



COLORADO

Department of Revenue

Enforcement Division – Liquor & Tobacco

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Colorado Department of Revenue Liquor Enforcement Division Adoption of Revised Rule on an Emergency Basis Colorado Liquor Rules, 1 C.C.R. 203-2

Emergency Rule

Revised Liquor Rules, 1 C.C.R. 203-2:

Regulation 47-322(L). Unfair Trade Practices and Competition – Value of Labor

Statement of Emergency Justification and Adoption

Pursuant to sections 24-4-103 and 44-3-202, C.R.S., I, Heidi Humphreys, Deputy Executive Director and Chief Operating Officer of the Department of Revenue, as State Licensing Authority, hereby adopt the aforementioned revised Colorado Liquor Rule, which is attached hereto, to add subsection (L) to the rule. (The remainder of Regulation 47-322 remains unchanged.)

Section 24-4-103(6), C.R.S., authorizes the State Licensing Authority to issue an emergency rule if the State Licensing Authority finds that the immediate adoption of the rule is imperatively necessary to comply with a state or federal law or federal regulation or for the preservation of public health, safety, or welfare and compliance with the requirements of section 24-4-103, C.R.S., would be contrary to the public interest.

I find: (1) the adoption of this revised rule effective immediately, is imperatively necessary to comply with the statutory mandates of the Colorado Liquor Code, sections 44-3-101 to 44-3-1002, C.R.S., the Colorado Beer Code, sections 44-4-101 to 44-4-109, C.R.S., and the Colorado Special Event Liquor Permits Code, sections 44-5-101 to 44-5-108, C.R.S.; (2) the adoption of this revised rule is imperatively necessary to preserve the public health, safety, and welfare; and (3) compliance with the notice and public hearing requirements of section 24-4-103, C.R.S., would be contrary to the public interest.

Statutory Authority

The statutory authority for this revised rule is found at the following subsections: 44-3-102, 44-3-201(1), 44-3-202(1)(b), 44-3-202(2)(a), 44-3-202(2)(a)(I)(A), 44-3-202(2)(a)(I)(C), 44-3-202(2)(a)(I)(G), 44-3-202(2)(a)(I)(R), 44-3-308, and 44-4-102, C.R.S.

Purpose

The purpose of adopting this revised rule on an emergency basis includes establishing requirements and procedures to implement, and to ensure compliance with, the following bills:

Senate Bill 16-197 (Concerning the Retail Sale of Alcohol Beverages, and, in Connection Therewith, Restricting the Issuance of New Liquor-Licensed Drugstore and Retail Liquor Store Licenses Except Under Specified Circumstances; Allowing Liquor-Licensed Drugstore and Retail Liquor Store Licensees to Obtain Additional Licenses Under Limited Circumstances; Repealing the Limit on the Alcohol Content of Fermented Malt Beverages on January 1, 2019; And Making An Appropriation.)

Senate Bill 18-243 (Concerning the Retail Sale of Alcohol Beverages, and, in Connection Therewith, Making an Appropriation.)

Senate Bill 19-011 (Concerning the Conversion of Certain Fermented Malt Beverage Licenses Issued Under the “Colorado Beer Code” to Malt Liquor Licenses Issued Under the “Colorado Liquor Code”)

The foregoing bills relate to the expansion of “full strength” beer sales through fermented malt beverage retailers. The relevant portions of the Senate Bills 16-197 and 18-243 went into effect on January 1, 2019 and the relevant portions of Senate Bill 19-011 went into effect January 31, 2019. Since the passage of Senate Bill 16-197, the Liquor Enforcement Division (“Division”) has been working with stakeholders to anticipate and address issues created by the passage of the foregoing bills.

One such issue is the value of labor as unlawful financial assistance. The changes implemented by the foregoing bills have fueled uncertainty and conflicting interpretations regarding what constitutes unlawful financial assistance, unfair trade practices, and unfair competition within the meaning of section 44-3-308, C.R.S., which is the state corollary to federal prohibitions on unfair competition and unlawful practices found in 27 U.S.C. 201, *et seq.* (Federal Alcohol Administration Act) and 27 CFR Part 6. These laws and regulations are commonly known as “tied house” restrictions (referring to the ties between suppliers and retailers created by such practices).

Post-Prohibition alcohol regulation is based upon a “3-tier” system (manufacturers, wholesalers, and retailers), in which financial ties between the tiers are limited to prevent the first two tiers from controlling the retail tier and creating monopolies. “Tied house” restrictions prohibit financial assistance between the tiers through trade practices that create unfair competition in order to protect the 3-tier system. One form of unlawful financial assistance is giving things of value between the tiers with the goal of influencing product choice (i.e., inducing product exclusivity, in whole or in part). Labor is always a thing of value to any employer. The restrictions on “value of labor” in alcohol regulations recognize this reality and seek to prohibit “tied house” situations created by suppliers giving so much free labor/goods to retailers that they (the suppliers) can effectively control the retailer’s product choice and exclude competitors.

Regulation 47-322 addresses various types of unfair trade practices and competition; however, the prior version of Regulation 47-322(L)—related specifically to the value of labor—did not define what constituted specific permitted acts of labor. In anticipation of “full-strength” beer

sales in grocery and convenience stores coming online earlier this year, parts of the industry and the Liquor Enforcement Division (“Division”) became concerned the prior version of Regulation 47-322(L) did not contain sufficient guardrails around labor. The Division has received complaints that retailers (e.g., large grocery, convenience, and retail liquor stores) have been demanding suppliers perform valuable labor seven days a week under threat the retailer will otherwise switch to a different supplier that *is* willing to provide that level of free labor. The concern is that limits on supplier-provided labor are necessary to protect small suppliers (e.g. craft brewers) from being driven out of business by larger suppliers (ultimately harming consumers) and simultaneously to protect suppliers from being pressured by retailers to provide unreasonable amounts of labor for free.

In an effort to have appropriate safeguards in place on January 1, 2019, the Liquor Division filed a notice of proposed rulemaking hearing on September 27, 2018 (*see* SOS Tracking No. 2018-00498), conducted a series of working group meetings, and held a permanent rulemaking hearing on November 1, 2018. However, on December 5, 2018, after discovering it had inadvertently failed to submit a draft of the proposed rules to the Department of Regulatory Agencies, as required by section 24-4-103(2.5)(a), C.R.S., the Division terminated the original rulemaking proceeding (*see* SOS Tracking No. 2018-00498) and initiated a second permanent rulemaking proceeding (*see* SOS Tracking No. 2018-00658). Because there was not enough time to complete a second permanent rulemaking process for those proposed rules prior to January 1, 2019, it was necessary to adopt the value of labor rule, among other rules, on an emergency basis (*see* SOS Tracking No. 2018-00711, adopted on December 27, 2018).

The State Licensing Authority and the Division continued to work with stakeholders on the value of labor issue to determine how best to address value of labor. While other rules were adopted on a permanent basis, the decision was made to let the emergency value of labor rule expire on April 26, 2019 and to continue to seek a workable solution for the Division and industry. However, as a result, subsection (L) of Regulation 47-322 was removed from the Colorado Liquor Rules by the Secretary of State’s Office (*see* SOS Tracking NO. 2019-00186).

The Division has since held three working group meetings with industry stakeholders, on May 13, 2019, June 3, 2019, and June 5, 2019, to discuss revisions to the value of labor rule. The Division also has received additional written comments on drafts of the value of labor rule. Having considered this input, the State Licensing Authority is now ready to adopt a revised value of labor rule on an emergency basis.

Since the removal of subsection (L) of Regulation 322, there has been no regulation specifically addressing the relationship between the value of labor and unfair trade practices and competition. The industry, and state and local licensing authorities, imperatively need immediate guidance to ensure compliance with the law regarding unfair trade practices and unfair competition to ensure appropriate safeguards are in place to ensure public health and safety given the public’s expanded access to beer with no maximum alcohol content. Immediate guidance is also needed to ensure unlawful financial assistance does not result in suppliers being able to control the retail outlets for the sale of alcohol beverages.

In accordance with the legislative declaration of section 44-3-102, C.R.S., the Colorado Liquor Code is deemed an exercise of the police powers of the State of Colorado for the protection of the economic and social welfare and the health, peace, and morals of the people of the State of Colorado. Regulation of the manufacture, distribution, and sale of alcohol beverages under the

Colorado Liquor Code, Beer Code and Special Event Liquor Permits Code is a matter of statewide concern. It is imperatively necessary to adopt this revised rule to ensure proper regulation and control over the administration and enforcement of articles 3, 4, and 5 of title 44 to meet these legislative charges and responsibilities in order to preserve the public health, safety, and welfare of the State of Colorado.

The State Licensing Authority is filing a permanent rulemaking notice in conjunction with this Statement of Emergency Justification and Adoption. A public hearing on the proposed permanent rules will take place on, August 6, 2019, beginning at 9:00 A.M., at 1881 Pierce Street, Room 110, Lakewood, CO 80214. That process will include the opportunity for additional substantial stakeholder and public participation.

Adoption, Effective Date and Expiration

The State Licensing Authority hereby adopts the forgoing new and revised rules on an emergency basis, effective immediately. Prior versions of the forgoing revised rule, contained in 1 C.C.R. 203-2, are hereby repealed and replaced by the attached emergency rule, which will remain in effect until its expiration upon 120 days from the adoption date unless sooner terminated or replaced by permanent rules.


Heidi Humphreys
Deputy Executive Director/Chief Operating Officer
Colorado Department of Revenue
State Licensing Authority

27 June 19
Date