

NEWS & INSIGHTS

Pa. Alcohol Industry: Old Tools, New Laws During COVID-19

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Although online shopping and delivery had already been the norm for many households, the COVID-19 pandemic has accelerated e-commerce and dramatically changed the way many consumers purchase their goods and services, including alcohol. With restrictions on indoor dining, the temporary closure of Pennsylvania's Fine Wine & Good Spirits (FWGS) stores, and overall health concerns about face-to-face transactions, the number of options for purchasing alcohol were limited. Retailers, such as bars and restaurants, saw on-premise sales plummet or become non-existent. Without retail accounts to sell alcohol directly to consumers, manufacturers had to pivot and look for other avenues to sell their products. On the demand side, home-bound consumers were in search of new, safer

ways to purchase alcohol from the comfort of their couches or contactless pick-up options. By implementing existing, but previously seldom used, delivery and shipping methods and quick changes in the Pennsylvania Liquor Code, manufacturers and retailers were able to adjust their operations in order to meet the demand and new consumer expectations. Although many provisions of the current Liquor Code leave much to be desired, it has provided convenience to consumers and an important lifeline for the Pennsylvania alcohol industry.

Beer

Pennsylvania has a reputation for an antiquated and overly restrictive set of alcohol laws, but it is surprisingly generous in some respects. Compared to other states, Pennsylvania-licensed breweries have great benefits, including the ability to self-distribute their own products instead of contracting with a distributor and the ability to transport their own beer without any additional licensing, including delivery directly to a customer's door. Direct delivery by a brewery is certainly convenient for the customer, but often not logistically feasible for the brewery, especially many smaller craft breweries. Instead, many brewers took advantage of another benefit of their Pennsylvania brewery license — the ability to ship their beer directly to consumers within Pennsylvania. Although a handful of breweries established online sales and delivery programs pre-pandemic, there are now dozens of breweries offering this service. Any delivery of alcohol other than by the manufacturer must be through a certain transporter-for-hire license issued by the Pennsylvania Liquor Control Board (PLCB). Conveniently, the two most commonly used shipping services, FedEx and UPS, have such licenses. Shipping costs can be high, given the weight and additional services required, such as signature by an adult over 21 years of age; however, some breweries are offering free shipping for orders over a certain dollar amount. These shipping programs have become very popular with crafter breweries and their fans, allowing consumers from across the state to try beers from breweries that do not normally distribute to their areas.

In addition to being able to have some of their favorite Pennsylvania-produced beer delivered, consumers have also been able to enjoy delivery of out-of-state beer. Although legal since the passage of Act 166 of 2016, out-of-state beer orders and delivery have only really taken hold within the past year. Act 166 created a direct malt or brewed beverage shipper (DBS) license. A DBS licensee can accept online orders and ship up to 192 ounces of malt or brewed beverages per month to Pennsylvania residents. One unpopular limitation is that no more than 96 ounces of any one specific brand may be shipped to a Pennsylvania resident, meaning Pennsylvanians looking to stock up on out-of-state favorites might need to source from multiple DBS licensees. Another caveat is the DBS license is only available to retailers and wholesalers, not breweries. However, despite this restriction, a number of out-of-state breweries have obtained a DBS license and have begun to ship beer to Pennsylvania residents.

Wine

Pennsylvania has allowed direct wine shipping since 2002; however, the consumer convenience factor was as ill-conceived as the wine vending machines that graced select grocery stores in 2010-2011. The initial premise was good – Pennsylvania residents were permitted to purchase wine online from out-of-state wineries holding a direct wine shipment (DWS) license issued by the PLCB. The devil was in the details though, and the additional restrictions imposed on this process caused it to never gain much traction amongst consumers. For example, although it was called “direct wine shipping”, the wine purchased on the internet was not delivered to the customer's doorstep – it

was delivered to one of the FWGS stores where the customer would then pick it up. Additionally, any wine brand that was within the PLCB's inventory (even if not available at every location) could not be purchased through this process and DWS licensees could not sell more than 9 liters-per-month to any one customer.

Act 39 of 2016 eliminated the prior DWS license and created a new, more convenient process. This process governs all shipments of wine to residents of Pennsylvania, whether from an out-of-state winery or from an in-state limited winery. This new DWS license is available to any entity licensed by its respective state or country as a wine producer. Instead of a 9 liter-per-month limitation, a DWS licensee can sell up to 36 cases of wine (9 liters per case) in any calendar year to a Pennsylvania resident. More importantly, the DWS law now allows delivery directly to the consumer's door and a consumer can purchase wine from a DWS even if it is also sold by the PLCB.

It is important to note the DWS law is very clear that only wine manufacturers are eligible to the DWS license and the licensed manufacturer can only sell and ship its own products under this license. As a result, many of the largest online wine retailers are still not permitted to sell or ship wine to Pennsylvania consumers. Some internet retailers have applied for and received DWS licenses; nonetheless, given the reporting and auditing processes included as part of Act 39, a retailer's ability to use the DWS license is probably short-lived.

Spirits

Although the PLCB has loosened its grip on wine slightly, it still has a firm hold on liquor. To date, there is no process akin to the DWS or DBS licenses for liquor, and that will not likely change in the near future. While the PLCB has not allowed out-of-state distilleries, retailers, or wholesalers special direct shipping privileges to Pennsylvania residents, it has created its own online marketplace for Pennsylvania residents to order and have their wine and spirits purchases delivered directly to their door. Orders can also be picked up in person select FWGS stores.

Other than the online ordering and delivery offered by the PLCB, Pennsylvania residents also have the option to place orders with Pennsylvania licensed limited distilleries delivered directly to their doorstep. Licensed limited distilleries are permitted to transport their own products in their own vehicles as part of their license privileges, which allows them to make deliveries direct to customers, or they can use a third party that has obtained a transporter-for-hire license to make deliveries on their behalf.

Cocktails-to-go

The Pennsylvania Liquor Code had a few tools in place prior to the COVID-19 pandemic to help manufacturers accommodate the shift to online alcohol sales and delivery. However, a change in the Liquor Code after the pandemic was declared allowed Pennsylvania's retail licensees, such as bars and restaurants, to open an entirely new sales channel to their customers – cocktails to-go.

For many licensees, the sale of alcohol for on-premise consumption is their main revenue driver, which made the restrictions on indoor dining potentially catastrophic for the industry. In an effort to provide some relief, Act 21 of 2020 was passed into law to allow certain retail licensees to sell prepared beverages and mixed drinks for take-out. Restaurant and hotel licensees who lost at least 25% of their average monthly sales as a result of the COVID-19

emergency declaration are eligible to sell sealed containers holding between 4 and 64 ounces of spirits and at least one mixer combined. Act 21 requires restaurants and hotels to offer a meal while they are selling cocktails-to-go; however, there is no requirement that a customer purchase a meal in order to purchase a cocktail-to-go. Despite the often criticized 192-ounce limit on beer purchases to-go, there is no limit on how many cocktails-to-go a customer can purchase at a time. Also, while restaurants can use transporter-for-hire licensees to deliver beer and wine to customers, cocktails-to-go cannot be delivered.

Importantly, this law is only temporary; it expires upon the end of the COVID-19 emergency disaster declaration or when the licensee is able to resume at least 60% of its prior capacity. To date, there has been little discussion on whether this temporary provision will be made into a permanent license privilege. Other states that undertook similar measures and allowed temporary sales of cocktails to-go have since made their laws permanent. For example, Iowa and Ohio recently passed laws making their temporary approval of cocktails-to-go permanent. Efforts are underway in a number of other states, including Virginia, Texas and Florida, among a handful of others, to make their temporary measures permanent. Given the trend across the nation is leaning toward making cocktails-to-go a permanent part of the alcohol consumption landscape and the desperate need of the restaurant industry to recover, it seems likely that Pennsylvania will adopt a similar approach.

Kenneth J. McDermott is a liquor [licensing and alcohol law](#) attorney at Saxton & Stump with 10 years of experience helping Pennsylvania's alcohol manufacturers and retailers open their doors and reach their business goals. In addition to providing guidance on licensing issues, he has successfully appealed decisions by the Liquor Control Board and defended clients in citation actions. Ken is a passionate advocate for the industry and maintains an active Twitter account, [@PA_Alcohol_Law](#). He can be reached at kjm@saxtonstump.com or 717-941-1211.

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