
SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION**Senator Bill Dodd****Chair****2021 - 2022 Regular**

Bill No:	SB 389	Hearing Date:	4/20/2021
Author:	Dodd, et al.		
Version:	4/6/2021 Amended		
Urgency:	No	Fiscal:	Yes
Consultant:	Felipe Lopez		

SUBJECT: Alcoholic beverages: retail on-sale license: off-sale privileges

DIGEST: This bill authorizes the holder of a retail on-sale license to sell alcoholic beverages for off-sale consumption for which their license permits on-sale consumption, as specified.

ANALYSIS:

Existing law:

- 1) Establishes the Department of Alcoholic Beverage Control (ABC) and grants it exclusive authority to administer the provisions of the ABC Act in accordance with laws enacted by the Legislature. This involves licensing individuals and businesses associated with the manufacture, importation, and sale of alcoholic beverages and the collection of license fees for this purpose.
- 2) Provides, under the ABC Act, for the issuance of various alcoholic beverage licenses, including the imposition of fees, conditions, and restrictions in connection with the issuance of those licenses.
- 3) Prohibits a person from exercising the privilege which a licensee may exercise or performing under the authority of a license unless the person is authorized to do so by a license.
- 4) Authorizes a person holding an on-sale general license, with respect to beer and wine, and any on-sale license, with respect to the particular beverage or beverages mentioned in the license, to exercise the rights and privileges granted by an off-sale beer and wine license.

- 5) Allows a person who has purchased and partially consumed a bottle of wine to remove the partially consumed bottle from the premises of an on-sale beer and wine public premises licensee.
- 6) Provides that any person under 21 years of age who purchases any alcoholic beverage, who consumes any alcoholic beverage in any on-sale premises, or who possesses any alcoholic beverage on any street or highway or in any public place or any place open to the public is guilty of a misdemeanor.
- 7) Provides that every person who sells, furnishes, gives, or causes to be sold, or given away any alcoholic beverage to any person under 21 years of age is guilty of a misdemeanor.
- 8) Defines an “on-sale” license as authorizing the sale of all types of alcoholic beverages: namely, beer, wine, and distilled spirits, for consumption on the premises (such as at a restaurant or bar). An “off-sale” license authorizes the sale of all types of alcoholic beverages for consumption off the premises in original, sealed containers.

This bill:

- 1) Authorizes the holder of a retail on-sale license to sell the alcoholic beverages for off-sale consumption for which their license permits on-sale consumption provided the beverages are in manufacturer prepackaged containers.
- 2) Authorizes the holder of a retail on-sale license to sell the alcoholic beverages for off-sale consumption for which their license permits on-sale consumption when the beverages are not in manufacturer prepackaged containers if the alcoholic beverages are packaged in a container with a secure lid or cap sealed in a manner designed to prevent consumption without removal of the lid or cap by breaking the seal.
- 3) Requires any licensee who sells alcoholic beverages for off-sale consumption to “post” the following warning sign in a manner that notifies consumers of restrictions regarding open container laws:

Alcoholic beverages that are packaged by this establishment are open containers and shall not be transported in a motor vehicle except in the vehicle’s trunk or, if there is no trunk, the containers shall be kept in some other area of the vehicle that is not normally occupied by the driver or passengers. This does not include a utility compartment or glove compartment (See Vehicle Code Section 23225).

- 4) Defines “post” for purpose of this bill to mean prominently display on the premises, post online, or present in whatever manner is necessary to ensure that the consumer purchasing, or delivery person transporting, the beverages to which this bill applies is given notice of the warning in this bill.

Background

Purpose of the bill. According to the author’s office, “SB 389 builds upon the current regulatory relief by allowing restaurants and bars the ability to sell both prepackaged alcoholic drinks and pre-mixed drinks to costumers for consumption off the licensed premises. The ability to include alcoholic drinks with to-go orders has been helpful for many restaurants during the Covid-19 Pandemic. In addition, it is very likely that even when consumers are allowed to dine in restaurants, there will be those individuals who will still prefer to get their cocktails delivered rather than having to gather in an enclosed space. This bill will provide that opportunity.”

The author’s office further argues that, “nothing in this bill changes any laws related to drinking and driving or drinking in public. In addition, nothing in this bill forces restaurants or bars to take advantage of this bill. This bill simply provides an opportunity.”

On-Sale and Off-Sale Licenses. The Department of ABC issues a number of alcohol licenses that are available to individuals seeking to operate businesses that sell alcoholic beverages. Each license establishes specific responsibilities and privileges especially when it comes to “on-sale” and “off-sale” privileges.

Alcohol licenses are deemed “on-sale” if the license authorizes the sale of alcoholic beverages but requires that they are consumed on the premises. Some examples of “on-sale” businesses include bars and restaurants although restaurants do have some “off-sale” privileges. For example, under existing law restaurants are authorized to sell both wine and beer to customers for “off-sale” consumption.

On the other hand, alcohol licenses are deemed “off-sale” if the business sells alcoholic beverages sold at the establishment but are required to be consumed offsite. Some examples of “off-sale” businesses include liquor stores or grocery stores that sell alcoholic beverages. In addition, some licenses include both “on-sale” and “off-sale” privileges. Some examples are wineries and craft distilleries.

ABC Regulatory Relief. On March 19, 2020, the Department of ABC issued its first regulatory relief designed to support the restaurat industry in its efforts to assist California in slowing the spread of the Covid-19 virus. Among other things,

the first regulatory relief allows licensees with on-sale privileges the privilege of selling those alcoholic beverages for off-sale consumption in manufacturer pre-packaged containers as to which their license permits on-sale consumption.

For example, a Type 47 restaurant is allowed to sell beer, wine, and distilled spirits for off-sale consumption, regardless of any condition on its license to the contrary and regardless of the statutory prohibition against on-sale licensees selling distilled spirits for off-sale consumption. Similarly, a Type 41 beer and wine restaurant licensee is allowed to sell beer and wine, but not distilled spirits, for consumption off the premises regardless of any conditions on its license that prohibit such sales.

In addition to selling manufacturer pre-packaged containers, the first regulatory relief allows licensees selling beer, wine, and pre-mixed drinks or cocktails not in manufacturers containers for consumption off the licensed premises when sold in conjunction with meals prepared for pick-up or delivery either by the licensee or by a meal provider. Any such alcoholic beverages need to be packaged in a container with a secure lid or cap and in a manner designed to prevent consumption without removal of the lid or cap. Containers with lids with sipping holes or openings for straws are not considered to be an appropriate container. Any licensee selling such beverages for off-sale consumption are required to prominently post warning in a manner that puts consumers on notice of limitations regarding open container laws.

While the regulatory relief allows restaurants the ability to sell both prepackaged alcoholic beverages and cocktails for consumption off the licensed premises, it did not diminish in any way the responsibility of the licensee to ensure that alcoholic drinks are being sold and delivered to persons under the age of 21. Restaurants are still fully responsible for ensuring that any customer who purchases alcoholic beverages are of legal age regardless of whether that customer purchases the alcohol in person or through any other means and regardless of whether the customer picks up the alcoholic drinks at the restaurant or if the alcohol is delivered to their home.

Other states. Like California, most other state alcohol laws limit restaurants' sales of adult beverages to on-premises consumption. However, when business owners suspended their dine-in business to stop the transmission of the Covid-19 virus, many states began to allow alcohol sales with carryout and delivery meals. Currently, 33 states and the District of Columbia allow to-go sales of alcohol, including spirits and cocktails or cocktail kits. Other states allow for bottled beer and wine to be sold for consumption off-premises, but not mixed drinks or spirits.

According to the National Restaurant Association's, "2021 State of the Restaurant Industry Report," approximately seven out of 10 full service restaurants and half of fast-casual eateries offer alcohol for carryout or delivery. Around 20% of adult costumers, and about 30% of millennials, have added alcoholic drinks to a takeout or delivery order since the pandemic began. Furthermore, according to Technomic, a leading food service research firm, 58% of consumers surveyed said the ability to purchase alcoholic beverages with their takeout orders has a major impact on their choice of restaurant. Technomic also found that restaurant operators expect alcohol to-go sales to settle in at an average of 21% of total alcohol sales once the pandemic subsides.

Iowa and Ohio have already passed legislation to permit alcohol sales for off-premise consumption past the pandemic and 37 other state legislatures are currently considering similar legislation.

ABC penalties. It is the stated policy of the Department of ABC to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law. Any person licensed by the Department of ABC, and their employees, must abide by all California laws. If the Department of ABC has evidence of a violation involving a licensee or a licensed premise, it will file an administrative complaint, called an accusation. An accusation, if proven, will lead to the suspension or revocation of the license. An accusation is in addition to, and not a substitute for, possible criminal and civil penalties that local city and district attorneys may bring against the licensee or employee who committed the violation.

Criminal penalties can result from violations that are criminal offenses. For example, the sale or service of alcoholic beverages to a minor is not only grounds for an accusation but constitutes a criminal offense. Thus, the seller could be arrested, charged with a crime, face a fine, community service work or imprisonment in county jail.

Existing law authorizes the Department of ABC to issue a 15-day suspension to a licensee for a first violation of provisions relating to the sale or furnishing of alcoholic beverages to a person under the age of 21. A second violation within 36 months may result in a 25-day suspension and a third violation within 36 months may result in license revocation.

Additionally, existing law allows a licensee to pay a fine in lieu of serving the suspension. If the Department of ABC finds that public welfare and morals would not be impaired by the substitution of a fine for the actual suspension of the licensed business, the retail licensee may pay a sum of money equal to 50% of the

estimated gross receipts from the sale of alcoholic beverages during the period of suspension, subject to various limits. However, a licensee may not petition the Department of ABC for an offer in compromise for a third or any subsequent violation that occurs within 36 months of the initial violation.

Author Amendments. The author has agreed to take the following amendments in committee:

Amendment 1: The Craft Brewer's Association has raised concerns that because a licensed beer manufacturer is not considered an on-sale retail licensee, even if they operate a bona fide public eating place, they will not have the ability to take advantage of the provisions of this bill. Therefore, the author has agreed to take the following amendment:

Notwithstanding any other law to the contrary the holder of a retail on-sale license *and a licensed beer manufacturer operating a bona fide public eating place* may exercise the following rights and privileges subject to the requirements of this section:

Amendment 2: The Craft Brewer's Association has also raised concerns that allowing beer to be delivered in a container that is not in a manufacturer prepackaged container could dramatically affect the quality of the beer. Therefore the author has agreed to take the following amendment.

(b) In addition to the privilege provided by subdivision (a), the licensee may sell the alcoholic beverages, *except for beer*, for off-sale consumption for which their license permits on-sale consumption when the beverages are not in manufacturer prepackaged containers if both of the following conditions are met:

Amendment 3: Similarly, the Wine Institute has raised concerns that allowing wine to be delivered in a container that is not in a manufacturer prepackaged container could affect the quality of the wine. Therefore, the author has agreed to take an amendment to require that if wine is not sold in a manufacturer prepackaged container that it be sold in a single serve container.

Amendment 4: In order to ensure that the container can be easily identified as containing an alcoholic beverage, the author has agreed to add a provision to the bill that would require the container to be clearly and conspicuously labeled or otherwise identified as containing an alcoholic beverage.

Amendment 5. In order to ensure that this bill does not in any way require a licensee to sell alcoholic beverages for off-sale consumption, the author has agreed

to add language to the bill to specify that nothing in this bill shall require a licensee to sell any alcoholic beverage for consumption off the licensed premises, whether or not the alcoholic beverage is in a manufacturer sealed container or otherwise.

Prior/Related Legislation

SB 314 (Wiener, 2021) would, among other things, authorize the Department of ABC for 365 days from the date the Covid-19 state of emergency order is lifted, or longer if the licensee has a pending application for permanent expansion of their premises, allow licensees to continue to exercise license privileges in an expanded licensed area authorized pursuant to a Covid-19 temporary catering permit, as provided. (Pending in the Senate Governmental Organization Committee)

SB 1242 (Bauer-Kahan, 2021) would authorize a bona fide public eating place holding an on-sale general license or a bona fide public eating place holding an on-sale license to sell the alcoholic beverages for off-sale consumption for which their license permits on-sale consumption when the beverages are not in manufacturer prepackaged container, as long as those alcoholic beverages are sold in conjunction with a meal. (Pending in the Assembly Governmental Organization Committee)

SB 254 (Portantino, 2017) would have prohibited a certified delivery network, as defined, from delivering alcoholic beverages sold by an off-sale retail licensee to persons within this state without first obtaining a license issued by the Department of ABC. (Never Heard in the Assembly Governmental Organization Committee)

AB 1470 (Evans, Chapter 535, Statutes of 2009) allows a person who has purchased and partially consumed a bottle of wine to remove the partially consumed bottle from the premises of an on-sale beer and wine public premises licensee.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

SUPPORT:

Alchemist Bar & Lounge
Athletic Club Oakland
The Bar on Dolores
California Chamber of Commerce
California Craft Brewers Association
California Music & Culture Association
California Restaurant Association
Diageo

Distilled Spirits Council of the United States
Dogpatch Saloon
Elda Agave, LLC
ELIXIR Saloon
El Rio
Future Bars Group
The Little Shamrock
Lord George
Madrone Art Bar
Pop's Bar
Red Window Bar
San Jose Downtown Association
San Francisco Athletic Club
SF Bar Owner Alliance
Smuggler's Cove
Southside Spirit House
Southwest California Legislative Council
Tony Nik's Cafe
Zeki's Bar
Various Individuals
83 Proof

OPPOSITION:

Alcohol Justice
California Alcohol Policy Alliance

ARGUMENTS IN SUPPORT: According to the California Restaurant Association, "California restaurants remain on serious lock-down, as they are only allowed to utilize extremely limited on-site space due to current state-imposed capacity restrictions and requirements for physically distanced tables. Those continued restrictions for on-site dining have left many, many restaurants barely able to hang on. SB 389 modernizes alcohol laws to better accommodate the current operating restrictions imposed upon restaurants and provides them with the option to use this, as one of several, economic lifelines, and ways to serve their customers with proper conditions and protections for public safety."

According to the SF Bar Owner Alliance, "bars were hit disproportionately hard by pandemic in the last year with San Francisco bars seeing a loss of four out of five jobs. Many of them were unable to open for on premise service over the past year, and because of this were cut out almost completely from PPP funds. Our industry was utterly devastated, and we need robust help from the government if we ever

hope to recover. For many bars, their only source of revenue was through selling to go alcohol allowed by ABC's emergency regulatory relief. SB 389 would make permanent this relief, including allowing bars to sell to go beer, wine, spirits and cocktails. These would be incredibly promising revenue streams to our beleaguered industry. Furthermore, customers have now grown accustomed to ordering food and beverages to go. We believe this trend will remain in the future to some degree. SB 389 allows bars to adapt to the changing customer behavior, which – we believe – will be required to continue to stay in business.”

ARGUMENTS IN OPPOSITION: Alcohol Justice is opposed to the bill because “cocktails-to-go are a bad idea that benefit a licensee's bottom line while threatening public health and safety. Cocktails-to-go have been wisely prohibited since the link to death and injury from drinking and driving became evident. The alcohol industry, constantly seeking opportunities to relax restrictions, have used the COVID-19 pandemic as an excuse to demand this change. It will always be a bad idea and should never become a permanent privilege.”