



MEMORANDUM

TO: Alcoholic Beverage Control Board DATE: July 9, 2019

FROM: Erika McConnell, Director RE: Restaurant or Eating Place Licenses in
Hotels

At the April 29-30, 2019, board meeting, the board was asked to determine whether or not a restaurant or eating place license issued to a hotel should be renewed, considering that the hotel indicated that they do not have a restaurant, and that the hotel provides free food and alcoholic beverages only to their guests on specific nights of the week.

The board raised questions about whether a hotel that offers free drinks to its guests needs a license, and about the use of free alcohol as a marketing device. The board asked the staff to research the issues and the potential effects on other licensees.

1. Question: If a business is offering free drinks only to its customers (defined as individuals who have purchased something from the business), does it need to have a liquor license?

Response: AS 04.11.010(a) states, "Except as provided in AS 04.11.020, a person may not knowingly manufacture, sell, offer for sale, possess for sale or barter, traffic in, or barter an alcoholic beverage unless under license or permit issued under this title."

The exceptions in AS 04.11.020 are: "(a) A license or permit is not required to authorize sales made by a person under a judgment and decree of foreclosure, under the bankruptcy law of the United States, or under order of the board or a court under AS 04.16.220.

(b) A license or permit is not required to serve alcoholic beverages in exchange for valuable contributions at a private gathering of a bona fide group of co-workers or of a professional, social, or fraternal organization if equal contributions are made by all in attendance and only the amount required to purchase the alcoholic beverages is contributed. All other applicable provisions of this title and regulations under this title shall be observed at these private gatherings."

If a business is offering free alcohol to their customers who are paying the business for some particular service, can it really be assumed that the customers are not paying for the alcohol as part of the service? This question applies to hotels, spas, nail salons, boutiques, etc. Are the costs for the food and alcohol included in the room rate and the offer of "free" food and alcohol simply a marketing device? Most jurisdictions conclude that if the alcohol is only being provided to persons who have paid for some other good or service, then the alcohol is part of that sale and is not truly free. Free alcohol would be if the alcohol is provided to any person, whether or not they have purchased anything else from the business. Should the conclusion be otherwise, then a bar could sell

ice to a patron, provide “free” alcohol with the sale of ice, and thus avoid Title 4 compliance, which would essentially negate Alaska’s alcohol control.

From Florida’s Division of Alcoholic Beverages and Tobacco: “any payment for services or products which provides the access to the alcoholic beverage is not considered complimentary (costing nothing) and thus is considered a sale of alcoholic beverages and requires a license.”

From the Texas Alcoholic Beverage Commission: “...to be truly ‘free,’ it must be available to any adult who walks in the door and requests it. If alcoholic beverages are only available to paying customers, the assumption is that the cost of the alcohol is included in the price of the service.”

If it is determined that no license is needed, then these businesses would not be licensees and would not be bound by Title 4. Thus, the prohibition on advertising free alcohol would not apply to them, and they would be able to advertise their business with the offer of free alcohol to registered hotel guests.

2. Question: Is being open to the general public for meal service a requirement for a restaurant or eating place license?

Response: The answer to this question hinges on the meaning of “bona fide restaurant or eating place.”

3 AAC 304.305 states, “In AS 04.11.100 and this section, a “bona fide restaurant or eating place” is an establishment, or portion of an establishment, where, during all times that beer or wine is served or consumed,

- (1) the patron's principal activity is consumption of food; and
- (2) a variety of types of food items appropriate for meals is available for sale as shown on a menu provided to patrons and filed with the board;”

The phrase “meals...available for sale...to patrons” as well as the generally accepted concept of “restaurant” (a business where you go to purchase and consume a meal) leads me to conclude that a restaurant must offer meals to the general public in order to be considered a bona fide restaurant or eating place.

3. Question: How many hotels hold restaurant or eating place licenses but offer meals only to their lodging customers?

Response: Using only license file information, it appears that 29 hotels/places of lodging have restaurant or eating place licenses. Of those 29, 11 appear to only serve meals to lodging customers and not have a “bona fide restaurant”—this information is based off of their premises diagram, menu, and any other information provided to the board. Of those 11, eight appear to be in remote locations. The other three appear to be on the road system.

4. **Question:** Are there other hotel licensees that offer free food and alcoholic beverages?

Response: There appear to be a few other hotels that offer free food and alcoholic beverages, often on a limited basis (only certain days per week). As best I can tell, all other hotels using this model have a beverage dispensary – tourism license. A BDL-tourism license is not required to have a bona fide restaurant, but is instead required to provide either “a dining facility,” “kitchen facilities in a majority of its rental rooms,” or be in an airport terminal.

Other questions for the board to consider:

5. What qualifies as “a dining facility” under AS 04.11.400(d)(1)(A) for the purposes of qualifying for a BDL-tourism license?

6. If providing food on a limited basis qualifies as “a dining facility,” how often does food need to be provided? Could a hotel provide food in their “dining facility” one night per week and still qualify for a BDL-tourism license? Is providing only breakfast sufficient to be “a dining facility”?

I would like to thank Sarah Oates of CHARR and Alicia Maltby, Executive Director of the Alaska Hotel & Lodging Association, for their assistance with the research for this memo.