

September 18, 2013

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Tiffany Rogers, Beverage Director
Settlers Inn/Glass Wine Bar Kitchen/Mill Market
4 Main Avenue
Hawley, PA 18428-1114

RE: Growlers, To-Go Beer, Minors & Discounts

Dear Ms. Rogers:

ISSUE: This office is in receipt of your letter of August 17, 2013, wherein you ask four (4) questions regarding growler beer sales, to-go beer, minors, and loyalty discounts. Your questions are answered in the order in which they were presented.

Records maintained by the Pennsylvania Liquor Control Board (“Board”) indicate that The Settlers’ Inn, Ltd. holds Hotel Liquor License No. H-5133 (LID 34064) for use by it at its premises located at 4 Main Avenue, Hawley, Pennsylvania.

OPINION:

1. Does Hawley, PA have an open container law? We plan to sell growlers of beer and would like to know what the restrictions and best practices are on the sale of that item?

As you know, holders of retail licenses other than clubs may sell malt or brewed beverages for off-premises consumption when sold in quantities of not more than one hundred ninety-two (192) fluid ounces in a single sale to one (1) person. [47 P.S. § 4-407(a)]. Therefore, you may sell draft beer in growlers for off-premises consumption if limited to one hundred ninety-two (192) fluid ounces in a single sale; hotel licensees may sell for consumption on hotel property. [47 P.S. § 4-407].

However, while the Liquor Code allows beer to be taken off the licensed premises in an unsealed container, local municipalities may have ordinances which prohibit open containers of alcoholic beverages within the boundaries of that municipality. As this office cannot advise you as to the open container laws in your municipality, it is suggested that you contact your local municipality or local police department to determine if your municipality has any applicable open container ordinances.

2. We are selling six (6)-packs to-go from our establishment, but have a separate register for those sales. Are we able to sell any other items in that portion of the store at those registers? For example, we are wondering if we would be able to sell beer related merchandise such as bottle openers, brewery t-shirts, glass growlers, glassware, etc. Would we be able to sell these at the same register? Or need to use a separate register?

Section 13.52 of the Board's Regulations provides that licensees of any class may sell promotional items advertising their own business only, such as tee shirts, mugs, caps and other similar items, to the general public. [40 Pa. Code § 13.52(f)]. Therefore, as the holder of a hotel liquor license, you may sell logo tee shirts and hats advertising your business, and no additional permission is required.

However, section 3.52 of the Board's Regulations prohibits a licensee from conducting another business, or permitting another to be operated, on the licensed premises, without Board approval. [40 Pa. Code § 3.52(a), 3.52(c)]. The sale of beer-related merchandise, such as bottle openers and brewery tee shirts, would be considered a business separate and apart from the hotel business if such items are not promotional items advertising your business only. [40 Pa. Code § 13.52(f)].

To conduct another business on the licensed premises, your hotel would have to request approval from the Board's Bureau of Licensing ("Licensing"), indicating the items the hotel intends to sell and how such business would be conducted. Licensing would then forward such a request to the Board for its consideration.

With regard to the use of separate registers, however, there is nothing in the Liquor Code or the Board's Regulations which would require your hotel to use separate registers for purchases of alcohol and non-alcoholic items at the licensed premises. Separate registers are generally required only where a licensee has approval to operate another business or has an interior connection. [See 40 Pa. Code § 3.52].

3. We also serve breakfast and lunch items (sandwiches, quiche, etc.) in our café area – what is the rule for alcohol service at these tables? It is not a full service restaurant – patrons may order their items at the counter and pick it up to take it at the table. Our question is essentially, if guests are ordering their beverages at the counter and seating themselves, how does the “Pizza Hut” rule apply? May underage diners sit at the same table as of age diners that are consuming alcohol? Or must they be accompanied by someone over twenty-five (25)? We would like clarification on this rule and some tips on best practices. Also, what if an underage person drinks from someone’s alcoholic beverage? What is the best way to monitor these situations?

The general rule in Pennsylvania is that minors may not be present in an establishment licensed to sell alcoholic beverages. Pennsylvania law defines a minor as a “person under the age of 21 years.” [1 Pa. C.S.A. § 1991]. As you know, one (1) of the five (5) exceptions to the general rule is the exception for minors at food-oriented establishments, also known as the “Pizza Hut exception.”

Under this exception, minors are permitted on the premises without the presence of a parent, legal guardian, or proper supervisor, so long as a restaurant, hotel, or retail dispenser licensed premises has gross sales of food and non-alcoholic beverages equal to at least fifty percent (50%) of its combined gross sales of both food and alcoholic beverages. [40 Pa. Code § 5.321]. Such minors are not permitted to sit at the bar counter and no alcoholic beverages can be served to any adult at the table or booth where the minor is seated, unless the minor is also there with a parent, legal guardian or proper supervisor). [Id.].

Therefore, your hotel would qualify for the “Pizza Hut” exception so long as your licensed café area has gross sales of food and non-alcoholic beverages equal to fifty percent (50%) or more of its combined gross sales of both food and alcohol. However, the exception does not allow minors to sit in the bar area, nor does the exception allow adults to be served alcohol at the same table or booth as a minor. In your case, that means that if an adult served alcohol by you consumed such alcohol at the same table where a minor is seated, then you would not be able to avail yourself of the “Pizza Hut” rule.

However, such minors may be permitted to sit in the bar area or at a table where alcohol is served if they fall into at least one (1) of the other four (4) exceptions:

1. Minors with parents (“Parent exception”)

If a minor is with one (1) or both of the minor's parents, then the minor is permitted to be on the premises. The minor and parent(s) can sit anywhere on the premises, including the bar area, and alcoholic beverages can be served to the parent(s) or to any other adult with the minor.

2. Minors with legal guardians ("Guardian exception")

If a minor is with a legal guardian, then the minor is permitted to be on the premises. The minor and the legal guardian can sit anywhere on the premises, including the bar area, and alcoholic beverages can be served to the guardian or to any other adult with the minor.

3. Minors under proper supervision ("Proper supervision exception")

If a minor is under proper supervision, then the minor is permitted to be on the premises, including the bar area or table where alcoholic beverages are served. Section 102 of the Liquor Code defines a proper supervisor as someone who is at least twenty-five (25) years of age, who is directly responsible for the care and conduct of the minor while on the premises, and who keeps the minor within his or her sight or hearing. Proper supervisors are generally unpaid volunteers. However, licensees/employees may act as proper supervisors as long as they are not performing any employment-related duties at the same time. [47 P.S. § 1-102].

Proper supervisors can only supervise a limited number of minors. In Philadelphia, that number is five (5). In the rest of Pennsylvania, the number is twenty (20), i.e., one (1) proper supervisor can supervise up to twenty (20) minors. Notwithstanding such limitations, if the minors are on-premises as part of a school-endorsed function, each proper supervisor can supervise up to fifty (50) minors.

4. Minors attending a social gathering ("Social gathering exception")

If a minor is attending a social gathering, then the minor is permitted to be on the premises. A social gathering is an event marketed to or catering to minors, in whole or in part, for which at least forty-eight (48) hours advance notice has been given to the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"). No alcohol can be served to anyone, even adults, at a social gathering and all alcohol must be removed from or secured by lock and key at the premises.

Finally, with regard to the consequences of minors consuming alcohol, be advised that section 493(1) of the Liquor Code states that licensees are strictly liable for service to visibly intoxicated persons and minors, including minors who may be on licensed premises with a parent, legal guardian, or under proper supervision. [47 P.S. § 4-493(1)]. As such, your hotel could be held strictly liable for service to minors, or for the furnishing of alcohol to minors, at your licensed premises.

4. We would like to offer a discount program which encourages guests to be environmentally conscious and purchase a growler to reuse at our properties. We would like to have the discount to apply as follows: If a guest purchases a growler, they get a percentage off the price of their first fill of the growler. Then, when they bring the growler back to any of our participating restaurants, they can receive a percentage off the price of their subsequent fills. The discount would encourage customer loyalty and the purchase and reuse of our growlers. Would this be legal for us to feature as a promotion? If not, what portion would be in violation?

Section 493(24)(i) of the Pennsylvania Liquor Code generally prohibit licensees from offering anything of value to induce, directly or indirectly, the purchase of alcoholic beverages, or from offering or giving to trade or consumer buyers any prize, premium, gift or other inducement to purchase liquor or malt or brewed beverages, except advertising novelties of nominal value. [47 P.S. § 4-493(24)(i)]. Advertising novelties are limited to a wholesale cost of fifteen dollars (\$15.00).

Moreover, please be advised that section 493(24)(i) of the Liquor Code also prohibits the offering of volume discounts (i.e., buy a growler refill and receive a ten percent (10%) discount). Thus, it is not permissible to offer discounts on the purchase of growler refills that differ from the set price for such beer. However, it would be permissible for your hotel to offer a quantity of beer at a set price which results in a lower cost than the price of smaller quantities of such beer, so long as the pricing reflects an economy of scale and is not tied to another purchase.

If you have any additional questions, please feel free to again contact this office.

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS

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BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE
PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,

FAITH S. DIEHL
CHIEF COUNSEL

cc: Pennsylvania State Police, Bureau of Liquor Control Enforcement
Jerry W. Waters, Director of Office of Regulatory Affairs
Tisha Albert, Director, Bureau of Licensing
Jeffrey Lawrence, Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 13-424