

Practice Update

Essential Precautions to Take in Liquor Licensing Sales

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All too often we are asked to review liquor licensing clauses in purchase and sale agreements for hotels and restaurants where we find that the language proposed actually requires both parties to unknowingly break the law to accommodate the transaction. This often occurs because specialized alcoholic beverage counsel are not brought in to advise regarding the transaction and the potential issues that can emerge related to state and local alcoholic beverage laws and regulations.

While hotel and restaurant operators and their legal counsel generally know that the alcoholic beverage industry is governed by a complex regulatory framework, which vary by state, many do not think about the potential hazards in the business licensing, permitting and regulatory compliance process until it is too late. As a result, often time and money are lost on issues which are completely avoidable if planned for from the onset.

For example, on the transactional side, hotel and restaurant operators often unknowingly violate state licensing regulations by failing to obtain the proper interim licenses to operate post-closing (i.e., before the seller's liquor license has formally transferred or a new license is issued to the buyer). By way of

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example, it has become standard practice in Florida for hotel buyers and sellers to enter into an “Interim Beverage Service Management Agreement” whereby the seller agrees to allow the buyer to utilize the seller’s alcoholic beverage license in the operation of the hotel post-closing until such time as the buyer can transfer the license or obtain its own license.

However, Florida beverage law explicitly prohibits business conducted on a licensed premises to be managed or controlled by anyone other than the licensee or its authorized employees.[1] Utilizing such an agreement puts both the buyer and seller at risk of enforcement action and leaves the attorneys who drafted the agreement potentially defending a malpractice claim. Should a problem arise from the sale of alcoholic beverages during the time in which the buyer is operating post-closing under the seller’s license, not only are both buyer and seller looking at license violations, but their liability insurers may both have a basis for denying any related claims.

Had a liquor license expert been consulted, such an arrangement could have been easily avoided. The parties would have been made aware of an administrative procedure created precisely for the purpose of allowing the buyer to obtain temporary liquor licensure at closing to avoiding a gap in the ability to sell alcoholic beverages.

Just as important as identifying contract issues is knowing where to search for due diligence concerns. Alcoholic beverages are regulated at multiple levels of government, and it is important when dealing with alcoholic beverage establishments to understand how the regulations at all levels of government affect the licensure. For instance in many states, the state governs qualifications to hold a liquor license, but each municipality has unique zoning requirements which govern the placement of alcoholic beverage licenses. Failure to recognize these unique and constantly evolving codes, in even the smallest municipalities, can prove to be devastating to a client. Awareness of such subtleties

in the code, such as minimum distance separation, undue concentration limitations, number of hotel rooms, or square footage requirements, are essential to ensuring a client is properly advised and prevented from making costly decisions which could otherwise be avoided.

Finally, hotel and restaurant operators often make the incorrect assumption that obtaining a liquor license for a hospitality venue is as easy as filling in the blanks on an application, paying a fee and opening for business. Doing so often leads to delays or creates errors that are potentially fatal to their concept or business plan. For example, many states require extensive disclosures and multiple agency approvals before a license application is considered complete. If an incomplete or incorrectly completed liquor license application is submitted for processing, although it will be date stamped and accepted by the state's alcoholic beverage control board, a notice will ultimately be issued advising that the application is deficient and needs to be corrected and resubmitted before the application can be processed and the license issued. As a result of the delays, the venue remains unable to serve alcoholic beverages for weeks and potentially even months, leading to lost revenues.

Not only is it important to engage specialized alcoholic beverage counsel at the transactional and permitting stage, but specialized alcoholic beverage counsel can be an invaluable resource during the post-closing, transition phase of a transaction as well as with respect to day-to-day operations. For example, specialized counsel can prove invaluable on compliance issues, advising on questions such as the following: If I run out of Vodka, can I send someone to buy more at the liquor store down the street? Can I store excess inventory off premises? Can I build an outdoor bar counter by the pool? Will changing the management company affect the liquor license?

And, of course, specialized alcoholic beverage counsel is essential if you are fighting an enforcement action against a state's alcoholic beverage control board for an alleged violation of the beverage law, or if you are fighting another party to a failed transaction due to the inability to transfer a liquor license.

An alcoholic beverage license is at the heart of any business that involves the sale of alcoholic beverages. It ties into every other operating license of such a business, requiring prior approval of all other applicable regulatory state and local agencies before it will be issued, and a business cannot buy or sell alcohol without one. Engaging specialized alcoholic beverage counsel can help avoid unnecessary liability, as well as costly and time consuming mistakes.

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