

New Law Taxing and Regulating Short-Term Rentals January 2019

Pursuant to G.L. c. 64G, Massachusetts has long imposed a state excise tax of 5.7% on the transfer of occupancy of a bed and breakfast establishment, hotel, lodging house, or motel. In addition, municipalities have been authorized to adopt G.L. c.64G, §3 to assess an additional “local option” room excise tax.

On December 28, 2018, Governor Baker signed into law “An Act Regulating and Insuring Short-Term Rentals,” Chapter 337 of the Acts of 2018 (“Act”). The Act, among other things, amended G.L. c.64G by extending to short-term rentals the application of the state and local option room excise taxes. This amendment has far reaching implications for municipalities and the short-term rental industry, discussed in detail, below.

Definitions. The following defined terms are key to understanding the Act.

Short-Term Rental: Rental of rooms, apartments, houses, or other units to be occupied for no more than 31 consecutive calendar days, excluding hotels, motels, lodging houses and bed and breakfast establishments; short-term rentals may be owner-occupied, tenant-occupied, non-owner occupied, or professionally managed properties.

Bed and Breakfast Establishment: A private owner-occupied house renting four or more rooms, with breakfast included.

Bed and Breakfast Home: A private owner-occupied house renting up to three rooms, with breakfast included.

Operator: A person operating a bed and breakfast establishment, hotel, lodging house, short-term rental or motel.

Applicability of State Excise Tax. The Act revises state law to add “short-term rentals” to those businesses already subject to the state excise tax: bed and breakfast establishments; hotels; lodging houses; and motels. In addition to those entities one might expect to be excluded from the state excise tax (such as government institutions, non-profit institutions, nursing homes, dormitories), bed and breakfast homes are explicitly excluded.

Further, short-term rentals of less than \$15 per day, registered operators who rent for fewer than 14 days in one calendar year, and military personnel travelling on official military orders, are exempt from the state and any local option room occupancy excise tax.

Effective Date of State Room Excise Tax on Short-Term Rentals. The state room excise tax will be effective for transfers of short-term rentals commencing on or after July 1, 2019, except for contracts which were entered into before January 1, 2019. While the Act authorizes an intermediary, such as a real estate agent or a hosting

platform such as AirBNB to collect the state room excise tax, the short-term rental operator remains liable for payment of any applicable taxes or fees.

Rentals that begin before July 1, 2019, even if the rental term extends beyond that date, are exempt from the state room excise tax. Additionally exempt are rentals for a price of less than \$15 per day and operators who rent out their property for fewer than 14 days in one calendar year.

The Department of Revenue has issued FAQs on the new law and we anticipate further guidance.

Local Room Excise Tax. A municipality seeking to impose a local room excise tax must accept the provisions of G.L. c.64G, §3A by a majority vote of its local legislative body and set the tax at an amount of up to 6% of the total value of the stay. If a municipality votes to accept G.L. c.64G, §3A, the local option room excise tax will take effect on the first day of the calendar quarter following 30 days after its acceptance, or such later first date of a calendar quarter as the municipality designates. For example, if a municipality votes to accept the statute, or to change the tax percentage, and does so prior to May 31, 2019, the local option room tax, including the tax on short-term rentals, will be applicable on July 1, 2019, or such later calendar quarter as the legislative body may determine, at the rate set by the legislative body.

Municipalities that have previously accepted G.L. c.64G, §3A need take no further action, and the applicable local room excise tax will automatically be imposed on short-term rentals commencing on or after July 1, 2019 in the same manner as the state tax.

A municipality, by majority vote of its legislative body, may change the percentage rate of the local option excise tax. Further, like any local option statute, upon the expiration of three years from the date of acceptance, a municipality may revoke its acceptance G.L. c.64G, §3A by a majority vote of its legislative body. However, be aware that G.L. c.64G, §3A prohibits any such change more than once in a 12-month period.

The operator, or an intermediary with whom the operator has a signed agreement to collect or facilitate the collection of rent and applicable taxes and fees, is responsible for collecting the local tax room excise tax from tenants and remitting the tax to the Department of Revenue monthly. The Department will then distribute such local excise to the municipality at least quarterly. Municipalities may request information as to the total amount of tax collected in the preceding fiscal year.

Optional Community Impact Fees. The Act creates two new local options for those municipalities that have adopted G.L. c. 64G, §3A. First, by a vote of its legislative body to adopt G.L. c.64G, §3D(a), a municipality may impose a community impact fee of up to 3% of the total amount of rent for each change of occupancy for professionally managed units. For these purposes, a unit will be subject to the community impact fee if it is one of two or more units operated by the same operator in a single city or town, and is not located “within a single-family, two-family, or three-family dwelling that includes the operator’s primary residence.” The local acceptance vote must also set the particular amount of the fee.

If the municipality has accepted G.L. c.64G, §3D(a), then it may also accept G.L. c.64G, §3D(b) for the purpose of assessing an additional community impact fee of up to 3% on the transfer of occupancy of a short-term rental located within a two- or three-family dwelling that includes the operator’s primary residence.

The operator is responsible for paying the community impact fee directly to the municipality on a monthly basis.

Municipalities must dedicate at least 35% of the revenue received from the community impact fee to affordable housing or local infrastructure projects.

Dedication of State or Local Room Excise Taxes or Fees. Typically, all revenue received by a municipality must be credited to the General Fund. However, the Municipal Modernization Act amended G.L. c. 40, §5B, the stabilization fund statute, to allow a municipality, as a local option, to dedicate without further appropriation to an existing stabilization fund or to a special purpose stabilization fund not less than 25% of certain fees, charges, or receipts, including the local option room excise tax. To make such a dedication, a municipality must, by a two-thirds vote of its legislative body, accept the Fourth Paragraph of G.L. c.40, §5B. The Department of Revenue has advised that the new local option community impact fees will be treated as receipts reserved accounts (unless the municipality opts to dedicate such funds to a stabilization account).

State Regulation of Short-Term Rentals. Operators of short-term rentals will be required to register with the Department of Revenue using MassTaxConnect to obtain a certificate of registration. Additionally, the Executive Office of Housing and Economic Development is required to establish and maintain a registry for all G.L. c.64G operators, including short-term rentals, identifying the location of such entities only by street name and municipality. The Executive Office must promulgate regulations related to the Registry by September 30, 2019.

Local Regulation of Short-Term Rentals. General Laws c.64G, §14 states that municipalities may enact ordinances and bylaws to regulate registered operators, including the imposition of civil penalties for violations. The statute provides that such bylaws or ordinances may include local registration and licensing, limitations on the number of local licenses or permits issued, limitations on the number of days per year a property may be rented, compliance with applicable codes, and health and safety inspections at a frequency determined by the municipality. Municipalities may also publish a “public registry” of all short-term rentals within their limits, and include such information as they may determine, including where such accommodations are located. Municipalities may also set municipal fees to reimburse them for costs associated with necessary local administration of the short-term rental program.

Pursuant to the Home Rule Amendment to the Massachusetts Constitution, municipalities may regulate other aspects of short-term rentals not enumerated in the Act provided that such ordinances and bylaws are “not inconsistent” with the law. In addition, boards of health retain authority to enact health regulations to ensure that short-term rentals do not constitute a threat to public health and safety.

Planning. The Act furthers regional and statewide planning efforts, including, for example, requiring the Department of Revenue to publish annually on its website, and provide to regional and municipal entities upon request, statistical data regarding rentals. The Act also establishes a commission to report by January 30, 2020 on the feasibility and use of rental units for local and regional emergency shelter during extreme weather events and other states of emergency.

Cape and Islands Water Protection Fund. In Barnstable, Dukes, and Nantucket counties, G.L. c.64G, §3C imposes an additional room excise tax of 2.75% on bed and breakfast establishments, hotels, motels, lodging houses, and short-term rentals to generate revenue for a Cape and Islands Water Protection Fund (“Fund”). The Act amends G.L. c. 29C, by adding §§19 and 20, establishing the Fund and a Management Board with a representative from each municipality in the Fund. The additional 2.75% room excise tax is deposited directly into the Fund and the Management Board must make “an equitable distribution among participating municipalities consistent with revenue deposited from each municipality into the Fund.”

A municipality in these counties will be a member of the Fund if it is subject to a so-called Section 208 area-wide wastewater management plan pursuant to the Federal Clean Act or a comprehensive wastewater management plan (“CWMP”) under the Massachusetts Clean Waters Act, if the Department of Environmental Protection (“DEP”) determines that the CWMP is a “suitable equivalent plan.” Because all municipalities in Barnstable County are already subject to a 208 Plan, they are automatically in the Fund. Municipalities in Dukes and Nantucket Counties will not be in the Fund unless a municipality takes the steps set forth in the law, including a request to, and a determination by, DEP that the municipality has a suitable equivalent plan.

Although joining the Fund is not subject to local acceptance, a two-thirds vote of town meeting is required for a town to withdraw from the fund. A town may exercise this option beginning on March 28, 2020, one year after the effective date of the Act, however, a municipality may not withdraw from the Fund during any period in which it receives a financial assistance award from the Fund.

Once a municipality withdraws from the Fund, it may return to the Fund by a majority vote of Town Meeting. However, under such circumstances, the municipality must wait at least two years from the date of its return to receive any financial assistance from the Fund.

Please contact Joel B. Bard (jbard@k-plaw.com) or John W. Giorgio (jgiorgio@k-plaw.com) at 617.556.0007 if you have any questions regarding the Act or regulation or taxation of short-term rentals.

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