

**RESTING EASY WHEN MINORS ARE AFOOT:
MINORS AND ALCOHOL**

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FIRM OVERVIEW

Flaherty & O'Hara, P.C. provides alcohol beverage and hospitality law counseling, including licensing, transactional, litigation and related services to a wide variety of national, regional and local clients in the restaurant, hospitality and entertainment industries. With several decades of combined experience in the alcohol industry, we know the technical and practical implications of state and federal liquor laws and keep abreast of changes and trends in alcohol laws nationwide in order to provide high-quality legal services tailored to meet the individual needs of each of our clients.

We have played a leadership role in defining the liquor laws in Pennsylvania, arguing many of the seminal cases in the industry, drafting legislation, and pioneering business solutions to some of the obstacles presented by governmental regulation of the industry.

In our practice, we provide services to a broad range of clients, including restaurants and taverns, resorts, hotels, franchisors and franchisees, stadiums and arenas, manufacturers and distributors, brewers, amusement parks, theaters, colleges and universities. We also assist in real estate acquisition and site selection. In addition to working directly with our clients, we assist and counsel other law firms and legislators who deal with matters related to the regulation of alcohol.

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I. SCOPE OF ARTICLE

This article is meant to provide members of the hospitality industry with an overview of some of the relevant statutes and caselaw that affect restaurants and hotels when underage patrons or employees come into contact with alcohol. The goal of the authors is not only to provide an overview of the applicable law but also to encourage liquor licensees to take affirmative actions to avoid the potential liability associated with minors and alcohol by offering steps to avoid or minimize associated risk. This article is neither intended to, nor does it, provide legal advice upon which readers may rely without further consultation with an attorney or create an attorney-client relationship.

II. INTRODUCTION

For hotels and restaurants, offering alcoholic beverages can provide both increased customer satisfaction as well as increased profit margins. Whether a hotel provides alcohol can be a decisive factor in whether a car pulls into the parking lot or continues down the road to another establishment. But choosing to serve or allow others to serve alcohol brings with it the risk that beer, wine or spirits will end up in the hands of minors.

This paper and the discussion related to it address some of the laws aimed at limiting youth access to alcohol and ways licensees can prevent harm to minors, adults, employees, third parties and their own financial interests through preventative measures.

III. LEGAL AGE TO SERVE OR HANDLE ALCOHOL

All states have minimum age requirements for employees who serve or dispense alcoholic beverages in on-premises licensed drinking establishments. Typically these minimum age requirements range from 18 to 21 years old and may apply differently to servers and bartenders (generally, the term "servers" is used to refer to individuals working as waiters and waitresses who take orders at and deliver alcohol to patrons' seated at tables).¹

A. How Old Must Your Servers and Bartenders Be?

There is no single nationwide rule that mandates a minimum age for those who serve or dispense alcohol – each state determines its own rules. A few states require both servers and bartenders to be at least 21 years of age, but most states require neither servers nor bartenders to be 21 years old. Additionally, many states treat table servers and bartenders differently by allowing servers under the age of 21

¹ See Alcohol Policy Information System (APIS), a web based project of the National Institute on Alcohol Abuse and Alcoholism. The consolidation and organization of statutes and laws on the APIS website contributed significantly to this paper.

to provide alcoholic beverages while prohibiting anyone under 21 from working as bartenders. (No states permit bartenders to be under 21 while requiring servers to be over 21).² See attached chart, “On-Premise Alcohol Servers and Bartenders.”

1. States Where Neither Servers Nor Bartenders Must Be 21 Years of Age or Older (28 states)

A solid majority of states permits both servers and bartenders to sell and serve alcoholic beverages to on-premises customers *before* the age of 21. Most of these states provide that servers and bartenders must be *at least* age 18 (Maine is the single exception that permits 17-year-olds to work as both servers and bartenders if properly supervised).³ Permitting those who are not allowed to consume alcohol to work so closely with alcohol could seem like a bit of a contradiction, but it may be related to the changes in many states in recent decades that raised the minimum drinking age from 18 to 21. States may have wanted to avoid disrupting the hiring practices of restaurants and other business that sell alcohol and therefore changed only the minimum age for those who consume alcohol rather than those who serve or tend bar. Labor shortages may be another reason many states have chosen to allow servers and bartenders under age 21 to serve alcohol.

Several states place conditions on on-premises servers and bartenders under 21 years of age. These include requirements that a manager or supervisor over age 21 be present when the underage person is serving alcoholic beverages or tending bar and/or that the underage server or bartender undergo beverage server training beyond that otherwise mandated in the state.

For example, Colorado’s statute states that “no person under twenty-one years of age shall be employed to sell or dispense malt, vinous, or spirituous liquors *unless* he or she is supervised by another person who is on premise and has attained twenty-one years of age.”⁴ Similarly West Virginia’s Code makes it unlawful for any licensee (or agent of the licensee) to “employ any person who is between the ages of eighteen and twenty-one who is not directly supervised by a person aged twenty-one or over in a position where the primary responsibility for such employment is to sell, furnish or give non-intoxicating beer, wine or alcoholic liquors to any person.”⁵

In Alabama, although underage servers and bartenders are not required to undergo server training as a condition of serving alcoholic beverages or tending bar, an employer of an underage waiter, waitress, or server in a restaurant must be a licensee of the board who has been annually certified as a responsible vendor under the Alabama Responsible Vendor Act.⁶

² APIS - http://www.alcoholpolicy.niaaa.nih.gov/index.asp?SEC={DCBE5C24-E92B-4830-91BE-20B4FF0162D7}&Type=BAS_API

³ Maine Rev. Stat. Ann., Title 28-A, § 704

⁴ Colo. Rev. Stat., § 120-47-901 (emphasis added)

⁵ W.V. Code, § 60-7-12

⁶ Ala. Code, § 28-1-5

2. States Where Servers May Be Under 21, But Where Bartenders Must Be 21 or Older (19 states)

Many states permit the hiring of servers under age 21 who provide alcoholic beverages but require that bartenders must be 21 years or older. This may stem from the fact that in some states a person under 21 is not permitted to sit down at a bar (whether or not they are attempting to be served alcohol) while that same underage person is permitted to sit at a table in a restaurant where alcohol is being served. In addition, it may reflect the notion that the bartender, who is over the age of 21, is the person preparing the drinks while the waitresses and waiters merely serve the drinks.

In California, an employee between the ages of 18 and 21 may work at a bona fide public eating place and sell alcohol “where such person is not acting in the capacity of a bartender and the service occurs in an area primarily designed and used for the sale and service of food for consumption on the premises.”⁷

Arizona is another example of a state that permits servers to be under 21 years of age (19 is Arizona’s minimum) but requires bartenders to be at least 21. Arizona is unique however in that it requires the consent of a parent or a guardian for a 19 or 20-year-old server to be permitted to sell or otherwise handle alcohol and only allows such sales in restaurants, hotels and motels with food permits.⁸

3. States Where Both Servers and Bartenders Must be 21 or Older (3 states)

Only three states require that both servers and bartenders must be 21 or older to serve alcohol. These states are Alaska, Nevada and Utah. Nevada’s 21-and-over rule for both servers and bartenders may be tied to the interests of the service industry in and around Las Vegas. Utah’s strict rule is likely based on the strong religious influence in that state.

Of the three states, Alaska seems to be the most restrictive, with absolutely no exceptions to its ban on anyone under the age of 21 selling or serving alcoholic beverages.⁹ Utah, on the other hand, allows a minor to be employed to enter the sale of an alcoholic beverage in a cash register or other sales recording device so long as the minor is not actually serving an alcoholic beverage to a customer.¹⁰

⁷ Cal. Business and Professional Code, § 25667

⁸ Ariz. Rev. Stat., § 4-244

⁹ Alaska Statutes, Section 04.16.052

¹⁰ Utah Code Annotated, Section 32A-4-106

IV. MINORS IN POSSESSION AND/OR CONSUMING ALCOHOL

Each of the 50 states has at least one statutory provision prohibiting the possession of alcohol by minors. Surprisingly, consumption by minors on the other hand is not specifically prohibited in 18 states.

A. Are Possession and/or Consumption of Alcohol by Minors Ever Permitted?

Though all states prohibit possession of alcoholic beverages by minors to some degree, there are numerous exceptions to this general rule that vary widely by state. Some states have created an exception for family members that can be broken down into two general categories; parental/guardian exceptions and spousal exceptions. Other states have exceptions relating to possession of alcohol by minors on private property. Additionally, some states have exceptions for alcohol possession by minors for educational, religious or medical reasons.¹¹

Statutory restrictions on alcohol consumption by minors are often closely tied to restrictions on possession; of course, consumption usually necessitates possession. Although all states prohibit possession of alcohol by minors to some degree, some states do not specifically prohibit underage alcohol consumption. In addition, some states that do prohibit underage consumption allow different exceptions for consumption than those that apply to underage possession.

1. Parental/Guardian Exceptions

Many states allow minors to possess or consume alcoholic beverages as long as a certain degree of parental/guardian oversight occurs. In some states parents or guardians may have to consent to or be present for this exception to apply. In other instances a reference is made simply to "family" or "family member" in the statutory language without further elaboration.¹²

In Illinois for example, "possession and dispensing, ... or the consumption by a person under 21 years of age under the direct supervision and approval of the parents or parent or those persons standing in loco parentis of such person under 21 years of age in the privacy of a home, is not prohibited...." Under this Illinois statute, possession and consumption by a minor may occur only with parental or guardian presence and approval and it must occur in a private residence (Illinois also has an exception for religious beliefs, to be discussed later).¹³

¹¹ APIS - http://www.alcoholpolicy.niaaa.nih.gov/index.asp?SEC={DA244DAF-EB78-425C-915B-D26D303F9E13}&Type=BAS_APIS

¹² APIS - http://www.alcoholpolicy.niaaa.nih.gov/index.asp?SEC={0D5C719E-FCE8-4E15-A367-4145C655505F}&Type=BAS_APIS

¹³ 235 Ill. Comp. Stat. §§ 5/6-16, 5/6-20

Texas has perhaps the least stringent requirements with regard to possession and consumption of alcohol by a minor as it relates to the parent/guardian exception. Under Texas law a minor may possess and consume an alcoholic beverage as long as it is consumed or possessed in the visible presence of the minor's adult parent or guardian. Because there is no mention of private property this exception extends to public areas such as restaurants and hotels.¹⁴

Montana, on the other hand, takes a stricter approach to the parental exception. Under Montana's Code, minors are permitted to possess and consume alcoholic beverages provided by a parent or guardian only in a non-intoxicating quantity. Like Texas however, there is no mention of private property and a minor is ostensibly permitted small non-intoxicating quantities of alcohol in public settings such as hotels and restaurants under this exception.¹⁵

2. Spousal Exceptions

The spousal exception, the other major family exception, allows possession or consumption when the minor's spouse is present and/or consents. While some states specify that the spouse must be of legal age, others do not.

In Wisconsin, "any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age who knowingly possesses or consumes alcohol beverages is guilty of a violation."¹⁶ Texas has a similar rule in that a minor may consume alcoholic beverages if the minor is in the visible presence of his or her spouse (provided the establishment was willing to serve them; it is voluntary rule with regard to licensees).¹⁷

Delaware's exception lacks an age requirement for the spouse who provides alcohol for possession and/or consumption because it does not mention spouses directly. Delaware Code Annotated Title 4, Section 904 vaguely refers to "members of the same family" and allows consumption or possession by a minor if in the "private home of any of said members."

Regardless of a state's spousal exception rule with respect to minors consuming alcohol, a hotel can always refuse to serve alcohol to a minor.

3. Private Property Exceptions

The private property exceptions vary with regard to the types of properties they extend to, but typically fall into one of three categories; all private locations, private residences only or in the home of a parent or guardian only. Additionally, in

¹⁴ Texas Alcohol Beverage Code Annotated, Section 106.05

¹⁵ Mont. Ann. Code, § 16-6-305

¹⁶ Wis. Stat., §§ 125.02 and 125.07

¹⁷ Texas Alcohol Beverage Code Annotated, Section 106.05

some jurisdictions, a private property exception requires the presence and/or consent of a parent, legal guardian, or spouse.

Colorado's private property exception has one of the more restrictive provisions when it comes to consent. It requires not only the consent and presence of a parent or guardian when minors possess or consume alcohol, but also the knowledge and consent of the owner of the private property where the alcohol is possessed or consumed. It does not however require that the private property be the residence of the parent or guardian or even that the private property be a private residence.¹⁸

Illinois requires that a parent or guardian be both present and consent and that possession and/or consumption by the minor occur at a private residence.¹⁹ In Minnesota, consumption is only permitted in a parent or guardian's home and only with consent but the parent or guardian is not required to be present. Possession by a minor in Minnesota on the other hand is permitted in the home of a parent or guardian without the presence or consent of a parent or guardian.²⁰

4. Educational/Religious/Medical Exceptions

Some states also allow exceptions for minors possessing or consuming alcohol for educational purposes, such as students in culinary schools, religious purposes such as communion, or legitimate medical purposes.

Louisiana has a fairly narrow exception, permitting alcohol consumption by minors for "medical purposes when purchased as an over the counter medication, or when prescribed or administered by a licensed physician, pharmacist, dentist, nurse, hospital, or medical institution."²¹

Though Michigan's statutory language lacks the medical exception seen in Louisiana, it contains exceptions for both educational and religious purposes. Michigan permits consumption of alcohol by a minor "who is enrolled in a course offered by an accredited postsecondary educational institution in an academic building of the institution under the supervision of a faculty member...if the purpose of the consumption is solely educational and is a necessary ingredient of the course," and also permits "consumption by a minor of sacramental wine in connection with religious services at a church, synagogue, or temple...."²²

By its express wording, Michigan's statute applies only to private educational buildings and religious buildings, but Illinois' religious exception notes that the statute should not be read to "prohibit the giving of alcoholic liquor to a person under

¹⁸ Co. Rev. Stat., § 12-47-901

¹⁹ 235 Ill. Comp. Stat., § 5/6-20

²⁰ Minn. Stat., § 340A.503

²¹ La. Rev. Stat. Ann., § 14:93.10

²² See Michigan Liquor Control Code of 1998

the age of 21 years in the performance of a religious ceremony or service.” This provides no private property limitation and presumably could apply to a religious event or service conducted in a setting such as a hotel (i.e. bar mitzvah).²³

V. MINORS (AND ADULTS) IN SELF-SERVICE SITUATIONS

Hotels often offer amenities that include the provision of alcohol for adult patrons in a self-service or nearly self-service environment. These amenities may include permitting an outside group to rent a conference room, host a seminar or other event and supply its own alcohol to those attending; hosting a Manager’s Reception where complimentary beer and wine may be provided alongside hors d’oeuvres; and/or providing a mini-bar, available in individual hotel rooms that contains beer, wine and/or liquor along with other snacks.

A. Outside Groups Providing Alcohol on Hotel Premises

Often individuals or groups will approach a hotel seeking to rent a conference room to host a wedding, corporate meeting or other event with the intention of offering alcoholic beverages to those in attendance. Hotels should remain cognizant that because they retain control over the facility, the possibility of being held liable exists if a minor consumes alcohol at such an event.

One-way to alleviate negative repercussions from individuals or groups overserving guests in rooms on hotel premises is to require that those patrons purchase a liquor-liability insurance policy. It is not uncommon for wedding parties to purchase a policy like this along with broader wedding insurance.²⁴

Additionally, licensees should be wary of indemnification clauses that stipulate that the hotel will indemnify, defend, and hold harmless the group or individual from and against liability arising from alcohol-related incidents. If the bartenders or other alcohol servers are not hotel staff they may not be properly trained and the chances of an alcohol related incident increase.²⁵

A final option is to require that the group allow only the hotel’s certified and experienced bartenders to provide alcohol. Although this will probably require the hotel to indemnify the group, it will help insure that safe and responsible alcohol service will occur.

B. Manager’s Receptions

Manager’s Receptions are usually provided by hotels in the late afternoon or evening and allow patrons to unwind with alcoholic and non-alcoholic beverages and offer a variety of appetizers. The benefit to such complimentary offerings is that they

²³ 235 Ill. Comp. Stat., § 5/6-20

²⁴ <http://www.legalmatch.com/law-library/article/weddings-and-alcohol-liability.html>

²⁵ http://meetingsnet.com/checklistshowto/more/meetings_steps_limit_liquor_2/

may attract new guests and help retain existing ones. But in states where Manager's Receptions are permissible, the possibility of minors having access to alcohol because of the self-serve nature of such receptions creates the potential for liability.

The location of the hotel can be a factor in determining the risk associated with providing Manager's Receptions. Because most jurisdictions provide that any sober adult who walks through the door (guest or non-guest) is permitted to enjoy the free offerings, hotels located in densely populated areas or near a university are more likely to have non-guests (and potentially minors) consuming alcohol.

Another aspect of Manager's Receptions that should be emphasized is supervision. In order to responsibly furnish alcohol and limit the risk of alcohol falling into the hands of minors, hotels should make it their policy to have employees trained in alcohol beverage service monitoring the Manager's Receptions, even if the only alcohol provided by a hotel is through Managers' Receptions. Trained and alert staff will be able to spot not only minors but also adult guests who may have overindulged and help alleviate any situations that may arise.

C. Mini-Bars

Typically, a mini-bar (also called an alcoholic beverage cabinet, among other things) comes in the form of a small refrigerator stocked with a precise inventory. Hotel guests are permitted to take and consume individually priced beverages, snacks or other items throughout their stay. In the past, housekeeping staff monitored the items taken and the cost, but many mini-bar refrigerators today are electronically equipped to detect when an item is removed from the refrigerator and the cost is then automatically added to the guest's bill.

Mini-bars may be locked or unlocked. Locked versions are often made accessible by room key-cards to limit access and monitor use. Many states require that mini-bars be locked.

Arizona is an example of a state that has created explicit rules governing the use and monitoring of mini-bars designed to restrict both access by minors and overindulging by adults. Under Arizona's statute, access to a mini-bar is provided only to registered guests of legal drinking age by the hotel staff furnishing a key, magnetic card or similar device.²⁶ By law, a key is not to be initially provided and the mini-bar is not to be restocked between the hours of 1:00am and 6:00am on weekdays and 1:00am and 10:00am on Sundays. Additionally, the mini-bar can contain no more than thirty individual portions of spirituous liquor and can only be stocked by an employee 19 years of age and older.²⁷

²⁶ Ariz. Rev. Stat., § 4-205.06

²⁷ Id.

California first introduced mini-bars in 1985, where they are statutorily referred to as “controlled access alcoholic beverage cabinets.”²⁸ They are defined as, “closed container, either refrigerated, in whole or in part, or non-refrigerated, and access to the interior of which is (1) restricted by means of a locking device which requires the use of a key, magnetic card, or similar device, or (2) controlled at all times by the licensee.”²⁹ Many of the rules are the same or similar to those provided by the Arizona statute. Both prohibit providing mini-bar access to minors by limiting the distribution of keys or keycards to adult guests. California, like Arizona, also has an age minimum for employees restocking the mini-bar, but it is 21 as opposed to 19-years-old.³⁰

Access to mini-bars can be restricted not just with regards to the age of the guest but with the hours during the day that alcohol may be dispensed. In New Jersey, automatic timing or similar devices must be utilized to lock-out the units during the hours when the sale of alcoholic beverages for consumption on the premises is prohibited.³¹ In Minnesota, on the other hand, the dispensing of alcohol from mini-bars is specifically exempted from restrictions on hours and days of sale that other on-premise sales are subject to.³²

VI. FURNISHING ALCOHOL TO MINORS (AND ADULTS)

A. Licensee Furnishing Alcohol Directly

All states prohibit adults from furnishing alcoholic beverages to minors, although most allow for some exceptions. Certain instances when furnishing alcohol to minors may be permissible were discussed in the preceding section on possession and consumption (i.e. parent/guardian exceptions, spouse exceptions, private property exceptions and education/religious/medical exceptions).³³

This section will examine some of the ways in which licensees can be held liable for furnishing alcohol to minors or allowing others to furnish alcohol to minors. (Some states define “allowing others to furnish” as “failing to prohibit” or have enacted strict liability laws which say that if a minor obtains alcohol on licensed premises, even if the licensee did everything it could to prevent it and knew nothing of it, the licensee is liable.) See attached chart, “Furnishing Alcohol to Minors.”

²⁸ California Hotel and Lodging Association (citing California’s Business and Professions Code Section 23355.2(a))

²⁹ Id.

³⁰ Id.

³¹ See New Jersey’s Alcohol Beverage Control Handbook for Retail Licensees

³² Minn. Stat., § 340A.504

³³ APIS - http://www.alcoholpolicy.niaaa.nih.gov/index.asp?SEC={B7EBF080-DB1F-4092-9897-E3F083BB3075}&Type=BAS_APIS

1. Hotel restaurant/bar setting generally

Every state prohibits the sale of alcoholic beverages to minors in a restaurant or bar located within a hotel (though some exceptions exist). Unlike establishments that stand alone as restaurants or bars, these locations tend to attract less attention (i.e. sting operations, ABC checks) from liquor authorities. Of course, less attention from liquor authorities does not necessarily mean minors are any less likely to attempt to obtain alcohol from a bar or restaurant within a hotel.

a. Frequenting

Frequenting refers to the minimum age for a patron to enter a bar or restaurant that is licensed to provide alcohol. Licensees who operate bars or restaurants within hotels should be aware that in most states the age minimum is 21 to patronize a bar or restaurant that provides alcohol though a small number of states permit minors 18 and older to enter a bar. In virtually every state a minor can enter a bar with a parent or guardian or proper supervision under the applicable statute. In larger cities such as Las Vegas, New York and Los Angeles minors are often drawn to bars, clubs and restaurants that are part of the experience at high-end hotels. These larger hotels however are not the only ones susceptible to having minors slipping through the doors to enter off limits bars and restaurants; all licensees with hotels with bars and restaurants should be on the lookout for minors trying to enter such premises. It should be noted however that in states where entire hotel premises are licensed and the minimum age to rent a room is 18, entering or renting a room by a minor age 18 to 20 does not constitute frequenting.

In California, any licensee who “permits a person under the age of 21 years to enter and remain in the licensed premises without lawful business therein is guilty of a misdemeanor.” Additionally, a minor in California who frequents a bar without legitimate business there will face a misdemeanor.

In Louisiana, on the other hand, anyone age 18 or older is permitted to enter a bar, though those under 21 are not permitted to consume alcohol. The exception in Louisiana is that 18-20 year old patrons are permitted to consume alcohol in a bar if they are in the presence of a parent, spouse or legal guardian.³⁴

b. Pass-off in bar or restaurant

Adults obtaining alcohol and handing it off to minors can create a problem in bars or restaurants within hotels. In virtually every state, there is a statute or regulation making it unlawful for a licensee to permit or allow alcohol to be furnished to a minor or to allow a minor to possess or consume alcohol on a licensed premise. In addition, a pass-off violation creates potential civil liability in most states if a minor injures himself or herself or a third party.

³⁴ <http://www.atc.rev.state.la.us/faqs.html>

c. False identification

All States prohibit the use of false identification to obtain alcohol. Nonetheless this tactic for acquiring alcohol is often employed by minors. As a consequence, licensees, retailers, bartenders and other alcohol servers must take affirmative steps to limit opportunities for minors to obtain alcohol. Enterprising minors may acquire and use false identification that appears to be valid but misstates their age as 21 or over. This can be accomplished through physically altering information (i.e. birthdates) on otherwise valid identification, obtaining IDs with entirely fraudulent information or using the identification card of someone 21 years or older. Though many states now employ advanced technology to produce identification cards that are more complex than earlier versions, high quality color copiers and printers along with unscrupulous internet sites provide numerous false identification options.

Carefully inspecting ID cards such as driver's licenses, non-driver identification cards, passports and military identification cards can help alcohol providers limit liability and keep alcohol from falling into the hands of minors.

i. Affirmative defenses generally

Many states offer general affirmative defenses to licensees who make good faith attempts to screen for false identification and are nonetheless deceived.

In Illinois, proof that the licensee or his agent was shown and reasonably relied upon seemingly valid identification is an affirmative defense in any criminal prosecution.³⁵ The statute explicitly notes however that the licensee's reliance must be reasonable and lists the forms of acceptable IDs (including but not limited to a "motor vehicle operator's license, a registration certificate issued under the Federal Selective Service Act, or an identification card issued to a member of the armed forces.")³⁶

The notion of a reasonable reliance (i.e. the unexpired and valid ID of an older white male will never be found to have been reasonably relied upon by a licensee if the person offering it is a young Asian female) and the list of forms of acceptable identification seen in Illinois are typical of the majority of states that allow an affirmative defense.

ii. Electronic card scanners and defenses

The advent of electronic ID card readers has made the sometimes difficult job of examining IDs easier, and in some states use of such card readers has been integrated into a specific affirmative defense for prosecutions resulting from alcohol sales to minors.

³⁵ 235 Ill. Comp. Stat., § 5/6-16

³⁶ Id.

Caution is warranted when scanners are used, though, because licensees' employees have been known to rely on a positive ID scan without regard to whether the picture on the card matches the person presenting it as proof of age.

In New York, there is an affirmative defense to selling or otherwise providing alcohol to a minor if the minor, "produced a photographic identification card apparently issued by a governmental entity and that the alcoholic beverage had been sold, delivered or given to such person in reasonable reliance upon such identification."³⁷ The statute provides further that this reasonable reliance may be based upon the seemingly valid use of an ID card by a minor based on the output from swiping it through an electronic card reader (this situation is likely to occur in the case where a minor attempts to use someone else's valid ID as his or her own).

Similarly, in West Virginia a licensee who can demonstrate both that he has installed a "transaction scan device" and that he requires employees to use it for all alcohol sales transactions can avoid criminal, civil and administrative penalties "for the improper sale, furnishing or giving away of liquor to an individual who is less than twenty-one years of age by one of his or her employees, servants or agents."³⁸

Though all states include some reasonableness standard at least as a practical matter, Arizona's statute explicitly states that if a reasonable person would have reason to question that the identification presented and scanned belonged to the person presenting the identification (as in the situation mentioned earlier where a minor attempts to use someone else's valid ID as his or her own) then the licensee or employee is presumed to have constructive knowledge of the minors actual age and can be penalized.³⁹

d. Sting operations

Sting operations involving underage patrons and alcohol are one method employed by law enforcement in numerous states to target restaurants, hotels, bars and other licensed establishments who sell to minors. Though the law governing sting operation procedures differ among the 50 states (or even within states in different counties or cities), such sting operations generally involve underage volunteers (or youthful appearing 21-year-olds) who attempt to purchase alcohol from licensed premises to determine if alcohol will be improperly sold. If alcohol is improperly sold the licensee may be subject to fines or a suspended or revoked license.

Because sting operations seem to be an increasingly popular enforcement method we will discuss some of the tactics used in various states as well as the controversies that have arisen from its implementation.

³⁷ N.Y. Alco. Bev. Cont. Law § 65-b

³⁸ W. Va. Code § 60-3A-25a

³⁹ Ariz. Rev. Stat. § 28-3310

In California, sting operations involving minors have been conducted by the California Department of Alcohol Beverage Control since the 1980s. When the program first began, the violation rate of retail establishments was as high as 40-50% but has dropped to as low as 10% in some cities since the program began. A first time violator in California faces a maximum fine of \$250 and/or 24-32 hours of community service. Administrative action will also be taken against the businesses liquor license.⁴⁰

Earlier this year the North Dakota Supreme Court ruled that underage sting operations were justified under a 2001 state law that allows individuals to work under orders from a law enforcement officer, as long as they believe what they are being asked to do is within the officer's authority. Two convenience store operators and a bar owner had challenged the tactic, claiming that the state legislature had not given local police the authority to use underage decoys since North Dakota law forbids minors from entering bars and liquor stores. The court noted that the legislative history contained ample evidence that the intent of the 2001 law was to facilitate alcohol compliance checks involving minors.⁴¹

Finally, in Alabama this year, ABC agents joined forces with the Selma Fire and Police Departments to sweep through all the alcohol-serving establishments in the city to crack down on underage drinking. Under Alabama law, if an establishment has three citations for the same violation over a 4-year period, a hearing must be held before the ABC. An ABC agent noted that it is "not hard to lose your license in Alabama." Aside from using underage decoys as an enforcement tactic, the ABC and police departments also assist in training employees and licensee in how to avoid violations.

2. Examining liability in two states: Washington and South Carolina

a. Administrative liability

In both the state of Washington and South Carolina, adults or licensees can be held criminally liable for furnishing alcohol to minors. Under Washington's Code, "it is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years or permit any person under that age to consume liquor on his or her premises or on any premises under his or her control."⁴² Washington allows exceptions for parental/guardian furnishing and for both religious and medical reasons. Furnishing alcohol under this section is treated as a gross misdemeanor, carrying elevated misdemeanor-type penalties.

South Carolina has made it unlawful to sell, give or transfer alcohol to a minor for consumption. The law also provides that if a licensee is charged with unlawful

⁴⁰ Ca. Dept. of Alc. Bev. Control website

⁴¹ AP story – 7/18/2006

⁴² Wash. Rev. Code, § 66-44-270

sale to a minor and the minor provides false identification, the minor will also be charged. South Carolina provides exceptions for parental/guardian and spousal furnishing as well as exceptions for bona fide educational and religious ceremonies. Furnishing alcohol in any of these ways is a misdemeanor.⁴³

b. Civil liability

Of importance to many hotels and restaurants is whether they can be held liable in a civil action for injuries proximately caused by the provision by their staff of alcohol in violation of state law. The distinction often lies in whether the suit is brought by the inebriated guest himself (for his/her own injuries – 1st party plaintiffs) or if the suit is brought by a third-party who has been injured by the inebriated guest (3rd party plaintiffs).

i. 1st Party Plaintiffs

In both Washington and South Carolina, a licensee is not liable to adult patrons who sue as 1st party plaintiffs over their own injuries incurred as a result of their over-consumption of alcohol. The Washington Supreme Court has stated that the Revised Code of Washington, § 66-44-200, protects the public health, safety and welfare, but not intoxicated persons. Similarly the Supreme Court of South Carolina ruled in *Tobias v. The Sports Club, Inc.* that an intoxicated adult patron could not maintain an action against a tavern owner for injuries which the patron sustained as a result of the service of tavern owner's service of alcohol.⁴⁴

This outcome is not necessarily universal however, and certainly not when the injured party is a minor rather than an adult. In Washington, licensees owe a duty of care to: (1) the minor patron; (2) any minors who receive alcohol from a minor patron; and (3) third persons foreseeably injured by the minor patron or any minors who received alcohol from the minor patron.⁴⁵

In South Carolina the issue remains undecided. The court in *Tobias* said that it would, "leave for another day the issue whether we will recognize a first party action brought by a minor."⁴⁶ Given the special status that minors hold in many states (i.e. there is a greater need to protect minors and they are often seen as less culpable) it seems likely that when the case arises in South Carolina they reach a similar conclusion to the one reached in Washington.

⁴³ S.C. Code Ann., §§ 61-4-50, 61-4-90

⁴⁴ *Tobias v. The Sports Club, Inc.*, 504 S.E.2d 318 (S.C. 1998)

⁴⁵ Liability for Over-service: Food for Thought for the Holidays, Emily Harris Grant, King County Bar Association website

⁴⁶ *Tobias*, 504 S.E.2d 318 at 320

ii. 3rd Party Plaintiffs

Third party liability involves the inebriated adult or minor patron who has been served by a licensee injuring someone else (the plaintiff). Often this kind of case arises out of an accident involving drinking and driving and the decisive factor is whether alcohol was served to a visibly, noticeably, obviously or apparently intoxicated patron, depending on state law. Analysis in these scenarios is much different than that involved in 1st party liability.

In *Daley v. Ward*, the South Carolina Court of Appeals examined the facts of a case involving a visibly intoxicated patron who was served alcohol by the defendants at their bar.⁴⁷ The adult patron left the bar and rear-ended the plaintiff, causing injury. The plaintiff's case involved the statute prohibiting the sale of beer or wine to intoxicated persons. The court wrote, "We find no reason for which the class of persons protected by the statute should not include third parties injured by the actions of an intoxicated person served in violation of the statutes."⁴⁸ Thus, 3rd party plaintiffs can recover from the defendant in South Carolina when injured by the adult patron served alcohol by the defendant. *Daley* applies to patrons who are under 21-years-old as well because the relevant statute refers to drunk or intoxicated persons, minors and the insane.⁴⁹

Recently in Washington the Washington Supreme Court resolved a key question relating to 3rd party liability: whether the patron had to be "obviously intoxicated" when he or she was served by the licensee or merely "apparently under the influence of liquor."⁵⁰ In *Barrett v. Lucky Seven Saloon*, the defendant served Ned Maher at least two pitchers of beer over a three-hour period before he attempted to drive home. Maher drifted over the centerline after falling asleep and collided with the plaintiff Jeffrey Barrett, causing severe and permanent injuries.⁵¹ The Washington Supreme Court held that under the Revised Code of Washington, § 66-44-200(1) a licensee is liable for a 3rd party's injuries if it served an adult patron who was "apparently under the influence of liquor." The court noted that "apparent" is generally defined as "seemingly."⁵²

A licensee in Washington can also be held liable for injuries suffered by a third party as a result of the defendant's illegal sale or provision of alcohol to a minor. The licensee must exercise ordinary care, defined as care equal to that which a reasonable person would exercise under the same or similar circumstances.⁵³

⁴⁷ *Daley v. Ward*, 399 S.E.2d 13 (S.C. 1990)

⁴⁸ *Id.* at 14

⁴⁹ S.C. Code Ann., §§ 61-4-50, 61-4-90

⁵⁰ *Barrett v. Lucky Seven*, 96 P.3d 386 (Wa. 2004)

⁵¹ *Id.* at 387

⁵² *Id.* at 390

⁵³ *Schooley v. Pinch's*, 951 P.2d 749 (Wa. 1998)

B. Adults Furnishing Alcohol in a Hotel Setting

High school and college-age minors who have yet to reach age 21 can create difficult problems for a hotel. Issues range from underage alcohol parties before or after proms to sneaking underage guests and alcohol into overcrowded rooms or pool areas meant for responsible paying guests.

This section highlights some of the laws designed to combat underage drinking at hotels and punish those who facilitate such activities by furnishing alcohol to minors.

1. Laws Addressing Adults who Furnish in a Hotel Setting

Though all states prohibit the furnishing of alcohol to minors to some extent, some states have laws that address the hotel setting in particular. Illinois statutes provide that, “any person who rents a hotel or motel room from the proprietor or agent thereof for the purpose of or with the knowledge that such room shall be used for the consumption of alcoholic liquor by persons under the age of 21 years shall be guilty of a Class A misdemeanor.” This law applies both to patrons who may be old enough to rent a room yet not old enough to drink (i.e. 18-20) and patrons 21 years of age and older.⁵⁴

Under South Carolina’s Code, it’s unlawful for any person to rent or lease a room in a lodging establishment for the purpose of allowing the room to be used by minors to possess or consume alcohol.⁵⁵ Like the Illinois provision it applies to adult and minors alike who facilitate underage drinking.

A section of Alabama’s Code also deals with drinking in a hotel room but its scope is limited to over-21 adult offenders. Under that provision, no adult having control of any residence, who has authorized an open house party at the residence and is in attendance at the party, shall allow the open house party to continue if alcohol is being possessed or consumed by minors, the adult has knowledge of the possession or consumption and the adult fails to take reasonable action to prevent that possession or consumption.⁵⁶ A violation of this section, like those in South Carolina and Illinois, is a misdemeanor.

VII. WHAT HOTELS AND OTHER LICENSEES CAN DO TO REDUCE YOUTH ACCESS TO ALCOHOL AND LIABILITY

Incidents involving underage access to alcohol can harm a hotel or restaurant in ways ranging from the minor (e.g. a damaged reputation within the community) to the catastrophic (e.g. massive civil liability). The following section is designed to offer some examples of affirmative steps that can be taken to protect not only minors

⁵⁴ Ill. Comp. Stat. 5, § 6-16

⁵⁵ S.C. Code Ann., § 45-2-40

⁵⁶ Ala. Code, § 13A-11-10.1

and other patrons from alcohol related incidents but also to safeguard the economic interests of the hotel or restaurant.

A. Nine Positive Steps⁵⁷

1. Restrict the number of persons who can occupy a room at one time

Because underage drinkers often seek out a “safe location” and congregate into fairly large groups, occupancy restrictions may aid hotel managers in limiting parties or gatherings involving minors.

2. Monitor hotel parking lots and other unsupervised areas (i.e. weight rooms, pool areas, etc)

Areas of the hotel property that may seem rather innocuous or unlikely to inspire alcohol consumption can turn out to be prime spots for underage drinking. Poorly lit parking lots or a pool area late at night may be just the place for minors to find a clandestine drinking spot.

3. Inform adult guests of their legal liability for providing alcohol to minors

One of the easiest ways to inform adult hotel guests of their liability with regard to underage drinking is to require adult renters to sign a statement upon registration indicating that the renter understands and agrees to abide by the law.

Another possible option is to post signs at sign-in area that inform adult renters that underage drinking will not be tolerated and that they bear responsibility for allowing underage drinking to occur in rooms that they rent.

4. Allow only trained servers to serve alcohol at hotel events

The safest way to implement this policy is as a two-part requirement – (1) Require all hotel staff who serve alcohol to undergo alcohol education/training and (2) Require all alcohol servers who are not hotel employees (i.e. servers hired by wedding parties or other groups) to be trained in responsible beverage service.

This would help ensure that responsible and knowledgeable people would providing alcohol as well as provide a mitigating factor in the event of an alcohol related incident.

⁵⁷ Some of these steps are modifications of strategies outlined by the Alcohol Epidemiology Program at the University of Minnesota - <http://www.epi.umn.edu/alcohol/policy/hotels.shtml>

5. Develop an official policy for safe alcohol consumption

As a supplement to a requirement that in-house and outside staff undergo training in alcohol beverage service, an official policy for safe alcohol consumption can assist staff in understanding clearly what can and cannot be tolerated. Such a policy can be used to address not just risks related to minors but also issues such as over-serving patrons in a hotel restaurant or bar and allowing guests to bring their own alcoholic beverages into rented rooms.

6. Provide extra staff / security for events in which alcohol will be served

All alcohol at hotel events should be monitored by a hotel employee or security guard to make sure that youth do not have access to the alcohol (e.g., ensuring that youth cannot serve themselves beer from kegs that are unsupervised).

7. Encourage and reward all staff – including housekeeping and maintenance – to participate in your safe alcohol policy

Housekeeping and maintenance staff who may not have experience or training in food or beverage service or alcohol intervention may well encounter minors or youthful appearing guests in remote areas of the hotel or in back entryways carrying alcohol or displaying signs of inebriation. Such employees ought to be motivated to report such observations, as members of the hotel team, to appropriate managerial staff, for further investigation.

8. Increase security and sensitivity seasonably as warranted

On-site managerial and security staff, as well as all other on-site hotel employees, should be sensitized to seasonal increases in alcohol consumption generally and consumption by minors specifically. For example, high school students notoriously indulge in illegal alcohol consumption during prom season in the spring; underage college students overindulge during football homecoming season in the fall; Christmas and New Years celebrations, during which adults and minors alike may overindulge in alcohol; Spring break season, especially in warmer climates, traditionally sees its share of underage consumption of alcohol.

9. Keep an eye open for indications of underage drinking (i.e. noise violations, disruptive behavior, etc)

A final recommendation is simply to maintain a heightened awareness of any indications that underage drinking may be occurring.

VIII. Conclusion

As we have discussed, the risks associated with minors coming into contact with alcohol are substantial and varied. Additionally (and consistent with alcohol beverage regulation in the United States in general), the laws regarding the regulation of alcohol in the hotel and restaurant setting vary from state to state. In determining how to protect minor patrons, adult patrons and the financial interests of the entities involved, the laws of each state (and possibly municipality, county, or city) must be examined.

Nevertheless, providing a safe environment with minimal risk is possible. The nine steps mentioned earlier provide a solid base for limiting risk by focusing on strong supervision, well-trained staff and common sense policies.

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Resting Easy When Minors are Afoot – Minors & Alcohol

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