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Dram Shop Liability: Addressing the New "To Go" rules in Texas

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In our continuing series of articles addressing Dram Shop Liability in Texas, this article addresses "to go" alcohol sales.

One thing the pandemic brought to Texas that may have been a positive was the change in laws concerning alcohol sales and delivery of alcohol. In 2019, Texas, like many other states, approved new legislation allowing restaurants and bars to sell to-go alcoholic beverages. Prior to the pandemic, most states, including Texas, prohibited such sales. Senate Bill 1450 created two separate paths that authorize certain retailers to deliver alcohol directly to consumers.

Chapter 28 of the Texas Alcoholic Beverage Code (the "Code") establishes an independent delivery authority to permittees who hold a Mixed Beverage Permit **and** Food and Beverage Certificate.

Chapter 57 of the Code establishes a new "Consumer Delivery Permit" authorizing the holder to deliver alcohol to consumers on behalf of certain enumerated permit holders.

ELIGIBILITY:

Businesses that have both a Mixed Beverage Permit (MB) and a Food and Beverage Certificate (FB) may deliver alcohol to their customers. In addition, holders of a Mixed Beverage Restaurant Permit and Food and Beverage Certificate are also eligible.

These retailers may deliver the alcohol themselves through employees or agents, or utilize a third-party vendor such as Door Dash or Favor to make the deliveries.

The sale of alcohol must be made during the permittee's normal hours of legal sale.

Deliveries may only be made to an address that is legal/wet for the type of alcohol that is being delivered. It must be delivered in the same county, city, or town as the retailer's place of business, or within 2 miles of the municipal boundary if located in a city or town.

LIMITS:

Businesses may only deliver alcohol when it is accompanied by an order of food that was prepared on the permittee's premises. However, there is no "food" to "alcohol" ratio, and there is no limit on the number of beers, ales, wines or other distilled spirits that can be sold.

The alcohol must be delivered in the original container that was sealed by the manufacturer of the beverage, and, distilled spirits are delivered in single-serving sized containers that do not exceed 375 mL. An MB permittee may NOT deliver beverages that it pre-mixes and seals itself. However, House Bill 1024 was passed effective May 12, 2021, and allows distilled spirits mixed with other beverages or garnishes and stored in a tamper-proof container (such as in-house mixed margarita) clearly labeled with the permit holder's business name and the works "alcoholic beverage." The term "tamper-

proof container" means a container that clearly shows whether it has been opened, and may include being placed in a bag that has been sealed with a zip tie or staple or sealed with shrink wrap or a similar seal.

Alcoholic beverages that are sealed by the permit holder and are delivered may not be transported in the passenger area of a motor vehicle, but must be placed in the trunk, the area behind the last upright seat of the vehicle if the vehicle does not have a trunk, glove compartment or similar storage container that is locked.

PROTECTION FROM LIABILITY:

A retailer who sells alcohol for delivery satisfies its responsibility when it transfers possession of the alcoholic beverage to a newly created "CD Permittee," i.e., a CD Permit holder, or a delivery driver acting as an agent of or on behalf of a CD Permittee. If a retailer ensures that the driver is acting as an agent for a CD permittee,[1] it is no longer responsible for the remainder of the transaction. The conduct of the CD permittee or driver acting as its agent or independent contractor is NOT attributable to the retailer with respect to:

- Providing, selling or serving alcohol to a minor
- Providing, selling or serving alcohol to an intoxicated person
- Delivering alcohol to a dry or otherwise illegal area
- Any other provision of the Code

CONSUMER DELIVERY PERMIT:

Under the Act, a CD Permit may be issued to a business or person who contracts with or employs individuals for the delivery of retail goods to consumers. The CD permittee may make deliveries of alcohol to bona fide orders placed by the consumer.

The driver must be at least 21 years of age and hold a valid driver's license.

DRIVER RESPONSIBILITIES:

The responsibility of the driver making the delivery is the same as the responsibility for selling/serving alcohol to consumers on premise. The driver must NOT deliver alcohol to a Minor, or to an Intoxicated Person. The recipient of the alcohol must actually present the driver with valid proof of their identity and age before the alcohol is handed over to the consumer.

The delivery person is required to either acknowledge completion of the delivery on a software application or have the recipient sign a receipt acknowledging delivery, and comply with the following:

- Alcohol may only be delivered to a person who is at least 21 years of age
- Alcohol may only be delivered to a person who purchased the alcohol from the retailer or who was designated in advance by the purchaser as the recipient of the beverage or is located at the delivery address.
- The recipient must present valid proof of identity and age
- **The recipient must not be intoxicated**
- The delivery must be made during the retailer's legal hours of operation or if the driver receives the beverage during legal hours of operation and completes the delivery to the consumer within a reasonable amount of time after leaving the retailer's premises.
- The delivery must be made to an address that is legal/wet for the type of alcohol being delivered.
- The delivery must be within the same county, city or town as the retailer, or within 2 miles of the municipal boundary if the retailer is located in a city or town.

LIABILITY OF CD PERMITTEE:

A CD permittee is not liable for the conduct of the driver acting on its behalf if:

- The CD permittee has not directly or indirectly encouraged the delivery driver to violate the law; and
- The delivery driver (1) holds a valid (newly created) Texas Responsible Alcohol Driver Certificate (TRAD)[2] or (2) completes the delivery using a software application that meets the standards set forth in the Commission's rules

governing delivery compliance software applications.

LIABILITY OF DELIVERY DRIVERS:

The delivery driver bears the most responsibility in this newly created scheme. It is illegal for a driver to deliver or sell an alcoholic beverage to a minor or to an intoxicated person.

The law provides a presumption that the driver did not sell the alcohol with the required criminal negligence if:

- The driver held a valid TRAD certificate at the time of the delivery; and
- The driver completed the delivery due to a technical malfunction of a valid delivery compliance software application that otherwise meets the requirements established in the Commission's rules.

It is also illegal for the driver to deliver an alcoholic beverage to a location that is not wet for the type of beverage being delivered.

CONCLUSION:

This new framework for the delivery of alcoholic beverages has proven very popular. Dram shop claims will inevitability result in the future, but if the rules are properly followed, liability may be avoided. Commercial delivery companies who employ independent contractors to make these deliveries will attempt to shield themselves from liability in that fashion. Retailers will point to the statute for protection. Stay tuned.

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[1] A retailer is not required to confirm that a CD permittee or its delivery driver has received the TABC delivery driver certification, even though it is advisable that a retailer do so.

[2] The TRAD course is specifically for delivery drivers who will be delivering alcoholic beverages directly to consumers and teaches the drivers how to deliver legally and safely.

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