paragraph essay.

▶ TEAM ACTIVITY

Draft a one-page code of conduct for an independent restaurant with 50 employees. Be prepared to justify your document to the rest of the class.

Chapter 2

Hospitality Contracts

"Okay," Lance Dani thought, as he hung up the telephone. "It's only 11:00 A.M. Nothing to get upset about . . . yet. I'm sure Ms. Sangus will know what to do."

Lance was the new front office supervisor at the hotel managed by Trisha Sangus. Generally, he considered himself very good at resolving guest-related difficulties, but he knew that this one was not going to be easy. He had personally handled the room reservation for Tom and Sarah Barry because he knew how important it was. The Barrys' wedding had been held in the hotel the previous night, and the food and beverage staff had performed flawlessly. The newlyweds had checked into the hotel's spectacular bridal suite around 11:30 P.M., and had even called down to the front desk to say thank you for the complimentary champagne Mr. Dani had arranged to be placed in their room. But that was yesterday. He hoped that they would be just as happy in a few hours.

Lance again reviewed the two room reservations facing him on his desk. He had asked that they both be printed in hard copy so he could study them carefully.

Mr. Tom Barry
Arrival: Friday, November 3; Departure Saturday, November 4
Room Type Reserved: Bridal Suite, #417
Confirmation Number: 458Y31

Mr. Patrick Farmer
Arrival: Saturday, November 4; Departure Sunday, November 5
Room Type Reserved: Bridal Suite, #417
Confirmation Number: 463Y75

"No problem," he had thought, but that was before the Barrys' call of a few minutes ago stating that Northeast Airlines had canceled all flights out of the city due to a severe snowstorm, and they would require their room for one more night. Lance reviewed the second reservation. No question about it, the Farmers would be arriving soon. Preparations were currently underway for their wedding, which was also to be held in the hotel. Two guests, both VIPs, only one spectacular bridal suite. Time to see the general manager.

As usual, Trisha took the news calmly, and began gathering the facts of the situation. "Do we have any unsold rooms for tonight?" she asked.

"We have 34 arrivals scheduled for tonight, with 26 available rooms," replied Lance. "Twenty reservations are credit-card guaranteed, 14 have a 6:00 P.M. hold. With the storm, we may lose a few more arrivals than normal, but you can count on some unanticipated stay-overs also. I originally forecasted for 10 total no-shows."

"Did you confirm the Farmers' reservation for the bridal suite?"

"Yes," said Lance, "it's part of their group contract."

"How many members of the Farmers' group block have reserved?"

"They have picked up 90 percent of their 20-room block."

"Deposit?"

"One thousand dollars."

Trisha thought for a moment, then said, "We have a confirmed reservation for the Farmers, and remember that they have a contract with us to host their reception and dinner tonight. I'm meeting with the chef and the food and beverage director at noon to review the preparations. The reception and dinner have a value to the hotel of over $10,000 in food and beverage sales. We certainly don't want to upset that guest. In addition, we have an extremely important stay-over guest in the bridal suite, which the Farmers also have reserved. It seems clear to me that we have only one choice. I'm sure you know what to do, Lance. Let's make sure we do it right."

As Lance left the general manager's office, he was not at all sure he knew what to do. He certainly was not sure how to avoid a serious difficulty with one or both of the hotel's two very important customers. All he knew for sure was that he wished he had a second bridal suite. What was most confusing, he thought, was exactly who had a right to the bridal suite. As he arrived back at his office, Jodi, his front-desk agent, peeked her head around his door and knocked softly.

"Mr. Dani," she began. "There is a Mr. Farmer here. He knows he's early, but he has requested an early check-in. I told him I would need to get an okay from you. What should I tell him?"

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. How to identify the fundamental components of a contract.
2. The types of contracts commonly used in the hospitality industry.
3. Ways to protect a hospitality operation from guests who do not honor their reservations.
4. The significance of essential clauses in hospitality contracts.
5. How to avoid legal difficulties related to contracts before they arise.

2.1 INTRODUCTION TO CONTRACTS

Generally speaking, litigation in the hospitality industry arises because the **plaintiff** believes one of the following to be true:

- The **defendant** did something he or she was not supposed to do.
- The defendant didn't do something he or she was required to do.

Surprisingly, it can be perplexing for hospitality managers to know precisely what is expected of them when serving guests. It can also be just as difficult to know what should reasonably be expected of the vendors and suppliers with which the manager interacts. **Contracts**, and the laws surrounding them, have been established so that both parties to an agreement can more clearly understand exactly what they have agreed or promised to do.

▶ **LEGALESE**

Plaintiff: The person or entity that initiates litigation against another. Sometimes referred to as the claimant, petitioner, or applicant.

▶ **LEGALESE**

Defendant: The person or entity against which litigation is initiated. Sometimes referred to as the respondent.

▶ **LEGALESE**

Contract: An agreement or promise made between two or more parties that the courts will enforce.

Written and Verbal Contracts

Hospitality managers make a great number of promises and enter into a multitude of agreements on a daily basis. While effective managers enter into these agreements in good faith, any number of problems can arise that may prevent a promise from being fulfilled.

ANALYZE THE SITUATION 2.1

In response to a telephone inquiry, Vincent's Tree Service offered to trim an apple tree on the lawn outside the front lobby of the Olde Tyme Prime Rib restaurant, for a fee of $500. Mr. Wilbert, the restaurant's manager, agreed to the price and a start date of Monday. At noon on Monday, Vincent's informed Mr. Wilbert that the job was completed. The tree trimming went fine, but a large amount of branches and leaves from the tree were left neatly piled near the tree's base. When Mr. Wilbert inquired about the removal of the debris, Vincent's stated that removing it had never been discussed, and was not included in the quoted price. Mr. Wilbert agreed that the topic of removal was never discussed, but stated that it is generally assumed that when a company trims a tree, it will remove the brush it generates; therefore, he refused to pay until the brush was removed.

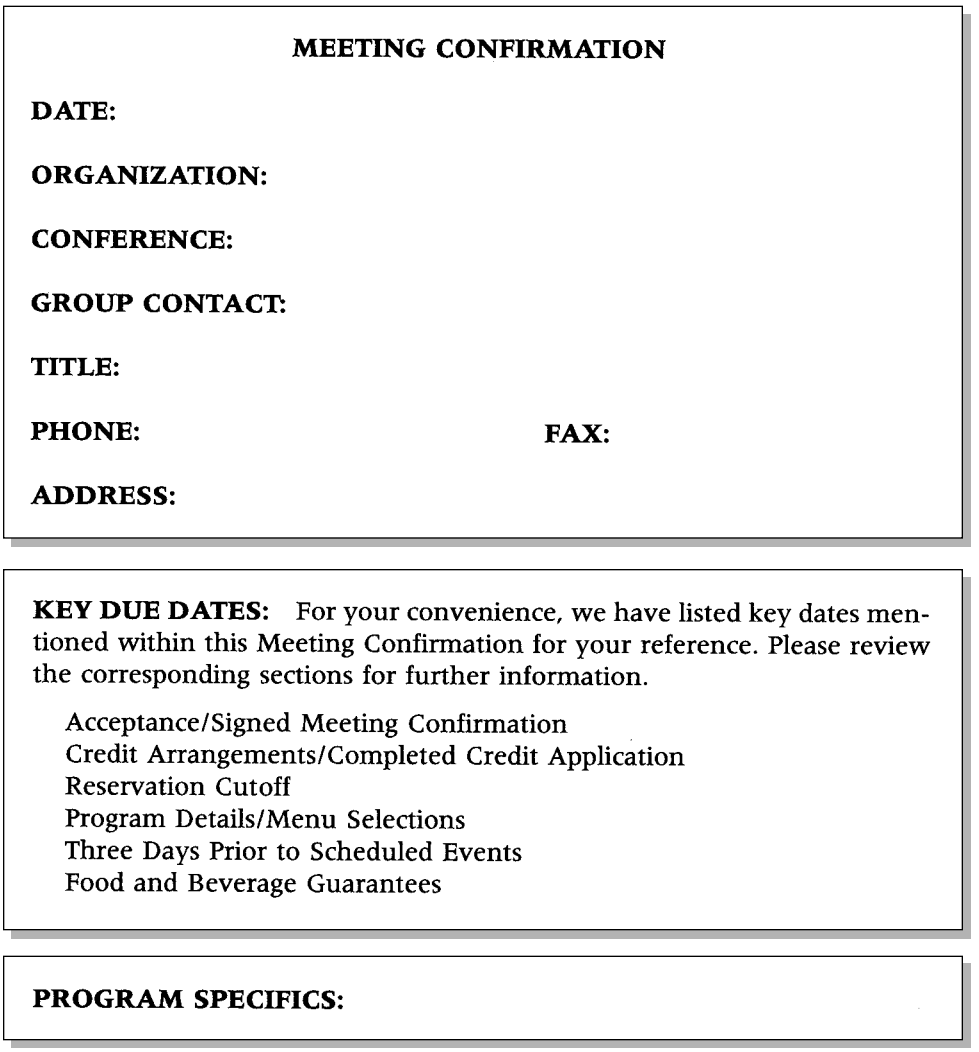
1. Which party's argument seems valid? Why or why not?

Valid contracts may be established either in writing or verbally. Generally speaking, written contracts are preferred over verbal contracts because it is easier to clearly establish the responsibilities of each party when those responsibilities are completely spelled out. In addition, time can cause memories to fade; businesspeople may change jobs or retire; and recollections, even among the most well-intentioned of parties, can differ. All of these factors can create discrepancies in verbal contracts.

Interestingly, despite the fact that written contracts have distinct advantages over verbal agreements, in the hospitality industry, most transactions with guests are established orally, rather than in writing. When a potential customer calls a restaurant to order a pizza for home delivery, a contract is established via telephone. The guest agrees to pay for the pizza when delivered, just as the restaurant agrees to prepare and deliver a high-quality product. It simply would not be practical to get such an agreement in writing. Likewise, the guest who calls a restaurant and makes a reservation for eight people at 7:30 P.M. on a Friday night does not usually get a written agreement from the restaurant stating that it accepts the responsibility to provide a table for that group. The guest simply makes a verbal request, and that request is either accepted or denied based on the space available at the restaurant.

There are, however, cases in which transactions with guests are confirmed in writing. Figure 2.1 is an example of a contract to provide services for a group meeting held in a hotel. Another example of a written, ordinarily enforceable, contract related to guests is the registration card, which is signed by guests when they stay at a lodging facility. Figure 2.2 shows such a card used by Holiday Inn. Note that only the guest signs this contract, unlike the guest service contract in Figure 2.1. Also, the responsibilities of the hotel are not clearly stated on the registration card, although they have been clearly established over time by common law. These responsibilities will be discussed fully in Chapter 9, "Your Responsibilities as a Hospitality Operator."

Even when dealing with vendors, suppliers, and others who provide services to the hotel, verbal contracts are quite common. When a hospitality operation does business with a vendor that has an excellent reputation, a typical verbal contract can be established in as simple a manner as a telephone call. If, for example, the manager of a restaurant is required by state or local law to have the fire extinguisher system above the deep-fat fryers inspected twice a year, the agreement to do so may not be committed to writing each time an inspection is made. Perhaps the same company has been performing the inspection for several years. Indeed, it may be that in order to efficiently schedule its staff, the inspection company, rather than the restaurateur, decides on the exact day of in-



MEETING CONFIRMATION

DATE:

ORGANIZATION:

CONFERENCE:

GROUP CONTACT:

TITLE:

PHONE: **FAX:**

ADDRESS:

KEY DUE DATES: For your convenience, we have listed key dates mentioned within this Meeting Confirmation for your reference. Please review the corresponding sections for further information.

Acceptance/Signed Meeting Confirmation
Credit Arrangements/Completed Credit Application
Reservation Cutoff
Program Details/Menu Selections
Three Days Prior to Scheduled Events
Food and Beverage Guarantees

PROGRAM SPECIFICS:

Figure 2.1 Group meeting contract.

Dates:

DAY:

DATE:

SINGLES:

DOUBLES:

CONCIERGE:

Check-in time is 4:00 P.M.; check-out time is 12:00 P.M.; late check-out is $15.00 per hour until 4:00 P.M., after which time a full day's charge will apply. Complimentary luggage storage is available.

GUESTROOM RATES

Singles:

Doubles:

Concierge Level: $40 additional

Early Arrival:

Late Departure:

The above room rates are subject to prevailing taxes, which are currently at 17%.

DAY MEETING PACKAGE RATES (for all meeting attendees):

Subject to 8.25% sales tax and 20% service charge

This DAY GUEST PACKAGE RATE includes:

Lunch (Aspen Dining Room): Lunch is available for seating at 11:30 A.M. or 12:30 P.M.

Meeting Room Supplies: Room setup, pads, pencils, ice water pitchers, and hard candies.

Continuous Beverage Service (7:30 A.M.–5:00 P.M.): Coffee, decaf, tea, assorted sodas, and bottled water.

Community Refreshment Breaks

Morning Break (7:30 A.M.–10:30 A.M.): Assorted baked goods (varies daily), sliced fresh fruit, assorted mini-yogurts and orange juice.

Afternoon Break (2:00 P.M.–4:00 P.M): Assorted afternoon snacks, fresh baked cookies or brownies of the day, candy, whole fresh fruit, and lemonade.

Standard Audio Visual

10–25 people: 2 flipcharts (including markers and masking tape), overhead projector, screen, podium and easel.

26–50 people: 2 flipcharts (including markers and masking tape), 2 overhead projectors, 2 screens, standard microphone, VCR, easel, and message board.

51–75 people: 3 flipcharts, 2 overhead projectors, 2 screens, standard microphone, VCR, easel, and message board.

76+ people: 4 flipcharts, 2 overhead projectors, 2 screens, standard microphone, lavaliere microphone, VCR, easel, and message board.

Figure 2.1 *(Continued)*

RESERVATIONS

Procedure

We understand that reservations will be made with a rooming list. A copy of our rooming list is enclosed. The rooming list is to be returned to our office before the cutoff date.

Cutoff Date

All reservations must be received no later than _____. At that time, any uncommitted rooms in your guest room block will be released for general sale, and future reservations will be subject to space and rate availability. A payment guarantee will be required to continue holding guest rooms.

Billing

Arrangements have been made for all individuals to pay for their room, taxes, and incidental charges, and for all group charges be placed on a master account to be paid by the booking organization.

FUNCTION ARRANGEMENTS

We have reserved meeting space as outlined below. Meeting rooms are not held on a 24-hour basis unless otherwise noted. A conference services manager personally assigned to your account will be contacting you to discuss and finalize your exact room setup requirements, menu selections, and audiovisual equipment needs.

Please advise us of all changes to your agenda so that we may best serve your specific program requirements. Should there be a significant reduction in attendees, we reserve the right to adjust function space accordingly.

Day Date Time Function Setup Attendance

MEETING ROOM RENTAL

The charge for meeting space will be _____ per break-out per day.

FUNCTION GUARANTEES

A final guarantee of the number of meeting attendees and/or catered food functions is due no later than three (3) business days prior to each scheduled event. This guarantee represents the minimum guest count for billing purposes and may not be reduced after this time.

CREDIT ARRANGEMENTS

Upon our accounting department's approval of your credit application, your master account will be direct-billed. Our credit terms are "Net due upon receipt of invoice" with interest charged at 1.5% on all balances over 30 days of billing date.

CREDIT APPLICATION

Credit application due: _____

RECEIVING/HANDLING OF PACKAGES

Incoming materials for your meeting should arrive at the hotel no more than three (3) days prior to your meeting date. Packages for your meeting

Figure 2.1 *(Continued)*

should be addressed to the attention of your hotel service manager, and list the name and date of your meeting. If more than one package is sent, please indicate the number of packages sent by listing, for example, "package 1 of 3" or "package 2 of 3." Five (5) or fewer boxes will be delivered complimentary to your meeting room. There is a $1.50 handling and delivery charge for six (6) or more boxes.

CANCELLATION

Acknowledgement of a definite commitment by the Hotel will, in good faith, continue to protect the facilities and dates agreed, to the exclusion of other business opportunities. Therefore, the commitment of space and dates is of specified value to the Hotel. Due to the great difficulty in reselling guest rooms and conference space on short notice, cancellation of the entire program will be subject to an assessment according to the following schedule:

0 to 30 days prior to arrival. Full payment on total number of guest rooms, meeting charges, package plans, and any estimated banquet revenues as booked for the duration of the dates agreed upon.

31 to 60 days prior to arrival	75% of the above
61 to 90 days prior to arrival	50% of the above
91 to 180 days prior to arrival	30% of the above
181 days to 1 year prior to arrival	15% of the above
Signing date to one year prior to arrival	10% of above

ATTRITION

The rates and the availability for this program are based on the contracted guestroom block. Therefore, reduction in the guestroom block will be subject to an assessment according to the following schedule:

Up to 60 days prior to arrival: 10% can be reduced without any fee. Additional rooms over the 10% will be charged for one-night guestroom revenue.

60 to 31 days: 10% of the existing block can be reduced without any fee. Additional rooms over the 10% will be charged two nights guestroom revenue.

0 to 30 days prior to arrival: 5% of the existing guestroom block can be reduced without any fees. Rooms reduced over 5% will be charged for the full number of nights they were contracted for.

PROGRAM ALTERATION CONTINGENCY

This agreement has been based on the sequence of days, number of agreed-upon guestrooms, and function requirements specified. If these requirements are significantly changed, we reserve the right to alter the terms and conditions of this contract, including assessment of cancellation fees and availability of specified rooms and rates.

ACCEPTANCE

If the above details meet with your approval, please sign this letter of agreement and return to us by_____. If an approved agreement is not received by the above option date, the Hotel will release the tentative space reserved.

Figure 2.1 *(Continued)*

We sincerely appreciate the opportunity to serve _____. You can be assured of the effort of our entire staff and my personalized attention to help make your meeting and stay most enjoyable and successful.

ACCEPTANCE BY CLIENT	ACCEPTANCE BY HOTEL
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

Figure 2.1 *(Continued)*

spection. In this case, the presence of the inspector, access provided to the facility, the invoice for services performed, and a written inspection report all serve as indications that a verbal agreement to inspect the restaurant was in existence, even if no written agreement exists.

Components of an Enforceable Contract

▶ **LEGALESE**
Enforceable contract: A contract recognized as valid by the courts and subject to the court's ability to compel compliance with its terms.

▶ **LEGALESE**
Offer: A proposal to perform an act or to pay an amount that, if accepted, constitutes a legally valid contract.

▶ **LEGALESE**
Acceptance: Unconditional agreement to the precise terms and conditions of an offer.

▶ **LEGALESE**
Consideration: The payment exchanged for the promise(s) contained in a contract.

All contracts, whether verbal or written, must include specific components that will make them legally **enforceable** in a court of law. If any of the components are missing, the courts will consider the contract unenforceable.

To be enforceable, a contract must be legally valid, and it must consist of an **offer**, **acceptance**, and **consideration**.

Legality Not all agreements or promises made between two or more parties are legally valid. If, for example, a child of 10 years old "agrees," even in writing, to host 100 of his friends at the local amusement park, the park owner would have no recourse if the 10-year-old subsequently neglected to arrive with his friends and pay the admission fees. The reason, logically, is that society requires a party to a contract to be of a minimum age before he or she can legally commit to the promises made in the contract. In most cases, minors do not meet the minimum age requirement: therefore, any contract they would enter into would be considered unenforceable by the courts. In addition, an individual who does not have the mental capacity to understand what the terms of the contract entail will not be able to enter into an enforceable contract. This incapacity could be due to a variety of reasons, from mental illness to inebriation.

Even if the parties to a contract are considered legally capable, the courts will not enforce a contract that requires the breaking of a law. If, for example, a gourmet restaurant contracts with a foreign supplier to provide an imported food product that has not entered the country with the proper inspections, the courts will not enforce the contract because the activity involved—that is, the selling of uninspected food products—is itself illegal. Agreements to perform illegal acts are not enforceable. Thus, to be considered legally enforceable, a contract must be made by parties who are legally able to contract, and the activities specified in the contract must not be in violation of the law.

Offer Given that two or more parties are legally capable of entering into a contract, and that the contract involves a legal activity, the second component required in a legally enforceable contract is an offer.

The offer simply states, in as precise a manner as possible, exactly what the offering party is willing to do, and what he or she expects in return. The offer

Guest Name					
XXXXXXXXXXXXXXX XXXXXXXXXX					
Room Number XXXX	Room Type XXXX	Room Status X	Arrival Date mm/dd/yy	Departure Date mm/dd/yy	
Room Rate XXXXXXXXX	Second Rate XXXXXXX	Mkt/Seg X-XXXX	# of Guests X	Sp. Svc. XXXXX	ETA
Confirmation Number XXXXXXXXX		Reservation Number XX-XXXXXX-X		ID XXX	Time XXXXXX
Company XXXXXXXXXXXXXXXXXXXXXXXXX					
Address XXXXXXXXXXXXXXXXXXXXXXXXX					
Address XXXXXXXXXXXXXXXXXXXXXXXXX					
City XXXXXXXXXXXXXXXXXX		State XX		Zip XXXXXXXXX	
Telephone Number (XXX) XXX-XXXX		Advanced Deposit			
Settlement Code X	Account XXXXX	Description		Approval	
Alliance Code XXX	Alliance Number XXXXXXXXXXXXXXXX		Priority Club Level XXXXXXXXXXXXXXX		
Comments XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX					

Holiday Inn

HOLIDAY INN ANYTOWN
123 MAIN STREET
ANYTOWN, ZZ 12345-6789
Phone: (000) 000-0000
Fax: (000) 000-0000

Please notify a Guest Service Representative if there are any errors on this record of your registration. We want to make certain that your name and room number are correct so that your mail and messages can reach you promptly.

Independently owned by and operated by XXXX

UPON CHECKING OUT,
MY ACCOUNT WILL BE SETTLED BY:

- ☐ Visa
- ☐ MasterCard
- ☐ American Express
- ☐ Discover
- ☐ Diners / Carte Blanche
- ☐ CASH
- ☐ Other

NOTICE

LIABILITY FOR LOSS OF ANY MONEY, JEWELRY OR OTHER VALUABLES IS LIMITED BY LAW. IF YOU ARE NOT FAMILIAR WITH THE LAW IN THIS AREA, YOU SHOULD READ THE NOTICE POSTED AT THE DESK OR IN THE ROOMS.

I AGREE THAT MY LIABILITY FOR THIS BILL IS NOT WAIVED AND AGREE TO BE HELD PERSONALLY LIABLE IN THE EVENT THAT THE INDICATED PERSON OR COMPANY FAILS TO PAY FOR ANY PART OR THE FULL AMOUNT OF THESE CHARGES. I AGREE THAT IF AN ATTORNEY IS RETAINED TO COLLECT THESE CHARGES, I WILL PAY ALL REASONABLE ATTORNEY FEES AND COSTS INCURRED.

SIGNATURE ____________________

Please Note:

A safe deposit box is available for the protection of your valuables. The hotel's liability is limited pursuant to general business law.

TRANSPORTATION REQUEST

Guest Name / Contact ____________________
Number of Persons ________ Group ____________________
Date Service Required ______ Time Service Required ______

FROM Airport	**TO Airport**
Airline ____________	Airline ____________
Flight # ____________	Flight # ____________
Terminal ____________	Terminal ____________

Special Instructions ____________________

Make of Auto / Color	License No.
Year	State

Figure 2.2 Guest registration card. (Copyright 1999 Bass Hotels & Resorts, Inc. All rights reserved.)

may include specific instructions for how, where, when, and to whom the offer is made. The offer may include time frames or deadlines for acceptance, which are either clearly stated or implied. In addition, the offer will generally include the price or terms of the offer.

When a guest enters a restaurant and reads the menu, he or she is reading a series of offers from the restaurant manager. While the menu may state, "16-Ounce Roast Prime Rib of Beef, $22.95," the contract offer could be stated as, "The restaurant will provide prime rib, if you, the guest, will agree to pay $22.95 for it."

When a school foodservice director places an order for produce with a vendor, the offer is similar. The foodservice director offers to buy the necessary products at a price quoted by the vendor. The reason that an offer is a required component of a contract is clear. The offer sets the term and responsibilities of both parties. The offer states, " I will promise to do this, if you will promise to do that."

Returning to the tree-trimming case referred to earlier in this chapter, you can see why the offer is so important in a contract. In that example, the restaurateur and the tree service had differing ideas on precisely what constituted the offer. In fact, a great deal of litigation today involves plaintiffs and defendants who seek the court's help to define what is "fair" in regard to a legitimate offer, when those offers have not been clearly spelled out. It is important to note also that the courts will enforce contracts that have reasonably identifiable terms, even if those terms are heavily weighted in favor of one of the parties. Because of this, it is a good idea to clearly understand all of the terms of an offer prior to its acceptance. By doing so, the effective hospitality manager can help minimize his or her potential for litigation.

Consideration An important part of the contract is consideration, which can best be viewed as something of value, such as the payment or cost of the promises of performance agreed to in a contract. For a contract to be valid, consideration must flow both ways. In the case of the prime rib dinner just mentioned, the consideration by the restaurant is the prime rib. The guest, by ordering the prime rib, is agreeing to pay $22.95 as consideration. Similarly, an airline that offers to transport a passenger round trip does so for a specific fare, which in this case is the consideration. The airline provides the trip and the guest pays the fare.

Consideration may be something other than money. If a restaurant agrees to host an employee Christmas party for a professional decorating company in exchange for having the company decorate its restaurant for Christmas, the consideration paid by the restaurant would be the hosting of the employee Christmas party, while the consideration paid by the decorator would consist of the products and services required to decorate the restaurant.

Another type of consideration often employed in the hospitality industry is the temporary or permanent use of property. When a hotel advertises a specific rate for the rental of a room, that rate is the consideration to be exchanged for the overnight use of the room.

When that same hotel company purchases a piece of land to build a new property, it will likely exchange money for the right to build on or own the property.

Consideration can also be the promise to act or not act. When the board of directors of a country club agrees to employ a club manger for a certain annual salary, the club provides consideration in the form of money, while the club manager's consideration consists of the work (acts) that he or she will do while managing the club. In some cases, consideration requires that one of the contracting parties does not act. Suppose that a couple buys an established restaurant from its current owner. The restaurant's name, as well as the original restaurant owner, is well known in the local area. Consideration in the sales contract may well include language that prohibits the original owner from opening a restaurant with a

similar name in the immediate vicinity for a specified period of time. In this case, the consideration requires the original owner not to act in a specific manner.

A hotel may rent a room for $25, $250, or $2,500 per night should it so choose. The guest has a right to agree or not agree to rent the room. As long as both parties to a legitimate contract are in agreement, the amount of the consideration is not generally disputable in court. Indeed, should an individual who is competent wish to sell a piece a land he or she owns for $1 (perhaps to a charitable group), the courts will allow it, regardless of the appraised value of the land. The important point here is that the courts will ordinarily not deem a contract unenforceable simply because of the size of the consideration. It is the agreement to exchange value that establishes mutual consideration, and thus the contract's enforceability, not the magnitude of the value exchanged.

Acceptance Because it takes at least two parties to create a contract, a legal offer and its consideration must be clearly accepted by a second party before the contract comes into existence. It is important to note that the acceptance must mirror exactly the terms of the offer in order for the acceptance to make the contract valid. If the acceptance does not mirror the offer, it is considered a counteroffer rather than an acceptance. When an acceptance that mirrors the offer is made, an **express contract** has been created.

▶ **LEGALESE**

Express contract: A contract in which the components of the agreement are explicitly stated, either orally or in writing.

An offer may be accepted orally or in writing, unless the offer itself specifies the manner of acceptance. In both cases, however, it must be clear that the terms of the offer were in fact accepted. It would not be fair, or ethical, for a wine steward to ask if a diner would like an expensive bottle of wine, and then, because the diner did not say no assume that the lack of response indicated an acceptance of the offer. In that circumstance, the diner should not be required to pay for the wine. In the same manner, a contractor who offers to change the lightbulbs on an outdoor sign for a restaurant cannot quote a price to the restaurant manager and then proceed to complete the job without a clear acceptance by the manager.

ANALYZE THE SITUATION 2.2

JoAnna Hart was offered a position as director of foodservice for the independent school district of Laingsford. She received a written offer of employment on the first of the month, with a stipulation that the offer would be in effect until the fifteenth of the month. If Ms. Hart were to accept the employment offer, she would have to sign the employment contract and return it to the Laingsford Superintendent of Schools before the offer expired on the fifteenth.

Upon reading the details of the contract, Ms. Hart felt that the salary identified in the letter was too low, and thus she adjusted it upward by $5,000, initialing her change on the contract copy. She then returned the offer letter to the schools superintendent with a cover letter, stating she was pleased to accept the position as detailed in the contract. The contract arrived by mail in the office of the superintendent on the fourteenth of the month, at which time, the superintendent called Ms. Hart to express his regret that she had rejected the employment offer. During the telephone call, Ms. Hart realized that the superintendent would not accept her salary revision proposal, so instead she verbally accepted the position at the original rate of pay. The superintendent, however, declined her acceptance, stating that the original employment offer no longer existed.

1. Does the school have the legal right to withdraw its offer of employment? Why or why not?

Legal acceptance may be established in a variety of ways. In the hospitality industry, these generally take the form of one of the following:

1. Verbal or nonverbal agreement.

In its simplest form, acceptance of a contract offer can be done verbally, with a handshake or even with an affirmative nod of the head. If, for example, a guest in a cocktail lounge orders a round of drinks for his table, he is verbally agreeing to the hotel's unspoken, but valid, offer to sell drinks at a specific price. If, when the drinks are consumed, the guest is asked if he would like another round, and he nods his head in an affirmative way, he will be considered to have accepted the offer of a second round. Acceptance may also be implied by conduct. If a guest at a delicatessen stands in line to order coffee, and while doing so sees a display of breakfast muffins that are clearly marked for sale, unwraps a muffin and begins to eat it while waiting in line, her actions would imply the acceptance of the deli's offer to sell the muffin.

2. Acceptance of a deposit.

In some cases, a hospitality organization may require a deposit to accompany, and thus affirm, the acceptance of an offer. If, for example, a hotel is offering a two-night package over New Year's weekend, it may decide that the offer to rent a room for that period specifies an acceptance that must be made in the form of a nonrefundable guest deposit.

3. Acceptance of partial or full payment.

In some cases, full or partial prepayment may be required to demonstrate acceptance of an offer. This concept of payment prior to enjoying the benefits of the contract is not at all unusual. Theaters, amusement parks, and cinemas are all examples of contracts that are affirmed via prepayment. It is the right of hotels and restaurants to make full or partial prepayment a condition of their contracts. It is the right of the guests, however, to refuse this contract offer and take their business elsewhere should they wish to do so.

4. Agreement in writing.

In many cases, the best way to indicate acceptance of an offer is by agreeing to the offer in writing. As mentioned previously, a large number of management/guest contracts in the hospitality industry are made orally. Dinner reservations and hotel reservations made over the telephone are quite common. When the sum of money involved is substantial, however, even these reservation contracts should be confirmed in writing, if at all possible. In most cases, the confirmation of an offer in writing provides more than just proof of acceptance. Because most people are more cautious when their promises are committed to paper, a written contract acceptance is often accompanied by a summary of the terms of contract. This helps prevent confusion. For example, when a hotel guest asks the hotel to send written confirmation of a room reservation, that confirmation document would include such information as:

Name of the guest
Date of arrival
Date of departure
Room rate
Type of room requested
Smoking or nonsmoking preference
Number of guests in room
Type of payment agreed to (e.g., cash, credit card)
Hotel cancellation policy

It is generally one or more of the preceding elements of a reservation that are in dispute when guests claim that the hotel has made an error in their reservation. It is clear that the number of disputes over hotel-guest contract terms would be greatly reduced with the increased use of written documentation of acceptance.

In today's business environment, agreement in writing can take several forms. The fax machine allows rapid confirmation, and revision, of contract terms. This machine has become an indispensable component in the hospitality manager's effort to manage his or her legal environment. Electronic mail (e-mail) is also a quick and sometimes even more effective way to accept contract terms in writing. E-mail has the advantage of allowing both parties to revise documents directly as they are passed back and forth. Last, the regular U.S. postal service has traditionally been recognized as a legally binding method of providing written acceptance of contracts.

Consider, for example, the food vendor that is promoting a special sale on boneless hams for the Christmas holidays. The vendor faxes a flyer to all of its clients. On the flyer, an offer for the sale of the hams is made that includes a 20 percent price reduction if orders of the hams exceed $100,000 and "payment is made by November 1." A cafeteria chain's purchasing agent receives the fax and decides to take advantage of the offer. The agent fills in the order form that is attached to the flyer and places it in an envelope, along with a check for the full purchase amount. The flyer and check are mailed, and the envelope is postmarked on November 1 by the postal service. The purchasing agent will be considered to have met the terms of the contract and to have responded within the prescribed time frame because the acceptance was postmarked on the first of the month. However, if the vendor had stated "acceptance must be received in our offices by November 1," then the acceptance would not have been in time. Again, this points out the importance of clarity and specificity when agreeing to any contract terms.

◀ SEARCH THE WEB 2.1 ▶

Log on to **www.yahoo.com**.

1. Under Search, type: "hospitality contracts."
2. Search for stories related to contracts and contract negotiations that are making headlines in the news, nationally or in your area.
3. Print out one of the articles and be prepared to summarize it in class.

2.2 INTRODUCTION TO HOSPITALITY CONTRACTS

Many of the contracts used in the hospitality industry are similar to those used in other industries, such as contracts for staff employment, routine facilities and grounds maintenance, equipment purchases, employee insurance, and accounting services. There are, however, some unique hospitality contracts and contract relationships that the future hospitality manager will encounter.

Common Hospitality Contracts

It is not possible to list all of the potential types of contracts that hospitality managers may confront, but the following five deserve special explanation because of their widespread use in the hospitality industry.

Franchise Agreements In a franchise agreement, the owner of a hospitality facility (the **franchisee**) agrees to operate that facility in a specific manner in exchange for a franchise. A franchise can take many forms, but is generally the

▶ LEGALESE

Franchisee: The person or business that has purchased an/or received the franchise.

▶ **LEGALESE**
Franchisor: The person or business that has sold and/or granted the franchise

right to use the name, trademark, and procedures established by the **franchisor** for the sale of a product or service in a specific geographic area.

In a typical franchise agreement, an owner gives up part of his or her freedom to make operational decisions in exchange for the franchisee's expertise and the marketing power of the franchisor's brand name. The owner of a doughnut franchise, for example, gives up the right to make doughnuts according to any recipe she chooses, but gains the national recognition of a well-known "name" for her doughnut products.

Franchise agreements are extremely common in the hospitality industry. They are also very complex. In Chapter 3, "Hospitality Operating Structures," we will look closely at the agreements and operating relationships associated with franchises. Here, what is important to remember as a future hospitality manager is that franchise agreements are simply a variation of a normal contract, and while often complicated, they are governed by the same legal system that governs all contracts.

Management Contracts A management contract is created when the owner of a hospitality facility allows another party to assume the day-to-day operation of that facility. Hospitals, school foodservices, campus dining operations, and business dining facilities are commonly operated under management contract. Hotels, from the smallest to the largest, can also be operated in this manner. In a management contract, the facility owner allows the management company to make the operational decisions that are required in order for the facility to effectively serve its clientele.

Typically, a management contract will set forth the time frame that the agreement will be in effect, the payment terms, the responsibilities of each party, and the terms by which the arrangement can be ended, as well as a variety of legal and operational issues. Many of the groups or individuals who own hospitality facilities have neither the time nor the expertise to efficiently operate them. The district school board that allows a professional management company to operate a lunch program for its students does so, in part, because it recognizes that its expertise is in meeting the students' educational, not nutritional, needs.

In many cases, the owners of food and lodging operations are not experts in the management of their own facilities, thus, hospitality management companies are an integral part of the industry.

Group Rooms Contracts A group rooms contract is developed when an individual or organization requires a large number of hotel rooms. The situations can be as varied as a group convention or a family wedding. Some hotels require that any request exceeding a total of 10 sleeping rooms per night be confirmed by a group rooms contract. The reason is simple: When a guest requests a large number of rooms, he or she may expect a discount for each room purchased. This is often agreeable to the hotel, but the precise conditions under which the discount is to be offered are best confirmed with a written contract. Furthermore, a group rooms contract may be drawn up one or two years before the rooms will actually be used. This is often the case for large convention hotels that may contract for rooms and space several years ahead of time. A written contract guarantees that the sponsoring group will have the amount of rooms they need, and the hotel can expect to receive revenue for the use of its rooms for a certain period of time.

Convention or Meeting Space Contracts Similar to the group rooms contract, and in fact sometimes a part of the same document, is the convention or meeting space contract. While hotels primarily contract for the sale of sleeping rooms, many hotels also offer guests the ability to reserve meeting rooms or exhibition halls. For example, a large hotel may contract with a state association to provide sleeping rooms, meeting space, and an exhibit hall for the use during the association's annual convention. When this occurs, the price of the meeting space is

often tied to the number of sleeping rooms used by the group. In other cases, the meeting space is not related to the use of sleeping rooms, so a separate contract must be prepared. Since most hotels have limited meeting space, and that space is used primarily as an enticement to sell sleeping rooms, the effective hospitality manager must carefully contract for the sale of this space. The convention or meeting space contract allows the manager to precisely set the terms and conditions on the sale of its valuable meeting space. (Refer back to Figure 2.1 for an example of a typical meeting space contract.)

Purchasing Agreements Employees who purchase goods for hotels and restaurants are unique in that they have the ability to bind their employers to contracts that often have values of thousands or hundreds of thousands of dollars. These agreements can cover even the simplest of tasks, such as the daily delivery of milk, bread, or produce. In this case, the restaurant may agree, either verbally or in writing, to buy a certain product at market (current) price from a vendor who is trusted to provide high-quality products and services. In other situations, the contract may entail the delivery of many products at agreed-upon prices to thousands of outlets. Purchase agreements may have an expiration date, or may continue on a day-to-day basis until changed by one of the parties. Because the dollar value of these contracts can be very high, purchase agreements are best committed to writing and reviewed on a regular basis.

The Uniform Commercial Code (UCC)

It is important that the hospitality manager become familiar with purchase agreements and sales contracts, for two reasons: because they are used frequently in the industry and because a special code of laws exists to help facilitate business transactions that are carried out using sales contracts. The **Uniform Commercial Code** (UCC) was developed to simplify, modernize, and ensure consistency in the laws regulating the buying and selling of personal property (as opposed to land), any loans granted to expedite those sales, and the interests of sellers and lenders. The rules of the UCC, first developed in 1952, were designed to add fairness to the process of transferring property, to promote honesty in business transactions, and to balance the philosophy of **caveat emptor** by giving buyers, sellers, and lenders a measure of protection under the law.

▶ **LEGALESE**

Uniform Commercial Code (UCC): A model statute covering such issues as the sale of goods, credit, and bank transactions.

▶ **LEGALESE**

Caveat emptor: A Latin phrase meaning "let the buyer beware." The phrase implies that the burden of determining the relative quality and price of a product falls on the buyer, not the seller.

The main purposes of the UCC are:

1. To simplify, clarify, and modernize the law governing commercial transactions.
2. To permit the continued expansion of commercial transactions.
3. To provide for consistency in the law regarding the sale and financing of personal property in the various jurisdictions (municipalities, counties, and states).

The UCC comprises eleven articles, or topic areas. These are:

Article 1	General Provisions
Article 2	Sales Contracts
Article 2A	Leases
Article 3	Commercial Paper
Article 4	Bank Deposits and Collections
Article 4A	Funds Transfers
Article 5	Letters of Credit
Article 6	Bulk Transfers
Article 7	Warehouse Receipts, Bills of Lading, and Other Documents of Title
Article 8	Investment Securities
Article 9	Secured Transactions; Sales of Accounts and Chattel Paper

The UCC governs many aspects of the hospitality manager's work, including the selling of food and drink, the buying and selling of goods (personal property), and the borrowing and repayment of money. Accordingly, you need to become familiar with its basic concepts. For example, when purchasing goods under contract, the UCC has three basic requirements:

- Sales of more than $500 must be in writing and agreed to by both parties.
- The seller has an obligation to provide goods that are not defective and that meet the criteria and terms set forth in the contract.
- The buyer has an obligation to inspect the goods that were purchased, to make sure they conform to the terms of the contract, and to notify the seller immediately of any discrepancies.

The important thing to keep in mind about the UCC is that it is a law that requires you to fulfill any promises made in a purchasing or sales contract. If a restaurant enters into an agreement to buy 50 heads of lettuce from a food wholesaler on or before a specified date, then that wholesaler is obligated to deliver 50 heads of lettuce on time, and the restaurant is obligated to pay for it.

The UCC protects the interests of buyers by requiring that goods or products offered for sale be fit for use and free of any known defects. In other words, the food wholesaler cannot deliver 50 heads of spoiled lettuce to the restaurant, or it will not have fulfilled the terms of the sales contract. Likewise, the UCC also protects the interests of sellers by requiring that buyers inspect all goods after receiving them and inform the seller immediately of any defects. Thus, the restaurant cannot claim three months after the fact that the lettuce it received was spoiled, then refuse to pay the outstanding bill. It must notify the food wholesaler immediately of the spoiled lettuce or live with the consequences.

The UCC is a very complex law with many requirements that hospitality managers must be aware of. In Chapter 4, "Legally Managing Property," we will look closely at Articles 2 and 9 when we discuss the legal aspects of buying and selling property. Then, in Chapter 12, "Your Responsibilities When Serving Food and Beverages," you will learn how the UCC regulates the wholesomeness of the food and beverages that are sold in restaurants and other hospitality operations.

Forecasting Contract Capacity

One of the most difficult tasks facing the hospitality manager is that of forecasting contract capacity; in other words, knowing exactly how many contracts for products and services to accept on any given day or night. It is important to remember that a reservation, even if made orally, can be a contract. While some legal experts would argue that a contract does not exist until a deposit or form of payment has been supplied, the majority of legal scholars would agree that a contract is established when the guest makes a reservation and the restaurant or hotel accepts that reservation in a manner consistent with its own policies. Therefore, if a hotel or restaurant accepts only reservations that are guaranteed with either a deposit or a credit-card number, at that facility, the contract will not be said to exist until that deposit is received or the credit card number is supplied. If, on the other hand, the hospitality facility regularly accepts reservations on an exchange of promise basis (i.e., the guest agrees to show up and the facility agrees to provide space), a contract does indeed exist at the time the reservation is made, and the hospitality facility can be held accountable if it does not honor its part of the contract.

To illustrate the difficulty encountered by hospitality professionals, consider the situation facing the food and beverage director of a large public golf course and country club. At that club, Mother's Day brunch is the busiest meal of the year. The club dining room seats 300. The average party stays 90 minutes while

eating. The club will serve its traditional Mother's Day buffet from 11:00 A.M. to 2:00 P.M. Reservations are required, and historical records indicate that, on average, 15 percent of those making reservations will not show up (are no-shows), for a variety of reasons. The club does not require either a deposit or a credit card number to hold a reservation. The challenge for the food and beverage director is to know just how many reservation contracts to accept. If too few contracts are accepted, guests will be told the facility has sold out, yet the club's revenue will not have been maximized because more guests could have been served. If too many contracts are accepted, guests may not be able to be served at the time they have reserved or, possibly, may not be served at all, because there is no place to seat them. In the former situation, the club has not maximized its profit potential; in the latter, it may not be able to fulfill its contractual promises.

The hospitality industry is different from many other businesses because of the highly perishable nature of its product. A hotel room that goes unsold on a given night can never be sold on that night again. In a like manner, a table for five at a Mother's Day brunch can be sold only once or twice on that day. If the table goes unsold, the revenue lost cannot be easily recouped. This is different from most retail environments, where excess inventory can be discounted if management so desires. Obviously, the cost of no-shows at the hotel or country club would be passed on to other guests in the form of higher room or menu prices. Clearly, this is a no-win situation for both the hospitality operator and the guest.

Years ago, the airline industry tried to address the problem of no-shows by over-forecasting its contract capacity. Air carriers would accept far more reservations for seats on its flights than actually existed. In a precedent-setting piece of litigation, Ralph Nader sued Allegheny Airlines in 1973 for intentionally overbooking a flight on which he had reserved a seat.[1] Nader won the lawsuit; and due in part to his litigation, in 1997, the Civil Aeronautics Board required the airline industry to inform consumers of their rights whenever an airline must "bump," or deny seating to, a passenger on its reserved and ticketed flights. The lesson for the hospitality industry is quite clear: If widespread over-forecasting of contract capacity takes place, and consumers suffer, the federal or state government may step in with mandated remedies for guests and regulated operational procedures for the hospitality industry.

Establishing an Effective Reservation Policy

The solution to the problem of forecasting contract capacity in the hospitality industry is to make a clear distinction among reservations that are confirmed, guaranteed, and nonguaranteed, and to take reasonable steps to reduce no-show reservations. In some facilities, the no-show rate is as high as 50 percent. In an effort to address this issue in a legally responsible and morally ethical way, future hospitality managers and the entire industry should begin adopting and educating consumers about the precise definition of a **confirmed reservation**.

▶ **LEGALESE**

Confirmed reservation: A contract to provide a reservation in which the provider guarantees the guest's reservation will be honored until a mutually agreeable time. A confirmed reservation may be either guaranteed or nonguaranteed.

A confirmed reservation can be made orally or in writing. In the restaurant business, it is common to hold a reservation for 15 to 20 minutes past the originally agreed-upon time. Thus, if a dinner reservation is made for 8:00 P.M., the manager will hold space for the dinner party until 8:15 P.M. or 8:30 P.M., depending on the restaurant's policy. If the guests do not arrive by that time, they will have breached the reservation contract and be considered a no-show. In the hotel business, confirmed rooms are generally held until 4:00 P.M. or 6:00 P.M., after which the guest, if he or she has not arrived, is considered a no-show.

The difficulty involved in collecting monies due when a guest no-shows a confirmed but **nonguaranteed reservation** is significant. As a practical matter, col-

▶ **LEGALESE**

Nonguaranteed reservation: A contract to provide a confirmed reservation where no prepayment or authorization is required.

[1] *Nader v. Allegheny Airlines, Inc.* 365 F. Supp. 128 (1973); reversed 512 F.2d 527; cert. Granted 96 S.C. 355.

lections on nonguaranteed reservations are almost never undertaken. There is no doubt that the guest who verbally reserves a table for dinner on a Friday night and then no-shows the reservation has broken a contract promise. The problem, however, is that initiating a lawsuit for a sum as small as a party of five's dinner bill is truly prohibitive in both time and money. On the other hand, guests also find that they have little recourse when a restaurant denies their confirmed but nonguaranteed reservations. The courts have been hesitant to force restaurants to pay heavy penalties if they refuse to honor a nonguaranteed reservation, even when there is clear evidence that the reservation was the result of a legitimate contract.

▶ **LEGALESE**

Guaranteed reservation: A contract to provide a confirmed reservation in which the provider guarantees the guest's reservation will be honored regardless of time of arrival, but stating that the guest will be charged if he or she no-shows the reservation. Prepayment or payment authorization is required.

To prevent these types of problems, hotels and restaurants should strive to accept all or nearly all of their reservations as **guaranteed reservations**, and accept nonguaranteed reservations only on an as-needed basis. For example, a popular restaurant may accept dinner reservations on a busy weekend only if the reservations are accompanied by a credit-card number that will be billed if a guest should no-show. Similarly, a hotel in Indianapolis will likely require payment in full to reserve a room during the busy Indianapolis 500 race weekend.

What is called for is a reasoned response on the part of both parties. Guests must understand that a reservation requires the setting aside of space that could be sold to another. Hospitality managers should train their reservation agents to explain that guests will be given a confirmed reservation only if they agree, in advance, to guarantee that reservation.

Three major points should be clearly explained to the guest before agreeing to the guaranteed reservation contract:

1. The hotel or restaurant will honor the reservation and will never knowingly offer to rent space for which it already has valid, guaranteed reservations.
2. The cancellation policy of the hospitality facility will be explained at the time of the confirmed reservation so it is clearly understood by the guest.
3. Payment in accordance with the reservation contract will made by the guests in the event that they no-show the reservation.

It is interesting to note that the state of Florida passed a law that says hotels will be fined if they deny space to any guest who has guaranteed a reservation by paying a deposit (as set by the hotel). Because most people would agree that knowingly accepting more guaranteed reservations than can be accommodated is ethically questionable, it is important that the hospitality industry work hard to ensure that a reservation, once confirmed, is honored.

Even when reservations are guaranteed with a deposit, no-shows can present a legal challenge in the hospitality industry. For customer relations purposes, few hospitality managers are willing to take a no-show guest to court to recover the money lost from holding a reservation. The time and legal expense, as well as the possible loss of goodwill, is simply too great. Naturally, guests do not like to be billed for services they did not use, even if they have contracted for them. Differences of opinion and possible litigation can arise, especially when a hospitality manager takes an aggressive stance in billing no-show guests for their confirmed reservations.

It might appear that the billing of guaranteed no-show reservations would be fairly straightforward. It is not. Even when policies on billing no-shows are clearly explained, difficulties will arise and judgment calls will have to be made. Consider the following situations in which the front office manager of a midscale corporate hotel must decide whether to bill guaranteed reservations that have been designated as no-shows by her automated front office property management system:

- Francine Dulmage arrived one day early for her confirmed guaranteed reservation, but since she was already in the hotel, she did not think to

cancel her original reservation. The property management system listed Francine as a no-show the following night.

- A guest, Ryan Thomas, arrived at the hotel, claiming he had a reservation, but none was found under his name. The guest was checked in as a "walk-in," that is, a guest with no prior confirmed reservation. That evening, the property management system identified the reservation of Thomas Ryan as a no-show.
- Peggy Richards, who had guaranteed her reservation with a credit card, was told that in order to avoid a charge to her card, she would need to cancel her reservation by 4:00 P.M. on the day of arrival. She canceled at 4:20 P.M., because her cell phone was out of range at 4:00 P.M. Her company is the hotel's largest client.
- Bart Stephens, a regular at the hotel, checks in with a reservation he made for himself. That night, the property management system identifies a Mr. Stevens as a no-show. On further investigation, the front office manager finds that the hotel reservationist had misspelled the name on a second reservation made by Mr. Stephens's secretary, who could not recall whether she or Mr. Stephens was supposed to have reserved his room. The credit card number used to reserve the room for Mr. Stevens belongs to Mr. Stephens.
- For the past 10 years, the Scotts family of Tennessee has held its annual reunion in the same hotel. This year, 18 rooms have been reserved by Mr. and Mrs. Scotts. All of the rooms are confirmed reservations, guaranteed with Mr. Scotts's credit card. When Mr. and Mrs. Scotts check into the hotel, their group totals 17, not 18, different parties. When asked if they will need the eighteenth room, Mr. Scotts says no, a death in the family has reduced their need to 17 rooms this year, and unfortunately in future years as well. He apologizes for not contacting the hotel prior to his arrival. That night, the property management system identifies one room for Mr. Scotts as a no-show.

As these examples illustrate, it is difficult to eliminate all no-shows. They are an inevitable part of the hospitality industry. However, it is in the best interest of any hospitality facility that must forecast contract capacity to do so as effectively as possible.

LEGALLY MANAGING AT WORK:
Reducing No-Show Reservations

The following steps can help improve managerial accuracy in the forecasting process. In addition, they will help reduce the chance of litigation when contractual obligations related to reservations cannot be fulfilled.

1. Become known as a facility that honors its confirmed reservations. If you choose to over-book, advise your guests of the practice and the potential consequences to them. Establish a consistent policy for placing guests in other comparable properties in the event it is not possible to honor a confirmed reservation.
2. Whenever possible, document all reservations in writing.
3. Put all policies related to making guaranteed reservations and the billing of no-shows in writing. Follow these written policies. ◀

For more ways to protect your operation from no-show reservations, review the recommended practices in Figure 2.3, which MasterCard distributes to hospitality operators.

MasterCard Guaranteed Reservations Best Practices

1. Take the cardholder's account number, card expiration date, name embossed on the card, and address.
2. Confirm the room rate and location.
3. Issue the cardholder a reservation confirmation number, and advise the cardholder to retain it.
4. Explain the hotel's no-show policy.
5. Confirm the details of the reservation in writing/by fax, including your guarantee policy, cancellation procedure, and billing statement for no-shows.
6. Explain to cardholders that if they fail to cancel by the agreed-upon time, their MasterCard will be charged for the night, plus applicable tax.
7. Upon cancellation of a reservation, retain the cancellation number.
8. Communicate to cardholders in writing that you have initiated a billing to their credit card for their no-show, including all pertinent information, a copy of the sales draft, and the hotel's reservation policy.
9. In the event of a no-show, the hotel must complete a sales ticket filling in the cardholder's name, account number, expiration date, date of no-show, assigned room number, and merchant ID number; and must write "guaranteed reservation/no-show" in place of the cardholder's signature; and follow the usual authorization procedures.
10. Remember, that if a cardholder who has guaranteed a reservation by use of a MasterCard arrives within the specified period (until check-out time the next day), the lodging facility is obligated to provide a room.

Figure 2.3 MasterCard guaranteed reservations best practices.

2.3 ESSENTIAL HOSPITALITY CONTRACT CLAUSES

Since contracts can cover a variety of offer and acceptance situations, their form and structure will vary considerably. That said, all hospitality contracts should contain certain essential clauses, or stipulations, that a manager should identify and review carefully before entering into the contract relationship. These essential clauses are not specific wordings, rather, they are areas or terms of the agreement that should be clearly spelled out, to ensure that both parties to the contract understand them completely. The reason for including these clauses in contracts, and for reviewing them carefully, is to prevent ambiguity and misunderstanding.

Essential Clauses for Providing Products and Services to Guests

It is always better to settle potential difficulties before agreeing to a contract than to be forced to resolve them later, and perhaps create ill will or significant legal problems. Reviewing the following essential clause areas in every contract, before agreeing to their terms, can help you do just that.

1. Length of time that contract price terms are in existence.

When an offer is made, it generally will include the price proposed by the seller. It is just as important to clearly establish exactly how long that price is to be in effect. When issuing coupons, for example, the manager of a quick-service restaurant (QSR) will want to clearly inform consumers of the coupon's expiration date. If a hotel's director of sales grants a particular cor-

poration a special discounted room rate based on anticipated rooms sales, it is important to note the length of time that the reduced rate will be in effect. When any offer for products or services includes price, the wise hospitality manager will specify the time frame for holding, or honoring, that price.

2. Identification of who is authorized to modify the contract.

Unanticipated circumstances can cause guests to change their plans at the last minute. This is especially true in lodging, where group rooms or meetings contracts may be modified during the group's stay. A typical situation would be one in which an organization signs a contract for meeting space. In one of the meeting rooms, an invited speaker requests an overhead projector and screen, something not included in the original contract. If, acting on the request of the speaker, the hotel provides the equipment, the contracting organization may refuse to pay for it. Although the equipment was provided, the invited speaker was not authorized to modify the original contract.

It is always important to identify, prior to agreeing to contract terms, exactly who will be given authority to modify the contract should the need arise. It is also best to require that any modifications to the contract be in writing wherever practical.

3. Deposit and cancellation policies.

Hotels often require deposits before they will reserve sleeping rooms for guests. It is important to remember that hotel rooms are an extremely perishable commodity. Room nights cannot be "saved up" by hotel managers in anticipation of heavy demand. Consequently, hotel managers must be very careful to ensure that rooms reserved by a guest will in fact be purchased by the guest. The portion of a contract that details an operation's deposit and cancellation policies is critical both to the hotel and the guest, and thus must be made very clear.

Deposits are used to guarantee reservations. Typically, a deposit equal to the first night's room and tax bill will be required on group rooms contracts and some individual room reservations. This deposit may be required at the time of the contract's signing or 30 days prior to the group's arrival. For most individual room reservations, a credit-card number from a valid credit card may be the method used to guarantee the reservation. In other cases, personal checks or certified checks may be required.

Cancellations of reservations can occur for a variety of reasons. If the hotel is to have a fair cancellation policy, it must consider the best interests of both the hotel and the guest, and the policy must be clearly stated in the contract. This is true whether the contract is oral or written. Generally, failure to cancel a guaranteed reservation by the agreed-upon time will result in forfeiture of an advanced deposit or one night's room and tax, billed to the credit-card number that was given to guarantee the reservation.

When groups are very large and the revenue expected from the group's stay at the hotel is substantial, cancellation penalties can be more tightly defined. Figure 2.4 illustrates the type of clause used in a convention hotel to protect the hotel from last-minute cancellations of an entire group.

4. Allowable attrition.

Allowable **attrition** refers to the amount of downward variance that may be permitted in a contract before some type of penalty is incurred on the part of the guest. Attrition, then, is simply the loss of previously estimated guest counts. Consider, for example, the individual guest responsible for hosting a large family reunion in his or her city. When the guest first approaches the hotel to reserve sleeping rooms and space for meals, the family

▶ **LEGALESE**

Attrition: Reduction in the number of projected participants or attendees.

Cancellation Clause

If arrangements for the event are canceled in full, a fee consisting of a percentage of the total anticipated revenue outlined in this contract will be charged. The fee is determined by the length of time between written notification of the cancellation and the scheduled arrival date as follows:

0–31 days prior to arrival	100% of anticipated revenue
32–90 days prior to arrival	75% of anticipated revenue
91–180 days prior to arrival	50% of anticipated revenue
181–365 days prior to arrival	25% of anticipated revenue

Anticipated revenue may include room, meal, gratuities, telephone, and hotel-provided services, as well as taxes due on recovered sums.

Figure 2.4 Cancellation clause.

reunion may be months away. The guest will want to know the specifics of room rates to be charged, as well as prices for meals. Both of these charges, however, may be dependent on the "pick-up," or actual number of guests to be served. This is true because, in most cases, the larger the number of sleeping rooms sold or meals provided, the lower the price may be. At the time of the contract signing, however, the actual number of guests to be serviced is unknown. The guest responsible for planning the reunion may estimate 200 attendees when planning the event, but at the reunion, only 100 individuals show up. Allowable attrition clauses inform both parties of the impact of a reduced number of actual guests served.

Figure 2.5 is an example of an allowable attrition clause in a group rooms contract. Notice that both parties to the contract are clearly informed about the consequences of reduced pick-up on the part of the guests. Also, the clause has a statement clearly indicating that if the size of the group is reduced by too much, the hotel may relocate the meal or meeting space of the group. This is particularly important in a facility with limited meeting space, where there may be only one very large room. If guests reserve this room based on a large estimate, which then fails to materialize, the hospitality manager may have no choice but to move the group to a smaller room, thus freeing the larger room for potential sale.

It is important to remember that many guests tend to overestimate the projected attendance at their functions. If the hospitality manager does not consider the impact of attrition, his or her operations may be hurt by this common guest tendency. As attrition disputes are becoming more common, meeting planners are insisting that contracts also include clauses that hold the hotel accountable for using diligence to resell any rooms unused by the meeting to reduce the damages caused by exceeding the allowable attrition.

5. Indemnification for damages.

To indemnify means to secure against loss or damage. This concept is important when a hotel contract with an organization whose individual members will occupy rooms is designated under a group contract. In a famous incident from a few years ago, an organization of law enforcement officers contracted with a hotel to hold its annual convention. During the course of the convention, a few members of the organization became intoxicated and caused some damage to the physical property of the hotel. The question then arose: Who should be held responsible for the damages? The law enforcement organization, the individual officers, and the cities that employed them were all considered possible sources of damage reimbursement.

Allowable Attrition Clause

The Hotel agrees to hold ample inventory to accommodate the rooms reserved in this Group Rooms Contract. In doing so, the Hotel may be put in a position to turn away other groups that may request rooms for the same dates. Therefore, the Hotel limits the amount of attrition or reductions in the contracted room block. Additional reductions will be billed at 100% of the contracted room and tax.

91 days or more prior to arrival	50% of room block
61–90 days or more prior to arrival	20% of room block
31–60 days or more prior to arrival	10% of room block
Less than 31 days prior to arrival	2% of room block

For all meal and meeting functions, the Hotel reserves the right to move groups to a room with capacity equal to the actual number of guests to be served.

Figure 2.5 Allowable attrition clause.

It is important to make clear exactly who will be responsible if damages to rooms or space should occur. While significant damage during a guest's stay is certainly the exception rather than the rule, the possibility of consequential damage does exist and should be addressed. A general clause covering this area in a group rooms contract might read as follows:

The group shall be liable for any damage to the hotel caused by any of its officers, agents, contractors, or guests.

6. Payment terms.

While it may seem that payments and terms for payment are relatively straightforward, in the hospitality industry, contract payment terms can sometimes become quite complex. Consider the case of a visiting college basketball team. The head coach reserves sleeping rooms and agrees to pay for the rooms with a college-issued credit card. One of the players, however, makes several hundred dollars' worth of long-distance telephone calls from his hotel room. Who is responsible for this payment? Further, how can the hotel hope to collect the monies due to it? The best way to address problems such as these is to clearly and precisely state the terms of payment and the responsibility for all expenses incurred.

Dining establishments generally require a cash, check, or credit-card payment at the time of meal service. In the lodging industry, payment can take a variety of forms. Some of the more common payment arrangements and variations are:

A. Individual guest pays all charges.
B. Company or group pays all charges.
C. Payment in full is required prior to arrival.
D. Hotel directly bills company or group for room and tax only.
E. Hotel directly bills company or group for all charges.
F. Individual guest pays incidentals (e.g., telephone, meals, movies, laundry, parking).
G. Multiple guests are all billed to one common master bill.

Note that in the preceding example, if the coach's contract called for payment variation B, then the college would indeed be responsible for the long-distance telephone charges. If the contract included a clause similar to that in F, then the individual player would be held responsible for the

charges. Again, the importance of using precise language to prevent ambiguity should be apparent to the effective hospitality manager.

7. Performance standards related to quantity.

Previously, we discussed ways for hospitality managers to address the problem of attrition and no-shows. But what of the guest whose actual numbers exceed the original estimate? If, for example, a catering hall anticipates serving 200 guests, but 225 people show up, the operation may face space and production shortages. Because this type of situation is also common, many operators will prepare food and create place settings in the dining room for a number of guests larger than the contracted guest count. This approach prevents frantic, last-minute attempts to meet an unanticipated demand.

While there is no industry standard established, many operators find that agreeing to prepare for 5 percent more guests than the contracted number is a good way to balance the potential needs of the guest with the actual needs of the operation. When the operation agrees to a performance standard related to quantity, this standard should be clearly stated in the contract.

When providing for products and services in the vastly diverse hospitality industry, additional essential clauses may be required based on the type and style of the hospitality facility. When that is the case, management should identify these potential problem areas and address them each and every time a contract is executed.

Essential Clauses for Receiving Products and Services

Just as there are essential and important components of a contract that state when the hospitality manager is responsible for providing products and services, it is equally critical to ensure that essential clauses are in place when contracting to purchase or receive products and services. Here, too, it is in the best interest of both parties to get all contractual arrangements in writing. Listed next are some of the important contractual elements to be considered before executing a purchasing contract.

1. Payment terms.

One of the most significant components of a contract for buying products and services is the payment terms. Consider the case of the restaurateur who wants to purchase a new roof for her restaurant. She gets three bids from contractors, each of whom quotes her a similar price. In one case, however, the builder wants full payment prior to beginning work. In the second case, the builder wants half the purchase price prior to beginning the job and the balance upon a "substantial completion" of the work. In the third case, payment in full is required within 30 days after completion of the job. Obviously, in this case, the payment terms could make a considerable difference in which contractor gets the bid.

Required down payments, interest rates on remaining balances, payment due dates, and penalties for late payments are points that should be specified in the contract and reviewed carefully.

2. Delivery or start date.

In the case of some delivery dates, a range of times may be acceptable. Thus, when purchasing sofas, a hotel could insert contract language, such as "within 60 days of contract signing" as an acceptable delivery date clause. In a like manner, food deliveries might be accepted by a kitchen "between the hours of 8:00 A.M. and 4:00 P.M."

In some cases, the delivery or start date may be unknown. Consider, for example, the following contract clause written when a hotel agreed to lease

part of its lobby space to a flower shop. The time it would take to get the shop stocked and operational was unknown, and thus the start date of the lease could not easily be determined. The delivery/start clause here is part of that longer contract document. In the section titled "Start Date," it reads:

> *The initial Operating Term of this agreement shall commence at 12:01 A.M. on the first day the Flower Shop is open for business and terminate at 11:59 P.M. on the day preceding the tenth (10th) anniversary thereof; provided, however, that the parties hereto may extend this agreement by mutual consent for up to two (2) terms of five (5) years each.*

Note that, though the actual start date was uncertain, the language identifying precisely when the start date was to occur was unmistakable. In all cases, it is important that a start date be present and that it be clear.

3. Completion date.

Completion dates let the contracting parties know when the contract terms end. In the case of a painter hired to paint a room, this date simply identifies when the painter's work will be finished. If the contract is written to guarantee a price for a product purchased by a restaurant, the completion date is the last day that price will be honored by the vendor.

It is often difficult to estimate completion dates. This is especially true for construction contracts when weather, labor difficulties, or material delays can affect timetables. Despite these difficulties, completion dates should be included whenever products or services are secured.

Some contracts are written in such a manner that the completion or stop date of the contract is extended indefinitely unless specifically discontinued. The following clause is taken from an agreement to cooperatively market hotel rooms with a discount hotel broker. Note the language related to the contract's extension.

> *Unless otherwise noted in the contract, this participation agreement between the hotel and Tandy Discount Brokerage automatically renews on an annual basis unless cancellation is received in accordance with established publication period deadlines.*

Self-renewing contracts are common, but must be reviewed very carefully by management prior to acceptance of their terms. It is important to calendar any action required by management to discontinue a self-renewing contract so that critical dates will not be missed.

4. Performance standards.

Performance standards refer to the quality of products or services received. This can be an exceptionally complex area because some services are difficult to quantify. The thickness of concrete, the quality of carpeting, and the brand or model of a piece of equipment can, for example, be specified. The quality of an advertising campaign, a training program, or interior design work can be more difficult to evaluate.

The effective hospitality manager should quantify performance standards in a contract to the greatest degree possible. With some thought, and help from experts in the area under contract, great specificity may be determined. Consider the foodservice manager who wishes to purchase canned peach halves. A purchase specification, such as the following, could be included as part of the purchase contract:

> *Peaches, yellow cling halves, canned. U.S. Grade 3, (Choice), packed 6, number 10 cans per case, with 30–35 halves per can. Packed in heavy syrup, with 19 to 24 Brix; minimum drained weight, 66 ounces per number 10 can, with certificate of grade required.*

Recall that under the Uniform Commercial Code (UCC), a vendor is contractually obligated to provide goods that are fit for use and free of defects. Clauses that specify performance standards in a purchasing contract give both buyers and sellers an added level of protection, because the extra details will clearly spell out the expectations of both parties, with regard to the nature and quality of the goods being transferred.

5. Licenses and permits.

Obtaining licenses and permits, which are normally required for contracted work, should be the specific responsibility of the outside contracting party. Tradespeople, such as plumbers, security guards, air conditioning specialists, and the like, who must be licensed or certified by state or local governments, should be prepared to prove they indeed have the appropriate credentials. However, it is the responsibility of the hospitality manager to verify the existence of these licenses, if they are required to perform the terms of a contract. And a photocopy of these documents should always be attached to the contract itself. Figure 2.6 is an example of a general clause related to the issue of licenses and permits.

6. Indemnification.

▶ **LEGALESE**
Indemnification: To make one whole; to reimburse for a loss already incurred.

Accidents can happen while an agreement is being fulfilled. In order to protect themselves and their organizations, hospitality managers should insist that the contracts they execute contain **indemnification** language similar to this example:

> *Contractor hereby agrees to indemnify, defend, and hold harmless the restaurant and its officers, directors, partners, employees, and guests from and against any losses, liabilities, claims, damages, and expenses, including without limitation attorneys' fees and expenses that arise as a result of the negligence or intentional misconduct of Contractor or any of its agents, officers, employees, or subcontractors.*

Consider the case of Melissa Norin, the manager of a restaurant located near an interstate highway. Melissa hired Twin Cities Signs Company to change the lights in a 60-foot-high road sign advertising the restaurant. While completing this work, a Twin Cities truck collided with a car parked in the restaurant's parking lot. The car owner approached Melissa, demanding that the restaurant pay for the car's damages. Without an indemnification clause in the contract for services with Twin Cities, Melissa's restaurant may incur expenses related to the accident.

Certainly, it is a good idea to have all contracts reviewed by legal counsel, but because of the significance of indemnification, this clause in a contract should be written only by a competent attorney.

Licenses and Permits Clause

The contractor represents and warrants that it has in effect all licenses, permits, and other authorizations or approvals necessary to provide the services from all applicable governmental entities, and that such licenses and permits shall be maintained and in full force and effect for the length of this contract. The revocation, suspension, or withdrawal of any license, permit, authorization, or approval shall be immediately reported in writing by the contractor, and in such an event, the contract will be suspended. The contractor shall provide evidence that all such licenses, permits, and other authorizations are in effect at the signing of this contract and at any time during its length at the request of the owner.

Figure 2.6 Licenses and permits clause.

7. Nonperformance clauses.

Often, it is a good idea to decide beforehand what two parties will do if the contract terms are not fulfilled. In the case of purchasing products and services, the simple solution may be for the hospitality manager to buy from a different vendor. If, for example, a fresh-produce vendor who has contracted with a group of family-owned restaurants frequently misses delivery deadlines or has poor product quality, the nonperformance solution may simply be to terminate the contract. Language would need to be written into the contract that would address the rights of the restaurant group to terminate the agreement if the vendor performed unsatisfactorily.

In some cases, nonperformance on the part of the vendor can have an extremely negative effect on the hotel or restaurant. If, say, a hotel books a well-known entertainer as a major component in a weekend package, the failure of that entertainer to perform as scheduled would have a significant negative impact on the hotel. It is very likely that the reputation of the hotel would suffer, because it promised its guests something it did not deliver. The guests are likely to demand refunds in such a situation, and the potential that one or more of them could bring litigation against the hotel is very real.

In addition to the costs incurred due to unhappy guests, the cost of replacement entertainment might be quite high if the original entertainer canceled on short notice. Figure 2.7 is an example of nonperformance contract language that might be used to protect the hotel in such a case.

When nonperformance by a vendor will cause a negative effect on the hospitality operation, it is critical that language be included in the contract to protect the operation. The protection may be in general terms, such as the clause below, or it may be quite specific. A common way to quantify nonperformance costs is to use a "dollars-per-day" penalty. In this situation, the vendor is assessed a penalty of agreed-upon "dollars per day" if it is late in delivering the product or service.

8. Dispute resolution terms.

In some cases, it is a good idea for contracting parties to agree on how to settle any disputes that may arise before they actually occur. To do so, several issues may need to be addressed. The first is the location of any litigation undertaken. This is not a complex issue when both parties to the contract and their businesses are located in the same state. When the contract is between two parties that are not located in the same state, contract language such as the following could be inserted into the contract.

This agreement shall be governed by and interpreted under the laws of the State of _____ [location of hotel].

Entertainer Nonperformance Clause

The "Entertainer" recognizes that failure to perform hereunder may require Hotel to acquire replacement entertainment on short notice. Therefore, any failure to provide the agreed-upon services at the times, in the areas, and for the duration required hereunder shall constitute a default, which shall allow the Hotel to cancel this contract immediately on oral notice. The "Entertainer" and or his or her agent shall be liable for any damages incurred by the Hotel, including without limitation, any costs incurred by the Hotel to secure such replacement entertainment.

Figure 2.7 Entertainer nonperformance clause.

Additional terms may include the use of agreed-upon, independent third parties to assist in problem resolutions. Litigation costs are another area of potential disagreement that can be addressed before any contract problems arise. Language such as the following makes clear who is responsible for the costs associated with contract litigation.

Should any legal proceedings be required to enforce any provisions of this Agreement, the prevailing party shall be entitled to recover all of its costs and expenses related thereto, including, without limitation, expert witness' and consultants' fees and attorneys' fees.

Exculpatory Clauses

▶ **LEGALESE**

Exculpatory clause or contract: A contract (or a clause in a contract) that releases one of the parties from liability for his or her wrongdoings.

In addition to the essential elements related to providing and receiving products and services just listed, some hospitality managers would add an **exculpatory clause**, especially when providing products and services to guests. These clauses seek to exculpate, or excuse, the hospitality operator from blame in certain situations. An example would be a sign in a pool area that states "Swim At Your Own Risk," or a clause in a group rooms contract that states "Operator not responsible for materials left in meeting rooms overnight." While these clauses may help reduce litigation, it is important to understand why this is so. Exculpatory clauses generally cause guests to exercise greater caution. Warning signs or contract language that cause guests to be more careful truly will work in the favor of both guests and the hospitality organization. In addition, some parties to a contract may accept the exculpatory statement as legal truth. That is, they will assume that they have somehow given up their right to a claim against the hospitality organization because of the exculpatory clause's language.

It is very important to note, however, that the courts have not generally accepted the complete validity of exculpatory clauses. In some cases, they do in fact exculpate; in others, they do not. Consequently, exculpatory clauses have the disadvantage of sometimes providing a false sense of security to the operator. In summary, these clauses can be useful, but they should not be relied upon to absolve the operator of his or her reasonable responsibilities to care for the safety and security of guests.

ANALYZE THE SITUATION 2.3

Laureen Statte was a guest at the Boulder Inn, a midpriced hotel in an urban area. When she checked into the hotel she inquired about the availability of a workout room. Upon receiving assurances that the hotel did indeed have such an area, Ms. Statte checked into the hotel, put away her luggage, changed into workout attire, and proceeded to the workout area.

Upon entering the workout room, she noticed a sign prominently posted near the entrance to the workout room stating: "Hotel Not Liable for Any Injuries Incurred During Workouts."

According to her attorney, Ms. Statte lifted deadweights for approximately 10 minutes, then mounted a treadmill. As an experienced treadmill user, she started slowly, gradually increasing the treadmill's speed. Shortly after beginning the treadmill workout, Ms. Statte fell backward into a plate-glass window that was approximately 2 feet behind the treadmill. The shards from the glass severely injured Ms. Statte.

Ms. Statte's attorney claimed the accident was the fault of the hotel because the treadmill was too close to the window, and the hotel neglected to outfit the windows with safety glass. As its defense, the hotel pointed out the presence of the exculpatory clause sign, which was clearly posted, and which Ms. Statte agreed that she read prior to beginning her workout. Who is liable?

1. As the hotel manager, how might you resolve this dispute?
2. Could a lawsuit have been prevented?

2.4 PREVENTATIVE LEGAL MANAGEMENT AND CONTRACTS

Breach of Contract

In some cases, the agreements and promises made in a contract are not kept. When this happens, the party that has not kept its agreement is said to be in **breach of**, or to have breached, the terms of the **contract**.

▶ **LEGALESE**

Breach of contract: Failure to keep the promises or agreements of a contract.

Sometimes, it is simply not possible to fulfill the obligations set forth in a contract. Guests who stay past their previously agreed-upon departure dates may make it difficult for a hotel to honor upcoming room reservations. Diners who stay longer than anticipated may do the same to restaurant guests who hold dinner reservations. Acts of nature, or war, government regulations, disasters, strikes, civil disorder, the curtailment of transportation services, and other emergencies may make keeping the promises of a hospitality contract impossible. This can happen to either party. A hotel that is closed because of a hurricane, as often happens on the southern and eastern coasts of the United States, may well be unable to service the guests it had planned to host. Likewise, if an air traffic controllers' strike closes all major airports, guests flying to a convention in Las Vegas may be unable to arrive in time for their room reservations. Voluntary breach of contract occurs when management elects to willfully violate the terms of the contract. In most cases, however, it is unwise to voluntarily breach a contract. When it is done, it usually means that the breaching party should not have agreed to the contract terms in the first place.

There can be a variety of reasons for breaching a contract, and the consequences of such a breach can be very serious, even if the breach was unavoidable. Consider the case of the hotel that contracts to cater a couple's wedding reception. The contract to provide dinner, a cash bar, and a room with a dance floor is agreed upon in January for a wedding that is to take place in early June. In late May, the hotel is sold, and the new owner immediately applies to the state liquor control board for a transfer of the liquor license. The control board requires a criminal background check of the new owner, which will take 60 days to complete. As a result, the hotel must operate for that period of time without a liquor license. The contract to provide a cash bar for the wedding is now breached, and the wedding party threatens litigation for the hotel's failure to keep its agreement. It may be that the breach just described could not have been avoided, but the negative effect on the wedding party is real, as is the threat of litigation and loss of customer goodwill.

Remedies and Consequences of Breaching an Enforceable Contract

If a contract's terms are broken, and the contract is enforceable, the consequences can be significant. The plaintiff can pursue a variety of options when it is clear that the other party has breached a contract. Some of the remedies that may be sought include the following:

1. **Suit for specific performance.**

   When this option is selected, the party that broke the contract is taken to court, with the plaintiff requesting that the court force the defendant to perform the specific contract terms that have not been performed, or to refrain from engaging in some activity that is prohibited by the contract. A simple example might be a franchisee who has met all the terms and conditions of a franchisor and has signed a franchise agreement, but at the last minute is told he or she will not be granted the franchise because the franchisors themselves wish to build and operate on the designated site. In this case,

the potential franchisee could bring legal action to force the franchisor to keep its promise and grant the franchise.

2. Liquidated damages.

Often, the language of a contract will call for a specific penalty if the contract terms are not completed on an agreed-upon date. If, for example, a building contractor has agreed to complete the repaving of an amusement park's parking lot by the beginning of the park's season, penalties may be built into the contract itself if the job is not finished on time. Indeed, the contractor may have offered the penalty option as an incentive to win the contract. Liquidated **damages** refer to these penalty payments. When a contract is breached, the liquidated damages could be imposed.

▶ **LEGALESE**
Damages: Losses or costs incurred due to another's wrongful act.

3. Economic loss.

When damages have not been specifically agreed upon in the terms of the contract, the party that has created the breach may still be held responsible for damages. Consider the plight of the travel agency that contracts with a hotel for 100 sleeping rooms during the Christmas season for a tour group traveling to Hawaii. Upon arrival, the group finds that the hotel is oversold, and thus the reserved rooms are not available. Because the hotel has breached the contract, the travel agency may bring litigation against the hotel claiming that the reputation of the agency itself has been damaged due to the hotel's contract breach. In addition, the agency may be able to recover the costs required to provide alternative housing for its clients. Few would argue that angry vacationers are good for business, and thus the agency may stand a good chance of recovering significant economic damages. These damages, if granted, would be the responsibility of the hotel to pay, as a direct result of the contract breach.

4. Alternative dispute resolution.

Often, there is honest disagreement over the meaning of contract terms. When this is the case, it may be difficult to determine which, if either, of the parties is in breach of the contract. When that occurs, the parties, or in some cases the courts, will elect to use dispute resolution techniques aimed at clearing up confusion or resolving the situation. Dispute resolution may also be used in other controversies, such as those involved with personal injury, employment, or labor disputes.

▶ **LEGALESE**
Arbitration: A process in which an agreed-upon, independent, neutral third party (the arbitrator), renders a final and binding resolution to a dispute. The decision of the arbitrator is known as the "award."

▶ **LEGALESE**
Mediation: A process in which an appointed, neutral third party (the mediator), assists those involved in a dispute with resolving their differences. The result of mediation, when successful, is known as the "settlement."

The two most common types of dispute resolution techniques are **arbitration** and **mediation**. In arbitration, the arbitrator is an independent, unbiased individual who works with the contracting parties to understand their respective views of the contract terms. The arbitrator then makes a decision that is binding on each party. In mediation, the mediator, who is again an independent, unbiased reviewer of the facts, helps the two parties come to an agreement regarding the issues surrounding the contract terms. While the mediation process is a voluntary one, and neither party is bound by the recommendations of the mediator, mediation can be an extremely effective way to bring a contract dispute to resolution.

Statute of Limitations

▶ **LEGALESE**
Statute of limitations: Various laws that set maximum time periods in which lawsuits must be initiated. If the suit is not initiated (or filed) before the expiration of the maximum period allowed, then the law prohibits the use of the courts for recovery.

It is important to understand that if you intend to use the courts to enforce a contract, you must do so in a timely manner. There are specific laws that set out maximum time periods in which the courts are legally permitted to enforce or settle contract disputes. These laws are normally referred to as **statutes of limitations**. Generally, the statute of limitations for written contracts is four years from the date of the breach; however, this is an area where exceptions apply and where state laws sometimes vary. As a hospitality manager, you should become familiar with your state's statute of limitations on contracts.

Preventing Breach of Contract

It is generally best to do all that is possible to avoid breaching an enforceable contract. As with any litigation, prevention is typically better than attempting to manage the negative consequences that may result from a contract breach. Preventing breach of contract may not always be possible. In most cases, however, the hospitality manager can avoid breaching contracts by following specific steps before and after entering into a contractual agreement. The steps listed below can help minimize the chance of litigation in the future.

LEGALLY MANAGING AT WORK:
Eight Steps to Follow When Drawing Up Contracts

1. Get it in writing.

The single most important thing a hospitality manager can do to avoid contract breach is to get all contracts in writing whenever possible. Many hospitality contracts are, by their nature, verbal contracts. Generally speaking, however, the verbal contracts for dining reservations or food delivery tend to be rather simple ones. When the relationship between the contracting parties is more complex, it is nearly impossible to remember all the requirements of the contract unless the contract is committed to writing. For example, the standard contract for a hotel to provide sleeping rooms to airline crews staying overnight may run 50 typed pages or more. Obviously, it would not be possible to recall all the details of such an agreement without having that agreement in writing. A manager and his or her staff can only fulfill the terms of a contract if those terms are known and readily available for review.

Because many contracts are complex, it is sometimes advisable to have these contracts reviewed by an attorney before agreeing to their terms. This can best be done if the contract is a written one. Changes, corrections, and improvements can be made only if the attorney can see the terms of the agreement and read what will truly be required of the client.

Last, it is a simple fact that the representative parties to a contract may change, but the contract can still be used. For example, the contract between a waste hauler and a hospital to provide trash removal service to the hospital's foodservice facility will continue, even if the manager of that facility is transferred, quits, or retires. In such a situation, the terms of the trash removal contract need to be established in writing, both as a professional courtesy to the incoming manger and as a service to the foodservice facility itself.

2. Read the contract thoroughly.

The number of individuals and hospitality managers who sign contracts without thoroughly reading them is surprising, given that it simply is not possible for the managers or staff of a hospitality organization to fulfill all of their contractual responsibilities unless they know exactly what those responsibilities are. Just as important, it is not possible to hold vendors and suppliers accountable for the full value of their products and services unless contract language is known and understood.

Consider the case of the hotelier who plans a beach party during a spring break weekend. This manager contracts one year in advance with a talent agency to provide a popular and expensive band that will play at the hotel during the two-day party. A fee is agreed upon and the agent sends the hotelier a standard performance contract. Upon reading the contract carefully, the hotelier discovers the following paragraph:

> *The agent, on behalf of himself and the entertainers, hereby authorizes the hotel and its advertising agency to use all publicity information, including still pictures, and biographical sketches of any and all entertainers supplied by the agent.*

These pictures and information may be used in any media, including television, radio, newspapers, and the Internet, that is deemed appropriate by the hotel. Agent further agrees that all such publicity information will be made available to the hotel no later than 30 days before the first performance.

It is the hotelier's opinion that 30 days is not nearly long enough to advertise the event. In fact, at least six months lead time is required to advertise in some of the spring break magazines that will be distributed on college campuses across the country. In this case, a single sentence in a much longer document could have a tremendous impact on the economic success of the entire spring break event. It is highly likely that the talent agent will, under the circumstances, agree to provide the publicity material in a time frame acceptable to the hotel. It is important to note, however, that it required a careful reading of the entire contract and the hotelier's experience in the field of advertising to detect this potential difficulty.

Reading a written contract thoroughly before signing it is an important activity that must be undertaken to prevent contract breach. If it is determined that the hospitality manager simply does not have the time to read a complex contract in its entirety, then the contract should be referred to an attorney for review. Many managers refer any contract that exceeds a specific dollar amount or length of time to an attorney. The important concept to remember, however, is that all contracts must be read carefully. It is the manager's responsibility to see that this is done.

3. Keep copies of all contract documents.

When agreements proceed as planned, contract language causes little difficulty. When there is disagreement or failure on the part of either party, however, contract language can be critical. It has been said, tongue in cheek, that "the large print giveth and the fine print taketh away." Because it is never possible to determine whether a contract will be trouble-free, it is a good idea to keep a copy of all contracts that are signed. If the contract is a verbal one, it is a good idea to make notes on the significant agreement points and then file these notes.

Many hospitality operators find that it is best to keep a separate section in their files devoted specifically to contracts. Others place contracts in individual customer or vendor files, and some do both. Regardless of the filing approach, if the contract is easily available for review when clarification is needed, the likelihood of contract breach will be reduced.

4. Use good faith when negotiating contracts.

Good faith is a term used to designate an individual's honest belief that what he or she is agreeing to do can, in fact, be done. In a hotel manager's case, this can be as simple a concept as deciding that the hotel will accept no contracts for room reservations unless it, in good faith, believes that guestrooms can be provided.

It is always best to carefully weigh the commitments of any contract. Many times, contracts are breached because one of the contracting parties finds it impossible to perform the obligations. While circumstances can change, and no one can be perfectly clear about the future, it is worth noting that a careful, realistic assessment of contract capability and capacity can go a long way in avoiding contract breach.

5. Note and calendar time deadlines for performance.

When a contract requires specific actions to be taken by or on designated dates, it is a good idea to list those dates in calendar form so there can be no mistaking precisely when performance is required. It is especially helpful to create these timelines prior to signing a contract. In this way, any potential conflicts or impossibilities may be detected before it is too late. Many lawsuits involving contracts are initiated because one party did not do what he

or she agreed to do in a timely manner. Noting and calendaring time deadlines can help prevent this from occurring.

6. Ensure the performance of third parties.

Many times in the hospitality industry, a manager must rely on others to fulfill some portion of a contract. Consider, for example, the hotel that hosts a meeting for a nonprofit organization of health-care workers. In order to secure the contract for the sleeping rooms and meeting space required by the group, the hotel agrees to provide audiovisual services for the meetings. Like many hotels, this hotel uses a third-party vendor to provide the audiovisual equipment. Obviously, a failure on the part of this third-party vendor can result in a failure on the part of the hotel to keep its promises. While it is not possible to prevent such an occurrence, it is important to recognize that when the use of third parties will be required, contract language addressing the third party's possible failure to perform should be included.

7. Share contract information with those who need to know, and educate staff on the consequences of contract breach.

Often, managers negotiate contracts that their employees must fulfill. However, an employee's ability to honor contract terms is directly related to his or her knowledge of those terms. Consider, for example, the hotel sales department that works very hard to prepare a bid to house the flight crews of a major airline that must lay over in the hotel's city. The contract is won and the crews begin to stay in the hotel. A portion of the contract relates to the cashing of personal checks. While the hotel's normal policy prohibits cashing personal checks over $25, the airline contract calls for the hotel to cash the personal checks of airline crew members for up to $100. These checks are guaranteed by the airline itself. Unless every desk agent and night auditor, as well as the management team at the front desk, are aware of this variation in policy, problems can occur. All it would take is the refusal by one uninformed or newly hired desk agent to cash a check and the hard work of the sales department could be severely compromised.

8. Resolve ambiguities as quickly and fairly as possible.

Despite the best of intentions of both parties, contractual problems can arise. When they do, it is important that they be dealt with promptly and in an ethical manner. By doing so, a potentially damaging situation may be resolved quickly and amicably.

Consider the case of a tour bus company that contracts to stop at a midpriced downtown hotel on its way to Florida. The tour operator has a contract for rooms and meals; it is in writing, and the conditions are clearly spelled out. Upon check-out, however, the tour operator is surprised to find that the hotel has added a parking charge for the bus to the operator's bill. The tour operator protests that no such charge was part of the contract, and thus they should not have to pay it. The hotel points out that nothing in the contract states that parking would be provided free of charge, and thus the bill is owed. In a case like this, honest people can agree to disagree about the intent of the original contracting parties. Had the issue come up prior to signing the contract, the matter might have been quickly resolved. At this point in the process, resolution is important because the reputation of the hotel and its integrity may well be more important than the small amount involved in the parking charge. It is the responsibility of management to weigh the costs of litigation in both time and money, before making a decision to fairly resolve a contract dispute.

By attempting to put himself or herself in the position of the other party and trying to understand that party's concerns, the manager may be able to find a compromise that is fair to all concerned and that will help reduce the possibility of litigation.

▶ INTERNATIONAL SNAPSHOT

International Contracts

With the increasing number of hotels and restaurants expanding outside of the United States and the number of non-U.S. vendors that are transacting with those hotels and restaurants, there is an increasing need for managers to be aware of issues that arise in transborder transactions.

In addition to the "normal" contractual provisions otherwise identified in this section of this chapter, a manager should keep certain issues in mind when contracting with a non-U.S. party or for performance of work or services outside of the United States. While each jurisdiction is different and has its own requirements, the following checklist can be used to identify potential areas that require additional thought:

1. **Clarity.** Take care to fully and accurately describe the performance required under the agreement. Memorialize any discussion in writing. Keep all prior correspondences to ensure that there is a record of what was discussed. Also, do not take anything for granted, and remember that there may be cultural and language variances that contribute to the need for more specificity. Make sure that both parties have a clear expectation of performance, and specify the language to be used for the agreement.
2. **Currency risk issues.** Specify in the agreement the type of currency used to pay for the transaction in question. Give preference to the currencies that are stable. And in long-term contracts (or contracts that are performed over time), it is advisable to agree on a specific exchange rate if the agreement contemplates the use of local currency as part of the business activity (e.g., guests at a hotel in a non-U.S. country pays in the currency of that country).
3. **Local law issues.** Consult a local lawyer on issues of local law. This is particularly important when business activities are being performed in non-U.S. countries. Certain activities and practices that are otherwise permitted in the United States may be specifically prohibited in other countries. For example, there may be certain foreign exchange restrictions prohibiting transfers of certain amounts out of a country without first complying with notification or permit requirements.
4. **Dispute resolution.** As there are no international courts to resolve transborder business and commercial issues, and because litigation is quite costly, it is important that any international contracts contain provisions that would provide for a mechanism to resolve matters in case of a dispute. This avoids confusion in the event of default. More and more often, parties rely on the resolution by senior executives of the contracting parties as a first step. If no resolution can be reached at that step, then the dispute resolution provision may call for arbitration by the International Chamber of Commerce or mediation by an expert familiar with the industry of the contracting parties. The key is that the terms of the arbitration and mediation must be spelled out. To ensure clarity of such terms, a lawyer familiar with international dispute resolution should be consulted.
5. **Choice of law/venue.** Make sure that that the agreement clearly states which laws govern the transaction. Will it be the laws of one of the parties or of a neutral location? Note that on certain issues, such as real estate, labor, or foreign exchange control issues, you may need to rely on local law. The laws of another jurisdiction, however, can still be elected to govern the other parts of the transaction or the agreement reached between the parties. Also, in case arbitration fails, it is important to agree

on the venue of the lawsuit. Because of the transborder nature of transactions, parties often agree in the agreement to a location (often neutral) where the litigation can be initiated and carried out. One word of caution: Make sure that the courts of the venue chosen have the capability to apply the laws specified in the agreement.

The foregoing is only a representative list of issues to consider in the context of an international contract. As always, local laws and customs should be reviewed and consulted, along with the fundamental contract principles otherwise discussed in this chapter and other parts of the book.

Provided by San San Lee of the Law Offices of San San Lee, Los Angeles, California. www.sansanlaw.com

WHAT WOULD YOU DO?

Assume that you manage a 300-room hotel. Your local university football team is playing a home game on Saturday, and demand for rooms far exceeds supply. Your no-show rate on reservations for the past three football games has been 8, 12, and 9 percent, respectively. Currently you have 100 nonreserved rooms.

Prepare a brief (half-page) report describing how you would answer the following questions.

1. How many room reservation contracts are you willing to accept?
2. Should you require that all reservations be confirmed?
3. What factors will you consider as you make your decision? What strategies will you employ to reduce no-shows?

Write a short (half-page) essay answering questions 4 and 5, drawing from your personal perspective.

4. You and your family are traveling out of state to attend one of your school team's away football games. Upon arrival, the hotel where you have a confirmed reservation denies you a room because it has none available. What do you think the hotel should do for you?
5. What if no other rooms were available within a 50-mile radius of the hotel you originally booked at?

▶ THE HOSPITALITY INDUSTRY IN COURT

The following two case studies involving hospitality firms revolve around the interpretation of contracts. First consider *Opryland Hotel v. Millbrook Distrib. Servs., 1999 Tenn. App. Lexis 644 (Tenn. Ct. App. 1999).*

FACTUAL SUMMARY

Millbrook Distribution Services (Millbrook) negotiated with Opryland Hotel (Opryland) for a group rooms and convention contract. Opryland provided guestroom rates and availability dates to Millbrook in a 1994 letter. Opryland had 1,891 rooms available in 1994. Additionally, the letter explained the newest addition to the hotel would be completed by June of 1996. The new addition would add 979 new guestrooms for a total of 2,870.

In 1994, Millbrook and Opryland entered into an agreement for the August 1996 Millbrook convention. The agreement contained policies and procedures for guestroom reservations and cancellations. The cancellation policy of the contract provided Millbrook would pay different levels of damages to Opryland for canceling the contract at specified times. So if Millbrook canceled by January 11, 1995, no damages would be paid to Opryland. If Millbrook canceled after January 11, 1995, but before July 11, 1995, Opryland would collect $75,000 in damages. Any part of this amount would be refunded if Opryland could resell canceled room nights up to $75,000. Finally, if Millbrook canceled between July 12, 1995, and July 11, 1996, Opryland would assess a fee for unsold room nights up to $300,000. Again, any part of this fee would be refunded to Millbrook if Opryland could resell the reserved Millbrook room nights over the convention dates.

The contract contained no language dealing with the total capacity of the hotel. Prior to the 1996 convention, Millbrook made a request for additional room nights from Opryland due to an expected increase in attendance. Opryland could not fill the request. Because the increase in attendance at the convention could not be accommodated, Millbrook canceled the contract in October of 1995.

ISSUE FOR THE COURT

The issue in the case was whether the Millbrook room night vacancies would be subtracted from the 1,891 rooms available before June 1996 or from the 2, 870 rooms available after June 1996. Millbrook presented arguments in favor of the lower number. Subtracting resold Millbrook room nights from the capacity of 1,891 resulted in 52 unsold room nights, for a total of $6,700 in damages. This figure was the result of multiplying the unsold room nights (52) in the Millbrook convention block by $130. Under the Opryland position, the cost to Millbrook would be about $170,000. Opryland argued the actual capacity of the hotel was 2,870 rooms. Applying the higher figure resulted in 1,313 unsold room nights in the Millbrook block. The contract language was unclear on the matter, so the court looked at other documents and conversations in deciding the intentions of each party, specifically, the court looked at the 1994 letter, along with the contract.

DECISION

The court decided Millbrook knew Opryland would have 2,870 rooms available for the convention dates when the contract was signed. The unsold room nights would be subtracted from 2,870, resulting in a higher amount of damages owed to Opryland by Millbrook. The Opryland position was accepted, and judgment in the amount of $170,690 was awarded to Opryland.

MESSAGE TO MANAGEMENT

Clearly enumerate the number of rooms included in "blocks" and attrition clauses. Use illustrations to set out cancellation consequences.

Second, consider *Hyatt Corp. v. Women's Int'l Bowling Cong., Inc., 80 F. Supp. 2d 88 (W.D.N.Y. 1999).*

FACTUAL SUMMARY

The Women's International Bowling Congress (WIBC) made convention arrangements with the Hyatt Regency of Buffalo, New York (Hyatt). Under the agreement, Hyatt would hold a block of rooms for WIBC convention attendees. The convention attendees would be financially responsible for their own rooms. WIBC made a request to Hyatt for additional rooms to be held under the convention block. Hyatt agreed to hold the additional rooms, and attempted to insert clauses into the revised agreement requiring WIBC to guarantee all rooms would be filled and obligating WIBC to pay for any unused rooms. WIBC did not sign the revised agreement but instead offered a substitute agreement that made no mention of a guarantee to fill all rooms or an obligation to pay for unused rooms. The substitute agreement proposed by WIBC was signed by both parties and incorporated into the convention contract. The convention attendees used only about half of the rooms held by Hyatt. Hyatt sued WIBC to recover compensation for the unused rooms. WIBC refused to pay for the rooms and asserted it was never obligated to do so.

QUESTION FOR THE COURT

The question for the court was whether the contract obligated WIBC to pay for unused rooms held by Hyatt for the convention room block. The court was first faced with whether the contract was unclear. In deciding whether WIBC was obligated to pay for unused the rooms, the court would only look to the terms of the contract if the language was clear. No outside evidence could be presented by the parties unless the terms of the contract were unclear and additional explanation was needed. Hyatt argued it was reserving a block of rooms for WIBC. In using the term "reserve," Hyatt attempted to show WIBC meant to pay for unused rooms. However, the actual term used in the contract was "hold." WIBC argued

the term "hold" made it clear no financial obligation was intended. Instead, the rooms were to be held by Hyatt for the individual convention attendees to reserve and pay for.

DECISION

The district court ruled in favor of WIBC. The court held the contract language was clear or unambiguous. It also held the use of the term "hold" meant WIBC was under no obligation to use all of the rooms in the room block or pay for unused rooms.

MESSAGE TO MANAGEMENT

The contracts must spell out clearly and unequivocally the intentions of the parties. Use illustrations, if need be, to clearly establish the scope of the agreement.

▶ WHAT DID YOU LEARN IN THIS CHAPTER

Contracts are used in the hospitality industry to govern the many different promises and business transactions entered into on a daily basis. Contracts can take one of two forms, verbal or written. To be enforceable in a court of law, a contract must be for a legal purpose, entered into by competent parties, and include an offer, acceptance, and consideration.

Some of the most common types of contracts in the hospitality industry are franchise agreements, management contracts, group rooms contracts, convention or meeting space contracts, and purchasing agreements. The Uniform Commercial Code (UCC) is the law regulating purchasing agreements, which gives protection to buyers, sellers, and financial lenders when goods are purchased under contract. Because reservations are considered to be a type of contract, it is important that hospitality managers develop reservation policies that will allow them to fulfill the promises made to guests, while maximizing their own income in the event that guests do not honor their reservations.

All contracts should contain certain essential clauses that spell out in detail the various terms, stipulations, and time periods surrounding the business transaction governed by the contract. A breach of contract occurs when one of the parties is unable to fulfill the obligations set forth in a contract. When this occurs, the injured party may go to court and receive damages or some other type of remedy. The best way for managers to prevent a breach of contract is by thoroughly understanding their rights and obligations under the contract, and by taking the necessary steps to fulfill those requirements.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Describe two hospitality situations in which a verbal contract is superior to a written contract, and explain why you believe it to be so.
2. Discuss "legality" as a major component required of an enforceable contract. Give a hospitality example where legality comes into question.
3. Using the Internet, go to the home page of a national hotel chain. Evaluate the hotel chain's reservation booking system from a legal perspective. Address specifically the concept of consideration.
4. You are the general manager of a midsized hotel. Draft a memo for your front desk staff describing the rationale and policy for billing guests with a confirmed reservation who do not arrive at the hotel to use their rooms.
5. Give a hospitality example that illustrates why it is so important to establish acceptance of an offer prior to the formation of a contract.
6. On a busy weekend, you have forecasted that 10 percent of your dining room reservations will no-show. Create notes that you would use to explain to your reservationist why he or she should continue to book reservations when you are past capacity.

7. Identify at least three essential contract clauses that protect the hotel when contracting to provide space and food products for a large wedding party.
8. You purchased a warranty for your telephone system that provides 24-hour response time from the vendor. Draft a letter to the vendor protesting the breach of contract that resulted when it took three days for you to get service. Remember that your goal is to have a professional relationship with the vendor, as well as a working telephone system.

▶ TEAM ACTIVITY

With your team, obtain a copy of a group meeting contract from a hotel in your area. Identify the following clauses in the contract:

Indemnification
Oral modification
Acts of nature
Guarantees (attrition)
Changes, additions, and modifications
Liquor liability
Americans with Disabilities Act (ADA)
Ownership
Duty to mitigate damages
Termination
Construction and remodeling
Service fees versus gratuities

If you cannot find one or more of these clauses, is the contract deficient? Why or why not?

Chapter 3

Hospitality Operating Structures

"Thanks for meeting with me," said Chris Joseph.

"When Professor Laskee suggested I call you, I wasn't sure if you would find time for me. You sure have a nice-looking hotel!"

"Thank you," said Trisha Sangus, general manager of the property. "I always liked Professor Laskee. He was one of my favorites. I learned a lot from him. Anything I can do for him is truly my pleasure. How can I help you?"

"Well," Chris replied earnestly, "I want to start my own restaurant!"

"Great!" replied Trisha. "How can I help?"

"I have some questions," Chris replied. "Do you think it is better to do this all on my own or to have partners? And can you give me any tips on securing funds? I don't have enough money to do it all by myself. I have some capital, but probably not enough to do the entire project. I do have some friends and family who can help. Also, I have been thinking about an independent place, but maybe a franchise makes more sense for my first restaurant. What do you think?"

"Time out," said Trisha with a smile. "First things first. I think it's wonderful that you want your own place. Owning a restaurant can be one of the most rewarding things you will ever do. I admire your enthusiasm. If you truly love serving people, and enjoy hard, work you'll make it!"

"I know I will," replied Chris.

"That's great. Confidence is important," said Trisha. "But let me ask you, have you considered the possibilities in structuring your business?"

"What do you mean, 'structuring'?" asked Chris.

"Well, let's look at your first question: to have a partner or go it alone. Your decision will be affected by how you like to work and the amount of control you want to retain, but it will also affect how much freedom you have should you decide to sell the business. An accountant can help advise you there, but you should know your options."

"Okay," said Chris. "I'll look into that. What about incorporating? Is that a good idea? For liability, I mean."

"Incorporating can reduce your personal liability if things don't work out, but there are other ways to do that, as well, and some of them are less expensive. But they do have limitations. An attorney can help you there, too; but again, you should understand your options."

"How about taxes?" asked Chris. "Are there differences there? I'd want to put most of the restaurant's earnings back in the business, at least for the first few years."

"Reinvesting in your business is smart," said Trisha, "and you are right to consider taxation. The type of organizational structure you select will definitely affect your tax rates."

"Wow," said Chris. "Selling, liability, taxes . . . what else is affected by the structure I choose?"

"Capital," replied Trisha. " Most people have to raise or borrow money to start their businesses."

"That would be me!" said Chris with a laugh.

"That's okay," said Trisha. "I don't know of a successful business person who has zero debt. It isn't what you owe; it's your ability to repay. And creditors will look at your business structure to determine, in part, how likely you will be able to repay."

"Will franchisors look at that, too?" asked Chris.

"Absolutely," replied Trisha. "Look, Chris, you want to make your own place happen. You can do it. But let me give you some reading material, then let's get together again next week. Sound good?"

"Sounds great," replied Chris. "I want to do this right, and I really appreciate your experience, and your willingness to help."

"Just remember," said Trisha with a smile, "free advisors always get a good table!"

"You got it," said Chris. "The best in the house."

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. The various organizational business structures used in the hospitality industry.
2. Some advantages and disadvantages of alternative organizational structures.
3. The responsibilities and obligations created by an agency relationship.
4. The unique business relationship involved in franchising.
5. How franchise agreements affect the purchase, operation, and sale of a franchised hospitality operation.

3.1 THE IMPORTANCE OF PROPER ORGANIZATIONAL STRUCTURE

One of the most appealing aspects of the hospitality industry is the opportunity for owning your own business. Whether they are interested in owning restaurants or hotels, one establishment or a whole chain, self-ownership is a strong factor in many people's excitement about the field of hospitality.

When individual entrepreneurs elect to start their own business, they face a variety of decisions about location, product offerings, and financing, to name but a few. An extremely important decision, and one that will affect the future success or failure of the business, is that of organizational structure.

Organizational structure refers to the legal formation of the business entity. This legal formation is important because the courts and governments treat businesses and their owners differently, based on their organizational structure. Therefore, it is important to choose a structure that works to the advantage of both the business and its owner.

Consider the case of John Graves, an individual who, after years of working for a national restaurant chain, wishes to open his own restaurant. Depending on the type of organizational structure John selects, the income tax he must pay on profits will vary considerably. In addition, the limits of his personal liability for the debts of his business will be influenced by the organizational structure he decides on.

Banks and other sources of capital may make decisions on the worthiness of investing in a business venture based on the organizational structure. Equally as important, an individual's ability to sell or transfer ownership of the business will be altered by the organizational structure selected. A variety of organizational structures are available to the entrepreneur. The most common ones are discussed in the following section.

3.2 COMMON HOSPITALITY ORGANIZATIONAL STRUCTURES

Sole Proprietorship

▶ **LEGALESE**

Sole proprietorship: A business organization in which one person owns and, often, operates the business.

A **sole proprietorship** is the simplest of all organizational structures. In this structure, a single individual owns all of the business and is responsible for all of its debts. The majority of small businesses in the United States are sole proprietorships. Examples in the field of hospitality could include a local hamburger stand, a doughnut shop, or perhaps a small bed and breakfast. In a sole proprietorship, the personal assets of the owner can be used to pay any losses, taxes, or damages resulting from lawsuits against the business. There is no personal protection from any of the risks associated with owning a business. Put another way, the sole proprietor has unlimited liability for the indebtedness of his or her business.

Profits in a sole proprietorship are taxed at the same rate as the owner's personal income tax. Each year, the owner files a tax return listing the proprietorship's income and expenses. Any profit or loss is reported on the individual owner's tax return. If the owner has income not directly related to the business, losses from the business can be used to reduce the overall amount of income subject to taxation.

Should the owner of a sole proprietorship wish to sell the business or pass his or her ownership rights on to others, he or she is free to do so.

Sole proprietorships can be started simply by opening a bank account to keep track of the business's income and expenses. Because the owner will have unlimited liability, lenders to a sole proprietorship evaluate the financial position of the owner carefully before providing capital to the business.

If the owner of a sole proprietorship is operating under an "assumed name," a name other than his or her own, an assumed-name certificate should be filed with the local government. Thus, if David Daniels began operating a diner and called it Davey's Diner, the term Davey's Diner would be the tradename. Accordingly, the assumed-name certificate filed with the local government would let anyone know that when they do business with Davey's Diner, they are actually doing business with David Daniels, or, put another way, they are doing business with David Daniels *dba* (doing business as) Davey's Diner.

Any entity operating under an assumed name—not just sole proprietorships—should file a certificate disclosing the ownership and ownership structure of the operation. In many states, filing this certificate is required by law.

General Partnership

▶ **LEGALESE**
General partnership: A business organization in which two or more owners agree to share the profits of the business, but are also jointly and severally liable for its debts.

A **general partnership** is similar to a sole proprietorship, except that it consists of two or more owners who agree to share the responsibility for the operations, financial performance, and liability of the business. Partnerships are formed through oral or written contracts. Generally, these agreements will specify the contributions and responsibilities of each partner, including:

- How much money each partner will contribute to the business.
- How much time each partner will contribute to the business.
- Who will make decisions on how the business is operated.
- How profits will be divided.
- How losses will be shared.
- A procedure for transfer of ownership, if one or more partners wishes to sell his or her portion of the business or becomes unable to participate as a partner.

In hospitality, partnerships are occasionally used to begin small operations; but as the risk of liability increases, the operations are better served by converting to one of the limited liability structures discussed later in the chapter.

As in a sole proprietorship, the partners in a general partnership have unlimited liability for the indebtedness of the business. Additionally, the partners are liable jointly for the partnership's debt; that is, they are liable as partner/owners, but they are also liable severally. This several liability means that, even if the partnership is owned on a 50-50 basis, should one partner be unable to pay his or her portion of the debt, the other partner will be liable for it. If loans are needed to establish the business, the personal assets of each partner will be evaluated by potential lenders. Profits from the business are distributed to the partners and taxed at the same rate as the owners' personal income tax.

Partnership agreements can be simple or complex, but as described in Chapter 2, "Hospitality Contracts," because they are contracts, they are best documented in writing. This is particularly important when addressing the transfer of ownership rights by one or more partners.

Consider the case of Greg Larson and Mike Haley, who have been equal partners for 20 years in a business that operates a ski run and lift for a resort hotel in Wisconsin. This year, at age 50, Greg would like to sell his portion of the partnership to his daughter. If there were nothing in the partnership agreement prohibiting such a sale, Greg would be free to transfer his half of the business to his daughter. If, however, there is language in the partnership agreement that allows the remaining partner the right of first refusal, Mike would be able to purchase the other half of the business himself, should he so desire, before Greg has the right to sell it to anyone else.

Limited Partnership (LP)

▶ **LEGALESE**
Limited partnership: A business organization with two classes of owners. The limited partner invests in the business, but may not exercise control over its operation, in return for protection from liability. The general or managing partner assumes full control of the business operation, but can also be held liable for any debts the operation incurs.

▶ **LEGALESE**
Limited partner: The entity in a limited partnership relationship who is liable only to the extent of his or her investment. Limited partners have no right to manage the partnership.

▶ **LEGALESE**
General (or managing) partner: The entity in a limited partnership relationship who makes the management decisions and can be held responsible for all debts and legal claims against the business.

While a sole proprietorship has only one owner, and a general partnership may consist of several owners, a **limited partnership** (LP) consists of two classes of owners: the **limited partner** and the **general or managing partner**. The limited partner is simply someone who invests money in the partnership. The general partner may or may not be an investor, but serves as the business's operating and financial manager.

Many successful hotel chains began as limited partnerships. A limited partnership is so named because of the "limits" it places on each class of partner's

liability. As a general rule, liability will be limited if a partner is not directly involved in the day-to-day managerial decision making of the business. The legal principle involved is one of control. A general partner exercises control over day-to-day operations, but as a result bears unlimited liability for any debts or damages incurred by the business. A limited partner risks only his or her investment in the business, but must give up the control of that investment in exchange for a limited amount of liability. In fact, if a limited partner becomes actively involved in the business's managerial decision making, the state may revoke the limited partnership's protected status, which would then subject all of the limited partners to potential unlimited liability for the debts of the business.

The taxation on the profits of a limited partnership is similar to the taxation requirements of general partnerships. The profits are distributed to the partners and taxed at the same rate as the owner's personal income tax.

The limited partnership is a special type of business arrangement provided for by state law. Most states require specific forms to be filed with the secretary of state or some other government official in order for a business to be granted limited partnership status. A limited partnership is closely regulated by the state in which it operates, and it is the state that permits limited partners to invest in a business and be exempt from a large share of the liability should the business fail. Most states require a written limited partnership agreement to be filed as well. Even in a state where it is not required, it is a good idea to have an attorney draw up an agreement prior to the start-up of the business.

ANALYZE THE SITUATION 3.1

Nicholas Kostanty formed a limited partnership with his father-in-law, Ray Sweeney, to open an upscale French restaurant in a midwestern town. Mr. Kostanty was the general partner and owned 75 percent of the business. Mr. Sweeney, with 25 percent ownership, was the limited partner and invested $100,000. After one year, difficulties in the restaurant's operation caused business to drop off, and Mr. Kostanty called Mr. Sweeney for advice.

After hearing of the difficulties, and concerned with the security of his investment, Mr. Sweeney traveled from Arizona to Indiana to visit the operation. Upon observing the operation for two days, the two partners decided to launch a large and expensive television ad campaign to increase flagging sales. Mr. Sweeney designed the campaign with the help of Seelhoff Advertising and Video, a local advertising agency specializing in television commercials.

Despite an immediate increase in sales, over time, volume continued to decline, and finally, three months after the ad campaign was launched, the restaurant closed its doors. Total debts at the time the restaurant closed equaled $400,000, with assets of the partnership totaling only $200,000. Included in the debt was $150,000 owed to the advertising agency. The agency sought payment directly from Mr. Sweeney. Mr. Sweeney, claiming that his liability was limited to the $100,000 he had previously invested in the business, refused to pay any additional money. The Seelhoff Advertising Agency sued the limited partnership, as well as Nicholas Kostanty and Ray Sweeney individually.

1. By hiring the advertising agency, did Mr. Sweeney forfeit his limited partner status?
2. Is Mr. Sweeney liable for the outstanding debts of the limited partnership?

C Corporation

A **C corporation**, often referred to simply as a **corporation**, is formed when groups of individuals elect to band together to achieve a common purpose. The corporation has an identity separate from that of its individual owners. A corporation is empowered with legal rights that are usually reserved only for individuals, such as the right to sue and be sued, own property, hire employees, or loan and borrow money. Corporations are different from sole proprietorships or partnerships in that it is the corporation itself, rather than the individual owners,

▶ **LEGALESE**

Corporation: A group of individuals granted a charter, legally recognizing them as a separate entity with rights and liabilities distinct from those of its members.

that is liable for any debts incurred. This is a powerful advantage. Accordingly, as an operation becomes more complex, and the risk of liability becomes greater, incorporating becomes a sound business practice. Today, many of the major hotel and restaurant companies are incorporated (e.g., The Hilton Corporation).

The owners of a corporation are called shareholders because they own "shares" of the business. Legally, shareholders have the power to determine a corporation's direction and the way it is managed. In reality, though, shareholders may have little influence on the way a corporation is run. Shareholders elect directors who oversee the business and hire managers for day-to-day operations (many of these directors and managers may be shareholders themselves). A shareholder is not liable for the debts or other obligations of the corporation, except to the extent of any commitment that was made to buy its shares. Shareholders also have a right to participate in any residual assets of the corporation if it is ever dissolved, once all liabilities have been paid off.

A C corporation gets its name from Chapter C of the United States Internal Revenue Code (IRC). Although C corporations eliminate individual liability, they also have a significant disadvantage. Profits from a C corporation are taxed twice. The first tax is levied on the profits the corporation makes. After those taxes are paid, the after-tax profits are distributed to the corporation's shareholders in the form of **dividends**. The individual owners are then required to pay taxes on those dividends. It is important to note that the corporation must pay taxes on its profits even if the profits are not distributed to the corporation's owners.

▶ **LEGALESE**

Dividend: A portion of profits received by a shareholder, usually in relation to his or her ownership of a corporation.

Corporations are taxed at differing rates from that of individuals, and the taxes they pay may be affected by special rules that allow certain business expenses to be deducted from revenues prior to establishing the corporation's taxable income.

Consider the case of Michelle Rogen, an entrepreneur who wishes to establish a company providing part-time security guards for restaurants and nightclubs. Ms. Rogen has an inheritance of $1 million that she holds in her name in various bank accounts. She would like to use $100,000 of her funds to begin her business. Because of her concern for potential liability, Ms. Rogen selects her business structure carefully. A sole proprietorship or a general partnership would not provide any liability protection for her. A limited partnership would also be ineffective because Ms. Rogen, as the business manager, would have to take on the general partner's role, and thus her liability would still be unlimited.

Ms. Rogen selects a C corporation structure, which will limit her liability to only the assets of the corporation. If the company is successful, however, it will pay a corporate tax (at a higher rate than Ms. Rogen would have to pay as an individual on those profits), then Ms. Rogen must pay her own individual tax on any profits she removes from the business. This double taxation is a powerful disadvantage of the C corporation structure.

Corporations are ordinarily more costly to establish and administer than sole proprietorships and general partnerships, but their ability to limit liability makes them very popular. To establish a corporation, the officers of the business must file "articles of incorporation" with either the secretary of state or a corporate registrar's office in the state in which the business will be incorporated. These articles will disclose the officers and board of directors of the corporation, as well as the number of shares the company is authorized to sell initially.

S Corporation

▶ **LEGALESE**

S corporation: A type of business entity that offers liability protection to its owners, and is exempt from corporate taxation on its profits. Some restrictions limit the circumstances under which it can be formed.

There is a type of corporation that avoids the double taxation inherent in a C corporation. This is known as an **S corporation**, and it also gets its name from the tax code. An S corporation is also known as a subchapter S corporation.

The S corporation format makes good sense for many hospitality businesses, such as family-owned operations. The requirements for establishing and maintaining an S corporation status include:

- A limit of no more than 35 shareholders.
- Issuance of only one class of stock.
- All shareholders must be U.S. citizens.
- All shareholders must be individuals, rather than corporations.
- The S corporation must operate on a calendar-year financial basis.

An S corporation provides the same liability protection offered by a C corporation, but must be established with the agreement of all shareholders. This is done by filing a form with the Internal Revenue Service that has been signed by all of the corporation's shareholders, to signify their agreement to elect S status.

In an S corporation, any profits from the business are distributed directly to the shareholders in proportion to their ownership of the corporation. The profits are reported on the individual owners' tax returns, and are taxed at the individuals' taxable rates, which is similar to the favorable taxation treatment of a partnership; however, shareholders also receive the liability protection of a corporation.

It is important to remember that income from an S corporation is taxable even if it is not distributed to the shareholders. For example, two brothers open a microbrewery and select the S corporation structure. Profits from the bar in the first year are $50,000. The brothers decide they want to use all of the profits from the first year to expand their marketing efforts in the second year. However, the brothers still must pay individual taxes on the first year's profits in proportion to their ownership in the S corporation.

In addition to filing the S election form with the federal government, in some instances, the state government also requires notification. Some states do not recognize the S corporation for state income tax purposes, but do recognize it for liability purposes. Generally speaking, the restrictions on an S corporation make it most suitable for smaller companies, especially those in which the owners are also the employees and managers.

Limited Liability Company (LLC)

The **limited liability company** (LLC) is a form of corporation created under state law. To fully understand the LLC, let's first recall the disadvantages of the business structures examined so far. If someone starting a new business chooses to establish it as a partnership, it is taxed only once, but obligates the owners to part or all of the liability. A corporation offers liability protection, but features double taxation and complex administrative regulations. An S corporation could be selected to avoid double taxation, but the restrictions on an S corporation can be significant. A limited partnership also avoids double taxation, but the liability of the general partner is unlimited.

▶ **LEGALESE**

Limited liability company (LLC): A type of business organization that protects the owners from liability for debts incurred by the business, without the need for some of the formal incorporation requirements. The federal government does not tax the profits of LLCs; however, some states do, while others do not.

The limited liability company is a fairly new type of entity, created by some states to combine the best features of a corporation with the simplicity of a partnership. Under the typical LLC statute, the members (similar to shareholders in a corporation, or partners in a partnership) are all protected from the company's debts, unless they undertake personal responsibility for a debt, such as a loan for the business. Thus, a member can serve as the company's owner or manager, yet still protect his or her personal assets from liability.

The LLC is governed by an operating agreement, which is similar to a partnership agreement. It sets the rules for managing the company, as well as the rights and responsibilities of the members.

If formed properly, the Internal Revenue Service will treat the LLC as a partnership for tax purposes; thus, there is no double taxation. However, in some states, the LLC will have to pay state income taxes on its profits. If the LLC is not formed properly or within the guidelines established by the state in which it does business, the IRS may consider the LLC to be a corporation for tax purposes.

Depending on the state in which it does business, the LLC may have to pay a filing fee or an annual registration fee. The LLC has become the preferred type of organizational structure in the hospitality industry particularly for independent operators and franchisees. Its characteristics and advantages are well suited for hospitality operators who are able to elect such a structure.

Like all organizational structures, the limited liability company should be selected only after seeking the advice of a business attorney and tax advisor.

Another entity is available in most states. Known as the limited liability partnership (LLP), it provides limited liability for its partners, as well as retaining the tax advantages of a general partnership. However, this particular entity is more often used for professional partnerships, such as doctors, lawyers, or engineers, rather than for individuals seeking to enter into a general business operation.

Figure 3.1 summarizes the important differences among the types of organizational structure we have looked at.

The Agency Relationship

Sole proprietorships, partnerships, and corporations are all subject to the federal and state laws governing employer-employee relationships. However, the conduct of employees will directly affect the liability (or potential liability) of a business. Hospitality owners need to keep these employee relationships in mind when deciding on an organizational structure for their business, and choose a structure that will best allow them to absorb any liabilities incurred by the employees of the organization.

In the United States, regardless of the organizational structure selected, the relationship between businesses and their hired help usually takes the form of one of three concepts:

Master-servant
Agent-principal
Independent contractor

Figure 3.2 summarizes the characteristics of each relationship. Returning to the previous example of John Graves, the man who wanted to begin his own restaurant, we can observe these relationships and the special rights and responsibilities they involve. It is highly unlikely that John will be able to operate his new restaurant entirely by himself. John would more than likely need to hire bartenders, waitstaff, and kitchen help. When he hires people to fill these positions, he is creating a master-servant relationship: John is the master and his employees are the servants. Traditionally, in the law, the term servant was used to describe employees who performed manual labor. They were not generally in a position to act and/or make decisions on behalf of the master or employer when dealing with third parties. The master-servant relationship implies that the employee is under the direct control of the employer; and since the employers are presumed to be in control of their employees, employers are generally held responsible for the behavior of the employees when they are working.

John may also hire someone to act as his general manager. In this instance, some of the general manager's work may be under the direct control of John, but the general manager may also be empowered to make decisions on behalf of the restaurant and to enter into contracts on behalf of the restaurant. When employees act on behalf of the principal, they are usually referred to as **agents** of the principal. Agents also have a duty to act in the best interests of the principal. In this instance, the agent would be the general manager, and the principal would be John and/or the restaurant business.

▶ **LEGALESE**

Agent: A person authorized to act for or to represent another, usually referred to as the principal.

As you can see, the distinction between the agent-principal relationship and the master-servant is often blurred. As empowerment becomes more widespread

	Sole Proprietorships
Liability	Owner has unlimited liability.
Tax Liability	Owner pays.
Tax Rate	Individual rate.
To Transfer Ownership	No restrictions.
	General Partnerships
Liability	Partners are liable.
Tax Liability	Partners pay, even if profits are not distributed.
Tax Rate	Individual rate.
To Transfer Ownership	Per partnership agreement.
	Limited Partnerships (LP)
Liability	General partner has unlimited liability; limited partners are liable only to extent of investment.
Tax Liability	Partners pay, even if profits are not distributed.
Tax Rate	Individual rate.
To Transfer Ownership	Per limited partnership agreement.
	C Corporations
Liability	Shareholders protected from personal liability.
Tax Liability	Corporation taxed on profits. Shareholders taxed on dividends.
Tax Rate	Corporate rate on profits, individual rate on dividends.
To Transfer Ownership	Shares are transferable, but can be restricted in some cases.
	S Corporations
Liability	Shareholders protected from personal liability.
Tax Liability	Shareholders pay, even if profits are not distributed.
Tax Rate	Individual rate.
To Transfer Ownership	Limitations covered in shareholders' agreement.
	Limited Liability Companies (LLC)
Liability	Members protected from personal liability.
Tax Liability	Members pay, even if profits are not distributed.
Tax Rate	Individual rate.
To Transfer Ownership	May require consent of all members, unless organizational agreement states otherwise.

Figure 3.1 Organizational summary chart.

Relationship	Characteristics
Master-servant	Also known as the employer-employee relationship, where the servant is the employee whose performance is controlled by the employer.
Agent-principal	An agent is empowered to act on behalf of or for the principal, with some degree of personal discretion, and the principal is ordinarily responsible for the conduct and obligations undertaken by the agent.
Employer-independent contractor	The employer has very little control, if any, over the conduct of the independent contractor; accordingly, the independent contractor is not an employee and usually not an agent (however, one could hire an independent contractor specifically to be an agent, such as a real estate agent or an attorney).

Figure 3.2 Three types of employer-employee relationships.

in hospitality workplaces, this distinction may fade altogether. Servants who are given more discretion and more authority will be more frequently categorized as agents. The distinction becomes important, however, when you are trying to assess the responsibility of the employer for the acts of the employee. For example, suppose a restaurant customer becomes violently ill from food poisoning that is later linked to unsanitary practices by a kitchen employee in John's restaurant. In a master-servant relationship, John would be held legally responsible for the guest's injuries under the concept of **respondeat superior**. However, it would be very rare for a court to hold John responsible if that kitchen employee made any contracts or promises on behalf of the restaurant with third parties.

▶ **LEGALESE**

Respondeat superior: Literally; "let the master respond," a legal theory that holds the employer (master) responsible for the acts of the employee.

The servant in the master-servant relationship does not have the ability to speak on behalf of John or the restaurant. But in the agent-principal relationship, the principal is ordinarily responsible for the behavior of the agent, as well as for any promises or obligations undertaken by the agent on behalf of John or the restaurant. Thus, if the general manager of the restaurant (the agent) enters into a long-term contract to purchase meat from a purveyor, John and the restaurant will be responsible for fulfilling the obligations undertaken by the contract (assuming that the contract is in proper form, as discussed in Chapter 2, "Hospitality Contracts").

Accordingly, it is very important that hospitality operators carefully select and train their employees. If you, as a hospitality manager, are responsible for hiring employees who will represent or make decisions on behalf of the operation, you must trust the decision-making capability of those individuals, as well as their integrity to act in the best interests of the operation when they are making decisions and/or entering into contracts. In Chapters 7, "Legally Selecting Employees," and 8, "Legally Managing Employees," you will learn how to properly select and manage employees under current federal and state employment laws, and see some ways that you can minimize the risk of liability by using effective employee selection and training techniques.

Back to John. From time to time, he may also need to hire individuals or other companies to come in and perform specialized tasks that are outside the day-to-day operations of his restaurant. For instance, he may need to repaint the exterior walls of the building that houses the restaurant. John could hire an indi-

- Degree of control or direction over the worker: The greater control, the higher probability that is an employer-employee relationship.
- The workers' investment in the enterprises: Does the worker provide his or her own tools and materials, or are they provided by the employer? If provided by the worker, that is evidence of an independent contractor.
- Opportunity for profit and loss: Employees are ordinarily guaranteed a wage, whereas an independent contractor, such as a painter, usually bids a job for a set amount and then has to perform the job efficiently to make a profit.
- Permanency of the work relationship: Most employees have a permanent, consistent relationship, full- or part-time with one employer; independent contractors work with many different employers and usually on a random basis.
- Are the workers' services an integral part of the employer's operation? A plumber that comes in every few months is not an integral component of the day-to-day operations; dishwashers, servers, front desk clerks, housekeepers are integral components.

Figure 3.3 Methods of assessing employer liability.

vidual painter or a company that provides painting services. This type of relationship would represent the **independent contractor** description.

▶ **LEGALESE**

Independent contractor: A person or entity that contracts with another to perform a particular task, but whose work is not directed or controlled by the hiring party.

Usually, employers are not liable for the behavior of independent contractors, and independent contractors cannot ordinarily bind employers to obligations that they have made. The general rule is that the more control that the worker retains, the more likely that the worker will be characterized as an independent contractor. Figure 3.3 displays some of the characteristics utilized by courts and government agencies to help determine whether the relationship is one of an employer-employee (master-servant) or that of an employer-independent contractor.

Chapters 9 through 12 examine the different types of circumstances under which hospitality operations may be held liable in a court of law, and identify some preventive measures that managers can take to minimize the risk of litigation. While we strive throughout this book to emphasize managerial practices that will promote safe and legal operations (and prevent the possibility of a lawsuit), accidents or misunderstandings will invariably occur, and at those times, a well-chosen organizational structure may provide the hospitality owner with a degree of protection against liability.

3.3 THE HOSPITALITY FRANCHISE

Regardless of the organizational structure selected, there are essentially two alternatives available to those who want to own a restaurant or hotel. They can elect to compete in the hospitality marketplace as an independent operation or as a **franchise**. Each approach has its strengths and limitations. An independent operator has complete freedom to implement any policies, procedures, and products he or she feels is appropriate. Drawbacks include the possible insufficiency of marketing clout or public recognition, reduced purchasing power, and a lack of operational support (something that owners without a lot of experience may find valuable or necessary).

▶ **LEGALESE**

Franchise: A contract between a parent company (franchisor) and an operating company (franchisee) to allow the franchisee to run a business with the brand name of the parent company, as long as the terms of the contract concerning methods of operation are followed.

According to the International Franchise Association, a franchise exists when one party allows another to use its name, logo, and system of business to generate sales and profits. One of the earliest franchisors was the Singer Sewing Machine Company, which set up dealers shortly after the Civil War to sell and repair its sewing machines. McDonald's is a present-day example of how, without tremendous personal wealth, an entrepreneur named Ray Kroc could take an idea and quickly spread it coast to coast. Many companies turn to franchising as a system for expansion because they can do so rapidly with a minimum amount

of capital and with the assistance of top-notch operators. However, in return, the company must be willing to share its revenues with those operators.

ANALYZE THE SITUATION 3.2

After five years of effort, you develop a unique style of roasting pork that is extremely popular in your hometown. You own and operate five units called Porkies that sell this product. Each unit costs $175,000 to develop. Total sales of each unit average $600,000, with a net profit margin of 10 percent per unit.

A friend of yours discusses your success with you and suggests the possibility of opening five new stores in his or her hometown. Your friend wants to know what you would charge to sell your recipe and your standard operating procedure (SOP) manual, as well as the use of the name Porkies.

1. How would you determine a fair price for your experience?
2. If your friend is successful, causing the name of Porkies to be even better known, thus resulting in greater demand for franchises, should your friend share in future revenue form franchise sales?
3. What are the ethical issues at play here?

If an owner elects to operate a franchise, he or she can gain the marketing support of an established trademarked name; credibility with potential investors, lenders, customers, and vendors; and, in many cases, assistance with operational problems that are encountered. Of course, these advantages come with a price. Typically, the franchisor will charge the franchisee an initial fee, plus a percentage of gross revenue. In addition, both parties will sign a franchise agreement, which outlines the duties and responsibilities of both the franchisor and franchisee. This is often referred to as a **licensing agreement**, because the franchise company (**licensor**) is granting the right, or **license**, to operate as one of its franchisees (**licensee**).

▶ **LEGALESE**
Licensing agreement: A legal document that details the specifics of a license.

▶ **LEGALESE**
Licensor: One who grants a license.

▶ **LEGALESE**
License: Legal permission to do a certain thing or operate in a certain way.

▶ **LEGALESE**
Licensee: One who is granted a license.

▶ **LEGALESE**
Disclosure: To reveal fully and honestly.

Franchisors advertise their franchising opportunities in the hospitality trade press, as well on the World Wide Web, and provide details on the relationship they are offering after a potential franchisee responds to a solicitation.

Franchise Disclosure

Evaluating and purchasing a franchise is a very complex undertaking. This can be made even more difficult if the companies selling franchises are not open and honest in the description of their offerings. In the past, some franchisors were fraudulent or deceptive in their claims. Because of this, regulations and laws have been enacted that specify **disclosure** requirements that franchisors must follow when describing their product offerings (see Figure 3.4).

The Franchise Rule

The Federal Trade Commission (FTC), through its mandate to regulate unfair or deceptive trade practices, is the government agency assigned the task of regulating the offering of franchises. To do so, the FTC requires all franchisors to supply information that it feels is necessary for a potential franchisee to make an informed buying decision. (The types of information that franchisors must disclose will be discussed later in this section.) It is important to note that while the FTC requires that certain information be disclosed, it does not verify the accuracy of that information. Figure 3.5 is a statement from the FTC that must be prominently displayed on the cover or first page of a disclosure document, which the franchisor is required to supply to anyone considering purchasing a franchise.

Crystal's Coneys and Chips

The International Franchise Leader in Coney Dogs and Fries

Crystal's Coneys and Chips is the worldwide segment leader in take-out Coney dogs and freshly made French fries (chips). There's a good reason why. Our franchisees realize that the support, training, and marketing assistance available through Crystal's Coneys and Chips (CC&C) ensure them the highest possible return on investment. It's true in Frankfort, Kentucky, as well as Frankfurt, Germany!

America and the world love Coney dogs and chips. At CC&C we have developed the very best recipes for both of these popular items. This means strong customer counts and strong revenues. Strong revenues mean a strong bottom line, and that's why our franchisee retention rate is second to none in the industry.

Ninety percent of our 500-plus stores are franchisee-owned and -operated. CC&C operates only 10 percent of them. That's why we know that listening to you, not competing with you, makes us both successful.

We can assist in site selection, financing, and start-up. Our franchise fees and start-up costs are low. If you are serious about your future in the Coney dog and chips market, e-mail Maureen Pennycuff, international director of franchise sales at *mpennycuff@cc&c.com,* or visit our Web site at

www.cc&c.com

This is the one franchise opportunity that you can't afford to miss!

Figure 3.4 Fictional representation of the type and style of information typically placed in an advertisement for a franchise that would be found in the hospitality trade press.

In the mid-1970s, the FTC developed a document titled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," which took effect on October 21, 1979. Commonly known as the Franchise Rule, it establishes detailed disclosure requirements for franchisors. Figure 3.6 is an excerpt from the FTC Franchise Rule. Note the very specific information it requires franchisors to disclose.

Federal Trade Commission Warning Statement

To protect you, we've required your franchisor to give you this information. *We haven't checked it and don't know if it's correct.* It should help you to make up your mind. Study it carefully. While it includes some information about your contract, don't rely on it alone to understand your contract. Read all of your contract carefully. Buying a franchise is a complicated investment. Take your time to decide. If possible, show your contract and this information to an advisor like a lawyer or an accountant. If you find anything you think may be wrong or anything important that's been left out, you should let us know about it. It may be against the law.

There may also be laws on franchising in your state. Ask your state agencies about them.

Figure 3.5 Franchisee warning statement.

FTC Franchise Rule [Excerpt]

Title 16—Commercial Practices; Revised as of January 1, 1986

CHAPTER I—FEDERAL TRADE COMMISSION

SUBCHAPTER D—TRADE REGULATION RULES

PART 436—DISCLOSURE REQUIREMENTS AND PROHIBITIONS CONCERNING FRANCHISING AND BUSINESS OPPORTUNITY VENTURES

16 CFR 436.1

In connection with the advertising, offering, licensing, contracting, sale, or other promotion in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any franchise, or any relationship which is represented either orally or in writing to be a franchise, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for any franchisor or franchise broker:

(a) To fail to furnish any prospective franchisee with the following information accurately, clearly, and concisely stated, in a legible, written document at the earlier of the "time for making of disclosures" or the first "personal meeting":

(1)

(i) The official name and address and principal place of business of the franchisor, and of the parent firm or holding company of the franchisor, if any;

(ii) The name under which the franchisor is doing or intends to do business; and

(iii) The trademarks, trade names, service marks, advertising or other commercial symbols (hereinafter collectively referred to as "marks") which identify the goods, commodities, or services to be offered, sold, or distributed by the prospective franchisee, or under which the prospective franchisee will be operating.

(2) The business experience during the past 5 years, stated individually, of each of the franchisor's current directors and executive officers (including, and hereinafter to include, the chief executive and chief operating officer, financial, franchise marketing, training and service officers). With regard to each person listed, those persons' principal occupations and employers must be included.

(3) The business experience of the franchisor and the franchisor's parent firm (if any), including the length of time each:

(i) Has conducted a business of the type to be operated by the franchisee;

(ii) Has offered or sold a franchise for such business;

(iii) Has conducted a business or offered or sold a franchise for a business:

Figure 3.6 FTC Franchise Rule excerpt.

(A) operating under a name using any mark set forth under paragraph (a)(1)(iii) of this section, or

(B) involving the sale, offering, or distribution of goods, commodities, or services which are identified by any mark set forth under paragraph (a)(1)(iii) of this section; and

(iv) Has offered for sale or sold franchises in other lines of business, together with a description of such other lines of business.

(4) A statement disclosing who, if any, of the persons listed in paragraphs (a) (2) and (3) of this section:

(i) Has, at any time during the previous seven fiscal years, been convicted of a felony or pleaded nolo contendere to a felony charge if the felony involved fraud (including violation of any franchise law, or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade;

(ii) Has, at any time during the previous seven fiscal years, been held liable in a civil action resulting in a final judgment or has settled out of court any civil action or is a party to any civil action:

(A) involving allegations of fraud (including violation of any franchise law, or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade, or

(B) which was brought by a present or former franchisee or franchisees and which involves or involved the franchise relationship; Provided, however, That only material individual civil actions need be so listed pursuant to this paragraph (4)(ii), including any group of civil actions which, irrespective of the materiality of any single such action, in the aggregate is material;

(iii) Is subject to any currently effective State or Federal agency or court injunctive or restrictive order, or is a party to a proceeding currently pending in which such order is sought, relating to or affecting franchise activities or the franchisor-franchisee relationship, or involving fraud (including violation of any franchise law, or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade.

Such statement shall set forth the identity and location of the court or agency; the date of conviction, judgment, or decision; the penalty imposed; the damages assessed; the terms of settlement or the terms of the order; and the date, nature, and issuer of each such order or ruling. A franchisor may include a summary opinion of counsel as to any pending litigation, but only if counsel's consent to the use of such opinion is included in the disclosure statement.

(5) A statement disclosing who, if any, of the persons listed in paragraphs (a) (2) and (3) of this section at any time during the previous 7 fiscal years has:

(i) Filed for bankruptcy;

(ii) Been adjudged bankrupt;

(iii) Been reorganized due to insolvency; or

(iv) Been a principal, director, executive officer, or partner of any other person that has so filed or was so adjudged or reorganized, during or within 1 year after the period that such person held such position in such other person. If so, the name and location of the person having so filed, or having been so adjudged or reorganized, the date thereof, and any other material facts relating thereto, shall be set forth . . .

The Rule is a trade regulation rule with the full force and effect of federal law. The courts have held it may only be enforced by the FTC, not private parties. The FTC may seek injunctions, civil penalties and consumer redress for violations.

The Rule is designed to enable potential franchisees to protect themselves before investing by providing them with information essential to an assessment of the potential risks and benefits, to meaningful comparisons with other investments, and to further investigation of the franchise opportunity.

The Rule, formally titled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," took effect on October 21, 1979, and appears at 16 C.F.R. Part 436.

Figure 3.6 *(Continued)*

◀ SEARCH THE WEB 3.1 ▶

Log on to the Internet and enter **www.ftc.gov**.

1. Select: Business Guidance.
2. Select: Franchise and Business Opportunities.
3. Select: Franchise Rule Text.
4. Read the entire FTC Franchise Rule (16 CFR Part 436), to familiarize yourself with its requirements, then write a one-page bulleted summary of the rule.

Essentially, the Franchise Rule imposes six different requirements in connection with the "advertising, offering, licensing, contracting, sale, or other promotion" of a franchise.

- **Basic Disclosures:** Franchisors are required to give potential investors a basic disclosure document at the earlier of the first face-to-face meeting or 10 business days before any money is paid or an agreement is signed in connection with the investment (Part 436.1(a)).
- **Earnings Claims:** If franchisors make earnings claims, whether historical or forecasted, they must have a reasonable basis for those claims, and evidence supporting the claims must be given to potential investors in writing at the same time as the basic disclosures (Parts 436.1(b)-(d)).
- **Advertised Claims:** The rule affects only promotional ads that include an earnings claim. Such ads must disclose the number and percentage of existing franchisees that have achieved the claimed results, along with cautionary language. The use of earnings claims in promotional ads also triggers required compliance with the rule's earnings claim disclosure requirements (Part 436.1(e)).
- **Franchise Agreements:** The franchisor must give investors a copy of its standard-form franchise agreement and related agreements at the same time as the basic disclosures, and final copies intended to be executed at least five business days before signing (Part 436.1(g)).
- **Refunds:** Franchisors are required to make refunds of deposits and initial payments to potential investors, subject to any conditions on refundability stated in the disclosure document (Part 436.1(h)).
- **Contradictory Claims:** While franchisors are permitted to supply investors with any promotional or other materials they wish, no written or oral claims may contradict information provided in the required disclosure document (Part 436.1(f)).

The Franchise Offering Circular

Some states have franchise investment laws that require franchisors to provide presale disclosures, known as franchise offering circulars (FOCs) to potential franchisees. These states treat the sale of a franchise like the sale of a security. They typically prohibit the offer or sale of a franchise within their governance until a company's FOC has been filed of public record with, and registered by, a designated state agency.

Those states with disclosure laws give franchise purchasers important legal rights, including the right to bring private lawsuits for violation of the state disclosure requirements. The FTC keeps a record of those states that require franchisors to provide FOCs. Potential franchise purchasers who reside in states that have these requirements should contact their state franchise law administrators for additional information about the protection these laws provide.

The FOC is a document designed to encourage the purchase of a franchise. These circulars generally will follow a format patterned after the FTC's Franchise

Rule. It is important to remember, however, that the FTC does not verify, as factual, the information contained in a circular. Because this is true, the documents making up the FOC should be read very carefully.

The following information must be included in a FOC. This information is requested by states that require FOCs, in accordance with guidelines established by the FTC. After reading these items, you may realize that these state requirements are almost identical to the FTC's own disclosure requirements in the Franchise Rule.

- A description of the franchisor and the type of license it is offering
- The business experience of the franchise company's owners and/or managers
- Initial fees, continuing fees, and royalties if required
- Initial investment estimates
- The licensee's obligations
- The licensor's obligations
- Policies about the geographic territory protected by the license agreement
- Restrictions on what the licensee may sell and how it may be sold
- Renewal and termination policies
- Transfer of ownership policies
- Claims regarding average earnings or profitability of current franchisees
- Locations of current franchisees
- A sample franchise (license) agreement
- Any information required by a specific state (California, Utah, Maine, etc.)
- The name and address of the legal representative of the franchisor

Additional items may be included based on state law, FTC requirements, and the specific nature of the franchise. Again, it is important to remember that one of the goals of the FOC is to facilitate the selling of franchises. As with any disclosure, those who prepare it should be honest, or they face possible litigation for deception. Similarly, those who read the document for purposes of purchasing a franchise should be prepared to verify, to the greatest degree possible, the information it contains.

Purchasing a Franchise

If, after reviewing the FOC, an owner elects to execute a contract with a franchisor, the two parties will sign a franchise agreement. The franchise agreement is the document that actually regulates the relationship between franchisee and franchisor. It is important to ensure that the information in the circular is consistent with that found in the franchise agreement.

Franchise Agreement The franchise agreement details the rights and responsibilities of both the franchisor and franchisee. The contract document will include detail on the following topics:

License granted
Franchisee responsibilities
Franchisor responsibilities
Proprietary rights
Audit requirements
Indemnification and insurance requirements
Transfer of ownership policies
Termination policies
Renewal options
Relationship of the parties to the contract
Areas of protection
Terms of the agreement (start and stop dates)

The franchise agreement is a critical contract in that it spells out in detail the responsibilities of both the franchisor and franchisee. As such, it should be carefully read and examined by an attorney. For a hospitality manager whose responsibilities include operating a franchise, either as an owner or as an employee hired by the owners, it is imperative that the contract terms be followed. If they are not, the franchisor may have the right to terminate the contract.

Advantages of a Franchise Purchase Whether the decision involves a hotel or restaurant, the purchase of a franchise license will make a tremendous impact on the buyer and seller. Generally, for a price that is competitive with that which would be spent on a new venture, the franchise buyer will obtain a proven concept with local or national name recognition. In addition, operational manuals, training assistance, and national advertising support may be obtained from the franchisor.

Some individuals elect franchising for its stability. Hospitality corporations are often notorious for relocating their employees and downsizing their staff. As a franchise owner, this risk is eliminated. Benefits are also derived when research and development is part of the franchisor's responsibilities. Most small business owners are too busy with day-to-day operations to research industry trends and develop new products or services to meet the needs of their customers.

When the franchise involves a lodging establishment, additional benefits may be available to the franchisee. A major benefit is the lodging facility's ability to participate in a national or international reservation system. Through connection to the Global Distribution System (GDS), a hotel or motel can make its products and prices known to travel agents and meeting planners across the country. While it is possible to link directly to the GDS without the purchase of a franchise, many lodging facility owners find it beneficial to link to the GDS through a franchise affiliation.

Disadvantages of a Franchise Purchase There are also disadvantages associated with purchasing a franchise. While there is no question that consumers often prefer the consistency associated with buying a franchised product or service, the manager of such a facility may be hampered by franchisor rules and regulations that do not take into account local needs and tastes. For example, having grits on a breakfast menu may make tremendous sense for an operation in a southern state, but may make no sense at all for the same type of unit in Wisconsin. If a franchisor is not sensitive to the needs of local clientele, the franchisee may have a difficult time achieving success.

Local conditions can affect more than menu items. In his book *Grinding It Out*, Ray Kroc speaks of the difficulties he encountered persuading the McDonald brothers to allow the modifications he required to adjust his building design from one that was successful in California to one that could survive the frigid winters of Illinois. The best franchisors allow their franchisees to make adjustments for local conditions, while maintaining the integrity of the franchise concept.

Before Signing a Franchise Agreement Because franchisors are generally in a stronger bargaining position than the franchisee, the franchise agreement is often heavily weighted in favor of the franchisor. However, like any contract, the franchise agreement is a negotiable document. Up-front fees or application fees, monthly royalties, areas of protection, required purchases, or renovations to facilities are all contract areas that can be negotiated prior to signing the franchise agreement.

Difficulties and misunderstandings can arise between franchisors and franchisees, even when details are clearly spelled out in the contract. Some of the most glaring areas of tension are centered around specific ways of operating the business, and balancing the needs of the franchisee with those of the franchisor.

In the next section, we will look at some of the most common areas of disagreement between franchisors and franchisees. Before signing a franchise agreement, you should read it carefully to see how it addresses different areas of operation that may affect your ability to run the business or make a profit. Knowing what these problem areas are ahead of time will help you anticipate questions you may want to ask or items you may want to negotiate with a franchisor before signing an agreement.

Operating as a Franchise

Franchisors are challenged by the responsibility of holding all franchisees to the same standards of operation. Consider, for example, the hotel franchisor who determines that, in order to compete effectively, its franchisees should provide in-room coffeemakers in all guestrooms. If this decision is made, it must be communicated and enforced. The question arises as to what should be done about a franchisee who complies with all other operating procedures, but claims it simply cannot afford to add this new guestroom amenity. Should the franchise be terminated? Should it be given an extension of time in which to comply? What about the franchisee who does comply, despite the fact that purchasing coffeemakers for each guestroom will cause the franchisee to face severe financial hardship?

Clearly, franchisors have a responsibility to encourage their franchisees to operate modern, clean, and efficient units. Difficulties can arise, however, when franchisors use their generally greater strength and bargaining power to unfairly influence franchisees. The following are some areas where franchisees and franchisors have reported disagreements:

1. Encroachment/impact.

Franchisors desire growth, whereas franchisees desire profitable units. While these two interests often coincide, sometimes they do not.

Consider the case of the hotel owner who opens a franchise unit from a hotel franchisor. The franchise agreement signed by both parties prohibits the franchisor from granting additional franchises of the same brand in a proximity that will damage the original franchisee. The question arises as to what constitutes damage, and who will make that determination. An unscrupulous franchisor may attempt to make the case that no damage will result from granting competing franchises in a given area, simply to maximize his or her own short-term revenue from franchise fees.

In some cases, franchisors have been known to grant franchises to individuals who develop strong sales in their area, then the franchisors build company-owned units nearby, which compete for clients with their own franchisees. Whether it is a restaurant franchisee concerned about loss of sales due to encroachment by other restaurants, or a lodging franchisee worried about the impact of a new hotel, the granting of additional franchises in an area already served by a franchisee can be cause for litigation. In the hotel industry, this issue has been made even more complex by the segmentation of brands.

ANALYZE THE SITUATION 3.3

In 2000, Robert Thornburg signs a franchise agreement with Starbelt Hotels to operate a full-service hotel under the Starbelt name. His franchise agreement includes a clause that prevents Starbelt from granting additional Starbelt franchises in Mr. Thornburg's market area without an impact study.

In 2005, Starbelt develops a second hotel brand that targets upscale travelers who do not desire the meeting rooms, full-service restaurants, and indoor pools that define the Starbelt

brand. The new hotels are called Moonbelts, and the franchisees who purchase this brand are connected to the same national reservation system as those franchisees in the Starbelt brand. Starbelt maintains a separate 800-number for each brand. However, a guest may book either hotel type with a call to either 800-number. The ADR (average daily rate) brand for a new Moonbelt hotel equals that of the older Starbelt hotels.

In 2010, Mr. Thornburg finds that a franchisor-owned Moonbelt hotel is to be built across the street from his hotel. He protests that many of his customers will find the Moonbelt hotel desirable, and that his franchisor has violated the terms of the franchise agreement by erecting a competing hotel in his territory. Mr. Thornburg requests a copy of the impact study he feels should have been produced by the franchisor. Starbelt Hotels maintains that Mr. Thornburg has protection only against other Starbelt hotels, and since Moonbelt targets a different clientele, no protection exists, nor should an impact study have been performed.

1. Has Starbelt violated the terms of the franchise agreement?
2. What steps might Mr. Thornburg take to protect his business?

Some enlightened franchisors have dealt with the impact/encroachment issue by granting franchisees a geographic territory that cannot be entered by the company or additional franchisees without the original franchisee's consent. The territory granted by the franchisor in this situation is defined by geographic borders written into, or attached to, the franchise agreement.

2. Purchasing requirements.

Franchisors often establish standards for products to be sold or supplies to be used in the operation of the business. In some cases, the product franchised is unique, meaning it can be purchased only from the franchisor. When this is true, it is reasonable for the franchisor to dictate the source of supply.

Problems can arise, however, when franchisors not only dictate product specifications of standard items, but also try to designate "sole source" vendors. In many cases, this practice, called a **tying arrangement**, is a violation of antitrust law.

▶ **LEGALESE**

Tying arrangement: An agreement, often illegal, requiring that, as a precondition of purchasing or obtaining services, other services must be purchased through the seller.

Not all tying arrangements are illegal. It may be appropriate, for example, for a bank to require life insurance before granting a loan to an individual who seeks funds to buy a business. This is legally allowable even though, in this case, the bank is "tying" the granting of a loan to the purchase of life insurance.

Some franchisors come close to violating the tying arrangement prohibition through their use of "preferred vendors." In these cases, franchisors arrange with a vendor to supply a specific product to all franchisees. The vendor may be charged a fee to participate in the preferred vendor program. This fee is kept by the franchisor. Instead of creating a specification that all franchisees must meet, the vendor dictates the supply source. This practice effectively eliminates the possibility of accepting bids from local vendors, which could potentially be lower. The two specifications for carpet in Figure 3.7 clearly illustrate the difference between establishing justifiable specifications and unfairly dictating a supplier. While it is legitimate for franchisors to take reasonable steps to ensure product conformity, the courts have not supported franchisors' efforts to force franchisees into tying arrangements.

3. Operations manual changes.

Before franchisees purchase a franchise, they are free to examine the standard operating procedures (SOP) manual provided by the franchisor. This manual will determine such aspects of the operation as opening and closing times, but also can be very specific with regard to product and service offerings, as well as to guest relations policies. SOP manuals can run into the hundreds of pages, depending upon the control the franchisor wishes to exert.

Legitimate Carpet Standard

1. Tufted construction.
2. Face weight not less than 25 ounces per square yard.
3. Jute or synthetic backing.
4. Fiber-continuous filament nylon or equivalent.
5. Pad a minimum of 6.5-lb. density per square foot for synthetic, or equivalent.

Questionable Standard

Carpet must be of Brand X, Style Y, purchased from vendor outlet Z, at the "special" price approved for franchisees.

Figure 3.7 Carpet specifications.

Figure 3.8 is an example of the specificity that some SOP manuals contain.

Generally, franchisors will require that the franchisee not only agree to follow the SOP manual, but also that they agree to comply with any changes in the manual. Franchise agreement language written into the contract will be stated in a manner similar to the following:

> *Franchisee agrees to comply completely, in all respects, with our requirements concerning the Standard Operating Procedures (SOP) Manual and all other policies and procedures we communicate to you.*

A classic case of change occurred when quick-service restaurants determined that the demand for breakfast products dictated a change in opening and closing times. Franchisees who had purchased franchises that required them to open only for lunch and dinner suddenly found that franchisors rewrote their SOP manuals to require opening for breakfast.

Franchisors continually review their policies and procedures manuals. In some cases, changes are made to reflect changing laws. Hotels, for example, may find an increasing number of their rooms must be designated as nonsmoking in order to satisfy franchisor requirements.

In the best scenario, franchisors seek operator input prior to making changes in their SOP manuals. It is important to remember, however, that franchisees generally are required to follow any new policies and procedures put into an SOP manual, even if that policy or procedure was not in place at the time of signing the original franchise agreement.

4. Renewal clauses.

While the duration of a franchise agreement can be established in any number of years agreeable to both parties, 10 years is a common length. When the agreement expires, the franchisee is under tremendous pressure to renew the franchise agreement. This would normally be the case, because, if the franchise is still in business after 10 years, the venture has probably been successful. Unfortunately, the franchisee typically is not permitted to renew under the terms of the existing agreement, but rather is asked to sign

Bathroom Light Policy

Bathroom light must be equivalent to not less than 1650 lumens, and must not be interconnected to exhaust fan switches.

Figure 3.8 Excerpt from a standard operation procedures manual.

a new agreement with terms that may be very different from those in the original agreement. The pressure to sign the new agreement can be very intense, especially if the old agreement contained a postagreement noncompete clause.

5. Noncompete clauses.

Franchisors often write **noncompete clauses** into the franchise agreement. The intent of the franchisor is to prevent a franchisee from learning trade secrets, and then using that information to run a competitive operation in the same market area. From the perspective of the franchisee, however, clauses such as these may prevent the legitimate practice of a learned profession.

▶ **LEGALESE**

Noncompete clause: A contractual agreement between two parties in a business relationship in which one party, upon termination of the business relationship, agrees not to compete within a designated geographic area or for a designated period of time.

ANALYZE THE SITUATION 3.4

Lo Vin Do was an immigrant from Southeast Asia. He spent 10 years in the United States operating a small restaurant that served lunches, dinners, and carryout baked goods. Later, he bought a franchise operation that sells European-style, fresh-baked breads. A clause in the franchise agreement signed by Mr. Do prohibited " . . . the operation, by Mr. Do, of a similar business . . . ," within a 10-mile radius for a period of five years if the franchise agreement was terminated for any reason.

Mr. Do established the franchise as a limited partnership. The business was marginally successful at first, but two years later declared bankruptcy. Mr. Do closed the operation and returned all confidential operating materials to the franchisor.

Later, Mr. Do, operating as a sole proprietor, again opened a small, table-service restaurant serving Vietnamese cuisine and French pastry products. This restaurant was located approximately three miles from his previous restaurant. The franchisor contacted Mr. Do stating that he must cease operation of the restaurant/bakery or face litigation.

1. Did Mr. Do violate the terms of the franchise agreement?

It is natural for the franchisee to assume, when signing the franchise agreement, that a noncompete clause is a minor item. The franchisee wants the new arrangement to work, and it seems fair to agree not to compete in a similar business against the franchisor. Difficulties can arise, however, when relationships dissolve between franchisors and franchisees and the franchisors use their generally stronger legal capabilities as an advantage in enforcing the noncompete clause.

Selling the Franchise

Selling a nonfranchised business is sometimes complex. However, selling a franchise can be even more difficult, because the sale of a franchise will generally require approval from the franchisor. The franchisor's rationale is clear: It is in their best interest to ensure that any owner who takes over a franchise indeed meets the requirements the franchisor has set out for its franchisees. This is, of course, a legitimate interest. It results, however, in a situation that places restrictions on the seller.

▶ **LEGALESE**

Right of first refusal: A clause in a contractual agreement between two parties in a business relationship in which one party, upon termination of the business relationship, can exercise the right to buy the interest of the other party before those rights can be offered for sale to another.

In some cases, the franchisor retains the **right of first refusal** in a franchise sale. In other cases, such as that in Figure 3.9, the franchisor will insert a clause in the franchise agreement that requires notification in the event of a pending sale. Should the new buyer elect not to renew the franchise, the franchisee may have to pay a termination fee to the franchisor.

When an independent restaurant or lodging facility owner elects to sell his or her business, he or she is free to determine a suggested selling price, advertise

Notification/Nonassumption Clause

In no event shall owner offer the hotel through public auction or through the media of advertising, either in newspapers or otherwise, without first obtaining the written consent of franchisor, which shall not be unreasonably withheld.

If in the event of the sale of the hotel the purchaser fails to assume owner's obligations hereunder, or in the event franchisor shall have elected to terminate this agreement, then owner agrees to pay to franchisor as liquidated damages and not as a penalty, no later than the closing, or 10 days following the effective date of such termination, a termination fee in an amount equal to the greater of 12 times the average monthly fees earned by the franchisor during the preceding 12 months or 12 times the basic fees projected in the current year's operating budget.

Figure 3.9 Right of first refusal clause.

that the business is for sale, and sell the business as he or she sees fit. When a franchisee wants to sell his or her business, however, the franchisor often requires that the buyer sign the current franchise agreement, which most often contains materially different financial terms from those in the selling franchisee's agreement. What the buyer is buying is often different from what the seller is selling.

Owning a franchise is an effective way for many entrepreneurs to improve their odds of success when starting a business. Investigating the many different alternatives available from various franchisors is an important part of this process.

Legal Responsibilities of Franchisees

From a legal standpoint, the manager of a franchise operation has the dual burden of operating in such a way as to satisfy both the owners of the operation and the franchisor. When conflicts occur between the best interests of the ownership and those of the franchisor, it is important to remember where the agency relationship lies. In fact, language inserted by the franchisor in a franchise agreement is typically very clear about that issue, as shown in Figure 3.10.

Hospitality franchises have grown tremendously in popularity since the mid-1950s, and there is every reason to believe that this type of business arrangement will continue to grow and evolve, both in the United States and internationally. The franchisors and franchisees in such relationships face great challenges.

The manager of a franchise unit also faces unique challenges. The manager represents the interests of guests, the owners, and the franchisor. It is a difficult balance, but one made easier when ownership structures and the workings of a franchise are thoroughly understood.

Agency Relationship Clause

The franchisee is an independent contractor. Neither the franchisee nor franchisor is the legal representative or agent of the other. No partnership, affiliate, agency, fiduciary responsibility, or employment relationship is created by this agreement.

Figure 3.10 Agency relationship clause.

▶ INTERNATIONAL SNAPSHOT

A Comparison of Franchise Disclosure Requirements under United States Law and International Law*

INTRODUCTION

Due to the widespread increase in franchising as a method of doing business, there has been a tremendous increase in franchise legislation both in the United States and internationally. Specifically, in addition to the United States, the following 12 countries have enacted franchise disclosure laws: (1) Australia; (2) Brazil; (3) Canada, Alberta Province; (4) Canada, Ontario Province; (5) China; (6) France; (7) Indonesia; (8) Malaysia; (9) Mexico; (10) Romania; (11) South Korea; and (12) Spain. Both the United States and the foreign jurisdictions regulate franchising and offer protections to prospective franchisees through presale disclosures, which take the form of a Uniform Franchise Offering Circular (UFOC) in the United States.

ITEMS TO BE DISCLOSED

The UFOC contains 23 broad categories of disclosure items. Of these items, the only ones that are either required or recommended to be disclosed in all of the foreign jurisdictions are the basic franchisor information, ongoing fees, and investment costs. The other items of disclosure (i.e., franchisor management, bankruptcy, franchisor and franchisee obligations, exclusive territory, franchisor financing, franchisee outlets, and trademark information) are required only in some of the jurisdictions.

The second main difference between the United States and the foreign jurisdictions deals with public figures (persons whose names or physical appearance are generally known to the public in the geographic area where the franchise will be located). In the United States, information pertaining to public figures must be disclosed, whereas the foreign jurisdictions do not require such disclosure.

The third difference between the United States and international disclosures deals with earnings information. Specifically, only Australia requires such disclosure, while Canada, France, and Romania recommend the disclosure of earnings information. Meanwhile, earnings information is a mandatory disclosure in the United States.

The fourth distinction involves the disclosure of the franchise agreement in the UFOC. In the United States, the franchise agreement must be included in the UFOC, while only six of the foreign countries require the franchise agreement to be disclosed.

The last major difference between the United States and foreign disclosure requirements centers around the franchisor's financial situation. In the United States, the franchisor's financial statements must be included in the UFOC. In contrast, only about two-thirds of the foreign jurisdictions require the franchisor's financial condition to be disclosed.

DISCLOSURE REQUIREMENTS IN CHINA

Franchising is still in its early stages in China. Currently, franchising is regulated through the "Trial Implementation Measures of the Administration of Franchise Operations" (the "Measures"), which were primarily established to standardize franchise operations and to protect the legal rights of the franchisor and franchisee.

Since franchising is not a predominant method of doing business in China, the disclosure requirements under Chinese law are minimal. Specifically, only the following items are either required or recommended to be disclosed in China:

Franchisor information
Initial fees
Ongoing fees
Investment information
Supplier information
Franchisor duties
Current and past franchisees
Financial statements
Receipt

None of the remaining items are required to be disclosed under Chinese law.

OTHER DIFFERENCES

These examples demonstrate just a few of the differences between United States and foreign jurisdictions with respect to presale disclosures. Other differences center around who is required to provide disclosures, who is required to receive disclosures, and when the disclosures are required. Further, there are differences between the United States foreign laws as to the exemptions and exclusions under the franchise laws. In sum, before investing in a franchise, a potential franchisee should seek the advice of an experienced franchise attorney to review the franchisor's business and to prevent any overreaching by the franchisor.

*Some of the factual information contained in this article was obtained from the following publication: Loewinger, Andrew P., and Lindsey, Michael K., *International Franchise Disclosure Laws* (Conference Proceedings of the ABA Forum on Franchising, Scottsdale, AZ, 2002).
Provided by Robert Zarco, Esq., and Himanshu M. Patel, Esq., of the law firm of Zarco Einhorn & Salkowski, P.A., Miami, Florida. www.zarcolaw.com

WHAT WOULD YOU DO?

Assume you are responsible for approving commercial loans at a bank where you are the senior lending official. You are approached by two hospitality management college graduates, each with three years' management experience acquired after they completed their studies. They are seeking a loan slightly in excess of $1 million to establish a restaurant in the community. The funds will be used to lease land, facilities, and equipment, as well as for renovation, inventory, salaries, and other start-up costs.

Write an essay that answers the following questions:

1. Will the organizational structure selected by the partners have an impact on your decision to extend the loan?
2. What other factors would influence your decision?
3. Would it make a difference to you if the partners were requesting the loan to complete a franchise agreement with an established and successful franchisor?
4. Would you want to review the specifics of the franchise offering circular? Would you want to review the franchise agreement?
5. What additional information might you request if the partners were seeking the loan to operate as an independent restaurant? Would it matter if the loan were for an existing restaurant, as opposed to a new start-up?

▶ THE HOSPITALITY INDUSTRY IN COURT

To see how a court views the legal relationship between a franchisor and a franchisee, consider the case of *Schoenwandt v. Jamfro Corp., 689 N.Y.S.2d 461 (N.Y. App. Div. 1999).*

FACTUAL SUMMARY

Fred Schoenwandt was injured at a Burger King restaurant in New York. He brought a personal injury suit against Jamfro Corp. (Jamfro) as the franchisee and Burger King Corp. (Burger King) as the franchisor. Jamfro Corp. had

purchased the franchise from Burger King over 15 years before Schoenwandt was injured in the restaurant.

QUESTION FOR THE COURT

The question for the court was whether Jamfro and Burger King were involved in a parent-subsidiary relationship or a franchise agreement. If Burger King was found to be the parent company and Jamfro the subsidiary, then Schoenwandt could sue both Jamfro and Burger King. If Burger King was found to be only the franchisor, it would be dismissed from the lawsuit and not be liable for Schoenwandt's injuries. Schoenwandt argued that Burger King exercised complete control over the daily operations of Jamfro and that it was this control that resulted in his injuries. Burger King argued that the agreement between it and Jamfro was merely a franchise agreement, with control being surrendered to Jamfro upon creation of the franchise. Pointing to the franchise agreement, Schoenwandt then argued Burger King retained control through certain terms in the agreement. Specifically, Schoenwandt argued Burger King retained control by reserving the right to terminate the agreement or reenter the premises if Jamfro failed to conduct business properly.

DECISION

The court ruled in favor of Burger King, holding the relationship between Jamfro and Burger King was that of franchisor-franchisee. Burger King was not liable for Schoenwandt's injuries and was dismissed as a party to the lawsuit.

MESSAGE TO MANAGEMENT

Franchisors need to be cautious when considering the extent of control over the franchised operations in the franchise agreement.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

Establishing the appropriate business format for a hospitality operation is a decision that requires owners or managers to consider the amount of liability risk they are willing to absorb, the willingness to pay taxes on the operation's profits, and the degree of control they wish to exercise over the business. There are a variety of organizational structures, to choose from, each offering different benefits to the business operator. Your business may not fit within the parameters established for particular structures so your choices may be limited.

However you choose to operate your business, you will rely on others to represent the interests of your business. To varying degrees, you will be responsible for their decisions and acts. Determining the types of employees that will be needed for your business operation, and the degree of control they will have, is an important liability consideration that must be factored into your choice of an organizational structure.

Franchises are used widely in the hospitality industry and are popular investment vehicles for many entrepreneurs. In a franchise operation, the business owner agrees to adhere to certain financial and operating conditions imposed by the franchisor in exchange for the right to provide a brand-name product or service. There are legal pros and cons for both the franchisor and the franchisee that arise from these business relationships.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Identify those organizational structures that result in paying income taxes based on distributed, as compared to earned, profits. Explain the advantages of each approach.
2. Explain the phrase *respondeat superior*, in terms of liability and organizational structure. Describe a real situation in which the phrase takes on meaning.
3. Compose a letter to a potential lender addressing only the issue of why the or-

ganizational structure you have selected for your new business group makes it advantageous for the lender to grant you the loan you have requested.

4. State the defining characteristics of six types of organizational structures used in the hospitality industry as they relate to:

   Taxes
   Liability
   Financing
   Transfer of ownership

5. List six areas of disclosure addressed by the FTC Franchise Rule. Select one of these areas and explain why you think it is important.
6. Using the Internet, locate the case of a recent lawsuit pitting a franchisor against his or her franchise company. Discuss the merits of the lawsuit. (Hint: Try **www.findlaw.com.**)
7. Contrast five advantages and five disadvantages of operating a restaurant or hotel as a franchisee, compared to operating as an independent.
8. Assume you own a restaurant that is successful in part because of a signature menu item with a secret recipe. Prepare a noncompete agreement for a chef you are hiring that you feel would be fair to both of you.

▶ TEAM ACTIVITY

1. Pair up in teams of two, then pair up with another team. One team will represent the franchisor and one team will represent the franchisee.
2. After reviewing the five crucial franchise issues—enroachment impact, purchasing requirements, operations manual changes, renewal clauses, and noncompete clauses—negotiate these five areas of contention to a compromise, if possible, and provide a brief description of the compromise. If a compromise is not possible, describe the remaining disputed issues.

Chapter 4

Legally Managing Property

The staff meeting had been going well. Trisha Sangus, general manager of the hotel, sat at the head of the conference table. The heads of sales and marketing, food and beverage, security, engineering, front office, and housekeeping were all in attendance, as was the property controller.

Trisha enjoyed the weekly meeting. It gave her a chance to learn from each of her colleagues, as well as to help her to guide their development. She knew that several of them had an interest in someday serving as a general manager, and she realized that an important part of her job was helping to give them the skills and knowledge they would need in their future careers. Some of them were almost ready for the next level of management, while others still had to master some of the basics they would have to face as a general manager.

Trisha was about to launch into a discussion of a proposed change she wanted to make in the type of background music playing in the lobby area when Walter Lott, the chief maintenance engineer, spoke up: "Ms. Sangus, I almost forgot—the garage called this morning on the van."

This won't be good, thought Trisha. The hotel's 17-passenger van was only three years old, but had already accumulated over 250,000 miles, due to a constant series of trips transporting guests to and from the airport. Maintenance costs had been averaging $500 a month. Fortunately, the van's engine had been holding up well, given its high number of miles. The van drivers had noticed a defective headlight in yesterday's daily inspection, and while the van was in the shop, the chief engineer had asked the service technician to investigate a periodic slippage in the transmission that prevented the van from accelerating properly.

Walter Lott continued, "It's the transmission alright, and the drive shaft. I think we can get it back in service for about $2,500, but I wanted to check with you first."

"Let's buy a new van," said Mr. Dani, the front office supervisor. "The old one is really starting to show its age."

"It's not in the capital budget," said Ms. Waldo, the controller, with a sigh.

"Well," said Mr. Ray, director of security, "if it stops running completely, you'll just have to use the 'Somewhere Account'!"

As the laughter died down, Mr. Dani asked, "What's the Somewhere Account?"

Trisha replied wryly, "It's the account we use when we have to find the money somewhere, because we have no choice. It's a figure of speech."

"How about a lease?" asked the executive housekeeper.

"That's too expensive," said the food and beverage director. "It's like renting an apartment instead of buying a house. Always buy, that's what my father told me."

"I thought leasing was less expensive," the executive housekeeper replied. "That's what my car dealer told me."

"Don't we save on taxes by leasing?" asked Mr. Dani.

"I wouldn't lease," said the food and beverage director, "unless the auto dealer pays for the repairs; otherwise, it's too expensive."

"But I thought we didn't have the funds anyway," said the sales and marketing director.

"Ms. Waldo said we don't have the capital funds in the budget," Trisha replied. "There are other funds. But before we do decide to lease or buy a new van—if that's in fact what we should do—we need to talk about the differences between leasing and buying."

Trisha knew her one-hour meeting was about to become a two-hour gathering, but she also knew, from the comments around the table, that her staff needed to understand some basics about property, leasing, and buying.

"Listen," she began. "There is a world of difference between buying and leasing a van, or anything else the hotel needs. I'll tell you why. . . . "

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. The difference between real property and personal property.
2. The function of the Uniform Commercial Code when buying property.
3. How to evaluate the purchase-versus-lease decision from a legal perspective.
4. How to avoid infringement of patent, copyright, and concept rights.

4.1 INTRODUCTION TO PROPERTY

In the hospitality industry, when a hotel manager is away from the hotel, it is common to say that he or she is "off property." Property, in this sense, refers to the grounds and building of the hotel. At the same time, when a guest enters the pool area, he or she may see a sign that states, "Towels are provided for your convenience, but are the property of the hotel." In this case, property refers to

a physical asset owned by the hotel. With so many different meanings and uses of the word, property, and its legal characteristics, is an extremely important concept for a hospitality manager to understand.

In the hospitality industry, there are two types of property the future manager must learn to administer. They are:

- Real property
- Personal property

Within the category of personal property, the two subtypes are tangible and intangible property, as shown in Figure 4.1. A tangible item is one that can be held or touched. Thus, furniture is a tangible form of property, as are land, equipment, food inventories, and a variety of other materials needed to effectively operate a hospitality facility. Intangible items are those that cannot be held or touched, but have real value, although that value can sometimes be difficult to establish, such as the good will of a business.

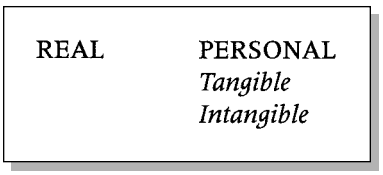


Figure 4.1 Property types.

Understanding the way the law views property is important, because it affects how property ownership disputes and claims are settled, the rights of an individual to use the property as they see fit, and even how ownership of the property is allowed to transfer.

The law treats **real property** differently from **personal property**, and these distinctions are critical for managers to understand.

▶ **LEGALESE**
Real property: Land and all the things that are permanently attached to it.

▶ **LEGALESE**
Personal property: Tangible and intangible items that are not real property.

Real Property

Real property refers to land and all things that are permanently attached to land. **Real estate** is a related term that is frequently used when referring to real property.

Certainly, the trees on a country club's land are part of its real estate. So, too, are the ponds, streams, and grassy areas that make up the golf course. **Improvements** are features such as fences, sewer lines, and the like, which are changes or additions to land that make it more valuable.

▶ **LEGALESE**
Real estate: Land, including soil and water, buildings, trees, crops, improvements, and the rights to the air above, and the minerals below, the land.

▶ **LEGALESE**
Improvements: An addition to real estate that ordinarily enhances its value.

Fixtures

While at first observation it may appear simple to determine what is real property and personal property, at times it is quite complex. This difficulty comes from trying to distinguish between items that were intended as improvements that are "permanently attached" to the land, as opposed to simply being placed on the land.

Clearly, a chimney built into the golf course clubhouse would be considered permanently attached to the clubhouse building. But would a fan placed on the floor of the dining room be considered permanent? Would a fan affixed to the chimney to improve heat circulation be considered real property? Would it matter exactly how the fan was attached? The answer to these more complex questions comes with an understanding of the legal terms **chattel** and **fixture**.

▶ **LEGALESE**
Chattel: Personal property, movable or immovable, that is not considered real property.

A fan set on the floor of a dining room would not be considered real property. Because it is clearly movable, it would be classified as chattel. In contrast, a fan that has been permanently installed in the fireplace itself would be considered a fixture. Fixtures include all the things that are permanently attached to property, such as ceiling lights, awnings, window shades, doors, and doorknobs. It is important to note that it is possible to remove an item that has been permanently attached to real property. Thus, a ceiling fan that has been permanently installed in a dining room could, of course, be removed. However, from a legal standpoint, an item that is to remain with the property would ordinarily be identified as a fixture.

▶ **LEGALESE**
Fixture(s): An article that was once a chattel but that has become a part of the real property because the article is permanently attached to the soil or to something attached to the soil.

ANALYZE THE SITUATION 4.1

Jay Geier purchased a cinnamon roll franchise from a franchisor. To house the operation, he purchased a small, but ideally located, building from David Stein. The two individuals agreed upon a fair price, then both Mr. Geier and Mr. Stein signed the sales contract. Mr. Geier was to take possession of the property on March 1.

On the morning of February 28, Mr. Geier arrived at the property to take some exterior measurements he would need in order to get a contractor's bid on resurfacing the parking lot. He observed Mr. Stein removing a window air conditioning unit from the small manager's office at the rear of the building.

Mr. Geier protested that the air conditioner should not be removed, as it was part of the sale. Mr. Stein replied that the air conditioner was his personal property and was never intended to be sold with the building, nor was it specifically mentioned in the sales contract.

1. Can Mr. Stein be permitted to take the air conditioner?
2. Would the air conditioner be considered real or personal property?
3. Should the air conditioner have been mentioned in the sales contract?

Questions often arise as to whether certain fixtures and/or improvements are to be considered real property or treated as personal property. The general rule is: If an item can be removed without damaging any real property, the item is generally considered to be personal property. When the issue is not clear, it is best to consult with an attorney skilled in this area of the law.

Personal Property

Anything that is not real property is personal property, and personal property is anything that isn't nailed down, dug into, or built into the land. A restaurant on an acre of ground is real property, but the tables and chairs in the dining room are not. A restaurant building permanently attached to a plot of land is real property. A van used for catering that is parked in the restaurant's parking lot is not.

▶ **LEGALESE**

Tangible property: Personal property that has physical substance and can be held or touched. Examples include furniture, equipment, and inventories of goods.

As previously stated, personal property can be considered either **tangible** or **intangible**. Tangible property is the type that we most often think of when referring to goods owned by a company or individual. Tangible property can be thought of as all of those items that can easily be moved from one location to another. Automobiles, furniture, artwork, and food inventories are all examples of personal property.

▶ **LEGALESE**

Intangible property: Personal property that cannot be held or touched. Examples include patent rights, copyrights, and concept rights.

Intangible property can be just as valuable as any real estate or tangible personal property. Intangible property includes items such as franchise rights, trademarks, money, stocks, bonds, and interests in securities. A share of Hilton Corporation stock is a tangible piece of paper, but its real value emanates from the fact that it represents an intangible shareholder interest in the Hilton Corporation. Money is also a form of intangible property. A five-dollar bill is a tangible piece of paper, but it represents an intangible interest in the monetary system used in the United States.

To appreciate the importance of intangible property, consider the case of Stanley Richards. Stanley invents a seasoning salt for beef, which chefs around the world agree is spectacular. His wife Ruth creates a small, stylized cartoon drawing of a cow for the label of his seasoning. Stanley consults an attorney, who helps the Richards apply for and receive the exclusive right to use Ruth's drawing in their business. Stanley's product is a huge success. Soon, the stylized cow is associated worldwide with creativity, good taste, and uncompromising quality. Millions of people immediately recognize the cow drawing and what it represents. Stanley is approached by a multinational seasoning company that produces seasonings for poultry, pork, and fish. They would like to use Ruth's drawing on

their own products. The company feels that having the drawing prominently displayed on its own products would improve market awareness of their nonbeef seasonings.

The right to use the stylized drawing of the cow, so valuable in this case, is an example of an intangible property right. While the drawing of the cow itself may be easily duplicated and worth only a few cents, what the stylized cow drawing represents is extremely valuable and may not simply be taken from the Richards without their agreement; they, and they alone, have the right to determine how this property can be legally used.

It is important to note that a partnership or company, as well as an individual, can own personal property. Thus, the word "personal" designates that the property is not "real" property. Instead, personal property could be considered all property that is not "real" or real estate.

4.2 PURCHASING PROPERTY

For the hospitality manager, the buying, leasing, or selling of property occupies a great deal of time. The foodservice director at an extended-care facility will buy property from vendors, such as food, supplies, and equipment, then turn around and sell some of that property—in this case, the food—to the residents of the facility. At the same time, other equipment for the operation may be leased, such as a dishwasher or a soda-dispensing machine. On a much larger scale, the director of operations for a large hamburger chain may be responsible for buying or leasing land on which to put new stores, buying or leasing the equipment that will go into the new stores, as well as selling off real and personal property that the company no longer needs.

Purchasing Real Property

In order to sell property legally, the seller must have a legal title to that property. It is the responsibility of the buyer to verify this right, however; otherwise, the buyer may find after the purchase that he or she does not legally own the property at all!

Whether the hospitality manager is purchasing real or personal property, the establishment of title to the property being purchased is the responsibility of the manager. And while it might appear that title to lands and real estate would be very simple to verify, the process in fact can be quite complex.

Deeds **Title** to real property can be transferred from an owner in a variety of ways, such as marriage, divorce, death, an act of the courts, bankruptcy, gift-giving, or a sale. A **deed** is the formal document used to transfer ownership of real property from one person or entity to another. A deed will consist of the date, the names and descriptions of the parties involved in the transfer, the consideration, a full description of the property, and any exceptions to the transfer.

Deeds may be either **warranty deeds** or **quitclaim deeds**. The laws governing deeds vary from state to state; thus it is important to make sure that legal title to the real property is provided in the deed.

When there is any doubt as to the legitimacy of the title to a property, it is sometimes necessary to conduct a **title search**.

Title Insurance Even when the ownership of a piece of property is well established through a title search, it is advisable for a buyer to purchase title insurance. Title insurance is a critical part of any commercial or private purchase of real estate. This insurance helps protect the interests of the buyer should another individual claim ownership of a piece of property after the buyer has completed the sale. Title insurance will cover any losses as the result of these claims.

▶ **LEGALESE**

Title: The sum total of all legally recognized rights to the possession and ownership of property.

▶ **LEGALESE**

Deed: A written document for the transfer of land or other real property from one person to another.

▶ **LEGALESE**

Warranty deed: A deed that provides that the person granting the deed agrees to defend the title from claims of others. In general, the seller is representing that he or she fully owns the property and will stand behind this promise.

▶ **LEGALESE**

Quitclaim deed: A deed that conveys only such rights as the grantor has. This type of deed transfers the owner's interest to a buyer, but does not guarantee that there are no other claims against the property or that the property is indeed legally owned by the seller.

▶ **LEGALESE**

Title search: A review of land records to determine the ownership and description of a piece of real property.

Some common instances where title insurance has protected a buyer include:

Forgery
Improper court proceedings
Survey mistakes
Missing heirs
Unfiled liens

Some inexperienced managers confuse title insurance with loan policy insurance. Loan policy insurance protects a lender (such as a bank) from claims against title to the real property, while title insurance protects the buyer.

To illustrate the importance of title insurance, consider the case of William Clark. Mr. Clark has a daughter named Kimberly. When her father dies, Kimberly inherits a piece of land outside a major city. Mr. Clark did not leave a will, but the house he lived in, and the land it rested on, was passed on to Kimberly, his only living heir, by state law. Thirty years later, Kimberly Clark sells the land to Brian Lee, who builds a restaurant on the site. Five years later, Joshua Davidson produces a lien and a will that, he claims, was signed by Mr. Clark. The will clearly states that Mr. Clark wished to leave the land not to his daughter, but to Mr. Davidson, to settle an old debt. In this case, Mr. Lee's claim to the land may be questionable. Title insurance would protect Mr. Lee if the newly produced will were in fact proved to be valid.

Purchasing Personal Property

For the future hospitality manager, purchases of personal property will, in most cases, vastly exceed purchases of real estate. Because this is true, it is very important to have a thorough understanding of the law and practices surrounding the transfer of ownership of personal property.

▶ **LEGALESE**
Bill of sale: A document under which personal property is transferred from a seller to a buyer.

Bill of Sale A **bill of sale** is the formal document used to transfer ownership of personal property from one individual or entity to another. As shown in Figure 4.2, the following items are included in a bill of sale:

BILL OF SALE

I, _____, of [name of firm, if appropriate], in the County of _____, State of _____, in consideration of _____ dollars ($_____), to be paid by _____, of [name of firm if appropriate], the receipt of which is hereby acknowledged, do hereby grant, sell, transfer, and deliver to _____ and his [or her] heirs, executors, administrators, successors, and assigns, forever, the following:

(Description of Property)

I hereby warrant that I _____ [or name of firm, if appropriate] am the lawful owner of the Property, that it is free from all encumbrances; that I have the right to sell the property; and that I will warrant and defend my right to legally convey it against any lawful claims or demands by anyone.

In witness, whereof, I_____, hereunto set my hand, this ___ day of_____ 20_____.

Seller _____

[Signature of individual or authorized representative of firm]

Figure 4.2 A bill of sale.

- Name of seller
- Name of buyer
- Consideration
- Description of the property
- Statement of ownership by seller
- Date of sale

Because a bill of sale is a contract, it can take many forms. In the hospitality industry, it is common for a buyer to agree to buy a certain type of good from a vendor on a regular basis. Consider the case of Renee Miller, the director of housing and foodservices at a state-supported university. Renee knows she will need a large amount of ground beef throughout the school year, but because she has limited freezer space, she must take delivery of the beef on a monthly basis. To negotiate the best possible price, she places all of her ground beef business with the same meat wholesaler. Renee executes a special contract for sale of goods with the seller to ensure that the quality, price, and terms she has agreed upon are maintained throughout the year (see Figure 4.3).

CONTRACT FOR SALE OF GOODS

Agreement made and entered into this [date] _____, by and between _____ [name of seller], of [address] _____ [city] _____, [state] _____ , herein referred to as "Seller," and [name of buyer] _____, of [address] _____ [city] _____ , [state] _____, herein referred to as "Buyer."

Seller hereby agrees to transfer and deliver to Buyer, on or before [date] _____, the following goods:

DESCRIPTION OF GOODS

CONSIDERATION TERMS

Buyer agrees to accept the goods and pay for them in accordance with the terms of this contract. Buyer agrees to pay for the goods at the time they are delivered and at the place where he [or she] receives the goods. Goods shall be deemed received by Buyer when delivered to address of Buyer as described in this contract. Until such time as goods have been received by Buyer, all risk of loss from any casualty to said goods shall be on Seller.

Seller warrants that the goods are now free from any security interest or other lien or encumbrance, that they shall be free from same at the time of delivery, and that he [or she] neither knows nor has reason to know of any outstanding title or claim of title hostile to his [or her] rights in the goods.

Buyer has the right to examine the goods on arrival and has [number] of days to notify Seller of any claim for damages on account of the condition, grade, or quality of the goods. The notice must specifically set forth the basis of his [or her] claim, and that his [or her] failure to either notify Seller within the stipulated period of time or to set forth specifically the basis of his [or her] claim will constitute irrevocable acceptance of the goods.

This agreement has been executed in duplicate, whereby both Buyer and Seller have retained one copy each, on [date] _____.

_____ _____

Buyer Seller

[Signatures]

Figure 4.3 Contract for sale of goods.

A contract developed to transfer ownership of personal property is common when the property cannot be viewed at the time of sale, as in Renee Miller's case, or when the property has not yet been manufactured. For example, if a hotel orders custom-made drapes and bedspreads, they may not be manufactured by the seller until a contract for their sale has been signed by both parties. As is the case with all contracts, the contract for sale of goods should be carefully examined by both the buyer and seller.

It is important to determine exactly when the transfer of ownership occurs in a sale of personal property. Generally, goods are shipped FOB, which means, "free on board." When used, the term refers to the fact that shippers are responsible for the care and safety of goods until they are delivered to the buyer's designated location. Transfer of ownership occurs not at the time of sale in this case, but upon delivery.

Notice that in both the bill of sale and the more formal contract for the sale of goods, the seller is not required to provide a title when transferring ownership. This is different from the sale of real property, where a title (deed) is a required part of the transaction. Unlike real property, ownership of personal property is generally assumed by its possession, and it is not customary for the seller to prove his or her ownership rights by a title. An exception to this rule is the sale of motor vehicles.

Stolen Property In the case of stolen property, even though possession implies ownership, it does not equate to the lawful right to sell. There is no criminal penalty imposed by law if a buyer innocently purchases stolen goods from a seller who purports to own those goods. However, in the event the rightful owner takes steps to reclaim his or her goods, the innocent buyer would have no recourse except to go back to the thief; that is, the buyer could file a lawsuit against the thief for the return of any money paid. In reality, the ability of the buyer to identify and help prosecute the thief is often minimal. Obviously, it is in the hospitality manager's best interest to buy only from reputable sellers.

A restaurant or hotel manager may be punished if it can be shown that he or she knowingly purchased stolen goods. While it may be easy to trace stolen goods, it is more difficult to determine if a buyer, in fact, knew the goods were stolen. However, frequently it can be inferred from circumstances surrounding the purchase.

ANALYZE THE SITUATION 4.2

As the owner operator of a popular Italian restaurant, controlling costs is an important part of your day-to-day activities. Costs of labor, food, and equipment are your direct responsibility. Profit margins are good, but controlling costs is a constant challenge.

At a meeting of the local chapter of the state restaurant association, you see your friend Wayne, who excitedly tells you about a purchase he has just made. Wayne owns and operates an upscale steakhouse in your town. He purchased 50 full-sized stainless-steel line pans for $2 each from a passing "liquidator." Wayne tells you that he jumped at the chance to buy them because when new, the line pans cost $75 each.

When you inquire about the seller, Wayne says that two men simply arrived at his restaurant in a small pick-up truck, with a variety of equipment and small wares in the uncovered back.

"Best of all," Wayne says with a wink, "as soon as I washed them and put them in with my regular stock, there was no way anyone could tell the difference between the ones I just purchased from the ones I already had!"

Talk at the restaurant association meeting centers on rising food costs and the likelihood of having to raise menu prices. Several operators state that they are seriously looking at price increases. You, too, have been considering such a move. Wayne tells the group that at his place, "We are going to hold the line on price increases this year."

1. If you had needed them, would you have purchased the pans?
2. What are the legal issues at play here? What ethical issues are at play?
3. If the "sellers" in this scenario are caught and confess to selling stolen merchandise, do you think that Wayne will get to keep his pans?

A buyer is violating federal law if he or she knowingly purchases stolen goods, and those goods have: (1) a value of over $5,000 and (2) been a part of interstate commerce.

The term interstate commerce merely refers to the movement of property from one state into another state. In order to commit a federal offense, a person must know that the property had been stolen, but he or she need not know that it was moving through interstate commerce.

Because of the severe penalties involved, the prudent hospitality manager will avoid purchasing any property that: is sold at far below its real value, is sold at odd times or by questionable salespersons, or if there is doubt as to its origin. If something appears too good to be true, it generally is, and thus should be avoided.

Warranty Those who sell property often find that any promises they make about that property can help to better sell it. For example, if the human resources manager at the corporate office of a franchise company decides to purchase a copy machine, the promises, or **warranties**, made by the copy machine's manufacturer may play a significant role in the machine selected. If two copy machines cost approximately the same amount, but the manufacturer of one warrants that it will provide free repairs if the machine breaks down in the first two years, while the other manufacturer does not, the warranty of the first manufacturer would probably be a deciding factor in the selection of the copy machine.

▶ **LEGALESE**

Warranty: A promise about a product made by either a manufacturer or a seller that is a part of the sales contract.

Before signing any contract for the purchase of goods, it is a good idea to determine what warranties, if any, are included in the purchase. When purchasing real property, a deed helps explain exactly what is included with the purchase. In a similar manner, a warranty helps explain exactly what rights are included in a purchase of personal property. It is important to remember that a warranty is part of the sales contract. That is, the intangible rights a warranty offers the buyer are just as real as the property itself.

Because they are part of the contract, it is always important to make sure that any warranties offered verbally are documented in the sales contract. Warranties can be considered to be either expressed or implied. An express warranty is created when a manufacturer makes a statement of fact about the capabilities and qualities of a product or service. These statements can be made either by a salesperson or in promotional literature. Examples include statements such as: "This copier will make 35 copies per minute," or "This dishwasher uses six gallons of water for each rinse cycle."

When a seller makes claims about the capabilities of a product or service being offered, that seller is obligated under the law to deliver a product that meets all of the capabilities described. Because express warranties are considered to be part of the sales contract, the law enforcing the truthfulness of warranties is the Uniform Commercial Code, which you read about in Chapter 2, "Hospitality Contracts." When a buyer relies on factual representations to purchase a product or service, and those statements later prove to be false, then a breach of the sales contract has occurred. Under Article 2 of the UCC, the buyer may be entitled to recover damages from the seller.

The UCC further protects the interests of buyers by requiring that any products sold be fit for use and free of defects. Thus, even though a seller may not specifically claim that his or her products are free of defects, a buyer would expect that any product purchased would be in good working order. This type of unwritten expectation is called an implied warranty.

Under Article 2 of the UCC, personal property that is sold must conform to two implied warranties. One implied warranty is that the item is fit to be used for a particular purpose. This is known as an implied warranty of fitness. The second implied warranty is that the item will be in good working order and will adequately meet the purposes for which it was purchased. This is called an implied warranty of merchantability.

In many states, consumers can enforce their rights with respect to implied warranties for up to four years after a purchase. This means that, for the first four years of a product's life, the seller is liable for any defects or breakdowns of his or her product, including the implied warranties established by the UCC.

The seller has the right to disclaim, or negate, any express or implied warranties by inserting language into the sales contract. The UCC has drafted standard contract clauses that can be used for those situations. As with any sales contract, the disclaimer must be in writing and must be agreed to by both parties.

Just as price is a negotiable part of any contract, so too are warranties. It is a good idea to try to negotiate additional warranties before making a purchase. Be-

DISHWASHER WARRANTY

FULL ONE-YEAR WARRANTY
For one year from date of original purchase, we will provide, free of charge, parts and service labor in your place of business to repair or replace any part of the dishwasher that fails because of a manufacturing defect.

FULL TEN-YEAR WARRANTY
For ten years from date of original purchase, we will provide, free of charge, parts and service labor in your place of business to repair or replace the tub or door liner if it fails to contain water because of a manufacturing defect such as cracking, chipping, peeling, or rusting.

LIMITED SECOND-YEAR WARRANTY
For second year from date of original purchase, we will provide free of charge, replacement parts for any part of the water distribution system that fails because of a manufacturing defect. Associated inlet and drain plumbing parts are not covered by this warranty. You must pay for the service trip to your place of business and service labor charges.

This warranty is extended to the original purchaser and any succeeding owner for products purchased for in the 48 mainland states, Hawaii and Washington, DC. In Alaska, the warranty is the same except that it is LIMITED because you must pay to ship the product to the service shop or for the service technician's travel costs to your place of business.

All warranty service will be provided by our Factory Service Centers or by our franchised Customer Care servicers during normal working hours. Check the White Pages for XXXX COMPANY OR XXXX COMPANY FACTORY SERVICE.

What Is Not Covered
Service trips to your place of business to teach you how to use the product.

Read your Use and Care material. If you then have any questions about operating the product, please contact your dealer or our Consumer Affairs office at the address below, or call, toll-free: 1-800-xxx-xxxx.

Improper Installation. If you have an installation problem, contact your dealer or installer. You are responsible for providing adequate electrical, plumbing, and other connecting facilities.

Replacement of fuses or resetting of circuit breakers.

Cleaning or servicing of air gap device in drain.

Failure of the product if it is used for other than its intended purpose.

Damage to product caused by accident, fire, floods, or acts of God.

WARRANTOR IS NOT RESPONSIBLE FOR CONSEQUENTIAL DAMAGES.
Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you. This warranty gives you specific legal rights, and you may also have other rights, which vary from state to state. To know what your legal rights are in your state, consult your local or state consumer affairs office or your state's attorney general.

Figure 4.4 Manufacturer's warranty.

fore buying personal property, it is imperative to understand the warranty offer and to compare warranties from competing brands before making a purchase. Effective hospitality managers seek to negotiate the longest, strongest, most comprehensive warranty possible, and insist that the warranty be in writing.

When evaluating the final warranty offer, the following questions should be considered:

1. How long is the warranty?
2. When does the warranty begin?
3. Will it include the charges for the parts and/or labor to make the repairs?
4. What parts of the purchase are covered by the warranty?
5. Can you lose the warranty if you do not follow manufactures guidelines for routine service and maintenance, and who can perform these tasks?
6. Where is authorized service performed?
7. Who pays to deliver the defective product to the repair area?

Figure 4.4 is an example of a warranty a hotel manager might encounter when buying dishwashers for a new extended-stay facility. Notice the promises that are made by the dishwasher's manufacturer.

4.3 FINANCING THE PURCHASE OF PROPERTY

The buying and selling of property is fairly straightforward when the buyer pays the seller the entire purchase price all at once. It is more complicated, however, when the buyer decides to pay for property over time. Consider the case of Bill Humphrey. Mr. Humphrey operates a 400-room hotel in the downtown area of an extremely large city. Mr. Humphrey determines that the ice machines in his hotel must be replaced. The cost will be in excess of $100,000. His controller advises him that the hotel cannot afford to purchase the ice machines for cash at this time, but could afford to make monthly payments toward the purchase price. Mr. Humphrey approaches the hotel's bank, explains the problem, and secures a loan to purchase the ice machines.

In this scenario, a number of problems could arise. What if the hotel cannot make its loan payments? What rights would the bank then have? Could it retake possession of the ice machines? These and other complications can arise any time personal property is financed.

Debtor and Creditor Relationship

A **lien** is the right of a person to retain a lawful interest in the property of another until the owner fulfills a legal duty. If, for example, a restaurateur purchases new tables and chairs from a seller, but elects to pay one-half of the purchase price at the time the tables are delivered and the other half over a period of six months, the seller would retain a lien on the tables and chairs. That is, the seller would maintain a lawful ownership interest in the chairs until they were paid for in full. Of course, since the tables and chairs are housed in the restaurant, the restaurateur would also have partial ownership and rights to the property. In this scenario, two parties have legitimate and legal claims to the ownership of the tables and chairs. This complex relationship of dual ownership can be made easier to grasp with a better understanding of collateral and **liens**.

▶ **LEGALESE**

Lien: A claim against property that gives the creditor (lienholder) the right to repossess and/or sell that property if the debtor does not repay his or her debt in a timely manner.

Collateral and Liens **Collateral** is an asset a person agrees to give up if he or she does not repay a loan. A lien is a claim against the property (the collateral) used to ensure payment of a debt. Liens can be recognized by contract, from general trade practices, or implied by law.

▶ **LEGALESE**

Collateral: Property that is pledged to secure the repayment of a debt.

The process of legally recording a contractual lien is known as "making the lien **perfect**," or "perfecting" the lien. The possessor of a lien, who files the ap-

▶ **LEGALESE**

Perfect a lien: To make a public record of a lien, or to take possession of the collateral.

propriate records with the proper public office, is known as a secured creditor. This type of creditor has a superior right to possession of the collateral or any proceeds if the collateral is sold.

Perfecting a lien implied by law is done by taking possession of the property. If, for example, an in-room air conditioning unit is taken to a repair facility, the repaired unit will normally stay in the possession of the service facility until payment for the repairs has been made.

Other liens include judgment liens, which are those ordered by the courts, and landlord liens, whereby a landlord can secure payment of rent by taking a tenant's property if necessary. In most states, mechanics or persons who furnish materials for buildings are entitled to a lien. In some states, these claims must be filed in the office of the clerk of the court, or established by a suit brought within a limited time. Upon the subsequent sale of the building, these liens if properly filed are paid.

Mortgages and Deeds of Trust

When financing the sale of real property, the creditor will generally insist on securing the debt with a lien backed by collateral. In most cases, the lien will be filed on the real property being purchased. For example, if Marion Pennycuff wishes to purchase land and a building in which to house a café, he could secure funding for this purpose from a bank, providing his financial position is good. Marion would actually buy the real property with money loaned by the bank, and the bank would file for a **mortgage** lien on the property. In this instance, the land and building would serve as collateral for the loan. In some states, a **deed of trust** serves as a substitute for a mortgage lien, but serves an identical purpose.

▶ **LEGALESE**
Mortgage: The pledging of real property by a debtor to a creditor to secure payment of a debt.

▶ **LEGALESE**
Deed of trust: Used in some states instead of a mortgage. A deed of trust places legal title to a real property in the hands of a trustee until the debtor has completed paying for the property.

If Marion should decide to sell the property before he has completely repaid his mortgage, a buyer would not be able to obtain a clear title to the property, until the original mortgage was completely repaid.

Assume, however, that Marion wished to borrow the $100,000 to begin a consulting company, instead of purchasing the land and building. It is most likely that the bank would still require Marion to provide collateral to secure the loan. This collateral could be in the form of real or personal property that Marion owned, including intangible personal property such as stocks or bonds.

Security Agreements

When creditors retain some legal rights of ownership in a piece of personal property, they are said to have a **security interest** in that property.

▶ **LEGALESE**
Security interest: A legal ownership right to property.

When personal, rather than real, property is involved, creditors protect and establish their interest by means of a security agreement. The **security agreement** is an arrangement similar to the mortgage or deed of trust. In it, the creditor makes a loan, and the debtor agrees to pay back the loan in a timely fashion. If the debtor doesn't, then the creditor has the right to seize the personal property, sell it, and apply the money generated by the sale to the debt. The debtor is still responsible for any remaining balance.

▶ **LEGALESE**
Security agreement: A contract between a lender and borrower that states the lender can repossess the personal property a person has offered as collateral if the loan is not paid as agreed.

Article 9 of the Uniform Commercial Code is the law that regulates purchases made using security agreements, and that gives a creditor the right to take back property that the debtor either cannot or will not pay for. As with other areas, the UCC requires debtors and lenders to follow specific procedures in order to finance the purchase of property in a way that is legally binding and that will be upheld by the courts. For example, because it is a contract, the security agreement must include a written description of the property that is being purchased, and must be signed by both parties.

Financing Statements

Under UCC rules, in order for a security agreement to fully protect the creditor, it must be perfected. This is generally done by preparing and filing a financing statement. A **financing statement** is the tool used in most states to record (perfect), a lien on personal property. These statements are typically filed with either the secretary of state's office and/or the local county recorder of records. To perfect their lien, creditors file a financing statement, or UCC-1 form, with the appropriate official. The filing of the UCC-1 form publicly states that a lien exists on a particular piece of personal property.

▶ **LEGALESE**
Financing statement: A formal notice of a lien being held on personal property, required under the Uniform Commercial Code in most cases. Also called a UCC-1 because of its form number in the UCC.

Unless otherwise indicated, the financing statement remains in effect for five years. When the loan has been paid off, the debtor can request a termination statement that clears the financing statement from the public records.

Figure 4.5 is a copy of the UCC-1 form currently in use. Note that it lists the debtor, the creditor, (secured party), and a description of the property that serves as the collateral.

If a creditor has been asked to use a piece of personal property as collateral for a loan, he or she can review the financing statements on file at the office of the governmental agency retaining these records. If creditors find that no previous liens have been recorded against the property, they can be assured that they will have perfected their interest in the property when they properly file a UCC-1 on that property.

It is common in the hospitality industry to buy personal property with a loan from a third-party creditor, such as a bank, or to have the purchase price financed over time by the seller. If for example you, as a manager, wish to purchase $30,000 worth of cash registers for a new restaurant, you have three options:

- Pay seller purchase price in full: No UCC-1 required.
- Borrow purchase price from a third-party lender (such as a bank), and pay seller in full: Third-party lender (bank) files UCC-1 on the cash registers, evidencing its lien on the registers.
- Seller agrees to finance purchase price over time: Seller files UCC-1 on the cash registers, evidencing its lien on the registers.

4.4 LEASING PROPERTY

Just as it is common to buy personal property in the hospitality industry, it is equally common to **lease** it. Both real and personal property can be leased.

▶ **LEGALESE**
Lease: A contract that establishes the rights and obligations of each party with respect to property owned by one entity but occupied or used by another.

Because a lease is a type of contract, it must clearly indicate the item to be leased, the price or rent to be paid, and the consent of the two parties to the lease—the **lessor** and **lessee**. A lease is different from a purchase of property in that leases transfer possession, rather than ownership. It is critical that hospitality managers understand fully the essential terms of any leases they enter into, and the differences inherent in leasing, rather than owning, a piece of property.

▶ **LEGALESE**
Lessor: The entity that owns the property covered in a lease.

▶ **LEGALESE**
Lessee: The entity that occupies or uses the property covered in a lease.

Essential Lease Terms as a Lessor

Hospitality managers take on the role of a **landlord** when they designate specific space in their hotel or restaurant to be operated by a **tenant**. Historically, hotels would lease lobby space to those businesses of interest to their guests. Thus, tailors, dressmakers, jewelers, furriers, and the like would occupy hotel space and provide additional revenue for the property. Parking lot operators might lease the hotel's parking spaces.

▶ **LEGALESE**
Landlord: The lessor in a real property lease.

More recently, in an effort to satisfy guest demands for regional or nationally well-known restaurants, some hotels have begun leasing their entire foodservice

▶ **LEGALESE**
Tenant: The lessee in a real property lease.

[redacted]

FCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER [optional]

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME

OR

1b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

1c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY

1d. SEE INSTRUCTIONS | ADD'L INFO RE ORGANIZATION DEBTOR | 1e. TYPE OF ORGANIZATION | 1f. JURISDICTION OF ORGANIZATION | 1g. ORGANIZATIONAL ID #, if any ☐ NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME

OR

2b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

2c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY

2d. SEE INSTRUCTIONS | ADD'L INFO RE ORGANIZATION DEBTOR | 2e. TYPE OF ORGANIZATION | 2f. JURISDICTION OF ORGANIZATION | 2g. ORGANIZATIONAL ID #, if any ☐ NONE

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME

OR

3b. INDIVIDUAL'S LAST NAME | FIRST NAME | MIDDLE NAME | SUFFIX

3c. MAILING ADDRESS | CITY | STATE | POSTAL CODE | COUNTRY

4. This FINANCING STATEMENT covers the following collateral:

7. ALTERNATIVE DESIGNATION [if applicable]: ☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER ☐ AG. LIEN ☐ NON-UCC FILING

6. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS. Attach Addendum [if applicable] | 7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) [ADDITIONAL FEE] [optional] ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

8. OPTIONAL FILER REFERENCE DATA

FILING OFFICE COPY — UCC FINANCING STATEMENT (FORM UCC1) (REV. 05/22/02)

Figure 4.5 Financing statement excerpt from Uniform Commercial Code.

operations. In addition, airports and shopping malls have become landlords for well-known, or "branded," foodservice concepts that appeal to a variety of guests.

When hospitality managers take on the role of landlord, it is critical that the lease contracts they enter into be reviewed by legal counsel prior to signing. An attorney can help ensure that the duties of both landlord and tenant are clearly spelled out in the lease, and that in the event of a breach of the agreement, appropriate remedies are available to the landlord. Consider the case of Michael Singh. Mr. Singh serves as the general manager of a 400-room hotel. Mr. Singh elects to lease his gift shop to an elderly couple with excellent references, and they operate the gift shop successfully for several years. Through no fault of their own, illness causes the couple to become less prompt in opening the gift shop. In fact, on a few days within the past two months, the shop has not opened at all. Mr. Singh knows that the couple's continued inability to open the store could severely damage the hotel's business. The rights of the hotel and the tenant in a situation like this must be clearly documented, so that the hotel manager can take appropriate steps to remedy the problem.

The hospitality lease, especially for real property, is generally different from that of an ordinary landlord and tenant relationship. When a landlord leases a home or apartment, the day-to-day use of that property is normally not subject to the inspection of the landlord. For the hotel operator, however, a lease is drawn up with the expectation that the space will be used for an activity that enhances the financial well-being of the hotel under terms contained in the lease. Thus operating hours, products sold, and even pricing strategies may be contained in a hospitality manager's lease when he or she serves as landlord. While a residential landlord may not impose him- or herself unduly on a tenant, the hospitality manager has a responsibility to make sure the tenant operates in compliance with the lease, since the tenant's actions can be helpful or harmful to the success of the entire hotel.

The following areas of a lease agreement deserve special attention when a hospitality manager assumes the role of the lessor (or landlord).

Length of Lease The lease length is important in that it directly affects rent amounts. Landlords prefer leases that are long because they minimize vacancies and guarantee a steady source of revenue for the use of the space. Increasingly, tenants also prefer long leases to avoid the rent increases that often occur when leases are resigned. However, a lease that is too long may prevent a landlord from raising the rent when necessary. In a like manner, the tenant may find that his or her business grows beyond the ability of the leased space to contain it, and a move to a larger space is required. In all cases, the lease length should be established to meet both the short-term and long-term interests of both parties.

Lease start dates, or occupation dates, should be clearly established in the lease agreement. Often, lessees will want early access to the space in order to install fixtures and make improvements. The number of days required to complete this work can be significant, and the party responsible for rent during that time period, or whether rent is to be paid at all, should be clearly spelled out.

While it is less common that hospitality managers find themselves as lessors of personal property, sometimes it does occur. An example would be the resort hotel that rents bicycles to its guests. This rental arrangement provides an excellent service to guests, but creates special liability issues for the hotel. These issues will be discussed in Chapter 10, "Your Responsibilities as a Hospitality Operator to Guests."

Rent Amount Lease payments on real property are typically of four distinct types, based on the payment responsibilities of the lessee.

- A "net" lease is one in which the lessee pays some or even all of the taxes due on real property, in addition to the base rent amount.

- In a "net net" lease, the lessee pays for both taxes and insurance as required by the lessor.
- In a "net net net," or triple-net lease—the most common type in the hospitality industry—the lessee pays for all of the costs associated with occupying the property, including building repairs and maintenance.
- In a "percentage" lease, tenants pay a fixed percentage of their gross revenue as part of their lease payment. While some fixed charges may also apply, the unique feature of this lease is its variability. Thus, a hotelier might charge the gift shop lessee monthly rent based on the sales achieved by the gift shop. In this way, rent payments are lower when business is slow for the shop, but increase as the business and the lessee succeeds.

It is important that both landlord and tenant understand the costs for which they will be responsible. When leasing personal property, the hourly, daily, monthly, or quarterly payments required should be clearly identified in the lease agreement.

Subleasing Rights of Tenant Most lessees realize that conditions can change, and they may not be able to or want to fulfill all of the lease terms specified in the lease agreement. Consider for example, the shopkeeper who leases space for a flower shop in an urban hotel. The shopkeeper is very successful, and elects to sell her rights to the flower shop space to open a larger shop in a different part of the city. In this situation, the shopkeeper will want to **sublet**—that is, to transfer or assign to another—her interest in the hotel lease to a new shopkeeper.

▶ **LEGALESE**

Sublet: To rent property one possesses by a lease, to another. Also called subleasing.

The concern of the hotel, as the lessor, of course, is that the new shopkeeper must be able to meet the requirements set forth in the lease. For this reason, it is a good idea for the lessor (hotel manager) to insist that any sublessee demonstrate his or her financial strength and integrity before the lessor approves the sublease arrangement.

While it would not be reasonable for the lessor to have complete say over who the sublessee may be, it is also not reasonable for the choice of sublessee to be left solely in the hands of the original tenant. Accordingly, leases should address this issue with a clause acknowledging the right of the lessee to sublease, but only with the landlord's written consent. The clause should also state that the landlord's consent cannot be unreasonably withheld.

Insurance Landlords are favorite targets for litigation. If a tenant is negligent, and the result is injury to an individual, the lessor must be protected. The size and types of policies that the lessor should require may vary, but in all cases the lessor should insist that:

- The lessee's insurance carriers must be acceptable to the lessor.
- Copies of the insurance policies should be delivered to the lessor at the time of the lease signing.
- Lessees and their insurance companies should be required to give prior notice to the lessor if the policies are canceled, withdrawn, or not renewed.

In addition, landlords, when preparing leases, may insert exculpatory type clauses that seek to limit their liability. As seen previously, these clauses may not provide complete protection, but they can sometimes be helpful. It is best to have a commercial insurance agent or attorney who is experienced in insurance to review lease provisions and insurance policies to ensure that both lessor and lessee have adequate insurance coverage for the responsibilities allocated to each by the lease agreement.

Termination Rights Leases may be terminated for a variety of reasons, but these reasons must be clearly spelled out as part of the lease. If, for example, a tenant is

delinquent in paying rent, the lessor can require that the premises be vacated. Most landlords will allow the payment to be made a few days later without penalty. This grace period should be clearly identified in the lease, as well as any penalties that will be assessed if the payment is tendered beyond the grace period.

Disturbances, violation of operating hours, significant damage to the property, and failure to abide by lease terms may all be justification for termination. However, while the reasons may be valid, they will not justify an **eviction** unless those reasons are distinctly identified in the lease.

▶ **LEGALESE**

Eviction: The procedure that a lessor uses to remove a lessee from physical possession of leased real property, usually for violation of a significant lease provision, such as nonpayment of rent.

When you as a hospitality manager serve as a landlord, the quality of the tenants who supply services to your guests can reflect well or poorly on the overall operation. Capable tenants who operate their businesses in a professional manner can be a real asset to a hospitality property; inexperienced or less-qualified tenants can cause great difficulty. When serving as a lessor, it is imperative that the hospitality manager examine the essential lease terms discussed in this section to ensure the best possible chance of the lessee's, and the lessor's, success.

Essential Lease Terms as a Lessee

When a hospitality manager takes on the tenant role in a lease arrangement, the lease may be for either real or personal property. When Mike Keefer decided to open a steakhouse, he discovered that his own favorite steakhouse was, in fact, for sale. Rather than sell Mike the restaurant, the owner agreed to lease the land, building, and equipment to him in exchange for a percentage of the restaurant's gross sales. This arrangement provided Mike with a lower-cost entry into the restaurant business, and provided the landlord with continued ownership of the restaurant property.

Whether the hospitality manager leases land, buildings, or equipment, such as dishwashers, icemakers, and beverage machines, it is important that an attorney review the provisions of the lease prior to signing. The following items deserve the hospitality manager's special attention when leasing real or personal property.

1. Landlord representation and default.

When a tenant leases real property, or an individual leases personal property, it is generally assumed that the lessor has the legal right to lease the property for its intended purpose. The issue of landlord representation and truthfulness, however, can become complex. Consider the case of the restaurateur who examined a property for use as a restaurant. The landlord stated in the lease that the space could lawfully be operated as a "restaurant." After the lease was executed, the restaurateur found that the restaurant's proximity to a school prevented him from obtaining a liquor license. The community zoning laws prohibited selling alcohol near a school. Thus, the landlord's representation that the space could be used as a restaurant was true, but only if that restaurant elected not to serve alcohol. The lesson here is that, as a tenant, any representation made by the landlord about the fitness of property for its intended purpose should be independently verified.

A related concern for lessees is the rights they have if the landlord should lose possession of the property through default. If, for example, a tenant pays his or her rent on time, but the landlord defaults on loans in which the property served as collateral, the rights of the lessee should be addressed in the lease. A clause can be inserted in the lease that guarantees that the tenant's lease will be undisturbed. This is an area of the lease that is best carefully reviewed by legal counsel.

2. Expenses paid by landlord.

Whether the lease negotiated is a net, a net net, a triple net, a percentage lease, or some combination thereof, disputes over covered expenses are a common

source of landlord/tenant disagreement. Because the landlord has limited ability to reduce expenses during periods of financial difficulty, there are few options available to him or her when costs must be reduced. If electricity is to be paid by the landlord, it represents a significant expense and should be addressed directly by the hospitality operator. A restaurant consumes a large amount of electricity through cooking equipment, dishwashing, and air conditioning. The lease should clearly identify whether any limits are set on the quantity of electricity that can be used, as well as the types and capacities available.

HVAC is the acronym for heating, ventilation, and air conditioning. In both a net and a net net lease, the repair and maintenance of these items are part of the lease arrangement and are ordinarily paid for by the landlord. The services provided for HVAC maintenance and repair can be critical and should be included in the lease, along with a schedule of times when the services are available.

ANALYZE THE SITUATION 4.3

Sandy Aznovario leased a corner space in a shopping center to operate Olde Style Buffet, an all-you-can-eat buffet geared toward senior citizens and families. The buffet was especially popular on weekends, and its best business was done on Sundays, before and after people in the community normally attended church.

Kathy Miley was the landlord for the shopping center. She and Sandy signed a net net lease, clearly stating that maintenance and repair of the HVAC system would be the responsibility of the shopping center's commercial real estate company.

On Easter Sunday, the Buffet's busiest day of the year, the head cook reported to Sandy that the overhead exhaust system in the kitchen was not working, and the kitchen was becoming unbearably hot, smoky, and humid. Sandy called the landlord's leasing office and heard a recorded message stating the office was closed because of the Easter holiday. Sandy then contacted Beatty's 24-hour Emergency HVAC Repair Service, which sent a representative, who examined the HVAC system, then replaced a broken fan belt on the rooftop exhaust fan.

Sandy submitted the bill from Beatty's, including a triple-time labor charge for holiday service, to Kathy Miley's company for payment. Kathy refused to pay the bill, stating that Beatty's was not the authorized HVAC service company used by Miley, nor did the lease specifically state that HVAC service would be provided on holidays.

1. Who is responsible for this bill?
2. What could have been done beforehand to keep this conflict from occurring?

Like HVAC service and repair, cleaning services, if provided as part of the lease payment, should be clearly identified, and a schedule of cleaning times should be attached to the lease itself. The number of times the restroom is cleaned daily, as well as a definition of "cleaning" should be provided. Does it include floor mopping and the cleaning of toilets and mirrors each time? Or does the cleaning only involve removing large paper debris from the floors? Obviously, a guest will have a different experience under these two alternatives.

It is the responsibility of the hospitality manager who leases space to determine precisely what he or she will get in the way of services included, and expenses paid for, by the landlord.

3. Terms of renewal.

The terms under which a tenant may renew his or her lease should be of utmost importance to the hospitality manager who finds himself or herself in the role of lessee.

Consider the situation of David Berger. David is the district real estate manager for a chain of muffin shops. As part of his job, David negotiates

leases for the company's 800-square-foot operations. More than property leases are managed by David. One of David's prime concerns when negotiating a lease is the provision for renewal. If David selects a successful site, he will seek to renew his lease with as little upward change in rent as possible. If the site is less successful, he may elect not to renew the lease, or do so only with a significant reduction in lease payments.

It is important to note that a landlord has no obligation to continue a lease that has expired. Because of that, David often encounters landlords who wish to dramatically increase the rent payments for spaces where the muffin shops have shown great success. To prevent this, David insists that renewal formulas limiting rent increases to an acceptable amount be written into each lease when it is originally signed.

Normally, a lease can be extended only upon written notice from the lessee. Leases can, however, be written in such a way so as to renew automatically, unless terminated in writing by one of the parties to the lease.

Rights of the Landlord

Most tenants understand that a landlord will have the right to periodically inspect their property. This should, however, be allowed only at reasonable hours, and with reasonable notice.

Of even more importance to most tenants is the right of a landlord to lease to a competing business. Consider the case of a landlord with a large 30-store shopping center. It is in the best interest of the landlord to fill all the space with high-quality tenants. The space may even be large enough to house more than one hospitality operation, for example, a bagel shop and a pizzeria.

If, however, the landlord rents space in the shopping center to an upscale bakery, would it be fair for that same landlord to rent space in the same shopping center to a second upscale bakery? Unless the lease of the first bakery expressly prohibits it, the landlord would have the right to lease space to a direct competitor. While few landlords will give a tenant veto power over any new tenants, it is reasonable to expect that a landlord will allow a tightly drawn definition of any future competitor, in order to help ensure the success of a tenant considering the leasing of space.

Deposits, Damages, and Normal Wear and Tear Normally, a landlord will require a deposit payment for the lease of real property. Landlords who lease personal property may also require deposits to ensure the return of the leased item in good condition. The amount of the deposit should be clearly spelled out in the lease.

Certainly, tenants must be held responsible for damages they incur on leased property. Tenants should not, however, be responsible for the normal wear and tear associated with the use of a piece of property. Difficulties can arise when the definition of normal wear and tear varies between landlord and tenant. Because it can be a source of conflict, the more detail that can be added to this section of the lease, the less likely it is for litigation to result. Dates by which a landlord must return a deposit upon lease termination, and the appropriate method of resolving disputes about owed amounts, should also be included.

Unfortunately, legal clashes between landlord and tenant are common occurrences. They can be reduced when if both parties to the lease carefully consider the essential lease terms that most directly affect the success of the lessor and lessee relationship. When vacancies are high, landlords may be willing to negotiate on terms they otherwise would reject. Likewise, if space is in short supply, tenants may be in a weaker negotiating position. Carefully reviewing lease terms is always a good idea and one that the hospitality manager would be well advised to undertake only with the aid of a qualified attorney.

The Buy-versus-Lease Decision

The decision to purchase or lease a piece of property is an important one. Managerial philosophy can play a large part in this decision. Regardless of whether one elects to own or merely utilize property, the decision has wide-ranging effects on a number of business issues. The most important effects are addressed in the next Legally Managing at Work discussion.

LEGALLY MANAGING AT WORK:
Legal Considerations of Buying versus Leasing

1. Right to use

Purchase	*Lease*
Unlimited use in any legal manner seen fit by the owner.	Use is strictly limited to the terms of the lease.

2. Treatment of cost

Purchase	*Lease*
Property is depreciable in accordance with federal and state income tax laws.	Lease payments are deductible as a business expense, according to federal and state tax laws.

3. Ability to finance

Purchase	*Lease*
The property may be used as collateral.	The property may not generally be used for collateral.

4. Liability

Purchase	*Lease*
Owner is liable.	Lessee and/or lessor may be liable.

5. Improvements

Purchase	*Lease*
Implemented as desired by owner.	Improvements limited to those allowed by lease terms.

6. Termination

Purchase	*Lease*
Ownership passes to estate holders.	Right to possess concludes with termination of lease contract.

7. Default

Purchase	*Lease*
Lender retains down payment and/or may foreclose on the property.	Lessor retains deposit and/or lender may evict and pursue balance of lease. With personal property, the lessor may reclaim the leased item. ◀

▶ **LEGALESE**
Capital improvement: The purchase or upgrade of real or personal property that results in an increased depreciable asset base.

▶ **LEGALESE**
Depreciation: The decrease in value of a piece of property due to age and/or wear and tear.

Often, the decision to lease rather than purchase property is an economic one. A new passenger van for a hotel may cost over $30,000. If the van is purchased, the hotel has undertaken a **capital improvement**. Payments for the van are not deductible as a business expense on the monthly profit and loss (P&L) statement. The value of the van, however, may be **depreciated** over a period of time fixed by law.

If a hotel operator wants to replace the air filters located in the ceiling of an atrium-style lobby four times a year, it makes little sense to purchase the mechanical lifts necessary to do the job. These pieces of equipment can be leased for a day and the task can be completed.

On the other hand, if a restaurateur wants to operate a restaurant in a prime location in a mall food court, he or she may have no option other than leasing, because the mall owner is not likely to sell the restaurateur the space needed to operate, but rather will lease the space under a **commercial lease**.

▶ **LEGALESE**
Commercial lease: A lease that applies to business property.

The owner of a piece of property has rights that a lessee does not enjoy. In some cases, however, the effective hospitality manager, for a variety of reasons, may find it desirable to lease a piece of property. In either case, it is important to know and protect the rights associated with each type of property's possession.

4.5 RESPECTING INTELLECTUAL PROPERTY RIGHTS

Some of the most important and personal property rights protected by law are those that relate to **intellectual property**, personal property that is both intangible and conceptual.

▶ **LEGALESE**
Intellectual property: Personal property that has been created through the intellectual efforts of its original owner.

In the hospitality industry, some managers violate intellectual property rights by using, but not paying for, the intellectual property of others. Good managers both avoid infringing on the property rights of others and pay for those intellectual items they legitimately use to assist their business.

When an individual creates something that is unique and valuable, his or her right to enjoy the financial proceeds of that creation is protected by laws related to trademarks, patents, copyrights, or trade dress. It is important to note that intellectual property maintains its status even after the death of the person who created the property.

Trademark

Trademarks are used to identify the producer, manufacturer, or source of a product. They are frequently used in the hospitality industry. The reason is clear: Guests like to see name-brand products in use by the establishments they frequent. Well-established trademarks, or marks as they are sometimes called, let consumers know precisely whose product they are buying or being served. For example, many restaurants find it convenient to serve ketchup directly from the bottle. As a consumer, a bottle manufactured and labeled by Heinz will elicit a much different response from one manufactured by Bob. When consumers see the Heinz name on the label, they associate the ketchup with the quality represented by the Heinz company. An unscrupulous foodservice manager who buys Bob's ketchup, then puts it in a Heinz bottle, violates not only food safety laws, discussed later in this text, but trademark property rights laws as well.

▶ **LEGALESE**
Trademark: A word, name, symbol, or combination of these that indicates the source or producer of an item.

The owner of a trademark has the right to prevent others from using that mark, if the owner was the first to use it in the respective marketplace. When a trademark has been properly applied for and received, no other person may manufacture or sell any article using the same or similar signs, marks, wrappers, or labels.

Trademark law protects the public by making consumers confident that they can identify brands they prefer and can purchase those brands without being confused or misled. Trademark laws also protect hospitality managers by ensuring that they are getting the quality they are paying for.

Patent

When an inventor creates something new, he or she may apply for a **patent** on the invention. If, for example, a restaurateur invents a piece of kitchen

▶ **LEGALESE**
Patent: A grant issued by a governmental entity ensuring an inventor the right to exclusive production and sale of his or her invention for a fixed period of time.

equipment that can easily peel and remove the center from a large Spanish onion, that restaurateur would be able to quickly produce one of today's most popular appetizer items. It would not be fair for another restaurateur to see that piece of equipment and proceed to manufacture it for sale him- or herself if the first restaurateur had applied for, and received, a patent on that piece of equipment.

The U.S. Patent and Trademark Office is the federal entity responsible for the granting of patents. An inventor, as the owner of the patent, has the right to exclude any other person from making, using, or selling the invention covered by the patent anywhere in the United States for 17 years from the date the patent is issued. If an inventor has applied for, but not yet received a patent, he or she may use the term "patent pending" or "patent applied for."

Copyright

▶ **LEGALESE**

Copyright: The legal and exclusive right to copy or reproduce intellectual property.

A **copyright** is the set of rights given to reproduce and use intellectual property. For example, the writer of a song has a right to compensation any time that song is performed. If a singer takes the song, records it, and then sells the recording, the copyright laws would require the singer to fairly compensate the songwriter who wrote the song's music and lyrics.

Copyright protection was considered so important that the founding fathers of the United States specifically granted the new Congress the responsibility of regulating copyrights. Figure 4.6 is an excerpt from the United States Constitution that addresses the issue of copyrights.

The owner of a copyright has the right to prevent any other person from reproducing, distributing, performing, or displaying his or her work for a specific period of time. The Copyright Act of 1976 states that copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, or computer program. Most of the items found on the Internet are copyrighted also, including the text of Web pages, contents of e-mail, and sound and graphic files.

▶ **LEGALESE**

Copyright owner: A person or entity that legally holds a right to intellectual property under the copyright laws.

When an individual has been granted a copyright, he or she is said to be the **copyright owner**. Copyright laws exist in foreign countries as well as the United States.

In some cases, it is legal to use a copyrighted work without permission from the owner, but the purpose of such utilization is very important. A copyrighted work used for commentary, news reporting, teaching, scholarship, or research, is normally not an infringement of a copyright.

In the hospitality industry, it is critical that copyrighted works be used only when appropriate authorization has been received, particularly when the use of a copyrighted work—such as the broadcasting of a boxing match—will provide a direct economic benefit to the hospitality establishment. Generally speaking,

The Constitution of the United States of America

Article 1, Section 8

The Congress shall have the power:

to promote the progress of science, and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

Figure 4.6 Excerpt from the U.S. Constitution.

the courts are aggressive enforcers of copyright laws, thus it is a good idea to be very clear about the origin and ownership of potentially copyrighted works before they are used in a manner to produce income and profit.

Trade Dress

▶ **LEGALESE**

Trade dress: A distinct visual image created for and identified with a specific product.

While the rights related to **trade dress** are actually a part of those rights related to trademarks, in the hospitality industry, they merit separate discussion. A trade dress is a very special and unique visual image.

Trade dress includes color schemes, textures, sizes, designs, shapes, and placements of words, graphics, and decorations on a product or its packaging. In the hospitality industry, an entire restaurant may be created in such a way as to be protected under the laws related to trade dress. The laws in this area can be murky. Certainly, no one restaurant chain has an exclusive right to operate a restaurant with a "down home" theme. A trade dress question arises, however, when one restaurant chain uses the same items to create that feel as does its competitor.

Italian, Mexican, French, and American restaurants, to name a few, all have unique characteristics associated, not with the product served, but with the feel and visual image of the establishment. Trade dress protection allows the creative restaurateur to protect his or her aesthetic ideas in an industry that highly rewards innovation and creativity. For an excellent and recent examination of the trade dress issue, do the following Search the Web exercise. It involves the case of two Mexican-style restaurants, one of which was accused of a trade dress violation.

◀ **SEARCH THE WEB 4.1** ▶

Log on to the Internet and enter **supct.law.cornell.edu/supct**.

1. In the Search field, type: "Two Pesos."
2. Select: "Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992)."
3. Select: Syllabus.

Review the intangible property rights Supreme Court case involving Two Pesos, Inc. and Taco Cabana, Inc. Be prepared to describe in class the items of similarity between the two businesses on which the court based its decision.

Preventing Intellectual Property Rights Infringement

In order to prevent infringing on the rights of intellectual property owners, the United States patent and trademark office maintains a database of registered patents and trademarks. Consult that database if there is any question of whether a mark or an invention is in the **public domain**.

▶ **LEGALESE**

Public domain: Property that is owned by all citizens, not an individual.

If a company does not take care, its trademarks can become part of the public domain. "Aspirin" is often mentioned as a word that began as a trademarked term, but later passed into such common usage that the courts would no longer enforce the property rights of the word's creator. A common word, used frequently by society, cannot become the subject of trademark protection.

While most hospitality managers can, through thoughtful planning, avoid infringing on patent and trademark rights, copyright issues are more complex. Consider the case of the corporation that owns a theme park with a variety of thrill rides. One of the most popular is a seated ride where four passengers share a

padded car that progressively goes faster and faster, traveling up and down on a circular track. The ride is fast, loud, and popular with teenagers. Hundreds of flashing lights and loud music, played by 25 broadcast-quality speakers, are an important ingredient in this ride. The corporation is free to put any type of lighting around the ride that it feels would be appropriate. However, the company is not free to broadcast any music it wishes over the speakers in conjunction with the ride, unless the music is used in compliance with U.S. copyright laws. Figure 4.7 shows the section of the United States legal code that deals with the infringement of copyright.

Copyright laws in the United States give songwriters and publishers the right to collect royalties on their intellectual property whenever their songs are played in public. Note that the law allows the owner of the copyright to recover the profits made by any group that unlawfully uses copyrighted material.

U.S. Code, Title 17, Section 504

Sec. 504. Remedies for infringement: Damages and profits

In General. - Except as otherwise provided by this title, an infringer of copyright is liable for either:

(1) The copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
(2) Statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits. The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages.

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just.

For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was:

(i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or
(ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection [g] of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

Figure 4.7 Copyright infringement.

Whether a hospitality manager plays songs in an establishment on CDs, television, tape, or in a live performance, the owners of the song have a right to royalties. This is because federal copyright laws state that playing copyrighted music in a public place constitutes a performance. When copyrighted music is performed in public, hospitality managers are in violation of the law if they do not pay the royalties due the owners of the music that has been played.

Of course, it would be extremely difficult for the practicing hospitality manager to know exactly who owns the rights to a particular piece of music. Most of the songs played in the United States are licensed by either Broadcast Music, Inc. (BMI); the American Society of Composers, Authors, and Publishers (ASCAP); or SESAC, which originally stood for the Society of European Stage Actors and Composers, but now is referred to solely by its acronym, pronounced SEE-sack. In order to play a given piece of music, a fee must be paid to the licensor that holds the right to license the music in question. Fee structures are based on a variety of factors, but the average restaurant, playing background music seven days a week, would be expected to pay only a few hundred dollars per year for the right to broadcast most of the music available for play. If the hospitality manager refuses or neglects to pay the fees rightfully due a licensing group, he or she can be subject to fines or prosecution.

Congress has determined that any facility that plays its background music on a piece of equipment that could normally be found in a home will not be held to the normal copyright infringement rules if they do not charge admission to hear the music. Certainly, it is not the intent of the copyright laws to prohibit turning on a simple radio or television in a public place. In 1998, President Clinton signed the Fairness in Music Licensing Amendment, a law that allowed small restaurants an exemption from some licensing fees. The law took effect in January 1999.

The specific provisions of the amendment providing for the free broadcast of music and video are quite clear. Restaurants under 3,750 square feet can play as many televisions and radios as they desire without paying royalty fees. There is no restriction on the size of the television that may be installed in a restaurant of this size. For specific information, log on to **www.copyright.gov**. For restaurants larger than 3,750 square feet, if the owner applies for and receives an exemption, the restaurant may play up to four televisions (no more than one per room), and use up to six speakers (no more than four per room). The television sets cannot be larger than 55 inches.

Many hospitality venues utilize jukeboxes for their patrons' entertainment. It is ordinarily the provider of the jukebox who has the burden of paying the royalties for the music included in the jukebox, but this should be spelled out in the agreement prior to the installation of the jukebox.

Just as music is covered by copyright laws, so too are the broadcasts of such groups as the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), and others. The right to air these broadcasts is reserved by the group creating the programming, and the hospitality manager who violates their copyrights does so at great risk. If you have any doubt about the legality of your intended broadcasts, contact the broadcast company (i.e., cable operator) or the owner of the broadcasted product (NFL, Time Warner, etc.) to clarify the circumstances under which you may broadcast and to get written permission to do so.

For hotels, the broadcasting of in-room videos or movies on demand is treated in a similar way to jukeboxes in restaurants. The providers of the service to the hotel operator are ordinarily responsible for paying the royalties from showing the product. Again, this needs to be clarified in the agreement between the provider of the service and the hotel operator.

▶ INTERNATIONAL SNAPSHOT

U.S. Hotel Companies Seeking Trademark Protection May Now File in the U.S. for Protection Abroad

Most well-known hotel companies earn their profits primarily by managing and franchising hotels, thereby allowing the hotels to operate under the hotel company's "flags." These flags (such as Westin, Marriott, and Hilton) are trademarks. They represent a way of doing business, the hotel company's valuable relationships with its customers, and, in essence, the company's power to deliver economic performance to a hotel. Hotel companies, therefore, consider their trademarks to be among their most valuable assets.

Valuable assets must be protected, and trademarks are no exception. Trademarks are usually protected by registering them in the jurisdictions where they are used. These registrations must then be renewed at intervals prescribed by the laws of the applicable jurisdiction.

Hotel companies often operate hotels internationally. This means that, to protect their marks, they should, at a minimum, register and renew their registrations in each country where the hotels are located. They should also consider "registering defensively" in countries where there is a high "knock-off" risk. Before November 2, 2003, the registration process required a U.S. hotel company to engage in a country-by-country registration process. One shortcut registration process has existed for some time: Companies may register for and obtain a European Community Trade Mark (ECTM), which provides protection in all countries of the European Union for the cost of a single application. But as of that date, U.S. companies were given an additional shortcut alternative to the country-by-country registration process. On November 2, the United States became the fifty-ninth country to implement the Madrid Protocol.

The Madrid Protocol is a treaty that allows trademark holders to file a single application covering all 60 protocol member countries. The resulting International Registration permits some applicants to greatly reduce costs associated with multiple international trademark applications.

Like any trademark protection regime, the Madrid Protocol has disadvantages as well as advantages:

- One-stop Madrid filings through the U.S. Trademark Office are more convenient and initially less costly than filing multiple international applications.
- International registrations offer the same scope of protection as a registration in the applicant's home country. Because U.S. trademark law requires applicants to describe the goods covered by their marks more narrowly than that of other countries, an international registration based on a U.S. application will give a U.S. trademark holder narrower protection in some other countries than non-U.S. trademark owners would receive.
- Because an international application must be based on an original "home country" application, if a U.S. applicant's original U.S. application is refused by the Patent and Trademark Office, or fails for any other reason within five years, the entire international application based on it will also fail. An applicant may refile applications in each individual country while retaining the original filing date, but the fees and costs associated with the original protocol application will be lost.
- If member country trademark offices raise substantive objections to applications for an international registration, local counsel will be necessary to resolve each such objection.
- Madrid filings do not cover countries that are not members of the Madrid Protocol. Some important countries that are not members include Canada and most of Central and South America.

Whether a company should seek international registration under the Madrid Protocol depends heavily on the countries where the company needs protection. If, for example, the company expects to use its mark solely in Europe and the United States, a European Community Trade Mark will provide protection in all countries of the European Union for the cost of a single application, and the costs and benefits of prosecuting a ECTM application will be generally more favorable than those associated with a Madrid filing. If, however, the company requires broad, worldwide protection, an international application may be the best overall approach.

Provided by Irvin W. Sandman, Esq., and Robert C. Cumbow, Esq., of Graham & Dunn's Hospitality, Beverage, and Franchise Team, Seattle, Washington. www.grahamdunn.com

WHAT WOULD YOU DO?

Assume that you are the food and beverage (F&B) director at a full-service hotel in a large East Coast college town. Your general manager, Mr. Peterson, is planning to have a large event centered around this year's Super Bowl. As the F&B director, you are an integral part of the event planning committee. One of the teams in the NFL final is from the state in which your hotel is located, so fan interest is very high.

Mr. Peterson proposes an event that will be held in the hotel's Grand Ballroom, which can hold 700 people. The festivities will begin at 3:00 P.M. on Super Bowl Sunday, with the televised pregame show, a darts tournament, and a Mexican food buffet. At 6:30 P.M., the game is to be shown on five 60-inch TV screens that will be placed around the ballroom. The chief maintenance engineer has assured Mr. Peterson that the sets can be mounted on the ballroom's walls. The evening will conclude with a postgame "victory" party, which will end around midnight.

During one of the planning meetings, the discussion centers on the admission price that will be charged. The issue of reserved seating is raised by Scott Haner, director of sales and marketing. He believes that corporate clients of the hotel will be more inclined to attend if they can be assured good seats near the large-screen televisions.

1. As a hospitality professional, what issues must you consider prior to finalizing this Super Bowl party event?
2. If Mr. Peterson elects to charge a $20 fee for seats close to the large screens, but only $5 for seats farther away from the screens, would your opinion be different? Why or why not?
3. What are the responsibilities of the management team in this scenario?

▶ THE HOSPITALITY INDUSTRY IN COURT

To understand just how possessive movie studios can be about their copyrights and how extensive the litigation can be in this area of the law, consider two case studies. First, *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49 (1993).*

FACTUAL SUMMARY

Professional Real Estate Investors, Inc. (PRE) operated a resort hotel, La Mancha Private Club and Villas (La Mancha), in California. The hotel had a substantial collection of movie titles on videodisc, and each room of the hotel was equipped with a videodisc player. The hotel made the videodiscs available for rent to guests for in-room viewing. PRE was also developing a market to sell videodisc players to other hotels for in-room viewing of rented movies.

Columbia Pictures Industries, Inc. (Columbia) and several other movie studios held the copyrights to the videodisc movies PRE purchased and rented to guests. Columbia also licensed the transmission of copyrighted movies to hotels through a cable television system called Spectradyne. So PRE was in competition with Columbia for the in-room viewing market at La Mancha. PRE was also entering into competition with Columbia for the in-room viewing market of the hotel industry in general with the introduction of videodisc players for sale.

Columbia eventually sued PRE for copyright infringement. Columbia claimed the rental of videodiscs for in-room viewing infringed its right to "perform the copyrighted work publicly" (17 U.S.C. § 106(4)). PRE in turn sued Columbia for violation of the Sherman (antitrust) Act. PRE claimed Columbia's copyright infringement suit was a "sham," or simply a way to hide anticompetitive behavior and a broader conspiracy to control the movie industry. If the copyright lawsuit was a sham, then Columbia could not claim immunity from antitrust liability.

QUESTION FOR THE COURT

The question for the court was whether Columbia's copyright infringement suit was a sham to cover its own anticompetitive behavior. In deciding whether the suit was a sham, the court first discussed Columbia's copyright infringement suit. PRE and Columbia both agreed PRE could sell or lease lawfully purchased videodiscs if it was the first purchaser. Both parties also agreed the playing of the videodiscs in the hotel rooms was a performance, as defined by the Copyright Act; however, the in-room viewing of videodiscs was not a public performance of the copyrighted material. So the rental of videodiscs for in-room viewing was not a violation of the Copyright Act.

After discussing the copyright issue, the court decided whether Columbia's lawsuit was a sham. PRE argued the copyright suit was a sham because Columbia did not honestly believe it could win. Columbia argued the lawsuit was a legitimate effort to stop a copyright infringement.

DECISION

Ultimately the court ruled in favor of Columbia. While PRE was not violating the Copyright Act, Columbia's lawsuit was not completely baseless. The Court defined a baseless lawsuit as one no reasonable person could expect to win. So, while Columbia did not win the lawsuit, there was at least some reason to believe success was possible. Since the lawsuit was not baseless, it was not a sham meant to conceal anticompetitive behavior.

MESSAGE TO MANAGEMENT

Carefully choose your entertainment and amenity providers. Be sure that you are indemnified by them in your contract with them for any potential copyright infringement issues.

Next consider the case of *Home Box Office, Inc. v. Pay TV of Greater New York, Inc. 467 F. Supp. 525 (E.D.N.Y., 1979).*

FACTUAL SUMMARY

In 1974, Home Box Office, Inc. (HBO) contracted with Microband National Systems, Inc. (Microband) to distribute HBO subscription television service to areas in and around New York City. HBO transmitted its service from atop the Empire State Building to various points throughout New York City. Microband received the signal with special equipment, converted the signal, and distributed it to individual households. Microband subcontracted the distribution service to other companies. Pay TV of Greater New York, Inc. (Pay TV) was one of those distribution companies.

Pay TV signed an agreement with Microband in October 1975 to distribute HBO services in Queens County for as long as Microband's contract continued with HBO. Pay TV claimed it entered the agreement believing it would eventually take the place of Microband as the main distributor. Pay TV repeatedly requested the right to distribute HBO services in other areas around New York City. HBO denied these requests despite Pay TV's investment of money and effort in securing new service areas. In May 1976, Microband ended the agreement with HBO. HBO, and Pay TV entered into negotiations for Pay TV to have exclusive distribution rights in the King and Bronx County areas as well as the already existing rights in Queens County.

By July 1976, no agreement was reached, but Pay TV continued to distribute services in Queens County and even expanded into other areas. In February

1977, HBO demanded in writing that Pay TV stop transmitting HBO service completely. A final attempt to reach an affiliation agreement failed, and in August 1978, HBO advised Pay TV it was transmitting HBO service without authorization ("pirating"). HBO advised Pay TV the transmission was illegal, and if it did not stop, a lawsuit would be filed. HBO filed suit in December 1978. At the time of the lawsuit, Pay TV continued transmitting to over 8,000 customers, collecting $75,000 per month. No payment was made to HBO by Pay TV. HBO asked for a temporary injunction to stop Pay TV from transmitting HBO service.

QUESTION FOR THE COURT

The question for the court was whether Pay TV could be ordered to stop intercepting and transmitting the HBO signal. HBO argued Pay TV was violating Section 605 of the Communications Act of 1934 (the act). Under Section 605, anyone intercepting and using signals not intended for the general public was violating the act. Pay TV admitted Section 605 applied to the suit between it and HBO, but argued HBO consented to the interception of the signal. Pay TV also argued HBO waited too long to ask for an injunction. Finally, Pay TV argued HBO was suffering harm, for which money damages could compensate. With this argument, Pay TV could pay HBO damages but continue to transmit the service while the lawsuit was taking place.

DECISION

The court ruled Pay TV was pirating services and found no evidence that HBO consented to the illegal transmission. The court also held HBO was not too late in seeking an injunction, and money damages would not repair the harm being done by Pay TV. Pay TV was ordered to cease transmission.

MESSAGE TO MANAGEMENT

Pirating (or profiting from) broadcasts not meant for distribution to the general public (or without a license from the distributor, e.g., NFL) is illegal and can subject you to serious economic liability.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

Property can be classified into several different categories. Real property refers to land and all the things attached to the land. Fixtures are personal items that were once separate but are now considered to be real property. Most items other than land are classified as personal property, which includes both tangible and intangible property. It is important to understand the difference among the categories of property, because different methods of financing the purchase of property exist for each category.

When property is transferred from one owner to another, specific types of documents and sales contracts are used to ensure the legality of the purchase and to protect the buyer and seller. Warranties, or advertised claims about the performance or quality of a product, are often treated as part of the sales contract. Thus, a seller is obligated by law to back up any warranties made. The Uniform Commercial Code offers protection under the law to both buyers and sellers of personal property, as well as to financial lenders.

A lease is a contract that transfers possession, but not ownership, of a piece of property. Leasing real and personal property is a common occurrence in the industry today. Whether a hospitality manager assumes the role of a lessor (landlord) or lessee, it is important to make sure that the lease agreement contains essential terms that will spell out the details of the agreement, and offers adequate protection to both parties.

Trademarks, patents, copyrights, and concept rights are all protected under the law. Hospitality operators must make sure that they are in compliance with laws governing the serving of brand-name products; the use or creation of concepts, logos, or images; and the public broadcasting of music and video.

RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Restate the difference between real and personal property, and give five hospitality examples of each.
2. Secure a bill-of-sale form, and check it for the six critical information items listed in this chapter. List additional items on the bill of sale, and describe why you believe each is included.
3. Prepare a memo for your staff that lets them know the difference between a deed and a bill of sale. Include an explanation of when each would be used.
4. Secure a copy of an express warranty, and analyze it for differences with an implied warranty.
5. Using the Internet, locate a lender who finances hospitality operations. Determine the current interest rate for a $1 million unsecured loan.
6. Choose a popular, independent, local restaurant. Write a two-page description of that property that you feel defines its trade dress.
7. Assume your operation is considering whether to buy or lease a beer-dispensing system from your vendor. Your boss has asked you to prepare a memo addressing the legal aspects of the decision. Prepare a one-page memo that addresses the major issues.
8. Give a hospitality example of each of the following:

   Trademark
   Patent
   Copyright
   Trade dress

▶ TEAM ACTIVITY

After reviewing Section 4.4 on leases, form teams of two, then pair up with another team. One team will represent the hotel; the other team will act as a potential tenant. Each team will have 15 minutes to review their position, after which 45 minutes will be used to negotiate the terms of a leasing agreement, using the following information:

- ▶ The space to be leased occupies 5,000 square feet in a hotel.
- ▶ The potential tenants are looking for a primary 10-year lease to open a restaurant/nightclub.
- ▶ Average rental rate in the area is $10 per square foot for a three-year lease.
- ▶ The space is a shell only (walls, roof, dirt floor).

Make the best deal you can. Be sure to address the rental rate, finish-out allowance, lease term, and other issues raised in your reading and class discussions. If all issues are not resolved, discuss the terms of the last offer made.

Chapter 5

Regulatory and Administrative Concerns in the Hospitality Industry

"Trisha Sangus here, how can I help you," said Trisha as she picked up the telephone in her kitchen. It was a Saturday, and one of her days off.

Lance Dani, front office supervisor at the hotel was on the other end of the line. "Ms. Sangus, I'm really sorry to call you at home, but we have a problem at the front desk. It's Coach Keedy from Northern University. He's ready to check out."

Trisha liked Coach Keedy. His team competed against the local university twice a year, and Trisha considered herself fortunate to have acquired his business. Despite the fact that he brought a large number of energetic college students to her hotel each time he arrived, the students were generally well-mannered and caused no difficulty. She certainly welcomed the weekend business they brought to town. Coach Keedy's team had lost the night before, and she knew when that happened, he would take it hard. It tended to be a bit unpleasant for everyone the next day.

"What seems to be the problem?" Trisha inquired.

"Well," Lance replied excitedly, "the coach is refusing to pay his entire bill. He says that, as a nonprofit organization, his college is tax-exempt, and he won't pay the sales tax or the local occupancy tax on his rooms. He's very upset. I asked him for a tax-exemption certificate, but he doesn't have any documentation proving his tax-exempt status. He said any fool would know a college is tax-exempt. Those were his exact words."

I was afraid this might happen, thought Trisha. In the past, her hotel had billed Coach Keedy's school directly for any room charges incurred when the team stayed at the hotel. However, the school recently changed its billing policy. Now, the coaches were expected to pay a team's hotel bill out of their own pockets, then seek reimbursement from the school. While she was sure the new policy had some financial merit for the school, it was a change that Trisha felt had some distinct operational disadvantages, and this was one of them. When the hotel controller's office billed the school directly, the complex issue of taxation was handled smoothly. The accountants for both the hotel and the school knew the intricacies of tax-exempt status. Dealing with customers across the front desk was another matter.

"How does he want to pay for the charges?" asked Trisha.

"With a personal check," replied Lance. "But he asked me to find a copy of the school's federal tax-exemption document."

Trisha knew that the college where Coach Keedy worked had submitted a federal identification number authorizing a tax exemption. The hotel controller's office had the document on file.

"Okay," said Trisha, "we know the coach represents a tax-exempt institution, and we do have his federal ID number on file, but by law, we're not allowed to deduct the tax if he pays with a personal check. Charge him the tax, just as the regulations require us to do. Explain that you talked to me, and I authorized it. If he wants a further explanation, call me back and I will talk to him and explain why. I also think it would be a good idea for you and me to get together tomorrow to review federal tax exemption status, state taxes, and local option taxes, such as the occupancy tax. I think I can clear up some misunderstandings you seem to have. Remember, call me back if you have more trouble. See you tomorrow."

"Okay Ms. Sangus, goodbye," Lance replied as he slowly hung up the telephone and stepped out of his office to explain the situation to the coach. Lance had a pretty good idea that, despite his best efforts, the coach would still want to talk to his boss. He also had a good idea that tomorrow's meeting with Ms. Sangus would be one in which note taking would be required.

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. How federal governmental agencies are involved in regulating the hospitality industry.
2. How to analyze the various roles of state governmental agencies that regulate the hospitality industry.
3. How to identify local governmental agencies involved in regulating the hospitality industry.
4. How to properly respond to an official inquiry or complaint from a regulatory entity.

5.1 FEDERAL REGULATORY AND ADMINISTRATIVE AGENCIES

The hospitality industry is regulated by a variety of federal, state, and local governmental entities. Hospitality managers must interact with these agencies in a variety of different ways, and observe all applicable procedures and regulations

established by government. Managers must fill out forms and paperwork, obtain operating licenses, maintain their property to specified codes and standards, provide a safe working environment, and open up their facilities for periodic inspection. The purpose of this chapter is to help you understand the scope of the regulatory process and be able to respond to questions from these regulatory agencies in a way that is both legally correct and sound from a business perspective.

With thousands of federal, state, and local agencies, departments, offices, and individuals regulating business today, it is simply not possible for a hospitality manager to be knowledgeable about all the requirements that may apply to his or her operation. It is possible, however, to do the following:

1. Be aware of the major entities responsible for regulation.
2. Understand how to resolve conflicting regulations.
3. Be aware of the process for responding to an inquiry or complaint from a regulatory entity.
4. Stay abreast of changes in regulations that affect your segment of the industry.

Internal Revenue Service (IRS)

The Internal Revenue Service (**www.irs.gov**) is a division of the United States Department of Treasury. The stated mission of the IRS is to: "Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities, and by applying the tax law with integrity and fairness to all." While it is unlikely that the agency responsible for collecting taxes will be popular in any country, the right of the IRS to charge an individual with a criminal act makes it deserving of a manager's thoughtful attention.

In the hospitality industry, managers interact with the IRS because of the manager's role as both a taxpayer (by paying income tax on the profits of a business) and a tax collector for the federal government (by withholding individual employee taxes on income). The IRS requires businesses to:

- File quarterly income tax returns and make payments on the profits earned from business operations (Form 941). Taxes must be filed on or before the last day of the month following the end of each calendar quarter.
- File an Income and Tax Statement with the Social Security Administration on or before the last day of February (Form W-3).
- Withhold income taxes from the wages of all employees (as specified in Circular E). Withheld employee taxes are deposited with the IRS at regular intervals (Form 8109). Employee withholding taxes must be paid quarterly, if the total amount of withheld tax for the period is less than $500; once a month, if the total amount of withheld tax is between $500 and $3,000; or within three working days of a payroll issuance, if the withheld amount is greater than $3,000.
- Report all employee income earned as tips (Form 8027), and withhold taxes on the tipped income.
- Record the value of meals charged to employees when the meals are considered a portion of an employee's income.
- Record all payments to independent contractors, and file any forms listing those payments (Forms 1096 and 1099).
- Furnish a record of withheld taxes to all employees on or before January 31 (Form W-2), and maintain copies of this record for four years.

The IRS ensures that businesses pay their taxes through periodic examinations of their financial accounts and tax records. These examinations are called audits. A hospitality manager must respond if the IRS notifies him or her of a forthcoming audit. The manager should also consult a certified public accountant

(CPA) or attorney that specializes in tax audits as soon as possible to ensure that the appropriate documents are prepared and in order.

It would be an oversimplification to state that federal tax laws are complex; they are hugely complex. As a hospitality manager, you may be responsible for submitting or filing the taxes owed by a business, so it is important that you understand the role that you play in ensuring your company's compliance with federal tax laws.

For example, the IRS considers tips and gratuities given to employees by guests or the business as taxable income. As such, this income must be reported to the IRS, and taxes, if due, must be paid on that income. In addition, employers are responsible for assisting the IRS in this reporting process by collecting tip-reporting forms from employees and forwarding the information to the IRS.

Figure 5.1 is a copy of IRS Publication 531. This publication explains the regulations related to an employee's reporting of tipped income. It is a good example of the instructions the IRS gives an individual taxpayer. Note that the IRS explains what is required and how the requirements can be met.

Just as employees have specific responsibilities for reporting tipped income, the employer also has responsibilities imposed by the IRS. For a complete list of a business's tax responsibilities, and to obtain copies of various tax forms, visit

IRS Publication 531: Reporting Tip Income

Keeping a Daily Tip Record

Why keep a daily tip record?

You must keep a daily tip record so you can:

- Report your tips accurately to your employer
- Report your tips accurately on your tax return, and
- Prove your tip income if your return is ever questioned.

How to keep a daily tip record.

There are two ways to keep a daily tip record. You can either:

1. Write information about your tips in a tip diary, or
2. Keep copies of documents that show your tips, such as restaurant bills and credit card charge slips.

You should keep your daily tip record with your personal records.

If you keep a tip diary, you can use Form 4070A, Employee's Daily Record of Tips. To get a year's supply of the form, ask the Internal Revenue Service (IRS) or your employer for Publication 1244, Employee's Daily Record of Tips and Report to Employer. Each day, write in the information asked for on the form.

If you do not use Form 4070A, start your records by writing your name, your employer's name, and the name of the business if it is different from your employer's name. Then, each workday, write the date and the following information:

- Cash tips you get directly from customers or from other employees,
- Tips from credit card charge customers that your employer pays you,
- The value of any noncash tips you get, such as tickets, passes, or other items of value,
- The amount of tips you paid out to other employees through tip pools or tip splitting, or other arrangements, and the names of the employees to whom you paid the tips. Do not write in your tip diary the amount of any service charge that your employer adds to a customer's bill and then pays to you and treats as wages. This is part of your wages, not a tip.

Figure 5.1 Reporting tip income.

the IRS Web site at **www.irs.ustreas.gov** and look up employment taxes in the Small Business Corner. The next Search the Web exercise will guide you as you examine these requirements.

◀ SEARCH THE WEB 5.1 ▶

Log on to the Internet and enter **www.treas.gov**.

1. Select: Business Services.
2. Select: Small Business Program.
3. Select: IRS Small Business Corner.
4. Select: Employment Taxes.
5. Select: Critical Forms and Publications.
6. Select: Publication 15: Circular E, Employers Tax Guide.

Read the portion of Publication 15 that refers to an employer's responsibilities related to the reporting of tip income by employers.

Occupational Safety and Health Administration (OSHA)

OSHA (**www.osha.gov**) is an agency of the Department of Labor. It was created in 1970 after the passage of the Occupation Safety and Health Act. The purpose of the act was "to assure, so far as possible, every working man and woman in the nation safe and healthful working conditions." Despite criticism from many in business, OSHA has taken an aggressive role in protecting workers' rights.

All businesses, including hospitality operations, must comply with the extensive safety practices, equipment specifications, and employee communication procedures mandated by OSHA. Specifically, businesses are required to:

- Provide a safe workplace for employees by maintaining facilities and providing protective clothing, in accordance with OSHA safety and health standards (these standards will vary for different types of workplace environments).
- Purchase equipment that meets OSHA specifications of health and safety.
- Establish safety checklists and training programs for employees, especially for those who will operate equipment that may cause injury.
- Report to OSHA within 48 hours any workplace accidents that result in a fatality or require the hospitalization of five or more employees.
- Maintain a record of work-related injuries or illnesses (OSHA Log 200), and file that record once a year. Employers are also required to post an annual summary of the prior year's injuries and illnesses.
- Schedule at least one employee trained in first aid on each work shift.
- Display OSHA notices on employee rights and safety in appropriate languages, in places where the notices can be easily read.
- Provide all employees with access to information on any toxic or harmful substances used in the workplace, and keep records certifying that employees have reviewed the information.
- Offer hepatitis B vaccinations for employees who may have come into contact with blood or body fluids.

OSHA monitors workplace safety with a large staff of inspectors called compliance officers. Compliance officers visit workplaces during regular business hours and perform unannounced inspections to ensure that employers are operating in compliance with all OSHA health and safety regulations. In addition, compliance officers are required to investigate any complaints of unsafe business practices. Figure 5.2 is an excerpt of the Occupational Health and Safety Act that gives the agency authority to enter a business to investigate worker safety.

Section 8, Title: INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized:

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Figure 5.2 OSHA inspection provisions.

OSHA Act of 1970

Section Title: Penalties

Section Number: 17

(a) Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

(b) Any employer who has received a citation for a serious violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, shall be assessed a civil penalty of up to $7,000 for each such violation.

(c) Any employer who has received a citation for a violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of regulations prescribed pursuant to this Act, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $7,000 for each violation.

(d) Any employer who fails to correct a violation for which a citation has been issued under section 9(a) within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Any person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

Figure 5.3 OSHA penalties for noncompliance.

(h) (1) Section 1114 of title 18, United States Code, is hereby amended by striking out "designated by the Secretary of Health, Education, and Welfare to conduct investigations, or inspections under the Federal Food, Drug, and Cosmetic Act" and inserting in lieu thereof "or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions."

(2) Notwithstanding the provisions of sections 1111 and 1114 of title 18, United States Code, whoever, in violation of the provisions of section 1114 of such title, kills a person while engaged in or on account of the performance of investigative, inspection, or law enforcement functions added to such section 1114 by paragraph (1) of this subsection, and who would otherwise be subject to the penalty provisions of such section 1111, shall be punished by imprisonment for any term of years or for life.

(i) Any employer who violates any of the posting requirements, as prescribed under the provisions of this Act, shall be assessed a civil penalty of up to $7,000 for each violation.

(j) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(l) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

Figure 5.3 *(Continued)*

Hospitality managers have the right to accompany OSHA compliance officers during an inspection, and managers should make it a point of doing so, for two reasons. First, the manager may be able to answer questions or clarify procedures for the compliance officer; second, the manager should know what transpired during the inspection. Afterward, the manager should discuss the results of the inspection with the compliance officer and request a copy of any inspection reports filed. Generally, inspections are not announced, although the compliance officer must state a specific reason for the inspection.

The penalties for violating OSHA regulations can be severe and costly. Figure 5.3 details the penalties OSHA can assess against a business. Because of the stringent penalties for noncompliance, it is important that hospitality managers ensure their workplace is safe. As stressed in this book several times, the best way to avoid accidents, lawsuits, and penalties is to adopt a philosophy of preventative management. Where worker safety is concerned, this may be as simple as providing information or as complex as developing an employee training program.

One example of the type of information OSHA requires to be posted or provided is the Material Safety Data Sheet (MSDS). An MSDS is a manufacturer's statement detailing the potential hazards and proper methods of using a chemical or toxic substance. The MSDS is intended to inform workers about the hazards of the materials they work with so that they can protect themselves and respond to emergency situations. The law states that employees must have access to MSDSs and be assisted in reading and understanding them. OSHA inspectors are responsible for ensuring that MSDSs are placed in areas accessible to workers.

ANALYZE THE SITUATION 5.2

Carlos Magana was a Spanish-speaking custodian working in a health-care facility kitchen. Bert LaColle was the new food and beverage director. Mr. LaColle instructed Mr. Magana to clean the grout between the red quarry kitchen tile with a powerful cleaner that Mr. LaColle had purchased from a chemical cleaning supply vendor. Mr. LaColle, who did not speak Spanish, demonstrated to Mr. Magana how he should pour the chemical directly from the bottle to the grout, then brush the grout with a wire brush until it was white.

Because the cleaner was so strong, and because Mr. Magana did not wear protective goves, his hands were seriously irritated by the chemicals in the cleaner. In an effort to lessen the irritation to his hands, Mr. Magana decided to dilute the chemical. He added water to the bottle of cleaner, not realizing that the addition of water would cause toxic fumes. Mr. Magana inhaled the fumes while he continued cleaning, and later suffered serious lung damage as a result.

Mr. LaColle was subsequently contacted by OSHA, which cited and fined the facility for an MSDS violation. Mr. LaColle maintained that MSDS statements, including the one for the cleaner in question, were in fact available for inspection by employees.

1. Did the facility fulfill its obligation to provide a safe working environment for Mr. Magana?
2. What should Mr. LaColle have done to avoid an OSHA violation?

Currently, according to OSHA's Hazard Communication standard, MSDSs must include:

- The material's identity, including its chemical and common names.
- Hazardous ingredients (even in parts as small as 1 percent).
- Cancer-causing ingredients (even in parts as small as 0.1 percent).
- List of physical and chemical hazards (stability, reactivity) and characteristics (flammable, explosive, corrosive, etc.).
- List of health hazards, including:

  Acute effects, such as burns or unconsciousness, which occur immediately.
  Chronic effects, such as allergic sensitization, skin problems, or respiratory disease, which build up over a period of time.

- If the material is a known carcinogen.
- Limits to which a worker can be exposed, specific target organs likely to sustain damage, and medical problems that can be aggravated by exposure.
- Precautions and safety equipment and emergency and first aid procedures.
- Specific fire-fighting information.
- Precautions for safe handling and use, including personal hygiene.
- Identity of the organization responsible for creating the MSDS, date of issue, and emergency phone number.

Figure 5.4 is an excerpt example of an MSDS. The specific product detailed is Jet-Dry, a trademarked item distributed by Economics Laboratories for use in commercial dishwashers. The point here is that all hospitality managers must be aware of the sometimes very specific requirements placed upon them by federal agencies. The requirements can be numerous, and they change frequently. One way to stay current with your obligations as an operator is to log on to OSHA's Web site (**www.osha.gov**) and click on New.

Environmental Protection Agency (EPA)

The EPA (**www.epa.gov**) is an independent agency of the federal government. Established in 1970, the EPA's mission is to "permit coordinated and effective government action on behalf of the environment." In the hospitality industry,

ECONOMICS LABORATORY—JET DRY (934984)

MATERIAL SAFETY DATA SHEET

FSC: 6850. NIIN: 00F000893

Manufacturer's CAGE: 85884

Part No. Indicator: A

Part Number/Trade Name: JET DRY (934984)

General Information
Company's Name: ECONOMICS LABORATORY, INC.
Company's Emergency Ph #: (612) 293-2233
Record No. For Safety Entry: 001
Tot Safety Entries This Stk#: 001
Date MSDS Prepared: 01JAN85
Safety Data Review Date: 22JAN85
MSDS Serial Number: BBHKT

Ingredients/Identity Information
Proprietary: YES
Ingredient: PROPRIETARY
Ingredient Sequence Number: 01

Physical/Chemical Characteristics
Appearance and Odor: CLEAR GREEN LIQUID--NO SPECIFIC ODOR.
Boiling Point: 212F
Specific Gravity: 1.022
Solubility in Water: COMPLETE
Percent Volatiles by Volume: 90%

Fire and Explosion Hazard Data
Flash Point: NON-FLAMMABLE
Extinguishing Media: ALL RECOGNIZED METHODS ARE ACCEPTABLE.
Reactivity Data
Stability: YES
Hazardous Decomp Products: OXIDES OF CARBON
Hazardous Poly Occur: NO

Health Hazard Data

Signs/Symptoms of Overexp: MAY CAUSE MINOR EYE IRRITATION, BURNING SENSATION.

Emergency/First Aid Proc: FLUSH EYES WITH PLENTY OF WATER. INGESTION: DO NOT INDUCE VOMITING. DRINK LARGE QUANTITIES OF WATER OR MILK.

Precautions for Safe Handling and Use

Steps if Matl Released/Spill: MOP UP SPILL. WASH AREA WITH WATER.

Waste Disposal Method: CONSULT LOCAL REGULATIONS.

Precautions—Handling/Storing: KEEP FROM FREEZING.

Label Emergency Number: (612) 293-2233

Figure 5.4 An MSDS for Jet-Dry.

the EPA serves as a regulator of pesticides, as well as water and air pollution. Care must be taken when discharging waste, particularly toxic waste such as pesticides or cleaning chemicals from laundry areas. In 1996, new amendments were added to the Safe Drinking Water Act of 1974, which is a federal law that empowers the EPA to set standards for drinking water quality and to oversee the states, towns, and water suppliers that implement and enforce those standards. The EPA also monitors indoor air-quality issues (such as smoking in commercial buildings). Recently, the EPA and the National Restaurant Association began working together to develop integrated waste management processes that could be adapted by local governments and by different types of foodservice operations.

Many EPA directives are carried out or implemented by state and local governments, such as state recycling laws and municipal ordinances for trash disposal. Thus, while you, as a hospitality manager, may have little contact with the federal agency, it is important to be fully aware of your state and local laws in these areas.

Food and Drug Administration (FDA)

The FDA (**www.fda.gov**) plays an important role in the hospitality industry. It is responsible for ensuring the proper labeling of food and the safety of food. As a foodservice manager, you will encounter the work of the FDA whenever you purchase food that has a mandatory FDA nutrition label. In addition, the FDA's Model Food Service Sanitation Ordinance is used by many state and community health departments as a basis for their own foodservice inspection programs.

Foodservice operators also need to be aware of the FDA's precise definitions governing the use of nutritional and health-related terms. A restaurant that prints phrases such as "low-calorie," "light," or "cholesterol-free" in their menus must make sure that the recipes for those dishes meet the FDA's requirements for those statements. These and other menu-labeling requirements will be discussed more fully in Chapter 12, "Your Responsibilities When Serving Food and Beverages."

Equal Employment Opportunity Commission (EEOC)

The Equal Employment Opportunity Commission (**www.eeoc.gov**) was established by Title VII of the Civil Rights Act of 1964, and began operating on July 2, 1965. Essentially, this agency enforces laws against discrimination in employment. Figure 5.5 lists the specific laws that are enforced by the EEOC. The following general areas fall under the jurisdiction of the EEOC:

Sexual harassment
Race/color discrimination
Age discrimination
National origin discrimination

Title VII of the Civil Rights Act
Equal Pay Act of 1963
Age Discrimination in Employment Act of 1967 (ADEA)
Rehabilitation Act of 1973, Sections 501 and 505
Titles I and V of the Americans with Disabilities Act of 1990 (ADA)
Civil Rights Act of 1991

Figure 5.5 Laws enforced by the Equal Employment Opportunity Commission.

Pregnancy discrimination
Religious discrimination
Portions of the Americans with Disabilities Act

Some of these areas will be discussed in detail in Chapter 8, "Legally Managing Employees." The impact of the EEOC upon the daily tasks of the hospitality manager is obvious. Consider, for example, the hotel manager who seeks to schedule a Christian to work on Christmas Day. The hotel is, of course, open. The question that may arise is whether the needs of the manager, who must staff the hotel, should take precedence over those of the worker, who desires a day off on the basis of his or her religious convictions.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individuals because of their religious beliefs when hiring and firing. The act also requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless doing so would create an undue hardship upon the employer. Flexible scheduling, voluntary substitutions or swaps, job reassignments, and lateral transfers are examples of accommodating an employee's religious beliefs. The question of whether or not a manager could "reasonably" accommodate the request of a Christian worker to be off on Christmas Day is complex. The point to be remembered, however, is that managers are not free to act in any manner they desire. The federal government, through the requirements of the EEOC, also plays a role in the actions of management.

The EEOC investigates complaints by employees who think they have been discriminated against. Businesses that are found to have discriminated can be ordered to compensate the employee(s) for damages, such as lost wages, attorney fees, and punitive damages.

Bureau of Alcohol, Tobacco, and Firearms (ATF)

The Bureau of Alcohol, Tobacco, and Firearms (**www.atf.treas.gov**) is responsible for enforcing all federal laws and regulations governing the manufacture and sale of alcohol, tobacco, firearms, and explosives, as well as for investigating incidents of arson. The ATF is housed within the U.S. Department of Treasury, just as the IRS is, because it enforces the payment of federal taxes on the production of alcohol and the sale of alcoholic beverages.

Hospitality managers will interact with the ATF in the following ways:

- Retail sellers of alcohol, including bars, restaurants, and hotels, must pay a special federal liquor tax each year (IRS Form 11, Special Tax Return). They will receive a Special Tax Stamp showing proof the tax was paid, and must keep this stamp on the premises, available for inspection.
- Alcohol vendors are not permitted to mix cocktails in advance of a sale and may not reuse emptied liquor bottles to store mixed cocktails.
- Operators must keep records, invoices, and receipts of all alcohol purchased.
- Operators must properly dispose of empty liquor bottles and may not reuse or sell them.

In its publication "P-5170.2, Federal Liquor Laws and Regulations for Retail Dealers," published in 1995, the ATF specifically dictates the way liquor retailers should handle empty liquor bottles. An excerpt from P-5170.2 is presented in Figure 5.6. Note the severe penalties assessed against businesses that do not comply with this regulation. The ATF enforces these regulations with its own officers, who conduct inspections during an operation's regular hours of business. Additional information on the regulations covering the sale of alcohol is included in Chapter 12, "Your Responsibilities When Serving Food and Beverages."

P-5170.2

Any retail dealer, or agent or employee of such dealer, who refills any liquor bottle with distilled spirits, or who reuses any liquor bottle by adding distilled spirits or any substance (including water) to the original contents is subject to a fine of not more than $1,000 or imprisonment for not more than 1 year, or both.

Disposition of liquor bottles

The possession of used liquor bottles by any person other than the one who emptied the contents thereof is prohibited, except that this prohibition shall not:

(1) prevent the owner or occupant of any premises on which such bottles have been lawfully emptied from assembling the same on such premises

(i) for delivery to a bottler or importer on specific request for such bottler or importer;

(ii) for the destruction, either on the premises on which the bottles are emptied or elsewhere, including disposition for purposes which will result in the bottles being rendered unusable as bottles; or

(iii) in the case of unusual or distinctive bottles, for disposition as collector's items or for other purposes not involving the packaging of any products for sale;

(2) prevent any person from possessing, offering for sale, or selling such unusual or distinctive bottles for purposes not involving the packaging of any product for sale; or

(3) prevent any person from assembling used liquor bottles for the purpose of recycling or reclaiming the glass or other approved liquor bottle material.

Any person possessing liquor bottles in violation of law or regulations is subject to fine of not more than $1,000, imprisonment for not more than 1 year, or both.

Figure 5.6 Refilling, reusing, and disposing of liquor bottles.

Department of Labor (DOL)

The U.S. Department of Labor (**www.dol.gov**) was established in 1913 to "foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment."

Today, the department is charged with preparing the American workforce for new and better jobs, and for ensuring the adequacy of America's workplaces. It is responsible for the administration and enforcement of more than 180 federal laws, which govern the protection of workers' wages, health and safety, employment, and pension rights; equal employment opportunity; job training; unemployment insurance and workers' compensation programs; collective bargaining; and collecting, analyzing, and publishing labor and economic statistics. Following is a brief description of some of the principal federal labor-related regulations most commonly applicable to hospitality businesses.

Wage and Hours The Fair Labor Standards Act (FLSA) prescribes standards for wages and overtime pay, which affect most private and public employment. The act is administered by the Wage and Hour Division of the Employment Standards Administration. It requires employers to pay covered employees the federal minimum wage and overtime of one-and-one-half-times the regular wage. It restricts the hours that children under 16 can work and forbids their employment in certain jobs deemed too dangerous. This agency also establishes guidelines for tip credits, meal credits, and uniform purchases. In Chapter 8, "Legally Managing Employees," we will look at specific provisions of the FLSA that hospitality managers must keep in mind.

Pensions and Welfare Benefits The Employee Retirement Income Security Act (ERISA) regulates employers who offer pension or welfare benefit plans for their employees. This area of the Labor Department is also responsible for reporting

requirements for the continuation of health-care provisions, required under the Comprehensive Omnibus Budget Reconciliation Act of 1985 (COBRA).

Plant Closings and Layoffs These types of occurrences may be subject to the Worker Adjustment and Retraining Notifications Act (WARN). WARN protects employees by requiring early warning of impending layoffs or plant closings. WARN is administered by a special division of the Department of Labor.

Employee Polygraph Protection Act This law, enacted in 1988, bars most employers under most circumstances from using lie detectors on employees or prospective employees. The law does permit employers to request that an employee undertake such a test in connection with any ongoing investigation into an incident that resulted in loss to the employer. Results of the lie detector test are not to be shared with anyone except the examiner, the employer, or those so ordered by the courts.

Family and Medical Leave Act This law, the FMLA, requires employers with 50 or more employees to grant up to 12 weeks of unpaid, job-related leave to eligible employees for the birth or adoption of a child, or for the serious illness of the employee or a family member. These provisions and others that relate to hiring and managing employees are discussed in Chapter 7, "Legally Selecting Employees," and Chapter 8, "Legally Managing Employees."

It is important to note that other federal agencies besides the Department of Labor also enforce laws and regulations that affect employers. As discussed earlier in this chapter, laws that ensure nondiscrimination in employment are generally enforced by the Equal Employment Opportunity Commission. The Taft-Hartley Act, which regulates a wide range of unionization issues, is enforced by the National Labor Relations Board.

Department of Justice (DOJ)

In the United States, the Department of Justice (**www.usdoj.gov**) is headed by the U.S. attorney general. Although the position of attorney general has existed since the founding of the republic, it was not until 1870 that a separate Department of Justice was created, bringing together under the authority of the attorney general the activities of United States attorneys, United States marshals, and others. The Justice Department investigates and prosecutes federal crimes, represents the United States of America in court, manages the federal prisons, and enforces the nation's immigration laws.

It is in the area of immigration that most hospitality managers interact with the Department of Justice. The Immigration and Naturalization Service (INS) was created in 1891 and is headed by a commissioner who reports to the attorney general. The INS requires hospitality managers to secure identification documents from all those they hire. This is mandated so that jobs will be given only to those legally able to secure them. The precise method of verifying employment eligibility will be discussed in Chapter 7, "Legally Selecting Employees." Penalties for noncompliance in this area can be severe, so it is a good idea to stay well versed in INS regulations.

The Department of Justice also enforces Title III of the Americans with Disabilities Act (ADA), which states that hospitality operations must remove barriers that can restrict access or the full enjoyment of amenities by people with disabilities. The requirements for complying with this section of the ADA are discussed in Chapter 10, "Your Responsibilities as a Hospitality Operator to Guests."

In response to the unfortunate incidents occurring on September 11, 2001, the federal government made sweeping changes to many agencies, combining a number of them under the Department of Homeland Security umbrella. This

agency is discussed more thoroughly in Chapter 13, "Legal Responsibilities in Travel and Tourism."

5.2 STATE REGULATORY AND ADMINISTRATIVE AGENCIES

Just as the federal government plays a regulatory role in the hospitality industry, so too do the various state agencies. It is important to understand that the states serve both complementary and distinct regulatory roles. The roles are complementary in that they support and amplify efforts undertaken at the federal level, but they are distinct in that they regulate some areas in which they have sole responsibility. Let's take a brief look at some of the state entities that play a significant regulatory role in the hospitality industry. The administrative structure or specific entity name may vary by state, but the regulatory process will be similar.

It is important to note that state and/or local regulations may affect the actions of hospitality managers more often than federal regulations. Codes and ordinances established at the state or local level can often be very strict, and may require investment in equipment or to pay extra diligence in the operation of a facility. The penalties for violating these laws can be just as severe as those at the federal level.

Employment Security Agency

Each state regulates employment and employee/employer relationships within its borders. Generally, items such as worker-related unemployment benefits, worker safety issues, and injury compensation will fall to the state entity charged with regulating the workplace. In addition, in most states, this entity will also be responsible for areas such as employment assistance for both employees and employers.

Consider the case of Virgil Bollinger. The hotel where Virgil works is purchased by a new owner, who states that Virgil's sales manager position is no longer needed. In Virgil's state, an employer's account is not charged for the **unemployment benefits** if an employee is let go as a result of staff reductions. However, Virgil believes that his employment has been terminated for other reasons, none of which relate to his work performance. It would be the role of the Employment Security Agency to determine to which, if any, unemployment compensation benefits Virgil is entitled.

▶ **LEGALESE**

Unemployment benefits: A benefit paid to an employee who involuntarily loses his or her employment without just cause.

▶ **LEGALESE**

Workers' compensation: A benefit paid to an employee who suffers a work-related injury or illness.

Workers' compensation is an area of great concern to most hospitality managers. Worker injuries are expensive, in terms of both money and disruption to the workplace. As a hospitality manager, it is important for you to know and follow the state regulations related to workplace safety, and the method for properly documenting and reporting any work-related injury. In each state, worker safety will usually be monitored by a workers' compensation agency, commission, or subdivision of the employment security agency.

Alcohol Beverage Commission (ABC)

While the sale of alcohol is not a requirement for a foodservice or lodging operation, many facilities do offer them for their guests' enjoyment. The nature of alcohol and its consumption, however, subjects the hospitality manager to intense regulation. Generally, this regulation takes place at both the state and local levels. A state's Alcohol Beverage Commission (ABC), will be responsible for the following areas of control:

- License issuing
- Permitted hours of sales

- Advertising and promotion policies
- Methods of operation
- Reporting of sales for tax purposes
- Revocation of licenses

As a hospitality manager, failure to abide by the regulations required to sell alcoholic beverages lawfully may subject you to criminal prosecution, as well as a civil proceeding (an administrative hearing) before the regulatory body of your state's ABC. In addition, the enactment of **Dram Shop Act** legislation could make a hospitality manager, or the business itself, liable to guests or third parties and their families should significant violations of the alcohol service regulations result in injury to an intoxicated guest, or to persons harmed by an individual who was illegally served. Simply put, providers of alcoholic beverages can be held responsible for the acts of their intoxicated patrons if those patrons were illegally served. Specific techniques related to the proper selling of alcoholic beverages will be fully discussed in Chapter 12, "Your Responsibilities When Serving Food and Beverages."

▶ **LEGALESE**

Dram Shop Acts: Legislation, passed in a variety of forms and in many states, that imposes liability for the acts of others on those who serve alcohol negligently, recklessly, or illegally.

States are very careful when granting licenses to sell liquor, and they are generally very aggressive in revoking the licenses of operations that fail to adhere to the state's required procedures for selling alcohol. In most states, license revocation can be the result of:

- Frequent incidents of fighting, disorderly conduct, or generally creating a public nuisance.
- Allowing prostitution or solicitation on the premises.
- Drug and narcotic sales or use.
- Illegal adult entertainment, such as outlawed forms of nude dancing.
- Failure to maintain required records.
- Sale of alcohol to minors.

Hospitality operators are also responsible for reporting all sales of alcohol to the state Alcohol Beverage Commission. The ABC will perform random audits to determine the accuracy of the information received. Other enforcement tools used by the ABC are to conduct unannounced inspections of the premises where alcohol is sold and/or to intentionally send minors into an establishment to test whether the operator will serve them.

ANALYZE THE SITUATION 5.2

Trixie Mitchell managed The Dusty Cellar, a bar near a college campus. She was active in her business community and served on the college's Presidential Advisory Board for Responsible Drinking. All servers and bartenders in her facility were required to undergo a mandatory four-hour alcohol service training program before they began their employment and to take a required refresher course each year. Each server was certified in responsible alcohol service by the national office of Ms. Mitchell's hospitality trade association.

On a busy Friday night during the fall football season, one of Ms. Mitchell's servers approached a table with four female patrons. Since all appeared to be near 21 years old, but well under the 35-year-old limit Ms. Mitchell had established for a mandatory identification (ID) check, the server asked to see a picture ID from each guest.

The server checked each guest's ID—verifying the age, hair color, general likeness, and absence of alterations to the ID card—and then requested—in a practice unique to Dusty's—the mandatory recitation by each patron of the birthday and address printed on the ID. Since all four guests passed their ID checks, the server served the patrons. Each guest had three glasses of wine over a period of 90 minutes.

The next day, Ms. Mitchell was contacted by the state ABC and an attorney for the parents of a teenager whose car was involved in an accident with one of the four patrons served the prior night. It had been established that one of the patrons, whose ID had been professionally altered, was 20 years old, not 21. This patron was involved in the auto accident as she

left the bar and drove back to her dorm room. The ABC began an investigation into the sale of alcohol to minors, while the attorney scheduled an appointment with Ms. Mitchell's attorney to discuss a settlement based on the potential liability arising from the Dram Shop Act legislation enacted in Ms. Mitchell's state.

1. Did Ms. Mitchell break the law by serving alcohol to an underage student?
2. Are Ms. Mitchell and her business liable for the acts of the underage drinking if her state has enacted Dram Shop legislation?

Treasury Department/Controller

A state's treasury department is responsible for the collection of taxes levied by that state. For those in the hospitality industry, this can include liquor taxes, sales taxes, occupancy taxes, as well as a wide array of use taxes.

An excellent example of the diversity displayed by the various states in regard to taxation is the document in Figure 5.7, published in 1997 by the Iowa State University purchasing department for its employees. It demonstrates the importance of a thorough understanding of the laws regarding taxation in the state where you will manage a hospitality facility.

A relatively recent development in the United States has caused an expansion of duties for many state treasury departments. In addition to the collection of taxes, these departments or agencies are often responsible for the regulation of their state's lottery and gaming operations. As this segment of the hospitality industry expands, so too will the regulatory efforts of the various state treasury departments. Typical areas of gaming and lottery regulation by treasury departments include licensing, lottery ticket sales, winnings disbursement, and casino operations. Figure 5.8 is an excellent example of the procedures that treasury regulators can mandate in the operation of gaming facilities. In this document,

IOWA STATE UNIVERSITY

Iowa State University (ISU), as a state educational institution, is exempt from paying state sales tax or local option sales tax on goods or services purchased in the state of Iowa. We are required to pay hotel/motel taxes. The states listed below also grant tax-exempt status to Iowa State University for goods or services purchased while in their state . . . (however) a form or copy of a letter is usually required.

Iowa State University is tax-exempt in the following states:*

Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, Wisconsin.

Goods or services purchased by Iowa State University while in the following states are subject to that state's sales tax. Iowa State University is not tax-exempt in the following states:

Alabama, Nebraska, Arizona, Nevada, Arkansas, New Jersey, California, North Carolina, Connecticut, Oklahoma, District of Columbia, South Carolina, Florida, Tennessee, Georgia, Utah, Louisiana, Vermont, Maine, Virginia, Maryland, Washington, Massachusetts, West Virginia, Minnesota, Wyoming.

The following states do not have a general sales tax:

Alaska, Hawaii, Montana, New Hampshire, New Mexico, Oregon.

Last Updated: Friday, March 6, 1998.

*Delaware did not respond with information regarding tax-exempt status.

Figure 5.7 Tax-exempt notice.

the Michigan Treasury Department identifies some of the written procedures for money handling that must be filed with the department prior to the granting of a casino license.

Attorney General

The state's attorney general is the chief legal officer of the state. Recall from Chapter 3, "Hospitality Operating Structures," that one responsibility of the attorney general's office is to specify the franchise information required for disclosure in that state. If, for example, an entrepreneur were interested in purchasing a franchise, the attorney general's office would regulate the franchisor and franchisee relationship.

DEPARTMENT OF TREASURY, MICHIGAN: GAMING CONTROL BOARD

CASINO GAMING: (By authority conferred on the Michigan Gaming Control Board by section 4 of Initiated Law of 1996, as amended, being § 432.204 of the Michigan Compiled Laws)

PART 9. INTERNAL CONTROL PROCEDURES R 432.1901 Rule 902.

The procedures of the internal control system are designed to ensure all of the following: (a) That assets of the casino licensee are safeguarded.

(b) That the financial records of the casino licensee are accurate and reliable.

(c) That the transactions of the casino licensee are performed only in accordance with the specific or general authorization of this part.

(d) That the transactions are recorded adequately to permit the proper recording of the adjusted gross receipts, fees, and all applicable taxes.

(e) That accountability for assets is maintained in accordance with generally accepted accounting principles.

(f) That only authorized personnel have access to assets.

(g) That recorded accountability for assets is compared with actual assets at reasonable intervals and appropriate action is taken with respect to any discrepancies.

(h) That the functions, duties, and responsibilities are appropriately segregated and performed in accordance with sound practices by competent, qualified personnel and that no employee of the casino licensee is in a position to perpetuate and conceal errors or irregularities in the normal course of the employee's duties.

(i) That gaming is conducted with integrity and in accordance with the act and these rules.

History: 1998 MR 6, Eff. June 26, 1998.R 432.1903 Board approval of internal control system. Rule 903.

(1) A licensee shall describe, in a manner that the board may approve or require, its administrative and accounting procedures in detail in a written system of internal control. A written system of internal controls shall include a detailed narrative description of the administrative and accounting procedures designed to satisfy the requirements of these rules. Additionally, the description shall include separate section for all of the following:

(a) An organizational chart depicting appropriate segregation of functions and responsibilities.

(b) A description of the duties and responsibilities of each position shown on the organizational chart.

(c) A detailed, narrative description of the administrative and accounting procedures designed to satisfy the requirements of these rules. Additionally, the description shall include a separate section for all of the following:

(i) Physical characteristics of the drop box and tip box.

(ii) Transportation of drop and tip boxes to and from gaming tables.

(iii) Procedures for table inventories.

(iv) Procedures for opening and closing gaming tables.

Figure 5.8 Lottery control.

(v) Procedures for fills and credits.
(vi) Procedures for accepting and reporting tips and gratuities.
(vii) Procedures for transporting chips and tokens to and from gaming tables.
(viii) Procedures for shift changes at gaming tables.
(ix) Drop bucket characteristics.
(x) Transportation of drop buckets to and from electronic gaming devices.
(xi) Procedures for chip and token purchases.
(xii) Procedures for hopper fills.
(xiii) Procedures for the transportation of electronic gaming devices.
(xiv) Procedures for hand-paid jackpots.
(xv) Layout and physical characteristics of the cashier's cage.
(xvi) Procedures for accounting controls.
(xvii) Procedures for the exchange of checks submitted by gaming patrons.
(xviii) Procedures for credit card and debit card transactions.
(xix) Procedures for the acceptance, accounting for, and redemption of patron's cash deposits.
(xx) Procedures for the control of coupon redemption and other complimentary distribution programs.
(xxi) Procedures for Federal cash transactions reporting.
(xxii) Procedures for computer backups and assuring the retention of financial and gambling operation.

(d) Other items as the board may require.

(2) Not less than 90 days before the gambling operation commences, unless otherwise directed by the board, a licensee shall submit, to the board, a written description of its internal control system that is designed to satisfy the requirements of subrule (1) of this rule.

(3) If the written system is the initial submission to the board, then a letter shall be submitted from an independent certified public accountant selected by the board stating that the licensee's written system has been reviewed by the accountant and is in compliance with the requirements of . . . this rule.

(4) The board shall review each submission required by subrule (2) of this rule and shall determine whether it conforms to the requirements of subrule (1) of this rule and whether the system submitted provides adequate and effective controls for the operations of the licensee.

If the board finds any insufficiencies, then the board shall specify the insufficiencies, in writing, and submit the written insufficiencies to the licensee. The licensee shall make appropriate alterations. A licensee shall not commence gambling operations until a system of internal controls is approved.

Figure 5.8 *(Continued)*

Public Health Department

The public health department is generally responsible for the inspection and licensing of facilities that serve food. This department may be self-standing, but it is often associated with or housed in a state department of agriculture.

Hospitality operators must comply with a variety of health codes and regulations that govern many aspects of their business. The most common areas of state health regulation include:

- Standards for the cleanliness of food, and proper procedures for storing, handling, preparing, and serving food.
- Standards for the storage and handling of food supplies.
- Mandated health procedures for employees working with food.
- Standards for the proper care and washing of food equipment, utensils, and glasses.
- Standards for the proper care and washing of hotel bedding and towels, and specified quantities to be furnished to guests.
- Standards for the supply and use of water for guest use (faucets, showers, swimming pools) as well as for cleaning and dishwashing.

- Standards for water and sewage discharge.
- Display of procedures for helping choking victims.
- Regulations for smoking in public places.

Penalties for violating state health ordinances vary widely. Sometimes it is a fine, but in other cases, an operation could be shut down entirely. In minor cases, if an operator can correct the violation within a specified time frame, no penalty will be imposed. And, at the end of that time period, the inspector will come back to verify that the appropriate corrections have been made.

Some state or local health departments occasionally furnish a list of health violators to local newspapers or television stations, which could result in unwanted negative publicity for a hospitality operator. This is an added incentive for managers to make sure they are always in compliance with state and local health ordinances.

Department of Transportation

The state department of transportation is responsible for a variety of areas that directly impact hospitality managers. Too often, regulators are viewed only as inspectors, rather than allies. This should not be the case. Consider the situation of a restaurant owner who operates a facility on a busy street in a midsized town. The street itself is maintained by the state highway department. During lunchtime, the restaurant's guests have a hard time turning into the restaurant parking lot from the opposite side of the street, because traffic is so heavy that there are few breaks in the traffic stream. The speed limit on the street is relatively high, so the crossing can be dangerous. This manager should approach the state department of transportation with the problem, in an effort to fashion a solution. It may well be that traffic patterns are so heavy that a reduced speed limit or even a turn lane could be justified. Typically, departments of transportation are also responsible for regulating driveways, exits and approaches, and traffic signage, including billboards on highways.

5.3 LOCAL REGULATORY AND ADMINISTRATIVE AGENCIES

Much of the regulatory process you will face as a hospitality manager will take place at the local level. This is a positive situation because local inspectors will come to know both you and your facility personally.

Health and Sanitation

Often, the health and sanitation department is responsible for the local inspection and licensing of facilities that serve food and beverages. Local inspectors may check for compliance with state health and sanitation codes, as well as municipal ordinances. Additional duties may include the mandatory certification of foodservice workers and managers, issuing and revoking licenses, establishing standards for restroom facilities, and certifying a safe water supply.

Building and Zoning

Building and zoning departments issue building permits, and inspect the building prior to, during, and after construction. They regulate both new building construction and additions or renovations. Standards for lighting, ventilation, rest-

rooms, elevators, and public corridors and entryways may be established by state or local agencies. (In addition, your insurance company may have its own requirements for lighting levels and ventilation systems.) Local zoning ordinances may also regulate outside land use, such as parking spaces and permits for sidewalk or patio dining. Local inspectors will make sure that facilities are in compliance with all state and local building codes.

In addition, these departments often regulate the type of businesses that can be located in specified areas. Though this process can be contentious, it is generally accepted as necessary for the greater good of communities. Most hospitality professionals would agree, for example, that a bar or nightclub should not be operated in a building adjacent to a school or church.

Zoning officials regulate land use in ways that can benefit hospitality managers, for example, by prohibiting negative businesses from locating next to land reserved for restaurants, hotels, and other commercial use. Imagine your concern, for example, if you were to learn that a private landfill operator had just purchased the vacant lot next to your four-star restaurant and was to begin accepting deposits in 30 days!

In addition to their role in regulating the placement and construction of businesses, local building and zoning officials are typically responsible for the construction and placement of signs outside a business. The regulations controlling the size, number, and construction materials required for signage can be quite extensive. Figure 5.9 is an example of a local sign ordinance that you might encounter as a hospitality manager. Note, in particular, the specificity of information required by the business prior to the granting of a sign permit.

Inspectors randomly visit businesses to ensure compliance with building and safety codes. Violators can be fined, and if guests or employees injure themselves as a result of a violation, it may result in a lawsuit.

Courts and Garnishment

In most communities, some agency of the court, sometimes called a "friend" of the court, will have the responsibility of assisting creditors in securing payment for legally owed debts. These debts can include a variety of court-ordered payments, such as child-support payments. In cases like these, a hospitality manager may be ordered by the court to **garnish** an employee's wages.

▶ **LEGALESE**

Garnish: A court-ordered method of debt collection in which a portion of a person's salary is paid to a creditor.

Historical Preservation

In some communities, historical buildings, their use, and renovation may be regulated by an agency charged with historical preservation. If you manage a hospitality facility in a historic building, city zone, or community, you may face regulation from the governmental entity charged with preserving the historical integrity of your facility. This may limit the types of alterations or improvements you may make to your facility, or it may require you to maintain your property in a manner that is consistent with the historical nature of the area.

Fire Department

The local fire department is a critical part of the safety net that hospitality managers offer their guests. Whether it is for a hotel or restaurant, dependable fire safety departments can assist a manager in limiting potential liability through careful adherence to all local fire codes and procedures. Fire departments will normally conduct routine facility inspections, assist local building departments

Sign Permits, Delta Township

The provisions of this chapter shall be administered by the township building official who shall have the authority to issue sign permits, without which it shall be unlawful to erect or replace any sign, whether freestanding, or mounted on, applied to or painted on a building or other structure.

Sign permits required. No person shall erect, place, structurally alter, or add to any sign without first obtaining a permit to do so in the manner hereinafter provided.

Application procedure. Application for a permit to erect, place, structurally alter or add to a sign shall be made to the township building official, by submission of the required forms, fees, exhibits and information by the owner of the property on which the sign is to be located, or by his agent or lessee. The application shall contain the following information:

1. The property owner's name and address.
2. The applicant's name and address
3. Address and permanent parcel number of the property on which the sign is or will be located
4. Identification of the type of sign (ground, pole, wall, etc.)
5. Name of business or name of premises to which the sign belongs or relates
6. Plans drawn to an accurate, common scale, depicting the following:
7. Dimensions and display area of the proposed sign, based on the definition of display area contained in this chapter
8. For ground signs and pole signs, the setback of the sign from the nearest public or private road right-of-way
9. For ground signs and pole signs, the height of the sign
10. For wall signs, the height and width of the building wall or tenant-controlled portion of building wall to which the sign will be attached.
11. The proposed graphic images and text to be displayed on the sign.

Scope. Sign permits issued on the basis of plans and other information submitted as part of the permit application authorize only the design and construction set forth and described in the permit application, and no other design or construction.

Figure 5.9 Sign permit ordinance.

in reviewing plans for new or renovated buildings, ensure that emergency lighting and sprinklers are installed and maintained properly, and offer fire safety training for managers and employees. As a hospitality manager, it is important to know your local fire codes, and make sure that your operation always includes the required number of fire extinguishers, smoke detectors, sprinklers, fans and ventilation ducts, emergency lights, and emergency exit signs. This equipment should be tested periodically to make sure that it is in good working order. The National Fire Protection Association has established national standards for ventilation systems and automatic fire protection systems in commercial kitchens. Insurance companies also have regulations that will determine the type and amount of fire protection equipment you will need for your operation.

Another important role of the fire department is to regulate the number of individuals who are allowed in a particular space at a given time. For example, it would be the fire department that would determine the maximum number of patrons who could be in a hotel ballroom at one time. The capacity of bars, nightclubs, dining rooms, and sleeping rooms are all examples of areas regulated by the local fire department. You have probably noticed signs that indicate the maximum number of people who can safely be in a public space. Often local laws require these signs to be prominently displayed.

Law Enforcement

While local police do not generally serve a regulatory role for business, some communities do have local laws or codes that are enforced by the police department, in a city, or by the sheriff's department in a more rural community. As we have seen, liquor laws, for example, are sometimes enforced by the local police. Other areas of interaction may be parking enforcement and the removal of disorderly guests.

Tax Assessor/Collector

Local municipalities obtain a significant portion of their tax revenues from businesses. These taxes may be levied on the basis of property value, sales revenue, or a combination of both. The tax assessor or collector is responsible for the prompt collection and recording of these taxes.

Increasingly, communities are looking to the hospitality industry as a vehicle for raising tax revenue. One such source of tax revenue is the local occupancy, or "bed," tax. Essentially, the occupancy tax is a tax on the sale of hotel rooms. It typically will range from 1 to 15 percent of gross room revenue. This tax may be assessed at the state level, local level, or both. In any case, there are typically few waivers for the tax, and its collection is aggressively enforced by the taxing entity.

5.4 MANAGING CONFLICTING REGULATIONS

Given the large number of legislative bodies daily creating new policies, there are surprisingly few instances where regulations are in direct conflict. As a rule, local legislators and public officials will review state guidelines prior to implementing new regulations, just as state regulators will review federal guidelines. In fact, where there are agencies at each governmental level, the federal agency may create model regulations that will then be adopted in whole or in part at the state level, just as the state may take the role of creating model regulations for possible use at the local level.

Consider the case of A. J. Patel. Mr. Patel is the regional manager for a hotel company that operates properties that provide a free continental breakfast to all registered guests. His properties operate in three different states. Mr. Patel must be familiar with the public health codes of three different state and local governments, which means he must stay abreast of the changing health code regulations of all six entities. His task has been made easier, however, because the federal Food and Drug Administration (FDA), has created a model Food Service Sanitation Ordinance, found at **www.foodsafety.org**, that is followed, with varying degrees of specificity, by many state and local communities. Figure 5.10 is a section of the Preface to the State of Michigan's Food Service Sanitation Ordinance. Note the relationship that is detailed among the federal, state, and local regulators.

There will be times when requirements placed on a hospitality manager will be in conflict; a federal requirement may conflict with a local one, for example. While this can sometimes be frustrating, it is important to know what you, as a manager, should do in such a situation.

A conflict of regulatory restriction occurs when one entity sets a standard higher or lower than another. If, for example, a local sanitation code requires all shelving in a kitchen to be 12 inches above the floor, yet the state code allows shelving to be within 6 inches of the floor, the more restrictive regulation will prevail. This is true because, in this case, a shelf 12 inches above the floor satisfies both regulatory bodies. The principle to remember is this: *When regulatory demands conflict, the "most restrictive" regulation should be followed.*

Michigan's state-local coordinated food service sanitation program regulates fixed, mobile, and temporary foodservice establishments as well as vending machines dispensing certain food and beverages. The program was first launched with passage of Act 269, P.A. of 1968, and has, from the beginning, been based in large part on the U.S. Public Health Service (USPHS) Model Recommendations for Food Service Sanitation. These recommendations are updated as technology, experience, and research dictate.

Michigan's current regulations consist of (1) the enabling legislation, Michigan's Public Health Code, Act 368, P.A. of 1978, Part 129, as amended; (2) the United States Public Health Service Model Foodservice Sanitation Ordinance; and (3) Foodservice Sanitation Rules promulgated under the authority of Section 12909 of the Public Code. The Foodservice Sanitation Section, Division of Environmental Health, Bureau of Environmental and Occupational Health, Michigan Department of Public Health is charged with responsibility for overall administration and coordination of the program and has delegated the authority for enforcement of the statue and administrative rules to local health departments.

Figure 5.10 State of Michigan Sanitation Ordinance.

ANALYZE THE SITUATION 5.3

Sharon Alexander operated The Texas Saloon, an upscale steakhouse restaurant that also served beer and wine. Sharon's average menu item sold for $10. Employees were allowed to eat one meal during their shift. For those who voluntarily elected to eat this meal, Sharon would deduct $0.25 per hour ($2 per eight-hour shift) from the federal minimum wage rate she paid her entry-level dishwashers, which reflected the reasonable cost of the meal.

Sharon relied on the Fair Labor Standards Act (FLSA) Section 3(m), which states that employers can consider, as wages, "reasonable costs . . . to the employer of furnishing such employees with board, lodging, or other facilities if such boards, lodging, or other facilities are customarily furnished by such employer to his [or her] employees." Sharon interpreted this regulation to mean that she could pay the entry-level dishwashers a rate that, when added to the $0.25 per hour meal deduction, equaled the federal minimum wage.

One day, Sharon was contacted by her state department of employment, which charged that she was in violation of the state minimum wage law. The law stated that "total voluntary deductions for meals and uniforms may not decrease an employee's wages below the federal minimum wage on an hourly basis." Sharon maintained that because she was in compliance with the federal law, she was allowed to take the meal credit against the wages paid to her entry-level dishwashers.

1. Is Sharon in compliance with the compensation laws of her state?
2. Do federal laws, in this case, take precedent over state law?

In some cases, a regulatory agency will influence a hospitality manager's operation in an indirect, but intentional manner. An example is the Hotel and Motel Fire Safety Act of 1990. Because the federal government was hesitant to require many older hotels to incur the expense of adding in-room sprinkler systems to their rooms, yet wanted to influence the safety of the traveling public, it enacted this law.

The Hotel and Motel Fire Safety Act of 1990 (Public Law 101-391) aims to increase the level of fire safety in hotels and motels by discouraging federally funded travel to hotels and motels that do not meet certain minimum fire protection standards. These standards require the installation of automatic sprinkler systems in hotels and motels over three stories in height, and the installation of hardwired (not battery-operated) smoke detectors in every room of each and every hotel and motel.

In general, the act prohibits federal funding of a meeting, conference, convention, or training seminar that is conducted in a place of public accommodation that does not meet the fire safety requirements of the act. Under the act,

states are responsible for submitting data to the U.S. Fire Administration regarding which hotels and motels meet those specified standards. Note that, in this case, the regulatory body, Congress, did not implement a restriction on operating hotels without sprinkler systems; it simply prohibited funding, by the federal government, of any travel to such a hotel.

5.5 RESPONDING TO AN INQUIRY

Despite the best efforts of management, it is not uncommon for a facility to be found in violation of a regulation. Consider the case of Gerry Monteagudo. Gerry has, for many years, heavily decorated the lobby and public areas of his hotel during the Christmas season. This year, shortly after the decorations had been put in place, Gerry received a letter from the local fire chief citing the hotel for three violations of the local fire code. An inspector noticed that some of the holiday lights were illuminated via the use of extension cords. These extension cords are not allowed, by ordinance, in the township where Gerry operates the hotel. In this case, the problem could be quickly rectified by replacing the extension cords with surge protector cords that are allowed by the local ordinance.

At the other extreme, consider the case of the hospitality manager who is notified that the IRS will be conducting an audit of tip-reporting compliance in her facility. The IRS auditors plan to trace the last three years of tips to all employees, and verify that the required employment taxes were paid on those tips. The manager, in assembling three years of paperwork, discovers that not all taxes were paid during the first year, before she assumed management of the facility. A penalty may still be assessed.

As can be seen, some regulatory violations can be very serious. Because that is true, it is a good idea to follow a standard set of procedures anytime a governmental agency raises the question of regulatory noncompliance.

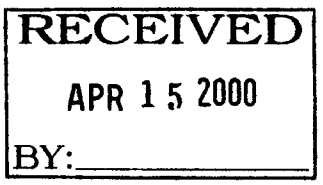


Figure 5.11 Date stamp.

LEGALLY MANAGING AT WORK:

Recommended Steps for Responding to Inquiries and Complaints by Government Agencies

1. Upon notification of a complaint or violation, document the date and time that all paperwork was received, and be sure to check of correspondence for required deadlines.

Upon receipt of correspondence from a government agency, the first thing that you or your clerical staff needs to do is to note on the correspondence itself the date that it was received. This can be done manually, but preferably with a small mechanical stamping device (as shown in Figure 5.11). Be sure that you include the day, month, and year of receipt. This is important because many governmental agencies require you to respond within a certain number of days from the date you received the correspondence.

As you read the correspondence, be on the lookout for the due dates of responses. Some due dates are measured from the date of receipt; other due dates are measured from the date mailed. For instance, a letter might state, "If you do not respond within 10 days of your receipt of this correspondence, then we will assume that the claimant's position is true and act accordingly." This is known as an automatic default provision. It is imperative that if you intend to respond, you do so within the time frame specified in the correspondence. There is rarely a remedy to missing a deadline for an initial response.

2. Assess the severity of the complaint. Determine if legal consultation is necessary.

As you read the correspondence, you will need to decide if legal counsel should be consulted in order to deal with the complaint raised in the correspondence. Additionally, you will need to decide if the issue raised needs to be referred to your insurance carrier. It may be a good idea to fax the correspondence to your insurance agent to get his or her opinion as to whether or not there might be coverage for the particular concern raised.

In the event you do forward this matter to your insurance carrier, and the carrier determines that you are covered, ordinarly as part of your coverage, the carrier will provide an attorney to defend the claim. If the carrier denies you coverage, you will need to hire your own counsel. In the event that occurs, or in the event that you determine on your own that you need legal counsel when dealing with a government agency, you may want to consult with, or retain, an administrative law specialist, an attorney who devotes a significant part of his or her practice to handling complaints for alleged violations of government regulations and/or prosecutions by the government.

3. Develop a plan of action.

How you as a manager should respond to a complaint or violation will vary based on whether or not you have determined that legal assistance is needed.

Without an Attorney

- Calendar all response dates, and be sure to allow yourself enough time for mailing.
- Identify all the people who need to be involved in the response, and contact them in a timely fashion to solicit their input.
- Always keep clear, legible copies of anything that you forward as a response to a complaint. In any response that you give, if it is not true or you cannot prove it, do not state it in your response.
- Follow the instructions on the correspondence exactly. If it says that you only have one page to respond, then use only one page. If it says that the response must be typed, then make sure it is typed. If your response needs to be signed and your signature must be notarized by a notary public, be absolutely certain that it gets done, and make sure that the copies that you keep are copies of the responses *after* you have signed them and had them notarized.

With an Attorney

- Forward the correspondence immediately to your attorney, together with any supporting documentation that the attorney might need to understand the situation completely. Also, include a list of people who might have knowledge of the situation raised in the correspondence. It is a good idea to include contact information for the attorney. You want to facilitate communication between the attorney and any witnesses who can help present a positive response on your behalf.
- Stay in direct communication with your attorney until the matter is resolved. Just because you have given it to an attorney does not mean it is off of your plate. It is still crucial that you keep up with time deadlines and potential witnesses. For instance, if you know that certain people are going on vacation or you yourself are going on vacation, let the attorney know so that he or she can plan accordingly in the event he or she needs statements of additional information from you or the witnesses. ◀

As a manager, you should never willingly violate a legitimate regulation. In most cases, noncompliance is unintentional, and the governmental agency has, as its responsibility, the duty to inform management of violations. Because many of these agencies can have a significant effect on the facility and, in some cases the manager personally, it is best to respond quickly and professionally to any charge of noncompliance.

5.6 MONITORING REGULATORY CHANGE

It is simply not possible to know every governmental regulation that could affect the hospitality industry, and some laws change on a regular basis. While changes in major federal law are rather well publicized, you cannot be sure that the policies of all federal agencies, state regulators, and local governments will be made known to you. Sources such as **www.HospitalityLawyer.com** can be very helpful in keeping managers current. The URLs listed in Figure 5.12 can be of help in following legislation at the national level. Reading about the hospitality industry will not only make you a better manager, but will also enable you to keep up with changing regulations.

For those managers employed by a national chain or management company, the parent company can be an excellent source of information on changing regulations. Indeed, one valuable service provided by franchisors to franchisees is regular updates on regulatory agencies and their work.

Because the federal government can play such a major role in regulating the hospitality industry, it is important to have current and rapid access to the actions taken by each of the federal regulatory agencies. Accessing the Web site addresses provided next to each agency name is a good way to keep up to date on any changes in the law in that particular area.

As a hospitality manager, it is important to stay involved in the hospitality trade association that most closely represents your industry segment. The National Restaurant Association (NRA), the American Hotel and Motel Association (AH&MA), the American Dietetics Association (ADA), and others regularly provide their memberships with legislative updates. Many of these organizations have state, regional, or local chapters that can be invaluable sources of information.

On a local level, chambers of commerce, business trade associations, and personal relationships with local police, fire, and building officials can help a manager stay up to date with municipal changes.

As a hospitality manager, it is critical that you take an active role in shaping the regulations that affect the industry. Governments, on the whole, attempt to pass regulations that they believe are in the best interests of the communities they represent. The problem arises, however, when the cost in dollars or the infringement upon individual rights will far exceed the societal value of implementing a proposed regulation. For example, some consumers feel that it would be a good idea to have 24-hour video surveillance cameras placed in hotel corridors, even if the cost of installing them resulted in higher room rates. Such a camera might be a deterrent to crime and would make them feel safer; however, other guests object to the cameras as an invasion of their privacy. Hotel managers caught in the middle agree that the safety of their guests is a major concern, but they also know that there are less intrusive ways to make people feel safe while respecting their privacy. Without input from the hospitality industry, however, regulators may not be aware of those alternatives and could pass a law that is ultimately not in the best interests of the hotel guest, the lodging industry, or society.

It is only by staying aware of regulatory changes and being committed to proactive participation in the regulatory process through education and leadership that the hospitality industry will continue to flourish.

HOSPITALITY INDUSTRY SAMPLING OF "WORLD WIDE WEB" HOME PAGE ADDRESSES FOR CORPORATE INFORMATION, REPORTS & PUBLICATIONS

LIBRARIES

- ⇒ Conrad N. Hilton College Library & Archives ..... http://www.hrm.uh.edu/Library
- ⇒ MD Anderson Library UH ..... http://info.lib.uh.edu
- ⇒ Harris County Public Libraries ..... http://www.hcpl.lib.tx.us
- ⇒ Houston Public Libraries ..... http://www.hpl.lib.tx.us
- ⇒ Library of Congress ..... http://www.loc.gov

MISCELLANEOUS

- ⇒ Bizlink (Company Research) ..... http://www.bizlink.org
- ⇒ Book Directory ..... http://www.bookdirectory.com
- ⇒ Business.com ..... http://www.business.com
- ⇒ City of Houston ..... http://www.ci.houston.tx.us
- ⇒ Evaluating Websites ..... http://servercc.oakton.edu/~wittman/find/eval.htm
- ⇒ Find Articles ..... http://www.findarticles.com
- ⇒ Find Law ..... http://www.findlaw.com
- ⇒ First Gov (Links to Government Sites) ..... http://www.firstgov.gov
- ⇒ Greater Houston Partnership ..... http://www.houston.org
- ⇒ Hospitality Travel Hotel Tourism Jobs ..... http://omni.cc.purdue.edu/~alltson/career.htm
- ⇒ Library Spot, Links to Reference ..... http://www.libraryspot.com/
- ⇒ Reuters ..... http://www.reuters.com
- ⇒ Search Engine Watch ..... http://www.searchenginewatch.com
- ⇒ Texas Work Commission ..... http://www.twc.state.tx.us
- ⇒ The Elements of Style (Guide to Grammar and Writing) http://www.bartleby.com/141/
- ⇒ Thesaurus.com ..... http://www.thesaurus.com
- ⇒ Webster Dictionary ..... http://www.m-w.com
- ⇒ Citation Machine (APA and MLA citation help) ..... http://www.landmark-project.com/citation_machine/cm.php

HOSPITALITY AND TOURISM ADDRESSES

- ⇒ (C.H.I.P.S.) Culinary & Hospitality book distributor ..... http://www.chipsbooks.com
- ⇒ AAA Diamond Rating Program http://www.aaa.com/news12/diamonds/inspections.html
- ⇒ ADA Home Page ..... http://www.ada.gov
- ⇒ Atlapedia ..... http://www.atlapedia.com
- ⇒ Aviation Now ..... http://www.aviationnow.com
- ⇒ Technology Resource ..... http://hoteltechresource.com
- ⇒ Daily Restaurant Industry News ..... http://restaurantnewsresource.com
- ⇒ Boutique Lodging ..... http://www.boutiquelodging.com
- ⇒ Casino Wire ..... http://www.casinowire.com
- ⇒ CIA the world fact book ..... http://cia.gov
- ⇒ Department of Transportation ..... http://www.dot.gov
- ⇒ E Hotelier ..... http://www.ehotelier.com
- ⇒ E-Hospitality ..... http://www.e-hospitality.com
- ⇒ Epicurious ..... http://www.epicurious.com
- ⇒ Hospitality Trends ..... http://www.htrends.com
- ⇒ Food Service Central ..... http://www.foodservicecentral.com
- ⇒ Foodservice.com ..... http://www.foodservice.com
- ⇒ Gaming Commissions ..... http://mentorms.best.vwh.net/poker/control.htm
- ⇒ Hospitality Industry Resources ..... http://www.hospitalitynet.org
- ⇒ Hospitality Jobs Online ..... http://www.hjo.net
- ⇒ Hospitality Lawyer ..... http://www.hospitalitylawyer.com
- ⇒ Hotel Chain Links ..... http://www.hotelstravel.com/chains.html
- ⇒ Hotel Interactive ..... http://www.hotelinteractive.com
- ⇒ Hotel Online (Daily News Updates and Reports) ..... http://www.hotel-online.com/Neo/News
- ⇒ Houston Health Department Food Page ..... http://www.ci.houston.tx.us/departme/health/foodpage.html
- ⇒ International Bed and Breakfast Directory ..... http://www.ibbp.com
- ⇒ ITA Tourism Industry ..... http://www.tinet.ita.doc.gov
- ⇒ Just Drinks ..... http://www.just-drinks.com
- ⇒ Just Food ..... http://www.just-food.com
- ⇒ Las Vegas statistics, etc. http://www.lasvegas24hours.com
- ⇒ Lodging Research ..... http://www.lodgingresearch.com
- ⇒ Meetings Industry Mall ..... http://www.mim.com
- ⇒ New World Hotelier ..... http://www.newhotelier.com
- ⇒ PKF Texas ..... http://www.pkftexas.com
- ⇒ Search Hotels ..... http://www.searchhotels.com
- ⇒ Smith Travel Research ..... http://www.smithtravelresearch.com
- ⇒ Texas Lodging ..... http://www.texaslodging.com
- ⇒ Texas Travel Research ..... http://research.travel.state.tx.us
- ⇒ Tourism Research Links (for researchers, NOT TRAVELERS) ..... http://www.waksberg.com
- ⇒ vFoodPortal ..... http://www.vfoodportal.com/index.phtml
- ⇒ Wired Hotelier ..... http://www.wiredhotelier.com
- ⇒ World Biz ..... http://www.worldbiz.com
- ⇒ Daily Travel Industry News ..... http://www.travelindustrywire.com

Figure 5.12 Hospitality industry sampling of Internet home page addresses for corporate information, reports, and publications. (Created by Cathleen Baird, director of archives, and maintained by the Lateka Grays, supervisor of the Conrad N. Hilton College Library for the University of Houston, students, faculty, and hospitality industry professionals.)

HOSPITALITY ORGANIZATIONS

- American Gaming Association ..... http://www.americangaming.org
- American Hotel and Lodging Association ..... http://www.ahla.com
- American Resort Development Organization ..... http://www.arda.org
- American Society for Industrial Security ..... http://www.asisonline.org
- American Society of Travel Agents ..... http://www.astanet.com
- Association for Corporate Travel Executives ..... http://www.acte.org
- Center for Industry and Exposition Research ..... http://www.ceir.org
- Club Managers Association of America ..... http://www.cmaa.org
- Confrerie de la Chaine des Rotisseurs ..... http://www.chaineus.org
- Convention Industry Council ..... http://www.conventionindustry.org
- Cruise Lines International Association ..... http://www.cruising.org
- Hospitality Financial & Technology Professionals ..... http://www.hftp.org
- Hospitality Sales & Marketing Association International ..... http://www.hsmai.org
- Hotel Electronic Distribution Network Association ..... http://www.hedna.org
- International Association of Culinary Professionals ..... http://iacp.com
- International Council on Hotel, Restaurant, and Institutional Education ..... http://www.chrie.org
- International Flight Catering Association ..... http://www.ifcanet.com/
- International Food Service Executives Association ..... http://www.ifsea.com
- International Hotel & Restaurant Association ..... http://www.ih-ra.org
- International Special Events Society ..... http://www.ises.com
- National Association of Catering Executives ..... http://www.nace.net
- National Association of College and University Food Services ..... http://www.nacufs.org
- National Indian Gaming Association ..... http://www.indiangaming.org
- National Restaurant Association ..... http://www.restaurant.org
- North American Gaming Regulators Association ..... http://www.nagra.org
- Pacific Asia Travel Association ..... http://www.pata.org
- Professional Association of Innkeepers International ..... http://www.paii.org
- Professional Convention Management Association ..... http://www.pcma.org
- Society for Human Resource Management ..... http://www.shrm.org
- Texas Restaurant Association ..... http://www.restaurantville.com
- Texas Travel Research ..... http://research.travel.state.tx.us/tresearch.asp
- Travel and Tourism Research Association ..... http://www.ttra.com
- Travel Industry Association of America ..... http://www.tia.org
- Wine Society of Texas ..... http://www.winesocietyoftexas.org
- World Tourism Organization ..... http://www.world-tourism.org
- World Travel & Tourism Council ..... www.wttc.org

JOURNALS, MAGAZINES & NEWS

- CEO Express ..... http://www.ceoexpress.com
- Food & Service News (TRA Magazine) ..... http://www.restaurantville.com
- Food Service Today ..... http://www.foodservicetoday.com
- Hospitality Technology Magazine ..... http://www.htmagazine.com
- Hospitality Upgrade ..... http://www.hospitalityupgrade.com
- Hotel & Motel Management ..... http://www.hotelmotel.com
- Hotel Business ..... http://www.hotelbusiness.com
- Hotels ..... http://www.hotelsmag.com
- Lodging Magazine ..... http://www.lodgingmagazine.com
- Meetings Network ..... http://www.meetingsnet.com
- Michael Pollock's Gaming Observer ..... http://www.gamingobserver.com
- Nation's Restaurant News ..... http://www.nrn.com
- Newspaper Links ..... http://www.newspaperlinks.com
- Prepared Foods ..... http://www.preparedfoods.com
- QSR (Quick Service Restaurants) Magazine ..... http://www.qsrmagazine.com
- Restaurant Marketing ..... http://www.restaurant-marketing.net
- Restaurants & Institutions Magazine ..... http://www.rimag.com
- Travel Weekly ..... http://www.twcrossroads.com
- World Gaming Live ..... http://www.casinojournal.com/

WINE REFERENCES

- American Institute of Wine & Food ..... http://www.aiwf.org
- Drink Wine ..... http://www.drinkwine.com
- Texas Wine Marketing Research Institute ..... http://www.hs.ttu.edu/texaswine/default.asp
- History of Wine ..... http://www.history-of-wine.com
- Into Wine ..... http://www.intowine.com
- Origins & Ancient History of Wine ..... http://www.upenn.edu/museum/Wine/wineintro.html
- Society of Wine Educators ..... http://wine.gurus.com
- Texas Alcohol & Beverage Commission ..... http://www.tabc.state.tx.us
- Wine Business ..... http://www.winebusiness.com
- Wine Industry News ..... http://www.wineryexchange.com
- Wine Institute ..... http://www.wineinstitute.org
- Wine Lovers Page ..... http://www.wine-lovers-page.com
- Wine Pros ..... http://www.winepros.com.au
- Wine Spectator ..... http://www.winespectator.com

Figure 5.12 *(Continued)*

▶ INTERNATIONAL SNAPSHOT

Immigration

The growing globalization of the world's economy and labor markets, in addition to amplif concerns regarding security, has increased the awareness of immigration issues for everyone. For employers in the hospitality industry, who want to secure "the best and the brightest" as well as meet the needs of a labor-intensive industry, these issues are especially acute. They must accomplish these goals while remaining in compliance with complicated immigration laws, rules, regulations, and processes.

Globally, the process of employing noncitizens in a given country typically requires some sort of sponsorship by an in-country employer. (One significant exception is certain European Union nations, which do allow for employment of nationals of other EU nations.) By and large, time-limited work authorization or work permits are available to noncitizens in highly skilled professions, to corporate transferees or managerial/executive positions, and to certain entrepreneurs/investors. In many countries, permanent residence status is also available, allowing a noncitizen to work and remain in a given country permanently, typically after having been a lawful resident in the country for several years. The availability of temporary work authorization or permanent residence status for noncitizens who work in low-skill or unskilled positions is far less common.

In the United States, the immigration system classifies persons into two primary categories: *citizens*, born in the United States, born to a U.S. citizen parent, or naturalized as U.S. citizens; and *aliens*, which essentially accounts for everyone else. The alien group is further divided into two primary segments: *immigrants*, who are aliens coming to the United States permanently or indefinitely (the terms "lawful permanent resident" and "green card holder" are used to describe persons authorized to remain indefinitely, for the remainder of their lives) in the United States, subject to certain conditions), and *nonimmigrants*, who are aliens coming to the United States for a defined time period (e.g., three years) and for a definitive purpose (e.g., to work in a professional capacity for a U.S. employer.)

Typically, most nonimmigrants are limited to employment with a specific employer. For example, professional (*specialty occupation* or *H-1B*) workers employed in a capacity requiring a bachelor's degree or higher are generally limited to employment with their employer sponsor. Likewise, *L-1 intracompany transferees* (managerial or specialized-knowledge persons transferred by a multinational corporation from an office overseas to a U.S. office) are limited to employment within the multinational organization. The U.S. system also has a limited H-2B temporary worker nonimmigrant classification available to even unskilled workers. An employer must establish a short-term or seasonal need and demonstrate the unavailability of U.S. workers via a labor market test to employ such nonimmigrants. The most common use of this classification in the hospitality industry occurs at seasonal resort properties during the high season.

Unlike many other countries, permanent residence is not available to persons based upon any particular period of U.S. residence, but instead depends upon specifically qualifying under existing family relation–based or employment-based categories. Most employment-based permanent residence cases require an employer to demonstrate the unavailability of a qualified, willing, and able U.S. citizen or lawful permanent resident worker, a labor market test known as *labor certification*. More senior or specialized persons can sometimes be sponsored without the need for labor certification.

Following the elimination of the Immigration & Naturalization Service (INS) as a separate department, the Department of Homeland Security (DHS) was

established in 2003 and assumed all INS responsibilities. The U.S. Citizenship and Immigration Services (USCIS), a bureau within the DHS, handles the majority of functions that were once completed by the INS, including nonimmigrant and immigrant (permanent resident) petitions. The DHS U.S. Immigration and Customs Enforcement (ICE) handles enforcement of federal immigration laws and customs laws, including I-9/IRCA.

Provided by Andrew Galeziowski of Ogletree and Deakins Law Firm, Atlanta, Georgia. www.ogletreedeakins.com

WHAT WOULD YOU DO?

After the highly publicized death of a college student, a local sports bar in your town lost its liquor license for 60 days. The student had consumed 21 shots of alcohol on his birthday and later died in his dorm room from alcohol poisoning. The bar was crowded, and because the shots had been purchased by a variety of friends of the victim, the bar manager and staff were not aware of the impending problem. Subsequently, the college's student newspaper published editorials warning against the perils of binge drinking and accused the management of the facility of negligence or indifference.

Sorrow in the community and outrage in the local press prompted the mayor of the city in which you operate your own Italian restaurant/pizzeria to propose a local ordinance banning the sale of more than three drinks per day to any individual. A drink, under the ordinance, would be defined as either a 12-ounce beer, a 4-ounce glass of table wine, or a $1\frac{1}{2}$-ounce shot of liquor. Violators would face a fine of $5,000 per incident. Enforcement would fall to the local police. It is widely known in the community that the mayor, generally a strong promoter of business, is a nondrinker, and support for the ordinance is strong because of the accident.

As the elected president of your local restaurant association, you have been asked to address the proposed ordinance at the next meeting of the city council. Develop a plan of action and outline for your address to the city council. In your essay, answer the following four questions:

1. What issues will you consider as you prepare your statement to the city council?
2. What message do you believe the majority of citizens in your community will support?
3. Where will you turn for advice and counsel in preparing your statement?
4. Will it make a difference to you if you know that the local television station will cover the council meeting?

▶ THE HOSPITALITY INDUSTRY IN COURT

To emphasize the importance of a hospitality operator knowing about OSHA and its hazardous materials definition, consider the case ot *Halterman v. Radisson Hotel Corp., 523 S.E.2d 823 (Va. 2000).*

FACTUAL SUMMARY

John Halterman (Halterman) was permanently injured while working for a Radisson Hotel (Radisson) in Alexandria Virginia. H&H, the company Halterman worked for, was hired by Radisson to do some welding repairs to washing machines in the laundry facility of the hotel. The machines contained residue of a product called Liquid Lusterfixe, an acidic laundry detergent. None of the Radisson employees warned Halterman about the presence of the chemical. However, Radisson did maintain a display unit for material safety data sheets (MSDS) on one wall of the laundry room. Those sheets listed all hazardous chemicals and their effects on humans.

During the welding process, the heat from Halterman's welding electrode caused the Lusterfixe to turn into a toxic gas. Halterman spent anywhere from 30 to 45 minutes welding on the machines without any protective breathing equipment. He breathed in unknown quantities of the gas while he worked on the washing machines. In all the repairs took several hours to complete.

Halterman was in good health when he began the work. By the time he left the hotel he had developed a cough. His cough worsened over the next few days, and he became short of breath. A doctor diagnosed him as having acute chemical

pneumonitis. The gaseous compound he inhaled was known to cause pneumonitis. Eventually, he developed interstitial fibrosis, or scarring of the lungs. Halterman lost about one-third of his lung capacity.

Halterman sued Radisson Hotel for failing to maintain the laundry room in a safe manner and for failing to warn him about the presence of Liquid Lusterfixe, a hazardous chemical. He also sued Radisson for violation of the Hazard Communication Standard (HCS) of the Occupational Safety and Health Act (OSHA). Under OSHA, an employer is required to implement a written system for warning employees about hazardous chemicals used on the work site. Radisson was required to tell its employees and the employer of other employees about the existence of the MSDS display unit.

QUESTION FOR THE COURT

The question for the court was whether Radisson violated the HCS provision of OSHA. Halterman argued Radisson did not communicate the hazardous nature of the working conditions to him. Radisson responded by claiming it was not required by the statute to warn him about the hazard but was merely obligated to inform his employer of the existence of the MSDS display unit.

DECISION

The court ruled in favor of Radisson, holding that the only obligation under the statute was to communicate the existence of the MSDS display to Halterman's employer. While Radisson had a duty to inform its own employees of hazardous chemicals present at the work site, there was no such duty for employees of other companies working at the hotel.

MESSAGE TO MANAGEMENT

Become familiar with your obligations under OSHA and meet them. Your employee's safety and the safety of others are at stake. Despite this ruling, the best practice is to make *all* aware of know dangers.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

Federal, state, and local governments all pass laws and regulations that can potentially impact a hospitality operation. These laws and regulations are enforced by administrative agencies at all three levels of the government. Hospitality managers need to be familiar with the most common agencies and the areas of the industry that they regulate. In order to comply with these regulations, hospitality managers may be required to file forms, submit to inspections, apply for licenses, operate their business in a specified manner, and maintain their facilities and equipment in good working order.

Many government and nonprofit agencies publish guidelines for managers that can help you take the necessary steps to keep your facility in compliance with various regulations. In situations where federal, state, or local laws conflict with one another, the most restrictive regulation is the one that must be followed.

If you receive a complaint from a government agency, it is important that you take the appropriate steps to respond to the complaint in a timely fashion, respond in the manner requested, and develop a satisfactory plan of action. You may also choose to consult with an attorney or your insurance company, depending on the nature and severity of the complaint.

Government publications and Web sites, industry trade associations, and local community groups are common sources of information that hospitality managers can turn to for information on changing laws and regulations.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Analyze the role of at least three federal entities that regulate the hospitality industry. Why do you think the federal government feels the need to be involved with regulation in each of these three areas?

2. Tip reporting is mandatory. Create a memo to a restaurant staff describing why they should comply.
3. Secure a material safety data sheet and compare its content to the list of required items detailed in this chapter.
4. Review the protected classes identified by the EEOC and determine if others should be added.
5. List five reasons a state's alcohol beverage commission might revoke a liquor license. Prepare a five-minute bartender training session that addresses one of these reasons and how a restaurant or bar might avoid the difficulty.
6. Assess the rationale behind the "most restrictive" concept as it relates to regulatory conflict.
7. Prepare, in detail, a management checklist for responding to an administrative inquiry.
8. Using the Internet, locate the home page of your state hotel and restaurant association. Secure the name of the person in the organization responsible for monitoring regulatory changes affecting the hospitality industry, and cite on such recent change in your state.
9. Log on to **www.HospitaltyLawyer.com** and review the OSHA summary update in the National Library.

▶ TEAM ACTIVITY

In teams, list as many (at least 10 in each category) local, state, and federal regulatory agencies that you would have to be concerned with if you were contemplating opening a country club in your community, with the following amenities: golf, tennis, pools, full-service restaurant, banquet facilities, and service of alcohol.

Chapter 6

Managing Insurance

"That was truly a great meal!" said Trisha Sangus as she left the lobby area of Chez Louise, one of her favorite restaurants in the city. Trisha was in a festive mood, as she walked back to the restaurant's parking lot with Bob Zaccarelli, editor of *The Community News*, her city's largest newspaper. Trisha and Bob had just enjoyed dinner while they worked together on planning the print advertising for the city's annual Taste of the Town festival. As they approached Bob's car, he shouted, "What the . . . !!!!"

Trisha looked at Bob's brand-new sports car. The driver's side window had been smashed. Shattered glass was everywhere, and Trisha noticed on the ground beneath the car window that it included the distinctive brown glass of a beer bottle with its wrapper still partially attached.

"Did they take anything?" asked Trisha, as Bob examined the inside of the car.

"No, I don't think so. My CD player's still here," replied Bob still angry. "I can't believe this. We were only inside for an hour! I thought this restaurant was in a safe neighborhood. It will take me a week to order a new window and get this fixed! I'll have to rent a car in the meantime."

Trisha looked up at one of the halogen lamps in the well-lighted parking lot. Nearby, other cars passed on a busy commercial street.

"I'm really sorry, Bob," she said. "It looks like the work of some kids with nothing better to do. If they had been car thieves, you would have lost the whole car! By the looks of things, I would guess someone drove by and threw the bottle from the street. I'm sure the police will be able to determine what happened better than we can. I have my cell phone. Would you like me to call them?"

"Don't bother," replied Bob. "The police are not going to be able to fix my window. Besides, as you say, it looks like vandalism. It's unfortunate, but I guess it goes with doing business in the city. Anyway, I'm sure the restaurant has insurance for this type of thing. "

"The restaurant?" asked Trisha quizzically. "Won't you file a claim with your own auto insurer?"

"No way," said Bob. "This happened in a restaurant parking lot. The owners' insurance should pay. My car is supposed to be safe here. It wasn't, and that's their responsibility. Just as if the car had been vandalized in your hotel parking lot, it would be your responsibility. It's as clear-cut a case of liability as I have ever seen. I'm going back in to see the manager!"

"Clear-cut," repeated Trisha to herself. She wondered what type of reception Bob would get from the manager at Chez Louise. She had never seen Bob so upset. She wondered how the hotel managers on her own staff would react if Bob approached them with a similar complaint. She knew what she would say, but what about her manager on duty? Just as important, if they said the wrong things, she wondered what impact might that have on the hotel's liability insurance coverage. Trisha made a mental note to add this issue to the top of her agenda for tomorrow's staff meeting.

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. To understand the value of insurance in protecting a business from financial loss.
2. To become familiar with the different types of insurance required of hospitality operations.
3. To understand the role of workers' compensation and the requirements of an employer.
4. To critically evaluate the financial rating of an insurance company and other information to help you select an insurance carrier.
5. To distinguish between the terms "primary" and "umbrella" insurance coverage, and determine appropriate amounts of coverage.
6. To analyze an insurance policy and determine what types of claims will be covered and what types of claims will not be covered.

6.1 INTRODUCTION TO INSURANCE

Every individual faces risk. Illness, accidents, the acts of others, and even death, are all potential hazards each of us faces in life. Your business will face possible calamities also. Floods, fire, and the acts of guests, employees, and others can all put your business at risk. To guard against the financial loss these risks can bring, both individuals and businesses need to **insure** themselves. In its simplest form, insurance involves the spreading of risk from one person or business to a larger group.

▶ LEGALESE
Insure (insurance): To protect from risk.

Hospitality businesses seek **insurance**, or protection from risk, for two basic reasons. First, because doing so makes good financial sense. Second, some types of insurance coverage are required either by law (such as workers' compensation) or by lenders to protect their collateral. Consider, for example, the restaurateur who owns a business that provides her a salary of $100,000 per year. The restaurant is her sole source of income. If the restaurant were to burn down, she would lose this source of income. To protect her business, and her income, she would want to buy a fire insurance policy that would pay to completely replace the restaurant in the event of a fire, provided the cost of the insurance was reasonable. Not buying the insurance would put this restaurateur and her family at great financial risk. Buying the insurance would provide that the restaurateur with both financial security, in the event of an accidental fire and the peace of mind that such security brings.

To be protected from risk does not mean that hazardous events will not occur. Insurance does mean, however, that the person with insurance is provided some protection against the financial loss he or she may incur as a result of a hazardous event.

The insurance industry is built upon four fundamental premises:

1. The type of hazard the insurance company is underwriting must be faced by a large enough number of individuals or businesses so that statisticians can use actuarial (**actuary**) methods to predict the average frequency of loss involved in the risk.
2. The monetary value of the loss must be calculable against an accepted standard. For example, if a hotel seeks coverage for broken windows caused by vandals, it must be possible for the **insurer** to fairly determine the cost of replacing such a window.
3. The **premiums** (fees) for the insurance must be low enough to attract those who seek to be **insured**, but high enough to support the number of losses that will be incurred by the insurer.
4. The risk must not have the possibility of occurring so frequently during any given time period that the insurer cannot pay all legitimate claims. Insurance companies spend millions of dollars annually researching industries to determine the risk factor of providing insurance for a specific market, such as hospitality. Obviously, the fewer number of casualty losses, workers injured, lawsuits, and so on, the lower the risk that the insurance company may have to pay out money on a claim. Logically then, the safer the operation, and the safer the industry as a whole, the lower the cost of insurance.

▶ **LEGALESE**
Actuary: A mathematician or statistician who computes insurance risks and establishes premium rates.

▶ **LEGALESE**
Insurer: The entity that provides insurance.

▶ **LEGALESE**
Premium: The amount paid for insurance coverage; can be paid in one lump sum or over time, such as monthly.

▶ **LEGALESE**
Insured: The individual or business that purchases insurance against a risk.

The insurance contract between an insurer and an insured is called a **policy**. There are a variety of policy types, but they can be conveniently grouped into three categories:

▶ **LEGALESE**
Policy (insurance): The contract for insurance agreed upon by insurer and insured.

- ▶ Life insurance
- ▶ Health insurance
- ▶ Property-casualty (often referred to as "property-liability")

Life insurance policies generally are written to pay a certain amount of money at the time of the insured's death, or to pay the insured an **annuity** upon the insured's reaching a specified age. Health insurance is generally created to pay for hospital and doctor bills, as well as annuity payments for those who are disabled. In the hospitality industry, it would be common for you, as a manager, to receive some level of both life and health insurance as part of your compensation package.

▶ **LEGALESE**
Annuity: Fixed payments, made on a regular basis, for an agreed-upon period of time or until the death of the recipient.

Property-liability insurance provides financial protection (**indemnification**) in the event of occurrences such as floods, fire, lawsuits, and automobile accidents. As a manager, it is important to know the types of insurance policies that make sense for your operation, and how to evaluate the quality of the companies that offer insurance, as well as the merit of the actual policies.

▶ **LEGALESE**
Indemnification: To insure against possible liability and loss, and/or to compensate financially for losses incurred.

▶ **LEGALESE**
Claim: Demand for money, property, or repairs to property.

It is also important to remember that insurance companies, like hospitality companies, are in business to make a profit. Profits in the insurance industry are the result of increasing premium amounts, increased return from the investment of premiums, and the reduction of costs, including the payment of insurance **claims**. Because this is true, insurers are very careful to pay only those claims that are proven to be legitimate and within the terms of the insurance policy.

Because insurance protects against risk at an agreed-upon price, it is critical that you as a hospitality manager know:

- The risks you are insuring against.
- The amount of coverage you will receive.
- Any exceptions to your coverage that are written into your policy.
- How much the insurance will cost.
- The likelihood that the insurance company is financially sound enough to pay, if it becomes necessary.

To purchase insurance, a potential buyer must demonstrate that he or she has an insurable interest in the premises to be insured. That is, he or she must demonstrate that a loss would, in fact, affect him or her in a material way. This insurance concept is fundamental and helps protect against possible intentional acts of destruction or fraud. In addition, an insured must honestly divulge information needed by the insurer to enable the insurer to establish appropriate premium rates.

ANALYZE THE SITUATION 6.1

Samuel Renko, president of the Senframe Hotel Management company, authorized the purchase of a $2 million fidelity insurance policy, the purpose of which was to protect the company in the event of employee theft or fraud. In discussing the purchase with the insurance agent, Jana Foster, Mr. Renko assured Ms. Foster that all hotel controllers were subject to a thorough background check before they were hired. As a specific condition of the insurance policy, background checks on controller candidates were required prior to employement.

The insurance policy was purchased and went into effect on January 1, 2003. On June 1, 2003, the Senframe company took over the management and operation of the Roosevelt Hotel, a 300-room property in a resort area. As part of the operating agreement with the Roosevelt Hotel's owners, the hotel's controller and its director of sales were retained by Senframe. On December 20, 2003, Senframe management discovered that the Roosevelt Hotel's controller had been creating and submitting false invoices. The invoice payments were deposited in a bank account he had established for himself five years earlier. Total losses for the five-year period that the falsification occurred were over $500,000.

The controller resigned, but the hotel owners sued Senframe for the portion of misappropriated fund ($70,000) taken during the period the hotel was under Senframe's management. Ms. Foster maintained that her insurance company was not liable to indemnify Senframe, because the controller had not been subjected to a background check, as Mr. Renko had promised. Mr. Renko countered that the controller, although not background-checked, had no criminal record of any kind, and thus a background check would not have prevented the hotel from hiring the controller.

1. Must Ms. Foster's company defend Senframe in the litigation brought by the hotel's ownership?
2. If you were on a jury, would you hold Senframe responsible for the employee theft?
3. Regardless of the outcome of this situation, what changes in operational procedure should be implemented by Mr. Renko and the Senframe Hotel Management Company?

As with any purchase, careful comparison-shopping before selecting insurance is a very good idea. Because insurance is a contract between the insurer and the insured, it is also a good idea to read the contract carefully, or to have an expert evaluate it for you. As with any type of contract, it is critical that the insurance policies be kept in a safe, secure location.

Purchasing insurance is often complex and can be confusing. You may find it easier if you think of buying insurance as a three-step process:

1. Determine the type of insurance coverage you need. Here, you are looking at various aspects of your operation and deciding which risks to protect against.
2. Determine the ideal monetary amount of insurance coverage and the type of policy you will require. Remember, as the dollar value of your coverage increases, so will the premiums you have to pay.
3. Select a specific insurance company from which you will buy your policy.

The next three sections of this chapter examine each of these steps in detail and offer some guidelines for helping you determine the appropriate type of insurance coverage.

6.2 TYPES OF COVERAGE

Because the hospitality industry is made up of a variety of operations in different locations, the insurance needs of restaurants and hotels will vary considerably. A hospitality establishment's insurance policies will reflect the unique characteristics of the type of business being operated and the location in which it does business. For example, a restaurant on the United States Gulf Coast may well feel that hurricane insurance makes sense, while the same type of operation in South Dakota would not. Similarly, the resort that offers overnight camping excursions for families may desire insurance against animal attacks, while the yogurt store in a shopping mall would be hard-pressed to justify purchasing such a policy.

Insurance companies offer a wide variety of products designed to meet the needs of their customers. Because this is true, hospitality managers must be very careful to make sure they select the proper insurance coverage for their specific situation. With too much coverage, or with coverage that is not necessary, operational profits are reduced because premium payments are unnecessarily high. With no insurance, or too little insurance of the right type, however, the economic survival of the hospitality operation and its members may be at risk.

Many states have laws requiring businesses to carry certain types of insurance, at specified minimum amounts, in order to conduct business within the state. In addition, when hospitality firms lease space in buildings, the lease agreement may also require them to carry minimum amounts of insurance.

While the specific types and amounts of insurance needed for any given hospitality operation will vary, the following types of insurance coverage are common.

Property-Casualty

Just as its name indicates, property-casualty insurance is purchased to protect against the loss of property. These losses include damages incurred due to fire, flood, or storms. Some insurance companies will classify threats to property in different ways, but in all cases, property-casualty insurance protects property and its contents. The determination of which risks to insure against must be made on the basis of each hospitality operation's special circumstances.

Consider the case of Ralph Escobar. Ralph operates a seafood restaurant that is housed on a ship that is permanently docked on one of the Great Lakes. Ralph, unlike many other restaurateurs, must insure his operation against a variety of water-related events that could destroy his business. These include accidentally being hit by another boat, high- or low-water damage, and seasonal storms that could damage his floating restaurant. Ralph must select casualty insurance that will cover these incidents and reimburse him for the cost of repairs and any potential loss of business.

Property-casualty insurance, in its many forms, is the most common type of business insurance purchased. It may be purchased in policies covering losses as small as a few hundred dollars or as large as many millions of dollars.

Liability

General liability insurance is selected when you wish to protect against injuries to other people resulting from the operation of your own hospitality facility. For example, Diane Sulayman operates a French fine-dining establishment that serves a variety of items including flamed desserts. One evening, her server accidentally sloshes flaming alcohol out of a flambé pan and it splashes onto the suit of a diner. The diner is not injured seriously, but suffers some minor burns, and is quite upset. Should the diner elect to bring a lawsuit against Diane, her general liability insurance would help cover the expenses and potential damages that might be awarded in such a lawsuit.

There are a variety of liability insurance types on the market today. The following are some of the most popular.

- Property damage liability coverage is selected when you wish to protect against claims resulting from damage to the property of others.
- Personal injury liability coverage provides you with protection for such offenses as false arrest, libel, slander, invasion of privacy, and food poisoning.
- Advertising injury liability coverage helps cover your legal liability for offenses arising out of the advertising of your business's goods and services.

Insurance companies have the right and obligation to defend any lawsuit against their insured customers that seeks damages for bodily injury or property damage, even if the allegations in the suit are groundless, false, or fraudulent. The insurance company can also enter into any settlement agreement it deems expedient. It is important to remember, however, that the company is not obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been reached or that falls outside the coverage of the policy.

Consider the case of Roger Kuhlman. Roger owns and operates a hotel in which a guest accidentally discharges a pistol in one of the guestrooms. The shot passes through the wall of the room and injures a guest in the next room. The injured guest sues both Roger and the guest responsible for the accidental shooting. Roger's insurance company defends his hotel in the lawsuit. In the resulting jury trial, Roger's hotel is deemed to be partially responsible for the accident and is ordered to pay the victim $3 million. The hotel's insurance policy provides only $1 million of coverage. In this case, Roger's hotel is responsible for paying the remaining $2 million.

With the increasing monetary value of awards resulting from litigation today, wise hospitality managers are attempting to confirm they have sufficient liability coverage. This is not an easy task. You must weigh the cost of coverage (the premium payments) versus the risk (possible damages), and assess your ability to absorb or pass on these insurance costs to your customers.

Employee Liability

An employee liability policy is selected when, as an owner or manager, you wish to supplement your general liability coverage with additional coverage for any harmful acts your employees may commit in the course of their employment. Some areas of coverage to be considered include those related to:

Wrongful termination
Workplace harassment

Sexual harassment
Breach of employment contract
Discrimination
Failure to employ or promote
Deprivation of a career opportunity
Negligent evaluation
Employment-related misrepresentation
Defamation
Theft

Dram Shop

Liquor liability, or dram shop, insurance provides establishments that sell alcohol coverage for bodily injury or property damage that may result from any or all of the following acts:

- Causing or contributing to the intoxication of a person.
- Serving alcoholic beverages to a person under the legal drinking age.
- Serving alcohol to an intoxicated person.
- Violating any statute, ordinance, or regulation relating to the sale, gift, distribution, or use of alcoholic beverages.

Serving alcoholic beverages in today's society makes a hospitality manager subject to great risk. Dram shop insurance is truly a necessity in today's legal environment, and states may require it as a condition for granting a liquor license.

Health/Dental/Vision

One of a hospitality manager's greatest costs, and one that continues to rise dramatically, is that of employee medical insurance. While medical coverage such as health, dental, and vision insurance is not a requirement, the degree to which it is offered can have a significant effect on a manager's ability to retain and maintain a quality workforce.

Like all types of insurance, the variety of coverage available in medical insurance is tremendous. In addition, this is one area of insurance where the cost is generally split, in some manner, between the employer and the employee. Employers can choose from contributing 100 percent of medical insurance premiums for their employees to simply making such coverage available to employees on a voluntary basis. Employees often depend on such coverage for their families, and can maintain that insurance even if they lose their jobs.

The Consolidated Omnibus Budget Reconciliation Act (COBRA), passed by the federal government in 1986, requires employers to continue providing health, dental, and optical coverage benefits to employees who have resigned or been terminated, and to family members of employees who have lost their health insurance due to death, divorce, or dropping out of school. COBRA participants may continue their benefits for up to 18 months following the loss of their insurance, although they are responsible for paying the entire cost of their premiums.

Workers' Compensation

The Workmen's Compensation Act of 1908 was the first effort to provide injury-related insurance to those workers who were hurt while on the job. This law, passed by Congress, and covering federal employees, spurred the states to enact similar legislation covering workers in their states. Today, all states require public and private sector employers to provide some form of mandatory workers' compensation insurance.

Workers' compensation policies provide payments to workers or their families in the event of an employee's injury or death. Coverage normally includes medical expenses and a significant portion of the wages lost by the employee being unable to work due to the injury. In more serious cases, lump-sum payments can be made to those workers who have been partially or permanently disabled. In addition, if a worker is killed while on the job, payments may be made to the worker's family. The injury must have happened in the "**course and scope**" of employment. The courts have broadly defined course and scope to sometimes include commuting to and from the place of employment, during mealtimes, or on or off the work site.

▶ **LEGALESE**

Course and scope: The sum total of all common, job-related employee activities dictated or allowed by the employer.

Injured employees are generally prohibited from suing their employer for damages beyond those awarded by workers' compensation. Only in the case of gross negligence or an intentional act will an employer potentially be subject to paying greater damages than those normally imposed by workers' compensation.

It is important to know that some states will designate specific doctors who will examine those employees who appear to have been injured. This is an effort on the part of the state to hold down premium costs and reduce incidents of fraud. It is also important to remember that employers cannot claim the negligence of the worker as a defense for a work-related injury. Usually, only in cases where the worker has been proven to be under the influence of drugs or alcohol at the time of the injury, or if the injury was fraudulent, will an employer be able to mount a legally valid defense against a workers' compensation claim.

In cases where another employee or third party has caused a worker injury, or when the employer challenges the legality of a worker's claim for compensation, a hearing is held before the state workers' compensation board. A judge will determine whether or not the claim has merit, and how much compensation the worker is entitled to receive, if any. Both parties have the right to appeal the judge's decision, if they choose.

Because some form of workers' compensation is mandatory in every state, the failure on the part of management to provide it is punishable by fines and/or imprisonment. Employers are also required by law to accurately report on-the-job accidents to the state agency overseeing the workers' compensation program. This information is significant, as the cost of providing workers' compensation insurance varies based on the safety history of the employer and the potential risk of injury to employees working for a specific employer. For example, a restaurant manager who does not encourage the immediate clean-up of spills in the kitchen, and thus experiences greater-than-average employee injuries due to slips and falls, will pay a higher premium than an employer in an identical situation whose internal policies help prevent such accidents. Many state workers' compensation boards use experience ratings, which categorize businesses by the number of injury claims that are paid out, to determine the amount of insurance premiums that will be assessed.

Depending on the state in which they are operating, an employer may provide workers' compensation insurance through a private insurance company, a state agency, or itself. If the state allows a self-insurance option, the security deposit required can be substantial since, under the self-insurance option, an employer might be solely responsible for the payment of large awards in the case of a serious accident.

ANALYZE THE SITUATION 6.2

Christina Fleischer was 16 years old when she was hired to work as a busser for a private country club. On Sunday mornings, the club operated a popular brunch that served 500 to 1,000 people between the hours of 9:00 A.M. and 3:00 P.M. On Christina's first day of work, her supervisor quickly detailed the job requirements. As part of her job, Christina was to remove the guests' used dishes from the table, take the dishes to a bussing station, and scrape any

leftover food from the dishes into a garbage receptacle lined with a plastic trash bag. Periodically, she was to bring the dishes to the kitchen to be washed and take the garbage receptacle to a designated area, where she would then remove the plastic trash bag and replace it with an empty one. The filled bags were left in the designated area until they could be taken out to a dumpster by a member of the dishroom staff. The garbage receptacles would often get very heavy, and all bussers were instructed to replace the plastic bags in them when they were half-full. Christina's supervisor made it a point of mentioning that during their 15-minute training session.

The club was very busy with Sunday morning brunch patrons on Christina's first day of work. Halfway through her shift, Christina forgot to replace one of the garbage bags until it was nearly full. She placed the garbage bag with the others in the designated location. Later that afternoon, a dishroom attendant, while taking out the 20 plastic garbage bags filled from the brunch, attempted to lift the bag that Christina had accidentally overfilled. The dishroom attendant seriously injured his back.

The injury was deemed within the scope of his work, so the dishroom attendant was awarded a monetary settlement by the workers' compensation board in his state. However, he then threatened to sue the country club, claiming negligence in Christina's training, and stated that this negligence was the direct cause of his accident. He also stated that management had provided workers with garbage receptacles that were too large and thus directly contributed to the accident.

1. Was management negligent?
2. Does the dishroom attendant have a viable claim against the club?
3. Do you feel the workers' compensation premiums for the club should be increased because of this incident?
4. What steps might the country club take to avoid paying higher premiums?

6.3 SELECTING AN INSURANCE CARRIER

Most insurance companies sell their products through agents, rather than directly to the public. Some companies use agents that represent them exclusively, while others use independent agents. These independent agents may represent several insurance companies, and can be a real asset in selecting the best policy at the best price. The premium rate, however, is set by the insurance company, and generally it cannot be changed by the agent.

An insurance agent does not provide insurance. The agent merely represents the insurance company that **underwrites** the actual insurance policy. When you buy an insurance policy, it is critical that you purchase it from a credible insurance company, and not just from an agent who is an effective salesperson.

▶ **LEGALESE**

Underwrite: To assume agreed-upon maximum levels of liability in the event of a loss or damages.

If an insurance company is to protect against risk, it must have the financial capability to pay any and all claims you are held responsible for during the coverage period. The last thing you want is to buy an insurance policy, then relax, believing you have coverage, only to find out after a claim has been filed that your insurance company does not have the assets to pay the claim. It is important to remember that if your insurance company will not, or cannot, pay a claim, you will be held responsible for payment.

Insurance companies are rated based on their financial capability to pay claims. According to analysts, the stronger the rating, the more financially solvent the company is projected to be. Rating categories vary based on the organization doing the rating, but generally use either an A+, A, A−, B+, and so on, system, or an AAA, AA, A, BBB, and so on, system. Today, it would be difficult to justify purchasing an insurance policy from an underwriter with a rating of less than A− or AA. It is best to buy from those companies that have achieved a rating of A+ or AAA.

Ratings can be verified by contacting the rating companies directly. A.M. Best and Standard & Poor's are two such companies. Alternatively, you can contact your state's insurance regulatory department. It can also provide you with a list

of complaints filed against the insurance companies for failure to pay claims in a timely fashion or to act in good faith. This is information you need to know before you buy your policy.

◀ SEARCH THE WEB 6.1 ▶

Log on to **www.insure.com**.

1. Select: Insurance Company Guide.
2. Select: What the Ratings Mean.
3. Read the definitions of AAA through B insurance ratings.
4. Select: Go to Insurance Company Guide.
5. Follow the path required to find the rating of your own automobile or life insurance company.
6. What is your insurance company's rating?
7. How does it rank among the insurance companies in your state?

6.4 SELECTING THE INSURANCE POLICY

Once you have found two or three companies that you feel are financially sound, the next step is to get quotes, or bids, to provide coverage from each of the companies.

Consider the case of Vasal Bakar. Mr. Bakar is seeking to add a dental plan to his employees' health coverage. He selects three companies, all of which are rated AA, and proceeds to request a bid from each. When he asks for dental insurance bids to cover his 240 employees, he gets the following response:

Dental Insurance Quote for Vasal Bakar

Insurance Company	*Coverage Cost per Employee*
One	$45.00/month
Two	$43.25/month
Three	$17.80/month

While at first glance it might appear that Company Three is offering the best policy price, it will be important to determine whether the level of dental coverage is the same under the terms of all three policies. When Mr. Bakal investigated further, he found that in the proposals of the first two companies, annual per-employee maximum benefits were $3,000, while in the case of Company Three, the per-employee annual maximum was only $1,000. Under these circumstances, the price for each $1,000 of employee dental insurance provided was actually highest from Company Three. The decision of whether to pay for the higher amounts of coverage, and whether the employees would be asked to contribute partial payments, is of course, left to Mr. Bakal.

To understand how much insurance you are actually purchasing for your premium dollar, and to realize how much total insurance you have for the period of time covered by the policy, it is critical that you understand the terms used in marketing insurance products.

Tina Shulky, the owner of a bagel franchise, is seeking liability coverage for her business. She selects some potential insurance providers, based on their financial ratings, then requests quotes on a **primary policy** with a **per-occurrence** amount of $500,000, an **aggregate** of $1 million, and an additional **umbrella** policy of $1 million.

If the policy that Ms. Shulky ultimately selects states that she has $500,000 of coverage per occurrence, it means that for each and every incident that occurs for which Ms. Shulky could be held liable, her insurance company will pay up

▶ LEGALESE
Primary policy: The main insurance policy that provides basic coverages and the amount of insurance provided by the policy.

▶ LEGALESE
Per occurrence: The maximum amount that can or will be paid by an insurer in the event of a single claim.

▶ LEGALESE
Aggregate: The maximum amount that can or will be paid by an insurer for all claims during a policy period.

▶ LEGALESE
Umbrella: Insurance coverage purchased to supplement primary coverage. Sometimes referred to as excess insurance.

to $500,000 on her behalf, less any **deductible**. If the judgment exceeds that amount, she would be responsible for anything over and above $500,000.

If her insurance policy has the term "aggregate" after the amount, it means that this is the total amount her insurance company will pay for all incidents and damages incurred during the coverage period. Thus, if she had a $500,000 per-occurrence policy and $1 million aggregate, two claims of $500,000 would wipe out her total insurance coverage (as would four claims of $250,000).

It's also important to understand how a deductible affects your total insurance costs. The deductible is an amount of money you are responsible for paying on a claim before your insurance company will begin paying for it. If you choose a high deductible, your premium payments will be lower, because you are assuming more risk by agreeing to pay a higher share of any claim filed against you. Managers must learn to factor the cost of the deductible into their insurance buying decision, and balance the needs of having a set amount of coverage that will be paid out by their insurance company with the amount of premium payments they are willing to make.

Basic coverage is referred to as primary coverage. In addition, you can also purchase an umbrella, or what is commonly referred to as excess coverage. Be aware that umbrella coverage ordinarily pays only when and if your primary per-occurrence coverage is completely exhausted from a single claim.

To illustrate this point, assume the following scenario: You have a $500,000 per-occurrence policy with $500,000 aggregate, plus you have $1 million in umbrella, or excess coverage. The policy period runs from January 1, 2005, to December 31, 2005. An accident occurs on January 20, 2005, and the claim is settled for $750,000. The primary coverage will pay the first $500,000, less any deductible you might have. Your umbrella policy will pay the remaining $250,000. However, if you have a subsequent claim from an incident that occurs on February 15, 2005, how much coverage do you have available to pay this claim? The answer is zero. You have depleted your coverage under your primary policy because it has a $500,000 aggregate. Your umbrella policy is not available, because it pays only if you have exhausted your primary per-occurrence amount on a given claim. If you do not have any primary per-occurrence coverage left, the conditions for coverage of your umbrella policy cannot be met, unless you are able to pay out of your pocket the first $500,000. If you find yourself in this situation, you need to buy additional primary coverage.

▶ **LEGALESE**

Deductible: The amount of money the insured has to pay before the insurance coverage will begin to pay. Accordingly, the higher the deductible, the less risk to the insurance company which should equal lower premiums.

6.5 POLICY ANALYSIS

Analyzing an insurance policy consists of determining both what is and what is not covered. You are responsible for knowing and understanding the types and amounts of coverage that are written into your insurance policy. And be aware that when you purchase insurance, you ordinarily do not immediately receive a copy of the actual policy, because it takes some time for the insurance company to put the formal policy together with your unique coverages and exclusions. Instead, you receive a one-page **face sheet**, which generally sets out the types and amounts of coverage; it does not contain detailed information on what is specifically included and excluded from the policy's coverage. The actual policy will contain this information, but usually, you will not receive it until 30 to 60 days from the date of purchase. In other words, the face sheet contains the large print, or overview, while the actual policy contains the fine print, and you won't get the latter until after you buy.

▶ **LEGALESE**

Face sheet: A one-page document briefly describing the type and amount of insurance coverage contained in an insurance policy. Sometimes referred to as a declaration page.

Figure 6.1 shows a segment of language taken from an actual insurance policy. It is important to remember that, despite the difficulty of reading documents such as this, the courts will hold an insured party responsible for reading and

B. Limits of Liability

Regardless of the number of persons or entities insured or included in Part I.D. Covered Persons or Entities, or the number of claimants or Claims made:

1. The maximum liability of the Company for **Damages and Claim Expenses** resulting from each **Claim** first made against the Insured during the **Policy Period** and the Extended reporting Period, if purchased, shall not exceed the amount shown in the Declarations as each Claim;

2. The maximum liability of the Company for all **Damages and Claim Expenses** as a result of all **Claims** first made against the Insured during the **Policy Period** and the Extended Reporting Period, if purchased, shall not exceed the amount shown in the Declarations as Aggregate.

The Company shall not be obligated to pay any **Claim** for **Damages** or defend any **Claim** after the applicable Limit of Liability has been exhausted by payment of judgments, settlements, **Claim Expenses** or any combination thereof. **Claim Expenses** are a part of and not in addition to the applicable Limits of Liability. Payment of **Claim Expenses** by the Company reduces the applicable Limits of Liability.

The inclusion of more than one Insured, or the making of **Claims** by more than one person or organization, does not increase the company's Limit of Liability. In the event two or more **Claims** arise out of a single negligent act, error or omission, or a series of related negligent acts, errors or omissions, all such **Claims** shall be treated as a single **Claim**. Whenever made, all such **Claims** shall be considered first made and reported to the Company during the **Policy Period** in which the earliest **Claim** arising out of such negligent act, error or omission was first made and reported to the Company, and all such **Claims** shall be subject to the same Limit of Liability.

Figure 6.1 Insurance policy language.

understanding his or her policy. If you are at all unclear about what your final insurance policy will and will not cover, have your attorney review a sample policy, which can be provided by the insurance company.

Because you will not receive the actual insurance policy until after you purchase the policy, it is imperative that you discuss any unclear issues with the insurance agent before you buy. Ask for written answers to your questions, and continue to request information until you are satisfied with your comprehension of the details. Once the policy arrives, read it and make sure you fully understand:

- The policy's language, and whether it is consistent with your agent's earlier explanations.
- The policy's coverage, **exclusions**, **exceptions**, and clarifying language.

▶ **LEGALESE**
Exclusions: Liability claims that are not covered in an insurance policy.

▶ **LEGALESE**
Exceptions: Insurance coverage that is normally included in the insurance policy, but that will be excluded if the insured fails to comply with performance terms specifically mentioned in the policy.

Most insurance policies will have both exclusions and exceptions. The insurer will almost always retain the right to exclude certain types of liability claims. If, for instance, a restaurateur has purchased fire insurance, but proceeds to intentionally set fire to his or her own restaurant, the insurance company would exclude, or refuse to cover, the cost of replacing the restaurant. Common exclusions include those involving intentional acts and fraud by the insured.

Exceptions are also common in insurance policies, and it is best to be well aware of all that apply. An exception is a statement by the insurer that it will not pay for an otherwise legitimate claim if certain conditions have not been met. For example, the insurance company may require a restaurant to have a valid license to serve food, in order to protect that restaurant in the event a guest claims damages resulting from food poisoning. Likewise, a fire insurance policy may require that an operator purchase and install specific types of fire suppres-

sion equipment, and that the equipment be inspected and approved on a regular basis by a qualified inspector.

In most cases, your insurer will require you to notify the company immediately if a claim is made by you, or if you believe something has occurred that might lead to litigation. In addition, if an attorney serves you with notification of intent to sue you, you must contact your insurance carrier. Some insurance policies are "claims made" policies. This term means that the coverage is available only if an actual claim is brought to the attention of the insurance company during the policy period. Most insurance policies, however, cover claims that occur during the policy period, even though they are not brought to the attention of the insurance company until after the coverage period has elapsed. Obviously, this type of policy is preferable to the "claims made" policy.

In spite of the problems and expense involved, insurance is not an option; it is a protection needed to operate your businesses with a sense of comfort and peace. You can avoid unpleasant surprises by taking the proper care when selecting insurance. This includes speaking and listening to your colleagues and asking those questions that will make it easier for you to purchase the right coverage in the right amount from the right insurance company.

Most policies are issued for a one-year period. Generally, new policies are issued annually, assuming there is mutual satisfaction with the coverage, claim responsiveness by the carrier, and an agreement as to the premium (or cost) paid for the amount of insurance.

In Chapter 9, "Your Responsibilities as a Hospitality Operator," we will examine how you can take steps to reduce insurance costs through the effective management and training of staff. Prevention of insurance claims, like the prevention of all legal claims, should be the goal of every hospitality manager.

WHAT WOULD YOU DO?

Assume you are an insurance agent with the Arizona Business Insurance Company (ABIC). You sell ABIC products exclusively. Your company, which is rated AA, offers insurance coverage against a variety of risks, including workers' compensation, and specializes in the hospitality industry.

You are approached by Ted Betz, the operational vice president of J-Town Smokies, a chain of pit barbeque restaurants. Mr. Betz would like to purchase workers' compensation insurance from your company because he will be opening five stores in the Southwest in the coming year. A review of his application and claim history indicates that J-Town Smokies has experienced a rather large number of worker injuries in its four years of existence. In fact, the rate of worker injury per man-hour worked is nearly two times that of the restaurant industry average. Further investigation indicates that most of these injuries resulted from cutting meat prior to or after the barbeque process.

A review of the U. S. Department of Labor statistics reveals the following highest injury rate industries for this year and last.

	Employees (in thousands)	***Accident Rate per Thousand This Year***	***Last Year***
Meat-packing plants	147.2	36.6	30.3
Ship-building and repairing	102.5	32.7	27.4
Steel foundries	26.6	26.4	26.4
Mobile homes	68.0	24.3	26.2
Automotive stamping	117.7	23.8	23.2
Restaurants	250.0	16.1	16.6

1. What type of information would you want to see from Mr. Betz before you offer to sell him a workers' compensation policy from your company?
2. Do you believe Mr. Betz's restaurants should pay the same amount for workers' compensation coverage as other restaurants, or should he be charged rates consistent with those in the meat-packing industry?

▶ INTERNATIONAL SNAPSHOT

Hotels Operating Internationally Need to Think Globally about Their Insurance Programs

Due to a number of factors, international insurance issues typically lag behind the U.S. insurance market by several years. These factors include:

- Less litigious claims environment
- Lower claims counts
- Absence of punitive damages
- Social environment, as respects claims

Because of this, international insurance pricing has remained lower than that in the U.S. insurance market. Quite often, this has led multinational hotel chains to place more emphasis on claims and risk control in the United States. Most hotels, especially those chains with large properties, are fairly adept at the basics of risk management that will allow them to control claims costs, minimize litigation potential, and maximize safety and risk mitigation. Too often, these concepts are not pushed out to the overseas locations on a consistent basis due to cost or internal operational hurdles.

Meanwhile, as the hotel industry was focused on the tight insurance market in the United States, the international insurance market and global legal climate changed in ways that are critical to the way a hotel operates. Over the past five years, the international insurance industry has started to drive the development of more sophisticated risk management programs throughout the world through market selection and pricing. The increasingly tight and limited international insurance capacity for both property and casualty lines is going to force multinational hotel chains to take more risk and to manage that risk in more countries.

WHY IS THIS HAPPENING?

A number of changes within the global insurance market and global legal climate are forcing underwriters and hotels alike to reexamine international insurance:

- *Market capacity:* Because hotels have traditionally been loss leaders in the insurance marketplace, there have always been a fairly small number of insurance carriers that are willing to look at a hospitality risk. Additionally, in the past five years, numerous insurance companies that have done multinational programs have left the market—Kemper, Royal US, and others. More international carriers have moved away from doing hospitality risks at all. This puts fewer markets in play for a hotel risk and forces pricing and selectivity up.
- *Legal changes:* The world legal climate still remains well behind the litigious environment in the United States. However, there have been significant increases in "claims awareness" in a number of countries. While the systems are not as developed, they are nevertheless making large strides and increasing claims for the hospitality industry. There is also a growth of global case law—that is, legal decisions in countries such as Australia have cited California case law.
- *Claims counts:* Around the world, we are seeing sharp increases in the claims counts being recorded on hospitality business. Since underwriting pricing is traditionally much lower on international accounts, as compared to U.S. accounts, this increase will put an immediate strain on insurer profitability and insured's costs.

- *Social change:* More and more, we are becoming a global economy. People travel the world and expect the legal system to keep up with them—not the other way around. Legislation such as the European Union's Tour Operators Liability is globally focused. Hotels need to protect every location they have in every country of the world, not just those where the claims occur.

WHAT SHOULD BE DONE?

Hospitality companies need to start managing the risk worldwide more aggressively than ever before. The basics of risk management need to be adhered to by all locations. Additional strategies would include:

- *Claims and litigation management:* Hotel chains should settle claims worldwide in the same manner, whether they are self-insured or not. A claim settled in Germany should be settled in the same manner as a claim in California. This will allow a hotel to create precedent in a lawsuit situation, not be surprised by it.
- *Program management:* Many international programs stand alone from a domestic program and may or may not require participation from all locations. This should be managed very closely: as carriers fail or exit the hospitality business, it will be much harder to be reactive to a program change than be proactive to it.
- *Brand-name protection:* All locations bearing the company name should be required to carry the same levels of insurance or carry a documented exception. All franchises should be required to carry U.S. suits no matter where they are in the world. Since that is not available in most countries, they should be required to purchase this as part of a program that the parent company sponsors. As lawsuits go global, companies need to ensure that the brand is protected in any court in the world.
- *Information management:* The key to underwriting and managing insurance risk is information flow. Standardize the forms for information on property and liability risks. Enforce the forms and collect them annually. While this is an administrative burden, it is critical to managing the insurances.

Insurance programs should help a hotel manage their risk. Historically, most international hotels have used insurance as a reason *not* to manage their risk, since it did not cost them to have claims. As the changes evolve, a hotel chain must be a step ahead of its carrier to allow it to control its own insurance destiny.

Provided by Elizabeth Francy Demaret, Managing Director, Worldwide Risk Services Group, Arthur J. Gallagher & Co. in Itasca, IL. **www.ajg.com**.

▶ THE HOSPITALITY INDUSTRY IN COURT

To review a case that involves the distinction between furniture and permanent fixtures, as discussed in Chapter 4, "Legally Managing Property," and to learn how insurance policies are closely analyzed by the courts when there is a dispute, consider the case of *Prytania Park Hotel v. General Star Indem., 179 F.3d 169 (5th Cir. 1999).*

FACTUAL SUMMARY

The Prytania Park Hotel (Prytania) in New Orleans, Louisiana, was heavily damaged by a fire in one of the hotel buildings. The guestrooms in the hotel contained custom-made furniture, which was attached by screws and bolts to the walls of the rooms. A significant amount of the furniture was destroyed by the fire. The owners of the Prytania submitted a claim to General Star Indemnity Company (General Star), the insurer of the hotel.

The insurance policy for the Prytania covered loss or damage to the building, loss or damage to business personal property, and loss of business income resulting from business interruption. The provision in the policy for loss or damage to the building included permanently installed fixtures, machinery, and equipment. Prytania was entitled to the full replacement value of permanently installed items under the terms of the policy.

The business personal property provision in the policy included furniture and fixtures, and limited the amount of a claim to the actual cash value of items lost or destroyed. The owners of the Prytania submitted a building claim to General Star for $276,687.96. This amount included the damaged hotel building and all the hotel furniture at full replacement value. A contents claim was also submitted in the amount of $85,888.10, covering business personal property, but not the hotel furniture. Prytania also submitted a claim $75,000.00 for loss of income.

General Star adjusted the claims and paid $186,448.47 on the building claim, which did not include compensation for furniture; $68,273.93 on the contents claim; and $34, 988.00 for loss of business income. The owners of the Prytania sued General Star to recover the unpaid portions of the claims.

QUESTION FOR THE COURT

The question for the court concerned the definition of permanently installed fixtures under the building provision and furniture and fixtures under the business personal property provision. Prytania argued the hotel furniture was permanently installed fixtures since removal from the walls would cause considerable damage to the furniture and walls. Prytania also argued the room furnishings were permanently installed fixtures based on the dictionary definition of each word. Since the owners intended the furniture to stay in one place and it had been secured to the wall, they argued it was permanently installed.

General Star argued the hotel furniture was clearly covered under the business personal property provision since the word "furniture" was used there and not in the building provision. Additionally General Star offered evidence showing removal of the furniture would cause no damage to either the furniture or the room.

DECISION

The court held the guestroom furniture was not permanently installed fixtures under the building provision of the policy. The furniture was covered under the business personal property provision since furniture was explicitly listed under the category. The court also found the furniture was not permanently attached since removal was possible without damage to the room walls or furniture.

MESSAGE TO MANAGEMENT

In insurance policies, leases, and other legal documents, it pays to clearly describe personal property, fixtures, and real property.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

Insurance is a valuable tool to help protect a business and its owners from financial loss. There are many different types of insurance coverage, including property/casualty, liability, health/life, and that for injuries to workers. Not all insurance companies are the same, so an owner/operator should research a company's reputation, claims-paying record, and financial strength prior to purchasing the needed coverage for the business. A thorough understanding of the terms used in the insurance industry—such as primary, umbrella, exclusions, and exceptions—is crucial for an owner/operator to make informed decisions about coverage and pricing.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Describe the importance of mathematics and statistics to the insurance industry.
2. Identify at least five types of insurance that would be needed by a nightclub or bar owner, and discuss the importance of each.
3. Assess the pros and cons of self-insurance in the area of workers' compensation.
4. Use the Internet to find a company that will likely provide liability coverage for your new hotel. Assume the hotel is to be built in Berlin, Germany, and that your company requires a minimum of an AA Standard & Poor's financial-strength rating.
5. Assess the legal climate today, then determine the amount of umbrella coverage your hospitality company would need to defend itself against a wrongful death suit brought about by Dram Shop legislation. Assume you have $1 million in primary coverage. Be prepared to discuss the factors that influenced your decision.
6. Describe the function and limitations of a face sheet, or declaration page.
7. Develop a checklist for purchasing insurance, beginning with the recognition of the need for insurance to the evaluation of the face sheet and actual policy.
8. Describe, in detail, an example of both an exclusion and an exception that might be in effect with a workers' compensation policy at a hospitality operation where you have worked.

▶ TEAM ACTIVITY

In teams, identify and evaluate Internet sites that would enable a prospective purchaser of insurance to discover information about various types of insurance coverage, the financial status of the companies offering the coverage, and the cost for the coverage. Present to the class the top three sites, and describe why your team selected them (e.g., scope and depth of information, ease of navigation, etc.).

Chapter 7

Legally Selecting Employees

"Okay Laura," said Trisha Sangus brightly. "Where are we on the hiring of the new sales manager?"

Laura O'Leary, the director of sales and marketing at Trisha's hotel, was very pleased. Three weeks ago, she had successfully presented the hotel's owners with a proposal to expand the nine-member sales staff to ten, and the owners had accepted her recommendation. Now, Laura was heading the search for just the right candidate.

It was important to Trisha that the selection of a candidate for the new sales position go smoothly, and with some speed, because she wanted to demonstrate to the owners that their decision had been a good one. Trisha had discussed the new position with Laura at great length. The city was becoming a popular destination for several association meetings and annual conventions. While the hotel had ample meeting and banquet facilities, this new market had gone virtually untapped. Trisha was convinced that the right person and the right strategy could make a huge difference in the number of rooms and meetings booked. The result on the hotel's bottom line could be significant as well.

"I know you have held some interviews," said Trisha. "I'd like to review the resumes of your three finalists." Laura gave Trisha the file containing the resumes.

"We have three candidates who meet the criteria we established," Laura explained. "Each is very different from the other, and each has strengths and weaknesses. On the whole, I'm very pleased with our choices."

Trisha rapidly scanned the resumes, along with the notes that Laura had taken during the candidates' interviews. She, Laura, and Michael Pinnard, the new human resources director, had come up with several important interview questions for this particular search.

Strengths	*Limitations*
Candidate One: Beverly	
Four-year degree in HRI from State University	First position in sales
Candidate Two: Pat	
Five years' hotel sales	Outside responsibilities experience
	Professional appearance
Candidate Three: Leon	
Two-year associate's degree	Limited computer skills
Two years' hotel sales experience	

"I haven't ranked the candidates in order of preference, but I would like you to see candidates number one and three," said Laura. "I think either one could do a great job."

"I'm curious about your comments on candidate two," said Trisha. "I understand the strength, but help me be clear on the weaknesses. Let's start with the 'outside responsibilities.'"

"Well," Laura began, "it has to do with children." She paused. "I know what you are thinking," said Laura, as she watched Trisha arch an eyebrow in response to her comment. "We certainly didn't ask Pat if she was married or had children. But when we asked her about the ability to work past five o'clock, she replied that she had four children at home, ranging from 8 to 14 years old, and that, given advanced notice, arranging for child care was certainly possible."

Laura looked earnestly at Trisha Sangus, then continued, "You know Trisha," said Laura, "we don't always know when our staff will have to work late. Site tours can pop up anytime. And client dinners can drag on and on. I told the candidate that sometimes we knew ahead of time and sometimes we did not. I was just being honest."

Trisha was well aware of the hours involved in hotel sales. She had spent four years as a director of sales and marketing. She adjusted the rim of her glasses, and carefully reviewed Pat's resume. "Laura," she began, "now help me understand the professional appearance comment."

"Well," Laura said, "you know how you stress that we should be professional-looking at all times?"

Trisha smiled slightly. She knew that she was perceived in the hotel as a stickler for detail. Staff uniforms were required to be pressed and clean, and nametags had to be fastened straight, and Trisha's reaction in the staff meeting when a junior manager proposed "casual Friday" for the hotel's administrative staff was still talked about. In short, Trisha expected management personnel to look sharp at all times.

"Well," Laura continued, " this candidate wore no makeup at all—no nail polish, no lipstick, not even a little blush! I think our customers expect a higher level of sophistication than that."

Trisha looked at Laura. There was no doubt that well-groomed Laura did in fact present the appearance Trisha had come to associate with a professional salesperson.

At times like this, Trisha thought, it was nice to have a human resources director in the hotel who was both knowledgeable and a good communicator, so she called him. "Michael," she said, as the human resources director picked up the telephone, "can you step in here for a minute? And bring your calendar. I think Laura will want to schedule some information sessions for her and her staff. And I want to schedule three interviews."

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. To utilize job descriptions, qualifications, and other tools for legally selecting employees.
2. To avoid charges of discrimination by knowing the classes of workers that are protected under the law.
3. To understand the procedure for verifying the work eligibility of potential employees before offering them employment.
4. To distinguish the rights of both employers and employees under the At-Will Employment doctrine.
5. To understand the concept of collective bargaining and the legal obligations when interacting with labor unions.

7.1 EMPLOYEE SELECTION

Legally selecting and managing a staff can be a very challenging task in today's complex world of laws and regulations. Some managers, especially those with many years of experience, believe that finding, maintaining, and retaining a qualified, service-oriented staff is every manager's most difficult task. It is true that the challenges of managing people are generally greater than those involved in managing technologies or products. People are complex and are affected by so many nonwork-related issues that you will find it both difficult and rewarding to be a leader to your staff.

The law is very specific regarding what you, as an employer, can and cannot do as you secure your workforce. Both you and your workers have rights that affect the employment relationship. In the next two chapters, we'll look at how to select and manage employees in accordance with the law.

As an employer, you will have wide latitude in selecting those individuals whom you feel would best benefit your business. However, it is critical that you develop an employee selection procedure that ensures fairness and compliance with the law (to avoid the risk of a discrimination lawsuit), while also allowing you to hire the best possible candidate for the job.

One tool that managers use to make good hiring decisions is the **job description**, which they then use as a basis for establishing a list of **job qualifications** that each candidate should possess.

▶ LEGALESE

Job description: A written, itemized listing of a specific job's basic responsibilities and reporting relationships.

▶ LEGALESE

Job qualifications: The knowledge or skill(s) required to perform the responsibilities and tasks listed in a job description.

Job Descriptions

Before an employee can be selected to fill a vacant position, management must have a thorough understanding of the essential functions that the employee will need to perform. These are contained in the job description. Legally, only those tasks that are necessary to effectively carry out the responsibilities and perform the tasks required in the job should be used in the description.

Job descriptions need not be long. In most cases, a single typewritten page or two will be sufficient to detail the information that makes up the body of a job description. Figure 7.1 is a sample of a job description used in the hospitality industry. The description includes the job title, reporting relationship, tasks, and competencies required for the job.

The job description serves a dual role. It is important from an operational perspective in that it helps supervisors and the human resources department keep track of the changing responsibilities of workers. However, it is also important from a legal perspective in that it may need to be produced in court to demonstrate that an employer fairly established the requirements of a job prior to selecting the candidates to fill those jobs.

Position Title: Executive Chef

Reports To: Food and Beverage Director

Position Summary: The department head responsible for any and all kitchens in a foodservice establishment. Ensures that all kitchens provide nutritious, safe, eye-appealing, properly flavored food. Maintains a safe and sanitary preparation environment.

Tasks:

1. Interviews, hires, evaluates, rewards, and disciplines kitchen personnel as appropriate.
2. Orients and trains kitchen personnel in property and department rules, policies, and procedures.
3. Trains kitchen personnel in food production principles and practices. Establishes quality standards for all menu items and for food production practices.
4. Plans and prices menus. Establishes portion sizes and standards of service for all menu items.
5. Schedules kitchen employees in conjunction with business forecasts and predetermined budget. Maintains payroll records for submission to payroll department.
6. Controls food costs by establishing purchasing specifications, storeroom requisition systems, product storage requirements, standardization recipes, and waste control procedures.
7. Trains kitchen personnel in safe operating procedures of all equipment, utensils, and machinery. Establishes maintenance schedules in conjunction with manufacturer instructions for all equipment. Provides safety training in lifting, carrying, hazardous material control, chemical control, first aid, and CPR.
8. Trains kitchen personnel in sanitation practices and establishes cleaning schedules, stock rotation schedules, refrigeration temperature control points, and other sanitary controls.
9. Trains kitchen personnel to prepare all food while retaining the maximum amount of desirable nutrients. Trains kitchen personnel to meet special dietary requests, including low-fat, low-sodium, low-calorie, and vegetarian meals.

Source: Anonymous

Figure 7.1 Sample job description.

If you review Figure 7.1 carefully, you will see that the job description does not mention the physical or mental abilities required to perform the job. The role of the job description is to define the job itself, while the role of the job qualification is to define the personal attributes required to satisfactorily perform the job.

Job Qualifications

Once you know exactly what kinds of tasks employees must perform in a given job, it is possible to create a list of the skills or knowledge they must possess in order to successfully perform those tasks. These skills should be written down and attached to the job description. If a potential job candidate is not selected for employment, and later elects to bring legal action against you, it will be critical that you can show how each component of your job qualification list is driven by, or logically flows from, the job description.

Job qualifications can consist of both physical and mental requirements. It is important to remember that the job qualifications list must not violate the law nor include any characteristics that would unfairly prevent a class of workers from successfully competing for the position. If, for example, a hotel groundskeeper listed a height of 6 feet as a job qualification for a grass-cutter, that qualification would be considered inappropriate, because there are minority groups that would have difficulty meeting it. The courts might interpret this job qualification as one that unfairly limits the potential for a minority candidate to secure the job. Even though the groundskeeper might be able to show that the tools normally used by the groundskeeping employees were located on shelves most easily reached by those who were 6 feet tall or taller, it is highly unlikely that this occupational qualification could stand up under the scrutiny of the courts, unless the groundskeeper could prove that a height of 6 feet was a **bona fide occupational qualification** (BFOQ).

▶ **LEGALESE**

Bona fide occupational qualification: A job qualification, established in good faith and fairness, that is necessary to safely or adequately perform the job.

To establish that a qualification is, in fact, a bona fide occupational qualification, you must prove that a class of employees would be unable to perform the job safely or adequately, and that the bona fide occupational qualification is reasonably necessary to the operation of the business. In the case of the groundskeeper, simply moving the tools or making the reasonable accommodation of providing a short ladder would open the job to candidates of any height, and probably would prevent a discrimination lawsuit. The following types of qualifications are examples that are appropriate in jobs where knowledge or skill is a necessary requirement of the job:

Physical attributes necessary to complete the duties of the job, such as the ability to lift a specific amount of weight
Education
Certifications
Registrations
Licensing
Language skills
Knowledge of equipment operation
Previous experience
Minimum age requirements, (for serving alcohol or working certain hours)

ANALYZE THE SITUATION 7.1

Cruz Villaraigosa owns and manages The Cruz Cantina, a lively bar and dance club that serves Cuban and other Caribbean-style cuisine. The club has a dance floor, has small tables, and serves outstanding food.

Cruz's clientele consists mainly of 20- to 40-year-old males, who frequent the Cantina for its good food, as well as the extremely low-cut, Spanish-style blouses worn by the young female servers who bring the food and drinks to the tables. The Cruz Cantina advertises to women and families, as well as to young men, but the reputation of the facility is predicated upon the physical attractiveness of the women whom Cruz has hired to serve the guests, and the uniforms these servers wear.

Cruz employs women and men of all races and nationalities, but all food and drink servers are female. When Cruz elects not to hire a young man for a job as a server, Cruz is contacted by the young man's attorney. The attorney alleges the young man has been illegally denied a server's job at the Cantina because of his gender, and that sex cannot be a bona fide occupational qualification for a food and beverage server position.

Cruz replies that her operation employs both men and women, but that one necessary job qualification for all servers is that they be "attractive to men," and that the qualification of "attractiveness to men" is a legitimate one, give the importance of maintaining the successful image, atmosphere, and resulting business the Cantina enjoys. She maintains that the servers not only serve food and beverages, but also play a role in advertising and marketing the unique features of the Cantina. Cruz also maintains that attractiveness is indeed an occupa-

tional characteristic that she can use to promote her facility, citing modeling agencies and TV casting agents as examples of employers who routinely use attractiveness as a means of selecting employees. Cruz states that her right to choose employees she feels will best benefit her business is unconditional, as long as she does not unfairly discriminate against a protected class of workers.

1. Do you think that the requirement that servers be "attractive to males" is a bona fide occupational requirement, and "necessary" for the continued successful operation of The Cruz Cantina?
2. If you were on a jury, would you allow Cruz to hire female servers exclusively, if she so desired? Why or why not?
3. What damages, if any, do you feel the male job applicant not selected for employment at the Cantina would be entitled to?

Applicant Screening

When choosing potential applicants for employment, hospitality managers generally utilize some or all of the five major selection devices. These are:

1. Applications
2. Interviews
3. Testing
4. Background checks
5. References

Applications The employment application is a document completed by the candidate for employment. It will generally list the name, address, work experience, and related information of the candidate. The requirements for a legitimate, legally sound application are many; however, in general, the questions should focus exclusively on job qualifications and nothing else. Most hospitality companies will have their employment application reviewed by an attorney who specializes in employment law. If, as a manager, you are responsible for developing your own application, it is a good idea to have the document reviewed by a legal specialist prior to its utilization. It is important that each employment candidate for a given position be required to fill out an identical application, and that an application be on file for each candidate who is ultimately selected for the position. Figure 7.2 is a sample of a legally sound employment application used by the Four Seasons Hotel, Houston. Note, specifically, how the questions are related to previous work history and job qualifications.

Interviews From the employment applications or resumes submitted, some candidates will be selected for the interview process. It is important to realize that the types of questions that can be asked in the interview are highly restricted, because job interviews, if improperly performed, can subject an employer to legal liability. If a candidate is not hired based on his or her answer to—or refusal to answer—an inappropriate question, that candidate has the right to file a lawsuit.

The Equal Employment Opportunity Commission (EEOC) suggests that an employer consider the following three questions in deciding whether to include a particular question on an employment application or in a job interview:

- Does this question tend to screen out minorities or females?
- Is the answer needed in order to judge this individual's competence for performance of the job?
- Are there alternative, nondiscriminatory ways to judge the person's qualifications?

FOUR SEASONS
Hotels and Resorts
www.fourseasons.com

We are an Equal Opportunity Employer
Complying with all applicable Federal and State Laws

Please Type or Print

DATE TODAY _____

LAST NAME	FIRST	MIDDLE
SREET ADDRESS		
CITY	STATE	ZIP
PHONE-HOME	PHONE-WORK	
TO VERIFY PREVIOUS EMPLOYMENT, PLEASE INDICATE IF YOU HAVE WORKED UNDER A DIFFERENT NAME.		

POSITION(S) DESIRED	☐ FULL TIME ☐ PART TIME ☐ ON-CALL/CASUAL
SALARY DESIRED	DATE AVAILABLE FOR WORK
SOCIAL SECURITY NUMBER	
ARE YOU PRESENTLY EMPLOYED? ☐ YES ☐ NO IF YES, MAY WE CONTACT YOUR CURRENT EMPLOYER? ☐ YES ☐ NO	
DO YOU HAVE A LEGAL RIGHT TO WORK IN THE U.S.? ☐ YES ☐ NO	
IF YOU HAVE WORKED FOR FOUR SEASONS HOTELS BEFORE, PLEASE STATE WHEN AND WHERE:	

EMPLOYMENT RECORD

List your previous experience beginning with your most recent position.

(Include military experience as a job.)

PLEASE FILL-IN COMPLETELY, DO NOT USE "SEE RESUME"

#1 EMPLOYER	
ADDRESS	PHONE
STARTING POSITION	STARTING SALARY
LAST POSITION	FINAL SALARY
DATES EMPLOYED From: To:	SUPERVISOR
DUTIES	
REASON FOR LEAVING	

#2 EMPLOYER	
ADDRESS	PHONE
STARTING POSITION	STARTING SALARY
LAST POSITION	FINAL SALARY
DATES EMPLOYED From: To:	SUPERVISOR
DUTIES	
REASON FOR LEAVING	

#3 EMPLOYER	
ADDRESS	PHONE
STARTING POSITION	STARTING SALARY
LAST POSITION	FINAL SALARY
DATES EMPLOYED From: To:	SUPERVISOR
DUTIES	
REASON FOR LEAVING	

#4 EMPLOYER	
ADDRESS	PHONE
STARTING POSITION	STARTING SALARY
LAST POSITION	FINAL SALARY
DATES EMPLOYED From: To:	SUPERVISOR
DUTIES	
REASON FOR LEAVING	

Figure 7.2 Employment application from the Four Seasons Hotel, Houston. (Reprinted with permission.)

EDUCATION AND SKILLS (answer only if job related)

	DIPLOMA / GED
HIGH SCHOOL DEGREE OR GED EQUIVALENCY	☐ YES ☐ NO

	NAME	GRADUATED	MAJOR
COLLEGE		☐ YES ☐ NO	

OTHER EDUCATION / TRAINING:
(List any special skill(s) related to the job you are applying for)

AVAILABILITY

ARE THERE ANY HOURS, SHIFTS, OR DAYS OF THE WEEK THAT YOU WILL NOT BE ABLE TO WORK? YES NO

IF YES, PLEASE STATE DAYS AND REASON:

I AM WILLING AND ABLE TO WORK:

☐ FULL TIME ☐ PART TIME ☐ TEMPORARY/SEASONAL

☐ ON-CALL/CASUAL ☐ DAYS ☐ EVENINGS ☐ OVERNIGHT

☐ WEEKENDS ☐ HOLIDAYS ☐ OVERTIME

ARE YOU CAPABALE OF PERFORMING THE ESSENTIAL FUNCTIONS OF THE JOB YOU ARE APPLYING FOR WITH OR WITHOUT REASONABLE ACCOMODATION?

☐ YES ☐ NO

HOW WERE YOU REFERRED TO FOUR SEASONS? PLEASE BE SPECIFIC. ☐ ADVERTISEMENT ☐ INTERNET ☐ ON YOUR OWN

NAME OF SCHOOL: NAME OF COMPANY EMPLOYEE: NAME OF AGENCY:

OTHER:

DO YOU HAVE RELATIVES OR ACQUAINTANCES WORKING IN THE HOTEL? ☐ YES ☐ NO
IF YES, PLEASE LIST THEIR NAMES & RELATIONSHIP:

IF UNDER AGE 18, INDICATE DATE OF BIRTH:

IF APPLYING FOR A JOB INVOLVING ALCOHOLIC BEVERAGE SERVICE, ARE YOU AT LEAST AGE 21? ☐ YES ☐ NO

HAVE YOU EVER BEEN CONVICTED OF A FELONY? ☐ YES* ☐ NO DO YOU HAVE FELONY CHARGES PENDING AGAINST YOU? ☐ YES ☐ NO

IF YES, PLEASE GIVE DATES AND DETAILS:

*CONVICTION OF A FELONY WILL NOT NECESSARILY DISQUALIFY YOU FROM EMPLOYMENT.

CERTIFICATION AND SIGNATURE – Please read carefully.

I declare that my answers to the questions on this application are true, and I give Four Seasons Hotels the right to investigate all references and information given. I agree that any false statement or misrepresentation on this application will be cause for refusal to hire or immediate dismissal. I affirm that I have a genuine intent and for no other purposes in applying for a job with Four Seasons Hotels. I agree that my employment will be considered "at will" and may be terminated by this company at any time without liability for wages or salary except for such as may have been earned at the date of such termination unless or until superseded by specific written employment contract. If requested by management at any time, I agree to submit to a search of my person or of any locker that may be assigned to me and I hereby waive all claims for damages on account of such examination. I understand that Four Seasons Hotels is a Drug Free Workplace and has a policy against drug and alcohol abuse and reserves the right to screen applicants and test for cause. I acknowledge that if I need reasonable accommodation in either the application process or employment I should bring the request to the attention of the Human Resources department.

I authorize you to make such legal investigations and inquiries of my personal employment, criminal history, driving record, and other job related matters as may be necessary in determining an employment decision. I hereby release employers, schools or persons from all liability in responding to inquiries in connection with my application.

I understand that an offer employment and my continued employment are contingent upon satisfactory proof of my authorization to work in the United States of America.

CONFIDENTIAL MATERIAL AND THE PROPERTY OF
FOUR SEASONS HOTELS LIMITED

SIGN HERE:_____ DATE:_____
(APPLICANT'S SIGNATURE) MONTH/DAY/YEAR

Figure 7.2 *(Continued)*

As a manager, you must be very careful in your selection of questions to ask in an interview. In all cases, it is important to remember that the job itself dictates what is an allowable question. Questions should be written down and followed. In addition, supervisors, co-workers, and others who may participate in the interview process should be trained to avoid questions that could increase the liability of the facility.

Generally, age is considered to be irrelevant in most hiring decisions, therefore, date-of-birth questions are improper. Age is a sensitive preemployment question, because the Age Discrimination in Employment Act protects employees 40 years old and older. It is permissible to ask an applicant to state his or her age if he or she is younger than 18 years old because that age group is permitted to work only a limited number of hours each week. It is also important when hiring bartenders and other servers of alcohol, who must be above a state's minimum age for serving alcohol.

Race, religion, and national origin questions are also inappropriate, as is the practice of requiring that photographs of the candidate be submitted prior to or after an interview.

Questions about physical traits such as height and weight requirements have been found to violate the law because they eliminated disproportionate numbers of female, Asian-American, and Spanish-surnamed applicants.

If a job does not require a particular level of education, it is improper to ask questions about an applicant's educational background. Applicants can be asked about their education and credentials if these are indeed bona fide occupational qualifications. Certainly, it is allowable to ask a potential hotel controller if he or she has a degree in accounting and which school granted that degree. Asking a potential table busser for the same information would be inappropriate.

It is permissible to ask an applicant if he or she uses drugs or smokes. It is also allowable to ask a candidate if he or she is willing to submit to a voluntary drug test as a condition of employment.

Questions concerning whether an applicant owns a home potentially discriminate against those individuals who do not own their own homes. Questions concerning the type of discharge received by an ex-military applicant are improper, because a high proportion of other than honorable discharges are given to minorities.

Safe questions can be asked about a candidate's present employment, former employment, and job references. In most cases, questions asked on both the application and in the interview should focus on the applicant's job skills, and nothing else. Figure 7.3 contains some guidelines, developed by the EEOC, for asking appropriate interview questions.

Preemployment Testing Preemployment testing is a common way to improve the employee screening process. Test results can be used, for example, to measure the relative strength of two candidates.

In the hospitality industry, preemployment testing will generally fall into one of the following categories:

- Skills tests
- Psychological tests
- Drug screening tests

Skills tests were among the first tools used by managers to screen applicants in the employment process. In the hospitality industry, skills tests can include activities such as typing tests for office workers, computer application tests for those who use word processing or spreadsheet tools, or food production tasks to test culinary artists.

Subject	Inappropriate Questions (May Not Ask or Require)	Appropriate Questions (May Ask or Require)
Gender or marital status	Number and ages of children	
	Pregnancy, actual or intended	
	Maiden name, former name	In checking your work record, do we need another name for identification?
Race	Race	
	Color of skin, eyes, hair, etc.	
	Request for photograph	(A photograph may be required after hiring, for identification)
National origin	Questions about place of birth, ancestry, mother tongue, national origin of parents or spouse	
	What is your native language?	
	How did you learn to speak Spanish (or other language) fluently?	If job-related, which foreign languages do you speak fluently?
Citizenship, immigration status	Of which country are you a citizen?	Are you a U.S. citizen?
	Are you a native-born U.S. citizen?	If hired, can you show proof that you are eligible to work in the United States?
	Questions about naturalization of applicant, spouse, or parents	
Religion	Religious affiliation or preference	
	Religious holidays observed	
Age	How old are you?	Can you observe regularly the required days and hours of work?
	Date of birth	Are you 18 or older? (To comply with labor laws)
Disability	Do you have any disabilities?	Are you 21 or older? (For positions serving alcohol)
	Have you ever been treated for (certain) diseases?	
	Are you healthy?	
Questions that may discriminate against minorities because of economic status, etc.	Have you ever been arrested?	Have you ever been convicted of a crime? If yes, give details. (If crime is job-related, as embezzlement is to handling money, you may refuse to hire.)
	List all clubs, societies, and lodges to which you belong.	List membership in professional organizations relevant to job performance.
	Do you own a car? (Unless required to do the job)	Do you have a reliable means of getting to work?
	Type of military discharge	Military service: dates, branch of service, education and experience (if job-related).
	Questions regarding credit ratings, financial status, wage garnishment, home ownership	
Assumptions related to sex, age, race, disability, etc.	Work is too heavy for women or handicapped	Can you do the job?
	Stereotypes: buspersons should be men, room cleaners and typists should be women, bartenders should be under 40, etc.	

Figure 7.3 Guidelines for conducting a job interview. (Source: *Supervision in the Hospitality Industry*, Fourth Edition, by Jack E. Miller, John R. Walker, Karen Eich Drummond, Copyright 2002, John Wiley & Sons, Inc.; used by permission.)

Psychological testing can include personality tests, tests designed to predict performance, or tests of mental ability. For both skills tests and psychological tests, the important rule to remember is this:

If the test does not have documented validity and reliability, the results of the tests should not be used for hiring decisions.

Preemployment drug testing is allowable in most states, and can be a very effective tool for reducing insurance rates and potential worker liability issues. A drug-free environment tends to attract better-quality employment candidates, with the resulting impact of a higher-quality workforce. There are, however, strict guidelines in some states as to when and how people can be tested. A document with language similar to that found in Figure 7.4 should be completed by each candidate prior to drug testing, and the signed document should be kept on file with the employee's application form.

If preemployment drug testing is to be used, care must be taken to ensure the accuracy of the testing. In some cases, applicants whose erroneous test results have cost them a job have successfully sued the employer. The laws surrounding mandatory drug testing are complex. If you elect to implement either a preemployment or postemployment drug-testing program, it is best to first seek advice from an attorney who specializes in labor employment law in your state.

Background Checks Increasingly, hospitality employers are utilizing background checks prior to hiring workers in selected positions. It has been estimated that as many as 30 percent of all resumes and employment applications include some level of falsification. Because this is true, employers are spending more time and financial resources to validate information supplied by a potential employee. Common verification points include the following:

Name
Social Security number
Address history
Education/training
Criminal background
Credit reports

Background checks, like preemployment testing, can leave an employer subject to litigation, if the information secured during a check is false or is used in a way that violates employment law. In addition, if the information is improp-

Employee Consent Form for Drug Testing

I agree, fully and voluntarily to submit to a urinalysis or blood test conducted by _____ for a drug screen as a condition of my consideration for employment. I understand that failing to meet the standards established for this test may result in the disqualification of further consideration of my application. Lastly, I understand that these results will be used only as the basis for an employment decision and will not be shared with any individual or organization outside the company.

The undersigned represents that he or she has read this information in its entirety and understands it.

Employee Signature _____ Date _____

Employer Witness Signature _____ Date _____

Figure 7.4 Employee consent form for drug testing. (Adapted from *Foodservice Safety and Security Managers Handbook*, by the National Restaurant Association Educational Foundation. Reprinted with permission.)

▶ **LEGALESE**

Negligent hiring: Failure on the part of an employer to exercise reasonable care in the selection of employees.

erly disclosed to third parties, it could violate the employee's right to privacy. Not conducting background checks on some positions can, however, subject the employer to potential litigation under the doctrine of **negligent hiring**.

Consider the case of Holly Rosecrans. Ms. Rosecrans is the assistant general manager of a country club in Florida. One of her responsibilities is the selection and training of pool lifeguards, which are required in her facility by local statute. Each lifeguard must be certified in cardiopulmonary resuscitation (CPR). Ms. Rosecrans interviews a candidate who lists the successful completion of a CPR course as part of his educational background. If Ms. Rosecrans does not verify the accuracy of the candidate's statement, and if a death results because the lifeguard did not have CPR training, the club might well be held liable for the death of the swimmer.

Using background checks as a screening tool does involve some risk, as well as some responsibility. Employers should search only for information that has a direct bearing on the position a candidate is applying for. In addition, if a candidate is denied employment on the basis of information found in a background check, the employer should provide a candidate with a copy of that report. Sometimes, candidates can help verify or explain the content of their own background checks. Reporting agencies can make mistakes, and if you rely on obviously false information to make a hiring decision, it may put your organization at risk.

In all cases, a candidate for employment should be required to sign a consent form, authorizing an employer to conduct a background check. Figure 7.5 is a sample consent form that could be used to document this authorization.

References In the past, employment references were a very popular tool for managers to use in the screening process. But in today's litigious society they are much more difficult to obtain. While many organizations still seek information from past employers about an employee's previous work performance, few sophisticated companies will divulge such information. It is important to note that some employers have been held liable for inaccurate comments that have been made about past employees. In addition, there are companies that specialize in providing job searchers with a confidential, comprehensive verification of employment refer-

Employee Consent Form for Background Checks and Application Verification

I agree, fully and voluntarily to checks related to:

1. (e.g., Criminal History)

2. (e.g., School Attendance Record)

as well as checks on information I have supplied in my employment application.

I understand that failing to meet the standards established for these checks as well as falsification of information on my application may result in the disqualification of further consideration of my application. Lastly, I understand that the results of these background checks and the accuracy of my application will be used only as the basis for an employment decision and will not be shared with any individual or organization outside the company.

The undersigned represents that he or she has read this information in its entirety and understands it.

Employee Signature _____ Date _____

Employer Signature _____ Date _____

Figure 7.5 Employee consent form for background checks. (Adapted from *Foodservice Safety and Security Managers Handbook*, by the National Restaurant Association Educational Foundation. Reprinted with permission.)

ences from former employers. Thus, employers are becoming more cautious about supplying information on employees who have left their organization.

To help minimize the risk of litigation related to reference checks, it is best to secure the applicant's permission in writing before contacting an ex-employer. Employers must be extremely cautious in both giving and receiving reference information. Employers are usually protected if they give a truthful reference; however, that does not mean these employers will be spared the expense of defending a **defamation** case brought by an ex-employee.

▶ **LEGALESE**

Defamation: False statements that cause someone to be held in contempt, lowered in the estimation of the community, or to lose employment status or earnings or otherwise suffer a damaged reputation.

If, for example, an employer giving a reference states that an ex-employee was terminated because he or she "didn't get along" with his or her co-workers, the employer may well have to be able to prove the truthfulness of the statement, as well as show proof that all of the blame for the difficulties were the responsibility of the ex-employee.

To minimize the risk of a lawsuit, you should never reply to a request for information about one of your ex-employees without a copy of that employee's signed release authorizing the reference check. How much you choose to disclose about an ex-employee is your decision; however, your answers should be honest and defendable. Also, it is best never to disclose personal information such as marital difficulties, financial problems, or serious illness, because you could be sued for invasion of privacy. Many employers today give only the following information about past employees:

Employer's name
Ex-employer's name
Date(s) of employment
Job title
Name and title of person supplying the information

If a prospective employee provides letters of reference, always call the authors of reference letters to ensure that they did in fact write them. When possible, it is best to put any request for reference information in writing, and ask that the response be in written form. If a verbal response is all you can get, document the conversation; write down as much of the dialogue as possible, including the name of the party you spoke to and the date and time the contact occurred.

Even with authorization, many employers are reluctant to give out information about former employees. If this happens, simply ask if the company would rehire that worker. The response to that question, combined with the information received from other employers, should help to determine the accuracy of the information given by the applicant.

The selection of the right employee for the right job is a specialized area of human resources, and the hospitality manager will often be able to rely on a human resources department or personnel director for assistance when undertaking this important task. For the independent entrepreneur, it is critical that the entire employee selection process be reviewed by an expert in employment law and continually monitored for compliance with established procedures.

Wording of Classified Advertisements One final aspect of employee selection that you must be aware of involves the wording of classified ads that you might place in newspapers or journals when announcing a job opening. As with job descriptions and qualifications, it is important that the terms you use in a classified ad do not exclude or discriminate against individuals. Federal law prohibits the use of words or phrases that might prevent certain types of people from applying for an advertised position. Phrases to avoid include references to age ("ages 20 to 30"), sex ("men" or "women"), national origin, and religion. There are a limited number of cases where a bona fide job qualification might limit the type of person who could apply, and that can be mentioned. In general, however, employers should focus their classified ads on a description of the job and any applicable educational, licensing, or background requirements needed.

7.2 DISCRIMINATION IN THE SELECTION PROCESS

Although employers are free to hire employees as they see fit, they are not free to unlawfully discriminate against people in their employment selection. Employment discrimination laws have been established to protect certain classes of people from unfair or exclusionary hiring practices.

The Fifth and Fourteenth Amendments of the United States Constitution limit the power of the federal and state governments to discriminate. The Fifth Amendment has an explicit requirement that the federal government not deprive any individual of "life, liberty, or property," without the due process of the law. Though discrimination by employers in the private sector is not directly addressed in the Constitution, it has become subject to a growing body of federal and state laws, which were passed in recognition of the personal freedoms guaranteed by the Constitution. Although many antidiscrimination statutes affect employee selection, the three most significant are:

Civil Rights Act of 1964; Title VII
Americans with Disabilities Act; Title I
Age Discrimination in Employment Act

Civil Rights Act of 1964, Title VII

▶ **LEGALESE**
Interstate commerce: Commercial trading or the transportation of persons or property between or among states.

Title VII of the Civil Rights Act of 1964, and its resulting amendments, applies to employers with 15 or more employees, and who are engaged in **interstate commerce**. Figure 7.6 presents the original language of the bill that relates to employee selection.

The act prohibits discrimination based on race, color, religion, sex, or national origin; sex includes pregnancy, childbirth, or related medical conditions. The act makes it illegal for employers to discriminate in hiring and in setting the terms and conditions of employment. Labor organizations are also prohibited from basing membership or union classifications on race, color, religion, sex, or national origin. The law also prohibits employers from retaliating against employees or candidates who file charges of discrimination against them, who refuse to comply with a discriminatory policy, or who participate in an investigation of discrimination charges against the employer.

One outcome of the Civil Rights Act was the formation of the Equal Employment Opportunity Commission, which oversees and enforces federal laws regulating employer/employee relationships. The EEOC investigates complaints by employees who think they have been discriminated against. Businesses that are found to have discriminated can be ordered to compensate the employee(s) for damages such as lost wages, attorney fees, and punitive damages.

▶ **LEGALESE**
Affirmative action: A federally mandated requirement that employers who meet certain criteria must actively seek to fairly employ recognized classes of workers. (Some state and local legislatures have also enacted affirmative action requirements.)

In later amendments, the Civil Rights Act was expanded to include **affirmative action** requirements. Affirmative action constitutes a good-faith effort by employees to address past and/or present discrimination through a variety of specific, results-oriented procedures. This is a step beyond equal opportunity laws like Title VII that simply ban discriminatory practices. State and local governments, agencies of the federal government, and federal contractors and subcontractors with contracts of $50,000 or more, including colleges and universities, are required by federal law to implement affirmative action programs.

Employers have used a variety of techniques for implementing affirmative action plans. These include:

- Active recruiting to expand the pool of candidates for job openings.
- Revising the selection tools and criteria to ensure their relevance to job performance.
- Establishing goals and timetables for hiring underrepresented groups.

Civil Rights Act of 1964
UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. [Section 703]

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Figure 7.6 Excerpt from the Civil Rights Act of 1964.

Originally, affirmative action activities were intended to correct discrimination in the hiring and promotion of African-Americans and other people of color. Now, affirmative action protections are being applied to women, and some government jurisdictions have extended affirmative action provisions to older people, the disabled, and Vietnam-era veterans. The goal of affirmative action is to broaden the pool of candidates and encourage hiring based on sound, job-related criteria. The result is a workforce with greater diversity and potential for all.

In addition to the federal Civil Rights Act, many states also have their own civil rights laws, which prohibit discrimination. Sometimes, the state laws are more inclusive than the Civil Rights Act, in that they expand protection to workers or employment candidates in categories not covered under the federal Civil Rights Act, such as age, marital status, sexual orientation, and certain types of physical or mental disabilities. State civil rights laws may also have stricter penalties for violations, including fines and/or jail time. As a hospitality manager, you should know the provisions of your state's civil rights law.

ANALYZE THE SITUATION 7.2

Jetta Wong is the owner and manager of the Golden Dragon oriental restaurant. The restaurant is large, inexpensive, an enjoys and excellent reputation. Business is good, and the restaurant serves a diverse clientele.

Ms. Wong places a classified ad for the table busser in the employment section of her local newspaper. The response is good, and Ms. Wong narrows the field of potential candidates

or two. One is the same ethnic background as Ms. Wong and the rest of the staff. The second candidate is Danielle Hidalgo, the daughter of a Mexican citizen and an American citizen. Ms. Hidalgo was born and raised in the United States.

While both candidates are pleasant, Ms. Wong offers the position to the candidate who matches the background of the restaurant and Ms. Wong. Her rationale is that, since both candidates are equal in ability, she has a right to select the candidate she feels will best suit her business. Because it is an oriental restaurant, Ms. Wong feels diners will expect to see oriental servers and bussers. No one was discriminated against, she maintains, because Ms. Hidalgo was not denied a job on the basis of race, but rather on the basis of what was best for business. Ms. Wong simply selected her preference from among two equal candidates. Ms. Wong relates her decision to Ms. Hidalgo.

Ms. Hidalgo maintains that she was not selected because of her Hispanic ethnic background. She threatens to file a charge with the EEOC unless she is offered employment.

1. Do you think Ms. Hidalgo was denied the position because of her ethnicity?
2. In the situation described here, does Ms. Wong have the right to consider race as a bona fide occupational qualification?
3. How should Ms. Wong advertise jobs in the future to avoid charges of discrimination?

Americans with Disabilities Act

On July 26, 1990, the Americans with Disabilities Act (ADA) was enacted. The ADA prohibits discrimination against people with disabilities in the areas of public accommodations, transportation, telecommunications, and employment. The ADA is a five-part piece of legislation; Title I focuses primarily on employment.

There are three different groups of individuals who are protected under the ADA:

- An individual with a physical or mental impairment that substantially limits a major life activity. Some examples of what constitutes a "major life activity" under the act are: seeing, hearing, talking, walking, reading, learning, breathing, taking care of oneself, lifting, sitting, and standing.
- A person who has a record of a disability.
- A person who is "regarded as" having a disability.

Employers cannot reduce an employee's pay simply because he or she is disabled, nor can they refuse to hire a disabled candidate if, with reasonable accommodation, it is possible for the candidate to perform the job. Employers are also required to post notices of the Americans with Disabilities Act and its provisions in a location where they can be seen by all employees.

Even with the passage of the ADA, an employer does not have to hire a disabled applicant who is not qualified to do a job. The employer can still select the most qualified candidate, provided that no applicant was eliminated from consideration because of his or her qualified disability.

Although the law in this area is changing rapidly, the following conditions, among others, currently meet the criteria for a qualified disability, and are protected under the ADA:

AIDS
Cancer
Cerebral palsy
Tuberculosis
Heart disease
Hearing or visual impairments
Alcoholism

Conditions that are not currently covered under ADA include:

Kleptomania
Disorders caused by the use of illegal drugs

Compulsive gambling
Sexual behavior disorders

The ADA has changed the way employers select employees. Questions on job applications and during interviews that cannot be asked include:

- Have you ever been hospitalized?
- Are you taking prescription drugs?
- Have you ever been treated for drug addiction or alcoholism?
- Have you ever filed a workers' compensation insurance claim?
- Do you have any physical defects, disabilities, or impairments that may affect your performance in the position for which you are applying/interviewing?

In situations where a disabled person could perform the duties of a particular job, but some aspect of the job or work facility would prevent the applicant from doing so, the employer may be required to make a reasonable accommodation for the worker.

An employer has provided reasonable accommodation when it has made existing facilities readily accessible to individuals with mobility impairments or other disabilities, and restructured a job in the most accommodating manner possible to allow a disabled individual to perform it. The employer is not obligated to provide a reasonable accommodation where such accommodation would result in undue hardship to the employer. Generally speaking, an undue hardship occurs when the expense of accommodating the worker is excessive or would disrupt the natural work environment. The law in this area is vague, thus any employer who maintains that accommodating a worker with a disability would impose an undue hardship should be prepared to document such an assertion. After investigation, the EEOC issues a "right to sue" letter to an employee if it concludes that an employer is in violation of the ADA.

LEGALLY MANAGING AT WORK:
Accommodating Disabled Employees

To reduce the risk of an ADA noncompliance charge related to reasonable accommodation, follow these guidelines:

1. Can the applicant perform the essential functions of the job with or without reasonable accommodation? (You can ask the applicant this question.)

If no, then he or she is not qualified and is therefore not protected by the ADA.
If yes, go to question 2.

2. Is the necessary accommodation reasonable? To answer this question, ask yourself the following: Will this accommodation create an undue financial or administrative hardship on the business?

If yes, you do not have to provide unreasonable accommodations.
If no, go to question 3.

3. Will this accommodation or the hiring of the person with the disability create a direct threat to the health or safety of other employees or guests in the workplace?

If yes, you are not required to make the accommodation and have fulfilled your obligation under the ADA. ◀

◀ SEARCH THE WEB 7.1 ▶

Log on to the Internet and enter **www.eeoc.gov**.

1. Under the section Laws, Regulation, and Policy Guidance, select: Enforcement Guidances and Related Documents.
2. Select: Small Employers and Reasonable Accommodation.
3. From the document displayed, determine:
   (a) What must an employer do after receiving a request for a reasonable accommodation?
   (b) Is the restructuring of a job to meet the needs of a disabled person considered a reasonable accommodation?

For additional information on job accommodation under the ADA, log on to the Job Accommodate Network for the ADA at **janweb.icdi.wvu.edu**.

One ADA provision that foodservice employers should be aware of concerns employees and job applicants who have infectious and communicable diseases. Each year, the U.S. Secretary of Health and Human Services publishes a list of communicable diseases that, if passed on through the handling of food, could put a foodservice operation at risk. Employers have the right not to assign to or hire an individual who has one of the identified diseases for a position that involves the handling of food, but only if there is no reasonable accommodation that could be made to eliminate such a risk.

Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment—including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

The ADEA applies to employers with 20 or more employees, as well as to labor unions and governmental agencies. The ADEA makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. As a narrow exception to that general rule, a job notice or advertisement may specify an age limit in the rare circumstances where age is shown to be a bona fide occupational qualification (BFOQ) reasonably necessary to the essence of the business, or a minimum age qualification to legally perform the job.

7.3 VERIFICATION OF ELIGIBILITY TO WORK

Even after an employer has legally selected an applicant for employment, the law requires the employer to take at least one more action before an employee can begin work. The employer must determine that the worker is, in fact, legally entitled to hold the job. Verification of employment status takes two major forms. The first is verification of eligibility to work, the second is verification of compliance with the child labor laws.

Immigration Reform and Control Act

The Immigration Reform and Control Act (IRCA) was passed in 1986. The act prohibits employers from knowingly hiring illegal persons for work in the United States, either because the individual is in the country illegally or because his or

her immigration and residency status does not allow employment. The law also applies to employers who, after the date of hire, determine that an employee is not legally authorized to work, but continue to employ that individual.

Under provisions of the IRCA, employers are required to verify that all employees hired after November 6, 1986, are legally authorized to work in the United States. Unlike many other federal laws, IRCA applies to organizations of any size and to both full- and part-time employees. The act requires that when an applicant is hired, a Form I-9 must be completed (see Figure 7.7).

Form I-9 is often misunderstood. Its purpose is to verify both an employee's identity and his or her eligibility to work; thus, it serves a dual role. The Department of Homeland Security via USCIS (United States Citizenship and Immigration Services) imposes severe penalties on employers who do not have properly completed I-9s for all employees. USCIS has been very meticulous in its audits, issuing large fines for even minor errors such as incorrect dates.

Every employee hired is required to complete an I-9 when beginning work; specifically, the employee is required to fill out Section 1 of the form. The employer is then responsible for reviewing and ensuring that Section 1 is fully and properly completed. At that time, the employer will complete Section 2 of the I-9 form.

Figure 7.8 details the documents that can be used in completing an I-9. It is important to note that the documents used to verify eligibility and identity must be originals. To ensure compliance, employers will often remind individuals to bring necessary identification documents with them on their first day of employment. If an employee cannot produce the appropriate documents within 21 days of being hired, the employer is obligated by law to terminate that individual.

The employer's part of the Form I-9 must be completed within three business days, or at the time of hire if the employment is for less than three days. Each completed I-9 should be kept for three years after the date of employment, or one year after the employee's termination, whichever is longer. Keep all I-9s readily available, as they must be presented to the USCIS within 72 hours upon request.

An employer's good-faith effort in complying with the verification and record-keeping requirements will ensure his or her defense if any charges surface that the organization knowingly and willingly hired a person who was not legally authorized to work. It is prudent practice to follow the letter of the law in this area, as fines as high as $10,000 per illegal employee can be levied against the business by the government.

Fair Labor Standards Act of 1938

The Fair Labor Standards Act of 1938 (FLSA) protects young workers from employment that might interfere with their educational opportunities or be detrimental to their health or well-being. It covers all workers who are engaged in or producing goods for interstate commerce or who are employed in certain enterprises. Essentially, the law establishes that youths 18 years and older may perform any job, hazardous or not, for unlimited hours, subject to minimum wage and overtime requirements.

Children aged 16 and 17 may work at any time for unlimited hours in all jobs not declared hazardous by the U.S. Secretary of Labor. Hazardous occupations include: working with explosives and radioactive materials; operating certain power-driven woodworking metalworking, bakery, and paper-products machinery; operating various types of power-driven saws and guillotine shears; operating most power-driven hoisting apparatus, such as nonautomatic elevators, forklifts, or cranes; most jobs in slaughtering, meat-packing, rendering plants; and the operation of power-driven meat-processing machines when performed in wholesale, retail, or service establishments; most jobs in excavation, logging, and

U.S. Department of Justice
Immigration and Naturalization Service

OMB No. 1115-0136

Employment Eligibility Verification

INSTRUCTIONS

PLEASE READ ALL INSTRUCTIONS CAREFULLY BEFORE COMPLETING THIS FORM.

Anti-Discrimination Notice. It is illegal to discriminate against any individual (other than an alien not authorized to work in the U.S.) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work eligible individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

Section 1 - Employee. All employees, citizens and noncitizens, hired after November 6, 1986, must complete Section 1 of this form at the time of hire, which is the actual beginning of employment. **The employer is responsible for ensuring that Section 1 is timely and properly completed.**

Preparer/Translator Certification. The Preparer/Translator Certification must be completed if Section 1 is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete Section 1 on his/her own. However, the employee must still sign Section 1.

Section 2 - Employer. For the purpose of completing this form, the term "employer" includes those recruiters and referrers for a fee who are agricultural associations, agricultural employers or farm labor contractors.

Employers must complete Section 2 by examining evidence of identity and employment eligibility within three (3) business days of the date employment begins. If employees are authorized to work, but are unable to present the required document(s) within three business days, they must present a receipt for the application of the document(s) within three business days and the actual document(s) within ninety (90) days. However, if employers hire individuals for a duration of less than three business days, Section 2 must be completed at the time employment begins. **Employers must record: 1)** document title; **2)** issuing authority; **3)** document number, **4)** expiration date, if any; and **5)** the date employment begins. Employers must sign and date the certification. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. These photocopies may only be used for the verification process and must be retained with the I-9. **However, employers are still responsible for completing the I-9.**

Section 3 - Updating and Reverification. Employers must complete Section 3 when updating and/or reverifying the I-9. Employers must reverify employment eligibility of their employees on or before the expiration date recorded in Section 1. Employers **CANNOT** specify which document(s) they will accept from an employee.

- If an employee's name has changed at the time this form is being updated/ reverified, complete Block A.
- If an employee is rehired within three (3) years of the date this form was originally completed and the employee is still eligible to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.
- If an employee is rehired within three (3) years of the date this form was originally completed and the employee's work authorization has expired **or** if a current employee's work authorization is about to expire (reverification), complete Block B and:
  - examine any document that reflects that the employee is authorized to work in the U.S. (see List A **or** C),
  - record the document title, document number and expiration date (if any) in Block C, and
  - complete the signature block.

Photocopying and Retaining Form I-9. A blank I-9 may be reproduced, provided both sides are copied. The Instructions must be available to all employees completing this form. Employers must retain completed I-9s for three (3) years after the date of hire or one (1) year after the date employment ends, whichever is later.

For more detailed information, you may refer to the INS Handbook for Employers, (Form M-274). You may obtain the handbook at your local INS office.

Privacy Act Notice. The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 USC 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by officials of the U.S. Immigration and Naturalization Service, the Department of Labor and the Office of Special Counsel for Immigration Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless this form is completed, since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986.

Reporting Burden. We try to create forms and instructions that are accurate, can be easily understood and which impose the least possible burden on you to provide us with information. Often this is difficult because some immigration laws are very complex. Accordingly, the reporting burden for this collection of information is computed as follows: **1)** learning about this form, 5 minutes; **2)** completing the form, 5 minutes; and **3)** assembling and filing (recordkeeping) the form, 5 minutes, for an average of 15 minutes per response. If you have comments regarding the accuracy of this burden estimate, or suggestions for making this form simpler, you can write to the Immigration and Naturalization Service, HQPDI, 425 I Street, N.W., Room 4034, Washington, DC 20536. OMB No. 1115-0136.

EMPLOYERS MUST RETAIN COMPLETED FORM I-9
PLEASE DO NOT MAIL COMPLETED FORM I-9 TO INS

Form I-9 (Rev. 11-21-91)N

Figure 7.7 Form I-9.

U.S. Department of Justice
Immigration and Naturalization Service

OMB No. 1115-0136

Employment Eligibility Verification

Please read instructions carefully before completing this form. The instructions must be available during completion of this form. ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification. To be completed and signed by employee at the time employment begins.

Print Name: Last	First	Middle Initial	Maiden Name
Address *(Street Name and Number)*		Apt. #	Date of Birth *(month/day/year)*
City	State	Zip Code	Social Security #

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):
- ☐ A citizen or national of the United States
- ☐ A Lawful Permanent Resident (Alien # A_____)
- ☐ An alien authorized to work until ___/___/___ (Alien # or Admission #)_____

Employee's Signature	Date *(month/day/year)*

Preparer and/or Translator Certification. *(To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.*

Preparer's/Translator's Signature	Print Name
Address *(Street Name and Number, City, State, Zip Code)*	Date *(month/day/year)*

Section 2. Employer Review and Verification. To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number and expiration date, if any, of the document(s)

List A	OR	List B	AND	List C
Document title:_____		_____		_____
Issuing authority:_____		_____		_____
Document #:_____		_____		_____
Expiration Date *(if any)*: ___/___/___		___/___/___		___/___/___
Document #:_____				
Expiration Date *(if any)*: ___/___/___				

CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on *(month/day/year)* ___/___/___ **and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment.)**

Signature of Employer or Authorized Representative	Print Name	Title
Business or Organization Name	Address *(Street Name and Number, City, State, Zip Code)*	Date *(month/day/year)*

Section 3. Updating and Reverification. To be completed and signed by employer.

A. New Name *(if applicable)*	B. Date of rehire *(month/day/year) (if applicable)*

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility.

Document Title:_____ Document #:_____ Expiration Date (if any): ___/___/___

I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Date *(month/day/year)*

Figure 7.7 *(Continued)*

LISTS OF ACCEPTABLE DOCUMENTS

LIST A

Documents that Establish Both Identity and Employment Eligibility

1. U.S. Passport (unexpired or expired)
2. Certificate of U.S. Citizenship *(INS Form N-560 or N-561)*
3. Certificate of Naturalization *(INS Form N-550 or N-570)*
4. Unexpired foreign passport, with *I-551 stamp or* attached *INS Form I-94* indicating unexpired employment authorization
5. Permanent Resident Card or Alien Registration Receipt Card with photograph *(INS Form I-151 or I-551)*
6. Unexpired Temporary Resident Card *(INS Form I-688)*
7. Unexpired Employment Authorization Card *(INS Form I-688A)*
8. Unexpired Reentry Permit *(INS Form I-327)*
9. Unexpired Refugee Travel Document *(INS Form I-571)*
10. Unexpired Employment Authorization Document issued by the INS which contains a photograph *(INS Form I-688B)*

OR

LIST B

Documents that Establish Identity

1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address
2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address
3. School ID card with a photograph
4. Voter's registration card
5. U.S. Military card or draft record
6. Military dependent's ID card
7. U.S. Coast Guard Merchant Mariner Card
8. Native American tribal document
9. Driver's license issued by a Canadian government authority

For persons under age 18 who are unable to present a document listed above:

10. School record or report card
11. Clinic, doctor or hospital record
12. Day-care or nursery school record

AND

LIST C

Documents that Establish Employment Eligibility

1. U.S. social security card issued by the Social Security Administration *(other than a card stating it is not valid for employment)*
2. Certification of Birth Abroad issued by the Department of State *(Form FS-545 or Form DS-1350)*
3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. Native American tribal document
5. U.S. Citizen ID Card *(INS Form I-197)*
6. ID Card for use of Resident Citizen in the United States *(INS Form I-179)*
7. Unexpired employment authorization document issued by the INS *(other than those listed under List A)*

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)

Figure 7.7 *(Continued)*

DOCUMENTS THAT ESTABLISH EMPLOYMENT ELIGIBILITY

Social Security card
An original or certified copy of a birth certificate issued by a state, county, or municipal authority
Unexpired INS employment authorization
Unexpired reentry permit (INS Form I-327)
Unexpired Refugee Travel Document (INS Form I-571)
Certificate of Birth issued by the Department of State (Form FS-545)
Certificate of Birth Abroad issued by the Department of State (Form DS-1350)
United States Citizen identification (INS Form I-197)
Native American tribal document
Identification used by Resident Citizen in the United States

DOCUMENTS THAT ESTABLISH IDENTITY ONLY

State driver's license or identification card containing a photograph
School or university identification card with photograph
Voter's registration card
United States military identification card or draft record
Identification card issued by federal, state, or local governmental agencies
Military dependent's identification card
Native American tribal documents
United States Coast Guard Merchant Mariner card
Driver's license issued by a Canadian government authority

DOCUMENTS THAT ESTABLISH IDENTITY AND EMPLOYMENT ELIGIBILITY

Current United States passport
Alien Registration Receipt Card (INS Form I-151.)
Resident Alien Card (INS Form I-551), which must contain a photograph of the bearer
Temporary Resident Card (INS Form I-688)
Employment Authorization Card (INS Form I-688A)

Figure 7.8 Form I-9 qualifying documents.

sawmilling; roofing, wrecking, demolition, and shipbreaking; operating motor vehicles or working as outside helpers on motor vehicles; and most jobs in the manufacturing of bricks, tiles, and similar products.

Youths aged 14 and 15 may work in various jobs outside school hours under the following conditions:

- No more than three hours on a school day, with a limit of 18 hours in a school week.
- No more than eight hours on a nonschool day, with a limit of 40 hours in a nonschool week.
- Not before 7:00 A.M. or after 7:00 P.M., except from June 1 through Labor Day, when the evening hour is extended to 9:00 P.M.
- That a break be provided after five contiguous hours of work.

Workers 14 and 15 years of age may be employed in a variety of hospitality jobs, including cashiering, waiting on tables, washing dishes, and preparing salads and other food (although cooking is permitted only at snack bars, soda fountains, lunch counters, and cafeteria-style counters), but not in positions deemed hazardous by the U.S. Secretary of Labor. As with other types of employment law, there are stiff penalties for employers who violate provisions of the Fair Labor Standards Act. Employers can be fined between $1,000 for first-time viola-

tions and $3,000 for third violations. Repeat offenders can be subject to fines of $10,000, and even jail terms.

All states have child labor laws as well. Employers in most states are required to keep on file documents and/or permits verifying the age of minor employees. When both state and federal child labor laws apply, the law setting the more stringent standard must be observed. Federal child labor laws are enforced by the Wage and Hour Division of the U.S. Labor Department's Employment Standards Administration. State and local child labor laws can vary, so it is best to confirm the specifics of the child labor laws in your own state by contacting your local state employment agency.

7.4 THE EMPLOYMENT RELATIONSHIP

▶ **LEGALESE**
Employer: An individual or entity that pays wages or a salary in exchange for a worker's services.

▶ **LEGALESE**
Employee: An individual who is hired to provide services to an employer in exchange for wages or a salary.

The laws related to employment, like those in other areas, are fluid, and change to reflect society's view of what is "fair" and "just," for both the **employer** and the **employee**. For example, in 1945, an employer in the United States could refuse to hire an individual on the basis of his or her race or religion. The employer would have had no fear of liability for such a decision, either from the government or the potential employee. Today, a decision to refuse employment on the basis of race or religion would subject the employer to legal liability both from both the government and the spurned job candidate.

At-Will Employment

▶ **LEGALESE**
At-will employment: An employment relationship whereby employers have a right to hire any employee, whenever they choose, and to dismiss an employee for or without cause, at any time; the employee also has the right to work for the employer or not, or to terminate the relationship at any time.

The right of employers to hire and terminate employees as they see fit is still a fundamental right of doing business in the United States. In most states, the relationship you create when you hire a worker is one of **at-will employment**.

Simply put, the doctrine of at-will employment allows an employer to hire or dismiss an employee at anytime, if the employer feels it is in the best interest of the business, subject to the antidiscrimination laws reviewed earlier in this chapter (and addressed further in Chapter 8, "Legally Managing Employees"). Assume, for example, that you have legally hired four full-time bartenders for a club you manage. Business becomes slow, and you elect to terminate one of the bartenders. The doctrine of at-will employment allows you to do so. Further, the doctrine allows you to reduce your bartender staff even if you have not experienced a downturn in business. You might elect to do so if you felt that you could secure the services of a better bartender, should you need one. Generally speaking, any worker can be fired for cause (i.e., misconduct associated with the job). The at-will employment doctrine allows employers to dismiss a worker without cause.

As an employer, your actions can affect the at-will employment status of your workers (for example, by explicitly entering into an employment contract or making promises to keep an employee on for a year). In order to preserve the maximum flexibility for your business, it is important that you maintain your at-will-employment status to cover all staff members that you select and manage. The scope of the at-will employment doctrine varies among different states, so you should familiarize yourself with the requirements placed on employers in the state in which you operate. These are available from the state agency responsible for monitoring employer/employee relationships.

Labor Unions and Collective Bargaining

In some hotels and businesses, certain categories of employees may belong to an organized labor union. Unions were formed to protect the rights of workers and to establish specific job conditions that would be agreed to and carried out by employers and employees. In this type of arrangement, a group of employees will elect to make one collective employment agreement with an employer that

will outline specific characteristics of their job position, such as the wage, hourly rate of pay, or limits on the hours per day or week that can be worked. The agreement would cover anyone employed in that position. This type of employment agreement is called a **collective bargaining agreement** (CBA), and can also be referred to as a "union contract."

▶ **LEGALESE**

Collective bargaining agreement (CBA): A formal contract between an employer and a group of employees that establishes the rights and responsibilities of both parties in their employment relationship.

The terms and conditions set forth in a CBA are developed using a process of collective bargaining between the employer and employees. Generally, the members of a labor union working for a specific company (or industry) will elect a representative, who will negotiate the terms and conditions of a collective bargaining agreement for the entire group. The bargaining process is carried out according to rules established by the National Labor Relations Act of 1935, which guarantees the right of employees to organize and bargain collectively or to refrain from collective bargaining. To enforce this act and oversee the relationship between employers and organized labor, Congress created an independent federal agency known as the National Labor Relations Board (NLRB). The NLRB has two principal functions:

- To administer secret-ballot elections that will permit employees to decide if they wish to be represented by a union in dealing with their employers, and if so, by which union.
- To prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions.

The NLRA identifies the activities and practices that would be considered "unfair." Employers are forbidden to:

- Discourage or threaten employees' attempts to unionize.
- Threaten to shut down an operation if employees want to form a union.
- Interfere, restrain, or question employees about their participation in a union, or interfere with union activities.
- Promise wage increases as a strategy for preventing the formation of unions.
- Discriminate against union members in the hiring, promoting, or managing of employees.
- Terminate union members who participate in a legal strike.

Under the law, employers are also protected from unfair labor practices that might be undertaken by a union. Examples of prohibited activities by union representatives include:

- Forcing or coercing employees to join a union or participate in union activities.
- Manipulating or interfering with the employer's process for designating its own union negotiator.
- Coercing an employer to discriminate against workers who are not union members.
- Requiring an employer to hire or pay for the services of more workers than necessary to do a job (commonly referred to as "featherbedding").
- Refusing to bargain collectively with an employer.
- Conducting an illegal strike, which is a strike undertaken in violation of the terms set forth in a collective bargaining agreement, or a strike not approved by the overseeing union.

It is up to the individual employer, union, or employee to request assistance from the NLRB in cases of unfair labor practices, or to hold an election that may unionize a job position. Complaints must be filed with the NLRB within six months of the alleged unfair activity. A representative from the NLRB will investigate the complaint. If the complaint is justified, and the parties have not taken steps to settle or withdraw the complaint, the NLRB will hold a hearing. If an unfair labor practice is found to have occurred, the NLRB will issue an order demanding that the unfair labor practice stop, and may also require the guilty

party to take steps to compensate the injured party through job reinstatement, by payment of back wages, or by reestablishing conditions that were in place before the unfair activity took place. Either party may appeal the order in federal court.

Under the NLRA, employees have the right to form unions and bargain collectively. Once a union is established, new employees hired for a specific position may be required to join the union that represents that job position. However, many states have passed "right to work" laws, which stipulate that an employee is not required to join a union if hired for a given position, even if other employees holding that position are unionized. As a manager, you should learn if your state has a "right to work" law.

For managers, a collective bargaining agreement should be treated in the same manner as any other formal contract. Its provisions should be read, understood, and followed. Membership in a union may give employees certain freedoms or conditions as part of their jobs, but employees still must be accountable for their work; and managers are still responsible for ensuring that employees perform their jobs properly, safely, and in accordance with the company's established policies and procedures. If problems do surface, a hospitality manager should consult with his or her company's designated union representative. Most CBAs have specific conditions for hiring new employees for a given position. As a manager you should review and know this segment of the CBA especially well.

ANALYZE THE SITUATION 7.3

Walter Horvath is the executive housekeeper at the Landmark Hotel. This 450-room historic property caters to leisure travelers. Occupancy at the hotel is highest on the weekends.

Like many hotels in large cities, the housekeeping staff is difficult to retain. Turnover tends to be high, and the labor market tight. Mr. Horvath works very hard to provide a work atmosphere that enhances harmony and encourages employees to stay. While he has little control over wage scales, his general manager does allow him wide latitude in setting departmental policies and procedures, as long as these do not conflict with those of the management company that operates the Landmark.

Housekeepers in Mr. Horvath's department highly prize weekends off, yet these are the busiest times for the hotel. In a staff meeting, Mr. Horvath and the housekeepers agreed to implement a policy that would give each housekeeper alternating weekends off, with the stipulation that those housekeepers who are working on weekends might be required to work overtime to finish cleaning all the rooms necessary to service the hotel's guests. The housekeepers agreed to this compromise, and the policy was written into the department's procedures section of the employee handbook, which all new housekeeping employees must read and sign prior to beginning work.

When the holiday season approaches, Mr. Horvath finds that his department is seriously understaffed. The hotel is filling to capacity nearly every weekend as guests flock to the city to do their Christmas shopping. During a job interview with Andreanna White, Mr. Horvath mentions the alternating weekend policy for housekeepers. Ms. White states that the she is the choir director for her church. "I could," she says, "miss alternating Sunday mornings, because I could arrange a substitute. Working overtime on Sundays, however, would cause me to miss both the morning and evening services, and I would not be willing to do that. I could, however, work an eight-hour day of Sundays with no problem, because then I could go to either the morning or evening service."

1. Should Mr. Horvath hire Ms. White, despite her inability to comply with the departmental policy in place at the hotel?
2. If Mr. Horvath hires Ms. White, can he still enforce the alternating weekend policy with currently employed housekeepers, who also might prefer not to work overtime on Sundays?
3. Do you believe Ms. White's choir director position warrants an exception to the departmental policy?
4. How should Mr. Horvath advertise position vacancies in the future?

▶ INTERNATIONAL SNAPSHOT

Canadian Employment Laws

If you operate a hotel anywhere in Canada, you need to consider employment-related laws in the province or territory where the hotel is located. The following is a summary of some important differences between U.S. and Canadian laws.

NO "EMPLOYMENT AT WILL"

The U.S. concept of employment at will described elsewhere in this book does not exist in Canada. In Canada, both employment standards legislation and the common law require an employer that terminates an employee's employment without just cause to provide certain entitlements.

Under employment standards legislation in each province, an employer must provide an employee notice of termination of employment or pay in lieu of notice (usually one week per year of service to a maximum of eight weeks: more for group terminations), unless the employee is terminated for willful misconduct or willful neglect of duty. Some jurisdictions also require an employer to pay severance pay in addition to providing notice. For example, in Ontario, an employee with five or more years of service with an employer that has an annual payroll of at least $2.5 million is entitled to one week's pay per year of service up to a maximum of 26 weeks.

The common law requires that an employer provide an employee "reasonable" notice of termination or pay in lieu of notice unless just cause exists, there is a clear agreement otherwise, or a union represents the employee. Reasonable notice for each employee is determined on a case-by-case basis and depends on a number of factors, such as the employee's position, age, and length of service, and the availability of similar employment elsewhere. Reasonable notice at common law almost always exceeds the notice required by applicable legislation.

PREGNANCY AND PARENTAL LEAVE

Whereas the U.S. Family and Medical Leave Act (FMLA), as further discussed in Chapter 8, requires an employer to provide an employee up to 12 weeks of unpaid leave, employment standards legislation in all Canadian jurisdictions require an employer to provide up to at least 52 weeks of pregnancy and parental leave. In addition, the right to pregnancy and parental leave applies to all employees in Canada, not just to those employed by employers with 50 or more employees (as provided by the FMLA).

DISCRIMINATION AND HARASSMENT

Prohibitions against discrimination and harassment in employment under various U.S. statutes, such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967, may be found in each province's or territory's human rights legislation (e.g., in Ontario, the Human Rights Code). Canadian human rights legislation in all jurisdictions prohibit discrimination and harassment on the basis of sex, disability, age, race, national or ethnic origin, color, religion or creed, marital status, and sexual orientation.

An employee in Canada may not file a civil action for discrimination, as is permitted in the United States. An employee may complain only to an administrative tribunal in the province he or she works, which adjudicates complaints. Administrative tribunals across Canada have wide powers to order reinstatement of employees; to require an employer to take steps to prevent discrimination and harassment and to award monetary compensation.

Monetary awards, however, are generally much lower than U.S. jury awards.

There are other significant differences between Canadian and U.S. employment laws. Local legal counsel can help to ensure that you are in compliance with all applicable laws. Other Canadian employment-related laws with which you should comply include:

- *Employment standards legislation,* which regulates minimum wages, hours of work, breaks, overtime pay, vacation and holidays with pay, entitlements on termination and leaves of absence.
- *Labor relations legislation,* which governs certification/decertification of unions and collective bargaining.
- *Occupation health and safety legislation,* which governs an employer's obligation to provide a safe workplace.
- *Statutory workers' compensation/workplace safety and insurance legislation,* which governs an employer's obligations respecting workplace injuries and accidents.
- *Pay equity and employment equity legislation,* which require equal pay for equal work and equal employment opportunities for employees.

For more information on any Canadian employment law issues, contact James R. Hassell or Patricia S.W. Ross of the Employment and Labor Law Department of Osler, Hoskin & Harcourt LLP Barristers & Solicitors, P.O. Box 50, 1 First Canadian Place, Toronto, Ontario, M5X 1B8, (416) 362-2111. Or log on to www.osler.com, Osler, Hoskin & Harcourt's Web site, which contains numerous articles on Canadian labor and employment law; to www.legis.ca, for copies of Canadian legislation; to www.info.load-otea.hrdc-drhc.gc.ca/labour_standards/provincial.shtml, for links to Ministry of Labour Web sites across Canada that provide information on employment standards, health, and safety, and labor relations; and to www.ohrc.on.ca, for Ontario's Human Rights Commission, and links to other human rights agencies across Canada.

Provided by James R. Hassell and Patricia S.W. Ross of Osler, Hoskin & Harcourt LLP, Toronto, Ontario. www.osler.com

WHAT WOULD YOU DO?

Alex Bustamante is applying for the position of executive chef at the hospital where you serve as director of human resources. The hospital has more than 800 beds, and the meal service offered to patients and visitors alike is extensive. Patients in this facility are extremely ill, and because of their weakened condition, dietary concerns are an important consideration.

While reviewing Mr. Bustamante's work history with him during an interview, he states that he was let go from his two previous positions for "excessive absence." When you inquire as to the cause of his excessive absence, Mr. Bustamante offers that it was due to the effects of alcoholism, a condition with which he has struggled for over 10 years, but for which he is currently undergoing weekend treatment and attending meetings of Alcoholics Anonymous (AA). He states that he never drank while at work, but sometimes missed work because he overslept or was too hung over to go in. His past employers will neither confirm nor deny Mr. Bustamante's problem. Both simply state that he had worked for them as an executive chef, and that he was no longer employed by their organizations.

Based on his education and experience, Mr. Bustamante is clearly the best-qualified candidate for the vacant executive chef's position. However, based on his life history, his ability to overcome his dependence on alcohol is, in your opinion, clearly questionable. Your recommendation on Mr. Bustamante's hiring will likely be accepted by the manager of dietary services.

1. Have you broken the law by inquiring into Mr. Bustamante's difficulty in prior positions?
2. Is Mr. Bustamante protected under the ADA?
3. If Mr. Bustamante were hired, but needed three days off per week to undergo treatment, would you grant that accommodation? Under what circumstances?
4. How do the rights of Mr. Bustamante's and the concept of negligent hiring mesh in this instance?

▶ THE HOSPITALITY INDUSTRY IN COURT

To understand how difficult it is to interpret and comply with antidiscrimination laws, consider the case of *Schurr v. Resorts Int'l Hotel, 196 F.3d 486 (3d Cir. 1999).*

FACTUAL SUMMARY

Karl Schurr (Schurr), a white male, worked on a part-time basis as a light and sound technician for Resorts International Hotel (Resorts), a New Jersey casino and hotel. In 1994, a full-time position became available for which Schurr applied. He was one of five applicants for the position. Resorts narrowed down the pool to Schurr and one other candidate, Ronald Boykin, a black male. Both candidates were qualified for the position and were regarded as equally qualified by Resorts.

A New Jersey law was in effect requiring all casino license holders to take affirmative action measures to ensure equal employment opportunities. In short, the regulations required the casinos in New Jersey to employee a certain percentage of women and minorities in specific job categories throughout the casino organization. The job for which Schurr and Boykin applied was in the technician category. Under the regulations, 25 percent of Resorts technicians were to be minorities. At the time Schurr and Boykin applied, only 22.25 percent of the technicians working for Resorts were minorities.

In an attempt to comply with state law and state casino regulations, the management for Resorts hired Boykin over Schurr on the basis of race. Bill Stevenson, the director of show operations and stage manager for Resorts, stated he was obligated to pick the equally qualified minority candidate in order to put Resorts in line with state employment goals. Schurr filed a complaint with the Equal Employment Opportunity Commission for discrimination on the basis of race and sued Resorts for a violation of Title VII of the Civil Rights Act of 1964.

QUESTION FOR THE COURT

The question for the court was whether the consideration of race as a factor in hiring was a remedial measure allowed under Title VII. Schurr argued the use of race as factor in hiring was a violation of Title VII. Resorts claimed the use of race was a nondiscriminatory component of its affirmative action plan designed to increase minority representation in certain job categories, hence fell under the remedial section of Title VII. The remedial aspect of Title VII was designed to cure past discrimination and inequities in minority hiring. Schurr argued Resorts affirmative action plan and the casino regulations were not based on evidence of historic or current discrimination in the casino industry.

DECISION

The court held the affirmative action plan used by Resorts and the New Jersey law violated Title VII. The plan was not based on historic or current discrimination in the casino industry or in the technician job category. Since there was no evidence of past or current discrimination, Resorts affirmative action plan was not necessary in the technician job category.

MESSAGE TO MANAGEMENT

The law in this area is extremely complex. Before implementing an affirmative action policy that discriminates on the basis of a protected class, be sure to have it thoroughly scrutinized for compliance with Title VII and current EEOC guidelines.

For a discussion of at-will employment in the state of Illinois, and a touchy discrimination case, consider the case of *Riad v. 520 South Michigan Avenue Assocs, 78 F. Supp. 2d 748 (N.D.Ill. 1999).*

FACTUAL SUMMARY

Nady Riad (Riad) was a general manager for the Congress Hotel (Congress) in Chicago, Illinois. Riad was an Egyptian-born naturalized American. He was recruited by the company managing the hotel, Hostmark Investor Limited Partnership (Hostmark), in part because of his excellent reputation in the hotel industry.

As part of the recruitment process, Riad was offered a competitive salary that included participation in an incentive bonus program. If the Congress met certain performance goals under Riad's management, he would be entitled to a fairly large bonus upon approval by the owner of the Congress. Riad accepted the position on an employee-at-will basis.

The Congress Hotel was owned by 520 S. Michigan Avenue Associates Limited (520). The majority owner of 520 was Albert Nasser (Nasser). Nasser is Jewish and was educated in Israel. Shlomo Nahmias (Nahmias) worked for 520 as the owner's representative at the Congress Hotel. Nahmias is also Jewish and was born in Israel.

During his time at the Congress, Riad improved the performance and the financial outlook of the hotel. The exact amount was disputed but the improvement was significant. Pursuant to his employment agreement, Riad believed he was entitled to and did ask for a bonus. Nahmias, acting as the owner's representative, denied his request, stating the Congress was in bankruptcy. Riad instead asked for a pay increase, which was also denied. During his tenure at the Congress Hotel, Riad never received a bonus or a pay increase despite consistently strong employment reviews.

Riad's Egyptian heritage was a possible factor in his being denied pay increases and bonuses. Nahmias made several references to Riad being an Arab managing a Jewish-owned hotel. In front of several employees, Nahmias made several derogatory comments about Riad and his Arab or Egyptian heritage. Eventually, Riad was fired from the Congress despite his excellent performance and the improved financial position of the Congress. Riad sued 520 for employment discrimination on the basis of race.

QUESTION FOR THE COURT

The questions for the court were, one, whether Riad presented sufficient direct evidence of discrimination and, two, whether Riad presented enough evidence for an indirect case of discrimination. Riad argued that Nahmias, who had the power to hire and fire hotel employees, was motivated by race in making decisions regarding Riad's employment. Nahmias and Nasser argued isolated comments about the race of an individual were not enough to show discrimination. They argued there was no connection between the statements and the decision to terminate Riad's employment.

Riad also argued there was evidence of indirect discrimination. Riad argued he was a member of a protected class, was performing his job adequately, and suffered adverse consequences. Again Nasser and Nahmias argued there was no evidence.

DECISION

The court held that Riad presented evidence of both direct and indirect discrimination. Nasser and Nahmias used Riad's race to make an employment decision and were liable to him for damages.

MESSAGE TO MANAGEMENT

Discrimination on the basis of a protected class (in this case, race) does not have a place in the hospitality industry. Establishing a proactive policy of diversity and inclusion via mutual respect can help prevent outcomes such as this one.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

Today, you cannot just hire anyone, and many different laws have been passed that affect the way in which you can legally hire and manage employees. Tools, such as written job descriptions, job qualifications, employment applications, and an established employee selection process that contains written guidelines for conducting interviews, preemployment tests, background checks, and reference checks are all used by the companies to ensure—and document—that they are selecting employees in compliance with the law.

It is illegal to discriminate against protected classes of workers in the job selection process. The Civil Rights Act of 1964 outlaws discrimination on the basis of race, color, religion, sex, or national origin. The Age Discrimination in Employment Act protects individuals 40 years old and older from discrimination based on age. The American with Disabilities Act not only protects those with disabilities from discrimination in the selection process, but also requires companies to make reasonable accommodations to facilities or job responsibilities that will permit disabled individuals to work in a given job.

A last step before assigning someone to your workforce is to ensure that he or she is eligible to be employed in the Untied States by complying with the requirements of the Immigrations Reform and Control Act.

The at-will employment doctrine defines the rights of employers and employees in most states, unless an employment contract modifies that relationship. Labor unions are associations of workers that join together to bargain as a unit with management or business ownership. Collective bargaining agreements establish the regulations and the terms that must be followed by both unionized employees and nonunion managers during the employment relationship.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Identify at least three exceptions to the at-will employment doctrine, and prepare a rationale for each exception's existence.
2. Create a description for your most recent job. Use that information to create a job qualifications list for the same job.
3. Appraise the pros and cons of refusing to supply detailed performance information about past employees to those who call for reference checks on them.
4. Use the Internet to determine the union organization in your home state or country that represents the largest number of hospitality workers.
5. Discuss the relationship between affirmative action and diversity awareness.
6. Develop your rationale for determining whether a visually impaired individual, whose sight is fully corrected by prescription glasses, falls under the protection of the ADA.
7. Create a checklist that could be used by a restaurant for complying with the requirements of the Immigration Reform and Control Act (IRCA).
8. Using the Internet, find the state or local agency that regulates child labor laws in your hometown, and compile a list of positions in the hospitality industry that could not be filed by 14- and 15-year-olds under its regulations.

▶ TEAM ACTIVITY

In teams, draft a job description for a hospitality line position (dishwasher, server, front desk agent, etc.) of your choice. List at least five qualifications the potential employee must have; then identify and list the selection tools (i.e., references, tests, drug screenings) that you would use to match the right applicant with the job described.

Chapter 8

Legally Managing Employees

The voice caught Trisha Sangus's ear as she rounded the basement stairwell and arrived at the hotel's security department offices.

"So these two guys' car breaks down . . . outside a farmhouse way in the country, see, and they go up to the door . . . "

Jon Ray, director of security, was the first one of the group of four men to see Trisha, the hotel's general manager. Jon was a retired policeman and one of the hotel's best department heads. He had done a lot to improve the safety and security of the hotel's physical assets since his arrival three years ago. Trisha knew that all of the guests were safer because of his innovative security efforts.

"Hello Ms. Sangus," Jon called out as the other three men glanced her way. Eric, the security guard who had been speaking, stopped and was now busily attempting to brush an imaginary piece of lint off his shirt. Tom, one of his co-workers, began talking somewhat loudly about the big ballgame that had been played the night before.

"Hello Tom, Eric, Leon," said Trisha as the three security staff members began to drift away from the group.

"Hi, Ms. Sangus," they replied, and then they were gone.

"Busy morning?" Trisha asked.

"The usual," Mr. Ray replied a bit offhandedly. Then, as he looked at Trisha, he stated, "Just the guys being guys. I'm sure in housekeeping the same kinds of stories are being told by their staff. You know, you can't dictate to employees what kind of jokes they like. As you know, most of my guys are ex-cops. They've seen and heard it all."

"I suppose that's true," replied Trisha slowly. "Jon, the story Eric was about to tell, do you think I would find it funny?"

"Well," Mr. Ray replied cautiously, "how can anyone be sure what amuses a person today? In my department, these guys probably would find the joke funny. Certainly not offensive. But they know better than to tell an off-color story around a lady."

"Interesting," thought Trisha as she returned to her office. She agreed with Jon. She didn't think any of his security staff would find a "farmer's daughter" joke offensive. She was also sure that none of the men would tell such a joke in the presence of a female staff person. And there had never been a complaint filed against anyone in Jon's department. On further reflection, however, Trisha realized that she, and the hotel, faced a serious problem. She picked up the telephone to call Jon.

"Jon," she began, "I'm concerned about employee safety in the hotel. As director of security, and a member of the management team, you should be concerned, too. I need you up here immediately."

"I'll come up as soon as I finish the morning report," Mr. Ray replied.

"No, Jon, not later, now!" she said firmly, as she hung up the telephone.

"I wonder what happened," thought Mr. Ray, as he hurried to Trisha's office. Whatever it was, it must have been big!

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. To differentiate between an employment agreement and an employee manual.
2. To establish a nondiscriminatory work environment.
3. To implement a procedure designed to eliminate sexual harassment and minimize the risk of penalties resulting from charges of unlawful harassment.
4. To legally manage the complex areas of employee leave, compensation, and performance.
5. To respond appropriately to unemployment claims.
6. To summarize and list the employment records that must be maintained to meet legal requirements.

8.1 EMPLOYMENT RELATIONSHIPS

▶ LEGALESE

Employment agreement: The terms of the employment relationship between an employer and employee that specifies the rights and obligations of each party to the agreement.

After you have legally selected an employee for your organization, it is a good practice to clarify the conditions of the **employment agreement** with that employee.

All employers and employees have employment agreements with each other. The agreement can be as simple as an hourly wage rate for an hour's work and at-will employment for both parties. An agreement is in place even if there is noth-

ing in writing or if work conditions have not been discussed in detail. Employment agreements may be individual, covering only one employee or, as discussed in the last chapter, they may involve groups of employees. Generally, employment agreements in the hospitality industry are established verbally or with an offer letter.

Offer Letter

Offer letters, when properly composed, can help prevent legal difficulties caused by employee or employer misunderstandings. As their name implies, offer letters detail the offer made by the employer to the employee. Some employers believe offer letters should be used only for managerial positions, but to avoid difficulties, all employees should have signed offer letters in their personnel files. Components of a sound offer letter include:

- Position offered
- Compensation included
- Benefits included (if any)
- Evaluation period and compensation review schedule
- Start date
- Location of employment
- Special conditions of the offer (e.g., at-will relationship)
- Reference to the **employee manual** as an additional source of information regarding employer policies that govern the workplace.
- Signature lines for both employer and employee

▶ **LEGALESE**

Employee manual: A document written to detail the policies, benefits, and employment practices of an employer.

Consider the case of Antonio Molina. Antonio applies for the position of maintenance foreman at a country club. He is selected for the job and is given an offer letter by the club's general manager. In the letter, a special condition of employment is that Antonio must submit to, and pass, a mandatory drug test. Though Antonio can sign the letter when it is received, his employment is not finalized until he passes the drug test.

Additional rules that Antonio will be expected to follow, or benefits that he may enjoy while on the job, will be contained in the employee manual.
minimize the risk of penalties resulting from charges of unlawful harassment.

Employee Manual

In most cases, the offer letter will not detail all of the policies and procedures to which the employer and employee agree. These are typically contained in the employee manual. The manual may be as simple as a few pages or as extensive as several hundred pages. In either case, an important point to remember is that employee manuals are often referenced by the courts to help define the terms of the employment agreement if a dispute arises. The topics covered by an employee manual will vary from one organization to another. However, some common topic areas include:

General Policies

- Probationary periods
- Performance reviews
- Disciplinary process
- Termination
- Attendance
- Drug and alcohol testing
- Uniforms
- Lockers
- Personal telephone calls
- Appearance and grooming

Compensation

- Pay periods
- Payroll deductions
- Tip-reporting requirements
- Timekeeping procedures
- Overtime pay policies
- Meal periods
- Schedule posting
- Call-in pay
- Sick pay
- Vacation pay

Benefits

- Health insurance
- Dental insurance
- Disability insurance
- Vacation accrual
- Paid holidays
- Jury duty
- Funeral leave
- Retirement programs
- Duty meals
- Leaves of absence
- Transfers
- Educational reimbursement plans

Special Areas

- Policies against harassment
- Grievance and complaint procedures
- Family medical leave information
- Dispute resolution
- Safety rules
- Security rules
- Emergency preparedness

Employee manuals should be kept up to date, and it should be clearly established that it is the employer, not the employee, who retains the right to revise the employee manual.

Many companies issue employee manuals with a signature page, where employees must verify that they have indeed read the manual. This is a good idea, as it gives proof that employees were given the opportunity to familiarize themselves with the employers' policies and procedures. It is also a good idea to use wording similar to the following on a signature page. The wording should be in a type size larger than the type surrounding it.

> *The employer reserves the right to modify, alter, or eliminate any and all of the policies and procedures contained in this manual at any time.*

An additional precaution taken by many employers is the practice of giving a written test covering the content of the employee manual before the employee begins work. The employee's test results are kept on file.

To clarify for employees that their status is "at-will," each page of the employee manual should contain the following wording at the bottom center of each page: "This is not an employment contract." A more formal statement should be placed at the beginning of the manual, such as:

> *This manual is not a contract, expressed or implied, guaranteeing employment for any specific duration. Although [the company] hopes that your employment rela-*

tionship with us will be long term, either you or the company may terminate this relationship at any time, with or without cause or notice.

The employee manual must be very carefully drafted to avoid altering the at-will employment doctrine. The document should be carefully reviewed by an employment attorney each and every time it is revised.

8.2 WORKPLACE DISCRIMINATION AND SEXUAL HARASSMENT

As noted in the last chapter, various laws prohibit discrimination on the basis of an individual's race, religion, gender, national origin, disability, age (over 40), and in some states and communities, sexual orientation.

Although the federal government has taken the lead in outlawing discrimination in employment practices, many states, and even some towns and cities, also have discrimination laws, which must be followed. In general, the state laws duplicate practices that are outlawed under federal law, such as discrimination based on race, color, national origin, and so on. It is important for a hospitality manager to know the provisions of a state civil rights law for several reasons.

Many state discrimination laws add other categories to the list of prohibited behavior, which are not covered under federal law, such as discrimination on the basis of marital status, arrest record, or sexual orientation. Also, while federal civil rights laws apply to businesses engaged in interstate commerce (which includes most restaurants and hotels), many state laws extend to other types of businesses, such as bars, taverns, stores, and "places of public accommodation." State discrimination laws are enforced by state civil rights agencies, which can assess severe penalties to businesses found in violation of the law. These penalties could include fines, prison terms, or both.

Some companies may also expand the protections that their workers receive under the law. As you saw in Chapter 1, "Prevention Philosophy," Hyatt's policy on conduct and ethics clearly states that its employees will not be discriminated against on the basis of their sexual preference. Since Hyatt Hotels are operated in many states and communities where the law does not prohibit Hyatt from discriminating on the basis of one's sexual preference, Hyatt has voluntarily broadened the protections for its workforce.

These prohibitions of discrimination in the employment area apply when selecting employees for a given job, as well as after they have been hired. With such a wide diversity of employees in the hospitality industry, it is not surprising that a variety of attitudes about work, family, and fellow employees will also exist. Managers cannot dictate conformity in all areas of their employees' value systems. However, as a manager, you are required to prevent discrimination by your staff, co-workers, and even third parties, such as guests and suppliers.

Preventing Discrimination

Workplace discrimination is enforced by the Equal Opportunity Employment Commission (EEOC). Applicants and employees can bring claims of discrimination to the EEOC and/or their state's counterpart to the EEOC (e.g., the Texas Commission on Human Rights), which will investigate the charges and issue a determination of whether they believe discrimination has occurred. It is important to keep in mind that if a discrimination charge is filed, the EEOC has the authority to examine all policies and practices in a business for violations, not just the circumstances surrounding a particular incident. If there is sufficient evidence of discrimination, the EEOC will first work with employers to correct any problems and try to voluntarily settle a case before it reaches the courts.

If a settlement cannot be worked out, the EEOC may file a lawsuit on behalf of the claimant or issue the claimant a right-to-sue letter. If the EEOC does not determine that unlawful discrimination occurred, then the claimant may accept that finding or privately pursue a lawsuit against the employer.

Penalties for violating Title VII can be severe. Plaintiffs have the right to recover back wages, future wages, the value of lost fringe benefits, other compensatory damages, attorneys' fees, as well as injunctive relief such as reinstatement of their job and the restoration of their seniority. In addition, federal fines for violating Title VII can be up to $50,000 (for businesses with fewer than 100 employees) to $300,000 (for corporations with 500 employees or more).

As we have stressed repeatedly, the best way to avoid litigation is by preventing incidents before they occur. Where discrimination is concerned, this involves making sure that your company's policies, and your own actions as a manager, do not adversely impact members of a protected class.

Some of the more common areas of potential conflict in the hospitality industry concern matters of appearance and language. For example, employers are permitted to require their employees to wear uniforms or adhere to certain common grooming standards (such as restrictions on hair length or wearing jewelry), provided that all employees are subject to these requirements and that the policies are established for a necessary business reason. While the courts have not outlawed the establishment of "English-only" rules in business, lawsuits have occurred when such companies discriminate against people who have pronounced accents or who do not speak English fluently, especially in job positions where speaking English would not be considered a bona fide occupational qualification.

Managing Diversity

Beyond preventing acts of overt discrimination, managers have a legal obligation to establish a work environment that is accepting of all people. The failure to establish such an environment is recognized by the courts to be a form of discrimination. Racial slurs, ethnic jokes, and other practices that might be offensive to an employee should not be tolerated.

As a manager, your ability to effectively work with people from diverse backgrounds will significantly affect your success. According to Gene M. Monteagudo, former manager of diversity for Hyatt Hotels International, "It is no longer possible to achieve success in the hospitality industry, either in the United States or abroad, unless you can effectively manage people in a cultural environment vastly different from your own."

Recognition of the differences among individuals is the first step toward effectively managing these differences. This can be confusing in a society that increasingly equates equality with correctness. The truth is that people are different in many cultural aspects; however, it is also true that "we do not have to be twins to be brothers." In other words, just because we are equal under the law does not mean that we are the same.

One of the great myths of management today is that, because workers are equal under the law, all workers must be treated exactly the same. This is simply wrong. The effective manager treats people equitably, not uniformly. If one worker enjoys showing pictures of her grandchildren to a unit manager, it is okay for that manager to show an interest in them. If another worker prefers privacy, it is equally acceptable for the manager not to ask that employee about his or her grandchildren. Is this more complicated than treating both workers exactly the same? Of course it is. And it may be considered confusing by some. The key to remember here, however, is that the unit manager, by recognizing the real differences between the two employees, and acting on those differences accord-

ingly, is treating them both equitably. That is, they are both being treated with respect for their own system of cultural values.

As you consider the diversity issue in greater detail, you will realize that the recognition of cultural differences is not a form of racism at all, but rather the first step toward harmony. The true racist is not the person who notices real cultural differences, but rather the person who ignores them. The culturally unaware foodservice manager who does not recognize, for example, the uniqueness and importance of the Asian worker's culture, denigrates that culture in much the same way as the individual who is openly critical of it. In the hospitality industry, the management of cultural diversity and the inclusion of all people in all aspects of the business will remain an important fact of operational and legal life.

Sexual Harassment

By their very nature, hospitality organizations are vulnerable to allegations of sexual harassment. Because this is true, it has become increasingly important that managers be informed about the attitudes and conduct that fall under the classification of sexual harassment. Currently, federal and state law recognizes two types of sexual harassment:

- **Quid pro quo** sexual harassment, in which the perpetrator asks for sexual favors in exchange for workplace benefits from a subordinate, or punishes the subordinate for rejecting the offer.
- Hostile environment harassment, in which the perpetrator, through language or conduct, creates an intimidating or hostile working environment for individuals of a particular gender. In a subtler way, this also occurs when "freezing out" tactics are used against employees or when employees are shunned or relegated to an outer office or desk with little or nothing to do, thus inhibiting all communication.

▶ **LEGALESE**

Quid pro quo: Latin term for "giving one thing in return or exchange for another."

Title VII of the federal Civil Rights Act, as amended in 1972, prohibits sexual harassment in the workplace. The penalties for violating sexual harassment laws are the same as those for other types of civil rights violations. Claimants can recover lost wages, benefits, and attorneys' fees, and can be reinstated in their jobs. Many states have also adopted laws to protect employees from sexual harassment, which may carry additional fines or penalties.

Employer Liability

Behavior that once may have been tolerated in the workplace is no longer acceptable. The result has been an explosion of sexual harassment claims, pitting employee against supervisor, employee against another employee, women versus men, men versus women, and even same-sex complaints.

In an important decision for employers, on June 26, 1998, the United States Supreme Court, in the case of *Faragher v. City of Boca Raton*, ruled on the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e, for the acts of a supervisory employee whose sexual harassment of subordinates created a hostile work environment amounting to employment discrimination.

The court held that an "employer is subject to **vicarious liability** to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." In this case, the court found that "uninvited and offensive touching," "lewd remarks," or "speaking of women in offensive terms" was enough to create a hostile employment environment.

▶ **LEGALESE**

Vicarious liability: A party's responsibility for the acts of another that result in an injury, harm, or damage. (See also *respondeat superior*.)

The court then determined that if this type of harassment occurs by a supervisor, the employer may avoid liability by raising an affirmative defense, if the following necessary elements are met:

- The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior.
- The plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The court also held that if a supervisor's harassment ultimately results in a tangible employment action, such as an employee's termination, demotion, or reassignment, the employer is not entitled to claim the affirmative defense just described, and the employer will be held strictly liable for any acts of sexual harassment by its supervisors.

The result of this ruling is that the main, and oftentimes only, legal defense for supervisors to allegations of sexual harassment is to demonstrate a history of preventive and corrective measures. Therefore, it is crucial that every hospitality employer have, at a minimum, an employee manual that outlines the company's sexual harassment policy. This policy should be reviewed by an attorney to determine if it is legally sufficient.

Zero Tolerance

In order to guard against the liability that results from charges of discrimination or harassment, and to ensure a quality workplace for all employees, hospitality organizations should institute a policy of zero (no) tolerance of objectionable behavior. Listed here are some of the measures that companies institute to create a zero tolerance environment.

- Clear policies that prohibit sexual harassment in the workplace.
- Workshops to train supervisors and staff how to recognize potentially volatile situations and how to minimize potentially unpleasant consequences.
- Provisions and avenues for seeking and receiving relief from offensive and unwanted behavior.
- Written procedures for reporting incidents and for investigating and bringing grievances to closure.

Of course, employers should not develop a zero tolerance policy of harassment merely to avoid lawsuits. However, by creating a clear policy statement that includes severe penalties for violation, companies can demonstrate a good-faith effort to promote a safe, fair work environment. An effective sexual harassment policy should include the following:

- A statement that the organization advocates and supports unequivocally a zero tolerance standard when it comes to sexual harassment.
- A definition of the terms and behaviors discussed in the statement.
- A description of acceptable and unacceptable behaviors; that is, no sexually suggestive photographs, jokes, vulgar language, or the like.
- An explanation of the reasons for the existing policy.
- A discussion of the consequences for unacceptable behavior. (You should probably list sexual harassment as a punishable offense in all company handbooks and manuals. Types of disciplinary action available to the company should be stated as consequences for sexual harassment or hostile environment offenses.)
- Specific identification of the complaint procedures to be followed by an employee.

- Several avenues for relief or ways to bring a complaint or concern(s) to the attention of management. (If all grievances must be cleared through the supervisor and he or she is the culprit, you have not helped.)
- Identification, by name, of the employer representative to whom complaints should be reported. This should be to someone who is not in an employee's chain of command. With the current state of the law, it is preferred to direct complaints to the personnel or human resources manager, with an alternative reporting procedure for employees in that department.
- A clear statement that all complaints and investigations will be treated with confidence. All investigative materials should be maintained in separate files with very limited and restricted access.
- A clear statement that the employer prohibits all forms of harassment and that any complaints by employees of other forms of harassment based upon any protected category will be addressed under the antiharassment policy.

Although a policy statement is a good beginning, it will not be effective unless it is adopted by managers and communicated to all employees. Most companies reprint their policy on sexual harassment in their employee manual. Other companies have taken additional steps: posting the policy in common areas, such as in lunchrooms and on bulletin boards, and discussing the policy at new employee orientations and other personnel meetings.

A training program is one of the most effective ways an employer can foster a safe working environment and ensure compliance with the law. All employees should participate in a sexual harassment training program, initially during orientation and thereafter on a regular basis. Some of the most effective training techniques include role-playing exercises, group and panel discussions, videos, behavior modeling, and sensitivity training. It is also important that employees become fully familiar with the avenues for seeking relief, should they ever feel uncomfortable because of someone else's behavior. Employees with any kind of supervisory responsibility should be trained to identify circumstances that could be perceived as harassment, and understand both the company's policy and their role in preventing unwelcome behavior and responding seriously to any complaints.

While training is important, it is even more important to evaluate the effects of training. This can be done by administering tests to employees before and after they participate in a training program, and keeping the results, as well as documenting the number of harassment complaints received and noting whether they have gone up or down. If the feedback shows that a training program is ineffective, change the program. If the feedback shows that an individual was unable to learn the demonstrated skills or follow company guidelines, then either retrain or terminate the employee; otherwise, you may risk a negligent retention claim, because based on the feedback you received, you should have known that this employee would violate company standards or regulations. A jury might conclude that termination of the employee would have prevented the incident that prompted the lawsuit.

Opposing attorneys will not walk away from a case just because you have a policy in place and state that training has occurred. They will want to see that training did in fact occur, what kind of training it was, and whether or not the training was effective. In order to win a lawsuit that accuses you of ineffective training, you must be able to document a training "trail" and be able to show those materials to a jury. Keep records of every seminar and workshop that is conducted and note the people who attended. If you used supporting materials such as videos or handouts, keep copies of them. If you solicited feedback after the workshop in the form of test results or employee evaluations, keep them on file. Why? Because, unfortunately, it is rarely the truth that wins lawsuits; it is usually the evidence that prevails.

ANALYZE THE SITUATION 8.1

Joseph Harper was a cook at the HillsTop resort hotel. He was 61 years old, and had been employed by the resort for over 25 years. Sandra Shana was the new human resources director for the facility. As part of her duties, Ms. Shana conducted the hotel's sexual harassment training program for all new employees, as well as management. The training sessions used up-to-date material provided by the resort's national trade association, and Sandra worked hard to evaluate the effectiveness of the training for both employees and management.

Mr. Harper attended three training sessions in the space of five years. When he was approached by Ms. Shana to schedule another training session he stated, "I don't know why I have to go through this again. It's nonsense and a waste of time. I have gone three times, and it's dumber each time I attend!" Mr. Harper had been heard to make similar comments each time he attended the training sessions, and once even challenged the trainers about the "political correctness" of the training. In addition, he had been heard making similar comments in the employee breakroom while other employees were in the room. No staff member of the resort had ever formally accused Mr. Harper of sexual harassment, however. The HillsTop resort stated in its employee manual that is an "at-will" employer.

1. As the human resources director, would you recommend either the discipline or termination of Mr. Harper based on his comments?
2. If the resort, and Mr. Harper specifically, were named in a guest-initiated lawsuit alleging harassment, and found liable, would you recommend disciplinary action against the human resources director or the resort's general manager for failing to act?
3. Does Mr. Harper have the right to openly express his opinion about the resort's harassment training while at work?

Investigating a Complaint

Unfortunately, even the most thorough prevention effort will not preclude all offensive behaviors. You must, therefore, have a procedure in place to deal with these incidents. This procedure must be strictly followed. Employees must be confident that they can come forward with their concerns without fear of ridicule, retaliation, or job loss.

When a complaint is lodged, or when inappropriate activity is brought to the attention of management, the employer should act immediately. At the time of the complaint, the employer should obtain the claimant's permission to start an investigation. Written consent forms, such as the one displayed in Figure 8.1 are recommended. Note that the form asks for permission to disclose the information to third parties, if necessary, so that a thorough investigation can be conducted.

Often, the circumstances surrounding a claim of sexual harassment are very personal. There are occasions when an employee may launch a complaint, then later change his or her mind or ask if the investigation can be conducted under certain conditions. As a manager, you need to be sensitive to an employee's emotions, but you must not allow them to interfere with a company's established investigation policies. Employees have the right to withdraw a complaint, but if they do so, you should have them sign a form, such as the one shown in Figure 8.2, stating that they no longer wish to pursue the matter and that they are comfortable having no further action taken.

In some situations, it may be necessary to pursue action, in spite of the employee's refusal to continue. For example, the facts brought to management's attention might be so serious that a company would need to consider taking some sort of immediate remedial action, such as the suspension or termination of the alleged harasser. Failure to do so could subject the company to liability for keeping the individual if he or she acts inappropriately again and management could not intervene. It is important to remember that just because an employee does not

Investigation Consent Form

I. Name: _____

II. Position and Title: _____

III. Facts of Situation (attach as many pages as necessary):

_____

_____

_____

_____

_____

_____

IV. I hereby request that the company investigate the facts set forth above. I also authorize the company to disclose as much of the facts set forth above as necessary to pursue the investigation. I also understand and acknowledge that the company shall use due diligence in keeping this matter as confidential as possible. I recognize, however, that in the course of the investigation the information may need to become public to do a thorough investigation.

Signature _____ Date _____

Employee

Figure 8.1 Investigation consent form.

Request for No Further Action

I. Name: _____

II. Position and Title: _____

On the ____ day of _____ 200__, I previously completed a consent form which, among other things, requested that the company investigate certain facts stated by me, a copy of which is attached to this document. I have now decided that it would not be in my best interest to pursue this matter, and am comfortable with my environment in the workplace, as it presently exists. I have been made aware that in the event that I become uncomfortable, I can seek the assistance and support of the company at any time, and have been encouraged to do so. At this time, however, I am requesting that at least for my benefit, no further action be taken in this regard, and I fully understand that an investigation for my benefit shall not take place. I do understand, however, that the company, after having been made aware of these circumstances, may elect to pursue an investigation on its own behalf and for the benefit of other employees.

Signature _____ Date _____

Employee

Figure 8.2 Request for no further action.

agree to formally complain or to follow through on a complaint, the employer is not relieved from the responsibility of providing a safe working environment.

If the complainant takes the position that the mere presence of the alleged harasser causes anxiety and distress, do not as an interim measure transfer that employee to another job or position. Suggest a couple of days off with pay while you investigate the complaint. A transfer tends to undermine the confidence of the victim, particularly after being told that there would be no retaliation for bringing the concern to the attention of management.

If you choose to undertake an investigation, be sure to do so thoroughly. An ineffective investigation could subject you to legal liability just as if no such investigation took place. When conducting an investigation, employers should exercise discretion in selecting the employees who will be interviewed. It is advisable to confine the investigation to the circle of the alleged victim's immediate co-workers who witnessed the incident or who were privy to the claimant's situation and confidence. The objective is to garner as much information as possible in order to conduct an even-handed and fair investigation. The questions contained in Figure 8.3 are a few that you might want to consider asking those who are not directly involved in an allegation. Interviewers should be tactful and alert to the interviewees' attitude, and be cognizant of their relationship with the victim as well as the alleged harasser. Witnesses should be reminded of the sensitive nature of the investigation and of the importance of maintaining confidentiality. Always conduct the interviews in private. The results should be discussed with the accused in a nonthreatening manner. To maintain the integrity of the process, individuals identified by the accused who might be able to disprove the allegations should be contacted and interviewed.

At all times, the investigation should be carefully and accurately documented. Conversations and interviews with witnesses should be recorded in writing, and whenever possible, signed statements should be obtained. A record of the decision made after the investigation should also be on file. References to the claim should not, however, appear in a personnel file, unless the offender has been issued a disciplinary action after a thorough investigation. A separate investigation file should be kept, and that file should be retained for as long as the statute of limitations on sexual harassment claims specifies. (That period can be as long as two years from the date an incident has occurred.)

1. Have you noticed any behavior that makes people uncomfortable in the workplace?
2. Did it involve sexual or ethnic matters? Would you mind sharing with me who was involved?
3. What is the general atmosphere of the work environment?
4. Do you consider any employees or supervisors to be chronic complainers?
5. Do you think some people are treated differently from others for reasons that are not job-related?
6. Do you feel as if any employees receive the benefit of favoritism for reasons other than job performance?
7. Have you noticed any personality conflicts?
8. Will you let me know if you think of anything else?

Figure 8.3 Possible questions for interviewees not directly involved. (Adapted from Jossem Jared, "Investigating Sexual Harassment," in *Litigating the Sexual Harassment Case*, the American Bar Association, 1994.

Resolving a Complaint

In order to avoid liability, an employer must offer evidence that a complaint of sexual harassment was investigated thoroughly and that the employer undertook prompt remedial action to end the harassing conduct. The Equal Employment Opportunity Commission (EEOC) recognizes effective remedial action to include the following:

1. Prompt and thorough investigation of complaints.
2. Immediate corrective action that effectively ends the harassment.
3. Provision of a remedy to complainants for such harassment (e.g., restoring lost wages and benefits).
4. Preventive measures against future recurrences.

Should the results of an investigation remain inconclusive, or if, after an investigation, no corrective or preventative actions are taken, the victim has the right to file a lawsuit against the employer. On the other hand, if an employer punishes an accused harasser without having conclusive evidence to back up a claim, the alleged harasser has the right to file a defamation lawsuit or an invasion of privacy action against the employer. If the results of an investigation prove inconclusive, the best actions to take are to: advise the alleged harasser that the investigation was inconclusive, inform all employees of the organization's zero tolerance policy of sexual harassment, spell out the consequences for failure to abide by that policy, and conduct sensitivity training programs. If there is a resolution to the investigation, have the complainant sign a resolution form, if possible, such as the one shown in Figure 8.4.

Resolution of Complaint

I. Name:_____

II. Position and Title: _____

III. On the ____ day of _____ , 200 __ , I previously completed a form, which alleged facts regarding the environment in the workplace, a copy of which is attached to this document. I have been made aware of the results of the investigation by the company, as well as its proposed resolution of this matter, which I understand to be as follows:

(i). The alleged harasser shall undergo sensitivity training.

(ii). The alleged harasser shall be suspended without pay for five (5) days beginning on the ____ day of _____ and ending on the ____ day of ____, 200__.

(iii). It is agreed by both parties that the alleged harasser shall return to work at the time stated above, but only after having undergone the sensitivity training.

I am satisfied with the resolution as set forth above, and understand fully that in the event the matter is not completely resolved by the foregoing actions, I have been encouraged to bring my concerns to the company for immediate attention.

Signature _____ Date _____

Employee

Figure 8.4 Resolution of complaint form.

Third-Party Harassment

Third-party sexual harassment occurs when someone outside the workforce harasses an employee or is harassed by an employee. Some examples might be a supplier harassing an employee, a guest harassing an employee, or an employee harassing a guest. In the case of *EEOC v. Sage Realty Corporation*, a federal court in New York held the real estate company responsible when one of its employees violated federal law by terminating a female lobby attendant who refused to wear a uniform that she considered too revealing. She felt that wearing the uniform had caused her to be the victim of lewd comments and sexual propositions from customers and the general public.

In the hospitality industry, where the interaction between guests and employees is a critical component of the business, the risks of third-party harassment are especially great. The adage "the customer is always right" does not extend to harassment. The law clearly states that employees do not have to tolerate, nor should they be subjected to, offensive behavior. This means that employers have a responsibility to protect their employees from third-party harassment.

This is especially troublesome when one considers that managers have limited control over guests, and that it is a natural desire to want to hold on to the customers' business and goodwill. From a legal and practical perspective, however, employees should know that they have the right to speak up when they are subject to unwelcome behavior, and managers should act quickly and reasonably to resolve any situations that do occur.

Liability Insurance

It is important to remember that zero tolerance does not necessarily mean zero claims of harassment. Incidents will occur. Because this is true, employers, especially in the hospitality industry, should purchase liability insurance that includes coverage for illegal acts of discrimination, including internal and third-party sexual harassment. This coverage is not provided in ordinary liability insurance policies; it must be specifically requested. The insurance should cover the liability for acts of the employer, acts of the employees, and any damages that may not be covered by workers' compensation policies.

8.3 FAMILY AND MEDICAL LEAVE ACT

A fairly recent, but highly significant, piece of federal legislation that greatly impacts managing people in the hospitality industry is the Family and Medical Leave Act of 1993 (FMLA). The U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division, administers and enforces the FMLA. The FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave each year for specified family and medical reasons. The FMLA applies to all government workers and private sector employers that employ 50 or more employees within a 75-mile radius. It is important to note that the 50 employees need not all work at the same location. For example, a multiunit operator whose total workforce equals or exceeds 50 employees within a 75-mile radius is covered by the act.

To be eligible for FMLA benefits, an employee must have worked for the employer for a total of at least 12 months and have worked at least 1,250 hours over the previous 12 months. A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave for:

1. The birth or placement of a child for adoption or foster care.
2. The care of an immediate family member (spouse, child, or parent) with a serious health condition.

3. Medical leave when the employee is unable to work because of a serious health condition.

Spouses who work for the same employer are jointly entitled to a combined total of 12 workweeks of family leave for the birth or placement of a child for adoption or foster care, and to care for a parent (not a parent-in-law) who has a serious health condition.

Under some circumstances, employees may take FMLA leave intermittently—which means taking leaves in blocks of time or reducing their normal weekly or daily work schedule. FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member or because the employee is seriously ill and unable to work.

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave, if the insurance was provided before the leave was taken, and on the same terms as if the employee had continued to work. In most cases, the employee is required to pay his or her share of health insurance premiums while on leave.

Upon return from FMLA leave, an employee must be restored to his or her original job or an equivalent one. An equivalent job need not consist of exactly the same hours but must include the same pay and level of responsibility. Some exceptions are made under the law, especially for salaried or "key" staff personnel.

Employees seeking to use FMLA leave may be required to provide:

- Thirty-day advance notice of the need to take FMLA leave, when the need is foreseeable.
- Medical certifications supporting the need for leave due to a serious health condition.
- Second or third medical opinions, if requested by and paid for by the employer.
- Periodic reports during FMLA leave regarding the employee's status and intent to return to work.

Covered employers must post a notice approved by the secretary of labor explaining rights and responsibilities under the FMLA. An employer that willfully violates this posting requirement may be subject to a fine of up to $100 for each separate offense. Also, employers must inform employees of their rights under the FMLA. This information can be included in an employee manual, when one exists. In some cases, provisions for leaves of absence are also part of a labor union's collective bargaining agreement, and managers should be aware of those provisions.

8.4 COMPENSATION

Generally, employers are free to establish wages and salaries as they see fit. In some cases, however, the law affects the wage relationship between employer and employee. For example, the Equal Pay Act, passed in 1963 by the federal government, provides that equal pay must be paid to men and women for equal work, if the jobs they perform require "equal" skill, effort, and responsibility, and are performed under similar working conditions. An employee's gender, personal situation, or financial status cannot serve as a basis for making wage determinations. In addition to equal pay for equal work, there are a variety of other laws that regulate how much an employer must pay its employees. In the hospitality industry, these laws have a broad impact.

Minimum Wage and Overtime

As mentioned in the previous chapter, the Fair Labor Standards Act (FLSA) established child labor standards in the United States. In addition, it established the

▶ **LEGALESE**

Minimum wage: The least amount of wages that an employee covered by the FLSA or state law may be paid by his or her employer.

minimum wage that must be paid to covered employees, as well as wage rates that must be paid for working overtime. The FLSA applies to all businesses that have employees who are engaged in producing, handling, selling, or working on goods that have been moved in or manufactured for interstate commerce. Some, but not many, hospitality operations may be too small to be covered under the FLSA. To be sure, a small business owner should check with the local offices of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor, Wage and Hour Division.

The minimum wage is established and periodically revised by Congress. Nearly all hospitality employees are covered by the minimum wage, but there are some exceptions. The FLSA allows an employer to pay an employee who is under 20 years of age a training wage, which is below the standard minimum, for the first 90 consecutive calendar days of employment. Also, tipped employees can be paid a rate below the minimum, if the tips they report plus the wages received from the employer equal or exceed the minimum hourly rate.

Some states have also established their own minimum wages. In those states, employees are covered by the law most favorable to them (in other words, whichever wage is higher, state or federal). The differences in state laws can be significant. Compare the current federal minimum compensation provisions in Figure 8.5 with those of several other states. You can see that each state has a great deal of latitude in enacting its own wage and overtime laws.

The FLSA does not limit the number of hours in a day or days in a week an employee over the age of 16 may work. Employers may require an employee to work more than 40 hours per week. However, under the FLSA, covered employees must be paid at least one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek.

Some employees are exempt from the overtime provision of the FLSA. These include salaried professional, administrative, or executive employees. In 2004, the DOL issued new guidelines for overtime eligibility. Go to www.dol.gov/esa/regs/compliance/whd/fairpay/seminar.htm for the most current information on eligibility and potential exemptions.

Wage and Hour Division investigators stationed throughout the country carry out enforcement of the FLSA. When investigators encounter violations, they

State	Minimum Wage	Overtime Hours	Tip Credit	Rest Breaks
Federal	$5.15/hour regular rate	1.5 times	$3.02/hour	None required
Oregon	$6.50/hour regular rate	1.5 times	None Allowed	10 minutes per 4 hours worked
South Carolina	No state law	No state law	No state law	No state law
Vermont	$5.25/hour	1.5 times, but hotels and restaurants are exempt	3.02/hour	No state law

Remember that whenever a state law or regulation is different from the federal law or regulation, the law or regulation most favorable to the employee must be followed.

Figure 8.5 Variances in federal and state compensation provisions.

recommend changes in employment practices in order to bring the employer into compliance, and may require the payment of any back wages due employees. Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to civil penalties of up to $1,000 per violation. Employees may also bring suit, when the Department of Labor has not, for back pay, and other compensatory damages, including attorney's fees and court costs.

◀ SEARCH THE WEB 8.1 ▶

Log on to the Internet and enter **www.dol.gov**.

1. Select: Search.
2. Enter: State Minimum Wages in the search box.
3. Select: Minimum Wage Laws in the States from the search results.
4. Select: The state where you live or go to school.
5. Identify the minimum wage rate for workers in your state.
6. Identify the overtime provisions (referred to as premium pay) for workers in your state.
7. Identify any exemptions or exceptions that relate to the hospitality industry.

Because the minimum wage and the laws related to it change on a regular basis, it is a good idea to regularly contact your local office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor, Employment Standards Administration, for legal updates.

Tipped Employees

The hospitality industry employs a large number of individuals who customarily receive **tips** in conjunction with their work duties. Some employees, such as hotel housekeepers, may receive tips only occasionally. Food servers, on the other hand, often receive more income in tips than their employer pays them in wages.

▶ LEGALESE

Tip: A gratuity given in exchange for a service performed. Literally an acronym for "**t**o **i**mprove **s**ervice."

The FLSA defines a tipped employee as one whose monthly tips exceed the minimum established by the Wage and Hour Division of the Department of Labor. Tips received by such employees may be counted as wages up to 50 percent of the minimum wage. The Wage and Hour Division also determines the minimum cash wage that employers must pay to tipped employees. If an employee's hourly tip earnings (averaged weekly) added to this hourly wage do not equal the minimum wage, the employer is responsible for paying the balance.

Consider the case of Lawson Odde. Lawson is employed in a state that has a minimum wage of $6.00 per hour. Under the law, his employer is allowed to consider Lawson's tips as part of his wages, thus the employer is required to pay Lawson only $3.00 per hour, and take a **tip credit** for the other 50 percent of the wages needed to comply with the law.

▶ LEGALESE

Tip credit: The amount an employer is allowed to consider as a supplement to employer-paid wages in meeting the requirements of applicable minimum wage laws.

Like the minimum wage and the requirements for overtime pay, state laws regarding tipped employees and allowable tip credits can also vary. Figure 8.5 details some selected differences in how state and federal laws consider tip credits. It is important to remember that because tips are given to employees, and not employers, the law carefully regulates the influence that you, as an employer, have over these funds. In fact, if an employer takes control of the tips an employee receives, that employer will not be allowed to utilize the tip credit provisions of the FLSA.

LEGALLY MANAGING AT WORK:
Calculating Overtime Pay for Tipped Employees

Tipped employees are generally subject to the overtime provisions of the FLSA. The computation of the overtime rate for tipped employees when the employer claims a tax credit can be confusing to some managers. Consider, for example, a state in which the minimum wage is $6.00 per hour and the applicable overtime provision dictates payment of one and one-half the normal hours rate for hours worked in excess of 40 hours per week. To determine the overtime rate of pay, use the following three-step method.

1. Multiply the prevailing minimum wage rate by 1.5.
2. Compute the allowable tip credit against the standard hourly rate.
3. Subtract the number in step 2 from the result in step 1.

Thus, if the minimum wage were $6.00 per hour and the allowable tip credit were 50 percent, the overtime rate to be paid would be computed as:

1. $6.00 × 1.5 = $9.00
2. $6.00 × .50 = $3.00
3. $9.00 − 3.00 = $6.00 overtime rate ◀

Tip Pooling

In some hospitality businesses, employees routinely share tips. Consider, for example, the table busser whose job includes refilling water glasses at a fine dining establishment. If a guest leaves a tip on the table, the size of that tip would certainly have been influenced by the attentiveness of the busser assigned to that table. The FLSA does not prohibit tip pooling, but it is an area that employers should approach with extreme caution. A tip, by its nature, is given to an employee, not the employer. In that way, a tip is different from a **service charge** that is collected from the guest by the employer and distributed in the manner deemed best by the employer.

▶ **LEGALESE**
Service charge: An amount added to a guest's bill in exchange for services provided.

Generally speaking, when a tip is given directly to an employee, management has no control over what that employee will ultimately do with the tip. An exception to this principle is the **tip-pooling** arrangement.

▶ **LEGALESE**
Tip pooling: An arrangement whereby service providers share their tips with each other on a predetermined basis.

Tip pooling is a complex area, because the logistics of providing hospitality services is sometimes complex. When a member of the waitstaff clears a table, resets it, serves guests by him- or herself, and then again clears the table, the question of who should benefit from a customer's a tip is straightforward. When, however, a hostess seats a guest, a busser—who has previously set the table—provides water and bread, a bartender provides drinks, and a member of the waitstaff delivers drinks and food to the table, the question of who deserves a portion of the tip can become perplexing.

Employers are free to assist employees in developing a tip-pooling arrangement that is fair, based on the specific duties of each position in the service area. This participation should be documented in the employee's personnel file. The tip-pooling consent form should include the information presented in Figure 8.6.

In a tip-pooling arrangement, employees cannot be required to share their tips with employees who do not customarily receive tips. This includes positions such as janitor, dishwashers, and cooks. Also, the Department of Labor will allow an employer whose employees are tipped on a credit card to reduce the credit card tips by an amount equal to the charges levied by the credit card company. Because it involves compensation, even well-constructed, voluntary tip-pooling arrangements can be a source of employee conflict. In addition, state laws in this field do vary, so it is a good idea to check with your state trade association or Wage and Hour Division regulator to determine the regulations that apply in your own area.

Tip-Pooling Consent Form

1. Employee name
2. Date
3. A complete explanation of the facility's tip-pooling policy
4. The statement: "I understand the tip-pooling procedures and procedures stated above, and agree to participate in the tip-pooling and redistribution program."
5. Employee signature line below the preceding statement

Figure 8.6 Tip-pooling consent form.

ANALYZE THE SITUATION 8.2

Stephen Rossenwasser was hired as a busser by the Sportsman's Fishing Club. This private club served its members lunch and dinner, as well as alcoholic beverages. Stephen's duties were to clear tables, replenish water glasses, and reset tables for the waitstaff when guests had finished their meals. Stephen's employer paid a wage rate below the minimum wage, because they utilized the tip credit portion of the FLSA minimum wage law.

When he was hired, Stephen read the tip-pooling policy in place at the club and signed a document stating that he understood it and voluntarily agreed to participate in it. The policy stated that, "All food and beverage tips are to be combined at the end of each meal period, and then distributed, with bussers received 20 percent of all tip income."

John Granberry, an attorney, was a club member, and a guest who enjoyed dining in Stephen's assigned section, because Stephen was attentive and quick to respond to any guest's needs. Mr. Granberry tipped well, and the dining room staff was aware that Mr. Granberry always requested to be seated in Stephen's section.

One day after Mr. Granberry had finished his meal, had added his generous tip to his credit card charge slip, and had begun to depart, he stopped Stephen in the lobby of the club, and gave him a $20 bill, with the words, "This is for you. Keep up the good work." A club bartender observed the exchange.

Stephen did not place Mr. Granberry's tip into the tip pool, stating that the gratuity was clearly meant for him alone. Stephen's supervisor demanded that Stephen contribute the tip to the pool. Stephen refused.

1. Is Stephen obligated to place Mr. Granberry's tip into the tip pool?
2. If Stephen continues to refuse to relinquish the tip, what steps, if any, can management take to force him to do so?
3. Can Stephen voluntarily withdraw from the tip-pool arrangement and still maintain his club employment?

Taxes and Credits

Employers are required to pay taxes on the compensation they pay employees and to withhold taxes from the wages of employees. Federal and state statutes govern the types and amounts of compensation taxes that must be paid or withheld. In some cases, tax breaks, called credits, are granted to employers or employees. While these taxes and credits can change, the most important employee taxes are the following:

Income Tax: Employers are required to withhold state and federal income taxes from the paychecks of nearly all employees. These taxes are paid by the employee, but collected by the employer and forwarded to the Internal Revenue Service (IRS) and state taxation agency. The amount that is to be withheld is based on the wage rate paid to the employee and the number of

2004 Form W-5

Department of the Treasury
Internal Revenue Service

Instructions

Purpose of Form

Use Form W-5 if you are eligible to get part of the EIC in advance with your pay and choose to do so. See **Who Is Eligible To Get Advance EIC Payments?** below. The amount you can get in advance generally depends on your wages. If you are married, the amount of your advance EIC payments also depends on whether your spouse has filed a Form W-5 with his or her employer. However, your employer cannot give you more than $1,563 throughout 2004 with your pay. You will get the rest of any EIC you are entitled to when you file your tax return and claim the EIC.

If you do not choose to get advance payments, you can still claim the EIC on your 2004 tax return.

What Is the EIC?

The EIC is a credit for certain workers. It reduces the tax you owe. It may give you a refund even if you do not owe any tax.

Who Is Eligible To Get Advance EIC Payments?

You are eligible to get advance EIC payments if **all three** of the following apply.

1. You expect to have at least one qualifying child. If you do not expect to have a qualifying child, you may still be eligible for the EIC, but you **cannot** receive advance EIC payments. See **Who Is a Qualifying Child?** below.

2. You expect that your 2004 earned income and AGI will each be less than $30,338 ($31,338 if you expect to file a joint return for 2004). Include your spouse's income if you plan to file a joint return. As used on this form, **earned income** does not include amounts inmates in penal institutions are paid for their work, amounts received as a pension or annuity from a nonqualified deferred compensation plan or a nongovernmental section 457 plan, or nontaxable earned income.

3. You expect to be able to claim the EIC for 2004. To find out if you may be able to claim the EIC, answer the questions on page 2.

How To Get Advance EIC Payments

If you are eligible to get advance EIC payments, fill in the 2004 Form W-5 at the bottom of this page. Then, detach it and give it to your employer. If you get advance payments, you **must** file a 2004 Federal income tax return.

You may have only **one** Form W-5 in effect at one time. If you and your spouse are both employed, you should file separate Forms W-5.

This Form W-5 expires on December 31, 2004. If you are eligible to get advance EIC payments for 2005, you must file a new Form W-5 next year.

TIP You may be able to get a larger credit when you file your 2004 return. For details, see **Additional Credit** on page 3.

Who Is a Qualifying Child?

Any child who meets **all three** of the following conditions is a **qualifying child.**

1. The child is:

- Your son, daughter, adopted child, stepchild, or a descendant of any of them (for example, your grandchild); or
- Your brother, sister, stepbrother, stepsister, or a descendant of any of them (for example, your niece or nephew), whom you cared for as you would your own child; or
- A foster child (any child placed with you by an authorized placement agency whom you cared for as you would your own child).

(continued on page 3)

▼ *Give the bottom part to your employer; keep the top part for your records.* ▼

Detach here

Form **W-5**

Department of the Treasury
Internal Revenue Service

Earned Income Credit Advance Payment Certificate

► **Use the current year's certificate only.**
► **Give this certificate to your employer.**
► **This certificate expires on December 31, 2004.**

OMB No. 1545-1342

2004

Print or type your full name

Your social security number

Note: *If you get advance payments of the earned income credit for 2004, you **must** file a 2004 Federal income tax return. To get advance payments, you **must** have a qualifying child and your filing status must be any status **except** married filing a separate return.*

1 I expect to have a qualifying child and be able to claim the earned income credit for 2004, I do not have another Form W-5 in effect with any other current employer, and I choose to get advance EIC payments . ☐ **Yes** ☐ **No**

2 Check the box that shows your expected filing status for 2004:
☐ Single, head of household, or qualifying widow(er) ☐ Married filing jointly

3 If you are married, does your spouse have a Form W-5 in effect for 2004 with any employer? . . . . . ☐ **Yes** ☐ **No**

Under penalties of perjury, I declare that the information I have furnished above is, to the best of my knowledge, true, correct, and complete.

Signature ► **Date ►**

Cat. No. 10227P

Figure 8.7 Form W-5.

federal income tax dependents and deductions the employee has indicated he or she is entitled to. It is important to remember that tips are considered wages for income tax purposes if they are paid by cash, check, or credit card, and amount to more than $20.00 per calendar month.

FICA: Often called Social Security taxes, the Federal Insurance Contribution Act (FICA) taxes to fund the Social Security and Medicare programs. Both employers and employees are required to contribute to FICA. FICA taxes must be paid on the employee's wages, which include cash wages and the cash value of all remuneration paid in any medium other than cash. The size of the FICA tax and the amount of an employee's wages subject to it are adjusted on a regular basis by the federal government.

FUTA: The Federal Unemployment Tax Act (FUTA) requires employers, but not employees, to contribute a tax based on the size of the employer's total payroll. Again, it is important to remember that payroll includes tip income and remuneration paid in forms other than cash.

EIC: The Earned Income Credit (EIC) is a refundable tax credit for workers whose incomes fall below established levels. The credit increases for families with two or more children, for families with a child under one year old, and for families that pay for health insurance for their children. Most workers entitled to the EIC choose to claim the credit when they file their federal income taxes. However, employees who elect to submit a Form W-5 (Earned Income Credit Advance Payment Certificate) have the option of getting the money in advance by receiving part of the credit in each paycheck (see Figure 8.7). Employers are required to include the EIC in the paycheck of any employee who submits a W-5, but are not required to verify the worker's eligibility for the credit. The extra money for EIC payments does not come from the employer, but rather is deducted from the income and payroll tax dollars they would normally be required to deposit with the IRS.

WOTC: The Work Opportunity Tax Credit (**www.tax-credit.com/index.htm**), was enacted in 1996 to replace the expired Targeted Jobs Tax Credit. The WOTC gives employers a tax credit of up to $2,100 for hiring certain disadvantaged workers, including certain disabled persons, recipients of Aid to Dependent Children, qualified veterans, qualified ex-felons, youths living in urban empowerment zones, some summer workers, and food-stamp recipients.

As a hospitality manager, it is critical that you keep up to date with the compensation, taxes, and credit legislation enacted at both the federal and state level. Certainly, all taxes that are due should be paid, but the hospitality industry often employs workers who are eligible for tax credits. In addition, employing certain individuals may make the employer eligible for tax credits as well.

8.5 MANAGING EMPLOYEE PERFORMANCE

Most employees come to a job with the expectation that they can complete or learn to complete the tasks assigned to them. In the hospitality industry, some of the workers hired are entering the workforce for the first time, while others may have many years of experience. Regardless of ability or background, to effectively manage employee performance, employers must have a valid and defensible system of employee evaluation, discipline, and, if necessary, termination.

Evaluation

Employee evaluation is often used in the hospitality industry as a basis for granting pay increases, determining who is eligible for promotion or transfer, or as a means of modifying employee performance. Unfortunately, the subjective nature of many employee evaluation methods makes them susceptible to misuse and bias. When the

▶ **LEGALESE**

Employee evaluation: A review of an employee's performance, including strengths and shortcomings; typically completed by the employee's direct supervisor.

employee can demonstrate that the evaluation system is biased against a class of workers specifically protected by the law, the liability to the employer can be great.

In most larger hospitality companies, the human resources department will have some type of form or procedure in place for use in employee evaluations. In smaller organizations, the process may be less formalized. In all cases, however, the hospitality manager must use great care to ensure that all employees are evaluated on the basis of their work performance, and nothing else. Therefore, it is critical that you base evaluations only on previously established criteria and expectations, such as the job descriptions discussed in Chapter 7, "Legally Selecting Employees."

▶ **LEGALESE**

Wrongful termination: A violation, by the employer, of the employment relationship resulting in the unlawful firing of the employee.

A false negative employee evaluation that results in loss of employment for the employee subjects the employer to even greater liability. **Wrongful termination** is the term used to describe the unlawful discharge of an employee. The at-will employment status that exists in most states does not mean employers are free to unfairly evaluate employees, then use the results of the evaluation as the basis for a termination.

Discipline

Companies have the right to establish rules and policies for their workplace, as long as those rules do not violate the law. Even potentially controversial policies such as drug testing or surveillance have been upheld by the courts, provided that those policies do not discriminate against or single out specific groups of employees.

Workplace rules should be properly communicated and consistently enforced. The communication process can include written policies and procedures (including an employee manual), one-on-one coaching, and formal training sessions. The enforcement process is just as important a part of the discipline process as is training. If, for example, a restaurant manager, in violation of stated sanitation policies, allows the cook to work without an effective hair restraint on Monday, it will be difficult for the employee to understand why the rule is enforced on Tuesday.

ANALYZE THE SITUATION 8.3

Gerry Hernandez worked as a breakfast cook at a large day-care facility. His attendance and punctuality were both good. Written into the facility's employee manual (which all employees sign when they begin their employment) was the following policy: "To be fair to the facility, your fellow employees, and our clients, you must be at your work station regularly and on time."

Gerry had worked at the facility for 10 months when, one day, he was 15 minutes late for work. While Gerry was aware of the facility work rule regarding punctuality, Gerry's supervisor, Pauline Cooper, rarely enforced the rule. Employees who were 5 to 20 minutes late may have been scolded, but no disciplinary action was usually taken, unless, according to Ms. Cooper, the employee was "excessively" tardy. She preferred to, in her words, "cut some slack" to employees, and thus was considered one of the more popular supervisors.

On the day Gerry was late, a variety of problems had occurred in the kitchen. Frozen food deliveries arrived early, and no cook was available to put them away; the sanitation inspector arrived for an unannounced inspection; and the rinse agent on the dish machine stopped functioning, so dishes had to be washed by hand. Ms. Cooper was very angry, so when Gerry arrived at work, she terminated him, stating, "If you can't get here on time, I don't need you here at all!"

The next day, Gerry filed suit against the day-care facility claiming that he was terminated because of his ethnic background. Ms. Cooper and the day-care facility countered that Gerry was an at-will employee, and thus the facility had the right to terminate employees as they see fit, especially when the employee was in violation of a communicated work rule.

1. Does Ms. Cooper have the right, under at-will employment, to terminate Gerry?
2. If Ms. Cooper has no records documenting her actions in cases similar to Gerry's, is it likely she will be able to help defend her organization against a discrimination charge?
3. How would you advise Ms. Cooper to handle tardy employees in the future?

Many organizations implement a policy of **progressive discipline** for employees. This system is used for minor work rule infractions, and some major ones. In a progressive disciplinary system, employees pass through a series of stages, each designed to help the employee comply with stated organizational workplace rules.

▶ **LEGALESE**

Progressive discipline: An employee development process that provides increasingly severe consequences for continued violation of workplace rules.

Progressive disciplinary systems usually follow five steps:

1. *Verbal warning*. In this first step, the employee is reminded/informed of the workplace rule and its importance. The employee is clearly told what constitutes a violation and how to avoid these violations in the future.
2. *Documented verbal warning*. In step 2, the supervisor makes a written record of the verbal reprimand, and the document is signed by both the supervisor and employee. One copy is given to the employee and one copy is retained in the employee's file.
3. *Written warning*. An official, written reprimand is the third step, generally accompanied by a plan for stopping the unwanted behavior and a setting forth of consequences if the behavior does not stop. This document is placed in the employee's file.
4. *Suspension*. In this step, the employee is placed on paid or unpaid leave for a length of time designated by management. A record of the suspension, its length and conditions, is placed in the employee's file.
5. *Termination*. As a last option, the employee is terminated for continued and willful disregard of the workplace rule.

In all of these steps, a written record of the action is required. Figure 8.8 is an example of a form that can be used to document the steps in the progressive discipline process.

Not all incidents of workplace rules violation are subject to progressive discipline. Destruction of property, carrying weapons, falsifying records, substance abuse while on the job, and some safety violations may be cause for immediate termination; in fact, failure to do so may place the employer in greater legal risk than not terminating the employee. Employers should make it clear that they reserve the right to immediately terminate an employee for a serious workplace violation as part of the progressive disciplinary procedure.

Termination

While states and the federal government give employers wide latitude in the hiring and firing of workers, the at-will employment doctrine does not allow an employer unrestricted freedom to terminate employees. An employer may not legally terminate an employee if it is done:

1. In violation of company employee manuals or handbooks.

Failure to follow the procedures outlined in employee manuals and handbooks may result in legal action against the employer because of the implied contract such documents may establish.

2. To deny accrued benefits.

These benefits can include bonuses, insurance premiums, wages, stock or retirement options, and time off with pay. If, however, the employee is fired for cause, the firing may be legal, and the accrued benefits may be forfeited.

3. Because of legitimate illness or absence from work.

This is especially true if the employee was injured at work and has filed a workers' compensation claim. Should the absence become excessive, however, the employer may be able to force the employee to accept disability status.

Employee's Progressive Performance Review

Date _____

Employee's Name: _____

Employee's Position: _____

Type of Action for this Discussion:

____ Oral Warning ____Written Warning ____ Probation ____ Suspension

Employer's view of the violation: _____

_____

_____

Employee's view of the violation: _____

_____

_____

Is the employee being placed on probation? ___No ___Yes, until what date: ___/___/__

Is the employee being suspended? ___ No ___Yes, until what date: ___/___/__

What specific action steps have been agreed upon between the employee and supervisor to improve and/or resolve the violation? (action steps and date): _____

_____

_____

I have reviewed and discussed this performance violation with my supervisor and understand the terms listed above to correct my performance.

_____ _____

Employee's signature Date

_____ _____

Employer's representative signature Date

_____ _____

Signature of Human Resources witness Date

Figure 8.8 Progressive discipline documentation form.

4. For attempting to unionize co-workers.

Some employers are reluctant to allow this type of activity to occur, but it is a right protected by federal law.

5. For reporting violations of law.

▶ **LEGALESE**

Whistle-blowers protection acts: Laws that protect employees who have reported illegal employer acts from retaliation by that employer.

In some states, private business **whistle-blowers protection acts** have been passed to ensure that employees who report violations of the law by their employers will not be terminated unjustly. These laws penalize employers that retaliate against workers who report suspected violations of health, safety, financial, or other regulations and laws.

6. For belonging to a protected class of workers.

Employers may not fire an employee because he or she is over 40; is of a particular race, color, religion, gender, or national origin; or is disabled. In

addition, employers may not treat these workers any differently than they would those workers who are not members of a protected class.

7. Without notice.

This is true under some circumstances related to massive layoffs or facility closings. In general, larger employers are covered by the Worker Adjustment and Retraining Notification (WARN) Act. WARN provides protection to workers, their families, and their communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. A covered plant closing occurs when a facility or operating unit is shut down for more than six months or when 50 or more employees lose their jobs during any 30-day period at the single site of employment.

Consider the case of the Mayflower Hotel, a large, independent facility employing 150 people. The hotel is purchased by new owners on June 1. On June 2, the new owners announce that all employees will be terminated from employment by the old owners, then rehired by the new. But employees will be subject to review before rehiring. In such a circumstance, the WARN Act would allow any employees who prefer not to work for the new company the time required to secure other employment.

8. If the employee has been verbally promised continued employment.

The courts have ruled, in some cases, that a verbal employment contract is in effect if an employer publicly and continually assures an employee of the security of his or her employment.

9. In violation of a written employment contract.

This is true whether the contract is written for an individual worker or the worker is a member of a labor union, that has a collective bargaining agreement (CBA).

In some cases, an employer may be called upon to produce evidence that an employee was terminated legitimately and legally. The seven guidelines in the upcoming Legally Managing at Work section can be used to ensure that terminations are defensible, should the need arise.

LEGALLY MANAGING AT WORK:
Guidelines for Conducting Defensible Employee Terminations

1. Conduct and document regular employee evaluations.

It is the rare employee whose performance becomes extremely poor overnight. Generally, employee performance problems can be identified in regular employee evaluation sessions. These evaluations should be performed in a thoughtful, timely manner, with an opportunity for employee input. These written evaluations should be reviewed by upper management to ensure consistency between and among reviewers.

2. Develop and enforce written policies and procedures.

As a manager, you may set yourself up for accusations that your discharge policies are unfair if you cannot show that employees were told, in writing, of the organization's rules of employee conduct. All employees should be give a copy of any employment rules, both because it is a good employment practice and to help avoid potential lawsuits. Employees should be give the chance to thoroughly review these rules and ask questions about them, and then they should be required to sign a document stating they have done so. This document should be placed in the employee's personnel file.

3. Prohibit "on-the-spot" terminations.

The hospitality industry is fast-paced, and tensions can sometimes run very high. Despite that, it is never a good idea to allow a supervisor or manager to terminate an employee without adequate consideration. This is not to say that a violent employee, for example, should not be required to leave the property immediately if his or her presence poses a danger to others. It does say, however, that terminations made in the heat of the moment can be very hard to defend when the emotion of the moment has subsided.

4. Develop and utilize a progressive disciplinary system.

Make sure that each step of the disciplinary process is reviewed by at least one person other than the documenting manager and the employee. A representative from the human resources department is a good choice, or in small properties, the general manager of the facility.

5. Review all documentation prior to discharging an employee.

Because of the serious nature of employee termination, it is a good idea to thoroughly review all documentation prior to dismissing an employee. If the evidence supports termination, it should be undertaken. If it does not, the organization will be put at risk if the discharge is undertaken despite the lack of documentation. If a progressive disciplinary process is in place, each step in that process should be followed every time. In this way, you can defend yourself against charges of discriminatory or arbitrary actions.

6. When possible, conduct a termination review and exit interview.

Employees are less likely to sue their former employers if they understand why they have been terminated. Some employers, however, make it a policy to refuse to tell employees why they have been let go, citing the at-will status of employment as their rationale. Each approach has its advantages and disadvantages. An employee who is shown documented evidence of his or her consistent, excessive absence, along with the results of a well-implemented progressive discipline program, is less likely to sue, claiming unfair treatment because of nonrelated demographic issues such as gender, race, ethnicity, and other protected class status.

7. Treat information regarding terminations as confidential.

In the most common case, an employee's discharge will be initiated by the employee's supervisor or manager, and should be reviewed prior to implementation by the immediate superior of that supervisor or manager. The actual exit interview may be witnessed by a representative from human resources or a second manager. ◀

Employee termination reflects a failure on the part of both the employer and employee. The employee has performed in a substandard manner, but perhaps the employer has improperly selected or poorly trained and managed that person. The details of these failures need not be shared with those who do not have a need to know. Nothing is gained; in fact, greater employer liability is incurred when management shares details of an employee's termination with others.

In-House Dispute Resolution

The cost of a lawsuit is very high. In the case of employment litigation, many companies have found that the cost of defending themselves against the charges of an unfair employment practice is extremely high, often exceeding the amount of the employee's claim of damages. For example, a simple dispute where an employee asks for damages in the amount of $5,000 may cost the employer five times that amount to defend the charge.

The cost to employees to pursue such an unfair employment claim is high also. Because the employee who charges an employer with an unfair practice is often no longer employed, the employee may face great legal expense at a time he or she can least afford to do so.

Cases involving unfair employment practices may drag on for years, which not only increases legal expenses, but can also diminish the likelihood of an amicable settlement between employer and employee. By the time the litigation has been completed, several years may have passed, much expense may have been incurred on both sides, the personal relationship between the employee and employer has been damaged, and both sides may well have come to realize that having one's day in court is often too long in coming and too expensive to undertake.

Because of the disadvantages just listed, a system of resolving disputes between employers and employees that is gaining widespread acceptance is the **in-house dispute resolution** process.

▶ **LEGALESE**

In-house dispute resolution: A program, funded by employers, that encourages the equitable settlement of an employee's claim of unfair employment, prior to or without resorting to litigation.

The in-house dispute resolution process is a management tool that seeks to provide:

1. Fairness to employees.

This is achieved by involving employees in the development and implementation of the program. At a corporate level, employers should realize that the purpose of an in-house dispute resolution program is the prevention of litigation, not the winning of every dispute.

2. Cost savings to employers.

The in-house dispute resolution program should result in reduced costs for employers. It is also important to realize that costs can be measured in terms beyond legal fees.

3. Timely resolution of complaints.

An in-house dispute resolution program grants, as its greatest advantage, the ability to deal quickly with a problem. Sometimes, this can save the employee/employer relationship and get the employee back to work feeling that his or her concern has been heard and that the employer really cares about him or her, something that rarely happens at the conclusion of a lawsuit.

A well-designed in-house dispute resolution program can have an extremely positive effect on an organization if it is established and operated in the proper manner. Features of an effective in-house dispute resolution program include:

1. Development with employee input.

Employees and employers generally will work toward developing a program that: is easy to access, is perceived as fair, provides a rapid response, includes a legitimate appeal procedure.

2. Training for mediators.

Those individuals who will hear and help resolve disputes should be specially trained in how to do so. In some companies, these individuals are called **ombudspersons**. Effectively trained mediators can resolve up to 75 percent of all worker complaints without litigation. The resolutions can range from a simple apology to reinstatement and substantial monetary damages.

▶ **LEGALESE**

Ombudsperson: A company official appointed to investigate and resolve worker complaints.

3. Legal assistance for employees.

The best programs take into account that employees may need advice from their own legal counsel, and thus payment for this advice is provided. While it might seem strange to fund the legal counsel of an employee in a work-related dispute, the reality is that costs savings will occur if an amicable solution to the problem can be developed.

4. Distinct and unique chain of command for appeal.

Sometimes, the original finding of the review process will be perceived by the employee as unfair. When this is the case, employees need to know that they can appeal the decision, without further complicating their relationship with the company. Also, they need to be assured that such an appeal will be heard by those who are unbeholding to the first decision maker. Obviously, not all employees will be satisfied with the resolution of their complaint. In addition, some areas such as workers' compensation claims may not be included in the program.

8.6 UNEMPLOYMENT CLAIMS

▶ **LEGALESE**

Unemployment insurance: A program, funded by employers, that provides temporary monetary benefits for employees who have lost their jobs.

Of the many costs related to maintaining a workforce, the cost of **unemployment insurance** is one of the largest and most difficult to administer. The unemployment insurance program is operated jointly by the federal and state governments. Each state imposes different costs on employers for maintaining the state's share of a pool of funds for assisting workers who have temporarily lost their jobs.

Figure 8.9 details the contribution rate charged to employers in the state of Ohio in 1999. It is presented as an example of a method used by several states to charge higher taxes to those employers that cause more of the fund pool to be used, and less to those with fewer claims. Thus, two restaurants with identical sales volume, but very different experiences in maintaining staff, can pay widely different unemployment tax rates based on how well they manage their staffs and their **unemployment claims**.

▶ **LEGALESE**

Unemployment claim: A petition, submitted by an unemployed worker to his or her state unemployment agency, which asserts that the worker is eligible to receive unemployment benefits.

A worker who submits an unemployment claim does not automatically qualify for payments. The employer has the right to challenge this claim. It is important to remember that each successful claim will have an impact on the employer's experience rate, the rate by which future contributions to the unemployment fund are determined. Thus, it is in your best interest, as an employer, to protest any unjust claim for unemployment benefits made by your ex-employees.

Each state will set its own criteria for determining who is eligible for unemployment benefits. Variances can occur based on answers to any of the following questions:

- How soon can the unemployed worker petition for benefits?
- When will any allowable payments begin?
- What will the size of the payments be?
- How long will the payments last?
- What must the unemployed worker do in order to qualify and continue receiving benefits?
- How long does the employee have to work for the former employer in order to qualify for assistance?

Generally speaking, an employee who quits his or her job for a nonwork-related reason is not eligible for benefits. Employees who are terminated, except for good cause associated with their work performance, generally are eligible. Again, the laws in this area are complex and vary widely, thus it is a good idea to thoroughly understand who is eligible for unemployment benefits in the state where you work. This can be accomplished by visiting a branch of your state agency responsible for administering unemployment compensation benefits.

The following are common examples of acts that usually justify the denial of unemployment benefits based on employee misconduct:

- Insubordination or fighting on the job
- Habitual lateness or excessive absence

Contribution Rates for the State of Ohio

For 2002, 2003, and 2004 the ranges of Ohio unemployment tax rates (also known as contribution rates) are as follows:

	2002	2003	2004	
Lowest Experience Rate	0.1%	0.1%	0.2%	
Highest Experience Rate	6.5%	6.5%	7.5%	
New Employer Rate	2.7%	2.7%	2.7%	(except the construction industry)
Construction Industry (New Emp.)	3.5%	3.4%	3.7%	
Mutualized Rate	0.0%	0.0%	0.0%	

Rate Notification

Tax rate notices are mailed for the coming calendar year on or before December 1. The tax rate is also printed on the employer's Contribution Report (JFS-66111), which is mailed to you quarterly for reporting and payment of taxes due. To determine how much tax is due each quarter, multiply the rate by the total taxable wages you paid during the quarter.

Experience Rate

Once an employer's account has been chargeable with benefits for four consecutive calendar quarters ending June 30, the account becomes eligible for an experience rate. This rate is calculated annually and includes such factors as unemployment benefit claims by employees and average annual taxable payroll (as reported by the employer via quarterly contribution reports). A delinquency rate is assigned if an employer fails to submit timely contribution reports required for determination of the experience rate.

New Employer Rate

If an employer's account is not yet eligible for an experience rate, the account will be assigned a standard new employer rate of 2.7% unless the employer is engaged in the construction industry, in which case the 2002 rate is 3.5%, the 2003 rate is 3.4%, and the 2004 rate is 3.7%.

Mutualized Rate

The primary purpose of the mutualized account is to maintain the unemployment trust fund at a safe level and recover the costs of unemployment benefits that are not chargeable to individual employers. These costs are recovered and the money restored to the fund through the mutualized tax levied on all contributory employers. The mutualized tax is used solely for the payment of benefits. For calendar years 2002, 2003, and 2004 the mutualized rate is 0.0%.

Delinquency Rate

Employers who did not furnish the wage information necessary for the computation of their 2004 experience rate by September 1, 2003, were assigned a contribution rate equal to one hundred twenty-five percent (125%) of the maximum experience rate possible for 2004. However, if the employer filed the necessary wage information by December 31, 2003, the rate will be revised to the appropriate experience rate. Please click here for information on waiver of delinquency rate.

Penalty Rate

If an employer files wage information after December 31 but within 36 months from the beginning of the year for which the rate is to be effective, the rate shall be revised to one hundred twenty percent (120%) of the rate that would have applied if the employer had timely furnished the wage information. Please click here for information on waiver of penalty rate.

Figure 8.9 Unemployment tax rates for Ohio.

- Drug abuse on the job
- Disobedience of legitimate company work rules or policies
- Gross negligence or neglect of duty
- Dishonesty

Claims and Appeals

If the state agency responsible for granting unemployment benefits receives a request for unemployment assistance from an unemployed worker, the employer will be notified and given a chance to dispute the claim. It is important that you, as an employer, respond to any unemployment claims or requests for information in a timely manner.

An employer should not protest legitimate unemployment benefit payments. It is appropriate, however, to protest those that are not legitimate. Employers often have difficulty proving that workers should not qualify for unemployment benefits, even in situations that may seem relatively straightforward. In addition, the state unemployment agents who determine whether or not to grant benefits often initially decide in favor of the employee. If an employer does not agree with the state's decision, that employer has the right to appeal.

In an appeal of unemployment benefits, each party has the right:

1. To speak on his or her own behalf.
2. To present documents and evidence.
3. To request that others (witnesses) speak on his or her behalf.
4. To question those witnesses and parties who oppose his or her position.
5. To examine and respond to the evidence of the other side.
6. To make a statement at the end of the appeals hearing.

An unemployment hearing is often no different from a trial. Witnesses must testify under oath. Documents, including personnel information, warnings, and performance appraisals, are submitted as exhibits. The atmosphere is usually not friendly. You must organize your case before the hearing to maximize your chances of success. If you have elected to have a lawyer help you, meet with him or her before the hearing to review your position.

Decisions are not typically obtained immediately after the hearing. You will probably be notified by mail of the judge's decision. If you lose the decision, read the notice carefully. Most judges and hearing examiners give specific reasons for their rulings, and this information may help you avoid claims in the future.

◀ SEARCH THE WEB 8.2 ▶

Log on to the Internet and enter **www2.myflorida.com**.

1. Select: Employer.
2. Select: Unemployment Compensation.
3. Select: Unemployment Appeals Information.
4. Select: Frequently Asked Questions (FAQs) about the Appeal Process.

Review the FAQs supplied by the State of Florida, then answer the following questions:

1. To whom does an employer appeal an unemployment insurance claim in the state of Florida?
2. How long does the average appeals hearing last?
3. Is the hearing recorded? Why or why not?

ANALYZE THE SITUATION 8.4

Carolyn Moreau was employed for nine years as a room attendant for the Windjammer Hotel. The hotel was moderately busy during the week and filled up with tourists on the weekends.

In accordance with hotel policy, Carolyn submitted a request on May 1 for time off on Saturday, May 15 to attend the graduation ceremony of her only daughter. The hotel was extremely shorthanded on the weekend of the fifteenth due to some staff resignations and a forecasted sell-out of rooms. Carolyn's supervisor denied her request for the day off. Carolyn was visibly upset when the schedule was posted and she learned that her request had been denied. She confronted her supervisor and stated, "I am attending my daughter's graduation. No way am I going to miss it!" The supervisor replied that she was sorry, but all requests for that particular weekend off had been denied and Carolyn was to report to work as scheduled.

On the Saturday of the graduation, Carolyn called in sick four hours before her shift was to begin. The supervisor, recalling the conversation with Carolyn, recorded the call-in as "unacceptable excuse," and filled out a form stating that Carolyn had quit her job voluntarily by refusing to work her assigned shift. The supervisor referred to the portion of the employee manual that Carolyn signed when joining the hotel. The manual read, in part:

> Employees shall be considered to have voluntarily quit or abandoned their employment upon any of the following occurrences:
>
> 1. Absence from work for one (1) or more consecutive days without excuse acceptable to the company;
> 2. Habitual tardiness;
> 3. Failure to report to work within 24 hours of a request to report.

Carolyn returned to work the next day to find that she had been removed from the schedule. She was informed that she was no longer an employee of the hotel. Carolyn filed for unemployment compensation. In her state, workers who voluntarily quit their jobs were not eligible for unemployment compensation.

1. Do you believe Carolyn was terminated or that she resigned from her position?
2. Do you believe Carolyn is eligible for unemployment compensation?
3. Whose position would you prefer to defend in the unemployment compensation hearing? Why?

8.7 EMPLOYMENT RECORDS AND RETENTION

Several federal and state agencies require employers to keep employee records on file, or to post information relative to employment. While the number of requirements is large, and can frequently change, the following examples will illustrate the type of responsibility employers have for maintaining accurate employment records.

Department of Labor (DOL) Records

Every employer subject to the Fair Labor Standards Act (FLSA) must maintain the following records for every employee:

- Employee's full name and home address, including zip code
- Gender of employee
- Position or job title
- Time of day and day of week when the employee's workweek begins
- The hourly rate of pay of the employee
- The hours worked each workday and total hours worked each workweek (A workday is any consecutive 24 hours and a workweek is a regularly recurring period of 168 hours.)

- Total regular and overtime earnings of the employee for the workweek
- Total additions to, or deductions from, wages paid each pay period (including items such as tip credit and charges for meals or uniforms)
- Total compensation paid to each employee for the pay period, which may include multiple workweeks
- Date of paydays
- A statement of the period of time (workweeks) included in the pay period

DOL Records on Employee Meals and Lodging Every employer that makes deductions from wages for meals, uniforms, or lodging must keep records substantiating the cost of providing these items. For example, David Pung manages a cafeteria in the southwest. As part of his employees' compensation, they are allowed one meal per four-hour work shift. Employees who participate in this meal program are charged a rate of $0.25 per hour worked, or $1.00 per meal. David must document both the deductions he makes for the meal (see the seventh item in the preceding list), and the cost of providing the meal. Since it is impossible to determine the cost of each employee's meal, David uses a method whereby the cost of the meal is determined by the following formula:

1. Total food sales less gross operating profit
2. Equals cost of all meals provided
3. Divided by total meals served (including all employee meals)
4. Equals cost per meal served

David documents this cost on a monthly basis, using his profit and loss statement as the source of his sales and gross operating profit figures and a daily customer count as his total number of meals served. Generally, the DOL will provide a good deal of latitude as to how an employer computes the cost per employee meal or costs of providing other services. These costs must be computed and maintained in the employer's records.

DOL Records for Tipped Employees All employers must keep the following records for tipped employees:

- A list or identification symbol for each employee whose wage is determined in part by tips
- The daily, weekly, or monthly amount of tips reported by the employee to the employer
- The hourly deduction taken by the employer as a tip credit
- The hours worked and amount paid to nontipped employees

In larger organizations, the payroll department will maintain the records required by the DOL. It is important to remember, however, that it is the facility manager who is responsible for producing these records, if required to do so by the DOL. Under current DOL rules, employers must maintain their records for the following time periods.

For Three Years

- From the date of last entry, all payroll records
- From the last effective date, all certificates, such as student certificates

For Two Years

- From the date of last entry, all employee time cards
- All tables or schedules used to compute wages
- All records explaining differences in pay for employees of the opposite sex in the same establishment

DOL Records on Family and Medical Leave The federal Family and Medical Leave Act (FMLA), requires employers to maintain the following records for at least three years:

- Employee name, address, and position
- Total compensation paid to employees
- Dates FMLA-eligible employees take FMLA leave
- FMLA leave in hours, if less than full days are taken at one time
- Any documents describing employee benefits or employer policies regarding the taking of FMLA leave

Immigration-Related Records

As discussed in Chapter 7, "Legally Selecting Employees," the Immigration Reform and Control Act (IRCA), requires employers to complete an employment eligibility verification form (Form I-9) for all employees hired after November 6, 1986. Employers must retain all I-9 forms for three years after the employee is hired or one year after the employee leaves, whichever is later.

Records Required by the ADEA

The federal Age Discrimination in Employment Act (ADEA) requires that employers retain employee records that contain the employee's name, address, date of birth (established only after the hiring decision), occupation, rate of pay, and weekly compensation. In addition, records on all personnel matters, including terminations and benefit plans, must be kept for at least one year from the date of the action taken.

As can be seen from the list of recordkeeping requirements just given, these stipulations in the hospitality industry are varied, complex, and sometimes overlapping. As a manager, it is important for you to ensure that your facility's recordkeeping is current and complete. An employment attorney who specializes in hospitality employment law can be very helpful in ensuring compliance in this area.

8.8 EMPLOYMENT POSTERS

Often, regulatory agencies will require that certain employment-related information be posted in an area where all employees can see it. The following regulations demonstrate that fact.

- DOL regulations require that every employer subject to the FLSA post, in a conspicuous place, a notice explaining the FLSA. Posters may be obtained by contacting a regional office of the DOL.
- EEOC regulations require that every employer subject to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 post in a conspicuous place a notice relating to discrimination prohibited by such laws. These posters may be combined, and may be obtained by contacting a regional office of the EEOC.
- OSHA regulations require that every employer post in a conspicuous place a notice informing employees of the protections and obligations under OSHA. Posters may be obtained by contacting a regional office of OSHA.
- DOL regulations require that every employer post in a prominent and conspicuous place a notice explaining the Employee Polygraph Protec-

Your Rights under the Family and Medical Leave Act of 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. Employees are eligible if they have worked for their employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles. The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances.

Reasons for Taking Leave:

Unpaid leave must be granted for *any* of the following reasons:

- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

At the employee's or employer's option, certain kinds of *paid* leave may be substituted for unpaid leave.

Advance Notice and Medical Certification:

The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."
- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

Job Benefits and Protection:

- For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan."
- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Unlawful Acts by Employers:

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA:
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement:

- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

For Additional Information:

If you have access to the Internet visit our FMLA website: **http://www.dol.gov/esa/whd/fmla.** To locate your nearest Wage-Hour Office, telephone our Wage-Hour toll-free information and help line at 1-866-4USWAGE (1-866-487-9243): a customer service representative is available to assist you with referral information from 8am to 5pm **in your time zone;** or log onto our Home Page at **http://www.wagehour.dol.gov**.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

WH Publication 1420
Revised August 2001

*U.S. GOVERNMENT PRINTING OFFICE 2001-476-344/49051

Figure 8.10 Employee rights under the Family and Medical Leave Act of 1993.

tion Act of 1988. Posters may be obtained by contacting a regional DOL office.

- DOL regulations require that every employer subject to the Family and Medical Leave Act post in a conspicuous place in the establishment a notice (as shown in Figure 8.10) explaining this federal leave law. Posters may be obtained by contacting a regional DOL office.

8.9 WORKPLACE SURVEILLANCE

Surveys by the American Management Association reveal that up to 43 percent of U.S. businesses monitor their employees electronically. Some common procedures include listening in on phone calls, reviewing voicemails, monitoring e-mail and computer files (such as sites visited on the Internet), or some form of video surveillance. That number grows even higher if you add in the companies that monitor their employees in other ways such as by conducting locker, bag, and desk searches.

Unfortunately, there is no one national policy that you can look to for guidance regarding privacy in the workplace. Many companies believe that they are protecting their proprietary business interests by monitoring employees and their work product. Additionally, as companies establish work conduct guidelines (such as sexual harassment zero-tolerance policies) to comply with the law, monitoring enables them to ensure compliance. Even though the law is difficult to pin down in this area, a few general principles can be established by reviewing a cross-section of federal and state laws and court cases.

Whether or not a particular monitoring technique is legal usually depends on four factors:

- Did the employee have a legitimate expectation of privacy as to the item searched or the information, conversation, or area monitored? In an employee lounge, probably not; in a restroom, absolutely!
- Has the employer provided advance notice to the employees, and/or obtained consent for the monitoring activity from the employee? If so, it is difficult for employees to argue that they had an expectation of privacy.
- Was the monitoring performed for a work-related purpose, and was it reasonable given all of the circumstances? Generally, the courts have allowed searches and monitoring that seem to be necessary for operating a business (e.g., protecting trade secrets, enforcing policies and procedures, ensuring quality service levels).
- Was the search or monitoring done in a reasonable or appropriate manner? Was it discriminatory? In other words, was it only utilized on a minority work subgroup?

If you do elect to monitor specific activities of employees, adopting the Employee Privacy Policy in Figure 8.11 is a good way to minimize any misunderstandings or legal difficulties. Let your employees know exactly what is expected of them, and give them a chance to question any part of your policy about which they are unclear. Because the laws in this area are complex and vary by location, it is a good idea to have your attorney review your company's monitoring/privacy policy before it is implemented.

Obviously, it is in the best interest of both employers and employees to work together to create a workplace that is productive for management and fair to all employees. As a hospitality manager, your legal liability will definitely be affected by your ability to achieve this goal. Figure 8.12 summarizes some of the most significant federal laws surrounding human resources management. Following the guidelines presented in this chapter will help you manage your operation legally and reduce your risk of liability.

Policy Regarding Employee Privacy

The Company respects the individual privacy of its employees. However, an employee may not expect privacy rights to be extended to work-related conduct or the use of company-owned equipment, supplies, systems, or property. The purpose of this policy is to notify you that no reasonable expectation of privacy exists in connection with your use of such equipment, supplies, systems, or property, including computer files, computer databases, office cabinets, or lockers. It is for that reason the following policy should be read; if you do not understand it, ask for clarification before you sign it.

I, _____, understand that all electronic communications systems and all information transmitted by, received from, or stored in these systems are the property of the Company. I also understand that these systems are to be used solely for job-related purposes and not for personal purposes, and that I do not have any personal privacy right in connection with the use of this equipment or with the transmission, receipt, or storage of information in this equipment.

I consent to the Company monitoring my use of company equipment at any time at its discretion. Such monitoring may include printing and reading all electronic mail entering, leaving, or stored in these systems.

I agree to abide by this Company policy and I understand that the policy prohibits me from using electronic communication systems to transmit lewd, offensive, or racially related messages.

_____ _____

Signature of employee Date

Figure 8.11 Employee privacy policy.

Equal Pay Act of 1963 →	Prohibits pay differences for men and women doing equal work.
Title VII of the Civil Rights Act of 1964 (as amended) →	Prohibits discrimination in employment based on race, color, religion, sex, or national origin.
Age Discrimination Employment Act of 1967 (as amended) →	Prohibits discrimination in employment against persons over 40; restricts mandatory retirement.
Occupational Safety and Health Act of 1970 (OSHA) →	Establishes mandatory safety and health standards in workplaces.
Vocational Rehabilitation Act of 1973 →	Prohibits discrimination in employment based on physical or mental disability.
Pregnancy Discrimination Act of 1978 →	Prohibits employment discrimination against pregnant workers.
Immigration Reform and Control Act of 1986 →	Prohibits knowing employment of illegal aliens.
Americans with Disabilities Act of 1990 →	Prohibits discrimination against a qualified individual on the basis of disability.
Civil Rights Act of 1991 →	Reaffirms Title VII of the 1964 Civil Rights Act, reinstates burden of proof by employer, and allows for punitive and compensatory damages.
Family and Medical Leave Act of 1993 →	Allows employees up to 12 weeks of unpaid leave with job guarantees for childbirth, adoption, or family illness.

Figure 8.12 Overview of significant laws impacting the management of employees. (*Source: Management,* Sixth Edition, by John R. Schermerhorn, Jr., Copyright 1999, John Wiley & Sons, Inc.; used by permission.)

▶ INTERNATIONAL SNAPSHOT

Managing Employees Abroad

Today's hoteliers may be called upon to travel to different countries to manage hospitality facilities. The laws and regulations governing employment are different in every country, sometimes in ways that are subtle, but just as often in ways that are fundamental. Some of the most common and most obvious examples are described here.

THE NATURE OF THE EMPLOYMENT RELATIONSHIP

In most places in the United States, an employer or employee may terminate the employment relationship at any time, for any lawful reason or no reason at all; this is often referred to as "employment at will." Although this notion seems natural in the United States, it often does not apply overseas.

To the contrary, many countries have laws that are much more protective of employees' right to retain their employment. Such laws may explicitly define the permissible reasons for terminating the employment relationship, or they may more broadly prohibit termination except in the most egregious of circumstances. There may be more intensive regulation of layoffs for economic or operational reasons (sometimes called "retrenchment" or "redundancy").

In some cases, an employer may simply be prohibited from terminating the employment relationship; if the law is violated, the government may require that the employee be reinstated. In other cases, the employer can end the relationship by the payment of a defined monetary amount, sometimes called "redundancy payments."

WORK PERMITS

Some countries protect their citizens' right to work by prohibiting the employment of foreigners except with special permission of the government. Employers may be required to look first to the local population for all employment needs at every level. Sometimes permits are easily obtainable for executive-level management or for persons with rare skill sets. Often, though, the employer will be required to demonstrate its efforts to hire employees within the jurisdiction before permits are issued. As a result, it may be more difficult, and it may take more time, to fill key vacancies.

APPLICATION OF U.S. LAWS IN FOREIGN COUNTRIES

Employers based in the United States (or controlled by U.S. companies) that employ U.S. citizens in locations outside of the country are subject to most of the antidiscrimination laws discussed earlier in this chapter with respect to those U.S. citizens. The United States' discrimination laws do not apply to noncitizens of the United States in operations outside the United States.

Conversely, multinational companies that operate in the United States are subject to the laws of the United States to the same extent as U.S. employers. Just as managers familiar with U.S. employment laws must be aware of potentially drastic differences in employment laws (and the respective effect on operations) when they move abroad, those entering the United States must adjust to the differences in this country, as compared to the places from which they came.

OTHER DIFFERENCES

These examples demonstrate just a few of the more common and obvious differences between U.S. employment laws and those that may be typical in other countries. There are likely to be other significant differences in such areas as minimum wages and methods of compensation, required compliance with

government welfare benefits programs, workplace safety standards, and taxation schemes. Upon beginning work in any foreign country, every manager should quickly become familiar not just with local customs and practices but with the laws that must be observed with respect to the hotel's employees.

Written by David Comeaux. Provided by David Comeaux of the Ogletree and Deakins Law Firm, St. Thomas, Virgin Islands. www.ogletreedeakins.com

WHAT WOULD YOU DO?

Naomi Yip is the sous chef at one of the city clubs managed by Clubs International, a company that specializes in the operation of golf, city, and other private clubs. The company manages over 50 clubs nationally. Naomi has been with the organization for five years and is considered one of the company's best and brightest culinary artists.

Thomas Hayhoe is the executive chef at the club where Naomi works and is Naomi's immediate supervisor. Naomi's annual evaluations have been very good, and she has been designated as "ready for promotion" in her past two evaluations. In January, Naomi announces she is pregnant and her due date is in July. In March, Chef Hayhoe completes his annual evaluation of Naomi. He does not recommend her for promotion to executive chef, Naomi's next step up, citing, "the extraordinary demands on time placed upon an executive chef within the Clubs International organization," which he claims Naomi will be unable to meet. Chef Hayhoe also cites conversations he has overheard with Naomi in which she declares, "I'm looking forward to spending as much time as possible with my baby."

Clubs International has just been awarded the contract to operate a new and lucrative account, the Hawk Hollow Golf Club. Assume you were the human resources director advising the company's vice president of operations.

1. Do you feel Chef Hayhoe's evaluation of Naomi is valid?
2. Based on Chef Hayhoe's recommendation, would you recommend Naomi for the executive chef's position at the new account?
3. How would you respond if the new client objected to the appointment of Naomi based on her pregnancy?

▶ THE HOSPITALITY INDUSTRY IN COURT

To understand how important it is to do a thorough investigation and take employee complaints seriously, consider the case of *Romero v. Howard Johnson Plaza Hotel, 1999 U.S. Dist. Lexis 15264 (S.D.N.Y. 1999).*

FACTUAL SUMMARY

Rose Romero (Romero) was a guestroom attendant for Howard Johnson Plaza Hotel (Howard Johnson). Romero was employed with Howard Johnson from 1987 until 1993. During her employment she was sexually harassed by a number of her co-workers on a number of occasions. In one incident, a male co-worker responded to a request made by Romero with a string of vulgar comments. Another incident involved Romero and an intoxicated male co-worker, who approached Romero stating he knew "how to please a woman" and then exposed himself. Romero reported some of the incidents to supervisors, the general manager of the hotel, security, her union, and ultimately the police.

After Romero made a complaint to the police, the management of Howard Johnson sent the male co-worker involved a letter stating the company's policy on sexual harassment. The letter also stated the allegations made by Romero could neither be confirmed nor denied due to the absence of a third-party witness. Romero also requested a union meeting be held so she could discuss her harassment claims. The meeting was conducted publicly, with several of her alleged harassers present. Despite the meeting and a reminder of Howard Johnson's harassment policy for the parties involved, the harassment continued.

After several fabricated reprimands and at least two suspensions based on false accusations, Romero left Howard Johnson in 1993. She sued Howard Johnson, two of her former co-workers, and three managers for sexual harassment.

QUESTION FOR THE COURT

The court was faced with at least two questions in this case. The first was whether Romero waited too long after the last incident of sexual harassment to bring her lawsuit against the defendants. Under Title VII of the Civil Rights Act of 1964, a person claiming workplace harassment or a hostile work environment must file a charge with the Equal Employment Opportunity Commission (EEOC) within 300 days of the unlawful action. Romero filed her claim with the EEOC on June 13, 1993. Howard Johnson argued Romero could not file complaints about incidents prior to August 22, 1992, and most of the incidents occurred before then. Romero argued that all of the incidents were part of an ongoing act of discrimination and could be considered a continuing violation. Romero also argued she was subjected to a hostile work environment, which involves a continuing pattern of discrimination or sexual harassment rather than one isolated event.

The second question for the court concerned the liability of Howard Johnson. Romero argued Howard Johnson created the hostile work environment because it either failed to provide a reasonable avenue for complaints or knew about the harassment and did nothing to stop it. If Howard Johnson created or contributed to a hostile work environment, it was liable for the misconduct also.

DECISION

The court decided Romero was subjected to a hostile work environment and that the sexual harassment was a continuing violation. Therefore she could sue based on all of the past incidents. The court also found evidence Howard Johnson either knew or should have known of the harassment and failed to stop it.

MESSAGE TO MANAGEMENT

Harassment of any kind must not be tolerated in the workplace.

To understand the Supreme Court view on an employer's obligation regarding prevention of sexual harassment, consider the case of *Faragher v. City of Boca Raton, 524 U.S. 775 (1998).*

FACTUAL SUMMARY

Throughout college, Beth Ann Faragher (Faragher) worked part-time and during the summers for the Parks and Recreation Department of Boca Raton, Florida (Boca Raton). While employed as a lifeguard from 1985 to 1990, Faragher was supervised by Bill Terry, David Silverman, and Robert Gordon. Terry and Silverman inappropriately touched female lifeguards, including Faragher, and regularly made lewd comments and sexual advances toward the female lifeguards. In 1986, the city of Boca Raton instituted a sexual harassment policy, but it is unclear whether the entire Parks and Recreation Department received a copy of the policy. Faragher and other female lifeguards mentioned the harassment to Gordon in conversation but never made formal complaints. In 1990, a complaint was finally initiated by a former lifeguard, which resulted in disciplinary action against Terry and Silverman. In 1992, Faragher filed suit against the city of Boca Raton, Terry, and Silverman, alleging a Title VII hostile work environment claim.

QUESTION FOR THE COURT

The question for the court was whether an employer (Boca Raton) could be held liable for the acts of its supervisory employees (Terry and Silverman) whose sexual harassment of a subordinate created a hostile work environment. Faragher argued the sexual harassment and discrimination was so widespread the city of Boca Raton either knew or should have known of the conduct of Terry and Silverman. Therefore, she argued, the city of Boca Raton was liable for the conduct of Terry and Silverman. Boca Raton argued the conduct of Terry and Silverman was outside the normal job functions for which they were hired and was so unreasonable the city was not responsible.

DECISION

The court held in favor of Faragher and found the city of Boca Raton liable for the conduct of Terry and Silverman. But it also found that Boca Raton could claim a potential defense. If the employer (Boca Raton) exercised reasonable care

to prevent and correct any sexually harassing behavior, and if the employee-victim failed to take advantage of any preventive or corrective measures provided, then the employer would not be liable for sexual harassment.

MESSAGE TO MANAGEMENT

Create a policy of zero tolerance; educate your employees as to what constitutes appropriate and inappropriate behavior, provide a path of relief for victims, investigate all claims promptly, and hold people accountable for their actions.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

It is a good practice to define the employment relationship between employers and employees. The agreement can be spelled out in an offer letter. An employee manual can help employees understand what is expected from them, as well as set out policies and procedures for the workplace.

Just as you cannot discriminate illegally in the selection process, you cannot discriminate after someone has been hired. Both federal and state civil rights laws exist to protect employees against discrimination in the workplace. You must invoke a zero tolerance policy for sexual harassment and other forms of illegal discrimination. Educate your employees about appropriate and inappropriate behavior. You must also be prepared to do a thorough investigation if inappropriate behavior is brought to your attention.

The Family and Medical Leave Act (FMLA) provides for most employees of larger companies to take time off to address personal issues such as the birth of a child.

Compensation for employees is a complex area, particularly in the hospitality industry, as it is labor-intensive and the primary beneficiary of the tip credit toward the minimum wage. Utilizing an objective method to evaluate employees can help to reduce potential litigation for discrimination and wrongful termination. Establishing an in-house dispute resolution program can also reduce potential liability from employee conflict or disputes. Unemployment insurance is available for employees who are discharged without cause related to the workplace (i.e., layoffs).

Certain records and documents (e.g., applications and payroll information) must be retained for a certain length of time. Also, several posters that outline employee rights in several areas must be displayed prominently in the workplace.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Compose an employment offer letter that does not jeopardize the at-will employment status of an assistant manager of a quick-service restaurant.
2. Draft a voluntary tip-pooling arrangement for use in a sports bar that employs both bartenders and waitstaff. Assume 75 percent of sales are generated in the seating area and 25 percent are generated at the bar itself.
3. Define the following concepts as they relate to sexual harassment.

   Zero tolerance
   Prevention
   Investigation
   Resolution

4. Use the Internet to look up and identify whether tip pooling is permitted in the state where you work or go to school. Cite your information source and the path to get there.
5. Contrast the concepts of at-will employment and wrongful termination.
6. List and discuss four advantages of an in-house dispute resolution plan.
7. Discuss the pros and cons of tying an employer's unemployment insurance tax rate to the number of claims successfully filed by ex-employees.

8. Detail a procedure for establishing the "cost" of providing lodging to summer college students employed by a theme park and living in dormitory-style housing provided by the park. Explain why this cost is important.

▶ TEAM ACTIVITY

In teams, put yourself in the position of the human resources director of the XYZ Hotel. It has come to your attention through the employee grapevine that one of your male executive housekeepers is making romantic overtures to several of the female housekeepers. How will you handle this situation? Be as specific as possible, given the page-length limitation (two pages, double-spaced). Address all issues and concerns, including yours and the accused's, as well as privacy, and, finally, recommend a solution.

Chapter 9

Your Responsibilities as a Hospitality Operator

"Let me see the incident report," said Trisha Sangus, as she took the document from the hand of Director of Security Travis Daniels. She studied the paper carefully. As a hotel general manager, she had seen dozens of reports of guests who had, or claimed to have had, an accident that could put the hotel at some legal risk. Trisha reviewed every incident report involving guests, and her insurance company was glad she did. Despite the cheerful holiday music playing in the background, Trisha knew a guest incident could mean a troubled holiday for the hotel.

"What's the background on this incident?" she asked.

"Well," began the security director, "as I understand it, Larry Nolan checked into the hotel around 11:00 P.M. last night. I verified that with the front-desk manager. Our front-desk system notes the time of check-in. Sometime after 1:00 A.M., Isaac, one of the night auditors, heard a thud, a brief shout, and a clattering of ice near the lobby elevator. When he went to the elevator entrance, he saw Mr. Nolan lying on the floor near the ice machine, with an ice bucket on the ground and ice all around."

"He slipped on the ice?" Trisha asked.

"No," said the director, "he claims he slipped on a Christmas ornament that had fallen from a wreath that was hanging on the wall about 3 feet from the ice machine. I talked to him by telephone in his room this morning. He said his cousin was a lawyer, and he was going to sue!"

"Was it a glass ornament?" Trisha interrupted.

"Yes. It was hanging about 9 feet above the ground."

"Did you investigate?" Trisha continued. "Had the ornament in fact fallen and broken?"

"Unfortunately, yes; I checked myself," said the director. All our decorations have four ornamental balls except this one. It has three, and a spot where it appears one was once attached. I think Mr. Nolan was probably right. The bulb did fall."

"What about Lance Dani, the manager on duty?" Trisha asked. "Did he file his manager-on-duty [MOD] closing report?"

"Yes," replied the director. "I have it here. Mr. Dani did the last rounds of the hotel at midnight, just as our procedures dictate. His report is signed and dated."

"Those rounds include checking the ice machine areas for leaks. Did Lance put his initials by that portion of the checklist?"

"Yes, he did," replied the director.

"And did he note a broken ornament?" Trisha asked as she reached across her desk for the MOD report.

"No," said the director. "The bulb must have fallen after midnight. A bad break for the hotel."

"Well," replied Trisha, "we make our own breaks generally. I'll call the insurance company and file a report. That's standard procedure, but frankly, I don't believe Mr. Nolan has much of a liability claim against the hotel, thanks to Lance doing his job right. But this will be a good time to review our accident procedures at the daily staff meeting."

As the director of security left her office, Trisha was glad everyone had performed well in the case of this accident. She had been in hotels where the staff had not been as well trained, and the results, as she knew, could be disastrous, for both the hotels and their managers' careers.

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. To differentiate between the types of legal duties required of a hospitality operator, and the consequences of the failure to exercise reasonable care in fulfilling these duties.
2. To evaluate operational activities in light of their impact on guest safety and potential legal damages.
3. To understand how a lawsuit is initiated and moves through the U.S. court system.
4. To create a checklist of the steps that should be initiated immediately following an accident.

9.1 DUTIES AND OBLIGATIONS OF A HOSPITALITY OPERATOR

Duties of Care

▶ LEGALESE

Duty of care: A legal obligation that requires a particular standard of conduct.

Hospitality operators owe a **duty of care** to those individuals who enter their establishments. Some duties of care are rather straightforward. For example, a

restaurateur has a duty of care to provide food that is safe and wholesome for guests. While hospitality operators are not required to be insurers of their guests' safety, and are generally not held liable for events they could not reasonably foresee, they are required to act prudently and use reasonable care, as defined later in this chapter, to fulfill their duties of care.

Because of the wide variety of facilities they operate, hospitality managers can encounter a variety of duties of care. These include the duties to:

1. *Provide a reasonably safe premise:* This would include all public space, the interior of guestrooms, dining rooms, and the exterior space that makes up the operator's total physical facility.
2. *Serve food and beverages fit for consumption:* This duty of care is shared with those who supply products to a foodservice operator, and would also include the techniques used by an operator to prepare and serve food or beverages.
3. *Serve alcoholic beverages responsibly:* Because of its extreme importance, this duty of care will be examined separately in Chapter 12, "Your Responsibilities When Serving Food and Beverages."
4. *Hire qualified employees:* This duty must be satisfied to protect yourself against charges of negligent hiring and other potential liabilities.
5. *Properly train employees:* This duty must be satisfied to protect yourself against charges of negligent staff training.
6. *Terminate employees who pose a danger to other employees or guests:* This duty must be satisfied to protect yourself against charges of negligent employee retention.
7. *Warn of unsafe conditions:* When an operator is aware, (or, in some cases, should be aware) of conditions that pose a threat to safety (such as a wet floor or broken sidewalk), those conditions must be made obvious to the guest.
8. *Safeguard guest property, especially when voluntarily accepting possession of it:* In the hospitality industry, guests may retain control of their own property (such as when they take an item into their hotel room) or the operator may take possession of it (such as when a guest's car is valet-parked, a coat is checked, or valuables are deposited in a hotel's safety deposit box). In each case, the law will detail the duty of care you must exercise to protect guests' property.

ANALYZE THE SITUATION 9.1

Alan Brandis arrived at the Golden Fox restaurant for a Friday-night fish-fry. During his meal, a severe thunderstorm began, which caused the ceiling of the men's restroom to leak. After finishing his meal, Alan entered the men's room to wash his hands. He slipped on some wet tile, which was caused by the leak in the roof. Alan struck his head during the fall and was severely injured.

One week later, Alan's attorney contacted the owners of the Golden Fox with a claim for damages. The restaurant owners maintained the fall was not their responsibility, claiming they were not the insurers of guest safety. While the owners knew of the condition of the roof, they said it leaked only during extremely heavy thunderstorms and was too old to fix without undue economic hardship. Most important, because the storm was not within their control, the owners maintained that it was not reasonable to assume they could have foreseen the severity of the storm, and thus could not be held liable for the accident.

1. Was the severity of the storm a foreseeable event?
2. What duty of care is in question here?
3. Did the restaurant act prudently?
4. Are the restaurant's defenses valid? Why or why not?

Standards of Care

▶ **LEGALESE**
Standard of care: The industry-recognized, reasonably accepted level of performance used in fulfilling a duty of care.

In fulfilling the duties of care just detailed, you must exercise a **standard of care** appropriate to the given situation. An appropriate standard of care is determined, in part, on the level of services a guest would reasonably expect to find in a hospitality facility. For example, a guest departing on a seven-day cruise of the Pacific would reasonably expect that the ship's staff would include a full-time doctor. The same guest visiting a quick-service restaurant at 11:00 P.M. would not expect to find a doctor on hand. In both cases, it is possible that a guest could suffer a heart attack and require medical care. The ship's standard of care, however, would include medical treatment, while the restaurant's would not.

Many disputes involving liability and negligence in the hospitality industry revolve around the question of what an appropriate standard of care should be. Like the law itself, these standards are constantly evolving. Generally speaking, you as a hospitality manager are required to apply the same diligence to achieve your standards of care as any other reasonable hospitality manager in a similar situation. Because standards are constantly changing, and because the standard of care you apply may be assessed during litigation by people who are not familiar with you or your operation, you must strive to stay abreast of changing procedures and technology. To help you do that, refer back to the continuing education components of the STEM principles discussed in Chapter 1, "Prevention Philosophy."

9.2 THEORIES OF LIABILITY

Despite the best efforts of management, accidents involving people can and do happen in hospitality facilities. Employees and guests are subject to many of the same risks in a hospitality facility that they are subject to outside the facility. For example, it is just as possible to trip and fall in a restaurant parking lot as it is to fall in a grocery store parking lot. It is not your responsibility as a hospitality manager to ensure that accidents never happen in your facility; that would be impossible. It is your responsibility to operate in a manner that is as safe as possible, and to react responsibly when an accident does occur. If you do not, the legal system is designed to hold you and your operation accountable.

Reasonable Care

▶ **LEGALESE**
Reasonable care: The degree of care that a reasonably prudent person would use in a similar situation.

Hospitality managers must strive to provide an environment that is safe and secure. For example, a hotel manager who rents a room with a lock on the door should be responsible for ensuring that the lock is in proper working order. A guest would reasonably expect the hotel to provide a lock that was in working order. In fact, the concept of reasonability is so pervasive in law that it literally sets the standard of care that hospitality organizations must provide for their employees and guests. That standard is embodied in the concept of **reasonable care**.

Essentially, reasonable care requires you to correct potentially harmful situations that you know exist or that you could have reasonably foreseen. The level of reasonable care that must be exercised in a given situation can sometimes be difficult to establish. In the case of the manager supplying a guestroom with a working lock, the standard is quite clear. It becomes complex, however, when the guest actually uses the lock. What if the guest does not use the lock properly, or forgets to use it at all? What if the guest abuses the lock to the point where it does not function and then has a theft from his or her room? Clearly, in these cases, the guest bears some or all of the responsibility for his or her own acts.

The doctrine of reasonable care places a significant burden on you as a hospitality manager. It requires that you use all of your skill and experience to operate your facility in a manner that would be consistent with that of a reasonable person (or manager) in a similar set of circumstances.

Torts

A **tort** is a wrong against an individual, in the same way that a crime is a wrong against the state. For example, a patron who drinks too much in a bar and then drives a motor vehicle is guilty of driving under the influence (DUI) of alcohol, a crime against the state. If that same driver causes an accident that injures another motorist, the intoxicated driver would be guilty of a tort, that is, an act that results in injury to another.

▶ **LEGALESE**

Tort: An act or failure to act (not involving a breach of contract) that results in injury, loss, or damage to another (e.g., negligence is an unintentional tort, whereas battery, physically touching someone, is usually an intentional tort).

There are two types of torts: intentional and unintentional. Intentional torts include:

Assault
Battery
Defamation
Intentional infliction of emotional distress

Unintentional torts include:

Negligence
Gross negligence

Negligence is the most common unintentional tort.

Negligence

A person who has not used reasonable care in a situation is deemed to have been **negligent**. Assume, for example, that a guest dives into a resort swimming pool and injures her neck. She thought the pool was deep enough for diving, but the point at which she jumped was only 4 feet deep. The pool was not marked in any way to indicate the water's depth. If a lawsuit follows, and a judge later decides that the resort knew, or could have foreseen, that its guests might dive into the pool, the resort could be found negligent; that is, it did not do what reasonable facility operators would do to protect their guests, such as posting signs prohibiting diving or installing visible depth markers.

▶ **LEGALESE**

Negligent (negligence): The failure to use reasonable care.

Negligence is said to legally exist when the following four conditions have been met:

1. A legal duty of care is present.
2. The defendant has failed to provide the standard of care needed to fulfill that duty.
3. The defendant's failure to meet the legal duty was the **proximate cause** of the harm.
4. The plaintiff was injured or suffered damages.

▶ **LEGALESE**

Proximate cause: The event or activity that directly contributes to (causes) the injury or harm.

In the hospitality industry, managers are responsible not only for their own actions, but under the doctrine of *respondeat superior*, managers can also be held accountable for the work-related acts of their employees. In some cases, managers are even held responsible for the acts of their guests or guests of their guests. The degree of responsibility that a hospitality manager might have for the acts of others ordinarily depends on the foreseeability of the act. If a dangerous act or condition was foreseeable, and no action was taken to warn or prevent, then liability will usually attach.

It is important to note that negligence can result from either the failure to do something or because something was done that probably should not have been. In the swimming pool example, the resort's negligence was the result of a failure to act. But what if the pool's depth was 4 feet and the resort incorrectly marked it as 8 feet? In this situation, if a guest dives into the pool and is injured, the resort's negligence would be the result of a specific inappropriate action it took, not inaction.

An operator can be considered negligent even when he or she is only partially responsible for the harm caused to another. Consider the case of a man who slips on an icy sidewalk in front of a restaurant and falls into a heavily trafficked street, where he is subsequently hit by a car. The fall may have caused only minor injuries by itself, but an even greater injury occurred because he was struck by the car. It is likely that the owner of the sidewalk will face potential charges of negligence, even if the majority of the damages suffered by the injured man were caused by the car, not the fall itself.

Gross Negligence

▶ **LEGALESE**
Gross negligence: The reckless or willful failure to use even the slightest amount of reasonable care.

When an individual or organization behaves in a manner that demonstrates a total disregard for the welfare of others, they are deemed to be **grossly negligent**. The distinction between negligence and gross negligence is an important one, for a simple reason: The penalty is usually greater in a situation involving gross negligence than one involving ordinary negligence. That is because an operator found to have been grossly negligent may be assessed punitive damages (discussed later in the chapter) to serve as an example and to deter others from committing the same act. Often, it is difficult to determine the difference between negligence and gross negligence. The difference in the eyes of a jury, however, can be millions of dollars in an award to a party that can prove it was harmed as a result of the reckless action or inaction of the operator.

ANALYZE THE SITUATION 9.2

Paul and Beatrice Metz took their 11-year-old daughter Christine on a weekend skiing trip; they stayed at the St. Stratton ski resort. The St. Stratton owned and maintained four ski trails and a ski lift on its property.

One morning, Mr. And Mrs. Metz were having coffee in the ski lodge while their daughter was riding the ski lift to the top of the mountain. On the way up, the car containing Christine Metz and one other skier jumped off its cable guide and plunged 300 feet down the mountain. As a result of the fall, Christine was permanently paralyzed from the neck down.

The Metzs filed a lawsuit against the resort. Their attorney discovered that the car's connections to the cable were checked once a year by a maintenance staff person unfamiliar with the intricacies of ski cable cars. The manufacturer of the cable car recommended weekly inspections, performed by a specially trained service technician.

The ski resort's corporate owners maintained that all skiers assumed risk when skiing, that the manufacturer's recommendation was simply a recommendation, and that their own inspection program demonstrated they had indeed exercised reasonable care. In addition, they maintained that Christine's paralysis was the result of an unfortunate accident for which the cable car's manufacturer, not the resort, should be held responsible.

1. Did the resort exercise reasonable care?
2. What level of negligence, if any, was present? Ordinary negligence? Gross negligence?
3. What amount of money do you think a jury would recommend the resort be required to pay to compensate Christine Metz for her loss, if it is found to have committed a tort against her?
4. Are the resort's defenses valid ones? Why or why not?

Contributory and Comparative Negligence

▶ **LEGALESE**
Contributory negligence: Negligent conduct by the complaining party (plaintiff) that contributes to the cause of his or her injuries.

Sometimes guests, through their own carelessness, can be the cause or partial cause of their own injury or harm. In legal parlance, this is called **contributory negligence**. Consider the case of the wedding guest who attends an evening reception at a local country club. In the course of the evening, the guest leaves the clubhouse and wanders on to the golf course. Because the course is not lit at

night, the guest trips over a railroad tie used to define the tee box on the third hole. The guest may claim that the club should have marked the railway tie as a hazard, and that it should have reasonably foreseen that guests would leave the clubhouse and walk on the golf course. The club's attorney, however, is likely to maintain, and rightly so, that walking at night on an unlighted golf course is dangerous and the guest did not exercise reasonable care. While many variables may determine the final outcome of this situation, the courts have held that the contributory negligence of the injured party can reduce an operator's liability for the damages suffered. Judges and juries will be able to compare the negligence of the plaintiff and the defendant when assessing responsibility for the injuries.

The doctrine of **comparative negligence** has become an acceptable way in which to recognize that reasonable care is a responsibility shared by both hospitality operators and those who claim to have been injured by them. If the court determines, for example, that a plaintiff was 25 percent responsible (contributory negligent) for his or her injuries, and the defendant was 75 percent responsible, the amount of damages awarded to the plaintiff would be reduced by 25 percent. The laws that determine comparative negligence vary widely across the 50 states. What is important for you, as a hospitality manager, to remember is that, during your investigation of any incident, do not overlook evidence of negligence on the part of the injured party.

▶ **LEGALESE**

Comparative negligence: Shared responsibility for the harm that results from negligence. The comparison of negligence by the defendant with the contributory negligence of the plaintiff. Also known as *comparative fault.*

Strict Liability

In some cases, a hospitality organization can be found liable for damages to others even if it has not acted negligently or intentionally. This is because some activities are considered to be so dangerous that their very existence imposes a greater degree of responsibility on the part of the person conducting the activity. For example, if an amusement park elected to train a wild tiger as part of its promotional activities, it would be held responsible for the tiger's actions, even if the park could not be proved to be negligent in the tiger's handling. This is true because keeping dangerous animals in close proximity to people is, in itself, a dangerous activity, and one that was voluntarily undertaken by the amusement park. In these types of circumstances, those who engage in the activity are judged not by their actions, but by the nature of the activity itself, which creates absolute, or **strict liability**.

▶ **LEGALESE**

Strict liability: Responsibility arising from the nature of a dangerous activity rather than negligence or an intentional act. Also known as *absolute liability* or *liability without fault.*

In the hospitality industry, the greatest operational threat imposed by strict liability is that involved with the serving of food and beverages. Recently, the courts have more often begun using the doctrine of strict liability to penalize those who sell defective food and beverages. The position of the courts is that the selling of unwholesome food and beverages is, in itself, so dangerous that those who do so, even unwittingly, will be held to a limited form of strict liability.

◀ **SEARCH THE WEB 9.1** ▶

Log on to **www.findlaw.com**.

1. Select: Legal Subjects.
2. Select: Injury & Tort Law.
3. Select: Injury & Tort Law Attorneys, Lawyers & Law Firms (Find a Lawyer).
4. Select your state.
5. Select your city.
6. Select the name of an attorney practicing in your city.
7. Contact the attorney's office by telephone or letter and ask if he or she can help you understand how the state and/or local courts view comparative negligence in his or her practice area.

Intentional Acts

▶ **LEGALESE**
Intentional act: A willful action undertaken with or without full understanding of its consequences.

While the law makes a distinction between negligence and gross negligence, it reserves the greatest sanctions for those who not only do not exercise reasonable care, but commit **intentional acts** that cause harm to others. If the employees of an innkeeper intentionally invade the privacy of a guest (e.g., viewing guest behavior in a guestroom via a hidden video camera), the innkeeper is subject to severe liability, including punitive damages.

To illustrate this concept, consider this situation: It is late Friday night, about 11 P.M., and your bar is packed—210 people at last count. Your fire occupancy limit is 125, but nobody pays attention to those signs. So far, the night has been fairly peaceful. You finally have a chance to sit down for a moment, so you take a seat at the end of the bar where you can see what's going on, and you ask your bartender to pour you a long, tall, cold ginger ale.

The drink arrives, and as it touches your lips—*flash!*—out of the corner of your eye, you see a flurry of activity. Two guys are fighting, and really going at it. You grab one guy and the bouncer grabs the other. There is blood all over the face of the guy you grabbed, and he is wailing. You notice a broken beer mug on the table. Three girls are screaming hysterically and wiping blood off their clothes and skin.

You finally get things calmed down, transport the injured patron to the hospital, and start collecting information. You find out:

- The fight started when a guy asked one of the girls to dance; she declined, and everyone at the table, including the subsequently injured patron, began laughing.
- The guy who asked the girl to dance took offense, picked up an empty beer mug, and smashed it into the face of "Mr. Laughter."
- The two guys had never seen each other before.
- The girls had never seen the "dancer" before the incident occurred.

Are you financially responsible for the injuries? Historically, the courts have decided that a hospitality operator is not responsible for damages suffered by a patron that were caused by the intentional actions of a third party, when the third party is a customer or guest. The courts' rationale is that the intentional or criminal act of a third party could not be foreseen by the operator, therefore, it would be impossible for the operator to take any precautions or preventative measures to keep it from happening.

Recently, however, the courts in many jurisdictions have concluded that if violent acts previously occurred on a property, or even if the property is in a "high-crime zone," an incident and resulting injury could be considered foreseeable, hence the operator may be held responsible if it failed to use reasonable care in managing the establishment.

Negligence Per Se

▶ **LEGALESE**
Negligence per se: When a rule of law is violated by the operator; such violation of a rule of law is considered to be so far outside the scope of reasonable behavior that the violator is assumed to be negligent.

The barroom brawl just described does not provide enough facts to discern whether the incident and resulting injury were foreseeable by the operator. But what is readily apparent from the facts is the concept of **negligence per se**.

You may recall that the bar had more than the allowed number of patrons. Is this negligence per se? Quite possibly. The injured patron's attorney will certainly argue that the occupancy restrictions should have been maintained, not just for fire regulations, but for physical safety as well. The occupancy restrictions would have helped to maintain order. More than likely, an expert in building safety or club management would concur.

It could also be argued that the excessive occupancy contributed to the likelihood of a fight breaking out on the premises, and that likelihood would have been foreseeable by the operator. In other words, fights, altercations, and injuries

are more likely to occur when there is not enough space between patrons (another reason for restrictive occupancy rules).

The moral of this story is, follow the law. It is tempting to pack the house, but there can be dire consequences if an injury occurs and you have violated an ordinance, such as excessive occupancy or serving an underage customer. Always obey local, state, and federal laws.

9.3 LEGAL DAMAGES

If an injured party suffers a demonstrable loss as a result of a tort, the law requires that the entity responsible for the loss be held accountable. The process for doing so is by awarding damages to the injured party. There are two types of damages for personal injuries most likely to be encountered by a hospitality manager: compensatory damages and punitive (or exemplary) damages.

Compensatory damages are actual, identifiable damages that result from wrongful acts. Examples of actual damages include doctor, hospital, and other medical bills, pain and suffering, lost income as a result of an injury, or the actual cost of repairing damage to a piece of real or personal property. The recovery of these damages is said to "compensate" the injured party for any out-of-pocket costs incurred as a result of the accident, as well as for pain and suffering. If, for example, a maintenance worker for the hotel accidentally leaves some tools in the hallway of a hotel, and a guest falls and breaks her watch, the cost of replacing the watch can be easily identified, and the hotel could be expected to reimburse the guest. The same could well be true of any medical bills the guest might incur due to the fall.

▶ **LEGALESE**

Compensatory damages: Monetary amount awarded to restore the injured party to the position he or she was in prior to the injury (e.g., medical expenses, lost wages, etc.). Also referred to as *actual damages*.

Punitive damages seek to serve as a deterrent not only to the one who committed the tort, but also to others not involved in the wrongful act. The principle here is that an individual who was grossly negligent or acted maliciously or intentionally to cause harm should be required to pay damages beyond those actually incurred by the injured party. In this way, society sends a message that such behavior will not be tolerated and that those who commit the act will pay dearly for having done so.

▶ **LEGALESE**

Punitive damages: A monetary amount used as punishment and to deter the same wrongful act in the future by the defendant and others.

Generally, punitive damages will be awarded only when a defendant's conduct was grossly negligent (the reckless disregard or indifference to the plaintiff's rights and safety) or intentional. In the hospitality industry, a manager could be found to have reckless disregard for the safety of a guest if, for example, the manager knew that a guestroom's lock was defective, yet sold that room to a guest who was subsequently assaulted and seriously injured.

9.4 ANATOMY OF A PERSONAL INJURY LAWSUIT

Hospitality managers do not want to operate their business in a way that will result in legal action being taken against them. In today's litigious society, even for a prudent operator, the threat of loss to the business because of lawsuits is very real. Some of the lawsuits that are filed are frivolous, while others raise serious issues. In either case, the effective hospitality manager must be aware of how lawsuits are filed, how they progress through the court system, and, most important, the role the hospitality manager plays in the process.

Personal Injury

Much of your concern as a hospitality manager will focus on the potential for damages that result from **personal injury**. The reason for this is fairly straightforward: Hospitality managers provide guests with food and beverages, lodging accommodations, and entertainment, yet the process of providing these goods and services can place a business in potential jeopardy. The adage "accidents can happen" today can be extended to "accidents can happen, and if they do, the affected parties may sue!"

▶ **LEGALESE**

Personal injury: Damage or harm inflicted upon the body, mind, or emotions.

Certainly, it is best to manage your business in such a way as to avoid accidents. Nevertheless, accidents and injuries will occur, and many times deter-

mining where to place the responsibility for the accident is unclear. Consider the case of Norman and Betty Tungett. The Tungetts check into a motel, and at about midnight, Mrs. Tungett goes out to her car to get a piece of luggage. While she is in the parking lot, she is assaulted. In addition to being badly frightened, she suffers physical harm, as well as lingering apprehension about being out after dark by herself. Listed here are just a few of the questions that could be raised in a case such as this:

1. Were the lights in the parking lot working well enough to minimize the chance that a guest would be assaulted?
2. Was management vigilant in eliminating potential hiding places for would-be assailants?
3. Were the Tungetts warned on check-in that the parking lot might not be safe, late at night?
4. Were access doors such that Mrs. Tungett could have easily gotten to her room after visiting the lot?
5. Had the motel experienced similar incidents in the past, and if so, what precautions had been taken?

Notice that, in this example, there is no clear-cut reason for believing the motel is in any way responsible for the Tungetts problem. It is important to remember, however, that the court system gives the Tungetts and their attorney the right to file a personal injury lawsuit in an effort to determine if, in fact, the motel was totally or partially responsible for the assault. In doing so, the Tungetts will seek damages resulting from the assault. Such a lawsuit will, without doubt, be time-consuming for management and expensive to defend against. Nevertheless, such lawsuits are filed on a daily basis, and it is rare that hospitality managers do not find themselves involved, to some degree, in such a suit at some time in their career. For this reason, we will examine the anatomy of a personal injury lawsuit from its inception to conclusion.

Demand Letter

▶ **LEGALESE**

Demand letter: Official notification, typically delivered to a defendant via registered or certified mail, that details the plaintiff's cause for impending litigation.

Typically, a manager will learn that he, she, and/or the business are being sued when a **demand letter** is received. The demand letter comes from an attorney who has been contacted by the injured plaintiff and has agreed to take up the plaintiff's cause. As you can see in Figure 9.1, the typical demand letter sets forth the plaintiff's version of the facts surrounding an alleged personal injury, and may also include the monetary amount of damages being sought and usually a deadline for the manager to respond to the charges.

Attorneys, generally, will accept a personal injury case with one of three payment plans. The first is the hourly fee, whereby the attorney bills his or her client (the plaintiff) at an hourly rate for each hour the attorney works on the personal injury claim. In this case, it is clearly in the best interest of the plaintiff to seek a conclusion to the case as quickly as possible to minimize attorney fees. In a second type of plan, the attorney agrees to take the case for one flat fee. In this situation, it is clearly in the best interest of the attorney to seek a quick resolution of the case. The third payment form is the **contingency fee**. Lawyers representing defendants charged with crimes may not charge contingency fees, and in most states, contingency fee agreements must be put in writing. Clearly, in a case where the attorney is representing the client on a contingency basis, it is in the best interest of the plaintiff and the attorney to seek the most favorable, rather than the fastest, settlement possible.

▶ **LEGALESE**

Contingency fee: A method of paying for a civil attorney's services where the attorney receives a percentage of any money awarded as a settlement in the case. Typically, these feeds range from 20 to 40 percent of the total amount awarded.

Regardless of the form of payment agreed on between the plaintiff and his or her attorney, the demand letter is the first step in the litigation process. If the response to the demand letter does not satisfy the plaintiff, he or she will likely instruct the attorney to file suit against the defendant.

January 15, 2005
Via Certified Mail: Z 123 456 789

Nina Phillips, General Manager
XYZ Hotel
Re: My client: Ginny Mayes
Date of Accident: January 1, 2005

Dear Ms. Phillips:

Please be advised that I represent Ginny Mayes. Ms. Mayes has retained my firm to represent her in her claim for damages against the XYZ Hotel and others that might be responsible for causing the incident that led to her injuries.

As you are aware, my client attended the New Year's Eve Gala that was hosted by the XYZ Hotel on December 31, 2004. At midnight, and until a few minutes thereafter, employees of the XYZ Hotel began opening champagne bottles by "popping the corks" (releasing the corks and allowing them to fly into the air).

My client was dancing on the dance floor when she was suddenly struck in her left eye by one of the corks. The cork was traveling at a high rate of speed, and when it struck her eye, she lost her balance and fell, striking her head on the wooden dance floor.

As a result of the negligent acts of the employees/agents of the XYZ Hotel, my client suffered severe injuries including a subdural hematoma, a concussion, facial lacerations, and a permanent partial loss of sight in her left eye.

You are further advised that my client's occupation for the past fifteen (15) years has been as a pilot for a major airline. Airlines require high vision standards to be met by their pilots. Ms. Mayes's physicians have advised her that she will no longer meet the minimum vision standards required to be a pilot (report enclosed), as a direct result of the injuries she sustained while attending the New Year's Eve Gala.

Accordingly, demand is hereby made for the sum of $25,000,000 (twenty-five million dollars) to compensate my client for the injuries she suffered due to the negligence and gross negligence of the employees of XYZ Hotel Company; including past, present, and future pain and suffering; past, present, and future medical expenses for both treatment and rehabilitation; and past, present, and future lost wages.

If you have liability insurance, you are strongly urged to advise the carrier of this claim, as most policies require prompt notification when a claim is made.

Please be advised that in the event this matter is not resolved to my client's satisfaction within ten (10) days of your receipt of this correspondence, that she has authorized me to pursue any and all legal remedies available to her in this regard, including filing suit seeking the recovery of compensatory damages, punitive damages, costs of court, and reasonable attorney fees.

Finally, you are advised that time is of the essence in this regard and that your silence will be deemed an admission. Please contact me or have your attorney contact me as soon as possible if you have any questions.

Thank you for your courtesy and cooperation.

Very Truly Yours,

Ms. Alixandre Caroline, Attorney at Law

Figure 9.1 Demand letter.

Filing a Petition

Filing a petition (or pleading or complaint) is the term used to describe the process of initiating a lawsuit. A petition is a document that officially requests a court's assistance in resolving a dispute. The petition will identify specifically the plaintiff and the defendant. In addition, it will describe the matter it wishes for the court to decide. Included in the complaint against the defendant will be the plaintiff's suggestion for settlement of the issue. The plaintiff may, for example, ask for monetary damages. After the petition has been filed with the administrative clerk of the court, the lawsuit officially begins.

Once the complaint is filed with the court, the court will notify the defendant of the plaintiff's charge and will include a copy of the complaint in the notification. Upon receipt of the complaint, the defendant needs to respond in writing within the time specified in the notice from the court.

Discovery

In the discovery phase of a civil lawsuit, both parties seek to learn the facts necessary to best support their position. This can include answering questions via **interrogatories** or **depositions**, requests for records or other evidence, and sometimes visiting the scene of the incident that caused the complaint.

▶ **LEGALESE**
Interrogatories: Questions that require written answers, given under oath, asked during the discovery phase of a lawsuit.

The discovery process can be short or very lengthy. Either side may ask for information from the other, and if necessary, a judge will rule on whether the parties to the suit must comply with these requests. In some instances, one party in a lawsuit may obtain a court order demanding that specific documents be turned over or that specific individuals be called to testify in court. This order is called a **subpoena**. A subpoena may also be used to obtain further evidence or witnesses while a trial is ongoing.

▶ **LEGALESE**
Depositions: Oral answers, given under oath, to questions asked during the discovery phase of a lawsuit. Depositions are recorded by a certified court reporter and/or by videotape.

The plaintiff in the lawsuit has the burden of proving the allegations set forth in the petition. This is the responsibility of proving to the finder of fact (judge or jury) that a particular view of the facts is true. In a civil case, the plaintiff must convince the court "by a preponderance of the evidence," that is, over 50 percent of the believable evidence. In a criminal case, the government has a higher standard, and must convince the court "beyond a reasonable doubt" that a defendant is guilty.

▶ **LEGALESE**
Subpoena: A court-authorized order to appear in person at a designated time and place, or to produce evidence demanded by the court.

Trial and Appeal

The trial is the portion of the injury suit process during which the plaintiff seeks to persuade the judge or jury that his or her version of the facts and points of law should prevail. In a like manner, the defendant also has an opportunity to persuade for his or her side. Most personal injury cases are tried in front of a jury. After a jury is selected to hear the trial, the process, while it may vary somewhat from state to state, is as follows:

1. Presentation by plaintiff
2. Presentation by defendant
3. Plaintiff's rebuttal
4. Summation by both parties
5. Judge's instructions about the applicable law and procedures to the jury
6. Jury deliberation
7. Verdict
8. Judgment or award
9. Appeal of verdict and/or award

▶ **LEGALESE**
Appeal: A written request to a higher court to modify or reverse the decision of a lower-level court.

Either side has the right to **appeal** a verdict or award. In the personal injury area, it is common for a losing defendant to appeal the size of the award if it is considered by the defendant's counsel to be excessive.

LEGALLY MANAGING AT WORK:
The Manager's Role in Litigation

Demand Letter
Upon receipt of a demand letter, turn it over to your insurance company and your attorney for advice. Follow the recommendations of the insurance company and your attorney. Be as cooperative as possible with any investigations that your insurance company or attorney may instigate.

Notification of Filing a Lawsuit
Ordinarily, a representative of the court (e.g., constable, sheriff, etc., or a private person authorized by the court) will personally hand you the pleading

to ensure that the court knows you received it. If you are served with a pleading, you must recognize that these pleadings, and your company's obligations to respond, are time-sensitive. You need to deliver the pleading to your attorney as prescribed; make sure your insurance company gets a copy and that you keep one for future reference.

Discover

As stated previously, the discovery process enables each party to obtain information from the other party, which will be used as documentary evidence to help prove the facts of a case. Managers will often be asked to turn over records of their business, repair invoices, reports, and information stored electronically. Plaintiffs often must turn over medical records and reports, doctor bills, receipts for damages, and other types of personal information. Often, a manager or staff member may be asked to prepare a personal statement during the discovery process, or even go to court and testify as a witness during the trial.

The cost of responding to discovery requests, either by testifying or preparing documents, can be a very expensive proposition for your operation, not only from a financial perspective but also because of the time involved and the disruption it causes to your staff. Accordingly, the better organized you are at the outset of the incident, the less of a burden the discovery process will be. Work closely with your attorney during this phase, be cooperative, and be sure to meet all time limits imposed for responses, as missing a deadline can be fatal to your side of the case.

Trial and Appeal

Request that your attorney update you frequently about trial settings (the date the trial will commence). Reciprocally, you need to let your attorney know about any times that you or your employees will be unavailable to testify (such as vacations, scheduled surgeries, etc.).

If your case is appealed, your involvement in the appellate process will be very minimal, if at all. This process rarely requires anything new from you that was not provided before the trial. Nevertheless, you should continue to maintain your records of the case and keep track of any witnesses. ◀

Alternative Dispute Resolution

There are alternatives to resolving personal injury claims in court. The parties at any time during the litigation process can agree on a settlement. Two other common methods used in the hospitality industry are mediation and arbitration. Both can be highly effective alternatives to the time, cost, and stress involved in going through a trial.

In mediation, a trained and neutral individual (the mediator) facilitates negotiation between the parties, in order to achieve a voluntary resolution of the dispute. In most cases, one full day of mediation can result in a compromise acceptable to both the plaintiff and defendant. Mediation can involve sessions jointly held with both parties and their attorneys, or separate meetings with each party, their attorneys, and the mediator. The cost of mediation will vary based on the complexity of the case, but is generally far less than that involved in going to a trial. If the mediation is unsuccessful, the parties may still pursue a trial. If a settlement is made, the parties sign a settlement agreement approved by their attorneys. This agreement, if drafted properly, is an enforceable contract.

In arbitration, a neutral third party (usually chosen by mutual agreement of both parties) makes a binding decision after reviewing the evidence and hearing the arguments of all sides.

The Manager's Role in Alternative Dispute Resolution Make sure that you and your attorney have established guidelines about what you can say, if anything,

and when you can say it. Be patient. To be effective, the negotiation process can sometimes appear tedious, but the art of compromise usually takes time. Be flexible and willing to compromise. Many times, an apology at this point in the process will help pave the way for compromises on other significant issues, including the amount of money to be paid.

◀ **SEARCH THE WEB 9.2** ▶

Log onto **www.spidr.org**.

1. Select: Ethical Standards of Professional Responsibility.
2. Review the document developed by the Society for Professionals in Dispute Resolution (SPIDR).
3. From the document displayed, determine:
   a. What are the major responsibilities to the parties addressed in the Society's Ethical Statement?
   b. Which responsibility do you believe is most important for effective mediation? Why?

9.5 RESPONDING TO AN INCIDENT

Despite all of your careful planning, preparation, and prevention techniques, guests can still be seriously injured on your property. Because of the explosion of litigation in this country and the large jury awards that can result, owners and operators of hospitality facilities have spent great amounts of time, energy, and money to implement training programs and procedures that will reduce accidents. But, when accidents do occur, you must be prepared to act in a way that serves the best interest of both your operation and the injured party.

In his book *Accident Prevention for Hotels, Motels, and Restaurants* (Van Nostrand Reinhold, 1991), author Robert L. Kohr states that the first 15 minutes following an accident are "critical" in eliminating or greatly limiting your legal liability. He is correct. It is your job to know what to do—and, just as important, what not to do—during this critical time period.

The moments following an accident are often confusing and tense. For a manager, they will demand excellent decision-making skills. The steps given in the next Legally Managing at Work box describe how control people (owners, managers, and supervisors) should react during this crucial time period. Remember, the objective is to act in such a way as to protect both the business and the accident victim. These steps will help you accomplish both.

As you can see, it is imperative that control people take charge of the scene immediately after an accident occurs. They should be the only ones talking to the injured party, and they need to be prepared to react and think quickly under pressure. Role-playing is a great way to train people to know how to respond appropriately when an accident or emergency situation arises.

Hospitality operations must continue to undertake serious prevention efforts, but they should also be prepared for reality: Accidents do happen, and the steps taken the first few minutes after an accident can be crucial in minimizing the negative impact of a potential claim.

LEGALLY MANAGING AT WORK:
Responding to an Accident

Step 1. Do call 911.

First and foremost, get qualified, professional help. Do not leave it to the discretion of an untrained person to determine whether or not an injury

requires professional medical treatment. Do not allow the delay of a decision-making process to increase your chance of liability. Call 911.

Step 2. Do attend to the injured party.

Let the injured party know that you have requested emergency assistance. Try to make him or her as comfortable as possible. If you have certified care providers on your staff, allow them to administer appropriate aid. Restrict the movement of the injured party as much as possible unless the injury makes immediate movement necessary.

Step 3. Do be sensitive and sincere.

Do not treat the injured person as a potential liability claim. If you do, you will probably end up with one. In discussions with many injured patrons who later filed lawsuits, it was found that a significant reason for making their claim was the insensitive treatment exhibited by the establishment after the accident occurred. Treat the injured party with sensitivity, sincerity, and concern.

Step 4. Do not apologize for the accident.

Being sensitive, sincere, and concerned does not equate to taking responsibility for the accident. Besides, until the investigation is completed, you do not know if an apology by you for the accident is appropriate.

Step 5. Do not admit that you or your employees were at fault. Do not take responsibility for the accident.

Statements such as these made immediately following an accident are often based on first impressions, without knowing all of the facts. Unfortunately, making such statements may have a profound impact on the injured party, as well as a judge or jury, who may perceive them to be a credible admission of guilt or liability. Even when the circumstances surrounding an incident seem glaringly obvious, refrain from admitting fault or responsibility. There is no reason to discuss liability, negligence, or responsibility at this time. The focus should be on the guest's injuries, not on the cause of the accident.

Step 6. Do not offer to pay for the medical expenses of the injured party.

By offering or promising to pay for medical expenses, the control person is possibly entering into a contractual arrangement with the injured party or the medical provider to pay for the cost of treatment. This contract might be enforceable even if the outcome of the accident investigation shows that the hospitality operation was not at fault. In minor injury situations, you can offer to call a particular doctor or treatment center for the injured party, but allow him or her to choose the provider. In very limited circumstances, you might want to agree to pay for the initial treatment only, but specify your position in writing with the medical provider.

Step 7. Do not mention insurance coverage.

Fortunately, most hospitality operations have insurance for many types of accidents and injuries that occur on their premises. Unfortunately, the fact that an operator has insurance will sometimes reflect as dollar signs in the eyes of the injured party. Psychologically, it is much easier to pursue a big, cold, indifferent, and unfamiliar insurance company than it is to pursue a very warm, concerned, and well-meaning hospitality manager.

Step 8. Do not discuss the cause of the accident.

Discussing the cause of the accident with the injured party is a no-win situation. If the injured party argues or implies that the hospitality operation is

at fault for the accident, and the control person agrees, fault has been admitted. If the control person disagrees, it will only create ill feelings and exacerbate the situation. Remaining silent is not an admission of liability, and is preferable to arguing with the injured party. Another alternative is for the control person to reassure the injured party, that he or she will conduct a complete investigation and will be happy to discuss the circumstances upon its completion.

Step 9. Do not correct employees at the scene.

This immediate reaction can have a very serious negative impact in the future. On-the-scene reprimanding of employees is sometimes interpreted by the injured party that a mistake was made or that the operation caused the accident. Control people need to remember that they cannot change what has already occurred. They can only hope to positively influence the future decision-making process of the injured party. This can best be accomplished by focusing on the injured party, not on the operation. There will be plenty of time to assess each employee's performance and to take appropriate corrective action if it is warranted, *after* the investigation has been completed.

Step 10. Do conduct a complete and thorough investigation.

Although it will take a great deal longer than 15 minutes, a significant amount of the information for a thorough investigation needs to be gathered immediately after the accident. If other guests saw the accident, request that they write down what they saw. Ask them to sign and date their statements, and to leave their address and phone number in case you need to contact them in the future. It may take years for a claim to be resolved. Attorneys and investigators will need to be able to locate the people who gave statements. An incident report, such as the one shown in Figure 9.2, can be used to help gather such information. Remember, evidence wins lawsuits, and the more evidence and documentation you have, the better your chances for a favorable ruling, or one that minimizes the amount of damages you will have to pay.

It is also important to have your employees fill out and sign a written report. Employees may change jobs, voluntarily leave, or be terminated from an operation before an accident claim is resolved. Depending on why they left, employees' perceptions of an accident, or the events leading up to it, may change over time, along with their overall perception of the operation and its owners and supervisors. It is not unusual for an employee to first recount a positive rendition of the events from the employer's perspective, then upon being terminated, to later report information that would make the employer look negligent in the eyes of an attorney or judge.

Step 11. Do complete a claim report and submit it to your insurance company immediately.

Most insurance policies require prompt notification of any and all potential claims if they are to provide coverage under the policy. The reason is that insurance companies want their experts to become involved in the investigation as early as possible. Your failure to report the claim could cause the claim to be excluded from coverage.

Step 12. Do not discuss the circumstances surrounding the accident or the investigation with anyone except those who absolutely need to know.

Conversations and opinions given to employees, or even people not associated with the business, can come back to haunt you. Restrict your conversations to the hospitality operation's attorneys or authorized representatives of the insurance company.

INCIDENT REPORT

Business _____ Date _____

Address _____ City _____ State _____

Complainant

_____

Last Name First Name Initial

_____

Address City State Zip

_____

Home Telephone Business Telephone

Type of Incident

_____

Theft Accident Property Damage Other

Injury

First aid given? Yes_____ No_____

First aid refused Yes_____ No_____

EMS called? Yes_____ No_____

Taken to emergency? Yes_____ No_____

Nature of injury _____

_____

_____

Detail of Incident

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Property and Value

Damaged/Missing Property Description Estimated Value

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

Figure 9.2 Incident reporting form.

Room Entry **Room Number** _____

Room entered? _____ Time _____

Door locked? _____ Door chained? _____

Entered by _____ Witnessed by _____

Police Report

Police Officer Name _____

Shield # _____ Report # _____

Arrest made? _____ Citation issued? _____

Witnesses:

Name _____ Tel: _____

Address _____ City _____ State _____

Name _____ Tel: _____

Address _____ City _____ State _____

Name _____ Tel: _____

Address _____ City _____ State _____

Comments: _____

_____

_____

_____

_____

_____

_____

_____ _____

Prepared by Reviewed by

_____ _____

Date Date

Figure 9.2 *(Continued)*

Step 13. Do not throw away records, statements, or other evidence until the case is finalized.

Cases can be resolved in several different ways: The claim could be settled prior to trial; the case could be tried in court and decided, or perhaps appealed until all avenues for appeal are exhausted. And sometimes a potential injury claim may not be filed as a lawsuit right away. Whatever the circumstance, the case will not be considered closed until the statue of limitations runs out (ordinarily two years from the date of the injury in a personal injury claim). If you are not absolutely certain whether a claim has been finalized, check with your operation's attorney or the insurance company, and request a letter of consent to destroy the evidence. ◀

▶ INTERNATIONAL SNAPSHOT

Negligence

Negligence overseas can spell liability at home. The standards used in the United States to determine whether the employees of a hospitality facility exercised reasonable care may apply to the foreign operations of American hospitality companies. Consider the following:

- Many Americans desire to travel overseas.
- Many of those Americans are more comfortable staying at a facility that has a familiar name and appearance.
- The American hospitality industry purposefully seeks to attract the business of those people.
- Those marketing efforts often succeed because the industry is able to combine the allure of exotic places with the peace of mind that accompanies known corporate brands.

Americans who travel overseas expect that their experience will be consistent with their experiences in the United States. So do U.S. courts. American travelers eventually come home, and when they have suffered losses overseas at facilities operated by American companies, any suit they file is likely to be filed at home. When that happens, U.S. courts usually impose U.S. legal standards. The following factors, either alone or in combination, will be considered:

- The parties to the litigation, namely the dissatisfied guest and the American operator of the overseas facility, are United States citizens. U.S. courts are not comfortable imposing foreign legal standards upon United States citizens.
- The foreign jurisdiction's legal principles may be repugnant to the policy of the U.S. jurisdiction. Similarly, U.S. courts are unaccustomed to analyzing and applying foreign legal standards.
- The foreign hospitality facility is under the control of an American company. For example, American hospitality companies typically impose their corporatewide practices and procedures on their foreign operations. The managers of the foreign operations may have been trained in the United States by the American operator.

Managers of overseas hospitality facilities operated by U.S. companies should strive to meet American standards of care in all aspects of the hospitality operation. U.S. courts evaluating their performance after an American tourist has an unfortunate experience will most likely expect them to do nothing less.

Provided by Perrin Rynders, of the Varnum Riddering Schmidt Howlett Law Firm, in Grand Rapids, Michigan. www.varnumlaw.com

WHAT WOULD YOU DO?

Assume you are a mediator whose job is to help opposing parties limit the expense and time of going to trial in matters of personal injury. In your current case, Jeremy and Anne Hunter have filed a personal injury suit against the Fairview Mayton Hotel's ownership group and its franchisor, Mayton Hotels and Resorts Inc.

According to the Hunters, they checked into their suite at the Fairview Mayton, one of 150 independently owned, franchise-affiliated properties, on a Friday night. Their daughter Susan, who was 8 years old at the time, opened a sliding patio door, and upon seeing the outdoor hot tub that was part of suite, asked her parents if she could get in. They told her yes. Upon entering the tub (it is agreed by both parties that Susan "jumped" into the hot tub), she suffered third-degree burns over 80 percent of her body, and her facial features were permanently disfigured because the water in the hot tub was 160 degrees Fahrenheit, not 102, the maximum recommended by the tub's manufacturer, and well above the 105-degree maximum dictated by local health codes. An investigation determined that the hot tub safety switch, designed to prevent accidental overheating, had been bypassed when some wiring repair was performed by the hotel's maintenance staff. (The Hunters are also suing the franchise company because a mandatory inspection of property safety, which, as part of the franchise agreement

was to have been performed annually, had not been done in the three years prior to the accident.)

The hotel's insurance company takes the position that Susan's parents gave her permission to use the tub, despite a written warning on the side of the tub saying it was not to be used by persons under age 14, and thus they bear a majority of the responsibility for the accident. The Mayton franchise company's insurance company states it is not responsible for the acts of its franchisees, and thus cannot be held accountable. The hotel's manager has been terminated. The Hunters, whose lawyer has accepted the case on a contingency basis, is suing for a total of $5 million.

1. What would you recommend the Fairview Mayton's insurance company do?
2. What would you recommend the franchise company's insurance company do?
3. What would you recommend the Hunters do?

▶ THE HOSPITALITY INDUSTRY IN COURT

To illustrate the importance of following company policies, consider the case of *Faverty v. McDonald's Rests. of Oregon, 892 P.2d 703 (Or. Ct. App. 1995).*

FACTUAL SUMMARY

Matt Theurer (Theurer), an 18-year-old McDonald's employee was involved in a severe auto accident one morning after work. Theurer fell asleep at the wheel and crossed over into oncoming traffic. His car struck a van driven by Frederic Faverty. Theurer was killed in the accident and Faverty was seriously injured.

The day before the accident, Theurer worked three shifts, for a total of nearly 13 hours, at a McDonald's restaurant. The first shift began after school at 3:30 P.M. and ended at 7:30 P.M. Theurer returned to the restaurant at midnight and worked on a special cleaning project until 5:00 A.M. The final shift of the morning was a continuation of the midnight shift ending at 8:21 A.M. Theurer asked to be excused from his next regular shift and left work telling the manager he was tired and needed to rest.

On five occasions during the week before the accident Theurer worked at least until 9:00 P.M. On a few nights he worked past 11:00 P.M., and once past midnight. In addition to working for McDonald's, Theurer was involved in a number of extracurricular activities and served in the National Guard. Many of his friends and family believed he worked too much and was not sleeping enough. McDonald's had a policy of not requiring its high school employees to work past midnight. Additionally, McDonald's policy was to limit the number of shifts worked to two a day. McDonald's controlled the schedules of its employees and knew how many hours each had worked.

The plaintiff Faverty settled the potential claims against the representatives of Theurer's estate. He then sued McDonald's, claiming it was responsible for the acts of an employee even away from the work site. Faverty claimed McDonald's should not have allowed Theurer to work so many hours when it knew Theurer would drive home while tired and pose a risk to himself and others.

QUESTION FOR THE COURT

The question for the court was whether McDonald's was responsible for the acts of its employees outside of the job site. McDonalds initially argued it was Theurer's employer and as such was not responsible for his conduct. As the employer, McDonald's argued, it would only be responsible for Theurer's actions on the job site and would be under no duty to control Theurer away from work. Faverty argued McDonald's had an obligation to avoid conduct that was unreasonable and created a foreseeable risk of harm to a third party. McDonald's next argued that an Oregon State law set the number of hours an employee could work, and the law was not violated. Faverty argued the law did not apply to restaurants and did not establish a maximum number of hours employees could be required to work.

DECISION

The jury ruled for Faverty, finding McDonald's responsible. Faverty was awarded damages for his injuries. The appeals court agreed with the trial court verdict and

held McDonald's had an obligation to avoid unreasonable conduct that created a possible risk to third parties. The court also held McDonald's was unreasonable in requiring Theurer to work as many hours as he did, and should have recognized he was tired and posed a risk to the public.

MESSAGE TO MANAGEMENT

This situation possibly could have been avoided if the manager at the restaurant had followed McDonald's policies. Set reasonable policies, follow them, and work hard to be sure your employees comply.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

All hospitality businesses must operate in a reasonably safe manner or face potential liability for accidents and injuries that occur to their guests. There are specific areas (or duties) that have been identified in the law that help to define the scope of the business's responsibility to visitors. These include the duty (or obligation) to provide a reasonably safe facility and grounds, to serve food and beverages fit for consumption, and to hire qualified employees. The term "reasonably," however, is sometimes a difficult standard to define, as it is based on current and customary practices in the industry.

If you failed to operate in a reasonably safe manner, and damages occur as a result, you may be found to have been negligent and be held liable for damages. If you ignored the safety and well-being of visitors, then you may be found to have been grossly negligent, and face greater liability than for ordinary negligence. The visitor also has a responsibility to act reasonably, or he or she may be found to have contributed to the cause of damages.

Types of damages include property loss, medical expenses, lost wages, pain and suffering, punitive fines, and legal fees. Not all types of damages are recoverable in every type of claim.

A personal injury claim is usually initiated with a demand letter. If the situation cannot be resolved amicably, a lawsuit may commence. The steps in a lawsuit include the filing of a petition, the discovery period, and a trial before a judge or jury. You, as a manager, have a crucial role in the litigation and/or resolution process. Claims do not always have to end up in trial; they are sometimes resolved through mediation or arbitration techniques.

If an accident should occur on your property (and one probably will despite your best prevention practices), the way your staff responds can have a significant impact on the consequences that arise from the accident.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Define and explain the difference between a breach of contract, a crime, and a tort.
2. Describe examples of negligence, gross negligence, and an intentional act that could result in the commission of a tort.
3. Detail the essential difference between a duty of care and a standard of care, using an example of each.
4. Give three examples of strict liability as it may apply to hospitality managers offering food, lodging, and entertainment products.
5. Using the Web or the library, search the hospitality trade press to find an article describing an incident of a jury awarding punitive damages to a plaintiff where a hospitality organization was the defendant. Explain why you believe the jury came to its conclusion.
6. Outline the process involved in initiating a personal injury lawsuit, and discuss the hospitality manager's role in that process.
7. List at least five advantages that result from using an alternative dispute resolution process, as opposed to going to trial in a personal injury lawsuit.

8. Create a checklist that can be used to guide a manager's actions in the first 15 minutes after an accident.

▶ TEAM ACTIVITY

In teams, design a procedural checklist (one-page maximum) for a manager-on-duty to follow when responding to a serious accident in a 1,000-room resort hotel located 100 miles away from the nearest medical center.

Chapter 10

Your Responsibilities as a Hospitality Operator to Guests

"Good morning, Trisha," said Sheriff Pat Hutting, as he strode into her office. "It's great to see you again. Let me introduce Detective Andy Letonski. Andy is from the city police force, and he is working a case. He asked me to arrange this meeting with you because, frankly, we think you could really help us out."

Trisha Sangus smiled at Sheriff Hutting. He was truly one of her best friends in the business community. He was also the chief law enforcement officer of the county where Trisha managed her hotel. He loved to golf, as did Trisha, and her excellent business and personal relationship with him was extremely helpful in getting a prompt response time when dealing with the occasional guest eviction.

"Good to see you too, Pat," Trisha replied, "and good to meet you Andy. What's going on?"

"Drugs," replied Andy. "As you know, our area has its share, despite the fact that they go virtually unseen."

"Yes," said Trisha. "Pat and I have helped the school district by holding DARE training sessions at our hotel on several occasions."

"That's right," said Pat as he turned to Andy. "No one in the area is a bigger supporter of our efforts than Trisha—and her property."

"Well," said Andy, "that's why I asked Pat to bring me here. You have a guest in room 417. The guest's name is Marty White."

"That could be," said Trisha. "It's a big hotel, but I really don't think that particular guest has come to my attention before today. Would you like me to check with the front desk to confirm that Mr. White is a guest here?

"Well," replied the detective, "I was hoping you could assist in another way."

"Andy's men have had Mr. White under surveillance for three days now," said the sheriff.

"We believe Mr. White is involved in drug trafficking in the area," added Andy.

"And what are you asking of me?" inquired Trisha.

"Just to allow us to look at Mr. White's phone records, so we can see whom he is calling," said Andy. "They could be a great help in locating his possible source of supply and delivery. Your telephone call accounting system does record the number of all outgoing phone calls, doesn't it?"

"Yes," replied Trisha, "it does."

"That's great," said Andy. "Those records would be a big help to us."

"Let me be sure I understand your request," said Trisha. "You are convinced that one of our guests is involved with the local drug trade?"

"Absolutely," said Andy.

"Do you have evidence of the involvement?" asked Trisha.

"We have a significant amount. There is no doubt Mr. White is involved. That's why I asked Sheriff Pat to set up this meeting with you," replied Andy. "He told me about your previous involvement in antidrug educational activities in the area."

"And you, Andy, would like to look at, but not copy, our records of the telephone calls that our guest has made since he has been here?" Trisha queried.

"That's correct," said Andy, as the sheriff looked at Trisha somewhat uncomfortably.

"Well," said Trisha, "let me think about a response. I'll get back to you within the hour."

"Can't we look at them now?" asked Andy earnestly.

Trisha looked at him carefully. She knew what she was going to say, but because of her friendship with the sheriff, she wanted to turn this request down carefully, and in a way that would not embarrass the sheriff, who was, she suspected, an unwilling partner in the meeting.

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. To understand your legal responsibility to admit guests and the circumstances when such admission can be denied.
2. To protect the guest's right to privacy.
3. To operate and maintain a facility in a way that maximizes the safety of guests and compliance with the law, including Title III of the Americans with Disabilities Act (ADA).
4. To differentiate among various types of nonguests and understand your obligations toward them.
5. To generate the procedures required to safely and legally remove guests from a property.

10.1 ACCOMMODATING GUESTS

Guests are the lifeblood of any hospitality organization. Guests are so important that management's role could be defined simply as the ability to develop and retain a viable customer base. Without a sufficient number of guests, success and profitability in the hospitality industry is impossible. The reality, however, is that, with guests, come guest-related challenges, particularly when the legal implications are considered. In this chapter, we will examine guests and their rights, as well as your rights as a manager or proprietor.

Definition of a Guest

The law views a hospitality manager's responsibility to those who come onto a property differently based upon the characteristics of the visitor. Consider the case of Eva Barrix. Eva is a motel owner who maintains a pool for the convenience of her guests. Late one night, a robber scales a fence around Eva's property and, because the thief is not familiar with the grounds, accidentally trips, falls, and stumbles into the pool. Clearly, the law does not require that Eva inform would-be criminals about the layout of her facility. In addition, despite the occasional well-publicized personal injury case, thieves would have a difficult time proving to the court that the owner of a business owes a duty of care to them, as discussed in Chapter 9, "Your Responsibilities as a Hospitality Operator." Contrast this example with a guest who may experience a similar fall near the pool area, and you will see why it is important to understand the distinctions involved in determining precisely who is **a guest** and who is not.

Certainly, duties of care apply to guests, and in most cases, to guests of guests. In the restaurant area, a guest is not limited merely to the individual who pays the bill. In fact, all diners are considered to be guests of the facility.

▶ **LEGALESE**

Guest: A customer who lawfully utilizes a facility's food, beverage, lodging, or entertainment services.

ANALYZE THE SITUATION 10.1

Nicole Frost and Steve Merchand were brother and sister. When their grandfather, Wayne Merchand, was hospitalized for care after a heart attack, the two began to visit him regularly at Laurel Memorial Hospital.

One Sunday afternoon, after visiting with their grandfather, Nicole and Steve went to the hospital's cafeteria for a light lunch. A professional foodservice management company operated the cafeteria under contract to the hospital. Nicole and Steve selected their lunches from an assortment of beverages and prewrapped sandwiches that were displayed unrefrigerated on a tray in the middle of the cafeteria serving line. The sandwiches were made of ham and cheese, with a salad dressing spread, lettuce, and tomato. Steve paid for the sandwiches, beverages, and some chips, then he and Nicole took a seat in the cafeteria dining room.

Approximately four hours after eating lunch, both Steve and Nicole became ill. They determined that they both had suffered from food-borne illness. The two filed suit against the hospital and its contract foodservice management company. When the facts of the case came out, the hospital maintained that, as visitors, not patients, the hospital had no liability toward Nicole and Steve. The foodservice management company operating the hospital cafeteria maintained that its liability extended only to Steve since he was the only guest who in fact purchased food from its service. Management maintained they should not be held responsible for the illness suffered by an individual that they did not actually serve.

1. Was Nicole a guest of the foodservice facility?
2. Should Steve bear partial responsibility for the damage he and Nicole suffered, given that he purchased the sandwiches?
3. What type of liability (from Chapter 9, "Your Responsibilities as a Hospitality Operator") applies in this case? Why?

▶ **LEGALESE**

Transient guest: A customer who rents real property for a relatively short period of time (e.g., small number of days with no intent of establishing a permanent residency).

▶ **LEGALESE**

Tenant: Anyone, including a corporation, who rents real property for an extended period of time with the intent of establishing a permanent occupation or residency.

In the lodging area, guests can be considered to be either a **transient guest** or a **tenant**, and the differences are significant. As can be seen by the definitions, the precise demarcation between transient guests and tenants is not easily established. It is important to do so, however, because the courts make a distinction between the two, even when hospitality managers do not. For example, a transient guest who checks into a hotel for a one-night stay but does not pay for the room by the posted check-out time the next morning may be "locked out." That means, in a hotel with an electronic locking system, the front desk manager could deactivate the guest's key, thus preventing his or her readmittance to the room until such time as the guest settles the account with the front desk. A tenant with a lease, however, could not be locked out so easily, and thus enjoys greater protection under the law.

Whether an individual is a transient guest or tenant is sometimes a matter for the courts to decide, but the following characteristics can help you determine which category an individual might fall into:

- *Billing format:* Transient guests tend to be charged a daily rate for their stay, while tenants are more likely to be billed on a weekly or monthly basis.
- *Tax payment:* Transient guests must pay local occupancy taxes, while tenants are ordinarily exempt from such payment.
- *Address use:* Tenants generally use the facility's address as their permanent address for such things as mail, driver's license, voter registration, and the like. Transient guests generally list another location as their permanent address.
- *Contract format:* Transient guests generally enter into a rooming agreement via a registration card, while tenants would normally have a lease agreement or specific contract separate from or in addition to their registration card.
- *Existence of deposit:* Tenants are almost always required to give their landlord a deposit. Often this deposit is equal to a specified number of months of rent. Transient guests, on the other hand, do not generally put up a deposit. This is true even if the hotel requires a transient guest to present a credit card upon checking into the hotel.
- *Length of stay:* While it is widely believed that any guest who occupies a room for more than 30 days becomes a tenant, the fact is, length of stay is usually not the sole criterion on which the transient guest/tenant determination is made. In fact, most guests who occupy the same hotel room for over 30 days may do so without affecting their transient status. It is true, however, that the length of stay for a tenant does tend to be longer than that of a transient guest.

Because the line between a transient guest and tenant is unclear, and because the states have addressed this situation differently, if you are a hotel manager and are unsure about the status of a guest/tenant, it is best to seek the advice of a qualified attorney before taking steps to remove the individual from his or her room.

ANALYZE THE SITUATION 10.2

Ketan Patel operated the Heartworth Suites, an extended-stay, limited-service hotel of 85 rooms. Approximately 40 percent of his guests were extended-stay, which Mr. Pate's company defined as a stay longer than five consecutive days. The remaining rooms were sold to traditional transient guests, whose average stay was approximately 1.8 days.

Bob Thimming was an extended-stay guest at the Heartworth, and an employee of Katy Highway Contractors. Mr. Thimming held the position of construction foreman for a stretch of interstate highway being repaired in the vicinity of the Heartworth Suites. His company

signed a contract with the Heartworth confirming that Mr. Thimming would be given a special monthly, rather than daily, rate because he was staying in the hotel for six consecutive months as part of his work assignment.

In the third month of his stay, Mr. Thimming arrived at the hotel from his job site at approximately 5:30 P.M. to find the door to his room ajar. He entered the room and discovered that his $4,000 watch, which he had left on the nightstand, was missing. Mr. Thimming contacted Mr. Patel to complain of the theft. Because the hotel was equipped with electronic locks, Mr. Patel was able to perform a lock audit and retrieved the following information for the day in question:

Time	Key Used	Key Issued To	Results
6:30 A.M.	7J 105-60	Guest	Entry
6:32 A.M.	7J 105-60	Guest	Entry
1:30 P.M.	1M 002-3	Maintenance	Entry

Mr. Thimming maintained that someone negligently left the door open, and as a result his watch was stolen. He contacted his company, whose in-house attorney called Mr. Patel. The attorney stated that Mr. Thimming was a tenant of the hotel, and as a landlord, Mr. Patel was responsible for the negligent acts of his employee and should reimburse Mr. Thimming for his loss. Mr. Patel replied that Mr. Thimming was not a tenant but a transient guest, and thus was subject to a state law that limits an innkeeper's liability in such cases to $350. The attorney disagreed, based on the six-month "lease" signed by Katy Highway Contractors for Mr. Thimming. He demanded that the watch be replaced and threatened to file suit if it was not. Mr. Patel contacted his attorney, who offered, based on his view of the complexity of the case, to defend the Heartworth Suites for $3,000, with a required retaining (down payment) of $2,000.

1. Was Mr. Thimming a transient guest or a tenant?
2. Why is the distinction important in this situation?
3. What should Mr. Patel do in the future to avoid the expense of litigation such as this?

Admitting Guests

▶ **LEGALESE**

Public accommodation: A facility that provides entertainment, rooms, space, or seating for the use and benefit of the general public.

As facilities of **public accommodation**, hotels and restaurants historically were required to admit everyone who sought to come in. More recently, as a result of evolving laws and the changing social environment in which hotels and restaurants operate, and as the protection of guests and employees becomes more complex, the right of the hospitality business to refuse to serve a guest has expanded. At the same time, laws have been enacted at the federal, state, and local levels that prohibit discrimination in public accommodations. Violations of these laws can result in either civil or criminal penalties. Beyond the legal expenses, negative publicity earned from this type of discrimination against guests can also cost a business significant amounts of lost revenue, and can damage a company's reputation for years to come. Consequently, it is important for you to know when you have to admit guests, as well as the circumstances in which you have the right to deny admission.

It is a violation of the Federal Civil Rights Act of 1964 to deny any person admission to a facility of public accommodation on the basis of race, color, religion, or national origin. In addition, it is a violation to admit such guests, but then **segregate** them to a specific section(s) of the facility or discriminate against them in the manner of service they receive or the types of products and services they are provided.

▶ **LEGALESE**

Segregate: To separate a group or individual on any basis, but especially by race, color, religion, or national origin.

State or local civil rights laws are usually more inclusive in that they expand the "protected classes" to categories not covered under federal law, such as age, marital status, and sexual orientation, and may also have stricter penalties for violations.

Historically, it has been argued that "private" clubs were exempt from the Civil Rights Act and could discriminate in their admission policies because they were

not in fact public facilities. Courts across the United States have slowly dismantled this argument by continuing to broaden the definition of public facilities, and, concomitantly, to narrow the definition of a private club. (For instance, if a country club is very selective about its membership, but nonmembers can rent its facilities for meetings, wedding receptions, and the like, is it really private?) In addition, many cities and towns have passed local ordinances that outlaw discrimination in private clubs, even if those clubs meet the "private" club definition under federal law. Accordingly, most clubs today have opted to comply with the Civil Rights Act and other antidiscriminatory laws.

It is legal, and in fact, in some cases, mandatory, for a facility of public accommodation to separate guests based on some stated or observed characteristic. Some communities, for example, require that restaurants provide distinctly separate spaces for their smoking and nonsmoking guests. It is important to note that such a practice is not illegal, because it does not discriminate against a protected class of individuals as defined by the Civil Rights Act.

◄ SEARCH THE WEB 10.1 ►

Log on to **www.usconstitution.net.**

1. Select: Plain text version of the Constitution, under the head The United States Constitution.
2. Scroll until you reach the Fourteenth Amendment, and read it carefully.
3. Are women specifically mentioned in the Fourteenth Amendment?
4. How does the wording of this amendment impact admission policies in the hospitality industry?
5. Do you believe the amendment prohibits "ladies only" or men only" nights?

Denying Admission to Guests

While it is illegal to unlawfully discriminate against a potential guest, you do have the right to refuse to admit or serve guests in some situations. In the following situations, a public accommodation can legally deny service to a potential guest:

1. The individual cannot show the ability to pay for the services provided.

In this situation, it is important that management be able to clearly show that all potential customers are subjected to the same "ability to pay" test. In a restaurant, for example, if only youths of a specific ethnic background are required to demonstrate ability to pay prior to ordering, the manager of that facility is discriminating on the basis of ethnicity and is in violation of the law.

2. The individual has a readily communicable disease.

An operator is not required to put the safety of other guests aside to accommodate a guest who could spread a disease to others.

3. The individual wishes to enter the facility with an item that is prohibited.

It is permissible to refuse service to individuals attempting to bring animals into the premises, (with the exception of guide animals for the physically impaired), as well as those carrying guns, knives, or other weapons. Some operators actually post a policy specifically referring to firearms. Figure 10.1 is an example of such a policy.

It is strictly prohibited for any person to carry a weapon, including but not limited to a handgun, or a concealed weapon anywhere on this property, including parking lots.

We reserve the right to search each person, his or her personal effects, and vehicle as a condition of entry onto or presence on this property.

This policy supersedes any right an employee or guest may believe he or she has to carry a weapon, concealed or otherwise, pursuant to state law.

Violators will be prosecuted.

Figure 10.1 Weapons policy.

4. The individual is intoxicated.

Not only is it legal to deny service to a guest who is visibly under the influence of drugs or alcohol, but admitting or serving such an individual could put you at great risk. (The duty of care required for an intoxicated person will be discussed more fully in Chapter 12, "Your Responsibilities When Serving Food and Beverages.") It is clear that an individual whose reasoning is impaired by drugs or alcohol poses a significant threat to the safety of others and thus loses his or her right to be served. Care must be taken in these circumstances to not put the guest or the general public at risk.

5. The individual presents a threat to employees or other guests.

Obviously, alcohol and drugs need not be present for a guest to pose a threat to other guests or employees. If the guest behaves in any manner that is threatening or intimidating to either employees or other guests, then that individual need not be served, as long as this policy is applied uniformly to all guests. Should such a situation arise, and service is indeed denied, it is best to document the situation using the Incident Report Form from Chapter 9, "Your Responsibilities as a Hospitality Operator," in case your actions are ever called into question. Some operators require guests to sign a "house rules" document that clearly states behaviors that the operator will not permit. Figure 10.2 is an example of such a statement.

6. The individual does not seek to become a guest.

While hotels and restaurants are considered places of public accommodation, they are also businesses. For example, a guest could enter a coffee shop in a downtown city hotel, order a cup of coffee, and occupy a seat for a reasonable amount of time. However, that same guest would not be permitted to enter the hotel's most exclusive dining room on a busy Friday night and order the same cup of coffee rather than a full meal. A reasonable person would assume that dining tables in a restaurant are reserved for those wishing to eat full meals, and thus denying service to a guest who does not want to do so is allowable.

7. The individual is too young.

Those businesses that serve alcoholic beverages may be required by law to prohibit individuals under a predetermined age from entering their facilities. It is important to note that laws in this regard tend to be state or local ordinances. In some communities, young people are allowed to eat in a bar as long as a person of legal age accompanies them. In others, that same young person may not be allowed to sit in a dining area that would permit them even to view the bar area. Because the line between a bar or lounge that

The following rules regulate the renting of rooms, suites, and cottages on this property. Occupants will be bound by these rules and policies, and failure to comply will result in termination of agreement and removal from property.

1. Renter is 21 years of age or older.
2. Renter will remain in room and not sublease or turn over room to other parties.
3. Renter will not utilize room for parties or unauthorized social gatherings.
4. Renter will not create noise or other disturbance.
5. Renter will not exceed maximum limit for number of occupants per room (five, or local code).
6. Renter will declare to hotel and pay for all occupants.
7. Renter will be responsible for all damage and excess wear and tear to room and property.

Guest Signature _____ Date _____

Property Witness _____ Date _____

Figure 10.2 House rules statement.

serves alcohol as its primary product and a restaurant that serves alcohol as an accompaniment to its food can be very unclear, managers should always check with the local or state agency granting liquor permits to ensure that they are up to date on the regulations regarding minors.

In most states, a hotel may refuse to rent a room to those under a specific age; however, it is important that this not be used as a method for unfairly discriminating against a protected class. To do so would be a violation of federal and state law.

8. The facility is full.

Obviously, the hotel that is full can deny space to a potential guest. The same is true of a restaurant, bar, or club that has reached its capacity. A hotel or restaurant that is full, however, faces a somewhat different situation when it denies space to a guest with a confirmed reservation. This would be a breach of contract and would, as described in Chapter 2, "Hospitality Contracts," subject the hotel to possible litigation on the part of the injured party. That said, in the case of a guest who arrives unreasonably late for a dinner reservation, the restaurant is not obligated to seat the guest, because the late arrival would be considered a breach of contract by the guest.

10.2 GUEST PRIVACY

When a guest rents a hotel room, the courts have held that the guest should enjoy many of the same constitutional rights as he or she would in his or her own home. The hotel is, however, allowed to enter the room for routine maintenance, cleaning, and emergency services such as might be required in a fire or other disaster.

Guestroom Privacy

The guest's expectation of privacy should always be respected even when routine intrusions become necessary. In general, you and your staff must be sensitive to guests' needs and expectations at all times. But when the guest is no longer classified as a guest, that is, if a guest unlawfully possesses a room, the courts will allow a hotel manager to remove the guest and his or her belongings

in order to make the room rentable to another guest. (The process for legally doing so will be explored later in this chapter.) Additionally, a guest has the right to expect that no unauthorized third party will be allowed to enter his or her guestroom.

ANALYZE THE SITUATION 10.3

Jessica Bristol and her two young children checked into room 104 of the Travel-In motel at 9:00 P.M. on Friday night. She produced a credit card issued in her name as a form of payment and requested that she be given the room for two nights.

On Saturday afternoon, a man identifying himself as Preston Bristol, Jessica Bristol's husband, presented himself at the front desk and asked for the key that she was supposed to have left for him at the front desk. He stated that he was joining his wife and children at the motel; they were visiting relatives, but he had had to work the day before.

The desk clerk replied that no key had been left and proceeded to call the room to inform Jessica Bristol that her husband was at the front desk. There was no answer in the room.

Preston Bristol then produced his driver's license for the desk clerk, which had the same address that Jessica Bristol had used on her registration card. Mr. Bristol also produced a credit card issued in his name with the same account number as that used by Jessica Bristol at check-in. As the clerk perused the license and credit card, Mr. Bristol offhandedly referred to a picture in his wallet of Jessica Bristol and his two children. Based on the positive identification, the clerk issued Mr. Bristol a key to Jessica Bristol's room.

At approximately 6:00 P.M. on Saturday, a guest in room 105 called the front desk to complain about a loud argument in room 104, Jessica Bristol's room. The desk clerk called room 104, but got no answer. The clerk then called the local police. When they arrived, they found Jessica Bristol badly beaten and her children missing. A description of Mr. Bristol's car quickly led to his arrest and the recovery of the children by the police.

Jessica Bristol recovered from her injuries and completed the divorce proceedings she had begun against her husband. In addition, she filed assault and battery charges against him. Jessica Bristol also sued the motel's manager, owner, and franchise company for $8 million, stating that the motel was negligent and had violated her right to privacy. The motel's position was that is acted reasonably to ensure Mr. Bristol's identity, and added that it was not an insurer of guest safety and could not have foreseen Mr. Bristol's actions.

1. Did the desk clerk act in a reasonable manner?
2. Did Mr. Bristol have a right to enter the room?
3. What should management do in the future to prevent such an occurrence?

LEGALLY MANAGING AT WORK:
Law Enforcement and Guest Privacy

There are occasions when local law enforcement officers, for reasons they believe are valid, demand entrance to a guestroom. Should such an event occur, it is imperative that hotel management:

1. Attempt to cooperate with a legitimate law enforcement official. You must, however, balance that cooperation with your guests' right to privacy. See the International Snapshot on page 280 for additional consideration under the USA Patriot Act.
2. Ask to see a search warrant. The United States Supreme Court has ruled that hotel guests have a constitutional right to privacy in their rooms and cannot be subject to illegal search or seizure. Hotel managers should not allow a guest's room to be searched by police without a proper search warrant.
3. Document the event, for the hotel's protection. This would include securing identification information on the law enforcement officer, his or her official police unit, the specifics of the demand, and any witnesses to the demand.

Privacy of Guest Records

Just as a guest's room is private, so too are the records created by the hotel that document the guest's stay. Consider the case of Russell Hernandez, the manager of a resort about 50 miles away from a major university. Mr. Russell receives a letter from representatives of the National Collegiate Athletic Association (NCAA) stating that they are undertaking an investigation of the local university's football recruiting efforts. They wish to know if a particular person was a registered guest on a date two years ago and, if so, who paid the bill for the room. If Mr. Hernandez provides that information, he does so at the resort's peril, because guests have an expectation of privacy with regard to such records. However, if a court order or subpoena is issued for the records, then the hotel must either provide the records in question or else seek legal counsel to inform the court why it is unable to comply or should not have to comply with the court order.

If a law-enforcement agent is requesting the information, the USA Patriot Act may now control the best practice. Please see the International Snapshot on page 280 for more details.

Guest privacy is a matter not to be taken lightly in the hospitality industry. Guests have a valid reason to expect that their rights will be protected by management. To ensure these rights is the morally and legally correct course of action for hospitality managers.

10.3 FACILITY MAINTENANCE

Just as you have a responsibility to protect a guest's privacy, you also have a responsibility to operate your facility properly and safely. Recall in Chapter 9, "Your Responsibilities as a Hospitality Operator," we discussed the duty of care that hospitality operators have to provide a safe premise. Failure to do so will place your operation at risk for a personal injury lawsuit.

Safe Environment

As a manager, you are responsible for providing a facility that meets the building codes of your local area. In most cases, this involves maintaining a facility in compliance with local, state, and federal laws, as well as the Americans with Disabilities Act. In addition, you are required to operate your facility in a manner that is reasonable and responsive to the safety concerns of guests. You can do this if you remember that a safe facility is a combination of:

- A well-maintained physical plant
- Effective operating policies and procedures

Each year, too many lawsuits are filed against hospitality operations, resulting from accidents that have occurred on the grounds, or inside, of an operation's physical facility. Consider the case of William Oliver from Wisconsin. One January night, Mr. Oliver arrived at a restaurant at 7:30 P.M., well after sundown. On his way from the restaurant parking lot to the front door, he slipped on some ice and hurt himself very badly. If Mr. Oliver decides to sue, the restaurant, in order to defend the lawsuit, will need to demonstrate that it had the proper procedures in place to maintain the safety of its parking lot during the winter. If the restaurant cannot demonstrate and provide documentation of such efforts, it will likely lose the case.

A large number of slip and fall accidents, both inside and outside hospitality facilities, are litigated annually. (Next to motor vehicle accidents, slips and falls are the second leading source of personal injury incidents. They are also a major cause of accidental death and injury in the United States.) The resulting judgments against hospitality companies can be costly. You can help protect your operation against slip and fall, and other accident claims, if you take the necessary

steps to maintain your physical facility, implement effective operating policies and procedures, and document your efforts.

While it is not the goal of this book to detail all of the preventative maintenance techniques and operating policies used by competent hospitality operations, recall from Chapter 9 that the courts will measure a hospitality operation's negligence based on the standard of care applied by the operation and the level of reasonable care expected by guests and provided by other facilities.

Establishing the appropriate standard of care may not always be easy to determine. By way of example, let's examine the safety requirements and operating policies for one area of hotel operation that is potentially dangerous and can subject operators to significant liability: the maintenance of recreational facilities such as pools, spas, and workout areas.

Swimming Pools Swimming pools and spas can be the source of significant legal liability. The dangers of accidental drowning, diving injuries, or even slipping on a wet surface can pose a significant liability threat to the operators of hotels, amusement parks, and others. While this list is not exhaustive, following these 20 recommendations will go a long way toward reducing the liability related to pools.

1. Pass all local inspections.
2. Train the individual who is maintaining the pool.
3. Supply a trained lifeguard whenever the pool is open. If no lifeguard is supplied, post a sign stating so.
4. Mark the depths of pools accurately.
5. Do not allow guests to dive into the pool. Remove diving boards, post warning signs, and write on the floor area surrounding the pool.
6. Clearly identify the "deep" end of the pool. Use ropes, and keep them in place.
7. Fence off the pool area, even if it is inside the building. Install self-closing and self-latching and/or locking gate doors.
8. Make sure the pool area, and the pool itself, is well lighted and that all electrical components are regularly inspected and maintained to meet local electrical codes.
9. Provide a pool telephone, with emergency access.
10. Prohibit glass in the pool area.
11. If the pool is outdoors, monitor the weather, and close the pool during inclement weather.
12. Prohibit pool use by nonguests.
13. Strictly prohibit all roughhousing.
14. Restrict use of the pool by young children, by people who are intoxicated, and by those who would put the pool over its occupancy limits.
15. Have lifesaving equipment on hand and easily accessible.
16. Install slip-resistant material on the floor areas around the pool.
17. Post warning signs in the languages of your customers.
18. Do not allow the pool area to be opened unless at least one property employee who has been trained in first aid is on duty.
19. Document all of your pool-care efforts.
20. Make sure your insurance policy specifically includes coverage for your pool.

Spas Like pools, spa hot tubs are also potential sources of liability. As a manager, it is your job to see that your staff implements the type of signage, physical care, and policies required to safely maintain these areas. The following list can help you maintain your spa in a manner consistent with current best practices:

1. Pass all local inspections.
2. Train the individual who is maintaining the spa.
3. Install a thermometer and check the spa temperature frequently (102

degrees Farenheit is the maximum recommended temperature); record your efforts.
4. Mark the depth of the hot tub.
5. Do not allow children under 14 to use the spa at all, and post signs to that effect.
6. Do not allow older children to use the spa alone.
7. Display a sign recommending that the following individuals not use the spa:

   Pregnant women
   Elderly
   Diabetics
   Those with a heart condition, on medication, or under the influence of drugs or alcohol
   Children under 14 years of age

8. Install a spa-area telephone, with emergency access.
9. Prohibit glass in the spa area.
10. Prohibit alcohol in the spa area.
11. Prohibit spa use by nonguests and solo use by guests.
12. Install nonslip flooring surfaces around the spa.
13. Display signage indicating maximum spa occupancy.
14. Make sure your insurance policy specifically includes coverage for your spa.
15. Have lifesaving equipment on hand and easily accessible.
16. Check the hot tub's water quality frequently, and document your efforts.
17. Post warning signs in the language of your customers.
18. Do not allow the spa area to be opened unless at least one property employee who has been trained in first aid is on duty.
19. Restrict guest access to spa chemicals and heating elements.
20. Document all of your spa-care efforts.

Workout Areas Workout rooms can also be a source of potential liability. Many operators of facilities with workout areas post a general "rules" notice, as well as signs governing the use of specific equipment in the workout area. Figure 10.3 is an example of a set of general rules. As you can see, maintaining a pool, spa, or workout area requires great care and attention. Accidents can occur, so the effective manager must take special care to prevent potential liability.

1. Equipment in this room is for the use of reasonable adults only. Improper use may result in serious injury.
2. Children under 16 could be seriously injured by improper equipment use or nonsupervision.
3. Please limit workouts to 30 minutes on cardiovascular machines.
4. Only water is allowed in workout area. No other food or beverage is permitted.
5. Please wipe off all equipment after use.
6. Lower and raise all equipment carefully.
7. Because of high risk of injury, you must use a spotter when using free weights.
8. Please replace all weights, dumbbells, bars, and plates when finished.
9. Children not allowed unless accompanied by an adult.

Figure 10.3 Workout area rules.

As a hospitality manager, safety should be one of your major concerns. All of your policies, procedures, and maintenance programs should be geared toward providing an environment that maximizes guest safety and security. To stay current in this field and to locate other forms, checklists, and procedures, log on to **www.HospitalityLawyer.com**.

Americans with Disabilities Act (ADA), Title III

Not only must facilities be safe, they must also be accessible. Title III of the Americans with Disabilities Act addresses the requirements involved with removing barriers to access public accommodations. (Recall that Title I of the ADA addresses making employment accessible to Americans with disabilities.) Title III requirements for existing facilities and alterations became effective on January 26, 1992.

Title III affects businesses that are considered to be places of public accommodation, as defined by the Department of Justice, which is responsible for enforcement of the act. These businesses are private establishments (for-profit or nonprofit) that fit one of the 12 following categories:

1. Place of lodging: hotel, inn, motel (except if fewer than six rooms and the residence of the owner)
2. Establishment serving food or drink: restaurant, bar
3. Place of exhibition or entertainment: theater, cinema, concert hall, stadium
4. Place of public gathering: auditorium, convention center, lecture hall
5. Sales or rental establishment: bakery, grocery store, clothing store, shopping mall, video rental store
6. Service establishment: bank, lawyer's office, gas station, funeral parlor, laundromat, dry cleaner, barber shop, beauty shop, insurance office, hospital, travel service, pharmacy, health-care office
7. Station used for public transportation: railroad depot, bus station, airport, terminal
8. Place for public display or collection: museum, library, gallery
9. Place of recreation: park, zoo, amusement park
10. Place of education: preschool, nursery, elementary, secondary, undergraduate, or postgraduate private school
11. Social service establishment: shelter, hospital, day-care center, independent living center, food bank, senior citizen center, adoption agency
12. Place of exercise and/or recreation: gymnasium, health club, bowling alley, golf course

Title III requires public accommodations to provide goods and services to people with disabilities on an equal basis with the rest of the general public. The goal is to give everyone the opportunity to benefit from our country's businesses and services, and to allow all businesses the opportunity to benefit from the patronage of all Americans. Under Title III of the ADA, any private entity that owns, leases, leases to, or operates an existing public accommodation has four specific requirements:

1. Getting guests and employees into the facility.

This involves removing barriers to make facilities available to and usable by people with mobility impairments, to the extent that it is readily achievable. Examples could include parking spaces for the disabled, wheelchair ramps or lifts, and accessible restroom facilities.

2. Providing auxiliary aids and services so that people with disabilities have access to effective means of communication.

This involves providing aids and services to individuals with vision or hearing impairments. Auxiliary aids include such services or devices as qualified

interpreters, assistive listening headsets, television captioning and decoders, telecommunications devices for deaf persons (TDDs), videotext displays, readers, taped texts, Brailled materials, and large-print materials. The auxiliary aid requirement is flexible. For example, a Brailled menu is not required if waiters are instructed to read the menu to customers with sight impairments.

3. Modifying any policies, practices, or procedures that may be discriminatory or have a discriminatory effect.

Such as a front desk policy advising people with disabilities that there is "no room at the inn" rather than attempting to accommodate them, or additional charges for guide animals.

4. Ensuring that there are no unnecessary eligibility criteria that tend to screen out or segregate individuals with disabilities or limit their full and equal enjoyment of the place of public accommodation.

Such as requiring a driver's license from all guests. Many people with disabilities do not have a driver's license. So the best practice is to request photo identification rather than a driver's license specifically.

As you can see, Title III compliance involves the removal of physical barriers, as well as discriminatory policies. Physical barrier requirements are generally achievable if you consider the following four priorities recommended for Title III compliance:

Priority 1: Accessible approach and entrance
Priority 2: Access to goods and services
Priority 3: Access to restrooms
Priority 4: Any other measures necessary

To evaluate a facility for its compliance with these four priorities, you must carefully compare your property with the requirements of Title III. A thorough checklist dealing with Title III can be found on the World Wide Web at **www.usdoj.gov/crt/ada/racheck.pdf**.

It is important to note that changes in your facility must be made where it is "reasonable" to do so. Because reasonability is determined on a case-by-case basis, it is important to plan and document your compliance efforts. To do so, the steps given in the next Legally Managing at Work feature can be of great value.

Laws regarding ADA compliance are complex, so it is a good idea to familiarize yourself with Title III requirements, especially if you are a facility manager. Before building a new facility or renovating an existing one, it is important to select an architect or contractor who is familiar with Title III requirements. And as you learned in Chapter 2, "Hospitality Contracts," it is important to have your construction and/or renovation contract specify who is responsible for ensuring ADA compliance.

LEGALLY MANAGING AT WORK:
Five Steps to Facility Evaluation

1. Plan the evaluation.
   - **a.** Set an evaluation completion date.
   - **b.** Decide who will conduct the survey.
   - **c.** Obtain floor plans.
2. Conduct the survey.
   - **a.** Use a checklist to evaluate the facility.
   - **b.** Use a tape measure.
   - **c.** Record results.

3. Summarize recommendations.
   a. List barriers found, along with ideas for removal.
   b. Consult with building contractors if necessary.
   c. Estimate costs of barrier removal.
4. Plan for improvements.
   a. Prioritize needs.
   b. Make barrier removal decisions.
   c. Establish timetables for completion.
5. Document efforts.
   a. Record what has been done.
   b. Plan for an annual review.
   c. Monitor changes in the law. ◀

◀ SEARCH THE WEB 10.2 ▶

Log on to **www.usdoj.gov/crt/ada/adahom1.htm**.

1. Select: ADA Regulations and Technical Assistance Materials.
2. Select: ADA Regulation for Title III.
3. Select: ADA Standards for Accessible Designs.
4. Browse through the standards established for accessible design and answer the following questions:
   a. How many rooms with a roll-in shower are required for a hotel with 800 rooms?
   b. How many rooms in the same size hotel must be designed to accommodate the visually impaired?
   c. Explain the term "equivalent facilitation" as it pertains to room charges for disabled guests.

10.4 RESPONSIBILITIES TO NONGUESTS

Guests are not the only individuals who may lawfully enter a hospitality property, of course. Owners, managers, employees, vendors, and a guest's own invited guests will all utilize a hospitality company's facilities or services. Because restaurants, clubs, and hotels are open to the public, people can come in for a variety of reasons, not all of which are for the purpose of becoming a guest. An individual could enter a hospitality facility to visit a friend, ask for directions, use the restroom, use the telephone, or commit a crime. As a manager, you have responsibilities for the safety and well-being of those who are not guests, although that level of responsibility will vary based on the type of nonguest in question. In this section, we will examine three distinct types of nonguests and your responsibilities to each.

Guests of Guests

Most hotels allow guests great freedom in permitting invited friends and family members to visit them in the hotel. Most guests expect, and most hotels allow, guests of guests to enjoy many of the privileges enjoyed by the guest. It is important to note that it is the hotel that allows this practice; it is not a guest's right that is inherent in renting a room. Obviously, it is unlawful for a hotel manager to refuse to allow guests of guests on a discriminatory basis. In addition, hoteliers may impose the same type of reasonable conduct standards on a guest's guest as they do on the guests themselves.

From a personal injury liability point of view, the guests of a guest, if they are on the premises in accordance with hotel policy, should be treated in the same

manner as a guest. That is, they should be provided with a safe and secure facility. A question arises, however, as to a hotel's liability for the acts of those not associated with the hotel. Under many state laws, a hotel has no legal responsibility to protect others from the criminal acts of third parties. But a legal responsibility may come into existence if the danger or harm was foreseeable. For example, if dangerous incidents of a similar nature had occurred on or near the premises previously, a jury might find that the hotel could have anticipated such an occurrence again and should have taken reasonable steps to attempt to prevent it.

Because it is not possible to know whether someone is a guest, or a guest of a guest, reasonable precautions should be taken to protect everyone who uses your facility. These precautions will be discussed more fully in Chapter 14, "Safety and Security Issues."

Invitees

▶ **LEGALESE**

Invitee: An individual who is on a property at the expressed or implied consent of the owner.

A guest is an **invitee** of a hotel. By the same token, many individuals who are not guests can be considered invitees as well. An invitee enters a property because he or she has been expressly invited by the owner, or because his or her intent is to utilize the property in some manner permitted by law and the property's ownership. In either case, the hotel is required to take reasonable care in maintaining its facility and to notify or warn the invitee of any potential danger.

Invitees include employees, managers, contractors, vendors, and individuals such as those entering to ask directions, use a telephone, or make a purchase. Because hotels and restaurants are open to the public, the number of situations in which an invitee enters the premises can be great indeed.

Consider the case of Jeremy Cavendar. Jeremy is the manager of a hotel facility attached to a large shopping mall in a major southwestern city. Because of its location, many shoppers pass through the hotel's lobby as they enter or exit the shopping mall. If an individual were hurt while passing through the lobby, Jeremy would likely be responsible for demonstrating that he and his staff had demonstrated reasonable care in maintaining the hotel lobby. This would be true even though the invitee in this case may have had no intention of utilizing any of the services offered by Jeremy's hotel. The mere fact that the hotel decided to locate within the shopping mall would demonstrate to most juries and personal injury attorneys that the hotel could have reasonably foreseen that a large number of shoppers would be passing through the area, hence that it should take reasonable care in protecting their safety.

Trespassers

Legally, hospitality managers do not owe the same duty of care to an individual who is unauthorized to be on a property as they do to one who is authorized. For example, a restaurant that has its floors mopped nightly has a duty to place "wet floor" signs around any area that is wet and that is likely to have foot traffic passing through it. However, the operator does not have a duty of care to illuminate those signs when the restaurant is closed. So, assuming that access is restricted, a burglar who enters the restaurant after hours has no legal right to expect that the operator will warn him or her of slippery floor conditions.

Some cases of trespass can be more complex, and operators should be very careful to make a distinction between a trespasser and a wandering guest. Consider the example of Deitra Reeves. Ms. Reeves was a guest of the Red Door Lounge, a very quiet and dimly lit club in a large city. One night, while seeking the ladies room, Ms. Reeves accidentally opened the door to a storage room, ran

into a storage rack, and was injured in a fall. The lounge's attorney argued that Ms. Reeves was a trespasser since guests are not allowed in storage areas. Ms. Reeves's attorney argued that Ms. Reeves was a guest, and the lounge was negligent because it should have had the storeroom locked. A facility can expect that guests, if allowed, may wander into restricted areas. When they do, they will, in most cases, still be considered guests.

ANALYZE THE SITUATION 10.4

Walter Thomas was visiting Jeff Placer, who had registered as a guest at a newly opened Lodger-Inn hotel. The hotel was located off an interstate highway exit; it had been open for only three days. When Mr. Thomas left Mr. Placer's room in the evening, he was assaulted in the hotel's parking lot.

Mr. Thomas contacted an attorney, who threatened to sue the hotel for the injuries. Lashondra Tyson, the attorney for the hotel, replied to Mr. Thomas's attorney that the hotel was not responsible for the acts of third parties, and that the hotel had no history of criminal activity taking place on its grounds, thus it could not have foreseen any potential problem. In addition, Mr. Thomas was not a registered guest in the hotel.

Mr. Thomas's attorney replied that many hotels experience problems in their parking lots, thus the hotel should, in fact, have anticipated potential problems. He also stated that Mr. Thomas was an invitee of the hotel and thus the hotel was required to guard his interest in the same manner as that of a guest.

1. What was the legal status of Mr. Thomas?
2. Why is the distinction important in this situation?
3. What records would Ms. Tyson need from the hotel's manager to give her the best chance of winning any potential lawsuit?

10.5 REMOVAL OF GUESTS

Just as guests must be admitted in accordance with the law, you must also treat those guests who are to be removed from your business in a way that is legally sound. Generally, guests can be removed from the premises for lack of payment, inappropriate conduct, or for certain conditions of health.

Lack of Payment

When guests check into a hotel or order food in a restaurant, it is reasonable to assume they will pay their bill. On occasion, a guest, for a variety of reasons, will not pay.

In a restaurant setting, the manager has few options for collecting. Clearly, the manager can refuse to serve the guest anymore during that visit and can rightfully refuse service in the future as long as the bill remains outstanding. However, if the guest leaves the premises, there is often little that can be done to recover losses.

It is legal for a hotel to require payment in advance for the use of a room, as long as that requirement is applied uniformly in a manner that does not unlawfully discriminate among guests. If a guest does not present himself or herself at the front desk for payment by the posted check-out time, or authorize a charge to an established credit card or account, that guest can be removed from the hotel for nonpayment. The hotel has a right, subject to local laws, to remove a transient guest from a room for nonpayment of charges due. A tenant with a lease, however, could not be removed or locked out of his or her apartment by a landlord without following state and local laws regarding eviction.

▶ **LEGALESE**

Eviction: Removal of a tenant from rental property by a law enforcement officer. An eviction is the result of a landlord filing and winning a special lawsuit known as an "unlawful detainer."

When a guest in a hotel does not pay, or cannot pay, the rightfully due bill, the term **eviction** is often used to denote the guest's removal. Legally, however, a hotel rarely will file a suit of unlawful retainer, which is required in an official tenant eviction. The term continues to be used, however, to refer to a guest who is removed by a variety of means from a hospitality property.

Whether it is in the best interest of the hotel to evict a guest is a judgment call made by the manager. Clearly, lost credit cards or travelers checks, and a variety of other circumstances, might cause a guest to be temporarily unable to pay his or her account. In this situation, it is up to you to protect the financial interest of the hotel while accommodating the guest to the greatest degree possible. When it is clear, however, that the guest either will not or cannot pay, and refuses to vacate the room, it is best to contact the local law enforcement agency to assist in the guest's removal. This protects the hotel in the event that the nonpaying guest claims the hotel used excessive force in the removal of the guest.

Often, the arrival of a law enforcement official at a restaurant or hotel is sufficient to encourage the guest to pay the bill. It is important to note, however, that the police will rarely, if ever, arrest a guest for failure to pay a bill that is owed. Efforts to collect on money owed to a hospitality operation should be pursued according to applicable state and local laws. This would entail filing a suit in **small claims court** or another appropriate court to get a judgment against the debtor (nonpaying guest). The cost of doing so is high in both time and money. Thus it is best to avoid the situation whenever possible. In Chapter 14, "Safety and Security Issues," we will discuss several ways that you can protect your operation from guests who have no intention of paying their bill.

▶ **LEGALESE**

Small claims court: A court designed especially to hear lawsuits entailing relatively small sums of money. They can provide a speedy method of making a claim without the necessity of hiring a lawyer and engaging in a formal trial.

Inappropriate Conduct

Guests who pose a threat to the safety and comfort of other guests or employees may be removed from a hotel or restaurant. Indeed, you have a duty of care as a manager to provide a facility that is safe for all guests. Thus, a guest who is extraordinarily loud, abusive, or threatening to others should be removed. Also note that inappropriate conduct may be considered a violation of the hotel's or restaurant's house rules (as discussed earlier in the chapter). Thus, a guest's disruptive behavior could be considered a breach of contract, which would give the hospitality establishment the authority to evict. Again, this is a situation best handled jointly by management and local law enforcement officials.

The question of whether such a guest should be refunded any prepaid money or charged for any damages that may occur varies with the situation. In general, it may be said that a guest who has utilized a room and is removed for inappropriate behavior must still pay for the use of that room. Whether management in fact levies such a charge is subject to the principles of sound business judgment.

Overstays

▶ **LEGALESE**

Overstay: A guest who refuses to vacate his or her room when he or she has exceeded the number of nights originally agreed to at check-in.

Because a hotel rents rooms on a transient basis, it can also decide not to allow a guest to **overstay** his or her reservation contract. For this reason, guests may be removed from their rooms if they in fact have breached their contractual reservation agreement with the hotel. While it might appear odd that a hotel would refuse to extend a guest's stay, it does happen. Consider the case of Giovanni Migaldi. Mr. Migaldi operates a hotel in Indianapolis, Indiana. The weekend of

the Indianapolis 500 race is always a sell-out for Mr. Migaldi, and he is careful to require that all guests reserving rooms for that weekend pay in advance. On the morning before the race, a tour group that was scheduled to leave requests to stay an extra night, after the tour bus experiences mechanical difficulty. Mr. Migaldi is expecting the arrival of another tour bus filled with racing fans coming to town for a three-night stay. If Mr. Migaldi allows the current tour bus passengers to stay, he will have no room for the prepaid racing fans due to arrive. All local hotel rooms are sold out, so Mr. Migaldi has no opportunity to move the race fans, nor does he want to violate his contract with them. Clearly, in this case, Mr. Migaldi will have to use all of his management skills to tactfully achieve the removal of the first group in order to make room for the second, confirmed group. This situation also illustrates the difficulty managers can face in maintaining their legal obligations while attempting to serve guests who encounter unexpected travel delays and difficulties.

Registration cards that are completely filled out, including a space for guest initials verifying arrival and departure dates, can be of great assistance in dealing with the overstay guest. Additionally, the registration card can state that additional nights, if approved by the hotel, will be at the "rack rate" (which is usually significantly higher than the rate a guest is actually paying).

Accident, Illness, or Death

A guest stricken with a severe illness, or the death of a guest, creates a traumatic experience for any hospitality facility. Just as people have accidents, get sick, die, attempt suicide, or overdose on drugs in their home, similar situations can also occur in hotels and restaurants. When they do, it is important that everyone in the facility know exactly how to respond. The priority should be to maintain the dignity of the guest while providing the medical attention appropriate for the situation.

If an emergency calls for the removal of a guest, extreme care should be taken. The checklist in the next Legally Managing at Work feature can be helpful in performing the removal in a discreet but effective manner.

LEGALLY MANAGING AT WORK:
Responding to Guest Health Emergencies

1. Train employees on their role in responding to a medical emergency.
2. Instruct employees to contact the manager on duty (MOD) immediately if it appears a guest is seriously ill, unconscious, or nonresponsive.
3. Call 911 or other emergency care providers. If the circumstances surrounding the incident seem suspicious, also notify the police.
4. Instruct the MOD to survey the situation to determine whether other guests are at risk, or the area needs to be secured against entry by others.
5. Designate an individual to keep unauthorized persons away from the area until the emergency medical team arrives.
6. Document the incident, using an incident documentation form.
7. Do not touch the guest unless you are medically trained to provide aid.
8. When the emergency medical team arrives, provide them with any information you have that can help to establish the identity of the guest.
9. If the guest is re moved from the property, secure and hold any personal property belonging to the guest. The length of time you must retain personal property and the method of disposing of the property at the expiration of that time will vary from state to state.
10. Report the incident to local law enforcement authorities if required to do so by law. ◀

▶ INTERNATIONAL SNAPSHOT

Should Foreign Governments Adopt Provisions from the USA Patriot Act to Combat Terrorists Acts against the Hospitality Industry?

The scene is becoming all too familiar. Terrorists are attacking hotels in greater frequency. First, it was Egypt. On April 18, 1996, terrorists attacked the Hotel Europa in Cairo, killing 18 Greek nationals. Next, it was the island of Bali. On October 12, 2002, in the late evening, a terrorist attack struck a nightclub on the island, murdering over 180, and injuring hundreds. Then, terrorists struck again in Kenya. On November 28, 2002, suicide-bombers attacked the Paradise Hotel, an Israeli-owned hotel, located in Mombasa, killing over 15 people, as two missiles were fired at an Israeli holiday jet that had taken off from Mombasa's airport. Recently, terrorists struck in Morocco. In May 2003, in Casablanca, terrorists targeted a restaurant, a Jewish community center and cemetery, and a five-star hotel, killing 45. Thailand was the next target. In August 2003, suicide-bombers attacked the J. W. Marriott Hotel in Jakarta, murdering 11 people and injuring 150.

International terrorists will continue to attack nonmilitary installations, known as "soft" targets. Unfortunately for the hospitality industry, today's soft targets include hotels, restaurants, and nightclubs. The central question for the international community, as well as hoteliers, is how to protect the hospitality industry from future terrorist attacks. The answer lies in the introduction of aggressive antiterrorism legislation abroad and increased vigilance by the hospitality industry.

The United States of America is not immune to terrorist attacks against soft targets, as is evident from the suicide-bombing attacks of September 11, 2001. In response to the terrorist attacks, the administration of President George W. Bush proposed sweeping legislation to combat terrorism. President Bush's immortal words to U.S. Attorney General John Ashcroft, "Never let this happen again," resulted in the passage of the USA Patriot Act (Patriot Act). The Patriot Act, not surprisingly, is applicable to hotels in the United States in several ways.

The Patriot Act provides for the use of emergency warrants to search hotel rooms or to obtain guest information. Under the Patriot Act, federal agents of the U.S. government may, with a search warrant, obtain "tangible records" from a hotel relating to guests or "groups of guests" that registered at the hotel. Even without a search warrant, registration records of a hotel guest may be obtained by a federal agent if proper law enforcement identification is produced to hotel management. Furthermore, records of all electronic transactions relating to a guest at the hotel must be produced if requested by a governmental entity. Those records include telephone records, e-mail correspondence, and transactions involving more than $10,000 in cash.

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 with reasonable grounds, is believed to have committed or is about to commit an offense of terrorism. If, however, 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.

The Patriot Act is not the only antiterrorism legislation in the world. Such legislation exists in the United Kingdom, the European Union, and/or other

foreign countries as well. But, many countries have limited, or have failed to implement, antiterrorism legislation at all. For instance, it was not until after the J. W. Marriott Hotel in Jakarta was attacked by terrorists that Prime Minister Thaksin Shinawatra rushed into law new antiterrorist legislation before world leaders attended the Apec meeting in October 2003. If the actions of the Thailand government are a barometer of sorts, then the worldwide community has a long way to go in confronting terrorism. Notwithstanding, the international community should consider adopting relevant provisions from the Patriot Act, so that foreign law enforcement agencies may investigate, apprehend, and prosecute terrorists before further hotels are attacked.

Provided by Richard Barrett-Cuetara, Esq., of the Cowles & Thompson Law Firm, in Dallas, Texas. www.cowlesthompson.com

WHAT WOULD YOU DO?

You are the area vice president of franchising for a quick service restaurant (QSR) company that serves a unique grilled chicken product, which has become extremely popular. Because of a strong marketing effort and solid operating results, your company's growth has been very rapid. In your five-state area, the company is considering purchasing a small chain of 15 units that sells a comparable chicken product. Those units, consisting of older buildings in excellent locations, are to be converted to units owned and operated by your company. Your immediate supervisor, the company president, has asked you to respond to the following:

1. How will you determine which units are not in compliance with Title III, ADA requirements?
2. What criteria will you use for prioritizing needed improvements?
3. How will you document a good-faith effort to meet Title III, ADA requirements?

Draft answers to your president's questions.

▶ THE HOSPITALITY INDUSTRY IN COURT

To see how a court views the legal relationship between a hotel operator and its guests, consider two case studies. First, *Young v. Rushmore Plaza Holiday Inn, 284 F.3d 863 (8th Circuit, 2002*).

FACTUAL SUMMARY

Steven Young was a guest at the Rushmore Plaza Holiday Inn in Rapid City, South Dakota. Young and three of his friends rented a suite at the hotel, and after an evening of drinking and bar-hopping they returned to the room. Young passed out in the bedroom of the suite while his two friends continued drinking just outside the door of the suite. Hotel security officers asked the two guests to return to their room or go to a hotel commons area so as to avoid disturbing other guests. The two individuals failed to comply and hotel security informed them they were being evicted and had 10 minutes to pack and leave the premises. Rather than packing and leaving, the two men simply went to the hotel restaurant, leaving the door to the suite partially open and Mr. Young asleep in the room.

The Rapid City police arrived shortly thereafter to remove the three guests from the room. Mr. Young was awakened by the officers, and while disoriented he scuffled with the officers and was arrested for assaulting a police officer. Mr. Young sued the police officers, the city of Rapid City, and the hotel for violating his privacy and for using excessive force in a self-help eviction (carried out by the hotel, rather than authorities).

QUESTION FOR THE COURT

The question for the court was whether hotel guests had the same right to possession of a hotel room as tenants had to a rental property. Young claimed he was a tenant of the hotel and was therefore entitled to the protection of the

South Dakota forcible entry and detainer statute. Under the statute, tenants were entitled to three days notice prior to an eviction and a jury trial to determine if the eviction was justified. The hotel argued the application of the statute would be impractical for hotels, especially in the context of a guest who was only staying for one or two nights.

DECISION
The court held hotel guests were not tenants for the purpose of eviction. Therefore, hotel guests were not entitled to the same protections as tenants in rental properties.

MESSAGE TO MANAGEMENT
There are significant benefits in maintaining the transient status of a guest. Consider *United States v. Kitchens, 114 F.3d 29 (4th Circuit, 1997).*

FACTUAL SUMMARY
Kedron and Koffi Kitchens (the Kitchens) were guests at the Town House Motel (Town House) in Charles Town, West Virginia. Guests were required to check out of the motel by 11:00 A.M. or reregister. The Kitchens stayed past 11:00 A.M. on the day they were to check out, so the manager requested they either check out or register again. The Kitchens did neither.

Two Charles Town police officers were eating lunch in the hotel restaurant and noticed a suspected drug dealer enter room 330. The officers asked the manager for the name of the person whom the room was registered to. The manager gave them the name and informed the officers the guests had stayed beyond check-out time. With the manager's consent the officers went to the room to inform the guests they either needed to leave or register again.

Just before they reached the room, the door to it opened and two individuals came out. While standing at the open door the officers observed the third individual run into the bathroom. The officers entered the room and instructed the occupant of the restroom to come out. After entering the room the officers noticed several vials of what appeared to be crack cocaine. All three individuals were arrested, and subsequent searches turned up more crack, totaling approximately 62 grams. The Kitchens were arrested, charged, and indicted for conspiracy to possess with the intent to distribute crack cocaine.

QUESTION FOR THE COURT
The question for the court was whether the evidence seized during the search and arrest was admissible since the officers entered the room without a warrant. The Kitchens argued they had an expectation of privacy in their motel room similar to the privacy enjoyed in ones home. The government argued that while motel and hotel guests did have a reasonable expectation of privacy in their rooms, the expectation was not unlimited. The court considered the practices of the hotel and guests in observing check-out time.

DECISION
The court held there was no reasonable expectation of privacy since the Town House did not allow guests to remain after check-out time without registering again.

MESSAGE TO MANAGEMENT
Guests who stay beyond check-out time are no longer invitees unless they reregister.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

A guest is a term used to describe a transient customer, as opposed to a tenant who may utilize a facility for a longer, or more permanent, time period.

Because most hospitality establishments are considered places of public accommodation, they must observe all applicable federal, state, and local civil rights laws that prohibit discrimination in the admission of guests into a facility, as well as the types of services provided.

Guests in hospitality establishments have expectations of privacy, both personally and for any information about their stay. Hospitality establishments are legally obligated to honor those expectations.

A hospitality operator has a legal obligation to provide a reasonably safe physical facility for its guests. This requires significant attention to potential dangers and preventative maintenance procedures. In addition, Title III of the American with Disabilities Act requires hospitality operators to remove barriers from their facilities to allow access to people with disabilities. Even when someone is not an actual guest, managers still may have a duty of care to provide a reasonably safe premise for individuals on their property.

The process of removing guests from an establishment should be undertaken as a last resort and with caution.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Identify at least four types of guests who could and/or should be denied service, and the reason for denial in each case.
2. Explain how a guest's room in a hotel is similar to his or her home for purposes of a legal search.
3. Create a 10-minute training program to be used to teach new employees the importance of, and procedures for, cleaning up dining room spills and slick spots as quickly as possible. Include a testing device to measure the effectiveness of your training.
4. List the four priorities established for ADA compliance, and explain why you agree or disagree with the prioritization.
5. Using the checklist provided in this chapter, evaluate the ADA compliance of a public restroom in your local library, museum, or art gallery.
6. Exculpatory statements (described in Chapter 2, "Hospitality Contracts") are often posted in recreational facilities, exercise rooms, pools, and spas. Explain their purpose and identify their limitations.
7. Contact your local small claims court administrator to determine:
   a. The location of the court
   b. The maximum dollar amount of judgment the court can order
   c. Any fees required to file a claim
   d. The forms required to file a claim
8. Develop a one-page checklist of actions that should be undertaken by a hotel staff to remove an extremely ill or deceased person from a room.

▶ TEAM ACTIVITY

In teams, draft a document (one page) titled "House Rules" for a metropolitan hotel that has historically been frequented by minors for prom and graduation celebrations.

Chapter 11

Your Responsibilities for Guests' Property

"Good morning, Lance," said Trisha Sangus as she walked into the lobby of the hotel she managed.

"Good morning, Trisha. It's a great day," replied Lance Dani. As the front office manager, Lance was responsible for hiring and training the desk clerks, who checked guests in and out of the hotel, as well as the reservationists, who received reservations from the general public, the hotel's national reservation system, and the sales department. In addition, Lance supervised the guest services area of the hotel, which included bellstaff and shuttle van drivers. In short, Lance's department would be the first and last contact most guests would have with the hotel. Because of that, Trisha spent extra time, whenever she could, helping to develop Lance's skills, as well as those of his staff.

"I see you have rearranged the information," said Trisha. "It looks good." The day before, she had asked Lance to "declutter" the reception desk. The mandatory display of the franchise hotel directory, complimentary newspapers, credit card information, and information on hotel services took up so much space on the front desk that it was often difficult to leave enough room for guests to check in and out. Trisha had asked Lance to review all the materials displayed at the front desk, with an eye toward removing anything that was not absolutely critical. Trisha liked a neat, efficient workspace, but now that he had complied with her request, something was bothering her, and she couldn't quite put a finger on it.

"Tell me what you've done," Trisha began, as her eyes swept across the front desk area.

"Well, replied Lance, "as you asked, I took a look at the material here at the front desk that the guests really use a lot. Then I tried to prioritize, you know, go from most used to least."

"That makes sense," replied Trisha, as she now saw, or rather did not see, the item whose absence had been the source of her uneasiness.

"Well," continued Lance, "after that it was just a matter of removing the things the guests didn't really use and keeping the important ones.

"The important ones?" asked Trisha.

"Right," said Lance, "like the complimentary newspapers and the guest comment cards."

"I notice you moved some signs also," said Trisha.

"Right," replied Lance. "After the desk area looked so good, we decided to move some signs so guests could see them better, such as the check-in and check-out times and the names of the credit cards we accept."

"Which signs did you remove altogether?"

"Just one," said Lance. "I moved the manager-on-duty sign back a bit. The letters are so large the guests can still easily see it. To make room for it, I removed the sign that informed customers we have safety deposit boxes. I talked to the clerks, and they said the guests almost never use the boxes.

"Let me see if I understand you correctly," said Trisha Sangus, in a voice Lance had come to know and did not look forward to hearing, "the desk clerks said that our guests only infrequently use our free safety deposit boxes, so you removed the sign stating we have them?"

"Yes," replied Lance slowly, adding a bit warily. "Is that okay? I made sure each of our desk clerks knows that if a guest asks to use a safety deposit box, we would certainly accommodate him or her. I mean, we provide lots of guest services without a separate sign—pay-per-view movies, for example. And our guests watch pay-per-views a lot more than they use our safety deposit boxes."

"So, as you see it," continued Trisha, "the sign announcing the availability of safety deposits boxes was simply a convenience to our guests? A nice way to let them know about our services?"

"Right," replied Lance.

"Hmmm," replied Trisha. "Lance, please, come into my office. I want to show you something."

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. To understand fully the responsibility hospitality managers have to safeguard the personal property of their guests.
2. To carry out the procedures needed to limit potential liability for the loss of guest property.
3. To assess the theories of bailment so as to be able to implement policies that limit potential legal liability.
4. To create the procedures required to legally dispose of personal property whose ownership status is in question.

11.1 LIABILITY FOR GUESTS' PROPERTY

Most hotels and restaurants are safe places to visit and work. As explained in Chapter 10, "Your Responsibilities as a Hospitality Operator to Guests," you as a hospitality manager have a responsibility to make your facility as safe as possi-

ble. This responsibility pertains to the well-being of the guests themselves and to the security of their property.

Common Law Liability

Historically, under common law, innkeepers were held responsible for the safety of a guest's property. In fact, the inns would often advertise that travelers could rely upon their personal protection during their stay. For example, if a traveler stayed at the Heidelberg Arms Inn, he or she was under the protection of the Heidelberg family, including the "arms" (weapons) that the family would muster against any intruders who would dare attack. This was important because, in the past, travel was risky, and those travelers who arrived for a night's lodging needed to know that the innkeeper could provide them with a secure haven during their stopover. Because of the importance of providing protection when traveling, an innkeeper became, under common law, an insurer of the safety of a guest's property. If the common law had not required innkeepers to maintain a protected environment, robbers and bandits would have made the inns unsafe places indeed, and travel would have been greatly restricted.

In today's world, hotel and restaurant guests still face the threat of robbery. The number of crimes reported annually by hotels and restaurants is large and growing. Jewelry, credit cards, and cash, as well as personal property such as cameras, furs, and the like all entice those who are not honest. Vacationers, business travelers, or simply those dining out are under the threat of an increasingly sophisticated type of thief. Unfortunately, even hospitality employees can also be a threat to guest property.

Hospitality managers must remain vigilant to various threats, from sophisticated con artists to "grab and go" thieves, because today's law may still hold those in the hospitality industry liable for the safety of their guests' property. Consider the case of Evan Gainer. Mr. Gainer checks into a hotel carrying a bag of diamonds valued at $100,000. The bag is stolen from his room. Under common law, the innkeeper could be liable to reimburse Mr. Gainer for the value of his stolen diamonds, even if he or she was unaware that the luggage contained such valuable items.

Of course, property liability extends beyond the threat of theft. Consider the case of Tony Mustafa. Mr. Mustafa allowed a hotel's valet parking staff to park his new Mercedes-Benz convertible in its elevated parking garage. While retrieving the car, a valet driver scraped the side of the car against a concrete pillar, damaging it extensively. As could be expected, Mr. Mustafa was quite upset, and would, in all likelihood, hold the hotel responsible for the damage done to his vehicle. In this case, the guest's property, while not stolen, was clearly damaged while in the possession of the hotel.

In summary, theft, negligent handling, fire, flooding, and a variety of other factors can threaten a guest's property. The general rule of common law is that the innkeeper will be liable for damage to, or loss of, a guest's property, unless an act of nature, civil unrest, or the guest's own negligence caused the damage or loss. Consequently, hospitality managers have an extraordinarily difficult task. Fortunately, in every state, the legislatures have moved to modify, under very specific circumstances, the common law liability requirements placed upon innkeepers.

Limits on Common Law Liability

When innkeepers face great liability exposure, they should also have a great deal of control over a guest's possessions. It was this recognition of the great risk taken by innkeepers that moved state legislatures to modify the centuries-old common law liability for innkeepers. Beginning in the mid-1800s, and continuing today,

each state has developed its own view of the extent of innkeeper liability for the possessions of their guests. The laws in each state vary considerably, however, so it is extremely important that hotel managers familiarize themselves with the law in their own state.

Figure 11.1 is a copy of the Innkeepers Liability statute for the state of Ohio. It is an excellent example of the type of law that state legislatures have passed for the benefit of innkeepers. Let's look carefully at several characteristics of the Ohio statute, which are common to most state liability laws.

1. Posting notice.

When a state legislature modifies the common law liability of innkeepers, it is only right that the guest be notified of the limitation. This is a critical point, and one that must be fully understood by the hospitality manager. Simply put, if a hotel wishes to take advantage of a state's laws limiting its liability for a guest's possessions, the guest must be made aware of the existence and content of that law. Notice that in the Ohio statute, guests must be made aware of the statute by requiring that the innkeeper keep "a copy of this section printed in distinct type conspicuously suspended in the office, ladies parlor or sitting room, bar room, washroom, and five other conspicuous places in such inn, or not less than 10 conspicuous places in all."

2. A secure safe.

If a hotel is to limit its liability for a guest's possessions, the hotel must provide a safe where guests can keep their valuables during their stay. Note

Section 4721.01 Liability for Loss of Property (GC Section 5981)

An innkeeper, whether a person, partnership, or corporation, having in his [or her] inn a metal safe or vault in good order suitable for the custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mileage books or tickets, negotiable or valuable papers, and bullion, and keeping on the doors of the sleeping rooms used by his [or her] guests suitable locks or bolts, and on the transoms and windows of such rooms, suitable fastenings, and keeping a copy of this section printed in distinct type conspicuously suspended in the office, ladies parlor or sitting room, bar room, washroom, and five other conspicuous places in such inn, or not less than 10 conspicuous places in all, shall not be liable for loss or injury suffered by a guest, unless such guest has offered to deliver such property to such innkeeper for custody in such metal safe or vault and the innkeeper has omitted or refused to take and deposit it in the safe or vault for custody and give the guest a receipt therefore.

Section 4721.02 Extent of Liability Agreement (GC Section 5982)

An innkeeper should not be obliged to receive from a guest for deposit in the safe or vault property described in section 4721.01 of the Revised Code exceeding a total value of five hundred dollars, and shall not be liable for such property exceeding such value whether received or not. Such innkeeper, by special arrangement with a guest may receive for deposit in such safe or vault property upon such written terms as may be agreed upon. An innkeeper shall be liable for a loss of any of such property of a guest in his [or her] inn caused by the theft or negligence of the innkeeper or his [or her] servant.

Section 4721.03 Limit of Liability for as to Certain Property (GC Section 5983)

The liability of an innkeeper whether person, partnership, or corporation, for loss of or injury to personal property placed in his [or her] care by his [or her] guests other than that described in section 4721.01 and 4721.02 of the Revised Code shall be that of a depositary for hire. Liability shall not exceed one hundred and fifty dollars for each trunk and it's contents, fifty dollars for each valise and it's contents, and ten dollars for each box, bundle or package and contents, so placed in his [or her] care, unless he [or she] has consented in writing with such guests to assume a greater liability [sic].

Figure 11.1 State of Ohio limitations on innkeeper liability.

that the Ohio statute states an innkeeper must provide access to a "metal safe or vault." Hotels in most states are required to provide a safe for guest valuables and to operate the safe in a reasonable manner. That is, the safe should be in good working order, and access to the safe should be restricted and closely monitored.

3. Suitable locks on doors and windows.

Obviously, the hotel that intends to limit its liability must provide a reasonably safe room for its guests. This would include providing functioning locks for doors and windows, or as stated in the Ohio statute, "suitable locks or bolts, and on the transoms and windows of such rooms, suitable fastenings."

4. Limits on required possession.

In most states, an innkeeper is not required to accept for safekeeping an unlimited amount of personal property. A hotel is not a bank, and it is not reasonable to assume that it would be as secure as a bank. Note the limitation allowed the innkeeper in the Ohio statute, which states, "An innkeeper should not be obliged to receive from a guest for deposit in the safe or vault property described in . . . the Revised Code exceeding a total value of five hundred dollars, and shall not be liable for such property exceeding such value whether received or not."

5. Limits on replacement values of luggage.

Because it is impossible to know for certain exactly what may have been contained in a lost piece of luggage, most states place a dollar limit on the replacement value of such items. Thus, if a piece of luggage placed in the care of the innkeeper is lost, the hotel's liability will be limited to the dollar value specified in the statute. Note the wording in the Ohio statute: "Liability shall not exceed one hundred and fifty dollars for each trunk and it's [sic] contents, fifty dollars for each valise and it's [sic] contents, and ten dollars for each box, bundle or package and contents." This limitation provision is very similar to that provided to airlines, by federal law, for lost or damaged luggage. Also, be aware that some limited liability laws also protect the innkeeper (and their insurance companies) in the event of a fire or natural disaster.

6. Penalty for negligence.

In nearly all states, if an innkeeper is negligent, the statute limiting liability becomes ineffective. As the Ohio statute states, "An innkeeper shall be liable for a loss of any of such property of a guest in his [or her] inn caused by the theft or negligence of the innkeeper or his [or her] servant." Note that the Ohio statute makes an innkeeper responsible for theft, if an employee (servant) commits it. Even more important, the innkeeper becomes liable for the full amount of any property loss resulting from the negligence of the hotel or its staff (subject to the contributory negligence of the guest).

Ensuring the Limitation of Liability

While it is implied rather than explicitly stated in the Ohio statute, failure on the part of the innkeeper to fulfill the statute's requirements will cause the innkeeper to lose the protection of the statute. Simply put, it is the responsibility of the innkeeper to prove that the hotel complied fully with all requirements set forth in the state law (i.e., appropriate notice with the right language, posted in the right number of conspicuous places, in an easy-to-read format, etc.).

ANALYZE THE SITUATION 11.1

Traci Kennear checked into the Pullman House Hotel. During her stay, jewelry with an estimated value of $5,000 was stolen from her hotel room. Ms. Kennear maintained that the hotel should be responsible for the jewelry's replacement and sued the hotel for the amount of the stolen jewelry. The hotel stated that its liability was limited to $300 under state law, because Ms. Kennear failed to deposit the jewelry in the safe deposit boxes provided by the hotel.

Ms. Kennear's attorney countered that the notice of the law, which the legislature stated must be "conspicuously posted" in order to be applied, was in fact posted on the inside of a dresser drawer filled with extra blankets for the guestroom, and that, further, the type size was so small that an average person would not be able to read the notice from a distance of 2 feet. The hotel replied that the notice was, in its view, conspicuously posted, and that Ms. Kennear should have asked for help from the hotel if she could not find or read the notice.

1. Did the hotel comply with the state legislature's requirement that the notice be conspicuously posted?
2. How could the hotel manager in this case ensure compliance with the "conspicuous posting" requirement of the state legislature?

11.2 BAILMENTS

There are situations when a hotel or restaurant manager may be entrusted with a guest's property in circumstances not covered directly under a state's liability statute. For example, suppose a guest arrives at a hotel and is greeted by a bellman who immediately takes the guest's bags and gives the guest a receipt before checking in. Who is responsible for the luggage? In this case, the guest has not had an opportunity to read the posted liability statutes, and has not even technically become a guest yet. However, because the bellman has taken voluntary possession of the bags, the hotel bears some responsibility for the safety of the guest's luggage.

Restaurants are not generally covered under the state laws that limit the liability of innkeepers. Nevertheless, restaurants too have responsibilities for the safety of their guests' property, especially in situations when the restaurant takes temporary possession of that property.

These responsibilities have been established by the courts through the application of a legal concept known as a **bailment**. In the hospitality industry, bailments are quite common. Coat checks, valet parking, safety deposit boxes, laundry services, luggage storage, and luggage delivery services are all examples of bailments. Restaurant and hotel managers must understand that they are responsible for the safety of a guest's property when a bailment is established.

▶ **LEGALESE**

Bailment: The delivery of an item of property, for some purpose, with the expressed or implied understanding that the person receiving it shall return it in the same or similar condition in which it was received, when the purpose has been completed. Examples include coat checks, valet parking, safety deposit boxes, laundry, luggage storage, and delivery.

Bailment Relationship

In a bailment relationship, a person gives property to someone else for safekeeping. For example, a restaurant guest may check his or her coat in a coatroom. The diner assumes that the restaurateur will safely hold the coat until he or she comes back for it. While there may or may not be a charge for the service, the restaurateur assumes responsibility for the safety of the coat when it is received from the guest. In this situation, a bailment has been created.

▶ **LEGALESE**

Bailor: A person or entity that gives property to another in a bailment arrangement.

The word bailment is derived from an old French word *bailler,* which means "to deliver." In a bailment relationship, the person who gives his or her property to another is known as the **bailor**. The person who takes responsibility for the property after receiving it is known as the **bailee**.

▶ **LEGALESE**

Bailee: A person or entity that receives and holds property in a bailment arrangement.

To create a bailment, the property must be delivered to the bailee. The bailee has a duty to return the property to the bailor when the bailment relationship

ends. Thus, if a guest delivers a suit of clothes to an in-house hotel tailor, the bailment relationship begins when the tailor accepts the clothing and ends when the clothing has been returned to the guest.

It is important to note that a bailment may be for hire; that is, the bailor may have to pay the bailee to hold the property (as in paying for valet parking), the bailee may pay for the privilege of using the property (as is the case when renting a car), or the relationship may take the form of a **gratuitous bailment**.

▶ **LEGALESE**

Gratuitous bailment: One in which there is no payment (consideration) in exchange for the promise to hold the property.

Types of Bailments

The law surrounding bailments is vast and varied. Essentially, however, bailments are divisible into three kinds:

- *Bailments for the benefit of the bailor:* In this arrangement, only the bailor gains from the agreement. This arrangement exists, for example, when a refrigeration repairman asks if he can leave his tools in a restaurant's storeroom for the night so they do not have to be reloaded into the repair truck. The tools will be used the next day to finish a repair job covered by the refrigerator's warranty. The restaurant that accepts the tools for safekeeping also accepts the responsibility of a bailment relationship, and so must exercise a high degree of care for the safety of the property (tools). If the restaurant is unwilling to do so, it can of course, simply refuse to accept possession of the property.
- *Bailments for the benefit of the bailee:* In some cases, the person holding the property gains from the bailment relationship. When the foodservice director of the local country club borrows chafing dishes from the food and beverage director of the local athletic club in order to service an extremely large wedding, the bailment is for the benefit of the bailee only. Again, it is important to note that this bailment relationship could be a gratuitous one, or the dishes could be rented to the country club. In either case, the bailee who benefits from the relationship is responsible for the safety of the property while it is in his or her possession.
- *Bailments for the benefit of both parties:* In many cases, a bailment, either for payment or gratuitous, is for the benefit of both parties. This would be the case, for example, when a restaurant agrees to park its guests' cars for them while they dine. The guests (bailors) gain the convenience of having their cars parked for them, and the restaurant (bailee) gains because of the increase in business that comes from providing the parking service.

While the rule of law varies somewhat in each of these three arrangements, as a manager, you need to realize that guest property, when in your possession, subjects you to the duty of reasonably caring for that property. A simple way to consider your responsibility is to assume that you should exercise as much care for the property of a guest as you would for your own property. If you cannot exercise that degree of care, it is best not to enter into a bailment relationship.

ANALYZE THE SITUATION 11.2

The Fox Mountain Country Club was a popular location for weddings in a midsized town. In the winter, the country club offered a free coat check service to its guests. A staff member employed by the country club operated the coat check service. The coat checkroom was located just outside the entrance to the club's Crystal Ballroom.

At a wedding held on June 15, Mrs. Kathy Weldo presented her full-length sable coat to the uniformed coat check attendant at the country club. Mrs. Weldo was given a small plastic tag with a number, which she observed corresponded to the number on a coat hanger where her coat was hung. Standing outside the coatroom, Mrs. Weldo had a clear view of her fur as

it hung on the coat rack. Mrs. Weldo remarked to the attendant that the coat was "very valuable," and that she hoped the attendant would watch over it carefully.

Upon leaving the club at 1:00 A.M., Mrs. Weldo went to the coat check area to retrieve her coat, only to find that it was missing. When she inquired about the coat's location, the coat check attendant apologized profusely, but could not explain the coat's disappearance. The attendant stated that he had left the coatroom unattended only twice that evening, one time for a 15-minute dinner break and the other for a 5-minute cigarette break. The door to the coatroom was left open and unlocked during those periods, so that guests who left early could retrieve their own coats.

Mrs. Weldo returned to the club the next day to speak to Ms. Miles, the club manager. Ms. Miles pointed to a sign prominently displayed near the coatroom door stating, "The club is not responsible for lost or stolen property." She recommended that Mrs. Weldo refer the matter to her insurance company.

1. What was the nature of the bailment relationship in this situation?
2. Did the club exercise reasonable care in the handling of Mrs. Weldo's coat?
3. What should the club manager do in the future to avoid situations such as this?

Liability under a Bailment Relationship

A hospitality facility is liable only if a bailment relationship is established. For example, many restaurants and hotels provide coat racks or unattended coatrooms for their guests. Generally, a restaurant would not be responsible for any theft or damage to a patron's property on an unattended coat rack, because the restaurant did not legally take possession of the property. Thus, a bailment was never created.

This concept also applies to items inside bailed property. For example, a restaurant that offers valet parking would be liable for damage to a guest's automobile. When the guest presents the car keys to the valet, possession of the car is transferred from the guest to the restaurant, and a bailment is established. However, the restaurant would probably not be liable for the loss of an expensive camera that was left inside the car. The restaurant knowingly accepted ownership only of the automobile. No bailment relationship was established for the camera left inside the automobile.

It is important to remember that, in cases where a bailment relationship does not exist, and a hospitality operation does not assume liability, managers should still exercise a degree of care over their guests' property to avoid the risk of a negligence lawsuit.

When a bailment relationship has been established, a hospitality operation will be liable for any loss or damage to a guest's property. In many states, a hotel or restaurant's liability for damage will be limited if the operation (bailee) can prove that it exercised the standard of care required under the law.

A bailee can also reduce its liability by establishing a set liability limit in agreement with the bailor, provided the limitation is not in violation of law or public policy. For example, a country club may post a sign stating it will reimburse guests for lost property up to a set amount. While some states may recognize this type of sign as a reasonable agreement between bailor and bailee to limit liability, other states do not recognize the validity of such a posting. Thus, a hospitality manager should read his or her state law carefully, or consult an attorney, before posting such a sign.

A hotel may also be liable for any bailed property of nonguests using its facilities, such as a hotel guest who has already checked out or an individual using a hotel restaurant or meeting room. However, the hotel's liability for such property may be limited under the terms of the state's liability law.

In all cases, if the loss or damage to a guest's property is the result of the hospitality operation's own negligence or fraud, the hospitality operation will be li-

able for the full amount of that property. By the same token, if a guest's own negligence contributes in some way to the property's loss, the hospitality operation's liability may be reduced or even eliminated altogether.

Note that, historically, the common law held a hotel liable for the loss of a guest's property if the property and the guest were within the premises of the hotel. This concept was known as ***infra hospitium***. Today, most states determine responsibility for lost or stolen items by applying bailment and/or negligence theories.

▶ **LEGALESE**
Infra hospitium: A Latin term meaning "within the hotel."

Consider the case of Alexis Lee. Alexis operates a tailor shop in the city. As part of her business, she makes the rounds of local hotels, seeking alteration and mending jobs. One day, Alexis takes an expensive man's suit from a guest staying at the Ritz hotel. The guest had delivered the suit to the bellstand for pickup by the alteration company. Unfortunately, in her hurry to finish her collection rounds, Alexis leaves her truck unlocked, and the suit is stolen from the back of it before she returns.

In this situation, it is likely that the guest would expect the hotel to replace the suit. The hotel, of course, may be able to press a case against Alexis if it can be shown that her actions were negligent. However, a bailment was created between the bellman and the hotel guest. Under the law, an outside agent acting as a bailee on behalf of a restaurant or hotel may subject the operation to liability. Even though the suit was outside the physical confines of the hotel, the bailment between the hotel guest and the bellman, and the subsequent bailment established between the bellman and Alexis, served, in effect, to extend the confines of the hotel to include Alexis's truck. Thus, the hotel could be liable for the loss of the suit.

Perhaps the most difficult application of bailment and liability concerns the safekeeping of guests' automobiles. Under common law, innkeepers were responsible for the protection of their guests' means of transportation (which, up until the twentieth century, typically meant the care and feeding of horses). Today, however, the use of automobiles presents a unique challenge, as they generally exceed the state's liability amounts, yet cannot be placed in a safe.

In cases where a restaurant or hotel offers valet parking, the situation is clear. The guest turns over his or her key to the valet, creating a bailment relationship, thereby placing liability for the automobile with the restaurant or hotel. In situations where a hotel has an agreement with an independent parking garage, the hotel may still be liable for a guest's automobile, since the garage could be considered to be an agent of the hotel.

Many motels have free parking lots on their premises, but accept no liability for their guests' automobiles. Guests are permitted to park on the lot if they so desire, but must keep their car keys with them. Thus, no bailment relationship is established between the guest and the motel that would cover any loss or damage to the automobile; that is, the motel would not be liable. That said, some states consider the availability of a parking lot to be a gratuitous bailment, which would hold the hospitality operation liable for any damage. In cases where guests keep their car keys, but a fee is charged for use of the parking lot, the courts may decide that the charging of a fee creates a bailment relationship, which could hold the parking lot owner liable. The laws covering liability for automobiles vary widely from state to state. As a hospitality manager, you should have a thorough knowledge of all the liability provisions included in your state's laws.

Detained Property

Bailees have significant responsibilities when a bailment is created, but so too do bailors. The bailee has the right to charge a fee to cover any costs that may be associated with holding or protecting property, such as a parking fee or charges for the services of a dry cleaner or tailor. In addition, the bailor may be required to pay reasonable charges for property requiring special handling or maintenance.

If the bailor is unwilling or unable to pay the agreed-on charges, the bailee may detain or keep the goods of the bailment as a lien until full payment is made.

Consider the case of the hotel that operates a parking garage and charges a nightly parking fee for guests. A guest arrives at the front desk to check out one morning and claims to be dissatisfied with the hotel and its services. The guest refuses to pay for either the room charges or the parking fees incurred. The hotel may choose to withhold the automobile from the guest until payment is made. In this situation, the automobile would be considered **detained property**. Of course, during the time the property was being withheld, the hotel, as the bailee, would have an obligation to protect the detained property from harm with the same measure of care it would normally exercise.

▶ **LEGALESE**

Detained property: Personal property held by a bailee until lawful payment is made by the bailor.

The situation just described illustrates not only the concept of detained property, but also why you must use your legal knowledge, as well as good judgment, when operating a hospitality facility. The hotel manager may well be within his or her legal rights to detain the automobile and demand payment, but that action may not be in the hotel's best interest. To maintain good customer relations, and to avoid a lawsuit, the manager may decide that a better approach would be to release the automobile. The procedure of detaining property can subject you to a possible lawsuit if not done properly. It is a course of action that should be pursued only after careful consideration of the legal consequences.

Innkeeper's Lien

The innkeeper's lien is a concept that helps to protect innkeepers from nonpaying guests. Essentially, it enables a hotel to detain certain property that guests may bring with them into the inn if they refuse, or are unable, to pay their bill. Most states allow the innkeeper to hold a guest's property until the appropriate charges have been paid. In the event the guest chooses not to pay the bill, the innkeeper is usually authorized to sell the items and apply the proceeds from the sale to the bill. The innkeeper can also use the proceeds to pay any costs that may have been associated with selling the property. Any surplus left over must be returned to the guest. Certain personal items, such as necessary clothing and wedding rings, have been held to be outside the scope of the innkeeper's lien. Ordinarily, the lien can be used only to pay charges incurred by the guest directly with the hotel. So, a charge incurred by the guest at an independent business center, for example, even though located within the hotel, would not qualify. State laws vary, so be sure to consult with the state hotel association for the proper methods to be used. Remember, though, that if at any time a guest pays the bill, the lien is extinguished and the property must be returned immediately.

◀ **SEARCH THE WEB 11.1** ▶

Log on to the Internet and enter **www.law.cornell.edu/ucc/ucc.table.html**. You will arrive at the Uniform Commercial Code.

1. Select: Article Seven from the list of articles available.
2. Scroll to Part 2, Warehouse Receipts: Special Provisions.
3. Select and read: §7-209. Lien of Warehouseman and §7-210. Enforcement of Warehouseman's Lien.
4. What does it mean if a bailee has a lien on a bailor's property?
5. Does a lien permit the possessor of property to sell it to satisfy the lien?
6. What are the implications of section 4 of 7-209 for the hospitality manager proceeding without an attorney?

11.3 PROPERTY WITH UNKNOWN OWNERSHIP

As a manager, you may experience occasions when you and your staff will discover personal property whose ownership is uncertain. Under common law, there are three classifications of property whose ownership is in doubt. Each classification carries with it unique responsibilities for the hospitality manager. The three property types are:

- Mislaid property
- Lost property
- Abandoned property

Mislaid Property

Mislaid property comes into existence when the property owner forgets where he or she has placed it. For example, in a restaurant, a guest may enter with an umbrella, place the umbrella in a stand near the door, but upon leaving the restaurant, forget to retrieve it. In this case, the umbrella is considered to be mislaid property, and the restaurant's manager or owner is responsible for the safekeeping of the umbrella until the rightful owner returns. In fact, if the umbrella is given by the manager to someone who claims to be the owner, but who in fact is not, common law would find the manager liable to the true owner for the value of the umbrella.

▶ **LEGALESE**
Mislaid property: Personal property that has been put aside on purpose, but then has been forgotten by the rightful owner.

A manager is required to use reasonable care to protect mislaid property until the rightful owner returns to claim it. If the rightful owner does not return in a reasonable amount of time, ownership of the property would transfer to the property finder. Most hotels and restaurants require their employees to turn in any mislaid property they find in the normal course of their work. Thus, ownership of the mislaid property would transfer to the employer, not the employee.

Lost Property

Lost property comes into being when the rightful owner accidentally or inadvertently forgets where he or she has placed the belonging. Under common law, the individual who finds lost property in a public place is allowed to keep it unless the rightful owner returns to claim it. In many states, the finder has a legal obligation to make a reasonable effort to locate the rightful owner of both lost and mislaid property.

▶ **LEGALESE**
Lost property: Personal property that has been inadvertently put aside, then forgotten by the rightful owner.

Like mislaid property, employees who find lost property in the course of their work must turn the property over to their employer. This is true even if the property was found in a public place. Thus, a hotel lobby cleaning attendant who finds a portable computer on the floor near a chair would be required to turn the property over to the hotel, because the employer could be responsible for the value of the property if the rightful owner were to return to claim it.

A question can arise over the length of time a finder of lost property must retain that property. One would expect the length of time that the property should be held would increase with the value of the property. Thus, a pair of diamond earrings found in a hotel guestroom would likely require a greater holding time than a pair of gym shoes. Many hotel operators solve this problem by requiring that all property be held a minimum length of time before it is given to the employee who found it (as a reward for honesty) or given to charity. Figure 11.2 is a sample form that a hotel or restaurant can use to properly track these lost-and-found items.

Lost-and-Found Ticket

Facility Name _____ Today's Date _____

Item Description _____

_____

_____

_____

_____

_____

Location found: _____ Room Number _____

Name of finder _____

Supervisor who received item(s) _____

_____

DISPOSITION OF PROPERTY

Date item returned to owner _____

Owner Name _____ Owner Address _____

Owner Telephone _____ _____

Returned to owner by _____

Date item:

Returned to finder _____ Disposed of _____

Figure 11.2 Form used to track lost-and-found items.

Abandoned Property

When an owner abandons property, he or she has no intention of returning to reclaim it. Obviously, it can be difficult for a manager to know when property has been abandoned and not just misplaced or lost.

▶ **LEGALESE**

Abandoned property: Personal property that has been deliberately put aside by the rightful owner with no intention of ever returning for it.

Under common law, a finder has no obligation to take care of or protect **abandoned property**. In addition, the finder of abandoned property is not required to seek out its true owner. Broken umbrellas, magazines, worn clothing, and inexpensive toilet articles such as razors, toothbrushes, and the like are all common examples of abandoned property found in hotels. The statement that "one man's trash is another man's treasure" certainly holds true in regard to abandoned property. Still, it is a good idea to make sure that any property discarded by the hotel is in fact abandoned. When in doubt, it is always best to treat property of doubtful ownership as mislaid, or lost, rather than abandoned.

ANALYZE THE SITUATION 11.3

Kari Renfroe was employed as a room attendant at the Lodge Inn motel. One day, as she came to work, she discovered an expensive leather jacket stuffed inside a plastic shopping bag in the employee section of the parking lot. The jacket had no ownership marks on it, and neither did the plastic bag. Kari turned the jacket over to the manager of the

motel despite the fact that there was no policy in place regarding items found outside the motel.

The jacket was still unclaimed 120 days later, at which time Kari approached the manager and asked if she could have the jacket, since she found it. The manager refused to give Kari the jacket, stating that all unclaimed property found on the motel's premises belonged to the motel.

1. Would the jacket be considered mislaid, lost, or abandoned property?
2. Who is the current, rightful owner of the jacket?
3. How could the motel manager avoid future confusion about handling "found" property?

Disposing of Unclaimed Property

When items of value are found in a hotel or restaurant, your first goal as a manager or owner should be to return the property to its rightful owner. When that is not possible, your next goal should be to safely protect the property until the rightful owner returns for it. Only after it is abundantly clear that the original owner will not be returning should the property be liquidated.

LEGALLY MANAGING AT WORK:
Disposing of Found Property

The following seven guidelines can help you as you devise a policy to protect the rights of original property owners and to reward the honesty of your employees.

1. Review your state's lost-and-found laws to determine any unique requirements that apply to the property in question.
2. Require all employees and management staff to turn in to the property manager or to his or her designee all personal property found in public places (lobbies, foyers, restrooms, etc.), as well as property found in rented areas such as guestrooms, suites, cabins, and campgrounds.
3. Keep a lost-and-found log book, wherein you record the name of the finder, the individual who received the found goods, the location where the property was found, and the date found.
4. If the value of the found item is significant, make all reasonable efforts to locate the rightful owner, and document these efforts.
5. Hold found property for a period of time recommended by your company or a local attorney familiar with the laws in your state regarding found property. Sixty days should be a minimum length for most found property.

Permit only the property manager or his or her designee to return found property to purported owners, but only after taking extra care to return the item only to its rightful owner.

If the original owner does not come forward, dispose of the property in accordance with written procedures, which have been shared with all employees and reviewed by your attorney. Many managers give found property to those who found it as a reward for employee honesty. They theorize that it is in the best interest of the facility and its guests to have all property returned promptly, and rewarding employees for doing so is one way to achieve this goal. Other facilities donate all valuable lost property to a local charity, while still others sell lost property once or twice a year to liquidation companies. ◀

As a guardian of guest property, it is your responsibility as a manager to protect and, when appropriate, properly dispose of property with unknown ownership. If you do so correctly, your guests and your employees will benefit.

▶ INTERNATIONAL SNAPSHOT

Limited Liability of Innkeepers in Canada

In Canada, innkeepers' liability is governed provincially. With the exception of Quebec, all provinces and territories limit liability for damage to a guest's property subject to two exceptions.[1] Innkeepers are liable where goods are stolen or lost through the neglect of the innkeeper or his or her employees, or when goods are deposited for safe custody with the innkeeper (unless the goods were kept in a safe or other sealed device).

Some provinces have additional limitations and exceptions. For example:

- In Quebec, innkeepers can be liable for up to 10 times nightly rate, and where the loss is caused intentionally, the liability can be unlimited.
- In nine jurisdictions,[2] innkeepers can be liable for refusing to receive goods for safe custody or where guests are unable to deposit the goods for safe custody through the fault of the innkeeper. This liability is limited where the establishment does not have a proper safe and the guest is informed of this when the innkeeper refuses to receive the goods.
- Saskatchewan provides that the innkeeper will not be liable for goods lost in a part of the hotel other than the guestroom of the owner of the goods. The innkeeper is also not liable for trunks or their contents or personal effects left by a guest in his or her room, if there is a proper lock and key for the door of the room, unless the room is locked during the absence of the guest and the key is left at the office.
- In Alberta, innkeepers may be liable for property belonging to persons who are not registered guests.

Given the variations between jurisdictions, it is critical to consult the legislation of the relevant province.

[1]While most provinces provide for no liability in circumstances where the exceptions do not exist, in three of the provinces, the liability is capped at a stated amount. For instance, the cap is $200 in Newfoundland, $100 in Saskatchewan, and $40 in Ontario.
[2]These clauses were found in the statutes of British Columbia, Ontario, Quebec, Manitoba, Saskatchewan, New Brunswick, Nova Scotia, Newfoundland and Labrador, and the North West Territories.
Provided by Frank Zaid, a partner, and Jasmine Lew, a student-at-law, with Osler, Hoskin & Harcourt LLP, Barristers and Solicitors, in the firm's Toronto, Ontario Canada office. www.osler.com

WHAT WOULD YOU DO?

You are the manager of a restaurant in a downtown area of a large city. Because of your location, no parking is available directly adjacent to your facility. For the past five years, you have made valet parking service available to your customers through A-1 Parking. Essentially, A-1 provided valet drivers who would stand outside your restaurant doors, approach cars as they arrived, give guests a claim check for their cars, and deliver the car to a parking garage owned by A-1. The parking garage is located one-fourth of a mile from your restaurant. When guests finish dining, the valet outside your restaurant radios the parking lot with the claim check number, and a driver from A-1 delivers the car to your front door, where guests pay a parking fee before they regain possession of their car. A-1 currently provides this service to several restaurants.

The arrangement has been a good one for both you and A-1. No trouble of any kind has ever been reported. Today, however, the owner of A-1 has announced he is retiring; he approaches you to inquire whether the restaurant would be interested in buying his business.

Draft a letter to the owner of A-1 Parking stating whether or not you wish to buy the parking garage business. In your letter, be sure to address the following points:

1. How operating the valet parking service yourself would change the relationship you have with your restaurant customers.
2. The need for insurance to cover potential damages to automobiles and other areas of liability you might need to insure against.
3. The potential pros and cons of assuming the responsibility for parking your guests' automobiles, as compared to the current situation.
4. The agency, liability, and bailment issues that would arise if the purchase were made.

▶ THE HOSPITALITY INDUSTRY IN COURT

To familiarize yourself with how complying with the requirements of a limited liability statute saved a motel $36,000, read the case of *Emerson v. Super 8 Motel, 1999 Conn. Super. Lexis 965 (Conn. Super. Ct. 1999).*

FACTUAL SUMMARY

Lannell Emerson (Emerson) stayed at a Super 8 Motel (Super 8) in Stamford, Connecticut on November 12, 1997. Emerson was carrying $36,000 in cash in the glove box of his car. Sometime during the night his car was broken into and the cash was stolen. Emerson sued Super 8 Motel for failure to keep his property safe.

QUESTION FOR THE COURT

The question for the court was whether Super 8 was obligated to keep the personal property of guests safe during their stay. Super 8 argued that under Connecticut law it had no duty to keep Emerson's personal property safe unless he gave the property to the person in charge of the office for safekeeping. The law specifically required motel guests to deliver the property to the person in charge of the office for safekeeping and to take a written receipt. The law also required the motel to post a notice of the availability of a safe in the guestrooms or motel office.

Emerson's only argument was he did not see a notice regarding the safe in either the office or the motel guestroom. He argued that Super 8 failed to comply with the Connecticut law by not posting a notice, hence it could not escape liability for the loss of his property. Super 8 offered evidence showing the notices were in place. Emerson submitted an affidavit stating he did not see the notices, but offered no other evidence.

DECISION

The court found for Super 8 and did not hold it liable for the loss of property suffered by Emerson. The court concluded Emerson failed to offer reliable evidence regarding the notices posted in the guestrooms or office. Super 8 was relieved of liability under the Connecticut law.

MESSAGE TO MANAGEMENT

A hotel must comply precisely with the requirements of the limited liability statutes in each state or face possible liability in situations like this one.

To learn the dire consequences of noncompliance, consider the case of *Frockt v. Goodloe, 670 F. Supp. 163 (W.D.N.C. 1987).*

FACTUAL SUMMARY

Marvin Frockt (Frockt), a traveling jewelry salesman, stayed at a Comfort Inn in North Carolina. Frockt had in his possession a jewelry sample case containing jewelry valued at about $150,000. Upon checking in, Frockt requested the case be placed in a safe at the inn. He also signed his registration card, which contained a statement saying the inn would not be responsible for loss of valuables. The clerk accepted the case to be placed in either the safe or a closet where the petty cash was kept. The clerk was not informed about the contents of the case nor their value. Frockt did state the case was very valuable. The clerk did not offer Frockt a receipt, but Frockt wrote out his own receipt keeping one copy and attaching the other to the case. When Frockt asked for the case the next day, it could not be located. Frockt sued the owners of the Comfort Inn for failing to keep his property safe.

QUESTION FOR THE COURT

The question for the court was whether the Comfort Inn was responsible for the loss of the jewelry case. Frockt argued Comfort Inn was responsible based on North Carolina common law giving innkeepers the duty to receive and safely keep all property at the request of the guest. North Carolina also had a statute dealing with guest personal property. It required innkeepers to receive money, jewelry, and valuables for safekeeping upon the request of a guest. The law limited the value of property required to be held by the inn to $500. The law also

required the innkeeper to keep a copy of the law posted in every guestroom and the office of the inn, and stated the law did not apply if the innkeeper failed to post notice. Frockt offered evidence showing Comfort Inn did not post a copy of the statute in the guestroom or the office. Frockt argued Comfort Inn's failure to post the statute meant it was not applicable to his case. He argued the common law applied and Comfort Inn was unconditionally responsible for all his property.

Comfort Inn argued it was free to place conditions on the receipt of property. Specifically, Comfort Inn argued it could condition acceptance of Frockt's case on his agreement to not hold Comfort Inn responsible for loss. Comfort Inn also argued Frockt agreed to not hold the inn responsible when he signed his registration card with the release from liability statement on it.

DECISION

The court decided Comfort Inn was responsible for Frockt's lost jewelry case. The release from liability statement on the registration card was void because it violated public policy. Additionally, since Comfort Inn failed to post copies of the statute dealing with valuables, the statute did not apply. The common law of North Carolina held innkeepers completely liable for all property left with the innkeeper for safekeeping.

MESSAGE TO MANAGEMENT

You cannot rely on exculpatory clauses. You need to follow the legal requirements precisely.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

As a hospitality operator, you have a responsibility to take reasonable steps to safeguard the personal property that guests bring with them onto your premises. Fortunately, laws have been passed in all states that limit the liability of the operator. There are several requirements that must be met by the operator for the limits to apply. Because the laws vary widely, it is crucial that you become familiar with the requirements of the statute in your state.

From time to time, operators will voluntarily accept possession of guest property (e.g., valet parking, luggage storage, etc.). These are called bailment relationships. Your responsibilities vary depending on the type of bailment that is created. As innkeeper's lien gives a lodging establishment the right to detain a guest's belongings in the event the guest refuses to pay the bill.

Property can also be mislaid, lost, or abandoned, and a manager must understand the distinctions between those three classifications in order to dispose of the property responsibly.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Discuss the impact that the common law liability of innkeepers had on the development of the early travel industry, and give three reasons why state legislatures have chosen to limit that liability.
2. Using the Internet, contact the offices of your state hotel and motel association to secure a copy of the current innkeeper's liability law. Review the document and create a list of posting/notice requirements that you would implement if you operated a hotel in your state. Explain your rationale for each item on the list and its posting location.
3. Give a restaurant example of a bailment for the benefit of a bailor and one for the benefit of the bailee.
4. Innkeepers are generally held responsible for an even higher degree of care than ordinary bailees. Why do you think this came to be under common law?
5. When a guest places a coat on a coat rack attached to his or her table in a restaurant, is a bailment created? Why or why not?

6. List 10 examples of bailment relationships in the hospitality industry.
7. Think of and write out an example you could use to teach employees the difference between mislaid and abandoned property. Why is such an example useful?
8. Create the portion of a lost and found policy for a hotel's room attendants that refers to disposition of unclaimed mislaid, lost, or abandoned property. Did you give the property to the employee who found it? Why or why not?

▶ TEAM ACTIVITY

In teams, draft a policy and procedures guide (not to exceed five double-spaced pages) for a large restaurant chain that will instruct employees as to how to handle and protect guest property. Be sure to include bailment issues such as valet parking and coat checks, as well as items that may be left behind by guests and found by an employee. Once you have developed a policy, present it to your class in the form of a 10-minute training session that would be used to educate employees about the new policy.

Chapter 12

Your Responsibilities When Serving Food and Beverages

"I know the numbers look good," Trisha Sangus said, as she adjusted her glasses. "That's the problem. They look too good." It was a typical second day of the month at the hotel. That meant reviewing the prior month's profit and loss statement. Trisha sat at her desk across from Ahmed Cantonio, the hotel's new controller. Ahmed and Trisha had worked together for three months, and Ahmed had seen this look on the general manager's face before. Usually, Trisha's P&L reviews focused on expense categories that exceeded budget. This time, the focus was on food cost. Those costs were actually below the projection Trisha and Ahmed had made at mid-month, which made Ahmed wonder all the more about Trisha's uneasiness. Usually, expenses below budget or projection were something to celebrate, but Trisha Sangus was not celebrating.

"Are you sure you have accurately reported sales for food and beverage?" asked Trisha. Ahmed was nearly offended. He had answered the same question 10 minutes ago. He was positive that all food and beverage sales had been properly recorded.

He replied, "For the month, $273,000. I checked the numbers three times. Banquet sales of $112,000, restaurant sales of $88,000, and bar sales of $73,000. That makes $273,000."

"And our mid-month projection for food and beverage cost of sales?" asked Trisha.

"Well," Ahmed began again, looking up from the P&L, "after we adjusted for the big banquet we picked up on the twenty-second, we projected sales of $275,000. Pretty close, if you ask me. Food and beverage costs combined were estimated at 28.5 percent, or $77,800."

"That's true," said Trisha, as she leaned back in her chair and stared at the ceiling. "However, I see an actual expense of only $64,800, and that has me concerned. Did you double-check beginning and ending month inventories as I had asked?

"Sure did," replied Ahmed. "I know they are accurate. I even spot-checked some of the inventory counts myself. Everything on the inventory is in-house and valued correctly."

"And total food purchases," continued Trisha, "we haven't omitted any invoices from our calculations?"

"No," replied Ahmed, "I am sure we have not. My assistant, Veronica, contacted every supplier this morning. We have all the invoices. I guess the new chef is just doing a great job holding down our costs. We should be pleased."

Trisha looked up at Ahmed. "Ahmed, I like low costs. When Jerry Mekemson was the chef here, before his retirement, we ran great food costs—always in line with my projections. I knew Jerry, and the quality he insisted we . . . "

Before she could finish, Trisha was interrupted by the telephone ringing on her desk. "Hello," said Trisha as she picked up the receiver. "This is Trisha Sangus, how can I help you? . . . Really?" she said. "None at all? But 25 pounds of bleu? By the way, do you happen to know offhand the current price difference between Roquefort and bleu? Okay, thanks Judy. No problem; yes, I'll be down."

"Well," said Trisha as she hung up the telephone, "that was Judy down in the kitchen storeroom. I called her earlier and asked her if I could get a Cobb salad for lunch. Let's go down to Jill's."

Ahmed was confused. Jill's Tavern was one of two restaurants operated by the hotel. It was a casual, fun-style restaurant that served salads, burgers, steaks, and grilled items—very high quality, and with superb service. But it wasn't like Trisha to leave an unsolved problem, even for lunch. In fact, she was noted for often eating lunch at her desk as she continued to work. And Judy didn't actually work in the dining room. She received and put away the grocery orders as they were delivered to the kitchen that serviced the restaurants.

"Let's go," said Trisha. "A Cobb salad with fresh grilled chicken breast, California avocado slices, Roquefort cheese—makes me hungry just thinking about it," she continued. But she had a look in her eye that told Ahmed she was thinking about more than just lunch. "I think we can have lunch and solve our mystery," she revealed. Let's ask the chef to eat with us, too." Ahmed had a feeling that Trisha was going to enjoy her lunch, but he wasn't quite sure that the new chef would.

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. A foodservice establishment's responsibilities, under the Uniform Commercial Code (UCC) and other laws, to serve wholesome food and beverages.
2. To apply "Truth in Menu" concepts to the service of food and beverage products.
3. To assess the current legal risks associated with serving alcohol.
4. To implement training programs that result in the responsible service of alcohol.

12.1 SERVING FOOD

People all over the world love to dine out. And when they are not dining out, Americans have increasingly begun to patronize foodservice operations that offer preprepared food they can take home to eat. In fact, 1996 was the first year that takeout occasions exceeded on-premise occasions in the U.S. foodservice industry. Whether the food is eaten in a restaurant or taken home, *Cooking for Profit* magazine estimates that U.S. restaurants post combined sales of nearly $1 billion per day. Some experts predict that fully 75 percent of all food eaten in the United States will be preprepared by restaurants or grocery stores within the first decade of the twenty-first century.

Uniform Commercial Code Warranty

As a hospitality manager involved with the service of food, you have a legal obligation to only sell food that is wholesome, and to deliver that food in a manner that is safe. This responsibility is mandated by the Uniform Commercial Code (UCC), as well as other state and local laws. Figure 12.1 details one section of the UCC that relates to selling safe food. When a foodservice operation sells food, there is an implied warranty that the food is **merchantable**. Simply put, a foodservice manager is required to operate his or her facility in a manner that protects guests from the possibility of **foodborne illness** or any other injury that may be caused by consuming unwholesome food or beverages. Unfortunately, sometimes, food is served that contains something that the guest normally would not expect to find in the dish (for example, a small stone in a serving of refried beans). The question that must be answered in these cases is whether or not the food or beverage served was "fit" for consumption.

▶ **LEGALESE**

Merchantable: Suitable for buying and selling.

▶ **LEGALESE**

Foodborne illness: Sickness or harm caused by the consumption of unsafe foods or beverages.

The courts usually apply one of two different tests to determine whether a foodservice establishment is liable to a guest for any damages suffered from eating the food. (In the case of the stone found in the refried beans, the damage may consist of a broken tooth from biting down on the small stone.) One test seeks to determine whether the object is foreign to the dish or a natural component of it. If the object is foreign, then the implied warranty of merchantability (fitness) under the UCC is breached, and the foodservice operator would be held liable. If it is a natural component, the warranty would not be breached. For example, the stone in the refried beans, though commonly found in large bags of raw beans, would be considered foreign, and thus the foodservice operator would probably be held responsible. If instead the guest had broken a tooth on a piece of clamshell while enjoying a steaming bowl of New England clam chowder, the guest would probably not recover any damages under this test. The clamshell, as a natural component of clams, the court reasons, is also a natural component of clam chowder.

Uniform Commercial Code: IMPLIED WARRANTY

§ 2-314.: Merchantability; Usage of Trade.

1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

Figure 12.1 Uniform Commercial Code: Implied Warranty.

The foreign/natural test is slowly being replaced by the "reasonable expectation" test. This test seeks to determine whether an item could be reasonably expected by a guest to be found in the food. The clamshell situation is a perfect example of why the law (and assessing liability) can be difficult at times. Clamshells are natural parts of clams, but are they really natural components of clam chowder? Put another way, would you, as a guest, reasonably expect to find pieces of clamshell in a bowl of clam chowder that was served to you? If a judge or jury decided that it was not reasonable to expect to find a clamshell in the chowder, then the foodservice operator would be held liable. A tricky situation arises if someone orders a fish "filet" sandwich. As the word filet means boneless, a guest would not expect to find bones in the sandwich. Accordingly, if a bone were present, and the guest choked on that bone, the consequences could be substantial for the foodservice operator.

Guest Safety

To help foodservice operators prevent foodborne illness, local health departments conduct routine inspections of restaurants and other food production facilities, and may hold training or certification classes for those who handle food. It is important to know the local health department requirements that relate to food handling in your area, and to work diligently to ensure that only safe food is served in your operation. If you do not, the results can be catastrophic.

Consider the case of Kelly Kleitsch. Kelly worked long hours to establish her own successful restaurant. With much hard work and a considerable investment of capital, Kelly built the reputation of her restaurant by serving quality food at fair prices. When a careless member of the food preparation team forgot to refrigerate a chicken stock one night, then used the stock the next day to flavor an uncooked sauce, which was later served, several individuals became very ill. The good reputation of Kelly's restaurant disappeared overnight as the local newspapers and television stations reported how one elderly lady was hospitalized after eating at the restaurant. Customer counts plummeted and Kelly lost her business. And that was before the lawsuit was filed on behalf of the elderly diner.

The law in this area is very clear. Restaurants will be held responsible for the illnesses suffered by their guests, if those illnesses are the direct result of consuming unwholesome food. Thus, managers must make every effort to comply with local ordinances, train staff in effective food-handling and production techniques, and document their efforts. The National Restaurant Association, and its

ANALYZE THE SITUATION 12.1

Harry Dolinski was the executive chef at the Regal House hotel. One of his specialties was a hearty vegetable soup that was featured on the lunch buffet every Thursday. Pauline Guilliard and her friends decided to have lunch at the Regal House one Thursday before attending an art exhibit. Ms. Guillard read the lighted menu at the front of the buffet line. The chef's specials, including the vegetable soup, were written on the menu with a felt-tip pen.

Ms. Guilliard selected the vegetable soup and a few other items, and consumed one full bowl of the soup. Three hours later, at the art exhibit, she suffered seizures and had difficulty breathing. It turned out that the soup contained MSG—a food additive to which she had severe reactions. Ms. Guilliard recovered, but her attorney contacted the hotel with a demand letter seeking compensation for her suffering.

The hotel's attorney replied that the soup served by the hotel was wholesome and that Ms. Guillard's reaction to the MSG could not have been reasonably foreseen. In addition, the hotel maintained that MSG is a common seasoning in use worldwide for many years, and thus

it would have been the diner's responsibility to inform the foodservice operation of any allergies or allergic reactions. As a result, the liability for Ms. Guillard's illness was hers alone.

1. Did the hotel have an obligation (or duty as outlined in Chapter 9, "Your Responsibilities as a Hospitality Operator") to notify guests that the soup contained MSG?
2. How do you think a jury would respond to this situation? What level of damages, if any, do you think a jury would be included to award in this case?
3. What should the chef do to avoid similar problems in the future?

ServSafe program, can be a great asset in managers' efforts to ensure the safety of the food they serve. ServSafe is a national educational program designed to help foodservice operators ensure food safety.

Of course, you should take all reasonable measures to ensure that the food you serve is safe and consumable by your guests. Disclosing ingredients and warning guests of potential concerns is the best practice. If a potential incident does occur, however, the steps itemized in the next Legally Managing at Work feature should be taken to ensure the safety of all guests and to prevent further potential liability.

LEGALLY MANAGING AT WORK:
Steps to Take When a Guest Complains of Foodborne Illness

1. Document the name, address, and telephone number of the guest who complains of an illness, as well as the date and time the guest patronized your facility.
2. Document all items eaten in your facility by the guest during the visit in question.
3. Obtain the name and address of the physician treating the guest. If the guest has not contacted a physician, encourage him or her to do so.
4. Contact the physician to determine if in fact a case of foodborne illness has been diagnosed.
5. Notify the local health department immediately if a foodborne illness outbreak is confirmed, so the staff there can assist you in determining the source of the outbreak, as well as identifying affected guests and employees.
6. Evaluate and, if necessary, modify your training and certification efforts that relate to the areas involved in the incident.
7. Document your efforts, and notify your attorney or company risk manager.

The quality of the food a restaurant serves is important, as we have seen, but how that restaurant serves its food can be just as important from a legal standpoint. Again, the UCC addresses the issue of a restaurant's responsibility to serve food properly. As can be seen in Figure 12.2, a restaurateur is considered an expert—that is, an individual with skill and judgment—when it comes to the proper delivery of prepared food and beverages.

Not only can restaurants be found guilty of serving unwholesome food, but they can also be found liable if they serve wholesome food in an unsafe or negligent manner. Consider Terry Settles. Terry and his wife were guests at the Remington restaurant. He ordered cherries jubilee for dessert. When the server prepared the dish, a small amount of alcohol splashed out of the flambé pan and landed on the arm of Terry's wife. As she jumped back in her chair to try and avoid the burning liquid, she fell and severely injured her back. There is little question in this case that the restaurant will face severe penalties for the carelessness of its server.

Management should frequently review all food temperatures, serving containers, food production techniques, and delivery methods. Chipped plates and

Uniform Commercial Code: GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

§ 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Figure 12.2 Uniform Commercial Code: General Obligation and Construction of Contract.

glasses or poorly washed utensils can present just as much of a legal risk as serving spoiled or unwholesome food. In addition, restaurants should strive to accommodate guests who ask that dishes be prepared without a specific ingredient to which they are allergic and to closely supervise the preparation of that dish. Some states even require restaurants to post signs disclosing the use of microwave ovens when applicable, to caution restaurant patrons who have pacemakers.

If an incident occurs that involves *how* a food was served, rather than *what* was served, the manager should complete an incident report at the earliest opportunity. (Refer back to the Incident Report Form in Figure 9.2.)

ANALYZE THE SITUATION 12.2

Penny Mance was a single mother of three children living in an urban apartment complex. She worked as a paralegal in a downtown attorney's office. One morning, Penny was asked to come into work an hour later than her usual time. She used the opportunity to treat her three children to breakfast at a fast-food restaurant near their home. The Mance family arrived at the restaurant at 8:00 A.M. and ordered breakfast. For their beverage selections, Penny ordered hot chocolate and the children selected orange juice.

After the family sat down, Tina, Penny's six-year-old daughter, told her mother that she wanted to try the hot chocolate. The beverage had been served in a Styrofoam cup with a plastic lid. Penny replied that the chocolate was "probably too hot for her to try." This comment was overheard by several guests sitting near the Mance family. Tina reached for the chocolate anyway; her mother, while trying to pull the chocolate away, spilled it on her own hands. Penny suffered second- and third-degree burns from the hot chocolate and was forced to miss work for three weeks. Upon returning, her typing speed was severely reduced as a result of tissue scarring on her left hand.

Penny retained one of the attorneys where she worked to sue the fast-food restaurant. In court depositions later on, it was estimated that the chocolate was served at a temperature of 190 degree Farenheit. The restaurant's attorney claimed the chocolate was not unsafe when it was served. He pointed to the fact that Penny knew the beverage was probably too hot for the child as an indication that she was willing to accept the risk of drinking a hot beverage. In addition, the restaurant's attorney maintained that is was the child's action, not the restaurant's, that was the direct cause of the accident. Undeterred, Penny's attorney sued for damages, including medical expanses, lost wages, and a large amount for punitive damages.

1. Did the restaurant act negligently in the serving of the hot chocolate?
2. Do you think that Penny Mance was negligent? If so, how much difference, if any, do you believe that Penny's negligence would make in the size of the jury's award?
3. Whom should the restaurant manager and company look to for guidance on property serving temperatures and techniques? Could you defend this source in court?

12.2 TRUTH IN MENU LAWS

As a hospitality manager, you have a right to advertise your food and beverage products in a way that casts them in their best light. If your hamburgers contain eight ounces of ground beef, you are free to promote that attribute in your advertising, your menu, and as part of your server's verbal descriptions. You are not free, however, to misrepresent your products. To do so is a violation of what has come to be commonly known as **Truth in Menu** laws. These laws, which could perhaps better be described as "accuracy in menus," are designed to protect consumers from fraudulent food and beverage claims. Many foodservice operators believe that Truth in Menu laws are recent legislation. They are not. In fact, the federal government, as well as many local communities, have a long history of regulating food advertisement and sales, as can be seen in Figure 12.3.

▶ **LEGALESE**

Truth in Menu Laws: The collective name given to various laws and regulations that have been implemented to ensure accuracy in the wording on menus.

The various Truth in Menu laws currently in effect run to thousands of pages, and are overseen by dozens of agencies and administrative entities, thereby taking the labeling of food to much greater degrees of accuracy. Though these laws are constantly being revised, it is possible for a foodservice operator to stay up to date and in compliance with them. The method is relatively straightforward, and the key is honesty in menu claims, in regard to both the price that is charged and the food that is served.

Certainly, menus should accurately reflect the price to be charged to the customer. If one dozen oysters are to be sold for a given price, one dozen oysters should be delivered on the plate, and the price charged on the bill should match that on the menu. Likewise, if the menu price is to include a mandatory service charge or cover charge, these must be brought to the attention of the guest. If a restaurant advertises a prix fixe dinner with four courses and a choice of entrees, the guest should be told the price of the dinner, which courses are included, and the types of entrees he or she may choose from.

ANALYZE THE SITUATION 12.3

Jeffery and Latisha Williams arranged a fiftieth anniversary party for Latisha's parents. They reserved a private room at the Tannery, an upscale steak and seafood house located two miles from their suburban home. The Williams hosted a total of 10 people. Unfortunately, the service they received from the restaurant staff was not very good. When the check arrived, Mr. Williams noticed that a 15 percent charge had been added to the total price of the bill. When he inquired about the charge, his server informed him that it was the restaurant's policy to assess a 15 percent "tip" to the bill of all parties larger than eight persons. The policy, explained the server, was not printed on the menu, but was to be verbally relayed anytime a guest made a reservation for more than eight people. Mr. Williams replied that the reservation was made by his secretary, and she mentioned no such policy when she in formed Mr. Williams of the restaurant's availability.

Mr. Williams refused to pay the extra charge claiming that it should be he, not the restaurant, who determined the amount of the gratuity, if any. When the restaurant manager arrived on the scene, he informed Mr. Williams that the server had misspoken and that the extra charge was in fact a "service charge," and not a tip. Mr. Williams still refused to pay the added charge.

1. Does Mr. Williams owe the extra 15 percent to the restaurant?
2. Does it matter whether the surcharge is called a gratuity or a service charge? How would that be determined?
3. What should the restaurant do to avoid similar problems in the future?

"Accuracy in menu" involves a great deal more than honestly and precisely stating a price. It also entails being careful when describing many food attributes,

1906	The Federal Food and Drugs Act and the Federal Meat Inspection Act authorize the federal government to regulate the safety and quality of food. The responsibility falls to the U.S. Department of Agriculture (USDA) and the Bureau of Chemistry, the Food and Drug Administration's predecessor.
1913	The GOULD Amendment requires food packages to state the quantity of contents.
1924	In *U.S. v. 95 Barrels Alleged Apple Cider Vinegar,* the Supreme Court rules that the Food and Drugs Act condemns every statement, design, or device that may mislead, misdirect, or deceive, even if technically true.
1938	The Federal Food, Drug, and Cosmetic Act replaces the 1906 Food and Drugs Act. Among other things, it requires the label of every processed packaged food to contain the name of the food, its net weight, and the name and address of the manufacturer or distributor. A list of ingredients also is required on certain products. The law also prohibits statements in food labeling that are false or misleading.
1957	The Poultry Products Inspection Act authorizes the USDA to regulate, among other things, the labeling of poultry products.
1966	The Fair Packaging and Labeling Act requires all consumer products in interstate commerce to contain accurate information and to facilitate value comparisons.
1974	The Safe Drinking Water Act authorizes the Environmental Protection Association (EPA) to establish standards for drinking water safety and water quality. (Mineral water, seltzer, and club soda are exempt from these provisions, because the FDA classifies them as soft drinks.) In addition, the FDA has established strict criteria and labeling requirements for all types of bottled water, mineral water, and sparkling water.
1990	Congress passes the Nutrition Labeling and Education Act (NLEA), which makes nutrition information mandatory for most foods. Among the few foods exempted were restaurant items, unless they carried a nutrient or health claim.
1993	The FDA issues regulations under NLEA that require restaurants to comply with regulations for nutrient and health claims that appear on signs and placards. Menu claims are exempt.
1996	The U.S. District Court in Washington, DC, rules that Congress had intended restaurant menus to be covered by NLEA, and orders the FDA to amend its nutrition labeling and claims regulations to include menu items about which claims are made.
1997	The FDA's regulations for nutrition labeling of restaurant menu items that bear a nutrition or health benefit claim take effect.

Figure 12.3 Laws regulating food labeling and advertising.

including the preparation style, ingredients, origin, portion sizes, and health benefits. Because this area is so complex, and because consumers increasingly demand more accurate information from restaurants, the National Restaurant Association (NRA) and many state associations have produced educational material designed to assist foodservice operators as they write and prepare menus. Called *A Practical Guide to the Nutrition Labeling Laws,* this publication is written

specifically for the restaurant industry; it outlines everything you need to know about nutrition claims you can make for your menu items. You can secure a copy for a modest charge from the NRA. In addition, the federal government issues food description standards that can be of great assistance. You should pay particular attention to the following areas when you begin writing the menu for your own foodservice establishment.

Preparation Style

Under federal law, certain food items and preparation techniques must be carried out in a very precise way, if that item or technique is to be included on a menu. In many cases, the federal government, through either the Food and Drug Administration or the U.S. Department of Agriculture, has produced guidelines for accurately describing menu items. Consider the following common items and the specificity with which their preparation style is determined by federal guidelines:

Grilled: Items must be grilled, not just mechanically produced with "grill marks," then steamed before service.
Homemade: The product must be prepared on premises, not commercially baked.
Fresh: The product cannot be frozen, canned, dried, or processed.
Breaded Shrimp: This includes only the commercial species, Pineaus. The tail portion of the shrimp of the commercial species must comprise 50 percent of the total weight of a finished product labeled "breaded shrimp." To be labeled "lightly breaded shrimp," the shrimp content must be 65 percent by weight of the finished product.
Kosher Style: A product flavored or seasoned in a particular manner; this description has no religious significance.
Kosher: Products that have been prepared or processed to meet the requirements of the orthodox Jewish religion.
Baked Ham: A ham that has been heated in an oven for a specified period of time. Many brands of smoked ham are not oven-baked.

It is important that your menu accurately reflect the preparation techniques used in your kitchen, not only because the law requires you to, but also to help ensure your operation's credibility with the public.

Ingredients

Perhaps no area of menu accuracy is more important than the listing of ingredients that actually go into making up a food item. While restaurants are not currently required to divulge their ingredient lists (recipes) to their guests, there are specific situations when the ingredients listed on a menu must precisely match those used to make the item. If, for example, an operator offers Kahlua and cream as a drink on a bar menu, the drink must be made with both the liqueur and the dairy product stated. Kahlua is a specific brand of Mexican coffee liqueur, and cream is defined by the federal government as a product made from milk with a minimum fat content of 18 percent. Of course, a bar manager is free to offer a different, less expensive coffee liqueur to guests, and use half-and-half (which contains 12 percent milkfat) instead of cream, but the drink could not be called a Kahlua and cream. To do so is unethical at best and illegal in most areas.

Whenever a specific ingredient is listed on a menu, that item, and that item alone, should be served. For example, if the menu says maple syrup, then colored table syrup or maple-flavored syrup should not be served. This is especially important when listing brand-name products on a menu. (Recall the dis-

cussion of trademarks and brand-name items from Chapter 4, "Legally Managing Property.")

If substitutions of the menu items must be made, the guest should be informed of those substitutions before ordering. As consumers' interest in their own health continues to rise, foodservice operators can expect more involvement and consumer activism in the area of accurate ingredient listings.

Origin

For many menu items, the origin of the product or its ingredients is very important. Many consumers prefer Colorado trout to generic trout, Washington apples to those from other states, and Bluepoint (Long Island) oysters to those from other areas. It can be tempting to use these terms to describe similar menu items from other places, which may cost less to purchase. But to do so is fraudulent. Moreover, it sends the wrong message to employees who know of the substitutions, as well the guests who ultimately are deprived of the items they thought they purchased. It is also illegal.

Size

Product size is, in many cases, the most important factor in determining how much a guest is willing to pay for a menu item. For example, a steakhouse could offer different cuts of beef and price them appropriately according to size. An 8-ounce steak might sell for $17.95, while the 12-ounce might sell for $23.95 and the 16-ounce for $25.95.

Other types of food products may be harder to associate with precise quantities. For example, "large" East Coast oysters must, by law, contain no more than 160 to 210 oysters per gallon, while "large" Pacific Coast oysters, by law, may contain not more than 64 oysters per gallon. Nevertheless, whether it is the size of eggs sold in a breakfast special or the use of the term "jumbo" used to refer to shrimp, specifying size on a menu is an area that must be approached with the understanding that the law will expect you to deliver what you promise. A simple rule of thumb for avoiding difficulties in this area is: If you say it, serve it.

Health Benefits

For many years, the only menu item most restaurants offered as a healthy one was the "diet" plate, generally consisting of cottage cheese, fruit, perhaps some grilled poultry, and a lettuce leaf. It is no surprise that today's health-conscious consumer demands more. In response, restaurants generally have begun to provide greater detail about the nutritional value of their menu items. The federal government, however, issues very strict guidelines on what you can and cannot say about your menu offerings. Thus, Truth in Menu laws relate not just to what is charged and what is served, but the nutritional claims made by foodservice operators as well.

According to FDA estimates, well over half of all printed menus in the United States contain some type of nutritional or health benefit claim. There are two types of claims generally found on menus: *Nutrient claims* contain specific information about a menu item's nutrient content. When a dish is described on a menu as being "low-fat" or "high-fiber," the restaurateur is making a nutrient claim. *Health benefit claims* can also appear on menus. These claims do not describe the content of specific menu items, but instead show a relationship between a type of food or menu item and a particular health condition. For example, some restaurants include a note on their menu stating that eating foods

low in saturated fat and cholesterol can reduce the risk of heart disease. Other restaurants identify nutritionally modified dishes on their menu using terms such as "heart-healthy" or "light," or use symbols such as a red heart to signify that a dish meets general dietary recommendations.

The Food and Drug Administration (FDA) has issued regulations to ensure that foodservice operators who make health benefit claims on their menus can indeed back them up. These regulations, published in the August 2, 1996, *Federal Register*, apply the Nutrition Labeling and Education Act (NLEA) of 1990 to restaurant items that carry a claim about a food's nutritional content or health benefits. All eating establishments must comply with these regulations.

Here are two examples of FDA regulations surrounding the use of common menu terms:

Nutrient Claim A low-sodium, low-fat, low-cholesterol item must not contain amounts greater than FDA guidelines for the term "low." Light, or "lite" items must have fewer calories and less fat than the food to which it is being compared (e.g., "light Italian" dressing). Some restaurants have used the term "lighter fare" to identify dishes containing smaller portions. However, that use of the term must be specified on the menu.

Health Benefit Claim To be considered "heart-healthy," for example, a menu item must meet one of the following two conditions:

- The item is low in saturated fat, cholesterol, and fat, and provides without fortification significant amounts of one or more of six key nutrients. This claim will indicate that a diet low in saturated fat and cholesterol may reduce the risk of heart disease.
- The item is low in saturated fat, cholesterol, and fat; provides without fortification significant amounts of one or more of six key nutrients; and is a significant source of soluble fiber (found in fruits, vegetables, and grain products). This claim will indicate that a diet low in saturated fat and cholesterol, and rich in fruits, vegetables, and grain products that contain some types of fiber (particularly soluble fiber) may reduce the risk of heart disease.

When printing health benefit claims on a menu, further information about the claim should be available somewhere on the menu or be available on request. Restaurants do not have to provide nutrition information about dishes on the menu that have no nutrient content or health claim attached to them. The FDA permits restaurants to back up their menu claims with a "reasonable" base, such as cookbooks, databases, or other secondhand sources that provide nutrition information. (By contrast, the FDA requires food manufacturers to adhere to a much more stringent set of standards. Many food manufacturers perform chemical analyses to determine the nutritional value of their products and to ensure that the information about their product printed on the food label is true.)

The enforcement of Truth in Menu regulations is undertaken by state and local public health departments, which have direct jurisdiction over restaurants by monitoring their food safety and sanitation practices. The general public can also act as a regulator in this area. In today's litigious society, a restaurant manager should have any menu containing nutritional or health claims reviewed by both an attorney and a dietician.

In addition to carefully developing menus, Truth in Menu laws require that restaurants truthfully and accurately specify what their servers say about menu items, as well as how their food products are promoted or shown in advertisements, photographs, and promotions.

◀ SEARCH THE WEB 12.1 ▶

Log on to the Internet and type in **www.burgerking.com**.

1. Select: BKFood.
2. Select: Lunch or Dinner.
3. Select: Entrée.
4. Select your favorite menu item from the supplied drop-down list; review its nutritional content, then answer the following:
   a. What are the eight nutritional categories about which this company supplies information?
   b. Do you think restaurateurs have a duty of care to provide this level of nutritional information? Why or why not?
   c. What do you think the future holds for the level of nutritional information that foodservice operators will be required to supply?

12.3 SERVING ALCOHOL

Throughout history, alcoholic beverages have played many roles. In some societies, they were thought to possess magical or holy powers. They were also an important part of medical treatment well into the 1800s. In various cultures, alcoholic beverages were considered a basic and essential food. Because beer, ale, and wine did not carry the diseases associated with drinking contaminated water, they became an accepted part of everyday meals. They were particularly valued by travelers, who had to be especially cautious about contracting strange diseases. In fact, most early taverns, as well as hotels, considered the service of alcohol to be a basic traveler's amenity. By the time the first settlers left for the New World, taverns were essential social centers, providing drink, food, and sometimes lodging. The early settlers brought this tradition with them to the New World. In the vast wilderness of the new continent, taverns took on new importance. By the mid-1800s, the largest taverns became the first hotels.

In 1920, Congress passed the Eighteenth Amendment to the Constitution, which prohibited the manufacture, sale, transportation, and importing of alcoholic beverages. The amendment was effective only in stopping the legal manufacture, sale, and transportation of liquor. Many people still drank, but they drank poor-tasting, illegally produced (and in some cases unmerchantable) alcoholic beverages. In 1933, Congress recognized the failure of prohibition and repealed the act with the passage of the Twenty-First Amendment. However, even after the appeal, the consumption of alcohol was not quickly reaccepted into American society.

The Twenty-First Amendment gave individual states, counties, towns, and precincts the authority to control the sale and use of alcoholic beverages within their jurisdiction. As a result, a variety of alcohol-related laws exist throughout the United States today. As a hospitality manager, it is your responsibility to know and carefully follow the applicable laws for your state and community. If you manage a facility that serves alcohol, you should have copies of the state and local laws regulating the service of alcohol in your community.

Privilege of Alcohol Service

▶ LEGALESE

Depressant: A substance that lowers the rate of vital body activities.

Alcohol is a drug. Historically it was used, like other drugs, to treat disease. And like other drugs, it is also a substance to which people can become addicted. Despite the fact that alcohol often creates a euphoric state in the user, it is a **depressant**. Other depressants include barbiturates, tranquilizers, Quaalude, Librium, and Valium. Interestingly, society very tightly regulates the dispensing of most depressants. Pharmacists must go to school in order to earn the right to

legally dispense many types of depressants. In most cases, a depressant can be requested from a pharmacist only after presenting a prescription from a licensed medical doctor. Alcohol, on the other hand, can be served by any individual over a state-specified age, who may have had little if any mandatory training prior to being employed as a bartender.

All that said, it is important to remember that no hospitality manager has a "right" to serve alcohol; rather, it is a privilege that is carefully regulated by law, and one that cannot be taken lightly.

There is no alcoholic beverage that is safer or more moderate than another. According to the federal government's dietary guidelines, the alcohol content in standard servings (drinks) of beer (12 ounces), table wine (5 ounces) and distilled spirits ($1^1/_2$ ounces in a mixed drink) is equal. Thus, the service of all types of alcoholic beverages must be treated in the same serious manner. Put another way, the major factor in controlling the risks associated with serving alcohol is to realize that it is not what you serve, but how much you serve that is most important.

The amount of alcohol consumed by an individual in a specific time period is measured by the individual's **blood alcohol level** (BAL). Many factors, in addition to the number of drinks consumed, influence the BAL of an individual. Because the liver digests alcohol at the slow, constant rate of about one drink per hour, a 150-pound man may typically reach a BAL of .10 (or 10 percent) by drinking two to four drinks in one hour. Ten drinks would produce a BAL of approximately .25. Figure 12.4 details some of the effects felt by individuals with increasing BALs.

▶ **LEGALESE**

Blood alcohol level (BAL): A measurement, expressed in a percentage, of the concentration level of alcohol in the bloodstream. Also known as *blood alcohol content*, or BAC.

Alcohol affects different individuals in a variety of ways. Specific BALs are commonly used by lawmakers to define legal **intoxication**. In October 2000, the federal government passed legislation that attempts to establish a .08 BAL as the standard in all states, but the federal government cannot directly force the states to enact the standard. Nevertheless, by providing that any state that does not utilize the .08 standard will forfeit federal highway construction funds, there is strong incentive for states to comply. Unfortunately, hospitality managers do not have the ability, at this point in time, to easily measure the BAL of their guests. Still, the law prohibits serving alcohol to an intoxicated guest. Thus, a hospitality manager must rely on his or her own knowledge of the law, operational procedures, and staff training programs to avoid doing so.

▶ **LEGALESE**

Intoxication: A condition in which an individual's BAL reaches legally established levels. These levels are not uniform across the United States. An intoxicated person may not sell or purchase alcohol, nor operate a motor vehicle.

Alcohol is sold in an amazing variety of hospitality locations. Bars, amusement parks, golf courses, sporting events, and restaurants are just a few of the venues where a guest may legally buy alcohol. Each state regulates the sale of alcohol in the manner it sees fit. Regional differences do exist, but in all cases, those who sell alcohol are required to apply for and obtain a **liquor license** or liquor permit to do so.

▶ **LEGALESE**

Liquor license: A permit issued by a state that allows for the sale and/or service of alcoholic beverages. The entity holding the license is known as the licensee.

Recall our discussion of alcohol regulation from Chapter 5, "Regulatory and Administrative Concerns in the Hospitality Industry." Every state has an alcohol beverage commission (ABC), which grants licenses and regulates the sale of alcohol.

Effects of Increasing BALs

BAL Level	*Effect*
.06–.10	Significant decrease in reaction time and visual abilities
.11–.15	Slurred speech and volatile emotions
.22–.25	Staggering, difficulty talking, blurred vision
.40	Induced coma
.50	Cessation of breathing and heart failure

Figure 12.4 Effects of increasing blood alcohol levels (BALs).

At the local level, some cities or counties also have a local alcohol control board that works with the state agency to grant licenses and enforce the law. As a hospitality manager, you should request a copy of your state and city's regulations.

Though different types of liquor licenses exist to meet the needs of various types of businesses, they can be divided into two general categories:

- Licenses for on-premises consumption (required for restaurants, taverns, clubs, etc.)
- Licenses for off-premises consumption (required for liquor stores and other markets that carry alcohol)

Various types of on-premises licenses also exist, such as a beer-only license, a wine license (which may or may not include beer, but does not include mixed drinks), and a liquor license (which includes, beer, wine, and mixed drinks). In most states, liquor licenses are issued for a period of one year, at the end of which the establishment must apply for a license renewal.

Once an establishment has been granted a liquor license, it is required to operate in accordance with all rules and regulations established by state and local ABCs. Some common areas of operation that are regulated by the states include:

- *Permitted hours of sale:* Local communities may prohibit the sale of alcohol after a specified time of day. Some communities have "blue laws," which restrict or prohibit the sale of alcohol on Sundays.
- *Approved changes for expansion or equipment purchases:* Before a liquor license is issued, the state or local ABC may inspect the applicant's establishment prior to granting approval. Once a premise has been inspected, any further changes to the size of the establishment or the equipment used must first be approved by the state ABC. In some states, establishments that serve alcohol are prohibited from operating in close proximity to a school or a church.
- *Maintaining records:* Establishments that sell alcohol must keep detailed records of the amount of alcohol purchased each day, information on the vendors from which alcohol is purchased (including the vendor's license and other business information), and the establishment's daily sales of alcoholic beverages. A state ABC will perform random audits to determine the accuracy of the information received.
- *Methods of operation:* As discussed previously, employees working as waiters, servers, or in any other capacity where they may be required to handle alcoholic beverages must be above the state's specified minimum age for serving alcohol. Other states have regulations restricting the types of promotions and advertising that a bar can undertake.

In addition to licensing, special rules may apply to specific situations in which alcohol is sold. In each case, however, its service is tightly regulated. Figure 12.5 is an example of one such regulation. Note how precisely the state of Connecticut regulates the sale of alcohol from mini-bars located in guest hotel rooms.

States are very careful when granting licenses to sell liquor, and they are generally very aggressive in revoking the licenses of operations that fail to adhere to the state's required procedures for selling alcohol. In most states, a liquor license can be revoked as a result of:

- Frequent incidents of fighting, disorderly conduct, or generally creating a public nuisance
- Allowing prostitution or solicitation on the premises
- Allowing the sale or use of drugs and narcotics
- Illegal adult entertainment, such as outlawed forms of nude dancing
- Failure to maintain required records
- Sale of alcohol to minors

Connecticut Permit Law

Sec. 30-37i. Hotel guest bar permit

a) A hotel guest bar permit, available to a hotel permittee, shall allow the retail sale of alcoholic liquor located in registered hotel guest rooms. The annual fee for a hotel guest bar permit shall be fifty dollars for each hotel room equipped for the retail sale of alcoholic liquor. (b) A hotel guest bar shall: (1) be accessible only by key, magnetic card, or similar device provided by the hotel to a registered guest twenty-one years of age or older; and (2) restocked no earlier than nine o'clock A.M. and no later than one o'clock A.M. (c) The Department of Consumer Protection shall adopt regulations, in accordance with the provisions of Chapter 54, for the operation of hotel guest bars.

Figure 12.5 Connecticut Permit Law.

In some states, representatives from the ABC will conduct unannounced inspections of the premises where alcohol is served and/or intentionally send minors into an establishment to see if the operator will serve them.

Liability Associated with Alcohol Service

Because alcohol can so significantly change the behavior of those who overindulge in it, society is left to grapple with the question of who should be responsible for the sometimes negative effects of alcohol consumption. In cases where intoxicated individuals have caused damage or injury, either to themselves or others, society has responded with laws that place some portion of responsibility on those who sell or serve alcohol.

Every state has enacted laws to prevent the sale of alcohol to minors, to those who are intoxicated, and to individuals known to be alcoholics. Figure 12.6 is

Minor in Possession: If caught with alcohol, a minor will be charged with a Class C misdemeanor. Maximum fine of $500, mandatory attendance at an alcohol awareness class, 8–40 hours community service and 30–180 days loss of driving privilege.

Minor Driving While Intoxicated (DWI): Zero BAL allowed for minor drivers. If caught, a minor will be charged with a Class C misdemeanor. Maximum fine of $500, mandatory attendance at an alcohol awareness class, 20–40 hours community service, and 60 days loss of driving privilege.

Possession of Fake Identification: If caught, a minor will be charged with a Class C misdemeanor. Maximum fine of $500, mandatory attendance at an alcohol awareness class, 8–12 hours community service, and 30 days loss of driver's license for first offense.

Adult Purchase of Alcohol for a Minor: A Class B misdemeanor. Maximum fine of $2,000, confinement in jail for up to 180 days, or both.

Bar That Sells Alcohol to a Minor: Bar owner to receive administrative penalties of 7–20 day liquor license suspension, and a fine not to exceed $25,000 for each day of the suspension. The bartender or employee who sold the alcohol to the minor faces a Class A misdemeanor charge with a maximum punishment of one year in jail and a $4,000 fine.

Figure 12.6 Summary of selected Texas laws that address minors and alcohol.

an example of how one state, Texas, has developed laws to discourage minors from drinking and to penalize those who would serve them. It is presented here as an example of how seriously society takes the sale of alcohol to minors.

To understand the complex laws that regulate liability for illegally serving alcohol, it is important to understand that there can be at least three parties involved in an incident resulting from the illegal sale of alcohol.

- *First party:* The individual buying and/or consuming the alcohol.
- *Second party:* The establishment selling or dispensing the alcohol.
- *Third party:* An individual not directly involved in a specific situation having to do with the sale or consumption of alcohol.

There is a misconception by some that the common law did not hold an organization that served alcohol liable for serving an intoxicated person. That is not the case. Under common law, a facility that negligently served alcohol to an obviously intoxicated guest could be sued for negligence if harm came to the guest. What is relatively new in many jurisdictions is that **third-party liability** can also be imposed on those that serve alcohol.

▶ **LEGALESE**

Third-party liability: A legal concept that holds the second party (seller) in an alcohol transaction liable for the acts of the first party (consumer), as well as for any harm suffered by a third party as a result of the first party's actions.

The two areas of liability theory that a hospitality manager should be aware of focus on the duties of a host who holds a party where alcohol is served and that of an establishment licensed to sell alcohol.

Social Host Historically, courts in the United States have not found that those who host parties where alcohol is served should be liable for the subsequent actions of their intoxicated guests. While this position, like all areas of social law, may change someday, the current feeling of most courts is that a **social host** has no common law duty to generally avoid making alcohol available to an adult guest.

▶ **LEGALESE**

Social host: A nonlicensed provider of alcohol, typically at a party of similar gathering.

There are several reasons why a social host is not held to the same standard of care responsibilities as a licensed provider of alcohol. Consider the case of Brad Seeley. Brad is a real estate agent who hosts a party in his home for past customers and potential clients. If you analyze the situation Brad has created by hosting this party, you will see that:

1. Brad's guests will likely make their own decisions on how much to drink.
2. It is unlikely Brad has acquired the knowledge and training to detect those who have become intoxicated.
3. He has no effective means of controlling the number of drinks consumed by his guests.
4. If large numbers of guests attend his party, it will be extremely difficult for Brad to know who, if anyone, is becoming intoxicated.

Despite the court's position on social host liability, the slogan "Friends don't let friends drive drunk," is a good rule to live by. As a responsible party host, Brad should be cautious about allowing his guests unlimited alcohol consumption.

While courts have not been inclined to impose a duty of care on a social host providing alcohol to a guest, they are less clear on the issue of whether a social host has a common law duty not to allow minors to consume alcohol. A social host does have a responsibility to see to it that they themselves do not serve minors alcohol. Because serving alcohol to a minor is illegal, even a social host could be accused of negligence should he or she allow it.

The most important thing for you, as a hospitality manager, to remember about social host liability is that the courts will not view your operation as that of a social host. As a license holder, you and your operation will be held responsible for the service of alcohol in a very different way.

Dram Shop Prior to the 1990s, most courts did not hold those who were licensed to serve liquor responsible for the damages sustained by a third party that re-

sulted from a customer's intoxication. Today, nearly every state has established **Dram Shop** laws that impose third-party liability upon those who sell or serve alcohol.

Under the Dram Shop legislation instituted in most states, **liquor licensees** are responsible for harm and damages to both first and third parties, subject to any contributory negligence offsets by these parties, if the following circumstances exist:

1. The individual served was intoxicated.
2. The individual was a clear danger to him- or herself and others.
3. Intoxication was the cause of the subsequent harm

▶ **LEGALESE**

Dram Shop: A name given to a variety of state laws establishing a liquor licensee's third-party liability.

▶ **LEGALESE**

Liquor licensee: An entity that has been issued a liquor license by the proper state authority.

It is important to understand that there can be criminal liability as well as civil liability when alcohol is sold irresponsibly. Civil liability, under state Dram Shop laws, could require an alcohol establishment to pay for various expenses to injured or deceased parties, such as medical bills, property damage, lost wages, monetary awards to surviving family members, awards for pain and suffering, and punitive damages. Criminal liability could subject a hospitality operator to a revocation of the liquor license, severe fines, and/or jail time.

Figure 12.7 is an example of the Dram Shop law for the state of Connecticut. Note the wording that holds alcohol servers responsible for injuries to third parties, the amount of damages they could be liable to pay, and the time limits placed on filing a lawsuit. Connecticut is one of several states that places a monetary limit on the amount of damages a hospitality operator would have to pay if found liable. Figure 12.8 summarizes the civil liability for a licensee and a social host with respect to first and third parties who have been harmed by the irresponsible and illegal service of alcohol.

Connecticut Dram Shop Law

Sec. 30-102. Dram Shop Act; liquor seller liable for damage by intoxicated person.

If any person, by himself or his agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of twenty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of fifty thousand dollars, to be recovered in an action under this section, provided the aggrieved person or persons shall give written notice to such seller within sixty days of the occurrence of such injury to person or property of his or their intention to bring an action under this section. In computing such sixty-day period, the time between the death or incapacity of any aggrieved person and the appointment of an executor, administrator, conservator or guardian of his estate shall be excluded, except that the time so excluded shall not exceed one hundred twenty days. Such notice shall specify the time, the date and the person to whom such sale was made, the name and address of the person injured or whose property was damaged, and the time, date and place where the injury to person or property occurred. No action under the provisions of this section shall be brought but within one year from the date of the act or omission complained of.

Figure 12.7 Connecticut Dram Shop Law.

Alcohol Liability

	Licensee Common Law	Licensee Dram Shop	Social Host Common Law
First-Party Liability	Yes	Yes	No
Third-Party Liability	No	Yes	No
Liable If Minors Served	Yes	Yes	Yes, in most cases

Figure 12.8 Alcohol liability.

ANALYZE THE SITUATION 12.4

Mark Hadley entered the Squirrel Cage Tavern at 4:00 P.M. on a Thursday afternoon. He sat down at the bar and, according to eyewitnesses, uttered just a single word when approached by the bartender. The one word was "draft."

As the bartender had only one brand of beef on draft, she silently pulled the beer, handed it to Mr. Hadley, and accepted the $5 bill he offered in payment. Mr. Hadley left the bar some 15 minutes later having never said a word to anyone, leaving the change from his $5 on the bar counter.

Subsequently, Mr. Hadley was involved in an auto accident in which a 10-year-old boy was rendered sightless. The boy's parents sued the Squirrel Cage Tavern and another operation, the Dulcimer Bar. The Dulcimer Bar was sued because Mr. Hadley had consumed 10 beers in three hours at that establishment prior to leaving it and driving to the Squirrel Cage.

Attorneys for the Squirrel Cage argued that their client could not have known of Mr. Hadley's condition when he entered their establishment, and that they were indeed acting responsibly in that they served him only one beer. Attorneys for the injured boy countered that the Squirrel Cage served alcohol to an intoxicated person, a violation of state law, and thus under the state's Dram Shop legislation was responsible for Mr. Hadley's subsequent actions.

1. Did the Squirrel Cage violate the liquor laws of its state?
2. Did the Squirrel Cage bartender act responsibly in the service of alcohol to Mr. Hadley? Did she act differently from bartenders in similar situations?
3. What should the owner of the Squirrel Cage do in the future, if anything, to minimize the chances of reoccurrence?

Training for Responsible Service

In many states, legislatures have sought to limit the liability of those who serve alcohol by enacting regulations that insulate, to some degree, those establishments that commit to thoroughly training their employees who are involved in the sale of alcohol. In most jurisdictions, responsible alcohol server training will be either mandated or strongly encouraged. The absence of such training would, without doubt, be a significant hindrance should you ever face a lawsuit that accuses your operation of irresponsible alcohol service. The National Restaurant Association, the American Hotel and Motel Association, and many private organizations provide excellent training materials that can help make your training task easier. Training for Intervention Procedures (TIPS) is one of the most well-recognized responsible server programs. Developed by Dr. Morris Chafetz, founding director of the National Institute of Alcohol Abuse and Alcoholism, TIPS incorporates a common-sense approach to serving alcohol responsibly in a variety of settings. Dr. Chafetz is also the author of the book

Drink Moderately and Live Longer: Understanding the Good of Alcohol (Scarborough House, May, 1995).

◀ SEARCH THE WEB 12.2 ▶

Log on to **www.hospitalitylawyer.com**.

1. Select: Alcohol Beverage Service Course.
2. Select: Your state.
3. Review Sample Course, if available in your state.
   a. What are the advantages of online training?
   b. What are the disadvantages of online training?

Regardless of whether you choose to create your own responsible server program or to purchase and implement one of the many available on the market, you should carefully review your program to ensure that:

1. It is an approved training course.

The training program you use will, in all likelihood, need to be approved by the agency that monitors alcohol service in your area. If you create your own training program, it too must be submitted for approval. The best of the nationally available training programs will be preapproved for use in your area, but it is your responsibility to make sure that the one you use is. Never purchase or use a training program that has not been approved. A jury could perceive the use of such a program as an indication that management was not serious about responsible alcohol server training.

2. It explains the nature of alcohol's absorption into the bloodstream.

A basic understanding of how alcohol is absorbed in the body is crucial for serving responsibly. A variety of factors affect an individual's BAL. These include:

- *Body weight:* The larger the body, the more the alcohol is diluted. Because of this, given the same amount of alcohol, a large person will be less affected by alcohol than a smaller person.
- *Food consumption:* The consumption of food slows the rate at which alcohol is absorbed into the system. In addition, different foods affect absorption rates in different ways.
- *Amount of sleep:* Tired people feel the effects of alcohol more than those who are well rested.
- *Age:* Younger people feel the effects of alcohol more quickly than older people. But the eyesight of older customers is more affected by drinking.
- *Health:* The liver plays an important part in removing alcohol from the system. Customers with liver problems are more apt to become intoxicated.
- *Medication:* Many medications do not mix well with alcohol, and in some instances mixtures can be very dangerous.
- *General metabolism:* Some people's bodies convert alcohol faster than others do.

3. It extensively instructs servers in the methods of checking for legal identification, as well as for spotting false IDs.

Often, minors who wish to drink secure false identification documents in order to gain access to establishments where they can buy alcoholic beverages. This puts the beverage manager in a difficult legal position. While a beverage manager is not expected to know whether a minor is presenting false identification, he or she is required to use reasonable care in spotting those who attempt to use a false ID. Because false ID documents are in such widespread

use, a major component of any responsible alcohol server program should be instruction in how to identify false IDs. Make sure your training materials address the following areas:

- Alteration of type style, including font and point size
- Cut-and-paste techniques
- Physical identification/picture match
- Relamination detection
- Random information verification, (address, Social Security number, etc.)
- Listing of qualifying ID documents

ANALYZE THE SITUATION 12.5

Michele Rodgers entered the Golden Spike Bar and Grill on a Friday night at approximately 10:30 P.M. At the door, she was stopped briefly by the bar's security guard. The guard, Luis Sargota, inspected Michele's photo ID, as he had been trained to do during the one-hour orientation class he attended on his first day of work.

The photo ID presented by Michele showed her age to be 21 years and three months. The photo on the picture was clearly her own. She was not asked to remove the ID from her wallet. Michele entered the bar and, over a period of three hours, consumed 5 Fuzzy Navel drinks, each containing approximately 1.5 ounces of 80-proof alcohol served with fruit juice.

Upon leaving the bar at 1:30 A.M., Michele was involved in a traffic accident that seriously injured a man who was driving home after working the late shift at a local factory. The family of the injured man sued Michele and the Golden Spike when it was discovered that Michele was in fact only 20 years old, and thus was not of legal age to drink alcohol.

The attorney for the Golden Spike maintained that the bar acted responsibly, in that it trained its security guards to check for identification prior to allowing admission to the bar, and that Ms. Rodgers had presented a falsified identification card, which the bar could not reasonably have known was false. In addition, the security guard stated that Ms. Rodgers "looked" at least 21 when she entered the bar. Thus, the bar was not guilty of knowingly serving minors.

1. Is the bar responsible for illegally serving Ms. Rodgers? Was she served excessively?
2. Since the security guard did not serve alcohol, do you think a jury would find one hour of orientation sufficient in his training?
3. What could the owners of the Golden Spike do in the future to prevent a reoccurrence such as this?

4. It emphasizes early intervention when confronted with possible overconsumption by guests.

It is clearly against the law to serve an intoxicated person. The difficulty, of course, lies in identifying when a person is intoxicated. The number of drinks served in a given time period gives an indication of possible BAL, but as we have seen, many factors effect BAL. A good responsible server-training program will teach your servers to note the observable behavioral changes that occur with advancing stages of intoxication. When these are noted, there are specific techniques that can be employed to limit the quantity of alcohol served to such guests and, if necessary, to refuse service completely.

5. It provides for documentation of training effectiveness.

It is not enough for employees to attend responsible service training sessions. They must demonstrate a mastery of the material as well. The best of

the training materials on the market have examination components to test trainee competence. The tests should be both reliable and valid. The examinations should be scored by an independent source and the results should be reported to management in a timely fashion. If you must defend your use of a particular program in court, you almost certainly will be defending its effectiveness as well. The inability to demonstrate your responsible server training results may damage your ability to prove that you have conducted your training in a responsible manner.

ANALYZE THE SITUATION 12.6

Samuel Vosovic attended a reception in the ballroom of the Altoona Pike Country Club. Mr. Vosovic was a salesman for a photography studio, and he attended a reception at the invitation of Ronald Thespia, one of the club's well-known members. Mr. Thespia's company sponsored the reception, which consisted of light hors d'oeuvres and an open bar.

Over the course of two and a half hours, it was determined that Mr. Vosovic consumed approximately nine drinks. The reception was large enough to require three bartender stations in the room. No single bartender served Mr. Vosovic more than three drinks in the course of the evening. Lea Tobson, one of the club's bartenders did finally detect a significant change in Mr. Vosovic's behavior and, when Mr. Vosovic requested another drink, refused to serve him and summoned a manager.

The club's food and beverage director determined that Mr. Vosovic was in all likelihood intoxicated. The director asked Mr. Vosovic to turn over his car keys, then instructed one of the club's waitstaff to drive Mr. Vosovic home, give the car keys to his wife, and take a cab back to the club. One hour after being taken home, Mr. Vosovic got back behind the wheel of his car and, still intoxicated, he lost control of the vehicle and crashed into a tree, killing him instantly. His wife brought suit against the country club under Dram Shop legislation in her state.

The club responded that it had acted responsibly in both refusing to service Mr. Vosovic and in ensuring that he got home safely. Mrs. Vosovic replied that her husband was upset at his treatment by the club when he arrived home and that she "couldn't stop him" when he took the car keys from her, intent on returning to the club. She held the club responsible because, as she stated, "They got him drunk." As additional evidence of the club's irresponsibility, she pointed to the tipping policy in place during open bars; essentially, in an open bar situation, the bartenders at the club were paid a percentage of the sales price of the alcohol consumed. Mrs. Vosovic's attorney claimed that the club's tipping policy encouraged its bartenders to overpour the drinks they served, as they sought to build the sales value of the event and thus their own income.

1. Did the country club act responsibly in this situation?
2. What steps could a responsible beverage manager take to reduce the possibility of such an incident reoccurring?
3. Would the club's tipping policy influence a jury's view of responsible alcohol service by the club if the case went to trial? Why?
4. Was it foreseeable that Mr. Vosovic, once home, would leave the house in his intoxicated condition?

▶ INTERNATIONAL SNAPSHOT

International Perspective on Food and Beverage Litigation

As in the United States, food and beverage litigation internationally involves issues of jurisdiction, substantive law, and burdens of proof. The following is a brief review of these issues.

As for jurisdiction, it was held that the when a seaman died onboard a ship in Africa from food poisoning, that the proper jurisdiction was the District of Columbia, the state of registry of the ship instead of Africa (*United States Shipping Board Emergency Fleet Corp. v. Greenwald, 16 F. 2d 948 (1927)*). Courts have also ruled that on international flights, the Warsaw Convention, which provides for uniform rules limiting aviation liability also applies to food and beverage claims (see *Rhodes v. American Airlines, 1996 U.S. LEXIS 21052 (NY 1996)*). Further, when a passenger became sick due to the food he ate on one leg of a round trip from Saudi Arabia, the Warsaw Convention was interpreted as conferring jurisdiction on the location of destination, or in Saudi Arabia and not New York, where the lawsuit was filed (see *Abdulrahman Al-zamil v. British Airways, Inc., 770 F. 2d 3 (2d Cir. 1985)*). A court also ruled that a French company operating a resort in New Zealand could be sued in New Zealand, with New Zealand law being applied in a case where a guest claimed to have suffered food poisoning at the resort (see *Club Mediterranee NZ v. Wendell, 1 NZLR 216; 1987 NZLR LEXIS 712 (1987)*).

Internationally, suppliers of food and beverage are subject to actions based on reasonable standards of care or negligence (see *McNeil v. Airport Hotel (Halifax) Ltd., 1980 A.C.W.S.J. LEXIS 15714, 5 A.C.W.S. (2d) 476*); and, under contract and warranty claims, such as for breach of the implied warranty of fitness for a particular purpose, or that the food would be fit for human consumption (see *Lockett v. A & M Charles Ltd., 3 AL ER 170, Kings Bench Div. (1938)*). A Canadian court held that the manufacturer and seller of a bottle of chocolate milk that contained glass and injured a consumer could be sued under causes of action in negligence and breach of warranty (see *Shandloff v. City Dairy Ltd. and Moscoe, [1936] O.R. 579; 1936 Ont. Rep. LEXIS 70 (1936)*).

The pivotal issue of causation exists under international law as well. In *Berko v. Canada Safeway Ltd., 2000 B.C.D. Civ. J. 4810 (2000),* the British Columbia Supreme Court held that, to be successful in her lawsuit, a plaintiff must still prove that the food was the cause of her illness. In *Berko,* the plaintiff became ill within a few hours of consuming food. The medical evidence suggested that the incubation period was too short to support a finding that the food consumed at the restaurant was the cause of her illness. Thus, she could not sustain her burden of proof and her lawsuit was dismissed. However, another Canadian court held that, even though evidence was circumstantial that the food was the cause of illness, the doctrine of *res ipsa loquitur* could be applied when a family became sick after eating a pizza purchased from a restaurant (see *Stewart v. J.M. Investment Ltd., 1993 A.C.W.S.J. 581586, 41 A.C.W.S. (3d) 989 (Saskatchewan Provincial Court, (1992)*).

Finally, as with many cities in the United States, the City of Toronto's laws require a restaurant operator to disclose the results of a food premise inspection. And Toronto's law was recently upheld as constitutionally valid, despite any perceived negative effect on a restaurant (see *Ontario Restaurant Hotel & Motel Association v. Toronto, [2004] O.J. No. 190; 2004 ON.C. LEXIS 287 (January 22, 2004)*).

Provided by James O. Eiler, Esq, partner and chair of the Hospitality Practice Group for Tharpe & Howell, Santa Ana, California; with the assistance of Diane L. Wall, JD.
www.tharpe-howell.com

WHAT WOULD YOU DO?

You are the general manager of a casual theme restaurant. The restaurant includes both a cocktail area and dining room. Average sales per restaurant are $4 million per year, with 30 percent of the sales attributed to alcohol. At the annual conference of managers, sponsored by your company, your supervisor, the district manager, assigns you to a company task force charged with making recommendations on a new liability training program for bartenders working in your operations.

Your specific task is to recommend the length of this portion of a bartender's training, as well as to estimate the costs associated with it.

1. Assuming that bartenders earn $15 per hour, including benefits, and trainers within your company average $40 per hour, develop a short outline of required training concepts; estimate the time to cover each topic; and assign a per-bartender cost, assuming the bartenders must be trained in a one-on-one setting.
2. Prepare a three- to five-minute presentation for your district manager and the other conference attendees that justifies your costs as developed.
3. Estimate the yearly cost of bartender liability training if your company of 400 restaurants hires 1,100 bartenders per year. Give your opinion on the cost likely to be incurred if no such training is implemented.

▶ THE HOSPITALITY INDUSTRY IN COURT

To understand how the failure to warn guests of certain ingredients can impact your operation, consider the case of *Livingston v. Marie Calenders, Inc., 72 Cal. App. 4th 830 (Cal. Ct. App. 1999).*

FACTUAL SUMMARY

David Livingston went to a Marie Calenders restaurant, where he ordered a bowl of vegetable soup. Before ordering, Mr. Livingston asked the waitress whether the soup contained MSG (monosodium glutamate). He explained he had asthma and was allergic to MSG. The waitress assured him MSG was not an ingredient in the soup so Mr. Livingston ordered and consumed the vegetable soup. Therafter, Mr. Livingston developed MSG symptom complex, which includes respiratory arrest, cardiac arrest, and brain damage, as well as a number of other symptoms. Mr. Livingston subsequently sued the restaurant and its owners for failing to warn him MSG was an ingredient in the vegetable soup.

QUESTION FOR THE COURT

The question for the court was whether Marie Calenders had a duty to warn Mr. Livingston the vegetable soup contained MSG. Mr. Livingston argued a manufacturer has a duty to warn where the harmful ingredient is one that a large number of people are allergic to, and the ingredient must be one whose harmful nature or prescence is not generally known to consumers. Where these conditions exist, Mr. Livingston argued, a manufacturer that fails to warn of the presence of such an ingredient should be strictly liable for the injury suffered by the consumer. The court pointed out strict liability was not to be confused with absolute liability. With strict liability, a manufacturer can warn consumers of the potential for harm resulting from an unintended use and be protected from liability. With absolute liability, a manufacturer would be liable for any injury resulting from any use of a product placed on the market.

DECISION

The court held for Mr. Livingston, ruling Marie Calenders could be strictly liable for failing to warn consumers about the presence of MSG in the vegetable soup. The court concluded Marie Calenders knew or should have known of the danger MSG posed to the general public, hence had a duty to warn the public of the presence of MSG in the vegetable soup.

MESSAGE TO MANAGEMENT

Menu disclosures and warnings such as the one set out here, are the best policies.

> **Caution**: There may be small bones in some fresh fish. Maraschino cherries and nearly all wines contain sulfating agents to protect flavor and color.

Certain individuals may be allergic to specific types of food or ingredients used in food items (e.g., MSG). We are not responsible for an individual's allergic reaction to our food or ingredients used in food items. Please alert your server of any food allergies prior to ordering.

There is a risk associated with consuming raw oysters or any raw animal protein. If you have chronic illness of the liver, stomach, or blood, or have immune disorders, you are at greater risk of illness from raw oysters and should eat oysters fully cooked. If you are unsure of your risk, consult a physician.

For an example of a Dram Shop lawsuit, see the case of *Jackson v. Cadillac Cowboy, Inc., 986 S.W.2d 410 (Ark. 1999).*

FACTUAL SUMMARY

On August 31 and September 1, 1994, Kevin Holliday was served alcoholic beverages at the Sundowners Club, a club owned by Cadillac Cowboy, Inc. (Cadillac Cowboy). Mr. Holliday became extremely intoxicated while at the club. Despite his intoxicated state, and with knowledge that he would drive his automobile while intoxicated, the club continued to serve Mr. Holliday. Around 12:45 A.M. on September 1, Mr. Holliday left the club in his pickup truck. His truck collided with a vehicle driven by James Jackson, causing it to roll over and kill Mr. Jackson. Mr. Jackson's wife, Pam (Jackson), sued Cadillac Cowboy Inc. for negligence in failing to refuse service to Mr. Holliday when it was clear he was very intoxicated.

QUESTION FOR THE COURT

The question for the court was whether a licensed alcohol vendor could be liable for selling alcoholic beverages to an intoxicated person who then caused injury to a third person. The plaintiff, Jackson, argued that since the court had already held vendors liable in cases involving the sale of alcoholic beverages to minors, liability should be extended to all persons. Cadillac Cowboy argued it was the job of the legislature to impose liability on alcoholic beverage vendors, and since the legislature had not enacted a civil liability statute, it could not be liable for the death of Jackson. The court examined the rule of law in a number of other states and found only six states that did not impose liability on vendors. The other 46 states all imposed liability in one way or another on state-licensed alcoholic beverage vendors.

DECISION

The court held in favor of Jackson, ruling that a state-licensed alcoholic beverage vendor could be held liable for serving an intoxicated patron who in turn injured a third party.

MESSAGE TO MANAGEMENT

Third-party liability laws exist in almost all states today. Be sure to train all employees and management on the responsible service of alcohol.

▶ WHAT DID YOU LEARN IN THIS CHAPTER?

Under the Uniform Commercial Code, you are charged with the duty of creating, storing, and serving food and beverages responsibly. You also have an obligation to represent truthfully the items that you sell to the public. Representations about the preparation style, ingredients, origin, size, and/or health benefits are regulated by law and should always be accurate.

The service of alcohol is a privilege. By serving alcohol irresponsibly, you and your employees may be endangering the person drinking and the general public, as well as the financial stability of the business for which you work. Training and education is the key to the responsible service of alcohol in the hospitality industry. Effective employee training programs should be established by operations that have been granted a license to serve alcohol.

▶ RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Log on to the Web site of the National Restaurant Association (**www.restaurants.org**). Follow the path for Food Safety until you arrive at Common Foodborne Illnesses. Identify at least three common foodborne illnesses and at least two ways each is spread. Create a 10-minute training session geared to dishwashers that would help them and you prevent these types of outbreaks.
2. Do you think restaurants face greater liability in what they serve or how they serve it? What impact will increased consumer acceptance of takeout foods have on your position?
3. Collect two takeout menus from restaurants near your home. Identify by circling the menu items, any reference to preparation style, brand-name ingredients, origin, size, or health benefit of their menu offerings. Compare the two restaurants' use of these descriptions.
4. Despite its name, "prime rib" does not have to come from prime grade beef. Contact your local butcher or meat purveyor to identify exactly which ribs are contained in prime rib. Check this information against that found in the National Association of Meat Purveyors' *Meat Buyer's Guide*.
5. As a drug, alcohol is classified as a depressant. Consult a medical encyclopedia to identify at least two other types of depressants, as well as the following characteristics of depressants:
   - ▶ Their primary effects on basic metabolism
   - ▶ Symptoms of excessive dosage
   - ▶ Symptoms of withdrawal
6. Contact your local police department or state police. Identify the BAL in your state in which a driver is considered legally intoxicated. Discover whether the same BAL applies to minors. Ask for details on how officers identify those that they believe have exceeded the legal limits of alcohol consumption.
7. Assume you operate a country western dance club. Create a script for your servers to follow when they must tactfully refuse to serve alcohol to an intoxicated guest. Provide responses your servers can use to counter the reactions they might reasonably expect from guests.

▶ TEAM ACTIVITY

In teams, brainstorm all of the physical characteristics that an intoxicated person might exhibit. Then develop 10 methods to help prevent your servers from serving people who are (or appear to be getting) intoxicated.

Chapter 13

Legal Responsibilities in Travel and Tourism

"Yes, I truly do understand how unsettling it can be not to get what you expected," said Trisha Sangus politely as she listened patiently to the guest who had identified herself as Ms. Hamilton. Trisha, the general manager, had been walking through the lobby of her hotel moments earlier and had overheard Ms. Hamilton complaining, very loudly, that her room was not at all what she had been promised when she had made her reservation.

Trisha had intervened when she heard Mr. Dani, the hotel's front office manager, explain to the guest that the room types reserved by Tours Deluxe, the bus tour operator managing the trip Ms. Hamilton was taking, were only rooms with king-sized beds, *not* rooms with two double beds.

"It's not our fault," Mr. Dani had stated to the guest. It was clear from her reaction, however, that Mr. Dani's explanation, though technically accurate, was not being taken well by Ms. Hamilton.

As she continued listening to Ms. Hamilton, the problem this guest was experiencing became clear to Trisha. Trisha also knew Ms. Hamilton's problem would be a difficult one to solve because the hotel was almost fully occupied with a large youth convention, and as a result, the only vacant rooms in the hotel were, undoubtedly, rooms with a king-sized bed. She also knew, as Mr. Dani had stated to the guest, that Tours Deluxe, one of the hotel's best high-volume customers, had, in fact, reserved only king-sized bedded rooms for their Single Seniors tour group, of which Ms. Hamilton was a part. Tours Deluxe had been an account that Trisha and the hotel's director of sales and marketing had worked very hard to land, and the relationship between this tour operator and the hotel had been, up to now, outstanding.

"It's very simple," said Ms. Hamilton, "but you people don't seem to understand. I booked this tour to get away and relax. I specifically told my travel agent that I wanted a room with two double beds because I like to lay my suitcase out on the second bed when I stay in a hotel. That's what I reserved with the Buckeye Travel Agency and that's what I paid them for. Your desk clerk," continued Ms. Hamilton, looking accusingly at Mr. Dani, "claims I have to take a room with a king-sized bed. That's simply not acceptable. I demand that you call my travel agent immediately and get this straightened out!"

"Let me see what I can do to help," replied Trisha, as she motioned for Mr. Dani to join her in the back office.

"Deluxe screwed up," began Mr. Dani as soon as he and Trisha were alone in the office. "They always reserve kings for their single's groups. Always." "This lady," he continued, referring to Ms. Hamilton, "really has a right to be upset—they misinformed her and sold her a room type she didn't want."

"That's where you're wrong," replied Trisha. "Deluxe doesn't sell directly to guests; they broker their tours through individual travel agencies. In this case, it sounds like Buckeye Travel is at fault. Besides, Deluxe does three tours a month with us; that's over 2,000 room nights per year. I'm not sure it is in this hotel's best interest, or Deluxe's for that matter, to tell this guest its tour operator 'screwed up.' What's the number to the tour coordinator's room?" asked Trisha as she reached for a telephone.

"Six-one-seven," replied Mr. Dani.

"This is Trisha Sangus," said Trisha as the Deluxe representative accompanying the tour group answered. "I think we are going to need your assistance down here at the desk. It concerns a member of your tour group. Thank you—that's great," said Trisha as she hung up the telephone.

Trisha then turned to Mr. Dani. "We will not, at this time," she said pointedly, "refer to anyone screwing up." "We will," she continued, "deal with this guest's issues and then talk with one of our best customers about how they would like to work with us to handle situations like this one in the future. Let's go see Ms. Hamilton."

▶ IN THIS CHAPTER, YOU WILL LEARN:

1. To recognize those national and international agencies and departments charged with monitoring and regulating the travel industry.
2. To understand fully the roles and potential liabilities of travel agents and tour operators as each fulfills its unique role in marketing and providing travel services.
3. To identify those common carriers typically utilized by the travel industry, as well as the recurrent areas of potential liability inherent in each of them.
4. To evaluate tourism as it relates to gaming, resorts and time-shares, and theme park operations, based, in part, upon the unique liability issues and managerial responsibilities inherent in each of these growing areas.
5. How, from a legal perspective, the unique characteristics of the Internet can impact restaurant and hotel managers' efforts to integrate the power of the Web into their own operations.

13.1 TRAVEL

The word "travel," which means "to make a journey," is an English variation of the old French word "*travailler*," which meant "to labor long and hard in dangerous conditions." In fact, in the earliest days of travel, transportation from place to place was expensive and difficult, dangers to life and limb were plentiful, and risks to personal health were significant. Despite this history, the travel and tourism industry is now, according to the World Travel and Tourism Council (WTTC), the world's largest industry, with an estimated economic value of 3.5 trillion dollars in gross domestic product (GDP); moreover, it employs 1 out of every 12 workers worldwide.[1]

As the global economy continues to make the world smaller, and as declining transportation costs (relative to income) make in-country and international travel available to larger and more diverse segments of society, it is not surprising that the legal issues raised by travel and travelers are significant. Recall that "law" was defined in Chapter 1 of this text, as "the rules of conduct and responsibility established and enforced by society." When members of two very different societies make contact through travel, the possibility that their "rules of conduct" will vary and even come into direct conflict can be very high indeed. As a professional hospitality manager, part of your job is to understand which rules of conduct (laws) should be followed. This is, of course, extremely difficult in a world with so many law-making countries, states, regions, regulatory agencies, and international governing bodies to consider.

The Travel Industry

In many parts of the world, the travel industry is referred to as the "travel and tourism" industry, or even simply the "tourism" industry. In the United States, few observers would identify businesspeople traveling across their home states to attend a company sales conference as tourists, yet such a journey certainly would expose those travelers to many features and conveniences used by tourists. For purposes of this text, the term "travel industry" will refer to those transportation services (airlines, trains, cruise ships, buses, and rental cars), lodging facilities (hotels, motels, resorts, etc.), eating and drinking places, sightseeing venues, and amusement and recreation activities used by all travelers, as well as to those travel professionals who market products and services to travelers.

The number of laws, regulations, and standardized procedures used in all of the individual industries that, collectively, make up the travel industry are large indeed. **Travel law** refers to those laws that directly impact the travel industry. The field is so extensive that some attorneys specialize in this field of law. **International travel law** combines aspects of contract law, employment law, tourism and hospitality procedures, antitrust rules, regulatory and agency compliance, and knowledge of certain international agreements and treaties into a comprehensive set of guidelines for the travel industry.

▶ **LEGALESE**

Travel law: The laws regulating business and individual behavior in the travel industry.

▶ **LEGALESE**

International travel law: The ordinances, rules, treaties, and agreements used to regulate the international travel industry.

Industry Components The travel industry is composed of many segments. Consider the case of Benny and June, two American college students who wish to spend their summer break traveling throughout Europe. To examine their entire travel experience, as well as to identify those travel-oriented industries that the students are likely to encounter during their trip, it is useful to view travel as consisting of five key components, as listed in Figure 13.1.

1. Preplanning Services
2. Transportation
3. Lodging
4. Food Services
5. Attractions and Activities

Figure 13.1 Five key components of the travel industry.

Preplanning Services To plan their trip, Benny and June may enlist the assistance of a travel agent, a professional whose job is to plan and sell travel-related

[1]WTTC Research Report, March 2003.

products and services. Travel agents work, directly and indirectly, with travel service providers and tour operators. Tour operators actually purchase travel services, then market these services directly to travelers or offer them to travel agents, who in turn sell them to travelers such as Benny and June.

◀ SEARCH THE WEB 13.1 ▶

Despite the popularity of the Internet as a way to "plan your own" travel, the services of professional travel agents continue to be in high demand. To view the Web site of the largest of the travel agent associations, go to **www.astanet.com**. This is the Web site of the American Society of Travel Agents (ASTA). When you arrive, click on News, then Press Kit to read about the goals of this effective organization.

In addition to selling tours, travel agents also work with transportation providers and those who sell lodging services, as well as those who market attractions and recreational activities.

Transportation If Benny and June indeed travel to Europe from the United States, the number of transportation services they will use are likely to be extensive. Starting with a taxi cab to the airport, continuing across the Atlantic with an international airline flight or cruise, and culminating, perhaps, in a car rental, bus ride, or trip by rail to their destination of choice, most journeys normally rely, in part, on the services of the very large segment of the travel industry related to transportation.

Lodging While Benny and June may decide, as they travel, to stay at traditional hotels, the choices they will encounter as they plan their overnight accommodations will be many. On one extreme, they may choose an extravagant destination resort in a desirable location that, in addition to their sleeping rooms, offers many recreational alternatives, gourmet food and beverage outlets, and numerous other free amenities and activities. Alternatively, they may select a more modestly priced lodging choice housed in a private home that simply provides them with their sleeping rooms and, perhaps, a limited breakfast in the morning.

The lodging segment of the travel industry is sizeable and offers travelers a wide range of accommodation choices. In addition to traditional hotels, many private clubs, casinos, cruise ships, time-share condominiums, and campground sites provide overnight alternatives to travelers. Most of these facilities are open to all of the traveling public. Some other types of facilities offer overnight accommodations for people away from their homes for other reasons. These include schools, colleges and universities offering residential services, health-care (hospital and nursing homes) facilities, correctional institutions (prisons), and military bases.

Food Services One of the greatest joys, as well as sometimes one of the most daunting aspects, of traveling is the ability to sample local foods prepared in ways and combinations that are different from those typically found "back home." From the leisurely meal to the hurried snack, the traveling public can choose from a wide variety of food venues. It is likely that Benny and June will find exploring the various cuisines and beverages of Europe one of the most talked-about features of their trip when they return.

Internationally, as well as in the United States, the foodservice industry consists of a plethora of food and beverage outlets that range from the exquisite and expensive to the very modestly priced "eat on the street" meals offered by vendors in most larger cities.

Attractions and Activities For many travelers, the food and lodging experiences they will encounter are substantially less important than are the sites these travelers will see and the things they will do on their trips. For Benny and June, a walk through Heidelberg Castle in central Germany, a chance to see the artworks contained in the famous Louvre museum in Paris, or renting bikes to cycle through the mountains of Switzerland may be the actual reasons for traveling to their chosen destinations.

In well-developed countries, the number of things a traveler can see and do can be extensive. The traveler to New York City, for example, can spend days exploring the sights, sounds, and activities available. In less-developed countries and areas, the natural attractions of beaches, mountains, or forests may be enough to attract significant numbers of travelers. In all cases, however, the attractions and activities offered are likely managed and staffed by local employees and operated according to the prevailing culture and customs of the area hosting the traveler. This will likely be the case regardless whether the activity selected involves attending a concert, sporting event, or the theater; visiting a museum, art gallery, or historical site; gambling in a casino; visiting an amusement park; or simply enjoying the area's natural physical setting.

Each of the five major components of the travel industry has developed, over time, its own set of rules, regulations, customs, and laws related to how it does business. Most travelers will not be as aware of how these operational procedures affect their travel experience as will the managers working in the areas. As a result, an important part of many travel industry managers' jobs is to communicate these specific procedures to the individual travelers they encounter.

Economic Breadth and Impact

The travel industry is big business. In 2001, the latest year for which complete data is available, the Travel Industry Association of America (TIA) reported that travel and tourism is the nation's largest services export industry, the third largest retail sales industry, and one of America's largest employers. It is, in fact, the first, second, or third largest employer in 29 states. In 2001, the U.S. travel industry generated sales of more than $555 billion, including airfares from domestic and international travelers. These travel expenditures, in turn, generated nearly 7.9 million jobs for Americans, with nearly $174 billion in payroll income. Approximately 1 out of every 18 U.S. residents in the civilian labor force was employed due to direct U.S. travel spending in 2001.[2]

Travel is popular. As shown in Figure 13.2, in 2002, domestic travelers took over 1 billion trips, on which they traveled more than 50 miles from home.

The financial impact of international travelers is also great. In 2001, international visitors to the United States spent $91.1 billion traveling in the country, including international passenger fares. That same year, U.S. resident travelers spent $82.5 billion while traveling in foreign countries.

◀ SEARCH THE WEB 13.2 ▶

Founded in 1941, the Travel Industry Association of America (TIA) is a Washington, DC–based nonprofit association that is recognized as the best source of research, analysis, and forecasting for the travel industry. Its goal is to make the United States the world's most popular travel destination. To view its Web site, go to **www.tia.org**. When you arrive at the site, click on About TIA to read about its goals and activities.

[2]Travel Industry Association of America 2001 Economic Report.

Total Domestic U.S. Person-Trips,* 2002	1021.3 Million
Purpose of Trip	
Leisure Travel (Pleasure, Personal)	77%
Business/Convention	12%
Combined Business/Pleasure	8%
Other	3%
Modes of Transportation Used	
Auto, Truck, RV	75%
Airplane	16%
Bus	2%
Train/Ship/Other	4%
Rental Car (Primary Mode)	3%
Top Activities for Domestic Travelers	
Shopping	First
Outdoor Activities	Second
Visiting Museums and/or Historic Sites	Third
*A person-trip is one person traveling 50 miles (one way) or more away from home and/or overnight. A trip is one or more persons from the same household traveling together.	
Source: Travel Industry Association of America; Travelscope®	

Figure 13.2 U.S. domestic travel in 2002. (*Source:* Travel Industry Association of America; Travelscope®.)

Just as the travel professionals in the United States recognize the magnitude and impact of travel on the national economy, so do travel professionals worldwide. The World Travel and Tourism Council (WTTC) is the association created by global business leaders in travel and tourism. Its members are chairs and chief executive officers from 100 of the industry's foremost companies, including airlines and other passenger transport, hospitality, manufacturing, entertainment, tour operators, car rental, and other travel-related services. Founded in 1990, the WTTC is headquartered in London. Its mission is to raise awareness of the impact of travel and tourism and to persuade governments to make it an economic and job-creating priority. Travel and tourism helps local economies in many ways, including:

- *Export earnings:* Currency earned by tourism results in the addition of "new" money in a local economy. For many countries and geographic areas, especially those that are not rich in natural resources, tourism dollars may be the single largest source of new income.
- *Enhancement of rural areas:* Tourism jobs and businesses are usually created in the most underdeveloped regions of a country, helping to equalize economic opportunities throughout a nation and providing an incentive for residents to remain in rural areas, rather than move to cities that may already be overcrowded and unable to easily support additions to the population.
- *Employment:* Travel and tourism is an important job creator. In addition, it is essential to understand that the vast majority of tourism jobs are in

small or medium-sized, family-owned enterprises such as restaurants, shops, and the management/provision of tourism-related leisure activities.
- *Development of infrastructure:* Travel and tourism encourages enormous investments in new infrastructure, most of which helps to improve the living conditions of local residents, as well as the enjoyment of the tourists. Tourism development projects include airports, roads, sewage systems, water treatment plants, restoration of cultural monuments, and the creation or expansion of museums.
- *Tax collections:* The tourism industry provides local governments with hundreds of millions of dollars in tax revenues each year through hotel occupancy and restaurant taxes, airport users' fees, sales taxes, park entrance fees, and employee income taxes.

Complexity of Legal Issues

The travel industry is large and complex; thus, its legal issues are as well. Travel law is unique, in that it encompasses many countries, industries, regulatory agencies, and even traditions. Returning to the example of Bennie and June, and given your understanding of sources of potential liability, imagine the complications that might arise if these two travelers bought a 21-day package tour of Europe (operated by a tour company based in Amsterdam) and that the tour company then subcontracted meals and accommodations for the tour with hotels and restaurants in a variety of European cities. Assume further that they purchased the tour from a New York state travel agent and that the two travelers took an Amtrak train to get to their departure city, where they stayed in a hotel that they reserved through an Internet booking site operated by a travel wholesaler located in Atlanta, and the next day, they flew on a transatlantic airline (operated by a non-U.S. company) to reach their destination. Finally, assume that their plane arrived late, and they missed the assigned departure time for their tour. No doubt you can begin to see the potential difficulties faced by consumers, as well as those who do business in a specific travel segment.

Travel law is complicated for a variety of reasons, including:

- *Interconnectivity:* When one travel-related business controls the sale and delivery of a complete travel product or service, the liability for poor or nonperformance may be easily assessed. When one business is dependent on the performance of another business, however, liability for poor performance is more difficult to determine. For example, assume a travel services seller, relying on the promise made by a resort developer that a new resort would be ready to accept business on January 1 of a given year, sells a three-night stay at the resort; but upon the guests' arrival, the swimming pools, tennis courts, and golf course are not yet fully operational. Is fault to be assigned to the travel seller, the resort operator, or both? The interconnectivity of travel services makes it critical for hospitality managers to understand travel law.
- *Jurisdiction:* By its very nature, much of the activity in the travel industry occurs in a variety of legal settings. Does a New Jersey traveler who books a night's stay at a hotel in Dallas, via an Internet site operating out of Florida, and who ultimately feels that the hotel did not deliver the services promised, seek relief through the New Jersey, Texas, or Florida courts? Where many travel-related legal issues are concerned, the question of precisely which court has **jurisdiction** is crucial to understanding the applicable law.
- *Variation in terminology and resulting expectations:* In the United States, the term "first class" has a specific meaning to most travelers. But is it realistic for American travelers to assume that the rest of the world is bound by the same expectations when the term "first class" is used? Clearly,

▶ **LEGALESE**

Jurisdiction: The authority given by law or treaty to a court to try cases and make decisions about legal matters within a particular geographic area and/or over certain types of cases.

everyone the world is not required to think exactly as Americans do. Alternatively, what if unscrupulous travel salespeople, knowing the ambiguity of the term "first class," seek to defraud unwitting travelers? The question of honest differences in terminology and resulting expectation is complicated by multiple languages and multiple translations of travel-related words, phrases, and concepts.

- *Identity of the actual service provider:* Travel services are often packaged; that is, travelers will, in many cases, buy a complete travel experience that includes transportation, meals, and lodging, as well as leisure activities. When a component part of that travel experience is defective, it may be very challenging to determine exactly who is responsible to the traveler. For example, if a company that puts tours together purchases, at a discount, 100 sleeping rooms from a hotel and then uses those rooms to lodge a tour group, is the hotel's customer the tour company or the individual traveler? If the hotel does not operate in the manner the tour company promised the travelers purchasing the tour, and if monetary compensation is due for that poor hotel service, is the compensation more appropriately refunded to the tour operator that purchased the rooms or the guest who stayed in the room? In complicated cases, it may well require a court to sort out a resolution.
- *Uncontrollable forces:* Travel is affected by many factors beyond the control of travel services providers. Severe weather, civil unrest, war, disease, and a variety of other variables can serve to make travel either unpleasant or impossible. Most observers would say that these forces should not generally be used to hold a travel services provider responsible for nonperformance of a contract. But what is the responsibility of the travel services provider that knowingly subjects travelers to these forces? For example, if a cruise ship captain knowingly sails his or her ship into waters that are in the direct path of a hurricane, that captain will likely, in most traveler's opinion, assume some level of liability for the potential outcome. A jury may be required to determine the actual degree of the cruise operator's responsibility.

In the remaining sections of this chapter, you will learn about some of the governmental and quasigovernmental groups that help regulate and set national and worldwide policy for the travel industry. You will also become familiar with the travel agents, wholesalers, and tour group operators that make up the distribution segment of the travel industry. In addition, we will examine those industries that provide the means of passenger transportation, (i.e., buses, trains, planes, etc.) for their unique regulation and liability issues. The intent is to demonstrate the interconnectivity of the travel industry and to direct you to sources of further information in those areas that entail specialized legal knowledge appropriate for hospitality managers.

13.2 REGULATORY INTERACTION AND OVERSIGHT

The travel industry is heavily regulated, and because it is so large and diverse, the number of groups and organizations responsible for the legal oversight of travel activities is considerable. From the perspective of the hospitality manager, some of the most significant of these include governmental agencies, both at the federal and state levels, and nongovernmental groups that operate internationally to coordinate travel policies.

U.S. Government Agencies

In Chapter 5, you were introduced to federal agencies that have responsibility for regulation and oversight in the hospitality industry. In the following subsec-

tions, you will learn about other federal agencies involved in regulation and policy development for the travel industry. The list is long and represents the most significant of the federal groups responsible for monitoring travel activities, but it is not exhaustive. In fact, travel-related activities impact nearly every federal agency. The agencies and departments identified here will, however, give some indication of the many ways in which travel professionals interact with the federal government in the course of their managerial duties. In addition to federal monitoring and control, states, counties, and local governments may all have agencies, departments, and code enforcement professionals that combine to provide additional regulatory oversight.

Federal Trade Commission (FTC) The Federal Trade Commission is charged with ensuring that the nation's markets are free of restrictions that could potentially harm consumers. In addition, it works to ensure that competition among firms is fair and results in the availability of lower prices and better goods and services. A further role of the FTC is the dissemination of information that consumers can use to make better purchase decisions. To ensure the smooth operation of the free market system, the FTC enforces federal consumer protection laws that prevent fraud, deception, and unfair business practices. The commission also enforces federal antitrust laws that prohibit anticompetitive mergers and other business practices that restrict competition and could harm consumers.

With regard to the travel industry, the FTC has increasingly devoted its attention to protecting consumers by investigating false, misleading, or deceptive advertising, telemarketing fraud, and Internet scams. While the FTC does not seek to resolve individual consumer problems, it does use information from individual complaints to investigate fraud and initiate law enforcement actions. The FTC also enters Internet, telemarketing, identity theft, and other fraud-related complaints into the Consumer Sentinel, an online database available for use by civil and criminal law enforcement agencies worldwide.

Centers for Disease Control (CDC) The Centers for Disease Control and Prevention is the major federal agency operating to protect the health and safety of individuals at home and abroad, as well as to provide information to enhance health decisions. The CDC, located in Atlanta, Georgia, is an agency of the Federal Department of Health and Human Services. Its official mission is to promote health and quality of life by preventing and controlling disease, injury, and disability.

Becoming seriously ill or having a major accident while traveling, especially in a country where the traveler does not speak the local language is one of many tourists' greatest fears. Travelers may also face health risks of which they are unaware because they simply do not know about travel-related threats to their health and safety in places they have not previously visited. In many cases, some of these threats could be avoided or minimized if the traveler was aware of them. The CDC makes available, on a region-by-region basis, information about health and safety risks for travelers worldwide. In addition, this information includes recommendations for meeting or minimizing these travel-related threats to health and safety.

◀ SEARCH THE WEB 13.3 ▶

One of the most popular services offered by the CDC is its "Travelers' Health" information. It is available online and seeks to inform travelers about the health risks they may encounter when traveling in various parts of the world. To view a sample of the information provided, go to **www.cdc.gov/travel**. When you arrive, click on Choose a Region, under the heading Destinations, to find out about the health risks you might encounter in an area of the world you would someday like to visit.

ANALYZE THE SITUATION 13.1

An elderly couple from Canada, traveling in Central/South America, goes on a shopping trip to a local produce market where they buy and consume some locally grown fruit. Upon returning, that evening to the international hotel in the area, which you manage, the husband falls ill and his wife calls your front desk seeking assistance.

1. What is the likely cause of the man's illness?
2. Based upon what you know about reasonable care for guests, what action would you expect your management team to take relative to the man's illness?
3. What would your position be if your hotel was later sued by the couple, claiming you had failed to warn them of local health risks?

to the improvement of business, including tourism. It houses the Census Bureau (**www.census.gov**), which collects economic data on the hotel and restaurant industries, as well as other service businesses. It also houses the United States Travel and Tourism Administration, (**www.tinet.ita.doc.gov**), which was established by the National Tourism Policy Act of 1981. This agency gathers statistics on travel activity and promotes tourism. On February 20, 2003 the Omnibus Appropriation Act for FY 2003 became law. Included in this appropriation was Section 210, which authorized the secretary of commerce to award grants and make lump-sum payments in support of an international advertising and promotional campaign to encourage individuals to travel to the United States. The Omnibus Appropriation both authorized and appropriated $50 million for this campaign, which is, of course, widely supported by those in the travel industry. The secretary of commerce is advised by the United States Department of Commerce Travel and Tourism Promotion Advisory Board (Figure 13.3), which includes some of the travel industry's most notable businesspeople.

Department of the Interior (DOI) In 1849, Congress passed a bill to create the Department of the Interior. Over the course of its history, the DOI has played a changing role in its mission of managing the country's internal affairs. As a result, it has had, at various times, responsibility for the construction of the national capital's water system, the colonization of freed slaves in Haiti; exploration of western wilderness, oversight of the District of Columbia jail, regulation of territorial governments, management of hospitals and universities, management of public parks, and the basic responsibilities for Native Americans, public lands, patents, and pensions. In one way or another, all of these roles had to do with the internal development of the nation or the welfare of Americans.

In 1916, President Woodrow Wilson signed legislation creating the National Parks Service. The act assigned to the new bureau the 14 national parks and 21 national monuments then under the DOI and directed it "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." The national monuments, generally smaller than the parks, included prehistoric Native American ruins, geologic features, and other sites of natural and cultural significance reserved by presidential proclamations under the Antiquities Act of 1906. Today, this agency sets policy for the National Parks Service, which includes some the country's most significant tourism destinations.

Manuel Cortez
President & CEO
Las Vegas Convention & Visitors Authority
Las Vegas, Nevada

Charles A. Gargano
Chairman & CEO
Empire State Development Corp
New York, New York

Noel Irwin Hentschel
Chairman & CEO
American Tours International
Los Angeles, California

William L. Hyde, Jr.
President & CEO
Ruth's Chris Steak House
Metairie, Louisiana

Jonathan Linen
Vice Chairman
American Express
New York, New York

Jeremy Jacobs
Chairman & CEO
Delaware North Co.
Buffalo, New York

J. W. Marriott, Jr.
Chairman & CEO
Marriott International, Inc.
Washington, DC

James A. Rasulo
President
Walt Disney Park & Resorts
Burbank, California

Henry Silverman
President & CEO
CENDANT Corp.
New York, New York

Manny Stamatakis
Board Member
Philadelphia Convention & Visitors Bureau
Philadelphia, Pennsylvania

Barry Sternlicht
Chairman & CEO
Starwood Hotels & Resorts
White Plains, New York

Robert Taubman
Chairman & CEO
The Taubman Company
Bloomfield Hills, Michigan

Glenn Tilton
Chairman & CEO
United Airlines
Chicago, Illinois

Jonathan Tisch
Chairman & CEO
Loews Hotels
New York, NY

Chris von Imhof
President
Alaska International Airport Tourism Marketing Council
Girdwood, Alaska

Figure 13.3 United States Department of Commerce Travel & Tourism Promotion Advisory Board, 2003.

◀ SEARCH THE WEB 13.4 ▶

The National Parks Service is in the tourism business. To view its Web site, where visitors can book tours, go to **reservations.nps.gov**.

Department of State The Executive Branch and the Congress have constitutional responsibilities for U.S. foreign policy. Within the executive branch, the Department of State is the lead U.S. foreign affairs agency, and the secretary of state is the president's principal foreign policy adviser. The Department of State advances U.S. objectives and interests in shaping a safer and freer world through its primary role in developing and implementing the president's foreign policy. The department also supports the foreign affairs activities of other U.S. government entities, including the Department of Commerce. In addition, it provides a variety of important services to U.S. citizens traveling abroad, including the issuing of passports and providing travel warnings. Figure 13.4 is an example of the type of warning developed by the Department of State and available to those traveling internationally.

◀ SEARCH THE WEB 13.5 ▶

An important service provided by the Department of State is that of issuing travel advisories and warnings to Americans planning to travel outside the United States. Travelers can access these warnings at **travel.state.gov/travel_warnings.html**.

Travel Warning
United States Department of State
Bureau of Consular Affairs
Washington, DC 20520

This information is current as of today, Sat: Sep 06, 2003.

Afghanistan

July 28, 2003

This Travel Warning provides updated information on the security situation in the country and continues to emphasize the Embassy's limited capability to provide consular services. The security threat to all American citizens in Afghanistan remains high. This Travel Warning supersedes that of April 2, 2003.

The Department of State strongly warns U.S. citizens against travel to Afghanistan. The ability of Afghan authorities to maintain order and ensure security is limited. Remnants of the former Taliban regime and the terrorist Al-Qaida network, and other groups hostile to the government, as well as criminal elements, remain active. U.S.-led military operations continue. Travel in all areas of Afghanistan, including the capital, Kabul, is unsafe due to military operations, landmines, banditry, armed rivalry among political and tribal groups, and the possibility of terrorist attacks, including attacks using vehicular or other bombs. The security environment remains volatile and unpredictable. There have been a number of attacks on foreign interests and nationals. Over the past year there have been several unsuccessful rocket attacks in Kabul and elsewhere in Afghanistan. On June 7, 2003, a suicide car bomber attacked International Security Assistance Forces (ISAF), killing four German soldiers. On March 30, a rocket landed at the ISAF compound, which is located across the street from the U.S. Embassy. On March 29, two U.S. soldiers were ambushed and killed in the southern Helmand Province. On March 27, an international aid worker was pulled from his vehicle and killed in northern Kandahar (near the border with Oruzgan Province), resulting in the curtailment of some assistance activities in the region. On December 19, 2002, a grenade thrown at an ISAF military installation killed one Afghan and injured two international aid workers. On December 17, 2002, a grenade attack injured two U.S. soldiers in central Kabul. On September 5, 2002, a car bomb was detonated in downtown Kabul, killing more than 30 Afghans.

From time to time, the U.S. Embassy places areas frequented by foreigners off limits to its personnel depending on current security conditions. Private U.S. citizens are strongly urged to heed these restrictions as well and may obtain the latest information by calling the U.S. Embassy in Kabul or consulting the Embassy website below. As stated in the current Worldwide Caution, terrorist actions may include, but are not limited to, suicide operations, bombings, assaults or kidnappings. Possible threats include conventional weapons such as explosive devises or non-conventional weapons, including chemical or biological agents.

The U.S. Embassy cannot provide passport or visa services, and its ability to provide emergency consular services to U.S. citizens in Afghanistan is limited. Afghan authorities also can provide only limited assistance to U.S. citizens facing difficulties.

U.S. citizens who choose to visit or remain in Afghanistan despite this Warning are urged to pay close attention to their personal security, should avoid rallies and demonstrations, and should register with and obtain updated security information from the U.S. Embassy in Kabul. The U.S. Embassy is located at Great Masood Road between Radio Afghanistan and the Ministry of Public Health (the road is also known as Bebe Mahro (Airport) Road), Kabul. Phone numbers are: (93-2) 290002, 290005, 290154; INMARSAT line, tel. 00 [872](76)837-927; fax 00[873](76)183-7374. The *Embassy website* is http://usembassy.state.gov/Afghanistan.

Updated information on travel and security in Afghanistan may be obtained from the Department of State by calling 1-888-407-4747 within the United States or, from overseas, 1-317-472-2328. For additional information, consult the Department of State's *Consular Information Sheet for Afghanistan* and the *Worldwide Caution Public Announcement,* on the Department's internet website at http://travel.state.gov.

Figure 13.4 Sample U.S. State Department travel advisory, for Afghanistan.

Department of Homeland Security (DHS) As noted in Chapter 5, in the months following the terrorist attacks against America on September 11, 2001, 22 previously disparate domestic agencies were merged into one department to protect the nation against terrorist threats. In the Department of Homeland Security. Its threefold mission is to:

1. Prevent terrorist attacks within the United States.
2. Reduce America's vulnerability to terrorism.
3. Minimize the damage from potential attacks and natural disasters.

More specifically, the department is composed of these five major divisions:

- *Border and Transportation Security:* This division is responsible for maintaining the security of American borders and transportation systems. The largest of the directorates, it is home to agencies such as the Transportation Security Administration, the U.S. Customs Service, the border security functions of the Immigration and Naturalization Service, the Animal and Plant Health Inspection Service, and the Federal Law Enforcement Training Center.
- *Emergency Preparedness and Response (EPR):* This division ensures that the country is prepared for, and able to recover from, terrorist attacks and natural disasters.
- *Science and Technology (S&T):* S&T coordinates efforts in research and development, including preparing for and responding to the full range of terrorist threats involving weapons of mass destruction.
- *Information Analysis and Infrastructure Protection (IAIP):* The IAIP assesses a broad range of intelligence information concerning threats to the country, issues timely warnings, and takes appropriate preventive and protective action.
- *Management:* This department is responsible for the budget, management, and personnel issues in DHS.

In addition to the five divisions of DHS, several other agencies affecting travel were folded into the new department. These include:

- *United States Coast Guard (USCG):* The head of the U.S. Coast Guard reports directly to the secretary of Homeland Security. However, the USCG also works closely with the Border and Transportation Security department while maintaining its independent identity as a military service. Upon declaration of war, the USCG would operate as an element of the Department of Defense.
- *United States Secret Service:* The primary mission of the Secret Service is the protection of the president. Additional roles include protecting U.S. currency from counterfeiters and safeguarding Americans from credit card fraud.
- *Bureau of Citizenship and Immigration Services:* The mission of this agency is to provide efficient immigration services and assist in easing the transition of immigrants to American citizenship.
- *Office of Private Sector Liaison:* This agency provides the business community with a direct line of communication to the DHS. The office works with individual businesses and through trade associations to foster interaction between the private sector and the DHS on a range of issues and challenges faced by America's business sector in the post-9/11 world.

The policies put in place by the DHS now and in the future will have a significant impact on the way Americans travel, as well as how America receives travelers.

Treasury Department The United States Treasury Department is entrusted with a variety of duties and functions. In addition to collecting taxes and managing

currency production and circulation, this department oversees functions in law enforcement, economic policy development, and international treaty negotiation. Travelers are affected by the department's participation in negotiations to reduce barriers to international trade and finance by working through the World Trade Organization (WTO), the Organization for Economic Cooperation and Development, and other international trade negotiating teams. In addition, it houses the Office of Foreign Assets Control (OFAC), which administers and enforces economic and trade sanctions, including travel bans, based on U.S. foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction.

Department of Transportation (DOT) The Department of Transportation was established by Congress in 1968. Its mission is to develop and coordinate policies that will provide an efficient and economical national transportation system while considering both environmental and national defense needs. The DOT consists of 11 individual operating administrations. These are:

- Federal Aviation Administration
- Federal Highway Administration
- Federal Railroad Administration
- National Highway Traffic Safety Administration
- Federal Motor Carrier Safety Administration
- Federal Transit Administration
- Maritime Administration
- Saint Lawrence Seaway Development Corporation
- Research and Special Programs Administration
- Bureau of Transportation Statistics
- Surface Transportation Board

While many of the activities of these DOT divisions affect tourism and travelers, the following four are of special note:

1. Federal Aviation Administration (FAA).

Early economic regulation of airlines by the federal government concerned mainly the airlines' participation in the airmail system. The Air Mail Act of 1925 allowed the U.S. government to pay airlines for carrying the mail. The McNary-Watres Act of 1930 let the Post Office Department review the accounting practices of these mail carriers, and as a result regulation of the airlines began. The airline companies that did not hold government contracts to carry the mail remained unregulated, and from 1930 to 1938, they grew quickly, competing for passengers by offering low prices. In 1935, the Federal Aviation Commission recommended that the entire air transportation industry, not just the airmail carriers, be regulated, much as the Interstate Commerce Commission regulated the railroads. As a result the federal government began regulating airfares and decided how many and which airlines could fly between cities. The Federal Aviation Act of 1958 established the Federal Aviation Agency (now the FAA), which added further regulations related to safety. Due to pressure by consumer groups, however, Congress passed the Airline Deregulation Act of 1978. This act ended most economic regulation in a series of steps over several years. As a result, airlines could offer new routes and drop routes that lost money.

The federal government also recognized the need to guarantee service to communities where airlines made little or no profit and where these airlines might want to eliminate service, which would leave travelers in those communities without air transportation. Under a program called Essential Air Service, airlines were prevented from dropping service to certain communi-

ties even though the airlines might not want to keep servicing them. In addition, airlines must meet FAA safety standards if they are to be permitted to use airspace. Thus, despite deregulation, the FAA is still heavily involved in air transportation policy. Specifically, the FAA is responsible for the issuance and enforcement of regulations and minimum standards relating to the manufacture, operation, and maintenance of aircraft. In addition, it is responsible for air traffic management, and thus operates a network of airport towers, air route traffic control centers, and flight service stations.

ANALYZE THE SITUATION 13.2

Ted Flood had a reservation at the Sleep Right hotel for the night of Oct 15. According to the reservation policy explained to Mr. Flood at the time he reserved the room from Sleep Right's national reservation system, the nonguaranteed reservation was to be held until 4:00 P.M. the afternoon of Mr. Flood's arrival.

Unfortunately, Mr. Flood's flight to the city where the Sleep Right was located was delayed, because Mr. Flood's plane had to spend four hours on the airport runway because of mechanical difficulties. Mr. Flood was unable to contact the hotel and, as a result, his room was released by the hotel at 4:30 P.M. and sold to another guest at 5:00 P.M. Consequently, the hotel had no rooms available when Mr. Flood, tired and frustrated, arrived at the front desk at 8:00 P.M.

1. What could Mr. Flood have done to avoid his difficulty?
2. What responsibility, if any, does the hotel now have to Mr. Flood?
3. What role did the FAA likely play in this situation?

2. Federal Highway Administration (FHWA).

The goal of the Federal Highway Administration is to create the best transportation system in the world for the American people and to enhance the country's economic vitality, quality of life, and the environment. The FHWA is headquartered in Washington, DC, with field offices across the United States. It performs its tasks through the Federal-Aid Highway program, which provides federal financial assistance to the states to construct and improve the National Highway System, urban and rural roads, and bridges. The program provides funds for general improvements and development of safe highways and roads. It also operates the Federal Lands Highway program, which provides access to and within national forests, national parks, Indian reservations and other public lands. Both of these programs, and the policies set by their administrators, of course, significantly impact vehicle traffic, travel and tourism in the United States.

3. Federal Railroad Administration.

A common misconception is that the federal government owns and operates the country's rail system. It does not. The Federal Railroad Administration does, however, provide some funding, and thus has some decision-making authority related to the country's intercity rail passenger system. It also administers federal grants to Amtrak (officially known as the National Railroad Passenger Corporation), which is the organization that actually operates much of the nation's rail system.

4. National Highway Traffic and Safety Administration (NHTSA).

The National Highway Traffic Safety Administration was established by the Highway Safety Act of 1970, to implement traffic safety programs. It is responsible for reducing deaths, injuries, and economic losses resulting from motor vehicle crashes. It does so by setting and enforcing safety performance standards for motor vehicles and motor vehicle equipment. The

NHTSA investigates safety defects in motor vehicles; sets and enforces fuel economy standards; helps states and local communities reduce the threat of drunk drivers; promotes the use of safety belts, child safety seats, and airbags; and provides consumer information on motor vehicle safety topics. Because of the immense popularity of auto travel in the United States, the NHTSA plays a major role in the travel industry.

Tourism Policy Council (TPC) As is clear by now, there are many federal agencies whose policymaking affects travel in the United States. The Tourism Policy Council is an interagency, policy-coordinating committee composed of the leaders of nine federal agencies and the president of the U.S. National Tourism Organization (USNTO). The TPC members work cooperatively to ensure that the national interest in tourism is fully considered in federal decisions that affect tourism development. The TPC also coordinates national policies and programs relating to international travel and tourism, recreation, and national heritage resources that involve federal agencies. The council works with the private sector and state and local governments on issues and problems that require federal involvement.

International Organizations

The United States is not, of course, the only government interested in promoting safe travel for its citizens, for many countries count on tourism for significant financial contributions to their economies hence, they too are concerned with traveler safety. That means there are a large number of international groups and organizations whose goal is to improve and promote the travel industry worldwide. The result is the creation of travel procedures, policies, and agreements. The following three organizations direct or control some of the most important of these international cooperative efforts.

World Tourism Organization (WTO) The World Tourism Organization is the leading international organization in the field of travel and tourism. It serves as a global forum for tourism policy issues and as a practical source of tourism know-how and statistics. Its membership includes 139 countries, 7 territories, and 350 affiliate members representing regional and local promotion boards, tourism trade associations, educational institutions, and private sector companies, including airlines, hotel groups, and tour operators.

The WTO has been vested by the United Nations with a central role in promoting the development of responsible, sustainable, and universally accessible tourism. Through tourism, the WTO aims to stimulate economic growth and job creation, provide incentives for protecting the environment and cultural heritage, and promote peace, prosperity, and respect for human rights. Demonstrating the economic importance of tourism and providing the world's most comprehensive tourism statistics is the work for which WTO is best known. By establishing standards for the reporting of tourism-related information, the WTO has created a common base of statistics that enables operators of tourist destinations to compare their success and progress with that of their competitors.

International Civil Aviation Organization (ICAO) The International Civil Aviation Organization is one of the least known but most important of the many international groups that affect travel policy and procedure. On December 7, 1944, 52 countries signed the document resulting from the Convention on International Civil Aviation, which was held in Chicago, Illinois. Figure 13.5 contains an excerpt from that document.

Today, the ICAO is a specialized agency of the United Nations. It develops rules and regulations concerning training and licensing of aeronautical personnel, both

"WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that co-operation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principals and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end."

Figure 13.5 Conclusion of the International Civil Aviation Convention, Chicago.

in the air and on the ground; communication systems and procedures; rules for the air and air traffic control systems and practices; and airworthiness requirements for aircraft engaged in international air travel, as well as their registration and identification, aeronautical meteorology, and maps and charts.

World Health Organization (WHO) The World Health Organization, the United Nations' specialized agency for health, was established in 1948. The objective of WHO is the attainment by all peoples of the highest possible level of health. "Health" is defined by WHO as a state of complete physical, mental, and social well-being—not merely the absence of disease or infirmity. International travelers are affected by the work of WHO, especially when visiting nations challenged to provide their own citizens, and thus visitors, with the basic components of healthy food and water supplies.

13.3 TRAVEL AGENTS AND TOUR OPERATORS

Not all travelers need the help of travel professionals when they decide to take a trip. For many, however, the knowledge and skills of such professionals are extremely important to the success of their trip. As a result, travel agents, tour companies, and travel wholesalers are essential components of today's travel industry, making it critical to understand how each operates and how travel law relates to them individually and to the hospitality industry as a whole.

Travel Agents

Historically, and despite the increased popularity of the Internet, individual and corporate travel agents remain the primary distributors of travel services. They offer customers packages or services provided by tour companies; organize tailor-made travel on request; and sell services such as vacation packages, air tickets, train tickets, cruises, hotel bookings, car rentals, and other services. Whether individual or corporate, as travel experts, their job is to inform and advise travelers. In the hospitality industry, hotel managers interact with travel agents on a daily basis because, in most hotels, a high percentage of the reservations made in the hotel will be booked by travel agents via the Global Distribution System (GDS) that electronically links travel agents worldwide to individual hotel reservation systems.

◀ SEARCH THE WEB 13.6 ▶

Important travel-related news affects travel agents throughout the world. Log on to the Internet and enter **www.travelagents.com**.

1. Select: Travel News from an area of the world in which you have an interest.

▶ LEGALESE

Fiduciary: A relationship based on trust and the responsibility to act in the best interest of another when performing tasks.

Compensation Travel agents contract for travel services on behalf of their clients. Accordingly, they have a **fiduciary** responsibility to those clients. This is an important concept because travel agents are expected to act in the best interests of their clients, not those of the hotels, airlines, or other travel organizations that may actually compensate the travel agent.

Travel agents are expected to be knowledgeable about the products they sell and to exhibit reasonable care in their dealings with clients. When they do not, they risk assuming liability for their own actions, as well as for the service levels and behavior of the third-party travel services suppliers with which they affiliate. For example, assume that a travel agent books a room for a client at a hotel in a large city. The agent represents to the client that the hotel is of "four-star" quality in a "safe" part of the city. In fact, the agent knows that the hotel is a "two-star" hotel in a high-crime area of the city. In this case, the travel agent's client is likely to have cause for legal action against the travel agent because of misrepresentation, even if the travel agent was compensated for the booking by the hotel, not the agent's actual client.

Travel agents have historically worked on a commission basis for the hotels, airlines, and other travel suppliers with which they do business. Even when travel agents are paid their commission by a third party, a hotel, or airline, they still owe a fiduciary responsibility to their client, the traveler. More recently, as airlines have reduced travel agent commissions, and as the Internet has made it increasingly popular to book travel without the assistance of a travel agent, some agents are directly charging their clients fees for services provided. When a travel agent charges to a client a fee for booking a hotel or airline reservation, it is clear that the travel agent has a fiduciary responsibility to that client.

Responsibilities Travel agents routinely perform a variety of tasks. Essentially, however, a manager in the travel agent industry has a duty to train and inform his or her in-office and outside sales staff on all phases of travel offered to the public so that these individuals are in a position to provide professional travel advice and to secure the most appropriate travel services available for each client. To that end, travel agents should make every effort to provide accurate information so that their clients can make an informed choice as to travel services. In particular, travel agents who work with clients wishing to travel internationally have a responsibility to advise their clients of the necessary passport and visa requirements for the trip to be undertaken. In addition, travel agents are required, at the time of booking any travel service on behalf of a client, to inform that client about any cancellation fee, revision fee, supplier service charge, or other administration charges, and the amount of these fees. When possible, agents must also inform clients of the existence of cancellation protection and/or insurance.

Regulatory Structure Travel agents and their actions are, of course, subject to the same rules of law as any other business; at this time, there is no federal licensing requirements specifically for travel agents. State regulation does vary, however; currently, 14 states have regulations that mention travel sellers specifically. And because different departments and agencies are responsible for the oversight of these agents in these states, regulations may vary widely indeed, as shown in Figure 13.6.

State	Agency with Regulations Related to Travel Sellers
California	Department of Justice
Delaware	Division of Revenue
Florida	Division of Consumer Services
Hawaii	Department of Commerce and Consumer Affairs
Illinois	Attorney General
Iowa	Office of the Secretary of State; Corporations Division
Massachusetts	Attorney General, Anti-Trust and Consumer Protection Division
New York	Office of the Attorney General
Ohio	State Fire Marshall
Oregon	Department of Consumer and Business Services
Pennsylvania	Bureau of Transportation and Safety
Rhode Island	Department of Business Regulation
Virginia	Department of Agricultural and Consumer Service, Consumers Affairs Office
Washington	Department of Licensing

Figure 13.6 Travel-regulation agencies for various states.

For those states not listed in Figure 13.6, the individual state's office of attorney general or the Department of Commerce is the most likely source of information regarding specialized state laws affecting travel agents.

Like professionals in many other businesses, travel agents have traditionally been primarily responsible for the regulation of their own industry and its members. And though the American Society of Travel Agents (ASTS), in conjunction with the Institute of Certified Travel Agents (ICTA), administers the Travel Agent Proficiency (TAP) test, there are not, at this time, any educational or experiential requirements that agents must meet before registering to take the exam, nor must they complete the TAP before being allowed to sell travel services.

Potential Liability Issues Constantly changing airfares and schedules, literally thousands of available vacation packages, and a vast amount of travel information on the Internet can make travel planning frustrating and time-consuming for travelers. To sort out their options, tourists and businesspeople often turn to travel agents. These professionals are truly "agents" in the agent/principal relationship defined in Chapter 3; that is, they act on behalf of a principal. For example, when a travel agent acts on behalf of a tour company (the principal) when selling a tour to the travel agent's client, the principal will be bound by the actions of the travel agent. In turn, the travel agent will be responsible for informing the client about the identity of the tour company.

Travel agents routinely act as agents for airlines, hotels, car rental agencies, and others. Thus, they have a duty to both their clients and their principals. Common areas of potential travel agent liability and as a result, possible litigation, have revolved around the following issues:

1. **Failure to provide promised services.**

   When a travel agent books a service for its client (the traveler) from a travel services provider, the agent should be confident about the ability of the provider to deliver as promised. That said, not all failures to provide services result in travel agent liability. For example, if a travel agent, in good faith, books a client at a Hilton hotel that normally operates a swimming pool, yet at check-in the guest discovers that the pool is closed for repairs, the agent is unlikely to be held responsible for this event because the client could reasonably foresee that such events happen at hotels. If, on the other hand,

the travel agent booked, for the same client, a whirlpool suite at the hotel knowing that the hotel did not have whirlpool suites, the travel agent would likely to be held liable for the inability of the hotel to provide the promised services. Travel agents have a duty to exercise reasonable care when promising specific travel services will be available from specific travel service providers.

2. Failure to honor agreed-upon pricing.

The ability of a travel agent in one part of the world to control the pricing behavior of a travel service provider in another part of the world is often quite limited. As a result, the traveler who paid a travel agent $100.00 to secure a hotel room reservation in a foreign country could, upon arrival at the hotel, be forced to pay additional monies before the hotel will actually honor the reservation. In such a situation, the traveler may have no immediate option except to pay the additional amount. He or she would likely, however, have a claim against the travel agent for failure to secure the services purchased at the agreed upon price. To avoid such situations, travel agents should deal only with reputable hotels as well as any other providers of travel services.

3. Misrepresentation.

Travel agents generally are paid only upon the sale of a travel service. Unfortunately, this causes unscrupulous travel agents to intentionally misrepresent the services they market in order to make more sales and thus more personal income. When they do so and are caught, they face potential liability. But actual liability in this area is not always easy to determine. For example, Florida is known worldwide as the sunshine state, yet it rains there in some months more than in others. If a travel agent represents to a client living in Vermont that a vacation to Florida during one of the rainy months, would be a chance to "escape to the sunshine," it might be unclear as to whether this statement constituted actual misrepresentation on the agent's part or was in fact a legal marketing effort designed to generate vacation sales, and thus agent commissions. It is highly unlikely that a jury would hold a travel agent responsible for the weather in Florida, but that same agent might be held responsible if it could be established that the agent willfully misrepresented the facts about Florida weather during a specific time period in order to sell more Florida tours.

4. Failure to discover and disclose.

Travel agents generally are not held liable for the negligent acts of the hotels, restaurants, airlines, and other travel service providers they represent, but they are responsible for informing clients about known hazards and risks. Thus, the travel agent who sells an excursion package for a rafting trip down a river would be required to disclose, if it were known, that, typically, several couples, per rafting season, drown on the same trip. The failure to discover and disclose such information puts the travel agent (as well as the clients!) at risk. To avoid this risk, travel agents must become knowledgeable about the products they sell, then they must be forthright with their clients about what they know. In addition, travel agents are liable for disclosing information that could be interpreted as creating a conflict of interest, which could be detrimental to the interests of their client. For example, if the travel agent is also acting as a tour operator selling its own packages to its travel agent clients, it must disclose this fact.

5. Negligence.

Faced with the difficulties involved with relying on other parties to provide the services they sell, travel agents have, commonly, sought to limit their li-

ability exposure through the use of contracts that include exculpatory clause or disclaimers. As noted in Chapter 2, however, the courts are not likely to limit a travel agent's liability via the use of exculpatory clauses or disclaimers when it can be proved that the agent exhibited negligence or gross negligence when interacting with his or her clients.

Of course, consumers who feel they have been treated unfairly by a travel agent have the ability to file a lawsuit against the agent. When large numbers of consumers experience the same alleged breach of law, it is often to their advantage to combine their complaints into a **class action lawsuit**. This is frequently the case when the same incident affects many potential plaintiffs in the same manner. If a class action lawsuit is successful, a period of time is generally established by the court to allow people who can prove they fit the class (suffered the same or similar damages due to the same or similar treatment) to file claims to share in any judgment amounts.

▶ **LEGALESE**

Class action lawsuit: A lawsuit filed by one or more people on behalf of themselves and a larger group of people who were similarly affected by an event.

To illustrate, assume a cruise ship returns to port after four days of what was to be a seven-day cruise. The ship does so because 300 of the 1,500 passengers became ill with a Norwalk-type virus. In this case, all 300 passengers, as well as the 1,200 who had their cruise cut short, may be able to file a successful class action lawsuit if it is determined that there was negligence on the part of the cruise ship's owners or operators that contributed to the viral outbreak.

◀ **SEARCH THE WEB 13.7** ▶

The world's oldest travel agency is the Thomas Cook Agency. Log on to the Internet and enter **www.thomascook.com**.

1. When you arrive, click on Here, under Corporate Web site.
2. Next select About Us.
3. Finally, click Short History to read about Cook's international operations and development.

Tour Operators

Tour operators are an important part of the travel industry, and while they often work closely with travel agencies, they are, from a legal perspective, distinctly different. Hospitality managers will generally encounter both travel agents and tour operators in their normal course of work.

▶ **LEGALESE**

Tour operator: A company whose primary activity is the planning, packaging, and marketing of travel services, including transportation, meals, accommodations, and activities.

Tour operator is the broad term used to identify those varied companies that purchase travel services in large quantity and then market those same services to individual travelers. In many cases, tour operators, because they purchase travel services in bulk, are able to buy them at a significant discount, add a markup that represents the tour operator's profit margin, and still offer travelers lower prices for these travel services than the individual traveler could negotiate on his or her own.

Sometimes travel agencies serve a dual role and also function as tour operators. Legally, however, a tour operator is not an agent, but rather is the principal in the provision of travel services. As a result, the tour operator is directly responsible for the delivery of the travel services they have marketed and sold. This distinction is an important one because principals are responsible for the failure to deliver services as promised, while agents are generally not held responsible, unless they knew or should have known at the time of the booking that services could not be delivered as promised.

Another difference between travel agents and tour operators is the way they earn their income. Tour operators do not work on commission; travel agents do. The tour operator's profit must come from the sale of travel services they them-

selves have previously purchased. For example, if a tour operator purchases 100 tickets to the Super Bowl, with the intention of packaging those tickets with airfare and overnight accommodations to create a "Super Bowl Extravaganza" vacation package, the tour operator will have incurred the cost of the football tickets whether the sale of the vacation packages is successful or not. Thus, while a travel agent may lose an unearned commission when a vacation package they offer for sale does not sell, the tour operator will likely face an out of pocket monetary loss.

Tour operating companies can offer either a limited or a large number of services. Thus, one tour operator may simply market self-guided trips, relying on selected transportation, hotels, and attractions to make up the trip's itinerary. For example, a tour package from such an operator might consist of airline tickets to a large city, hotel reservations, and tickets to the theater. In this case, the tour itself is not guided or managed by the tour operator. Other tour operators elect to offer full-service tours that include transportation, accommodations, meals, attractions, and the actual tour guides or leaders who serve as escorts. Of course, from a legal perspective, the potential for misunderstandings and litigation increases as the number of services offered by the tour operator increases.

Regulatory Structure Just as travel agents are regulated primarily at the state level, so too are tour operators. In most cases, the states are concerned about the financial stability of the tour operator. Since tour operators must generally purchase travel services ahead of their actual use, the financial risk taken by tour operators can be great. Some tour operators overextend themselves and then face financial difficulties that result in nonperformance or nondelivery of promised services for which they have previously received client monies. The state statutes that seek to protect consumers in these situations are varied, but all contain provisions designed to ensure that tour operators can provide the services promised or that consumers can recover money they have paid when the contracted-for services are not provided. Figure 13.7 is an example of this type of law in Hawaii. Note that Hawaiian travel agencies, as well as tour operators, are affected by this statute.

Trust Account. §§468L-5, 468L-23

Travel agencies and charter tour operators must maintain a trust account in a federally insured financial institution located in Hawaii. The account will be established and maintained for the benefit of those paying money to the seller. Payments received for travel services must be deposited in the trust account within five business days.

Withdrawals from the account are permitted for:

- Payments to the entity directly providing the travel services;
- Refunds as required by this law;
- Sales commission;
- Interest earned and credited to the account;
- Remaining funds of a purchaser once all travel services have been provided or once tickets or other similar documentation binding upon the ultimate provider of the travel services have been provided.

Charter Tour Operator - Additional Security §468L-22

In addition to the trust account, charter tour operators offering seven or more air charters per year must provide a bond or letter of credit of $300,000 - $1,000,000

Figure 13.7 Hawaii Revised Statutes, Chapter 468L.

Generally, when a person agrees to buy from a tour operator services or products that include transportation, lodging, an interest or investment in a time-share plan, travel investments, or other travel services, the travel operator must provide the buyer with written disclosure of all terms of the purchase within five business days. After receiving full written disclosure, typically the buyer may cancel such an agreement until midnight of the third business day after the disclosure is received.

Contracts made between tour operators and hospitality services suppliers such as hotels or restaurants will generally be governed by basic contract law. As a result, hospitality managers who do business with tour operators should become familiar with the laws and regulatory requirements that affect their own operations and those of tour operators. One such source of information is the National Tour Association, (NTA), a 4,000-member group consisting of travel professionals working in the packaged travel and tour segment of the industry. The association membership includes tour operators, travel suppliers, and individuals representing destinations and attractions.

◀ SEARCH THE WEB 13.8 ▶

The National Tour Association (NTA) monitors travel law related to tour operators. Log on to the Internet and enter **www.ntaonline.com**.

1. When you arrive, click on Government Relations.
2. Next select Sellers of Travel laws.
3. Read the Travel Sellers law in the state that is closest to you.

Potential Liability Issues Tour operators have specific responsibilities to those from whom they purchase travel services as well as to those persons actually using the services. Common areas of potential tour operator liability and, as a result, possible litigation, have revolved around some of the following issues:

1. Nonpayment for prearranged services.

As a hospitality manager, you are most likely to interact with tour operators when they contract with you for food or lodging services. In most cases, the terms of such agreements are subject to the traditional tenets of contract law. Nevertheless, disagreements can arise, so the best practice for restaurant and hotel managers is to seek payment from tour operators for the services they are to render *before* those services are supplied. Clearly, it is more difficult for a hotel or restaurant to collect payments due to them after services have been provided than it would be if payment were required in advance. Payment terms of contracts with tour operators should be clearly spelled out in any agreements made.

2. Nondelivery of promised services.

Most travel supplier and consumer-oriented complaints about tour operators revolve around the question of whether the travel services supplied were, in fact, those promised. Honest differences of opinion can easily exist in this area. As noted, tour operators usually concentrate on selling travel services; they rarely provide them. Thus, these businesses rely on others to transport, feed, and house their travelers. Inevitably, disputes can arise when promised services are not delivered. For example, did a restaurant selected by a tour operator actually provide tour participants "delicious" meals, as promised in a travel advertisement? Was a rafting trip "exciting?" Was a tour guide "qualified?" Often, the courts are asked to decide these issues because the actual written contracts including such terms are difficult to interpret and quantify.

3. Adhesion contracts.

An **adhesion contract** exists when one party to the contract dictates its nonnegotiable terms to the other party. If the terms of the contract are so one-

▶ LEGALESE

Adhesion contract: A contract whose terms were not truly negotiated or bargained and, as a result, may be so one-sided in favor of the stronger party that the contract is often deemed unenforceable by the courts.

sided as to be deemed unconscionable by the courts, the offending portion—or, in some cases, all of the contract terms—will be set aside, and the contract interpreted as the court sees appropriate. Because tour operator's booking conditions often fit the profile of an adhesion contract—that is, tour buyers are often offered a "take it or leave it" form to sign when selecting a tour—it is important that tour operators offer contracts that will be deemed, by the courts, to be fair to both parties. Thus, excessive cancellation or change fees, broad liability disclaimers, and unreadable fine print (so small it can be assumed to have been used to put off buyers) should be avoided in tour operator contracts.

4. Liability for injury or accident.

Despite all the advances made by the travel industry, travel can still be dangerous. This is especially true in this day of worldwide terrorist activities that are purportedly directed toward specific governments, but inevitably strike individual travelers on a random basis. In addition, many tour activities such as rock or mountain climbing, skiing, motorized sports, or hunting are inherently risky, regardless of the safety precautions taken. In cases such as these, and even in tours that involve no more strenuous or dangerous an activity than walking, accidents will happen, dangerous unforeseen as well as foreseen events will occur, and even the weather may cause injury or accident. All these raise the question of liability, especially for tour operators who, in most cases, contract for, rather than directly provide, the services they sell. Generally, the courts will not hold tour operators liable for the negligent actions of travel services suppliers unless they are owned by the tour operator. Tour operators will be held liable, however, for their own negligence.

5. Misrepresentation.

Most tour operators are honest, but some are not. Misrepresentation can occur whenever a tour operator knowingly misrepresents the fares and charges for their services, knowingly sells transportation when the tour operator has not made a binding commitment with the carrier designated in the agreement sold to the buyer, or knowingly misrepresents other travel services to be provided in an unscrupulous effort to entice buyers to buy. Unfortunately, misrepresentation can be difficult to prove. Therefore, as a hospitality manager doing business with a tour operator, you should strive to understand exactly what you have been contracted to supply, as well how your company will be presented in the marketing efforts of the tour operator.

ANALYZE THE SITUATION 13.3

As part of a three-day "Mystery Tour," Joan Larson of Apex Travel, Inc., a Wisconsin-based tour operator, contacted the Ragin Cajun restaurant in Illinois, for the purpose of reserving 120 seats for dinner on a Friday night in September. The tour group arrived, and one male group member, after three drinks, began making rude and suggestive comments to one of the restaurant's female servers. When Steve, the restaurant manager approached Gene, the Apex tour leader, about the situation, Gene maintained the comments were probably made in harmless fun and should be overlooked by the restaurant. "Besides," stated Gene, "our bus is leaving to go back to our hotel in one hour and that particular tour group member lives several hundred miles away and is unlikely to ever see that server again." As the Ragin Cajun's restaurant manager:

1. What are your legal responsibilities to your server?
2. Who is responsible for controlling this guest's behavior?
3. How would you respond to Gene, the tour operator?
4. What potential liability does Apex face in this situation?

13.4 TRANSPORTATION AND COMMON CARRIERS

The method of transportation travelers select for their trip is typically one of the most important decisions they make. Speed, comfort and safety, and cost are all factors that determine which method of transportation they will choose. Of those, the reduction in the cost of transportation is a primary factor contributing to the total amount of world travel and, subsequently, to the rise in the number of **common carriers**.

▶ **LEGALESE**
Common carrier: A company or individual that is in the regular business of transporting people and/or freight for a fee. Examples include airlines, cruise lines, trains, and buses.

Travel-related common carriers have a responsibility to service the transportation needs of most any passenger who wishes to travel. Generally, these carriers have no more right to refuse a passenger, if they have sufficient room, than an innkeeper has to refuse a guest (see Chapter 10). A common carrier has a special duty to its passengers to see that they arrive at their destination safely, which includes using the highest degree of care to protect them against physical harm. This is so important that the quality of a country or region's common carriers determines, in large part, the amount of tourism activity in that area, as well as how much others in the travel industry want to invest in and develop the area's tourism infrastructure.

The Transportation Industry

The transportation industry includes both those businesses carrying people and those moving freight. This is true because manufacturers need to safely transport their goods from one place to another in the same way that passengers must be transported. Historically, stage coaches, steamships, and railroads developed operating systems that accommodated mail, freight, and passengers. Today, some businesses in the transportation industry, such as United Parcel Service (UPS) and Federal Express (FedEx), specialize in the transportation of freight, others emphasize passenger transportation, and still others provide both. For the hospitality manager, knowledge of the laws related to the passenger transportation industries is very important. These include the airlines, as well as rail, cruise ship, bus, and—although they are not technically common carriers—car rental companies.

Airlines U.S. airlines carry over 500 million passengers per year. In most cases, airplanes are the preferred method of long-distance travel for both leisure and business travelers—even despite the tragic events of 9/11. Since 1954, the total number of passengers served by the airline industry has increased significantly each year, because of the speed and relatively low cost. Of course, with large numbers of travelers comes the potential for large numbers of legal issues, especially given the number of factors that can affect on-time arrivals and departures, along with the inconvenience and difficulty caused by missed connections, damaged luggage, or physical injury. While it is rare, airplanes can and do crash, and lawsuits inevitably result. In all cases, the cause of the crash is investigated thoroughly, and the findings are used to assist in the assignment of liability for the accident and to determine the law that applies to the particulars of the crash.

Precisely which laws apply to the relationship between a service provider and a consumer depends, in large measure, on what each party has promised and agreed to. The same is true of the relationship between airlines and their passengers. The details of the contract made between an airline and the passengers it carries is called the **tariff**, which, by law, must be made available, in its entirety, from the airline. To enforce the terms of its tariff, an airline must:

▶ **LEGALESE**
Tariff: The agreement between an airline and its passengers. When purchasing a ticket, the passenger agrees to the terms of the tariff.

- Ensure that passengers can receive an explanation of key terms identified on the ticket from any location where the carrier's tickets are sold, including travel agencies.

- ▶ Make available for inspection the full text of its contract (tariff) at each of its own airport and city ticket offices.
- ▶ Mail a free copy of the full text of its tariff to the passenger upon request.

The terms of the tariffs affect how passengers are treated. For example, each airline has its own policies about what it will do for passengers whose flights are delayed. There are no federal laws or requirements in this area. Some airlines, especially those charging very low fares, do not provide any amenities to stranded passengers. Others may not offer amenities if the delay is caused by bad weather or something else beyond the airline's control. Contrary to popular belief, airlines are not required to compensate passengers whose flights are delayed or canceled. Compensation is required by law only when a passenger is "bumped" from a flight that has been overbooked.

Airlines in the United States operate flights regionally, nationally, and internationally. When operating solely within the borders of the United States, federal law applies. This is because the U.S. Supreme Court has ruled that the Airline Deregulation Act of 1978 and the Federal Aviation Act 1958 preempt all state statutory and common law claims related to rates, routes, or services of air carriers.

▶ **LEGALESE**

Warsaw Convention: Short for the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, this agreement set limits on the liabilities of airlines that follow established guidelines for the safe operation of international airline flights.

In a similar manner, when airlines operate internationally, they are subject to the rules and liability limitations of the **Warsaw Convention**. The agreements made at the Warsaw Convention have been amended and updated several times. Today, as modified by subsequent agreements, it governs claims arising from international air transportation, and preempts common law and those laws created by various countries in which airlines operate. The Warsaw Convention applies to all international transportation supplied to persons, baggage, or goods by any aircraft for hire. It sets forth a comprehensive scheme that defines the liability of international air carriers for personal injuries, damage, and loss of baggage and goods, and damage caused by delay. The United States is a **signatory** of the Warsaw Convention, which means that, for international flights, U.S. consumer protection laws are preempted by its terms.

▶ **LEGALESE**

Signatory: An entity that signs and agrees to abide by the terms of a document.

Trains Train transportation was instrumental in the early development of the United States, but today its role is far smaller than that of airplanes and automobiles. Although rail companies can move freight efficiently, and make money doing so, given the present structure of the rail system in this country, it is simply unprofitable in most cases to operate trains for the purpose of passenger transportation. This should come as no surprise. Public dollars are routinely used to build airports, and the airlines that utilize them profit from doing so. In a similar manner, the automobile industry has benefited from the immense investment in public roads and highways undertaken by federal, state, and local governments. The average U.S. citizen has been less enthusiastic, however, about using tax dollars to invest in the land, track, signals, and equipment needed to build and maintain a reliable passenger rail system. Consequently, with the exception of specific areas or routes, especially in highly populated regions, passenger rail service is not routinely available. There are, however, still nationwide passenger rail routes operated by Amtrak.

Despite a widely held belief to the contrary, Amtrak—whose name is a blend of the words "American" and "track"—is not a part of the federal government. Amtrak, whose official name is the National Railroad Passenger Corporation, is, ostensibly, the nation's for-profit passenger rail service. However, since its inception in 1971, it has been dependent upon the federal government (as well as some state governments) for grants that enable it to continue offering its services. In 2003, Amtrak employed more than 20,000 individuals and, according to its annual statement, operated 2,141 railroad cars, including 168 sleeper cars, 760 coach cars, 126 first-class/business-class cars, 66 dormitory/crew cars, 225

Amtrak's fares, time schedules, equipment, routing, services and accessibility information are not guaranteed, are subject to change without notice, and form no part of the contract between Amtrak and a passenger. Amtrak reserves the right to change its policies without notice. Amtrak disclaims liability for inconvenience, expense, or damage resulting from errors in its timetable, shortages of equipment, or delayed trains, except when such a delay causes a passenger to miss a guaranteed connection. When a guaranteed connection is missed, Amtrak will provide alternate transportation on Amtrak, another carrier, or overnight hotel accommodations at Amtrak's discretion. It may be necessary for Amtrak to provide substitute transportation and to cancel service when necessitated by operational or safety conditions. (Effective 9/2003)

Figure 13.8 Amtrak liability disclaimer.

lounge/café/dinette cars, and 92 dining cars. Baggage cars make up the remainder of the fleet. More than 65,000 travelers per day, could, if they wished to do so, travel by rail to a destination in the United States. Since its inception, New York City, Philadelphia, and Washington DC are the most popular boarding and disembarkment points for Amtrak rail travelers, reflecting actual use of the railroad for large-city commuting rather than long-distance travel.

Amtrak, like all other common carriers, is responsible for the safe delivery of its travelers and can be held liable for its negligence. And as on airplanes, train delays can occur and travelers can be inconvenienced, and as a common carrier, Amtrak may bear some responsibility for the resulting impact on travelers. As can be seen in Figure 13.8, Amtrak's liability disclaimer seeks to limit its liability for the effects of traveler inconvenience by carefully detailing its responsibility in the event of a travel disruption.

◀ SEARCH THE WEB 13.9 ▶

Rail travel takes longer than air travel, but passenger fares, in some cases, make it more cost-effective. Log on to the Internet and enter **www.amtrak.com**.

1. At the site, price a passenger fare between New York City and Chicago.
2. Now price the same trip by airplane on **www.Travelocity.com**.
3. Compare the travel time involved with the fare savings. To whom do you believe train travel would be most appealing?

Cruise Ships Before the advent of airplanes, ships and luxury liners were the only available method of traveling from one continent to another. While the use of ships for business and vacation travel has generally decreased from the early 1900s through today, the use of cruise ships for, specifically, vacation travel has increased steadily. According to the Cruise Line Industry Association (CLIA), over 10.5 million passengers took a cruise in 2003.

The U.S. government also keeps statistics on cruise lines. The Maritime Administration (MARAD), which is part of the U.S. Department of Transportation, is responsible for the U.S. maritime transportation system of freight cargo and cruise travel. MARAD's statistics cover the 10 cruise lines that operate cruise ships with a capacity of more than 750 passengers. These 10 cruise lines are Carnival, Royal Caribbean, Disney, Celebrity, Holland America, Costa, Norwegian, Crystal, Princess, and Cunard. For vacation cruises, Miami is the largest departure port in the United States; Ft. Lauderdale is second. The western Caribbean was the most visited destination in 2003, with Alaska finishing second. Cruises typically range in length from three days to three months, with those cruises in the