

LAWS OF DELAWARE
VOLUME 83
CHAPTER 9
151st GENERAL ASSEMBLY
FORMERLY
HOUSE BILL NO. 1
AS AMENDED BY
SENATE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 4 OF THE DELAWARE CODE RELATING TO ALCOHOLIC LIQUORS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. The General Assembly finds and declares all of the following:

(1) The Centers for Disease Control (“CDC”) has determined that a novel coronavirus (“COVID-19”) presents a serious public health threat and has advised that asymptomatic individuals may be carriers of the COVID-19 virus who may unknowingly spread the virus to other individuals in close proximity. Social distancing is required to help mitigate the individual exposure to and community spread of the COVID-19 virus.

(2) The Governor declared a State of Emergency for the State of Delaware due to a public health threat as a result of COVID-19 on March 12, 2020.

(3) The Governor has issued 27 modifications to his original Declaration, including the Second Modification on March 18, 2020, which closed all restaurants, bars, and taverns only allowing them to provide food and beverage service through take-out or drive through service and off-premises delivery. This Modification permitted any restaurant, brewpub, tavern, or taproom with a valid on-premise license to sell alcoholic beverages as part of transactions for take-out or drive through food service so long as the cost for the alcohol did not exceed 40% of the establishment’s total sales transactions.

(4) The Governor’s Nineteenth Modification, effective May 22, 2020, modified §§ 524 and 541, Title 4 regarding the notice and protest provisions related to the expansion of outdoor seating for food and drink establishments. This Modification permitted all food and drink establishments to expand their outdoor seating for serving food and drinks if certain requirements were met. The permission granted for expansion for outdoor seating under the Modification expires on July 30, 2020, unless expressly extended by the State of Emergency Order or modified by the Delaware Code.

(5) On July 16, 2020, the Governor signed H.B. 349 which codified portions of the Second and Nineteenth Modifications to the State of Emergency Declaration by allowing food and drink establishments to sell alcohol for off-premise consumption and allowed establishments to continue to use outdoor seating for serving of food and drinks so long as certain conditions are met. However, H.B. 349 sunsets on March 31, 2021.

(5) In response to a surge of COVID-19 cases in this State, the Third Revision to the Twenty-Seventh Modification became effective on November 20, 2020 which increased restrictions on food and drink establishments. These restrictions include: (a) Mandating that the total number of guests inside food and drink establishments could not to exceed 30% of the stated fire occupancy requirements; (b) Prohibiting any areas where people would typically stand, including dance floors and gaming areas; (c) Limiting table seating to a maximum of 6 persons, consisting of no more than 4 adults; and (d) Prohibiting bar service except for parties of 2 people who must be at least 6 feet apart from other parties.

(6) Food and drink establishments have suffered significant losses as a result of their closures and restrictions due to COVID-19. Nationally, just in November, 2020, food and drink establishments lost 17,400 jobs, with an unemployment rate of 13.8%.

(8) In 2019, restaurant and food industry jobs in Delaware totaled 50,800 which equaled 11% of the total employment in this State. Between February and April 2020, Delaware lost 66% of its food or drink establishment jobs which made Delaware the 3rd highest in the nation.

(7) Nationally, the foodservice industry lost \$165 billion in revenue from March to July, 2020, and is on track to lose \$240 billion in sales by the end of the year.

(7) In Delaware, food and drink establishments in Delaware lost more than \$160 million in sales in April, 2020 alone. Between March and July, 2020, the foodservice industry lost an estimated \$700 million. Revenue from restaurant gross receipts dropped to less than 50% of 2019 receipts. 81% of Delaware restaurant owners estimate they will continue to operate at a loss for the next 6 months. Under the current restrictions, approximately 40% of Delaware restaurants will be forced to shut their doors within a year.

(8) Allowing food and drink establishments to continue to sell alcohol beverages for off-premise consumption and extending outdoor seating is necessary and proper in order to ensure the survival of these establishments in this State.

Section 2. Amend Chapter 5, Title 4 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underlines as follows:

§ 512 Licenses.

(a) Any person, who is the owner or lessee, or who is recognized by the Commissioner as being in charge of a hotel, beer garden, motel, taproom, restaurant, motorsports speedway, concert hall, horse racetrack, multi-purpose sports facility, club or multiple activity club, may apply to the Commissioner for a license to purchase spirits, beer, or wine from an importer and to receive, keep and sell such spirits, beer, or wine either by the glass or by the bottle for consumption on any portion of the premises approved by the Commissioner for that purpose. Such a license entitles a club to sell such spirits, wine, or beer only to members of that club. A multiple activity club which holds such a license may apply for an additional license to sell such spirits, wine, or beer to any person who is a guest of such club or of a member of such club who is duly registered in accordance with a bylaw or rule of such club, approved by the Commissioner, provided that if the Commissioner determines that any applicant is not a multiple activity club, as defined in § 101 of this title, the application shall be denied. There shall be no age restrictions on persons permitted on the premises of a licensed multiple activity club.

(1) Notwithstanding any law, regulation, or rule to the contrary, any restaurant, brewpub, tavern, or taproom, or other entity with a valid on-premise license issued pursuant to chapter 5, subchapter II of this title may sell alcoholic beverages in transactions for take-out, curbside, or drive through service.

(2) All alcoholic beverages sold for off-premise consumption under this subsection must:

a. Be sold in containers that are securely closed; and

b. Not exceed three 750 ML bottles of wine, one case of beer, and one liter of spirits per customer per day.

Section 3. Amend Chapter 5, Title 4 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underlines as follows:

§ 524 Notice of application.

(a) An application for a new license to purchase for resale, for transfer of an existing license, or for a substantive change to a license or licensed premise shall be filed with the Commissioner's office.

(b) Upon filing of an application for a new license to purchase for resale or for a substantive change to a license or licensed premise the applicant shall cause notice to be advertised in at least 2 different newspapers circulated in the community in which the applicant will operate if the application is approved for 3 issues. One of the newspapers must be a "local newspaper,"

as determined by the Commissioner either through rules or on a case by case basis. If the newspaper is a daily newspaper, the first publication shall be made within 3 days of the filing of the application and the third publishing shall occur within 10 days of filing the application. If the newspaper is a weekly publication, the first publication shall be made within 8 days of filing the application and the third publishing shall occur within 22 days of filing the application.

(c) Within 3 days of filing of an application for a new license to purchase for resale or for a substantive change to a license or licensed premise a notice shall be mailed by certified mail or first class mail as evidenced by a certificate of mailing postage-pre-paid to the following entities, individuals or groups of individuals:

(1) Except as provided in paragraph (c)(2) of this section, all property owners within 200 feet from any point on the property boundary line of the premises to which the license is to apply;

(2) All property owners within 1,000 feet from any point on the property boundary line of the premises to which the license is to apply if the premises is located within 1/4 of a mile of a riverfront, beachfront or other open water, or if the applicant intends to include space for outside dining, outside entertainment or the outside service or consumption of alcoholic beverages;

(3) The governing body of any incorporated areas within 1 mile from any point on the property boundary line of the premises to which the license is to apply.

(d) The notices referred to in subsections (b) and (c) of this section shall provide such information as determined by the Commissioner either through duly adopted rules or on a case by case basis. The following notice will, in addition to the aforesaid Commissioner approved notice, satisfy this notice provision:

“[Name of applicant] has on [Date of application] applied with the Alcoholic Beverage Control (“Commissioner”) for [Nature of application] for a premises located at [Location of the premises, including street and city]. Persons who are against this application should provide written notice of their objections to the Commissioner. For the Commissioner to be required to hold a hearing to consider additional input from persons against the application, the Commissioner must receive one or more documents containing a total of at least 10 signatures of residents or property owners located within 1 mile of the premises or in any incorporated areas located within 1 mile of the premises. The protest(s) must be filed with the Alcoholic Beverage Control Commissioner at the 3rd Floor, Carvel State Office Building, 820 North French Street, Wilmington, DE 19801. The protest(s) must be received by the Commissioner’s office on or before [state a date at least 30 days after the application is filed]. Failure to file such a protest may result in the Commissioner considering the application without further notice, input or hearing. If you have questions regarding this matter please contact the Commissioner’s Office.”

(e) The term “substantive change” referenced in this section shall mean any of the following:

(1) Any permanent change that will increase the square footage of the licensed premises;

(2) Any temporary change that will last longer than 60 days and result in an increase of the square footage of the licensed premises;

(3) Any change that would require a variance of the Commissioner’s rules or suspension thereof and results in:

- a. Live entertainment on a licensed patio;
- b. External speakers or amplifiers on a licensed patio; or
- c. Wet bar on a licensed patio;

(4) Any change in the floor plan of a restaurant licensee which would increase the number of bar seats or increase the area utilized for entertainment; or

(5) Any additional circumstance that the Commissioner determines is a substantive change.

(f) Notwithstanding § 524(e) of this title or any other law, rule, or regulation to the contrary, substantive change does not mean any of the following:

(1) An expansion of outdoor seating for serving of food and drinks that as of March 31, 2021 satisfied all of the requirements of ¶A.2. of the Nineteenth Modification of Governor Carney’s State of Emergency Declaration effective May 22, 2020, even if the State of Emergency Due to Public Health Threat is no longer in effect.

(2) An expansion of outdoor seating for serving of food and drinks after March 31, 2021 that meets all of the following requirements:

a. A plan approved by the appropriate political subdivision that does all of the following:

1. Considers local traffic patterns and parking capacity needs, but may extend the boundaries of seating beyond current property boundaries under the discretion of the appropriate political subdivision and applicable property owners on all local right of ways.

2. Does not intrude upon the State’s right of way, unless approved by the Delaware Department of Transportation in writing.

3. Maintains current access, unless approved by Delaware Department of Transportation in writing.

4. Maintains proper access to the property for all emergency services.

5. Abides by the current Declaration of State of Emergency Due to Public Health Threat and its Modification requirements relating to food and drink establishments unless the State of Emergency is no longer in effect.

6. Complies with the Americans Disabilities Act.

7. Adheres to all local noise ordinances.

8. Allows for the proper control over the distribution of alcoholic beverages.

9. Does not result in total outdoor seating capacity that exceeds the indoor seating capacity that the food or drink establishment was authorized to have prior to the Declaration of the State of Emergency Due to Public Health on March 12, 2020.

b. Approval by the Office of Alcohol Beverage Control regarding the service of alcohol on premises.

(g) Any plan approved by or submitted to the appropriate political subdivision and the Office of Alcohol Beverage Control pursuant to § 524(f) may allow for the service of alcoholic beverages without the requirement to serve food.

(h) Any plan submitted to the appropriate political subdivision and the Office of Alcohol Beverage Control pursuant to § 524(f) that meets all of the requirements of § 524(f)(2) should not be denied approval absent exceptional circumstances.

§ 543 Grounds for refusal of license; transfer or extension of premises.

(g) The Commissioner shall not grant a new license of any type and shall not grant an extension of premises of an existing license of any type unless the application for said new license or for said extension is accompanied by a Certificate of Compliance from the appropriate political subdivision showing:

(1) That the premises where the license is to be used are properly zoned for the applicant’s intended use; and

(2) That all necessary permits have been approved; and

(3) That the applicant has complied with all other applicable licensing requirements of the appropriate political subdivision.

This subsection shall not apply to any application for a temporary extension of premises as authorized by Commissioner rule; provided, that any such application has not been objected to by the appropriate political subdivision which shall be provided with notice of the application by the applicant within 7 days of the date the application is filed with the Commissioner.

This subsection shall not apply to any extension of premises of an existing license granted by the Commissioner pursuant to § 524(f) even if the State of Emergency is no longer in effect.

Section 4. Amend Chapter 5, Title 4 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underlines as follows:

§ 561 Grounds for cancellation or suspension.

(h)(1) Notwithstanding any law, regulation, or rule to the contrary, the Commissioner may temporarily suspend any license if the Commissioner has reasonable grounds to believe that the public's safety is at risk and that the licensee has violated the provisions of any of the following:

a. Declaration of State of Emergency Due to Public Health Threat or any State of Emergency s Modification requirements relating to food and drink establishments unless the State of Emergency is no longer in effect

b. Title 4.

(2) The temporary suspension shall be until the Commissioner no longer has reasonable grounds to believe that the public's safety is at risk, but can be no longer than 20 days unless otherwise provided herein.

(3) At the time of the temporary suspension, the Commissioner shall provide the licensee with notice of a hearing, which shall be held by electronic, telephonic or remote means, within 20 days of the issuance of the temporary suspension.

(4) If a licensee fails to attend such hearing, the Commissioner may continue the temporary suspension. If the temporary suspension is continued, a licensee may request the Commissioner to hold another hearing which shall be provided by electronic, telephone, or remote means within 20 days of the licensee's request.

(5) After a hearing, the Commissioner may do any of the following:

a. Continue the temporary suspension until a public hearing is scheduled in accordance with § 562 of this title if the commissioner believes that the public safety will be at risk if the temporary suspension is lifted.

b. Lift the suspension if the Commissioner believes that lifting the temporary suspension will not result in a risk to public safety.

c. Impose appropriate conditions or fines on the licensee.

d. Take whatever action the Commissioner believes is necessary and appropriate in order to ensure that the public safety will not be at risk by the licensee. except the Commissioner may not cancel or revoke a license unless pursuant to § 562 of this title.

§ 562 Public hearing and right of appeal.

(a) No license shall be cancelled or suspended, or any licensee fined:

(1) Until the licensee has been given a public hearing by the Commissioner at which time the licensee shall be entitled to legal representation and to present witnesses; and

(2) Unless the ground therefor shall be established by clear and convincing evidence.

A full and complete record shall be kept of all proceedings incident to such hearing. All testimony shall be recorded but need not be transcribed unless an order of the Commissioner is appealed to the Superior Court as set forth in subsection (c) of this section.

(b) Any order of the Commissioner relative to suspension or cancellation of a license, or a fine imposed against a licensee shall become final 10 days after the licensee receives notice thereof, unless within 10 days of the date of the postmark on the Commissioner's decision a written appeal is filed in the Superior Court. No bond shall be required for filing such appeal.

(c) The appeal shall state the grounds upon which a review is sought. After the appeal is filed, service shall be made by the Sheriff upon the Commissioner. The Commissioner shall certify and file with the court all documents and papers and a transcript of all testimony taken in the matter, together with the Commissioner's findings therein as soon as practicable but in no event later than 20 calendar days from the date of service of the appeal. The Superior Court's review of an appeal shall be on the record and the Superior Court shall take into account the experience and specialized competence of the agency and the purpose under which the agency acted. Further, the Superior Court's review, in the absence of fraud, shall be limited to whether the agency's decision is supported by substantial evidence on the record and is free from legal error.

(d) An appeal without bond may be taken from the decision of the Superior Court to the Supreme Court of this State in the same manner as is provided in civil cases. Upon the final determination of judicial proceedings, the Commissioner shall enter an order in accordance with such determination, or shall take such further or other action as the Court may order. A petition for judicial review shall act as a supersedeas.

(e) The public hearing required in subsection (a) of this section may be by electronic, telephone, or remote means.

Section 5. This Act expires on March 31, 2022 unless otherwise extended by a subsequent act of the General Assembly.

Approved March 23, 2021