

TITLE 4. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

May 11, 2020

NOTICE OF PROPOSED EMERGENCY RULEMAKING

The Department of Alcoholic Beverage Control (“ABC”) proposes to adopt the proposed emergency regulation to address changes in the alcohol industry due to the COVID-19 pandemic and state of emergency. Please find attached the proposed text to be effective as California Code of Regulations, title 4, section 147.

EXPRESS FINDING OF EMERGENCY

The Department of Alcoholic Beverage Control has found that the COVID-19 pandemic has caused a sudden and drastic shift of business models throughout the various industries regulated by the Department. As state and local public health directives continue to require many ABC-licensed businesses to remain closed or to limit customer activity and patron congregation, economic and social stressors have been growing. Many businesses and citizens have demonstrated an unwillingness to abide by the public health orders and have instead opened for business, increasing risks to the public health, safety, and welfare. This new and rapidly evolving situation calls for immediate enforcement by the Department through actions outlined by the proposed emergency regulation to avoid the serious harm to the public peace, health, safety, and general welfare. The delays attendant to the normal administrative disciplinary process would fail to resolve the immediate threat caused by licensee violations of public health orders during the existing declared state of emergency.

FACTUAL BASIS OF THE EMERGENCY

The Department has been preparing the implementation of California Code of Regulations, title 4, section 147, for a lengthy period and has received legislative support in 2019 to make emergency decisions made by the Department reviewable by Superior Courts in the county of affected licensees. The Department anticipated beginning the normal regulatory process on or about April 15, 2020.

With the state of emergency being declared in March, the Department shifted its focus to providing relief to its stakeholders and licensees who were hit with difficulties regarding shelter-in-place orders limiting many hospitality services. The Department has continually updated its Notice of Regulatory Relief in an attempt to aid ABC licensees’ ability to remain in business during this crisis.

Recently the Department began to receive complaints that some ABC Licensees are disregarding the laws and regulations set by the Department or orders from local officials and are thereby harming the public health, safety, and welfare. Due to delays inherent in the normal license disciplinary process, the Department is unable to immediately address these violations in the absence of this proposed emergency decision regulation.

During the current crisis where public health, safety, and welfare are already under attack, the Department has been requested by multiple agencies, both local and state, to act now in order to limit the compounding harm created by a few bad actors throughout the state who are abusing their licenses to sell and distribute alcohol. With this emergency regulation in place, the Department can move to speedily protect the public health, safety, and welfare during this time of crisis. The Department agrees that the normal regulations process would be inadvisable at this time due to the shifting changes in the industry and excessively high violation rates being reported. However, the Department anticipates quickly starting the certificate of compliance rulemaking process for this proposed regulation to allow public comment and input in how these changes will be made permanent once the COVID-19 pandemic has passed.

WRITTEN EMERGENCY COMMENT PERIOD

Government Code section 11346.1(a)(2) requires that, at least five working days prior to the submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the Department. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6

AUTHORITY AND REFERENCE

Government Code section 11460.20, Business and Professions Code section 23080 authorizes ABC to adopt these proposed regulations. The proposed regulations implement, interpret, and make specific

Government Code sections 11460.10, 11460.20, 11460.30, 11460.40, 11460.50, 11460.60, 11460.70, and 1460.80, Business and Professions Code sections 23080, 23090.5(b), 23095, 24200, 24200.1, 24200.5, 24200.6, 24200.7, 24201, 24202, 24203, 24204, 24205, 24206, 24207, 24300, 24301, 24044.5, and 24045.5.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current law has a large bureaucratic loophole through which unscrupulous ABC licensees can continue to present an immediate danger to public health, safety, and welfare during the lengthy administrative process of holding ABC licensees accountable for their violations of the ABC Act. The Department of Alcoholic Beverage Control (the Department) aims to close the loophole

with this regulatory action which will authorize the Department to issue emergency decisions to protect the public health, safety, and welfare as provided under the Administrative Procedures Act (APA) without waiting for protracted litigation. Protracted litigation has the potential to defer decisive action from the Department for months or years, providing opportunity for licensees to continue to harm the public.

Summary of Existing Laws and Regulations

Current law requires ABC to go through its entire normal accusation process prior to making any effective change upon the behavior of an ABC licensee or status of an ABC licensed premises. This formal process can last months. Even when an ABC decision is final, ABC decisions are subject to an automatic stay if appealed to the Alcoholic Beverage Control Appeals Board. This allows licensees endangering the public health, safety, and welfare to continue operation for years prior to effective ABC action.

Summary of Effect

If a business is operating in a fashion egregious enough to warrant an emergency administrative decision, the likelihood of the inappropriate behavior continuing is too great to allow it to continue during the automatic stay while the appeal process plays out. Bad actors are gaming the system; because they see an impending death sentence for their business on the horizon, they have no reasonable incentive to correct their behavior and abide by the rules. Instead, they elect to continue litigating, thereby extending the appeals process and profiting for as long as they can with an absolute disregard for the law. The proposed regulatory action will implement the Emergency Administrative Decision Regulations as allowed under Government Code section 11460.20. These Emergency Administrative Decisions will allow ABC to implement limits on the ongoing harm to the public health, safety, and welfare in the form of temporary suspensions, temporary limitations on licensed privileges, and temporary license conditions while the normal accusation process is pending. The regulations will ensure the Department complies with due process in issuing the temporary measures pending completion of an accusation process while also protecting the public health, safety, and welfare.

Comparable Federal Statute or Regulations

The ABC has determined that this proposed regulation does not have a comparable federal statute or regulation.

Policy Statement Overview

The Department mission to protect the public health, safety, and welfare through licensing alcohol businesses, and enforcing legislative standards is limited when the administrative process takes years to bring a final decision. By limiting bad actions from the market on an emergency temporary basis pending final rulings, California residents will have a higher quality of life through the benefits of better public health, safety, and welfare. In particular, delays in addressing violations of state and local public health orders in furtherance of a declared state of emergency mean that such violations may continue unabated, which would cause significant

harm to the general public's health and safety. The proposed regulations are consistent and compatible with existing state regulations.

Benefits Anticipated

By establishing immediate consequences for unacceptable behavior, ABC anticipates a reversal in the current trend of appeals and prolonged litigation which have become less of a deterrent and more of an unanticipated cost of doing business which bad actors are willing to pay. In addition, the emergency filing will allow the Department to act with speed during the state of emergency created by the COVID-19 pandemic and protect the public health, safety, and welfare from bad actors during the crisis.

Determination of Inconsistency/Incompatibility with Existing State Regulations

The ABC has determined that this proposed regulatory action is not inconsistent or incompatible with existing state regulations.

Small Business

The ABC has determined that this proposed regulatory action does not target small businesses. While some ABC licensees are small businesses, this regulation is affecting all ABC licensees who present an immediate harm to the public health, safety, and welfare through their actions. ABC is not affecting any business with this regulation without due process and the Department providing evidence that the business presents an immediate threat to the public health, safety, and welfare.

Disclosures Regarding the proposed Action

The ABC has made the following initial determinations:

1. Mandate on local agencies or school districts: None.
2. Costs or Savings to any state agency: ABC estimates a \$10,000 per year cost to the department through a rare appeal of a temporary order at the Superior Court of the county where a licensed premises subject to an emergency decision is located. This new cost will be absorbed into ABC's current budget.
3. Cost to any local agency or school district that is required to be reimbursed by the state: None.
4. Other nondiscretionary cost or savings imposed on local agencies: None.
5. Cost or savings in federal funding to the state: None.
6. Cost impacts on housing costs: None.

Determination of Statewide Adverse Economic Impact on Business

The ABC has made an initial determination that the adoption of this regulation will have negligible economic impact, which can feasibly be absorbed by the Department.

The need to require a report from businesses

The proposed change to regulation does not require any reports from ABC licensees or any other business.

Consideration of alternatives

The ABC has determined that no reasonable alternative considered by the department or that has otherwise been identified and brought to the attention of the department would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. ABC invites interested persons to present statement or arguments with respect to alternatives to the proposed regulation during the written comment period.

Agency contact person

Inquiries concerning the proposed regulatory action may be directed to the agency representative Robert de Ruyter, Assistant General Counsel, (916) 419-8958 or (designated backup contact) Sarah Easter, Associate Governmental Program Analyst, (916) 928-7627.

Internet Access

This notice, along with the full text of the proposed regulations is available at <https://www.abc.ca.gov/law-and-policy/regulations/>

TITLE 4. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

May 27, 2020

SUPPLEMENT TO FINDING OF EMERGENCY FOR THE PROPOSED EMERGENCY RULEMAKING

The Department of Alcoholic Beverage Control (“ABC”) proposed to adopt an emergency regulation to address changes in the alcohol industry due to the COVID-19 pandemic and state of emergency on May 11, 2020. The Department provides this supplement to the finding of emergency and changes to its proposed regulatory package on administrative emergency decisions in response to comments made by the public. Please find attached the updated proposed text to be effective as California Code of Regulations, title 4, section 147.

The Department licenses and regulates approximately 50,000 businesses in California that have the privilege to sell and serve alcohol on their licensed premises. With the advent of the COVID-19 pandemic, many emergency orders, rules, and directives have been issued by federal, state, and local officials to slow the spread of the deadly virus and to protect the public health, safety, and welfare. Most of these directives have ordered the 50,000 licensed premises with on-site alcohol privileges to close their doors and not allow consumers to congregate on the licensed premises to prevent the spread of the virus in those areas. With the state of emergency stretching now for over two months, the economic and personal strain on these business owners are becoming more and more acute. This has led normally law-abiding licensees to open their doors to allow patrons to gather and congregate, in defiance of local public health orders and thereby endanger the public health, safety, and welfare.

The Department has received 520 complaints from local law enforcement and the public of licensees in violation of rules established by an emergency order during this pandemic. In investigating the complaints, Department Agents have confirmed 176 licensed premises throughout the state to be engaging in activities that are in violation of emergency orders, presenting an immediate threat to public health, safety, and welfare.

The Department often seeks to attain compliance through education and warnings rather than taking disciplinary action. Initially the Department contacted each of these locations to request their compliance and to educate them on the harms created through their establishments remaining open. Of the 176 contacted by the Department, 14 initially refused to comply and remained in violation of the emergency orders in place. The only recourse the Department was left with was its normal disciplinary process that could take months or years before a resolution, while allowing a bad actor to continue to harm the public while the process continued.

Local and State agencies requested that the Department seek to impose its regulatory authority for administrative emergency decisions through the emergency rulemaking process to ensure that the immediate harm posed by an ABC licensee violating a public health and safety emergency order during the current ongoing COVID-19 crisis. As the economic strain becomes more burdensome, and if new restrictions are put in place or there is a need to retract from the various re-opening stages due to a resurgence of the virus, the Department will need to use this authority to ensure it can stop any immediate public harm presented.

The Department has changed its emergency regulation submission to better reflect strictly the emergency presented by the COVID-19 crisis and will hold back on all other emergency authority until the certificate of compliance rulemaking phase for the Department to regulate this statutory authority permanently for future cases where immediate harm must be averted using administrative emergency decisions.

Comparable Federal Statute or Regulations

The Department has surveyed applicable comparable federal regulations for the sale, distribution, and manufacture of alcoholic beverages. The Department has found no comparable federal statute or regulation to the proposed administrative emergency decisions regulatory package.

Determination of Inconsistency/Incompatibility with Existing State Regulations

The Department is the only agency with the authority over administrative emergency decisions for alcoholic beverage licenses within the state as outlined in the California Constitution Article XX section 22 and Business and Professions Code section 23080. The Department has surveyed all regulations effecting administrative emergency decisions and found no inconsistent or incompatible state regulations to the proposed regulatory package.

Necessity of Section 147 subsections (m) and (p)

Although there is no requirement for a full Initial Statement of Reasons for this regulatory package until the certificate of compliance stage, the department wishes to make clear the necessity of subsections (m) and (p) of the proposed text to better respond to commenters during the emergency regulatory public comment period.

§ 147 (m)

The proposed language is required to prevent licensees from using a petition for offer in compromise, in situations where the penalty imposed could be argued to apply under Business and Professions Code section 23095 due to a deduction of time from a previously served under a temporary suspension. The petition for offer in compromise is statutorily limited to violations that involve a fifteen-day suspension or less (except for a second offense involving a sale of alcohol to a minor, in which case there is no limit). Section 147(l) has the potential to shorten a lengthy penalty for a more serious violation to a fifteen-day suspension or less following the full

disciplinary process due to the deduction of any period of suspension already served under the emergency decision. It is necessary to ensure all parties are aware that a petition for offer in compromise is unavailable through the application of subsection (l) because the total suspension imposed was greater than fifteen days even if the final order for suspension is less than or equal to fifteen days at the time of imposition due to previous suspension time served under an administrative emergency order.

§ 147 (p)

The proposed language is required to ensure the public and courts of review understand that the proposed regulatory language will have no effect upon the jurisdiction of the Alcoholic Beverage Control Appeals Board to review the normal accusation process of the Department and impose an automatic stay during that review as outlined in Business and Professions Code section 23080.