

March 26, 2015

Frank Badolato
Pizza Piazza, Inc.

E: Delivery of Malt or Brewed Beverages and Advertising

Dear Mr. Badolato:

ISSUE: This is in response to your e-mail dated February 6, 2015, wherein you raise several questions regarding the delivery of malt or brewed beverages and the advertisement thereof. Your questions will be answered individually below.

Records maintained by the Pennsylvania Liquor Control Board's ("Board") indicate that Pizza Piazza, Inc. holds Restaurant Liquor License No. R-20167 (LID 44494) and Transporter-for-Hire Class B License No. IB-4392 (LID 71011) for use at the premises located at 305-307 Beverly Road, Mount Lebanon, Pennsylvania.

OPINION:

May customers place orders for delivery that are comprised only of malt or brewed beverages, or must they also order food?

It is permissible for customers to place orders for delivery that are comprised only of malt or brewed beverages. It is not required that food and/or non-alcoholic beverages accompany a delivery of malt or brewed beverages. However, please keep in mind that any alcoholic beverages that are being delivered pursuant to your transporter-for-hire license must have been lawfully purchased prior to the time of delivery.

What should our delivery drivers ask for as proof of age when making deliveries and to whom may they actually hand the malt or brewed beverages?

Transporter-for-hire licensees are required to check the identification of the individual accepting the delivery and must maintain records to document the verification of IDs. [47 P.S. § 5-512; Board Advisory Notice No. 22].

Subsection (a) of section 495 of the Liquor Code lists the acceptable forms of identification for purposes of establishing the affirmative defenses to citations for serving or furnishing alcohol to minors set forth in subsections (e), (f), and (g) of section 495 as follows: (1) a valid photo driver's license or identification card issued by the Department of Transportation or by any other state; (2) a valid

United States Armed Forces identification card; or (3) a valid passport or travel visa issued by the United States or a foreign country that contains the holder's photograph. [47 P.S. § 4-495(a)].

Subsections (e) and (f) of section 495 provide that no penalty shall be imposed against a licensee or a licensee's employee for serving alcohol to a minor if it is established to the satisfaction of an administrative law judge that the minor was required to produce one (1) of the forms of identification listed in subsection (a); the minor completed and signed a declaration of age card or a photograph, photocopy, or other visual or video presentation was made; and these documents were relied upon in good faith. [47 P.S. § 4-495(e)-(f)].

Subsection (g) of section 495 provides that no penalty shall be imposed on a licensee or a licensee's employee for a citation for serving alcohol to a minor if it is established to the satisfaction of an administrative law judge that: the minor was required to produce one (1) of the forms of identification set forth in subsection (a); the identification was scanned by a transaction scan device and was found to be valid; and the result was relied upon in good faith. [47 P.S. § 4-495(g)]. A "transaction scan device" is defined as a device capable of deciphering, in an electronically readable format, the information encoded on the magnetic strip or bar code of an identification card. [Id.]

Please be advised that while a licensee may voluntarily choose to accept forms of identification other than those set forth in subsection (a) of section 495, only those forms of identification specifically listed in subsection (a) can be used to establish the basis for a legal defense to a charge of serving a minor as provided for in subsections (e), (f), and (g) of section 495.

Additionally, please keep in mind that notwithstanding the actual *validity* of any form of acceptable identification, a licensee may still refuse to provide alcohol to anyone *suspected* of having a false or invalid identification.

Are we permitted to deliver malt or brewed beverages on Sundays? Does it make a difference whether we hold a Sunday Sales permit?

There are no restrictions on the hours or days on which a licensed transporter-for-hire may deliver alcoholic beverages. However, the actual sale of the malt or brewed beverages being delivered must occur on the days and during the hours

which your licensed retail business is permitted to sell alcoholic beverages. Thus, while a Sunday Sales permit would be required for your licensed retail business to sell alcoholic beverages on Sundays, it would not be required for your business to make deliveries pursuant to a transporter-for-hire license on Sundays.

What are the laws relative to advertising the price and availability of alcoholic beverages in Pennsylvania?

In Pennsylvania, the advertisement of alcoholic beverages is generally governed by section 498 of the Liquor Code [47 P.S. § 4-498]. Pursuant to section 498, manufacturers, wholesalers, retailers and shippers, whether from outside or inside the Commonwealth, and any licensees are permitted to advertise their products and prices in Pennsylvania. [47 P.S. § 4-498(a)]. Any advertisement of price may not contain: “[a]ny statement that is false, deceptive, or misleading”; “[a]ny statement that is disparaging of the products of a competitor”; or “[a]ny statement referring to monetary comparison between brands.” [47 P.S. § 4-498(b)]. Prices that are advertised or displayed on licensed premises must be the prices that are in effect at the time of the advertisement or display. [47 P.S. § 4-498(c)].

Moreover, for all alcoholic beverage and malt beverage advertising, the following conditions apply:

1. The entity responsible for the advertisement must be clearly identified in the advertisement.
2. No licensee may distribute, by mail, personally or through servants, agents or employees, price lists, circulars or handbills off the license premises to the general public as a means of advertising liquor, wine or malt or brewed beverages.
3. No print advertisement of alcoholic beverages of any type shall be permitted within three hundred feet of any church, school or public playground. This prohibition shall not preclude any point of sale advertisement, menus or other print advertisement regarding alcoholic beverages inside the licensed premises.
4. The use in any advertisement of alcoholic beverages of any subject matter, language or slogan directed to minors to promote consumption of alcoholic beverages is prohibited. Nothing in this section shall be deemed to restrict or prohibit any advertisement of alcoholic beverages to those persons of legal drinking age.
5. No advertisement shall be permitted, either directly or indirectly, in any booklet, program book, yearbook, magazine, newspaper,

- periodical, brochure, circular or other similar publication published by, for or on behalf of any educational institution.
6. No advertisement that is obscene shall be permitted; and
 7. Advertisement of alcoholic beverages and malt and brewed beverages shall not be inconsistent with the spirit of safety or safe driving programs.

[47 P.S. § 4-498(e)-(f)]. The term “advertisement” is defined as “any advertising of alcoholic beverages through the medium of radio broadcast, television broadcast, newspapers, periodicals or other publication, outdoor advertisement, any form of electronic transmission or any other printed or graphic matter, including booklets, flyers or cards, or on the product label or attachment itself.” [47 P.S. § 4-498(g)].

As indicated above, no advertisement is permitted, either directly or indirectly, in a booklet, program book, yearbook, magazine, newspaper, periodical, brochure, circular or similar publication published by, for or on behalf of any educational institution. However, you may wish to consult the decision in Pitt News v. Pappert, which held section 498 of the Liquor Code unconstitutional as applied to The Pitt News. [Pitt News v. Pappert, 379 F.3d 96, 113 (3d Cir. 2004) (holding 47 P.S. § 4-498 unconstitutional, as applied)].

Also, while section 498(e)(2) of the Liquor Code prohibits the distribution by mail of price lists, circulars or handbills to the general public as a means of advertising liquor, wine or malt or brewed beverages [47 P.S. § 4-498(e)(2)], the Liquor Code does not define the terms “circular” or “mailing.” However, Webster’s II New College Dictionary (1999) defines “circular” as a “printed advertisement, directive or notice for mass distribution,” and “mailing” is defined as “a batch of mail sent at one time by a mailer.” For purposes of clarity and uniformity, the Board has interpreted the terms “circular,” “price list,” and “handbill” to mean any form of “unsolicited” advertising. Nevertheless, please note that the Pennsylvania Attorney General’s Office has determined that this prohibition does not prevent a licensee from advertising in a newspaper or community newspaper.

Additionally, please be advised that section 493(24)(i) of the Liquor Code prohibits licensees from offering or giving anything of value as a means to induce the purchase of alcoholic beverages, or from offering or giving to consumers any prize, premium, gift or other inducement to purchase alcoholic beverages, except advertising novelties of nominal value. [47 P.S. § 4-493(24)(i)]. The Board has defined advertising novelties of nominal value as items that have a wholesale cost

of fifteen dollars (\$15.00) or less and contain advertising material. [40 Pa. Code § 13.52; Board Advisory Notice No. 10 (6th Revision)]. Advertising novelty giveaways may or may not be conditioned on the purchase of an alcoholic beverage.

Are we permitted to advertise in mailers, magazines, newspapers or flyers that we are now delivering six(6)-packs of malt or brewed beverages for home delivery? If so, may we also advertise the price of the six (6)-packs?

You would be permitted to advertise the price and/or availability of six (6)-packs for home delivery in newspapers or community newspapers, subject to the limitations discussed above. However, you would generally not be permitted to advertise the price or availability of six (6)-packs of malt or brewed beverages for home delivery in circulars or handbills off the licensed premises, unless such circulars or handbills are distributed only to persons who have voluntarily signed up for or requested to receive the same.

For advertising on cable television, radio, or the Internet, what may be said as far as prices and delivering malt or brewed beverages?

Advertisements that are run on cable television, radio, or the Internet are subject to the restrictions set forth in section 498 and section 493(24)(i), as previously discussed above.

May we include a six (6)-pack of malt or brewed beverages in a special for delivery? For example, may we offer a family dinner special that includes pizza, wings, salad, and a two (2)-liter bottle of soda or a six (6)-pack of beer for twenty-four dollars and ninety-five cents (\$24.95)?

The answer to your question depends upon whether the alcoholic beverages and/or food items that comprise the promotion would be offered at a discount from their regular prices when bundled together.

If the pizza, wings, and/or salad is being offered at a discount from their regular prices when bundled together with the six (6)-pack of beer, then this would violate section 493(24)(i) of the Liquor Code [47 P.S. § 4-493(24)(i)], which prohibits giving something of value to induce the purchase of alcoholic beverages, and, therefore, would not be permissible. In other words, if, for example the regular price of a six (6)-pack of beer of Bud Light beer is six dollars and ninety-five cents (\$6.95) and the regular price of the pizza, wings, and salad is twenty dollars

(\$20.00), then it would not be permissible to run promotion that effectively offers the pizza, wings, and salad for eighteen dollars (\$18.00) as part of the bundled twenty-four dollar and ninety-five cent (\$24.95) package because this would be considered an unlawful inducement to purchase alcohol.

However, if the six (6)-pack of beer is being offered at a discount from its regular price while maintaining the regular price of the pizza, wings, and salad within the bundled price, then the promotion would be permissible as long as it conforms to the discount pricing practices discussed below.

Section 406(g) of the Liquor Code and section 13.102(a) of the Board's Regulations authorize retail licensees to offer happy hour discount pricing. That is, restaurant liquor licensees are permitted to discount *any and all* alcoholic beverages for a period of time not to exceed four (4) consecutive or non-consecutive hours per day, and not to exceed fourteen (14) hours per week. [47 P.S. 4-406(g)]. During such happy hours, the price of alcoholic beverages may not change. The hours need not be consecutive and may be divided, subject to the above noted limitation, in any manner a licensee desires. Notice of all happy hours must be visibly posted on the licensed premises seven (7) days prior to each happy hour. [Id.].

In addition, section 13.102(b)(2) of the Board's Regulations authorizes retail licensees to offer daily drink special discount pricing. [40 Pa. Code § 13.102(b)(2)]. With regard to daily drink specials, retail licensees are permitted to offer one (1) specific type of alcoholic beverage at a discounted price all day, or for a portion of the day, if it chooses. [Id.]. A specific type of alcoholic beverage means a specific registered brand of malt or brewed beverage, a type of wine, a type of distilled spirits or a mixed drink. [Id.]. A specific brand of beer such as "Blue Hound Pilsner" or "Brendan's Cream Stout" or "Oil City Light" may be discounted, but not "all draft" or "all bottled" beer or "all Blue Hound products." Daily wine drink specials could be "Chardonnay" or "Merlot," but not "all white wine" or "all red wine" or "all Kendall's wines." Permissible spirits specials would be "Rum and Cola" or "all brandy drinks," but not "all well drinks" or "all Jackson's products." [Board Advisory Notice No. 16].

No discount pricing practice (daily drink special or happy hour) may occur between 12:00 a.m. and the legal closing hour. [47 P.S. § 4-406(g); 40 Pa. Code § 13.102].

Thus, if, for example, the regular price of a six (6)-pack of Miller Light beer is seven dollars and ninety-five cents (\$7.95) and the regular price of the pizza, wings, and salad is twenty dollars (\$20.00), then a promotion that effectively offers the six (6)-pack of Miller Light beer for four dollars and ninety-five cents (\$4.95) as part of the bundled twenty-four dollar and ninety-five cent (\$24.95) package would need to be conducted as a happy hour special or a daily drink special in order to be lawful. Also, please note that you cannot have two (2) different prices for the same six (6)-pack that are in effect at the same time.

If neither the six (6)-pack of beer nor any of the food items are being offered at a discount from their regular prices when bundled together, then it would be permissible for you to run the promotion at any time, for as long as you choose subject to the restrictions on advertising found in section 498 of the Liquor Code.

May we run promotions with our local beer distributors in our advertising and, if so, what are we allowed to say or print?

Please be advised that section 13.51 of the Board's Regulations prohibits a licensee of one (1) class, such as an importing distributor or distributor, from providing anything of value to licensees of another class, such as a restaurant liquor licensee. [40 Pa. Code § 13.51]. Similarly, the Liquor Code's provisions on interlocking business practices prohibit distributors and importing distributor from providing money or other things of value to equip or otherwise help the operation of the licensed business of a retail licensee and vice versa. [47 P.S. §§ 4-411, 4-443].

Historically, however, this office has approved cooperative advertising between licensees of a different class, so long as each party pays its proportionate share for the cost of advertisement. Nevertheless, any such cooperative advertising would be subject to the restrictions on advertising found in section 498 of the Liquor Code, as well as the prohibitions against unlawful inducements found in section 493(24)(i) of the Liquor Code, which were previously discussed above.

Should you have any further questions or concerns regarding this matter, the Liquor Code, or the Board's Regulations, please do not hesitate 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 BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,

FAITH S. DIEHL
CHIEF COUNSEL

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Advisory Opinion No. 15-118