

May 20, 2015

Christian Simmons

Re: Can a Brewer Transport for a Spirits Manufacturer

Dear Mr. Simmons:

ISSUE: This is in response to your telephone call of April 22, 2015, and your e-mails of April 23 and May 5, 2015. You advise that you hold a brewery license. In addition to holding a brewery license, you serve as a broker for a Pennsylvania limited distillery. In your role as a broker, you are not an employee but an independent contractor. You explain that your role as broker is to encourage retail licensees to purchase the limited distillery's product. If the retail licensee places an order with the limited distillery, you deliver the product from the limited distillery to the retail licensee and are paid a commission by the limited distillery. You ask if you are covered by the limited distillery's ability to distribute its own product, when you are delivering its product in your role as broker, or if, because you are an independent contractor and not an employee, you need to obtain a transporter-for-hire Class A license.

You also ask for confirmation that you may broker the sale of wine, spirits, and beer, including other beer manufactured in Pennsylvania, not limited to the beer you manufacture. You advise that you are fully aware of the three (3)-tier system and "know I can not wholesale" while you are on a manufacturing license. Furthermore, because you were told you do not have to get a broker license in Pennsylvania, you ask if there is some form of documentation that states that you are a licensed broker in Pennsylvania.

Records of the Pennsylvania Liquor Control Board ("Board") indicate that Four Seasons Brewing Company, Inc., holds Malt Beverage Manufacturing License No. G-500 (LID 68163) for the premises at 745 Lloyd Avenue Ext., Latrobe, Pennsylvania.

OPINION: Your first question concerns whether you must obtain a transporter-for-hire license to transport liquor on behalf of the limited distillery whose products you promote. Section 491(12) of the Liquor Code provides that it shall be unlawful "for a liquor licensee permitted to deliver liquor, to make any deliveries except in his own vehicles . . . or in the vehicle of another person duly authorized to transport liquor

within this Commonwealth.” [47 P.S. § 4-491(12)]. The Board’s Regulations provide that, as a general rule, a person who transports liquor, malt or brewed beverages or alcohol for hire shall obtain a transporter-for-hire license from the Board. [40 Pa. Code § 9.11]. There are a limited number of exceptions to this rule:

- (1) If the alcohol in question is “denatured,” as specified in the Liquor Code.
- (2) If transportation is accomplished by scheduled common air carriers of mail and passengers; or by common carriers by railroad
- (3) If the liquor, malt or brewed beverages, or alcohol in question are for the personal use of, and not for resale by, the transporter.
- (4) If transportation is by licensees of the Board whose licenses or permits authorize the transportation of liquor, malt or brewed beverages or alcohol in the regular operation of their licensed business.
- (5) If transportation is by persons who transport liquor, malt or brewed beverages or alcohol, through this Commonwealth commercially and not for delivery therein....

[40 Pa. Code § 9.11(b)]. The exception that appears to be most applicable is number four (4), since a limited distillery is authorized to transport its spirits in the regular operation of its licensed business. The question is whether an independent contractor is also covered by that exception.

Subsection (a) of section 9.28 of the Board’s Regulations, consistent with section 491(12) of the Liquor Code, provides that “A licensee engaged in the purchase or sale of liquor, malt or brewed beverages, or alcohol **may not use or permit to be used vehicles other than the ones identified for use in operation of its licensed business** for the transportation of liquor, malt or brewed beverages, or alcohol.” [40 Pa. Code § 9.28(a)]. The driver of such vehicle would be covered by the licensee’s privilege to deliver if there is some written evidence that the driver is an employee of the licensee.

To the extent that the Board’s Regulations allow an independent contractor to be covered by the privileges of a license, that license must be a transporter-for-hire license, not a manufacturing or retail license. Section 9.28(b) of the Board’s Regulations provides, “Persons who have contracted with and are performing

transportation services of alcoholic beverages **for the transporter-for-hire licensees** are considered **agents of the transporters-for-hire** for purposes of section 471 of the Liquor Code (47 P. S. § 4-471).” [40 Pa. Code § 9.28(b) (emphasis added)]. Since you would be serving as an independent contractor for a limited distillery, not a transporter-for-hire, your status as a contractor, rather than as an employee, precludes you from being considered an agent of the limited distillery. You would need to obtain a transporter-for-hire license.

There are three (3) classes of transporter-for-hire licenses, defined in the Board’s Regulations as follows:

- Transporter-for-Hire License, Class A: A license authorizing the holder to engage in the commercial transportation of liquor, malt or brewed beverages or alcohol to or from points located in this Commonwealth.
- Transporter-for-Hire License, Class B: A license authorizing the holder to engage in the commercial transportation of malt or brewed beverages only, to or from points located in this Commonwealth.
- Transporter-for-Hire License, Class C: A fleet license authorizing the holder to engage in the commercial transportation of liquor parcels within this Commonwealth.

[40 Pa. Code § 9.1]. As you are aware, a person who transports liquor would be required to obtain a Transporter-for-Hire Class A license.

You have asked for confirmation that you may broker wine, spirits, and beer in Pennsylvania, even in light of your status as a licensed brewery. It is assumed that you would undertake the promotion of a product that is manufactured by another Pennsylvania license holder, rather than from out-of-state manufacturers. You do not acquire title to the product, but encourage retail licensees to buy it for their licensed establishments. The product that you are promoting is not yet sold through the Board’s Fine Wine and Good Spirits stores, either as stock merchandise or through the Special Liquor Purchase division.

The role of “broker” as you describe it is neither provided for nor prohibited by the Liquor Code or the Board’s Regulations. Therefore, it is true that you do not have to get a broker’s license, but there is no documentation stating that you are a “licensed broker,” since such a license does not exist.

In addition to the transporter-for-hire license discussed above, there are some general guidelines that you should keep in mind. It is unlawful to sell liquor or beer without a license. [47 P.S. §§ 4-491(1), 4-492(2)]. You may facilitate sales transactions but at no time may you own or obtain title to the product.

It is permissible for you to be paid for your efforts, but you may not obtain a pecuniary interest in the license. Section 1.1 of the Board's Regulations defines the term "pecuniary interest" as:

An interest that sounds in the attributes of proprietorship. There is a rebuttable presumption of a pecuniary interest when a person receives 10% or more of the proceeds of the licensed business or when control is exercised by one or more of the following:

- (i) Employing a majority of the employees of the licensee.
- (ii) Independently making day-to-day decisions about the operation of the business.
- (iii) Having final authority to decide how the licensed business is conducted.

[40 Pa. Code § 1.1].

More specific guidance is not readily available for the role of "broker" as you have described it; there is guidance available for the role of "agent." However, the Board's Regulations include the following restriction:

A person who is a licensee **or the holder of a Malt or Brewed Beverage License**, or an officer, director, agent or employee of either a licensee or such a licensee, or who is not at least 21 years of age, and of good character, **is not eligible to be an agent** of a vendor under this subchapter.

[40 Pa. Code § 13.73 (emphasis added)]. Because you hold a brewery license, you are not eligible to become an agent, as that term is defined in the Board's Regulations.

The above does not address the promotion of the sale of beer. The promotion of beer is restricted by the three (3)-tier system. Out-of-state beer manufacturers must distribute their product through this system. Manufacturers and importing distributors

enter into territorial agreements. Product is first delivered to an importing distributor, and then to distributors. The promotion of beer by an importing distributor would be limited the territory where the importing distributor could sell the beer. Importing distributors and distributors are permitted to hold tastings of product on or off the licensed premises. [40 Pa. Code §§ 13.201, 13.211].

In-state manufacturers are permitted to self-distribute [47 P.S. § 4-446(a)(1)] unless they have obtained a hotel, restaurant, or eating place retail dispenser license, whereupon they must distribute through the three (3)-tier system. [47 P.S. § 4-446(a)(4)]. In-state manufacturers who self-distribute their product would not be restricted by territorial agreements and therefore might be able to use your services.

You may wish to consult with a private attorney who is experienced in Pennsylvania liquor law regarding your commercial enterprise.

Should you have any other questions and/or issues related to the Liquor Code or the Board's Regulations, please feel free to once 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,

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