Practice Update

Responding to COVID-19: What to Do with Excess Alcohol Inventory

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With the concern over the COVID-19 virus and its rapid spread throughout the American population, special events, concerts, festivals, celebrations, conferences, and other gatherings are being cancelled left and right. In Miami, Ultra Music Festival, a three-day electronic music festival with an anticipated attendance of over 70,000 people, has been "postponed" until 2021. In Chicago, the annual St. Patrick's Day Parade, an event that attracts over 300,000 people, was cancelled. In Austin, SXSW, a music, tech, and film festival has been cancelled for the first time in 33 years; last year approximately 417,000 people attended the conference's various events.

These are just a few examples of the various events being cancelled or indefinitely postponed throughout the country. In addition to large events, we are now seeing curfews and restrictions put on place on any public gatherings, and restaurants and bars being told to shut down for weeks at a time or being restricted to take-out only.

Like many others, the alcoholic beverage industry is likely to face significant disruption. However, the unique regulation of the alcoholic beverage industry will play a big role in what issues each tier faces and may have significant impacts on industry members' options to mitigate damage moving forward.

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With all of the emergency declarations being imposed around the country cancelling events and implementing social distancing at a regulatory level, many retailers may be finding themselves with an overstock of alcohol inventory, purchased in anticipation of St. Patrick's Day or other events in their neighborhoods, that will now be difficult to store and/or sell. Generally, retailers cannot return alcoholic beverages, and even in the few circumstances where retailers may be allowed to make returns, distributors are not actually required to accept such returns. Fortunately, the Alcohol and Tobacco Tax and Trade Bureau (TTB) has taken action and announced that, although returns related to overstock or slow-moving product are generally prohibited, due to the current emergency and the widespread cancellation of events, such returns will not be prohibited for the time being.

Additionally, some states, such as Illinois, have announced that they are also suspending state level restrictions on returns, although many states have not released any additional guidance. However, there is still no requirement that distributors accept such returns, so retailers may still be left on the hook.

While distributors generally don't have much incentive to take returns of products, they may be able to take back returns of bottled or canned products which can be resold to package stores that are more capable of moving product at this time. Distributors generally only take back products that have enough shelf life to be easily resold, but with current circumstances in mind, distributors are likely facing their own difficulties in relation to moving overstocked products, particularly those products that are packaged specifically for on-premises sales, such as kegs. In some instances, it may even be the manufacturers that will determine whether the distributor is able to accept the returns, as their distribution agreement may require such costs to be absorbed by the manufacturer.

However, it is unlikely that manufacturers will be willing, or have any incentive, to accept returns either. In fact, there are currently industry members in several states that are pushing regulatory agencies to allow craft manufacturers to ship directly to customers to help alleviate the impact of diminished crowds and restrictions on gatherings and events on smaller breweries and distilleries that rely on their taproom sales to survive. For those retailers stuck with surplus alcohol inventory from cancelled events and rejected return requests, it may be a good idea to brush up on available options in regards to the delivery of alcoholic beverages.

While there is already a large market for delivery services, concerns over being exposed to the virus while out in public and shortages of various products in stores have pushed more and more customers to delivery services. Many states allow for alcoholic beverage delivery, however they often also have additional regulations or requirements related to such sales. These regulations are not always spelled out very well, and in many markets are somewhat new and untested.

In New York, delivery apps such as Grubhub and Instacart, are able to deliver alcoholic beverages, per a 2017 declaratory ruling by the New York State Liquor Authority, but the ruling has yet to be codified into statute or rule. In Florida, the delivery of alcoholic beverages is a relatively new concept and in order to deliver alcoholic beverages, the sale must have taken place at a licensee's place of business (telephone, electronic, or mail order received at the place of business are construed as having taken place at the licensed premises).

This brings about uncertainty as to whether sales made on third party apps, which do not transmit the funds to the retailer associated with the sale until a later point in time, or where the licensee does not actually ring up the sale, will qualify as legal sales. Unfortunately, states have not yet provided much guidance on this issue, leaving many retailers to risk potentially violating alcoholic beverage laws just to stay in business during these hard times.

It is clear that COVID-19 is already having a significant impact on the alcoholic beverage industry as a whole. Despite the worldwide emergency and the fear associated with the pandemic, there is and always will be demand for alcoholic beverages. Retailers, distributors, and manufacturers who understand the laws regulating the beverage industry will know their options, find a way to survive, and will come out the other side ready for a comeback.

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