

TITLE 4. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

May 20, 2020

NOTICE OF PROPOSED EMERGENCY ACTION

The Department of Alcoholic Beverage Control (ABC or the Department) seeks to adopt the proposed emergency regulation to address changes in the alcohol industry due to the COVID-19 pandemic and state of emergency. Attached is the proposed text to be effective as title 4, section 141.1 of the California Code of Regulations.

EXPRESS FINDING OF EMERGENCY

With the various shelter-in-place directives and the enforced closure of bars and restaurants to on-premises activities, ABC has found that ABC licensees are more frequently selling alcoholic beverages via online and telephonic orders and delivering such alcoholic beverages to consumers away from the licensed premises. This has resulted in a sharp increase in careless and cavalier delivery of alcoholic beverages to minors and overly intoxicated people. This new situation calls for immediate enforcement by the Department through actions outlined by the proposed emergency regulation to avoid serious harm to the public peace, health, safety, and general welfare.

FACTUAL BASIS OF THE EMERGENCY

With the state of emergency for the COVID-19 crisis being declared in March 2020 and the temporary regulatory relief afforded by the Department with respect to the delivery of alcoholic beverages to consumers away from the licensed premises, the Department has seen an increase in unmonitored and unchecked deliveries of alcoholic beverages.

Recently, the Department has been receiving complaints regarding ABC licensees and their third-party delivery agents delivering alcoholic beverages without verifying the age or the state of sobriety of the recipient. In some instances, alcoholic beverages were simply left on the doorstep or at the front door. Deliveries in this manner disregard state law and regulations set by the Department prohibiting the selling or furnishing of alcoholic beverages to minors or those who are obviously intoxicated. Without visually checking the recipient or the identification of the recipient of the alcoholic beverages or even interacting with the recipient, there is no way for licensees or their delivery agents to determine if the recipient is of legal drinking age or not obviously intoxicated.

The existing regulation governing the use of minor decoys testing compliance with the law by licensees found in title 4, section 141 of the California Code of Regulations does not allow for the use of minor decoys for online or telephone orders in which the age of the person making the order is required before proceeding with the order. This existing regulation does not contemplate that the delivery of the alcohol will occur at a different time and location from that initial order.

Minor decoy operations under the proposed emergency regulation will address the new issue of no-contact deliveries during the current crisis where public health, safety, and welfare are already under attack. The Department needs to act now in order to limit the compounding harm created by some licensees throughout the state who are abusing their license privilege to sell and distribute alcoholic beverages. With this proposed emergency regulation in place, the Department can move to speedily protect the public health, safety, and welfare during this time of crisis by promptly discovering licensees who disregard and abuse the temporary relief permitting certain retail licensees to deliver alcoholic beverages for consumption off the licensed premises. The Department believes the regular rulemaking process would cause too much delay at this time due to the shifting changes in the industry, increased incidence of alcohol delivery, and excessively high violation rates of delivery service of alcoholic beverages to minors. For this reason, the Department now seeks to immediately promulgate this regulation as an emergency action and will subsequently prepare its permanent adoption through the regular rulemaking process and invite public comment and input on this new regulation.

WRITTEN EMERGENCY COMMENT PERIOD

Government Code section 11346.1, subdivision (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

Business and Professions Code sections 25658 and 25750 authorize ABC to adopt the proposed emergency regulation. The proposed emergency regulation implements, interprets, and makes specific Business and Professions Code section 25658.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws and Regulations

Current ABC regulations do not include an enforcement mechanism addressing retail alcoholic beverage delivery away from the licensed premises for off-premises consumption.

Summary of Effect

The unregulated delivery of alcoholic beverages to minors or merely dropping off alcoholic beverages at unattended doorsteps by licensees or third-party services is detrimental to the public health, safety, and welfare. Simply asking a customer whether they are of legal age to consume alcohol when taking an order for alcoholic beverages online or over the phone is not adequate if, at the point of delivery, the identification or age of the recipient is not visually inspected or verified, especially when the delivering party does not even attempt actual contact with the customer. In order to investigate this problem, the Department needs the ability to deploy minor decoys covering off-premises deliveries of alcoholic beverages as soon as possible.

Comparable Federal Statute or Regulations

ABC has determined that this proposed emergency 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 temporary regulatory relief for licensees is undermined by the conduct of the licensees it is designed to help. Preventing sales to and furnishing of alcoholic beverage to minors, and prosecuting violators, is one of the highest public safety priorities of the Department. By utilizing minor decoys for delivery service, the Department can identify those licensees violating the temporary relief measures and will be able to enforce the law against them, thereby protecting the public's health, safety, and welfare. In addition, the establishment of decoy operation standards will ensure licensees are treated in a fair manner.

Benefits Anticipated

By establishing the use of minor decoy operations for off-premises delivery of alcoholic beverages, the Department can investigate actions of licensees who are violating the temporary regulatory relief established during the COVID-19 crisis and put an end to these violations through enforcement action. In addition, the proposed emergency regulation addresses delivery services even after the pandemic has passed, therefore protecting the public health, safety, and welfare from bad actors during and after the crisis.

Determination of Inconsistency/Incompatibility with Existing State Regulations

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

Small Business

The ABC has determined this proposed emergency regulatory action does not affect small businesses: the laws that ABC seeks to enforce via the proposed emergency regulation are laws to which small businesses are already subject. The proposed emergency action only lays out the process by which ABC will seek enforcement of these same laws. Further, ABC is not affecting any business with this emergency regulation without due process or providing evidence that the business presents an immediate threat to the public health, safety, and welfare.

Disclosures Regarding the Proposed Emergency 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: None.
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

ABC has made an initial determination that the adoption of this emergency regulation will have negligible economic impact on businesses that do not violate the law. The laws that ABC seeks to enforce via the proposed emergency regulation are laws to which businesses are already subject. The proposed emergency action only lays out the process by which ABC will seek enforcement of these same laws. There is no foreseeable impact on businesses based on the process laid out in the proposed emergency regulation.

Description of All Cost Impacts That a Representative Private Person or Business Would Necessarily Incur in Reasonable Compliance with the Proposed Action

The ABC has made an initial determination that the adoption of this emergency regulation will have negligible economic impact on a representative private person or business that does not violate the law. The laws that ABC seeks to enforce via the proposed emergency regulation are laws to which persons and businesses are already subject. The proposed emergency action only lays out the process by which ABC will seek enforcement of these same laws. There is no foreseeable impact on representative private persons or businesses based on the process laid out in the proposed emergency regulation.

The Need to Require Report from Businesses

The proposed emergency 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 would be more effective in carrying out the purpose for which the emergency action is proposed. Utilizing minor decoys would be as effective, less burdensome to, and 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 statements or arguments with respect to alternatives to the proposed emergency regulation during the written comment period.

Agency Contact Persons

Inquiries concerning the proposed emergency 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, Regulations and Policy Unit, (916) 928-7627.

Internet Access

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