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LEGAL BRIEFING: FOOD & BEVERAGE LAW
BEER DELIVERY

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January 23, 2017

Beer Delivery

Recently, WHEC news ran a story about how one of Rochester's beloved pizza shops (see: <http://www.whec.com/news/beer-right-to-your-doorstep/4355253/>) will begin offering beer delivery. So, is it legal? The short answer is, yes. But as with any discussion of alcohol and the law, the short answer is rarely a sufficient answer.

Under New York's Alcoholic Beverage Control Law (ABC Law), a restaurant that has a license to sell beer may deliver unopened beer (including sealed growlers) *with* a food order. That means no beer-only orders – all beer must be delivered as part of a food order. It is not permitted to deliver wine or liquor.

The two licenses typically held by restaurants are an "On-premises" License or a "Restaurant Wine" License. On-premises Licenses allow establishments to offer a full bar – beer, wine and liquor – and sell beer for take-out and to-go in growlers. On-premises licensees are not required to have a full-kitchen, though certain food requirements need to be met. These include a food prep area along with the availability of *some* food that, according to the ABC Law: "complement alcoholic beverage tastings; are ordinarily consumed without the use of tableware; and can be conveniently consumed while standing or walking." A Restaurant Wine License allows only for the sale of wine and beer, but, as the name implies, it is only available for a "restaurant."

The ABC Law defines "Restaurant" as follows:

Alcoholic Beverage Control

§ 3. Definitions. Whenever used in this chapter, unless the context requires otherwise:

27. "Restaurant" shall mean a place which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation and which has suitable kitchen facilities connected therewith, containing conveniences for cooking an assortment of foods, which may be required for ordinary meals, the kitchen of which must, at all times, be in charge of a chef with the necessary help, and kept in a sanitary condition with the proper amount of refrigeration for keeping of food on said premises and must comply with all the regulations of the local department of health. Restaurant shall include a motion picture theatre, movie theatre or other venue that shows motion pictures that meet the definitions of restaurant and meals, and all seating is at tables where meals are served. "Meals" shall mean the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed

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a compliance with this requirement. "Guests" shall mean persons who, during the hours when meals are regularly served therein, come to a restaurant for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein. Nothing in this subdivision contained, however, shall be construed to require that any food be sold or purchased with any beverage.

The Liquor Authority will make the determination of whether an establishment is a restaurant by viewing the totality of the circumstances when applying the facts to the definition. Declaratory Ruling 2012-01938 of the State Liquor Authority is helpful in this regard. For context, a declaratory ruling is a ruling of the State Liquor Authority as to the applicability of the ABC Law, or the Rules of the State Liquor Authority, with respect to a specific set of facts presented in the request for the declaratory ruling (see 9 NYCRR § 98.1). Unlike opinions or letters of advice which may be issued by the State Liquor Authority, declaratory rulings are binding on the Authority with respect to the facts set forth in the ruling. Declaratory Ruling 2012-01938 was about getting an On-premises License for a movie theater. Relevant to this discussion is in that declaratory ruling, the State Liquor Authority whittled down its definition of restaurant to the following:

A "restaurant," according to §3(27), is defined as a "place which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation and which has suitable kitchen facilities connected there with," and "meals" are the "usual assortment of foods commonly ordered at various hours of the day."

Declaratory Ruling
2012-01938

July 25, 2012
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From the 30,000-foot view, a restaurant can be thought of as a place where people go to eat food that is prepared on site by a chef/cook. If there are no tables, no cooks, and no wait staff, it's not a restaurant. If food is prepared on site but there are no tables and no wait staff, it's probably not a restaurant, but it might be. Thus, the more food prepared, and the more seating and staffing available, the more likely an establishment would be deemed a restaurant as defined by the ABC Law, and vice versa. To give a little more perspective on this, in the same Declaratory Ruling, the Authority commented on whether the movie theater's intention to have tables that are connected to the patrons' theater seats constituted sufficient table seating under the ABC Law's definition of restaurant:

Even though AMC would be using a "cafeteria style" service system, the patrons will be served from a full service kitchen and there will be approximately 24 "food handlers" employed to ensure the appropriate level of service. Therefore, the Members of the Authority find that this business plan meets the ABCL definition of a restaurant with the requisite table seating.

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So before you start delivering beer, ensure that you are a restaurant under the ABC Law and that you have the appropriate licensure.

If you have any questions about this Legal Briefing, please contact any attorney of our Firm at 585-730-4773.

This Legal Briefing is intended for general informational and educational purposes only and should not be considered legal advice or counsel. The substance of this Legal Briefing is not intended to cover all legal issues or developments regarding the matter. Please consult with an attorney to ascertain how these new developments may relate to you or your business.
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