

August 12, 2016

Kristy Olshan
Member and Chief Financial Officer
Surly Penguin LLC
VIA E-MAIL

RE: Limited Distillery Questions

Dear Ms. Olshan:

ISSUE: This correspondence is in response to your e-mail sent June 5, 2016, wherein you indicate that your limited distillery is getting ready to launch, and you raise numerous questions regarding the sale and delivery of alcoholic beverages produced by a limited distillery. Your questions will be restated and addressed in turn below.

The Pennsylvania Liquor Control Board's ("PLCB") records indicate that Surly Penguin LLC holds Limited Distillery License No. AL-58 (LID 71984) for use at the premises located at 400 Pequea Boulevard, Conestoga, Pennsylvania.

OPINION: As a threshold matter, since you are beginning a private commercial enterprise in a highly regulated field, it is strongly recommended that you seek counsel from a private attorney experienced in Pennsylvania liquor law. You may also find voluminous information on the PLCB's website at www.lcb.state.pa.us. This information includes, but is not limited to, the Liquor Code, the PLCB's Regulations, Advisory Notices, and a searchable Advisory Opinion database. Your questions and the responses follow. Please note that, for purposes of clarity, some of your questions have been separated.

Question #1: I was told by a PLCB representative via phone that we need to complete and submit an application for Class A transporter-for-hire license in order to deliver our products. Is this correct?

Answer: The information that was previously provided to you is not entirely accurate. Pursuant to the Liquor Code and the PLCB's Regulations, licensed limited distilleries are authorized to deliver the products that they sell through the use of

their own vehicles or through the use of properly licensed transporters-for-hire. 47 P.S. § 4-491(12); 40 Pa. Code § 11.222(3). Therefore, because the limited distillery license itself authorizes your limited distillery to deliver its products, your limited distillery would not be required to also obtain a transporter-for-hire license or utilize the services of a transporter-for-hire licensee.

Question #2: State regulations indicate that a limited distillery may accept orders for the purchase of liquor produced on the licensed premises by mail, Internet, or telephone. Please kindly confirm that we are able to accept such orders through our company website or via our company phone if we do not plan to sell our product through the state-owned distribution and retail system. Given our limited production, we will not be producing the requisite quantities to sell our products through the state-owned distribution and retail system.

Answer: Your understanding is correct. The PLCB's Regulations specifically authorize limited distilleries to accept orders for the purchase of liquor produced on their licensed premises by mail, Internet, or telephone. 40 Pa. Code § 11.222(3). Thus, your limited distillery is permitted to accept orders through its own website or over the phone without the need to channel those sales through the PLCB in any respect.

Question #3: Our Class A transporter-for-hire license should allow us to deliver to other PLCB licensees. Will it also allow us to deliver our products to individuals (non-licensees)?

Answer: As indicated above, there is no need for your limited distillery to separately obtain a transporter-for-hire license. Your limited distillery license itself authorizes your limited distillery to deliver its products. 47 P.S. § 4-491(12); 40 Pa. Code § 11.222(3). The authority to deliver products with your limited distillery license includes deliveries to both licensed and non-licensed customers.

Question #4: Is there a minimum purchase quantity before we are able to deliver our products and is that different for licensees (bars and restaurants) and non-licensees (individuals)?

Answer: There is no minimum purchase quantity for deliveries to licensees or non-licensees set forth in either the Liquor Code or the PLCB's Regulations.

Question #5: I presume we are able to charge a separate delivery fee at market rates to deliver our products. Is this correct?

Answer: There is nothing in the Liquor Code or the PLCB's Regulations that precludes limited distilleries from imposing separate fees for delivering their products.

Question #6: What information needs to be included on the vehicle delivering our products? I believe we are required to list the name and address of the business, logo, and our PA license ID number and that they must be at least two inches in height. Are static stickers or magnetic decals permissible?

Answer: If your limited distillery will be delivering its products using its own vehicles, then those vehicles must bear the name, address, and license number of your licensed distillery on both sides in letters that are not smaller than two inches in height. 47 P.S. § 4-491(12). If, on the other hand, your limited distillery were to use the services of a licensed transporter-for-hire to deliver its products, then the vehicles used by the transporter-for-hire would need to bear the name, address, and license number of the transporter-for-hire on both sides in letters that are not smaller than two inches in height. Id. The use of static stickers or magnetic signs is permissible.

Question #7: Are there any restrictions on when we can deliver our products? For example, can we deliver products on Sundays?

Answer: Limited distilleries are only permitted to deliver their products on the days and during the hours that they are authorized to sell their products. 47 P.S. § 4-493(16). Therefore, your limited distillery would be permitted to deliver its products between 9:00 a.m. and 11:00 p.m., seven days a week. 47 P.S. § 5-505.4(b)(1).

Question #8: What types of payment are we able to accept (check, cash, credit)?

Answer: Limited distilleries may accept the following forms of payment from licensed customers: cash, checks, or debit cards. 40 Pa. Code § 11.222(2). Limited distilleries may accept the following forms of payment from non-licensed customers: cash, checks, debit cards, or credit cards. Id.

Question #9: Since I believe we are able to take orders for our product via our website and phone, can we also accept payment for our products via our website and via telephone?

Answer: Yes. It is permissible for your limited distillery to accept payment for your products via its website and via telephone.

Question #10: Can payment be accepted at the time of delivery by the delivery driver with a portable credit card scanner, for instance? If payment cannot be accepted in person by the delivery driver (who may be an independent contractor), would it be acceptable for an employee of the limited distillery to process payment via phone concurrent with the delivery?

Answer: No. Limited distilleries are only permitted to sell their products from their licensed premises (whether it be at their main location, satellite location, etc.). 47 P.S. § 5-505.4(b). As such, payment must be made prior to the time of delivery. It would not be permissible for a delivery driver to accept payment at the time of delivery. Similarly, it would not be permissible for payment to be processed via phone concurrent with the delivery.

Question #11: Are there age restrictions on employees of the limited distillery and on any independent contractors such as delivery drivers or sales representatives hired by the distillery (i.e., must they be over the age of twenty-one)?

Answer: Please be advised that there is nothing in the Liquor Code or the PLCB's Regulations that imposes age restrictions for employees of a limited distillery. However, other sources of authority, such as the Child Labor Law and the Crimes Code, may prohibit or restrict such employment.

For instance, the Crimes Code prohibits any minor who is under the age of twenty-one from intentionally transporting liquor or malt or brewed beverages. 18 Pa. C.S. § 6308(a). As such, no one under twenty-one years of age may deliver liquor produced by your limited distillery.

Employment of minors is primarily an issue of the Pennsylvania Department of Labor and Industry, Bureau of Labor Law Compliance. You may wish to contact that bureau at 1-800-932-0665.

In addition, because limited distilleries are eligible to hold certain retail licenses, 47 P.S. § 5-505.4(b)(3), note that retail licensees, such as restaurants and hotels, are prohibited from employing individuals younger than eighteen years of age to serve alcoholic beverages. 47 P.S. § 4-493(13). Minors between the ages of sixteen and eighteen may be employed on retail licensed premises to serve food, clear tables, and perform other similar duties, not to include the sale or serving of alcoholic beverages.

Question #12: Are we prohibited from hiring employees or independent contractors who have previously been convicted of a crime, including felonies?

Answer: There is nothing in the Liquor Code or the PLCB's Regulations that would prohibit limited distilleries from hiring employees or independent contractors having criminal records. Rather, the decision of whether or not to hire someone with a criminal record would be purely a business decision.

Question #13: Our limited distillery license provides us with the ability to sell our products on the licensed premises along with liquor accessories (such as cocktail shakers, flasks, etc.) and branded promotional items (such as T-shirts, hats, etc.). Our license does not cover food sales. However, may we give away or provide free food to patrons during special events and regular business hours (during a grand opening celebration or holiday-themed event, for example)?

Answer: Initially, please be advised that the Liquor Code specifically authorizes limited distilleries to sell food for consumption on or off their licensed premises at their main locations and at their PLCB-approved satellite locations. 47 P.S. § 5-505.4(b)(4).

Moreover, please be advised that the Liquor Code generally prohibits a licensee, including a manufacturer, from offering anything of value as an inducement to purchase alcohol. 47 P.S. § 4-493(24)(i). Therefore, while it would be permissible to offer or provide free food during special events or during regular business hours, the provision of such food cannot be made contingent on the purchase of alcohol. Otherwise, it would be viewed as an unlawful inducement to purchase alcohol in violation of the Liquor Code.

Question #14: For product that is given away (i.e., used for sampling or other marketing purposes) but not sold for profit, please confirm that we are not required to pay tax on that product.

Answer: This question falls outside the scope of the Liquor Code and the PLCB's Regulations; as such, this office is unable to answer the same. You should instead contact the Department of Revenue at (717) 783-9354 with regard to this question.

Finally, for your general information, please be advised that Governor Wolf recently signed into law Act 39 of 2016 ("the Act"), which became effective on August 8, 2016. The Act makes numerous changes regarding limited distillery licensees, including the following: it allows limited distilleries to sell for on-premises consumption wine produced by licensed limited wineries and malt or brewed beverages produced by licensed breweries; it increases the number of additional PLCB-approved satellite locations from two to five; and it gives limited distilleries the ability to obtain alcoholic cider, liquor, and food exposition permits and farmers market permits.

If you have any additional questions or concerns regarding this matter, the Liquor Code, or the PLCB'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.

Sincerely,



RODRIGO J. DIAZ
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