

At Your Service

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CALENDAR

January 2016 - March 2016 - Boston Wine Festival - Boston, MA
January 20, 2016 - Bisnow Restaurant Development Summit - Boston, MA
March 13-15, 2016 - New England Food Show - Boston, MA

Retailers and Restaurants Beware: Liability shift for EMV Chip Credit Cards



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Retailers and Restaurants Beware: Liability shift for EMV Chip Credit Cards

As of October 1, 2015, a liability shift has occurred between credit card companies and retailers/restaurants with regard to EMV chip cards. EMV, which stands for Europay, MasterCard and Visa, is a global standard for cards equipped with chips and the reader technology used to authenticate chip card purchases. In the wake of widely publicized data breaches, the credit card companies themselves have raised the standard for credit card transactions by “shifting” liability to retailers if they do not accept EMV credit cards.

What does this mean for retailers and restaurants?

Before October 1, 2015, any time a credit card was copied and used for improper purchases, the credit card company would refund the fraudulent purchases to the store. This was based on the understanding that the credit card company could and should do more to verify the card holder's identity.

After October 1, 2015, if a customer provides an EMV credit card and the retailer/restaurant does not have the appropriate EMV reader, then the liability for fraud shifts to the retailer/restaurant. The rationale is that the credit card issuer has done what it can to verify the consumer identity (by creating the EMV credit card) and the store failed to do what was necessary to protect the consumer. Accordingly, all parties are incentivized to upgrade to EMV.

The switch to EMV means that retailers and restaurants must add EMV terminals and processing system to comply with new liability rules. While the cost of upgrading will be significant, the losses incurred could potentially be far greater where EMV chip cards were used and the retailer has not upgraded. Accordingly, it is recommended that retailers upgrade to EMV as soon as possible. As a way to potentially defray the costs, companies should reach out to their credit card processors who may participate in the costs of upgrading to EMV.

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Suburban Restaurant Development Requires Careful Local Zoning Consideration

Pre-existing/non-conforming uses, a particular concern



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As Metro Boston expands into suburbia the demand for dining and entertainment outside of the city has skyrocketed. So too has the demand for suitable retail space in towns where residential-only zoning is generally the rule. While larger mixed use developments along 128 enjoy the benefit of comprehensive planning and zoning approvals under special permits, there are many commercial uses, including restaurants, located in residential neighborhoods that are allowed to remain in place as pre-existing, non-conforming structures and uses. Any restaurant presently operating in such a space or any operator in search of a suitable location outside of Boston should be aware of the basics behind zoning outside of the city, including the status of pre-existing, non-conforming uses and structures.

Generally, structures *and* uses that existed prior to the adoption of a zoning ordinance that would otherwise prohibit such structure or use are protected as pre-existing, non-conforming structures and uses under G.L. c. 40A, s. 6. Additionally, structures and uses that have existed for greater than six years are protected against removal or injunction based on the statute of repose (i.e. limitations) under G.L. c. 40A, s. 7, only if such structure was built and/or such use was commenced in reliance upon a building permit. Structures that have existed for greater than ten years are also protected without the benefit of a building permit under Section 7; however, unlike structures, uses are specifically not protected by the 10-year statute of repose. Despite the issuance of a seemingly valid building permit, structures that do not comply with current zoning are subject to removal if challenged, unless they are protected by the passage of time as described herein.

In summary, non-conforming uses are only protected if such use either pre-dated the zoning code or if such use was commenced under the auspice of a building permit and has been in existence for greater than six years. Non-conforming uses and structures may be deemed “abandoned” and may lose the benefit of both Sections 6 and 7 if they are not used continuously. Generally, if a non-conforming structure or use is vacant or stopped for two years it may be deemed abandoned and may be subject to compliance with current zoning. The determination of “abandonment” is usually based on the intent of the owner; however, the passage of time alone can result in a finding of abandonment. Casualty or other involuntary circumstances that result in temporary cessation of the use / structures do not result in abandonment.

The 6-year statute of repose (i.e. limitations) under Section 7 must also be read in light of the 30-day statute of limitations on any appeal from the decision of a building inspector to issue a building permit under G.L. c. 40A, s. 15. If an individual offended by the issuance of a building permit has actual or constructive notice of the issuance of the permit in question, the individual will be bound by the 30-day statute of limitations under Section 15 and may not take advantage of the longer 6-year statute of repose under Section 7. The nuances of what constitutes actual or constructive notice are complex, but the cases focus on actual or constructive notice of the building inspector’s action and not the resulting use or structure in question.

In summary, if any particular commercial use was commenced on the property prior to the adoption of any conflicting zoning bylaw, such use is protected in perpetuity unless it is abandoned or materially altered. Additionally, to the extent the use is mentioned in any building permit that was issued greater than six-years ago, the use is also protected by the statute of repose under Section 7 of Chapter 40A. Unless the use is “abandoned” it may be continued in perpetuity as a pre-existing, non-conforming use. However, any expansion or alteration of the pre-existing use that has occurred subsequent to the adoption of conflicting zoning must be authorized by a special permit, or be protected by a building permit coupled with the passage of time under Section 7. Structures – as opposed to uses within structures – are either protected as pre-existing, non-conforming structures, structures existing by virtue of a building permit for greater than six years, or structures existing for greater than ten years without a building permit.

Review of local building department records is critical to the analysis described above. Understanding the basics of zoning outside of Boston can help avoid trouble, particularly where pre-existing, non-conforming structures and/or uses are involved.

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Industry Trends

“How 10 Food Trends For 2016 Will Transform Restaurants”:

<http://www.forbes.com/sites/darrentristano/2015/10/28/how-10-food-trends-for-2016-will-transform-restaurants/>

“Want to provide better service? Go to where your guests are”:

<http://stayntouch.com/go-to-where-your-guests-are-mobile-pms/>

“See something, say something”:

<https://nrf.com/news/see-something-say-something>

RIW Client News

RIW congratulates our client Wahlburgers on the opening of their Fenway location. Pictured below on the left is Stacey Friends with chef/owner, Paul Wahlberg. Howie Altholtz and Lou Katz were also in attendance at the opening event. They are pictured below in the center with Wahlburgers CFO, Patrick Renna. Pictured below on the right is Lou Katz and his daughter Emmie Katz with Donnie Wahlberg.



Marketing Corner



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Two halves are better than one: Sometimes a diner sees more than one item that they really really want, but obviously aren't going to order two main dishes... Consider making available every main dish where practicable, as a half order... even if it means you have to add a slight upcharge. The more people taste of your menu, the better. *One good turn deserves another:* It's a nice touch to have someone come around and grind pepper on a salad or soup for you... But consider offering to leave the grinder at the table so they don't have to keep looking for you every time they want a little more or on the next item.

RIW Events/Participation

Michael Rosen will be moderating a panel for **Bisnow's Restaurant Development Summit** on January 20, 2016. The event will be taking place in Boston.

Lou Katz, Chris Agostino, Dave Robinson, and Howie Altholtz attended the **2015 Taste of Boston hosted by Boston Magazine** which took place on November 17, 2015, at the Boston Children's Museum.



Lou Katz moderated a panel at **The Boston Magazine Power of Ideas "Restaurant Evolution"** event, which took place on October 27, 2015, at the Boston Magazine headquarters.

Pictured to the left is Lou Katz; Rene Becker, Shepard; Josh Webber, The Bancroft; and Michael Serpa, Select Oyster Bar.



Also in attendance was Howie Altholtz, Mike Rosen, Kelly Caralis, and Dave Robinson. Howie is pictured to the right with RIW clients Robert Weintraub from Premier Property Solutions, and Michael Serpa, Select Oyster Bar. RIW co-sponsored this event.

Pictured right is Stacey Friends who moderated a global branding panel at the **MSI International Conference** on October 20, 2015.

Howie Altholtz gave welcoming remarks at the conference.



Ruberto, Israel & Weiner attorneys have comprehensive knowledge and expertise in the areas of law in which they practice and the industries served. Attorneys in RIW's Hospitality and Retail Services Group have provided legal services to industry clients for over 30 years.

Additionally, our attorneys organize seminars, lecture, write articles, participate in trade associations, and serve on Boards of Advisors for retail, food and hospitality industry companies.

For a full description of our Hospitality and Retail Services Group, including a list of representative clients, please visit our website at www.riw.com.

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