

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: February 17, 2020
To: Veterans and Legal Affairs Committee
From: Janet Stocco, Legislative Analyst

LD 205 **An Act To Extend the Ability of Restaurants and Bars To Serve Alcohol To Go**
(Senator Luchini)

SUMMARY

This emergency bill would temporarily permit—through April 15, 2022—the sale of liquor for off-premises consumption by the following entities, which must adhere to the following restrictions:

1. **On-premises retailers**—BABLO must identify, by rule, the categories of licensed on-premises retailers (ex: restaurants, taverns) that may sell liquor off-premises consumption under the bill.

Restrictions specific to on-premises retailers:

- The licensee may sell only the types of liquor—spirits, wine or malt liquor—the licensee is authorized to sell for on-premises consumption by virtue of its on-premises retail license;
- Wine and malt liquor must be sold in the original, sealed container. Spirits may only be sold as an ingredient of an “approved cocktail” (see description below); and
- Liquor sales must be accompanied by a food order and a sales receipt; the type of required “food order” must be established by BABLO by rule.

2. **Licensed Maine distilleries and small distilleries**—if the (small) distillery serves samples of its products to the public for on-premises consumption or sells its products to the public for off-premises consumption (*i.e.*, if it operates a tasting room).

Restrictions specific to (small) distilleries:

- The (small) distillery may only sell the spirits products it produces at the licensed premises.

NOTE: this restriction does not apply if the (small) distillery has a license to sell liquor for on-premises consumption—for example, a restaurant or lounge license. If the (small) distillery has such an on-premises retail license, sales at that licensed premises are governed by the restrictions listed under #1 for on-premises retailers.

- The (small) distillery may sell spirits either by the bottle/case for off-premises consumption—under the independent authority granted through its manufacturing license—or it may sell its spirits as an ingredient of an “approved cocktail” under the bill.

The following restrictions apply to all off-premises sales under the bill:

- A licensee must notify BABLO in advance of making any off-premises sales under the bill.
- Spirits may only be sold to-go as part of an “approved cocktail” that must:

- Be prepared on the day of sale by an employee of the licensee who is ≥ 17 years old;
- Contain no more than 4.5 ounces of spirits; and
- Be sealed in an “approved container,” —a tamper-evident container without openings that:
 - Is sealed in a manner prescribed by BABLO by rule that makes opening the container or tampering with the container’s contents easily detectable; and
 - Is affixed with a label naming the licensee and containing additional information required by BABLO by rule.
- Liquor must be delivered with the accompanying food order to a customer—who may not be a minor or a visibly intoxicated person—either on the licensed premises or at a remote location;
- A delivery to a customer at a remote location must be made by a person ≥ 21 years of age.

ADDITIONAL INFORMATION:

History of Alcohol Sales “to go” during coronavirus pandemic

- March 18, 2020 The Governor’s Executive Order [14 FY 19/20](#) directs: “all restaurants and bars shall close their dine-in facilities” but “[s]uch businesses that offer carry-out, delivery, and drive-through food and **beverage** service may continue to do so ...”
- That same day, BABLO issues a [Memorandum](#) explaining that permissible carry-out, delivery and drive through “beverage” service includes the sale of **beer and wine—but not spirits**—in the original manufacturers’ containers **if** the sale of beer and wine is accompanied by a food order. The type of food required “is based upon the type of liquor license issued by the Bureau.”
- April 2, 2020 BABLO issues a [Memorandum](#) clarifying the types of activities permitted by on-premises retailers, including that these licensees may **not** (1) sell beer, wine or spirits for on-premises consumption; (2) fill or sell growlers from taps in their establishments (but this is not a restriction for breweries with an associated restaurant license); (3) create or sell cocktails to go in any type of container.
- April 23, 2020 BABLO issues a [Memorandum](#) stating that, effective immediately “beverage” in the March 18 Executive order includes draft beer in **growlers to go** only if:
 - Growlers are accompanied by a food order;
 - Beer dispensed into the growlers must be from kegs that were on hand at the licensed premises at the time of the March 18th Executive Order;
 - The growlers meet the regular statutory requirements for growlers in [28-A MRSA §1355-A\(3\)\(C\)\(2-8\)](#)—*i.e.*, the statutory requirements for sale of growlers by Maine breweries, except licensees (breweries and on-premises retailers) may sell growlers of malt liquor not produced on their premises.
- April 27, 2020 BABLO issues a [Memorandum](#) stating that, effective immediately, “beverage” in the March 18 Executive Order includes spirits-based **cocktails to go** only if:
 - Cocktails are accompanied by a food order and time-stamped sales receipt;

- Cocktails are “batched for immediate use” or created for a specific order;
- Each container of cocktails contains ≤ 4.5 ounces of spirits;
- Cocktails are in tamper-evident containers using one of the following processes: crown capped glass bottles; screw tops that break apart when opened; or vacuum and heat-sealed pouches.
- The container has an affixed label that states the name of the establishment, date and time of production, and ingredients (including proof of spirits);
- Cocktails must be created by the licensed establishment (not another licensee);
- The licensee notifies BABLO via email that it will sell cocktails to go and identifies the type of tamper-proof container the licensee will be using.

May 14, 2020

BABLO issues a [Memorandum](#) that, in pertinent part,

- Explains which categories of on-premises retailers, *if they sell specified types of food*, qualify as “**restaurants**” that may open for on-premises sales under the Governor’s re-opening plan on May 18 or June 1 (depends on the county);
- Explains which types of on-premises retailers qualify as “**bars**” and which licensed Maine manufacturers’ facilities qualify as “**tasting rooms**” then scheduled to open for indoor service under the re-opening plan on July 1;
- Authorizes “restaurants” and “bars” as described in the memorandum to continue selling beer and wine “to go” in original containers as well as “cocktails to go” under the conditions in the April 27 Memorandum; and
- Revises the guidance on “**growlers to go**” in the April 23, 2020 Memorandum to allow “the replenishment of inventory of kegs”.

Nov. 2, 2020

BABLO [Letter](#) notifies licensees that, in light of increasing COVID-19 case numbers, the re-opening of “bars” and “tasting rooms” remains postponed.

ISSUES RAISED / AMENDMENTS PROPOSED

➤ *BABLO proposed amendment* (posted [here](#))

1. Supervision of approved cocktail preparation by 17 to 20-year-olds. BABLO suggested amending the bill on p.1, lines 29-30 to clarify that a 17 to 20-year-old employee may not prepare an approved cocktail unless another employee who is at least 21 years of age is present and acting in a supervisory capacity. *Compare 28-A M.R.S.A. §704(1-A)* (“An employee who is at least 17 years of age but less than 21 years of age may serve or sell liquor only in the presence of an employee who is at least 21 years of age and is in a supervisory capacity.”).
2. Delete language describing tasting rooms. BABLO suggested amending the bill to remove the language on p. 2, lines 13-15 limiting the types of Maine (small) distilleries that may serve cocktails to go to those that serve samples of their products at their production facility or sell their products for off-premises consumption at their production facility. In its testimony, BABLO suggested this language is unnecessary; if adopted, this amendment would allow any licensed Maine (small) distillery to sell cocktails to go without an accompanying food order, even if the (small) distillery does not otherwise sell spirits directly at its facility.

3. Types of spirits sold in approved cocktails by (small) distilleries. As the bill is currently drafted on p.2 lines 22-25, a licensed (small) distillery **may** sell cocktails to go containing spirits not produced by the licensee, but **only if** the (small) distillery also has an on-premises retail license—for example, if the (small) distillery has a restaurant license. BABLO suggested amending the bill to restate this prohibition—see proposed amendment p. 2, lines 26-27.
4. Who may make deliveries: Section 1056(2)(E) of the bill requires the person making deliveries to be at least 21 years of age, but does not specify whether that person must be an employee of the licensee or may be an employee of a third-party delivery service (ex: Grubhub or DoorDash). In each of their testimonies, BABLO and The Maine Sheriffs’ Association recommend that third-party delivery services not be authorized to make liquor deliveries.
5. Rulemaking: Section 1056(3) of the bill requires BABLO to engage in three specific types of rulemaking. Because of the length of time required to adopt rules and fact that this is an emergency bill, BABLO recommended adopting all requirements by statute, not by rule:

LD 205 required rulemaking topic:	BABLO proposed amendment to bill:
Identifying the categories of on-premises retailers that may sell liquor for off-premises consumption (after considering the types of food sold under each category of license).	Amend the definition of “qualified on premises retailer” on p. 2, lines 8-11 to include licensed on-premises retailers “that [have] a food requirement under this Title.” *
Defining the type of food order that must accompany a sale of liquor for off-premises consumption by a licensed on-premises retailer (not by a distillery/small distillery).	Define “food order” in the bill to mean “either a full course meal or food” based on the statutory food requirement applicable to the particular on-premises retailer.
Establishing requirements for the sealing and labeling of approved containers (for cocktails to go).	Require that approved containers: <ul style="list-style-type: none"> • <i>Be sealed</i> in one of three ways: “crown-capped glass bottles, a screw top bottle cap that breaks apart when opened or a vacuum and heat-sealed pouch.” • <i>Be labeled</i> with: the name and license number of the licensee selling the cocktail, the ingredients of the cocktail, and the date of creation.

* See attachment - outlining Title 28-A’s food requirements for on-premises retailers

- ***Distilled Spirits Council proposed amendment:*** The Distilled Spirits Council suggested extending the automatic repeal date from April 15, 2022 to December 31, 2022. Note that, because the Legislature usually is not in session at that time of year, it likely cannot prevent the law from being repealed unless it passes legislation at an earlier regular or special session.
- ***Wine Institute proposed amendment:*** The Wine Institute suggested amending the bill to allow on-premises retail licensees to sell wine and mixed drinks containing wine—for example, mimosas and sangria—in sealed containers to customers when accompanied by food orders. If the committee

wants to pursue this suggestion, it may wish to consider establishing the maximum amount of wine and other types of liquor may be included in each sealed serving, and imposing labeling requirements, similar to the definition of “approved cocktail.”

- ***Bureau of Motor Vehicles proposed amendment:*** After the public hearing, the Director of Legal Affairs at the Bureau of Motor Vehicles [suggested amending the bill](#) to clarify whether an “approved container” in which an approved cocktail may be sold is an “open alcoholic beverage container” for purposes of [29-A M.R.S. § 2112-A](#), which prohibits the operation of a vehicle on a public way if the operator or a passenger in the passenger area of the vehicle possesses an open alcoholic beverage container. [29-A M.R.S. § 2112-A\(1\)\(B\)](#) defines “open alcoholic beverage container” as follows:

"Open alcoholic beverage container" means a bottle, can or other receptacle that contains any amount of alcohol, and that is open or has a broken seal, or the contents of which are partially removed.

The committee may want to consider amending the bill to state, for example, that an approved container is not an open alcoholic beverage container for purpose of [29-A M.R.S. § 2112-A](#), as long as the required tamper-evident seal has not been broken.

TECHNICAL ISSUES

1. **§1065(2)(E) on p. 2, lines 41-42 of the bill:** Although licensed Maine (small) distilleries are not required to have a food order accompany their sales for off-premises consumption, this provision states: “Liquor sold for off-premises consumption must be delivered with the accompanying food order...” Should this language be clarified as it applies to sales by (small) distilleries?

FISCAL IMPACT

Not yet determined; however, the [fiscal note](#) for [LD 2174](#) (as amended by the committee) from the 129th Legislature indicated: “Any additional costs to [BABLO] as a result of provisions that allow on-premises retailers to engage in liquor take-out sales and delivery services of liquor until April 15, 2022, are anticipate to be minor and can be absorbed within existing budgeted resources.”

ATTACHMENT - Food sales by on-premises retailers

Title 28-A requires some, but not all, categories of on-premises retailers to sell food. When food must be sold, the type of food—*e.g.*, a full meal, sandwiches, snacks, etc. —is not always specified.

Category	Statutory requirements related to food
Hotel	Although $\geq 10\%$ of the gross annual income of most licensed hotels must be from the sale of food, §1061(3) , the type of food that must be sold is not specified. <i>See</i> §2(15)(H) (stating that “meals <i>may</i> be served” by hotels). But , hotels with Class I-A licenses are not required to sell food. §1002 .
Bed and breakfast	Must serve at least one meal per day, but there is no requirement that a specific type of food always be available when liquor is being sold. <i>See</i> §2(15)(B-2) .
Restaurant	Although at least 10% of a restaurant’s gross annual income must be from the sale of food, §1062(3) , in general the type of food that must be sold by a restaurant is not specified. <i>See</i> §2(15)(Q) (restaurant must have adequate facilities “for preparing and serving <i>suitable food</i> for the public”). Exception: if it is located on the same premises as and accessible from an off-premises retailer, the restaurant must serve “food,” which is defined as “hot or cold meals, including sandwiches and salads, but is not limited to hamburgers, cheeseburgers, hot dogs, pizzas and other food items that customarily appear on a restaurant menu.” Sales of “prepackaged snack foods such as popcorn, chips or pretzels” are insufficient.
Class A restaurant	A Class A restaurant must have the capacity “for preparing and serving full course meals on the premises.” A “full course meal” is defined as “a diversified selection of food that ordinarily cannot be consumed without the use of tableware and that cannot be conveniently consumed while standing or walking.” <i>See</i> §2(15)(R) .
Class A restaurant / lounge	Must have the capacity “for preparing and serving full course meals on the premises.” <i>See</i> definition of “full course meal” above. But , after 9 p.m. a Class A restaurant / lounge may serve liquor without serving full course meals. <i>See</i> §2(15)(R-1) .
Class A lounge	Although food must be offered for sale whenever liquor is for sale, the type of food that must be offered is not specified. <i>See</i> §1065 .
Indoor racquet clubs; ice skating clubs; golf courses; curling clubs and bowling centers.	Although food must be offered for sale to the public whenever liquor is for sale, the type of food that must be offered is not specified. <i>See</i> §1073(2) .
Auxiliary licenses at ski areas, golf courses and disc golf courses	In certain circumstances, a Class A restaurant, Class A restaurant/lounge, hotel, or club located at a ski area, golf course or disc golf course may obtain a license for a separate premises. Food must be sold at the separate

	premises, although not necessarily prepared there. The type of food is not specified. §1075(1) .
Qualified catering services	A qualified catering service may obtain a “self-sponsored event permit” to conduct events at its facility. During these events, “a diverse selection of food” must be provided at multiple stations, a buffet station, passed by servers or “served as a plated sit-down meal”. The “selection of food must include more than snack foods such as potato chips, crackers, pretzels or nuts.” §1076(10)(D) .

There is no statutory requirement that the following categories of on-premises retailers sell food:

- Auditorium;
- Civic auditorium;
- Club;
- Incorporated civic organization;
- Performing arts center;
- Pool hall;
- Tavern;
- Outdoor stadiums; and
- Golf course and disc golf course mobile service bars.