

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2015-2016 Regular Session

SB 761 (Hall)
Version: April 6, 2015
Hearing Date: May 12, 2015
Fiscal: No
Urgency: No
RD/TH

SUBJECT

Advertising: Internet private residence rental listings: notice

DESCRIPTION

This bill would require that a hosting platform provide a specific notice to hosts listing a residence for short-term rental on a hosting platform, as specified. The notice must be provided immediately before the occupant lists each real property on the online platform or Internet Web site, and must require the occupant to interact with the online platform Internet Web site to affirmatively acknowledge that he or she has read the notice. The bill would define various terms, including "hosting platform," for these purposes.

(This analysis reflects author's amendments to be taken in Committee.)

BACKGROUND

It is not uncommon for a tenant with a lease to need to move out before the lease ends, or require assistance in paying their rent. In these situations, the tenant may want to sublease the rental unit or assign the lease to another tenant; however, the tenant cannot sublease the rental unit or assign the lease unless the terms of the lease allow the tenant to do so. A "sublease" is a separate rental agreement between the original tenant and a new tenant to whom the original tenant rents all or part of the rental unit. In contrast, an "assignment" is a transfer of person's rights as a tenant to someone else. The tenant might use an assignment if he or she has a lease and needs to move permanently before the lease ends. Many rental agreements, however, specifically forbid the tenant from subletting all or any part of the premises without landlord approval, or using the premises for any commercial purpose.

In recent years, California has seen a rise in what is known as the "sharing economy," with the influx of ridesharing businesses such as "Lyft" and "Uber" and homesharing businesses such as "Airbnb," "FlipKey," and "VRBO." Generally, homesharing is

recognized as an agreement between two parties, in which one party rents out all or part of his or her home to another party on a temporary, one-time basis (i.e. Airbnb and HomeAway).” (DuPuis and Rainwater, *The Sharing Economy: An Analysis of Current Sentiment Surrounding Homesharing and Ridesharing*, National League of Cities (2014) <<http://www.nlc.org/Documents/Find%20City%20Solutions/City-Solutions-and-Applied-Research/Sharing%20Economy%20Brief.pdf>> [as of May 7, 2015].)

With the increasing popularity of short-term vacation rentals made available through websites such as Airbnb and VRBO, among others, however, questions have arisen as to whether tenants (as opposed to homeowners) of rentals are in violation of their rental agreements if they list their rental on these platforms for short-term rent. According to some, “[w]ith an Airbnb rental, the tenant is using the premises for an illegal commercial purpose, and is often creating a nuisance and substantial interference with the comfort, safety or enjoyment of the other building occupants by allowing strangers access who have not been screened by the landlord. These are grounds for terminating tenancy.” (See San Francisco Apartment Association, *SF Apartment: August 2014, Legal Q&A* <http://www.sfaa.org/aug2014/1408_legalqa.shtml> [as of May 7, 2015].) Moreover, while the tenant could be subject to eviction for those activities, there is debate over whether the 3-day notice that may be served needs to offer a right to cure. “Short-term rental, like other forms of subletting, falls into a gray area. Some argue that it is curable simply by stopping any future subletting. Others argue that the subletting, having already occurred, is no longer curable.” (*Id.*)

While questions may linger, it is clear that a tenant could be at risk of eviction if not careful, and that many are not even aware of the possibility of this risk as they are exposing themselves to as they participate in this relatively new economy. This bill seeks to provide a specified notice to the tenant that would make them aware of the potential restrictions in their rental agreement that could subject them to eviction.

CHANGES TO EXISTING LAW

Existing law defines the rights and duties of landlord and tenants, including presumptions regarding the terms of the hiring, the lawful means of terminating a lease or rental agreements, and the remedies available to the respective parties in the event of a breach of a lease or rental agreement, including remedies in the event of a tenant's wrongful assignment or sublet of a lease. Generally, the landlord may elect either to continue the lease in effect or to terminate it and collect damages. (Civ. Code Secs. 1940 et seq., 1951.4)

Existing law provides that a tenant of real property, for a term less than life, or the executor or administrator of his or her estate heretofore qualified and now acting or hereafter to be qualified and act, is guilty of unlawful detainer if he or she engages in certain activity. (Civ. Code Sec. 1161.) Existing law defines an unlawful detainer to include, among others, the situation where a tenant continues in possession, in person

or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease. (Civ. Code Sec. 1161(3).)

Existing law provides that a tenant who assigns, sublets, or commits waste upon the premises contrary to the conditions or covenants of the lease, or maintains, commits, or permits the maintenance or commission of a nuisance upon the premises, or uses the premises for an unlawful purpose, is guilty of an unlawful detainer and may, upon service of three days' notice to quit, be evicted from the premises by the landlord. (Civ. Code Sec. 1161(4).)

Existing law requires an operator of a commercial Web site or online service that collects personally identifiable information through the Internet about individual consumers residing in California who use or visit its commercial Web site or online service to conspicuously post its privacy policy on its Internet Web site. (Bus. & Prof. Code Sec. 22575 et seq.) Existing law also limits advertising by an operator of an Internet Web site, online service, online application, or mobile application directed to minors, as provided. (Bus. & Prof. Code Sec. 22580 et seq.) Existing law also provides provisions that protect the privacy of student's online personal information. (Bus. & Prof. Code Sec. 22584 et seq.)

This bill would establish requirements for a hosting platform providing internet private residence rental listings. This bill would define "hosting platform" to mean a marketplace that is created for the primary purpose of facilitating the rental of a residential unit offered for occupancy for tourist or transient use for compensation to the offeror of that unit, and the operator of the hosting platform derives revenues, as specified, from providing or maintaining that market place. "Facilitating" includes, but is not limited to, the act of allowing the offeror of the residential unit to offer or advertise the residential unit on the Internet Web site provided or maintained by the operator.

This bill would require a hosting platform to provide the following notice to hosts listing a residence for short-term rental on a hosting platform:

If you are a tenant who is listing a room, home, condominium, or apartment, please refer to your rental contract or lease, or contact your landlord, prior to listing the property to determine whether your lease of contract contains restrictions that would limit your ability to list your room, home, condominium, or apartment. Listing your home may be a violation of your lease or contract, and could result in legal action against you by your landlord, including possible eviction.

This bill would provide that the mandated notice must be in a font size that is equal to or greater than 100 percent of the standard font size of the other paragraphs on the online platform or Internet Web site or equal to the default font size on the online platform or Internet Web site.

This bill would require that the notice be provided immediately before the occupant lists each real property on the online platform or Internet Web site, and that the occupant interact with the online platform Internet Web site to affirmatively acknowledge that he or she has read the notice.

COMMENT

1. Stated need for the bill

According to the author:

Over the past few years, there has been significant growth in online Web site companies that allow people to rent a room or their entire unit on a short-term basis. These companies include AirBnb, VRBO, Homeaway, Flipkey, and others. They allow not only property owners to list, but tenants who rent apartments as well. Unlike homeowners, however, tenants who list their rooms or units, create a host of potential problems for the property owner and neighboring tenants, while at the same time, they jeopardize their own tenancy.

In California, the majority of rental leases contain a prohibition against subletting. Under current law, landlords have the right to evict tenants for subletting and for violating the rental agreement. Unfortunately, many tenants are not aware of these prohibitions. Standard leases include many legally required disclosures that can make the lease as long as 25 pages and many tenants may not have reviewed their lease in years.

Short-term rental Web sites provide little or no disclosure to prospective tenants who list their rooms or units for rent. By providing no information to prospective tenants, short-term rental websites are putting unsuspecting tenants in a position where they can face eviction.

Short-term rental websites are great and valuable tools, but they must be used responsibly in accordance with existing laws and contractual agreements. Tenants in apartments who list with short-term rental Web sites can create significant safety issues for their neighbors and the community. Short-term guests have had no screening or background checks, and keys or gate codes are given by the listing tenant to the short term guests. The risk of liability is significant for both tenants and owners.

SB 761 is intended to protect and educate tenants about the risks of listing their room or unit on short-term rental Web sites. It will simply require short-term rental companies to disclose very clearly and openly that listing a room or unit may be a violation of the lease and may subject the tenant to eviction. [. . .]

In support, the San Diego County Apartment Association (SDCAA) writes that “renting-out/sub-leasing a rental unit without permission, in violation of one[']s lease agreement, could be grounds for eviction. This has become an increasing problem with sites like Airbnb, et.al. This bill will put the person on notice that renting-out units may cause them to be evicted.”

2. Bill would provide legally factual warning to tenants

The sponsor of this bill, the California Apartment Association (CAA) notes that this is a problem specific to tenants of rentals. “Unlike homeowners, tenants who list their rooms or units on short-term rental websites create a host of potential challenges for the property owner and neighboring tenants, and at the same time, listing tenants jeopardize their own tenancy.” This, they assert, is due to the fact that in this state, “the majority of rental leases contain a prohibition against subletting” and landlords have the right under existing law to evict tenants who sublet in violation of the rental agreement. This is also compounded by the fact that many tenants are unaware of such prohibitions, especially when a standard lease can be as long as 25 pages, includes numerous notices, and the tenant has not reviewed the lease in years. CAA writes that “[w]hile eviction is never the preferred option for a landlord, the potential liability risks associated with short term rentals are too great for landlords and the neighboring tenants.” As described the proponents:

Tenants in apartments who list with short-term rental websites can create safety issues for their neighbors and the community. Short-term guests have had no screening or background checks, and keys or gate codes are given out by the listing tenant to strangers. Short-term rental web sites provide little or no disclosure to prospective tenants who list their rooms or units for rent. By providing no information to prospective tenants, short-term rental web sites are putting unsuspecting tenants in a position where they can face eviction.

Accordingly, this bill would arguably protect tenants by educating them about the potential risks of listing their room or unit on a short-term rental website, such as Airbnb, VRBO, and others. The bill would require that a “hosting platform” –i.e. a marketplace that is created for the primary purpose of facilitating the rental of a residential unit offered for occupancy for tourist or transient use for compensation to the offeror of that unit in order to generate specified fees or revenue – provide a specific notice to the hosts listing a residence for a short-term rental on the hosting platform. That notice would simply put the tenant on notice that they should refer to their rental contract or lease or contact their landlord, prior to listing the property to determine whether their lease of contract contains restrictions that would limit their ability to list their room, home, condominium, or apartment. The notice would also clearly indicate to the tenant that listing their home may be in violation of their lease or contract and result in legal action by their landlord – including eviction.

As a matter of public policy, insofar as hosting platforms generate revenue from facilitating activities that may cause unwitting tenants harm in the case of an eviction, they arguably should provide reasonable notice of factually accurate information of the potential legal and practical consequences to the tenant from participating in those activities without legal authorization from their landlord. The possible harm can be even direr in localities that are particularly attractive to tourists, as the tenants in such localities (such as San Francisco) face incredibly high rents and could risk losing their rent-controlled home over a short-term sublet that they did not realize would be in violation of their lease agreement.

3. Opposition concerns

Airbnb writes in opposition to the bill (as in print):

For thousands of Californians, home sharing provides a vital economic lifeline that makes it possible to pay the bills and pursue their dreams while the cost of living increases rapidly across our state. [. . .] As more and more middle class Californians embrace innovations that enable them to make efficient use of their resources, it is important to avoid unnecessary hurdles that stunt this new peer to peer economy.

We understand [the author’s] intentions with the proposed disclosure and have been working with his office to craft language that achieves his goal. We are concerned, however, that the currently proposed disclosure implies that all leases in California are constructed identically. Indeed, there is no standard lease language utilized across the State of California, and the proposed disclosure should clearly and adequately alert hosts, as Airbnb already does, of the importance of checking their lease and understanding their rights. Internet platforms like Airbnb cannot play the role of interpreting private contractual arrangements or mediating disputes that might arise between private parties.

To address their concerns, Airbnb requested two amendments, which are largely embodied in the recent amendments (*see* below). However, whereas Airbnb would have preferred the second half of the notice to provide that “Listing your home may, or may not, constitute a material breach of your lease, depending on the specific terms of your lease. A material breach of your lease could result in legal action against you by your landlord,” the bill provides, instead, “Listing your home may be a violation of your lease or contract, and could result in legal action against you by your landlord, including possible eviction.”

4. Amendments

This analysis reflects the following author’s amendments, for which mock-up will be provided in Committee.

Author’s amendments:

On page 2, in line 5, strike “private residence rental listings” and insert: “*Private Residence Rental Listings*”

On page 2, between lines 8 and 9, insert: “(a) “*Hosting platform*” means a marketplace that is created for the primary purpose of facilitating the rental of a residential unit offered for occupancy for tourist or transient use for compensation to the offeror of that unit, and the operator of the hosting platform derives revenues, including booking fees or advertising revenues, from providing or maintaining that marketplace. “*Facilitating*” included, but is not limited to, the act of allowing the offeror of the residential unit to offer or advertise the residential unit on the Internet Web site provided or maintained by the operator.”

On page 2, in line 9, strike “(a)” and insert: “(b)”

On page 2, in line 11, strike “(b)” and insert: “(c)”

On page 2, strike lines 14 to 18, inclusive, on page 3, strike out lines 1 to 8, inclusive, and insert:

22592. *A hosting platform shall provide the following notice to hosts listing a residence for short-term rental on a hosting platform:*

If you are a tenant who is listing a room, home, condominium, or apartment, please refer to your rental contract or lease, or contact your landlord, prior to listing the property to determine whether your lease of contract contains restrictions that would limit your ability to list your room, home, condominium, or apartment. Listing your home may be a violation of your lease or contract, and could result in legal action against you by your landlord, including possible eviction.

On page 3, line 15, strike “commits to offer” and insert: “lists”

The following amendment would address a drafting error in the notice language that may inadvertently imply that eviction is only possible with respect to short-term rentals of homes (in contrast to rooms, condominiums, or apartments). This language would track the language used elsewhere in the notice.

Suggested technical amendment:

On page 3 of the mockup, strike “Listing your home may” and insert “Listing your room, home, condominium, or apartment may”

The following amendments are also suggested to strike unnecessary language.

Suggested amendment:

On page 2, strike lines 9-13

Support: San Diego County Apartment Association (SDCAA)

Opposition: Airbnb

HISTORY

Source: California Apartment Association

Related Pending Legislation: None Known

Prior Legislation: None Known
