



COLORADO

Department of Revenue

Enforcement Division - Liquor & Tobacco

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BULLETIN 17-05

REFERENCE: Alcohol Ordering and Delivery Services, Including through the Use of Third-Party E-Commerce Platforms

DATE: October 24, 2017

Colorado Liquor Enforcement Division

The Liquor Enforcement Division (“LED”) has received a number of inquiries regarding ordering and delivery of alcohol beverages by or on behalf of licensees permitted to engage in such deliveries, particularly when such ordering and delivery services are provided through the use of third-party e-commerce platforms, such as internet sites or mobile device applications (“Third-Party Platforms”). This Bulletin is intended to provide guidance regarding permissible and prohibited practices related to ordering and delivery services under applicable Colorado statutes and rules, including through the use of Third Party Platforms.

1. Retail License Types Permitted to Deliver Alcohol Beverages

Under Colorado statutes, only the following three retail liquor license types are permitted to engage in delivery of alcohol beverages to consumers at locations off the licensed premises:

- Fermented malt beverage licenses for both on and off premises consumption issued pursuant to § 12-46-107(1)(c), C.R.S.;
- Retail liquor store licenses issued pursuant to § 12-47-407, C.R.S.; and
- Liquor-licensed drug store licenses issued pursuant to § 12-47-408, C.R.S.

The LED has received inquiries from persons interested in providing ordering and/or delivery services for restaurants holding liquor licenses, for which they would deliver both food and alcohol beverages to consumers at locations off the licensed premises. However, because restaurants licensed to sell alcohol beverages “may sell alcohol beverages only for consumption on the premises,” they are not permitted to take orders for delivery of, or to deliver, alcohol beverages to locations off the licensed premises, regardless of whether meals are also delivered. *See* Regulation 47-418(A), 1 CCR 203-2; *see also* § 12-47-411(1), C.R.S.

Delivery of alcohol beverages by the three retail liquor license types allowed to deliver alcohol beverages is governed by Regulation 47-426, 1 CCR 203-2 (“Regulation 47-426”). Regulation 47-426 provides as follows:

A. Delivery Prohibited.

No retail liquor licensee, licensed to sell malt, vinous, and spirituous liquor for off-premises consumption or fermented malt beverages for on and off premises consumption, shall conduct a delivery only business, or permit the delivery of such alcohol beverages beyond the customary parking area for the customers of the retail outlet except as permitted in B (1) of this regulation.¹

B. Delivery Permitted.

A retail liquor licensee, licensed to sell malt, vinous, and spirituous liquor, for off-premises consumption or fermented malt beverages for on and off premises consumption, may, deliver such alcohol beverages to any location off the licensed premises, pursuant to the following restrictions:

1. The order for the alcohol beverages which are to be delivered, must be taken by the licensee or an ordering service acting as an agent of the licensee pursuant to a written agreement entered into with the licensee. Licensee shall provide a copy of said agreement to the Liquor Enforcement Division prior to any orders being accepted by licensee's agent. The order may be taken by written order, by telephone, in person, or via internet communication with the licensee or its agent. The person placing the order must provide the licensee with their name, address, date of birth and a valid form of identification, including the identification number. Under no circumstances shall a person under 21 years of age be permitted to place an order for alcohol beverages.
2. Delivery of alcohol beverages shall only be made to a person 21 years of age or older at the address specified in the order. Delivery must be made by the licensee, an employee of the licensee, or a delivery service acting as an agent of the licensee pursuant to a written agreement entered into with the licensee. A copy of said agreement shall be maintained by the licensee. The licensee or his employee, or a representative of a delivery service who delivers the alcohol beverages shall note and log, at the time of delivery; the name, address, date of birth and the valid form of identification, including the identification number, of the person the alcohol beverages are delivered to. Under no circumstances shall a person under 21 years of age be permitted to receive a delivery of alcohol beverages.

¹ The reference to "B (1)" only in part A of Regulation 47-426 was an unintentional error made when the rule was adopted. The reference should have been to all of part B of Regulation 47-426. The Division has commenced a permanent rulemaking process, part of which will include correcting this error. Regardless, when read as a whole, it is clear that delivery of alcohol beverages is subject to all of the requirements and restrictions in part B of Regulation 47-426.

3. Licensees who deliver alcohol beverages shall maintain as a part of their required records, pursuant to 12-47-701 C.R.S., all records of delivery including: delivery agreements, delivery orders, receipt logs and journals. These records shall be maintained by the licensee for the current and three prior calendar years. Failure to maintain accurate or complete records shall be a violation of this regulation.
4. Have a licensed premises with the following conditions:
 - a. Open to the public a minimum of three (3) days a week; and
 - b. Open to the public a minimum of five (5) hours each day the business is open; and
 - c. Have signage viewable from a public road.

C. Suspension/Revocation.

Any delivery made in violation of Title 12, Articles 46 and Article 47, or in violation of this regulation may be grounds for suspension or revocation by the State Licensing Authority as provided for in section 12-47-601 C.R.S.

2. Agency Relationship Between Licensee and Ordering/Delivery Service Required

The LED has encountered proposed contracts between retail liquor licensees authorized to deliver alcohol beverages and third parties to provide ordering and delivery services on behalf of such licensees (including Third-Party Platform providers) in which an agency relationship between the licensee and the ordering and/or delivery service provider is disclaimed. Such contractual disclaimers are not permissible, because an agency relationship between them is required by law. *See* Regulation 47-426(B)(1) (“The order for the alcohol beverages which are to be delivered, must be taken by the licensee or ***an ordering service acting as an agent of the licensee....***”); Regulation 47-426(B)(2) (“Delivery must be made by the licensee, an employee of the licensee, or ***a delivery service acting as an agent of the licensee....***”). However, it is not prohibited to disclaim an agency relationship for purposes *other than* the licensee’s responsibility for violations committed by the third party providing ordering and/or delivery services.²

The requirement in Regulation 47-426 of an agency relationship between licensees and ordering and/or delivery service providers is an essential part of the regulation and control of the retail sale of alcohol beverages in the state of Colorado. An agency relationship is required because the state or any local licensing authority may only suspend or revoke a license for statutory or rule violations committed “by the licensee ***or by the agents***, servants or employees of the licensee....” § 12-47-601(1), C.R.S.

² For example, this Bulletin does not address the liability, if any, of the licensee or any ordering and/or delivery agent that contracts with the licensee for injuries or damages third parties may suffer as a result of their respective acts or omissions (i.e. liability in tort). Nor does it address whether an ordering and/or delivery agent should be viewed as an employee or an independent contractor for purposes of employment law.

Furthermore, if an unlicensed third-party ordering and/or delivery service were not acting as an agent of a licensee, its activities would constitute illegal sale of alcohol beverages. *See, e.g.*, § 12-47-901(1)(g), C.R.S. (making it “unlawful for any person...to sell, or possess for sale any alcohol beverage unless licensed to do so as provided by this article or article 46 or 48 of this title and unless all licenses required are in full force and effect”); § 12-47-301(3)(a), C.R.S. (“It is unlawful for any person to exercise any of the privileges granted under any license other than that which the person holds or for any licensee to allow any other person to exercise such privileges granted under the licensee’s license....”). The term “person” as used in these statutes is defined to include an “agent” (*see* § 12-47-103(23), C.R.S.)).

The terms “sell” and “sale” are defined broadly in the Colorado Liquor Code, which states:

“Sell” or “sale” means any of the following: To exchange, barter, or traffic in; to solicit or receive an order for except through a licensee licensed under this article or article 46 or 48 of this title; to keep or expose for sale; to serve with meals; to deliver for value or in any way other than gratuitously; to peddle or to possess with intent to sell; to possess or transport in contravention of this article; to traffic in for any consideration promised or obtained, directly or indirectly.

§ 12-47-103(34), C.R.S.

The LED also has encountered arguments that Third Party Platforms merely provide licensees with a technology platform for licensees to use in taking orders and arranging deliveries for the sale of alcohol beverages, and are not themselves engaged in providing either ordering or delivery services related to the sale of alcohol beverages. The LED’s position is that regardless of how Third-Party Platforms may characterize the services they provide to licensees, the Third-Party Platforms are integrally involved in the process of taking orders and/or arranging deliveries for the sale of alcohol beverages. As a result, retail liquor licensees engaging the services of such Third Party Platforms must ensure their contractual relationship and the agreed upon services fully comply with the Regulation 47-426, and all other relevant statutes and regulations. Furthermore, pursuant to Regulation 47-426(B)(1), the licensee is required to “provide a copy of said agreement to the Liquor Enforcement Division prior to any orders being accepted by licensee's agent.”

3. Identification Requirements to Prevent Underage Sales.

The LED has encountered contracts with ordering and/or delivery agents that require a single identification check at the time of delivery. Such contracts are not in compliance with Colorado law. Preventing underage sales is an important regulatory responsibility of the LED and licensees, and to fulfill that responsibility, Regulation 47-426 expressly requires checking for and documenting a valid form of identification at two points in time: first, when the order is placed (*see* paragraph (B)(1)); and second, when the order is delivered (*see* paragraph (B)(2)). Furthermore, simply viewing the identification is not sufficient; rather the licensee, employee, servant or agent that takes the order or makes the delivery must document all of the information required by Regulation 47-426. Specifically, with respect to the point in time when an order is placed, Regulation 47-426(B)(1) provides:

The order may be taken by written order, by telephone, in person, or via internet communication with the licensee or its agent. The person placing the order must provide the licensee with their *name, address, date of birth and a valid form of identification, including the identification number*. Under no circumstances shall a person under 21 years of age be permitted to place an order for alcohol beverages. (Emphasis added.)

Similarly, with respect to the point in time when the order is delivered, Regulation 47-426(B)(2) provides:

The licensee or his employee, or a representative of a delivery service who delivers the alcohol beverages shall note and log, at the time of delivery; the *name, address, date of birth and the valid form of identification, including the identification number*, of the person the alcohol beverages are delivered to. Under no circumstances shall a person under 21 years of age be permitted to receive a delivery of alcohol beverages. (Emphasis added.)

4. Other Considerations

a. Supplier Advertising and Unfair Trade Practices

The LED understands that some Third-Party Platforms desire to provide advertising and marketing services to alcohol beverage suppliers, as that term is defined in Regulation 47-100(F), on the same internet sites and mobile device applications where consumers order alcohol beverage delivery from retail liquor licensees. Such advertising and marketing could lead to violations by licensed suppliers and retailers under Regulation 47-316(C) and (E), would most likely constitute unlawful financial assistance under section 12-47-308, C.R.S., and could constitute unfair trade practices under Regulation 47-322. Determining whether such violations may exist will depend upon the totality of the circumstances, and is beyond the scope of this Bulletin.

b. Consumer payments, flow of funds, and compensation when using ordering and/or delivery agents

While ordering and/or delivery agents may be compensated by the retail liquor licensees with which they contract, they may not charge consumers for the ordering and/or delivery services they provide. Rather the full amount of any payment received from consumers who order delivery of alcohol beverages through an ordering and/or delivery agent must be transmitted by such agent to the retail liquor licensee, without retention by the ordering and/or delivery agent of any portion of the amount paid. The retail liquor licensee shall pay an ordering and/or delivery agent for its services through a separate transaction. Otherwise, the ordering and/or delivery agent would be considered to be engaging in the unlicensed sale of alcohol beverages on its own behalf, rather than on behalf of the retail liquor licensee, in violation of section 12-47-901(1)(g), C.R.S., and exercising the privileges of a license not held by the ordering and/or delivery agent, in violation of section 12-47-301(3)(a), C.R.S. For the same reasons, the compensation of ordering and/or delivery agents by the retail liquor licensee may not be based upon a percentage of the sale amount, a percentage of the profits, from such sale, or by volume. *See also* Regulation 47-318(A). Compensation based upon a flat monthly fee, a flat fee per delivery, or that is otherwise structured to avoid being based

upon profit from the sale of alcohol beverages is permissible.

c. Separate contracts and separate deliveries required

“Each license issued under this article 47 and article 46 of this title 12 is separate and distinct.” § 12-47-301(3)(a), C.R.S. Furthermore, “[a] separate license must be issued for each specific business or business entity and each geographic location.” *Id.* In order to maintain the separate and distinct nature of retail liquor licenses, and avoid potential confusion regarding which licensee is responsible for the acts of an ordering and/or delivery agent, an ordering and/or delivery agent must have a separate and distinct contract with any retail liquor licensee for which it will provide ordering and/or delivery services. *See* Regulation 47-426(B)(1) and (2). Ordering and/or delivery agents may not combine orders for or delivery of alcohol beverages for more than one retail liquor license in a single transaction, or a single trip. These restrictions apply regardless of whether more than one such license is held by common owners, part owners, shareholders or other persons interested directly or indirectly in such licenses. *See, e.g.*, § 12-47-407(4)(b) (concerning holding an interest in more than one retail liquor store license) and § 12-47-408(4)(b), C.R.S. (concerning holding an interest in more than one liquor-licensed drug store).

d. Returns

Retail liquor licensees may accept returns, and provide refunds, to consumers who have ordered alcohol beverages for delivery, including through a retail liquor licensee’s ordering and/or delivery agent. Ordering and/or delivery agents may charge the retail licensee (but not the consumer) a fee for assisting with returns and refunds, but the fee may not be based upon a percentage of the sale, or the profits from the sale. Any returned alcohol beverages must be conveyed back to the retail liquor licensee’s licensed premises.

If you have any questions about this bulletin, please contact the LED at 303-205-2306.