

What Licensees Should Know About Act 21 of 2020

On May 21, 2020, the Governor signed HB 327 (PN 3678) into law. Now known as Act 21 of 2020, it made two temporary but significant changes to the way liquor is distributed in Pennsylvania. These changes allow certain retail licensees to sell prepared beverages and mixed drinks to go to non-licensees and allow certain retail licensees to sell liquor to each other. These changes are discussed below in a question and answer format.

Sale of Prepared Beverages and Mixed Drinks To Go

1. What are prepared beverages and mixed drinks?

A “prepared beverage and mixed drink” is defined as a sealed container holding between 4 and 64 fluid ounces of spirits (liquor) and mixer that have been combined at the licensed premises.

2. What drinks do not fall under the definition of prepared beverages and mixed drinks?

The following are examples of drinks that would not meet the definition of “prepared beverage and mixed drink” and cannot be sold to go under this Act:

- A mixed drink containing both wine and liquor (because wine is not a spirit).
- An unopened bottle of liquor (because it was not combined at the licensed premises with a mixer).
- An unopened bottle of ready-to-drink cocktail purchased from a Fine Wine & Good Spirits store (because it was not combined at the licensed premises with a mixer).
- A gallon jug of rum and soda (because it is more than 64 ounces).
- 8 ounces of rum put in a container (because it was not combined with a mixer)

Licensees are reminded that other provisions of the Liquor Code allow wine and beer to be sold for off-premises consumption, and this allowance continues, as long as the rules for off-premises consumption are followed.

3. Which licensees may sell prepared beverages and mixed drinks to go?

Only hotel and restaurant license holders who have lost at least 25% of their average monthly sales because of the restrictions imposed by the COVID-19 emergency declaration and who are offering meals to go may sell prepared beverages and mixed drinks to go. Privately held

public golf course liquor licenses (PGR), continuing care retirement community liquor licenses (CCRC) and airport restaurant liquor licenses (AR) are considered restaurant liquor licenses and each may sell prepared beverages and mixed drinks to go if they otherwise qualify to do so.

4. Which licensees may not sell prepared beverages and mixed drinks to go?

The following license holders may not sell prepared beverages and mixed drinks to go:

- Club and catering club license holders
- Public venue and performing arts license holders (Although their licenses are considered restaurant liquor licenses, their sales of alcohol are limited to events and performance at the facility, which cannot currently occur. Also, they do not sell food to go.)
- A licensee whose license renewal has been objected to under the Nuisance Bar Program, until the objection is resolved
- A licensee whose license is currently suspended, in safekeeping
- A license that has been previously suspended under the Licensee Compliance Program

In addition, breweries, limited wineries, distilleries, limited distilleries of historical significance, distributors and importing distributors are unaffected by this Act.

5. What constitutes offering a meal, and is a food purchase required in order to purchase prepared beverages and mixed drinks?

The Act does not define what constitutes a meal for purposes of these temporary changes. Section 406 of the Liquor Code defines a meal as food sufficient to constitute breakfast, lunch or dinner; a snack such as pretzels, popcorn, chips or similar food is not sufficient as a meal. The Board believes this standard is to be applied to these temporary authorities as well.

However, a meal purchase is not required in order to purchase prepared beverages and mixed drinks under this temporary authority.

6. Is there a limit on how many prepared beverages and mixed drinks a person may purchase at one time?

No. A customer may purchase as many prepared beverages and mixed drinks as they wish.

7. Are there any additional requirements on the sale of prepared beverages and mixed drinks?

Yes. No later than 60 days after this Act goes into effect, a licensee must begin to utilize a transaction scan device to verify the age of an individual who appears to be under 35 years of age before making a sale.

In addition, any licensee selling prepared beverages and mixed drinks to go shall prominently post a warning sign that is at least 8 ½” by 11” on the licensed premises within 48 hours of the licensee beginning to sell prepared beverages and mixed drinks, reminding customers that it is illegal to have an open container of alcohol while in a vehicle. The warning sign must further note that prepared beverages and mixed drinks packaged for sale by the licensee are open containers and may only be transported in the vehicle’s trunk or in some other area of the vehicle that is not occupied by the driver or passengers.

Further, please note that curbside service of wine and beer are not authorized by the Act and remain illegal. To-go purchases of beer and wine must continue to occur on the licensed premise and are only permissible if they are made in compliance with the Liquor Code. For beer, this means no more than 192 ounces per sale; for wine sold to go by holders of wine expanded permits, this means no more than 3 liters per sale, with such sales occurring only at approved registers.

8. When can a licensee sell prepared beverages and mixed drinks?

Licensees can sell prepared beverages and mixed drinks from 7:00 a.m. to 11:00 p.m., Monday through Saturday, and from 9:00 a.m. to 11:00 p.m. on Sundays, if they have a Sunday Sales Permit.

9. How does a licensee establish that it meets the 25% threshold?

In order to acquire the right to sell prepared beverages and mixed drinks for off-premises consumption, a licensee must show that it has lost more than 25% of its average monthly sales totals, including alcohol sales.

- A licensee should compare its previous month’s sales to the corresponding month in the prior year to calculate the average monthly sales. (To calculate loss of sales, subtract COVID-19 sales from the pre-COVID-19 sales. Then take that number and divide it by the pre-COVID-19 sales. If the resulting fraction is 0.25 or higher, you have met the threshold; if it is less than 0.25, then you have not met the threshold).
- If the licensee was licensed but not open in the same month in the prior year, or if the licensee acquired its license less than a year ago but has at least one full month of pre-

COVID-19 sales, it should use the pre-COVID-19 month's sales closest to the month in question to calculate and compare average monthly sales.

- If the licensee did not use its license prior to March 2020 but has access to the previous license holder's monthly sales, then the previous owner's sales information may be used for comparison. Otherwise, the licensee may not sell prepared beverages and mixed drinks to go.

Example 1: Restaurant licensee wants to sell prepared beverages and mixed drinks for off-premises consumption in June 2020. His food and beverage sales in May 2019 were \$100,000. His food and beverage sales in May 2020 were \$50,000. He may sell prepared beverages and mixed drinks for off-premises consumption in June 2020 because he lost more than 25% of his sales ($100,000 - 50,000 = 50,000$; $50,000 \div 100,000 = 0.5$, which is greater than 0.25)

Example 2: Restaurant licensee seeking to sell prepared beverages and mixed drinks to go in June 2020 had May 2020 sales of \$80,000 and May 2019 sales of \$100,000. He cannot sell prepared beverages and mixed drinks for off-premises consumption in June 2020 because he did not lose 25% of his sales. ($100,000 - 80,000 = 20,000$; $20,000 \div 100,000 = 0.2$, which is less than 0.25)

Example 3: Restaurant licensee wants to sell prepared beverages and mixed drinks for off-premises consumption in June 2020. He acquired his license under prior approval in April 2019, but did not start operating until May 28, 2019, and his first full month of operation was June 2019. He had no sales in April 2019, \$2,000 in May 2019, \$100,000 in June 2019 and \$70,000 in May 2020. Since he didn't operate for a whole month until June 2019, he should use that month's sales of \$100,000 for comparison. In this case, since his sales in June 2019 are \$100,000 and his sales in May 2020 are \$70,000 he can sell prepared beverages and mixed drinks for off-premises consumption in June 2020 because he lost more than 25% of his sales ($100,000 - 70,000 = 30,000$; $30,000 \div 100,000 = 0.3$, which is greater than 0.25).

Example 4: Restaurant licensee wants to sell prepared beverages and mixed drinks for off-premises consumption in June 2020. He acquired the license in September 2019, and his first full month of operation was October 2019. His sales in October 2019 were \$100,000 and his sales in May 2020 were \$70,000. He can sell prepared beverages and mixed drinks for off-premises consumption in June 2020 because he lost more than 25% of his sales ($100,000 - 70,000 = 30,000$; $30,000 \div 100,000 = 0.3$, which is greater than 0.25).

Example 5: Restaurant licensee wants to sell prepared beverages and mixed drinks for off-premises consumption in June 2020. His April 2020 sales are \$35,000. He acquired his license in March 2020, so he does not have a full month of pre-COVID-19 sales to compare.

The previous owner of the license informs him that sales in May 2019 were \$100,000. He can sell prepared beverages and mixed drinks for off-premises consumption in June 2020 because he lost more than 25% of his sales ($100,000 - 35,000 = 65,000$; $65,000 \div 100,000 = 0.65$, which is greater than 0.25).

Example 6: Restaurant licensee wants to sell prepared beverages and mixed drinks for off-premises consumption in June 2020. His April 2020 sales are \$35,000. He acquired his license in March 2020, so he does not have a full month of pre-COVID-19 sales to compare. He does not know what the previous owner's sales were. He cannot sell prepared beverages and mixed drinks for off-premises consumption in June 2020.

10. Should a licensee with an interior connection to another business include the sales from the other business when trying to determine if they qualify to sell prepared beverages and mixed drinks for off-premises consumption?

No. The Act focuses on the licensed restaurant or hotel business and not any other business – such as a gas station, grocery store or convenience store – that the licensee may also operate. For restaurants, this means the sales in question are the sales that occur on the licensed premises. For hotel license owners – who need to operate a hotel to qualify for the license – this means the sales in question are the sales conducted by the hotel operation.

11. Are there any labeling requirements for the sealed container used to sell prepared beverages and mixed drinks?

The Liquor Code does not generally regulate labeling of containers. However federal law requires certain governmental warnings be placed on sealed containers. Specifically 27 USCS § 215 prohibits the manufacturing, importing or bottling of an alcoholic beverage without placing a statement on the bottle indicating that, according to the surgeon general, women should not drink alcoholic beverages during pregnancy and further noting that the consumption of alcoholic beverages impairs one's ability to drive a car or operate machinery and may cause health problems. Since the PLCB does not interpret federal law, you may wish to contact TTB for guidance on this issue.

12. Can customers start drinking out of the sealed containers prior to leaving the licensed premises?

No. The Act authorizes restaurant and hotel licenses to sell prepared beverages and mixed drinks for off-premises consumption in sealed containers. A sealed container is defined as a packaged container with a secure lid or cap designed to prevent consumption without removal of the lid or cap. Further, a lid with sipping holes or openings for straws must be covered or affixed with an additional seal before sale.

If a patron begins to consume the prepared beverage and mixed drink while on licensed premises, then the container is no longer sealed. Since restaurant and hotel liquor license holders can only sell prepared beverages and mixed drinks for off-premises consumption in sealed containers, allowing the customer to leave the premises after opening the container could lead to a citation.

13. Does a licensee need to file an application with the Board or otherwise notified the Board of its intent to sell prepared beverages and mixed drinks for off-premises consumption?

No. There is no requirement that the Board be notified if a licensee intends to begin selling prepared beverages and mixed drinks. Similarly, there is no application that needs to be filed with the Board. That being said, licensees should ensure their sales records reflect that they are eligible to sell prepared beverages and mixed drinks.

14. Are there special pricing rules for the sale of prepared beverages and mixed drinks?

There are no special pricing rules in the Act regarding prepared beverages and mixed drinks. Therefore, the general pricing rules apply.

With regard to pricing, a licensee is permitted to discount any and all alcoholic beverages for a period of time not to exceed 4 consecutive hours or nonconsecutive hours per day and a maximum of 14 hours per week. During this happy hour, the price of alcoholic beverages may not change. Section 406(g) of the Liquor Code requires notice of all happy hours to be posted on the licensed premises 7 days prior to the happy hour. In addition to happy hours, a licensee is permitted to offer 1 specific type of alcoholic beverage at a discounted price all day, or for a portion of the day if it chooses, as a daily drink special. A specific type of alcoholic beverage means either a specific registered brand of malt or brewed beverages, a type of wine, a type of distilled spirits or a mixed drink.

In addition, licensees are still prohibited from offering anything of value to induce the sale of an alcoholic beverage. For example, a licensee may not offer a free prepared beverage or mixed drink conditioned on the purchase of another prepared beverage or mixed drink.

15. Can payment occur at curbside?

Yes, payment may occur at curbside for prepared beverages and mix drinks. However, “curbside” must be immediately adjacent to the license premises. It would not be permissible, for example, to provide curbside service 400 feet away from the licensed premises if there is a public street 25 feet away from the licensed premises. Curbside never means home delivery.

Licenses are reminded that while there are other provisions of the Liquor Code that allow wine and beer to be sold for off-premises consumption, curbside sales of wine and beer are not allowed.

16. Can I sell extra drinks at curbside?

No. While payment at curbside is permitted, licensees may not take that opportunity to sell additional prepared beverages and mixed drinks. For example, a licensee cannot bring a tray filled with additional mixed drinks and offer to sell these additional unordered drinks to the consumer in his or her car.

17. Can I sell drinks in conjunction with an off-premises catering permit?

No. The temporary authority to sell prepared beverages and mixed drinks is limited to the licensed premises.

18. Can I deliver prepared beverages and mixed drinks?

No. While the Act authorizes the sale of prepared beverages and mixed drinks for off-premises consumption at curbside, it does not authorize delivery of those drinks.

19. The Act says that the Liquor Code prohibition on allowing minors, prostitutes and persons of ill repute to frequent licensed premises no longer applies. Does that mean that I will not get in trouble if I accidentally sell to a minor?

No. The prohibition on selling to minors and visibly intoxicated patrons still applies.

Hotel and Restaurant Licensees Selling Liquor to Each Other

1. Which licensees can now sell liquor to other licensees?

The Act defines a licensee authorized to sell liquor to other licensees as a restaurant or hotel liquor license holder authorized to sell prepared beverages and mixed drinks for off-premises consumption. The qualifications are set forth above in the Q&A discussing such sales. Both the buyer and the seller must meet the definition.

2. Does a licensee need to file an application with the Board or otherwise notify the Board of its intent to sell liquor to other licensees?

While there is no need to file an application, a licensee must inform the Board in writing of each sale of liquor to another licensee within 7 days of the sale's transaction. The notification should be sent to RA-LBCOVID19LiqSales@pa.gov and shall indicate the name and LID number of the selling licensee, the name and LID number of the purchasing licensee, as well as a description of the liquor sold, including brand names, sizes and number of containers.

3. What is considered liquor for purposes of the Act?

The Act uses the existing Liquor Code definition of liquor, which includes any alcohol that does not fall under the definition of malt or brewed beverages or wine.

4. Are there special pricing rules for the sale of liquor?

There are no special pricing rules in the Act regarding liquor. Therefore, the general pricing rules apply. While licensees have significant leeway in setting prices, there are rules regarding the discounting of the prices once they are established. See the second paragraph in response to question 14 above.

In addition, licensees are still prohibited from offering anything of value to induce the sale of an alcoholic beverage. For example, a licensee could not offer a free bottle of liquor conditioned on the purchase of another bottle of liquor.

5. Can I deliver liquor?

No. While the Act authorizes the sale of liquor to another licensee, it does not authorize delivery of that liquor. Since retail licensees already have the authority to pick up liquor that they have purchased at Fine Wine & Good Spirits stores, they are likewise permitted to pick up liquor they purchase from another licensee.

6. Can licensees sell liquor on credit?

No. The general rules on how liquor can be sold apply here as well, which are that a retail licensee can use cash, check or debit card for liquor purchases. Licensees cannot accept credit cards for these sales because the Liquor Code expressly limits credit card use to sales to non-licensees.

7. Is there a limit on how much liquor a licensee may sell to another licensee?

No. A licensee may sell and purchase as much liquor as they wish.