



January 31, 2024

To: Senate Committee on Federal and State Affairs
From: R.E. “Tuck” Duncan, General Counsel
Kansas Wine & Spirits Wholesalers Association - NEUTRAL – WRITTEN ONLY
RE: SB 253 Authorizing home delivery by licensed retailers, licensed clubs and drinking establishments and restaurants and third-party delivery services.¹

Chairman Thompson and Members of the Committee,

The bill before you generates for the legislature a public policy decision. SB 253 proposes to allow the home delivery of packaged wine, beer/CMB and spirits. The KWSWA is an opponent of this bill as drafted, however; we do have several suggested amendments if you advance this policy to the full Senate.

(1) If the legislature decides to approve delivery, it should be performed only by the licensees. No third parties. Arkansas enacted the following, for example:

That law provides:

3-4-107. Delivery of alcoholic beverages.

(a) The following permit holders may deliver or cause to be delivered alcoholic beverages directly to the private residence of a consumer twenty²⁷ one (21) years of age or older in a wet county or territorial subdivision during legal operating hours:

- (1) Retail liquor;
- (2) Microbrewery-restaurant; and
- (3) Small brewery.

(b) The permit holder authorized under subsection (a) of this section shall not deliver or cause to be delivered alcoholic beverages to an area outside of the county in which the permitted business is located.

(c) Alcoholic beverages shall be delivered by an employee of the permit holder and shall not be delivered through a third-party delivery system.

(2) If the legislation going forward allows for third-party delivery then **the individuals who make the deliveries should be issues permits.** The bill provides for minimum qualification for drivers, so using those qualifications permits can be issued after the required training and it can be done efficiently on-line. Only with permits can drivers be sanctioned for bad behavior.

¹ This testimony is an update of that submitted in March 2023. It is being prepared without the benefit of any possible amendments.

See the articles attached: *One-third of liquor deliveries in Oregon don't comply with rules on delivering booze to underage or intoxicated customers. And Food delivery apps fueled alcohol sales to minors, California regulators find* [reasons only licensees should perform delivery].

(3) Kansas law currently provides that no one other than the licensee can have a beneficial interest in the sale of alcohol. No percentage of sales can be paid to unlicensed persons. It is our judgment that as a result of that provision no third party could be paid a percentage of the sales and should only be compensated by a flat fee. Typically, that fee would be paid by the consumer. **The committee should codify that no percentage fees are permitted.**

(4) There are 2047 off-premise cereal malt beverage (CMB) licensees and 942 on-premise CMB licenses according to Kansas ABC. Is it the intent of the legislature that every bait shop, tavern, and c-store in addition to grocers, big-box and other CMB licensees are to be making deliveries?

Recently I prepared a letter for the committee regarding the current legal status of delivery laws. A copy is attached. We noted therein:

It is our understanding as of November 2023 that there are currently eight different direct-to-consumer alcohol shipping cases being pursued across the United States. The outcome of these cases is important to consumers, retailers, and both domestic and foreign producers. These cases range from winery and brewer direct shipping to retailer shipping. Similar retailer shipping cases are in Arizona, Indiana, Illinois, New Jersey, Rhode Island and Washington.

As a practical matter, Kansas may want to learn from these cases whether it can allow in-state delivery and prohibit out-of-state delivery before enacting any delivery law so as to avoid any unintended effects or negative consequences.

Our primary concern is that should the policy of delivery be adopted that there is a level playing field with adequate protections for consumer privacy and ensuring that deliveries are not made to persons under the legal drinking age.

Thank you for your consideration of these matters.

One-third of liquor deliveries in the state don't comply with rules on delivering booze to underage or intoxicated customers.

Liza B. Zimmerman · Tuesday, 07-Feb-2023
by Bruno /Germany from Pixabay | Wine deliveries in Oregon are not always being carried out in accordance with the law.
<https://www.beveragelaw.com/news>

More rural, and less populous, states may have greater issues keeping alcohol out of the hands of minors. A recent report from the Portland-based Oregon Liquor and Cannabis Commission (OLCC), called Eyes on Oregon, revealed that more than a third of recent deliveries executed in the state were noncompliant.

The report notes that the OLCC has "no uniform, established procedures or authority for monitoring and enforcing various types of alcohol-sales practices during delivery to private, home settings".

The report looked at the May to September period of 2022 and determined that, during those months, "a total of 106 observations were completed by Oregon young adults in seven counties [and] 37 percent of the home-alcohol deliveries were not compliant with ID-checking requirements, including 2 percent that were delivered with no contact."

What is more, "a large percentage of non-compliance was related to use of scanners or digital photos of IDs uploaded during online ordering; these are tools intended to support age checking, but do not replace the need to check a physical ID".

"Any licensee that is not training their delivery staff to properly qualify customers is playing with fire," shares John Hinman, a partner at the San Francisco law firm of Hinman & Carmichael.

"The OLCC has been working with all parties involved to keep the discussion moving forward on how best to deliver alcohol in Oregon," shared

Bryant Haley, alcohol and bottle bill spokesperson at the agency, in a recent interview.

As a fairly new resident of the state, I have seen as much casual dropping off of wine deliveries – without checking IDs – here in the southern part of Oregon, as I did in San Francisco, Napa and New York City when I lived there. Delivery territories are undoubtedly larger in this rural chunk of a large state and doormen or neighbors who accept packages are few and far between. Oregon is a state where Portland, the largest city, has an approximate population of 650,000 residents. The entire population of the state of Oregon is approximately 4 million, which is half the size of New York City.

Smaller entities, less regulation

The biggest question that comes to mind is if control states – of which Oregon is one, along with 17 other states and part of Maryland – which can be home to smaller retailers are not able to satisfy compliance laws as well as open states that tend to have bigger chains like Total Wine & More. I can say that over close to two decades in San Francisco Total Wine carded me every time wine was delivered, so kudos to them.

In my small mountain town in the south of Oregon, few stores offer home delivery and most of the wine retailers use FedEx and UPS to consign their packages. Both agencies vary between carding me and leaving the wine in question on my doorstep.

Both delivery services declined to answer my specific questions for this story but contributed generic comments such as, "FedEx Express and FedEx Ground use ID scan functionality for any delivery that requires an adult signature in the US". UPS didn't respond in time for the story.

The Eyes on Oregon report doesn't actually mention any specific delivery services. However, an insider, who declined to be identified, thinks that Instacart and DoorDash are the most likely suspects. Both services have a more complex delivery model than just a wine shop or UPS or FedEx, as both provide groceries and prepared

foods, which are much easier – legally – for customers to order and receive, regardless of how old the customer may be.

So, this raises the question of whether delivery services in Oregon are less trained, and more casual, when they drop orders off. Neither DoorDash or Instacart would answer specific questions for this story and provided the following generic comments.

"We are deeply committed to delivering alcohol safely and responsibly and that's why we've recently rolled out industry-leading safety features, including two-step ID verification. We look forward to working with lawmakers and the OLCC to ensure small businesses can continue to utilize this service and maintain access to a critical revenue stream," said a DoorDash spokesperson. At Instacart, another spokesperson said: "We take all alcohol delivery compliance very seriously."

Some Oregonians think that the state liquor board may prioritize profits over the well-being of the state's residents. "Because the OLCC and Oregon legislature have prioritized the profits of alcohol companies over the health and well-being of Oregonians. Hence, the home delivery of a toxic, addictive, carcinogen has been treated as if it were a harmless substance," said the Portland-based Mike Marshall, the director of Oregon Recovers, a statewide coalition seeking to create treatment programs for in-state addicts.

There seems to be little evidence that control states, who benefit from profits from the sales of alcoholic beverages, suffer from more compliance issues than open states. "There is no difference between control and open states when it comes to delivery issues," confirms Hinman.

"The problem is not that we are a control state: the problem is that we don't act like a control state," concludes Marshall.

A legal take

Some drinks attorneys think the issues within the state may derive from a lack of structured rules.

"Currently there is very little formal regulation of individuals who make home deliveries of alcohol in Oregon and no formal training requirements on checking IDs to ensure the person accepting delivery is over 21," said Susan Johnson, a partner in the Seattle-based Stoel Rives LLP drinks law practice. The firm also has offices in neighboring Oregon.

She adds that sales representatives in stores often get more training than delivery personnel. "Store clerks and servers in restaurants and bars generally receive detailed training in ID checking. There is currently no requirement for alcohol-delivery drivers to receive age-verification training."

The consequences could be high for a rural state without a lot of easy-to-access wine shops.

"If high rates of noncompliance continue, either with or without an enhanced regulatory scheme, Oregon could follow the route that neighboring state Washington has and recommend that home alcohol deliveries be prohibited," shared Johnson.

The future

Legislation is clearly the solution according to a number of people I interviewed. Giving "the OLCC authority to create a regulatory framework to license the companies that provide third-party, alcohol-delivery services along with permit and training requirements for individual delivery drivers is the most likely fix," says Johnson.

She goes on to note: "There is currently draft legislation circulating that, if introduced in the current legislative session and enacted into law, would do just that along with establishing civil and criminal penalties for both third-party delivery companies and delivery drivers for home deliveries to minors or intoxicated individuals."

Marshall says that the bottom line is that "delivery individuals need to be rigorously trained and licensed and the liability for the consequences of non-compliance must rest with the company selling the alcohol, not the individual delivering it."

Food delivery apps fueled alcohol sales to minors, California regulators find

The state began investigating after The Washington Post looked into a software loophole that allowed unsanctioned alcohol deliveries on Uber Eats

SAN FRANCISCO — California regulators have found food delivery apps facilitated a surge in alcohol sales to minors after the state relaxed restrictions on to-go cocktails and premixed drinks during the [coronavirus](#) pandemic.

An April investigation by the state Department of Alcoholic Beverage Control revealed that “third-party delivery services are routinely delivering alcoholic beverages to minors,” according to an [advisory posted](#) by the regulator last week. The investigation was prompted by a [Washington Post report](#) detailing how Uber Eats had turned into a rogue cocktail bar, delivering alcoholic beverages without following the new regulations.

The relaxed restrictions permitted restaurants to deliver alcohol to go provided it was paired with a meal, came in a sealed container and was transported in a hard-to-reach space such as the vehicle’s trunk. The courier also needs to ID the recipient upon delivery and ensure they are of legal drinking age. On Uber Eats, The Post found, drinks were left on doorsteps without any interaction and came in readily accessible cups with straw holes. The beverages were also ordered independent of meals.

The arrangement was particularly problematic for drivers because they could

have potentially been held criminally liable for unknowingly delivering alcohol to minors or intoxicated individuals under state law. The restaurant would also risk losing its liquor license and restaurant employees could be charged for selling to minors.

The state ABC investigation mirrored The Post’s findings and officials said they found “significant violations of the law” by all the major delivery apps tested, though they declined to name the companies.

Jacob Appelsmith, director of the department, said in an interview that the department ordered approximately 200 alcoholic beverages over the span of several weekends and had them delivered to individuals including decoys under 21 years old. While bars and restaurants logged a 25 percent failure rate, meaning they had sold to a minor a quarter of the time during the tests, delivery apps logged a “much worse” 80 percent failure rate, he said. In 4 in 5 instances, that meant, a minor could successfully order an alcoholic drink on a delivery app.

“Most concerning is that minors are routinely able to purchase alcohol through delivery from restaurants,” the ABC said in its advisory. While restaurant employees made the offending deliveries in some instances, “a far greater rate has been evident among third-party delivery services,” the department said.

Appelsmith said he personally phoned representatives of the delivery services in an effort to inform them of the abuse of their apps. After that, he said, subsequent tests “still had a 50 percent failure rate among the delivery services which was very disappointing,” adding the numbers were “really abysmal.”

Uber, DoorDash and co-owned Caviar, as well as Postmates, did not immediately respond to requests for comment.

Uber Eats doesn't allow alcohol delivery by default on its app, but some restaurants listed cocktails anyway. Because Uber doesn't provide for that option, it doesn't provide a system to check IDs like other delivery services that do allow alcohol.

Services such as Postmates, DoorDash and Caviar have measures in place like ID scanning and delivery guidelines for safe transportation of the beverages, along with requiring signatures to be collected in some cases.

The ABC said that on some of the apps, however, the delivery guidelines were ignored.

In addition to deliveries to minors, the department said it found other violations in its tests of restaurants and apps such as businesses providing drinks without meals, placing the cocktails in cups with masking tape over the straw hole or coffee cups with stoppered sipping holes, and couriers placing beverages in their cars' passenger compartments.

State regulations don't permit the department to sanction the delivery app companies themselves, so the penalty would fall on the delivery driver and the bar or restaurant where the drinks originated, Appelsmith said.

“There’s a more fundamental problem, which is the drivers aren’t paying attention to what they’re being told to do so the companies need to figure out a way to get them pay attention,” he said.



To: Senator Mike Thompson
Chairman, Senate Federal & State Affairs Committee

January 8, 2024

RE: Retailer delivery of alcohol and beer.

From: R.E. “Tuck” Duncan, General Counsel
KS Wine & Spirits wholesalers Association

I have been asked to provide you a brief memorandum on the current legal status of the issues affecting whether or not a Kansas retailers of alcohol (retail stores) or beer (grocers, c-stores) should be authorized to deliver their products to consumers.

One of the unresolved questions is what is referred to as the “Granholm Effect.” That refers to a US Supreme Court decision that found that under the dormant Commerce Clause cases if a state law discriminates against out-of-state goods or nonresident economic actors the law can be upheld only on a showing that it is narrowly tailored to advance a legitimate local purpose.¹

Recently the 6th Circuit Federal Court of Appeals² has ruled on an appeal of the challenge to Ohio’s retailer shipping laws that the district court make a new review of the evidence. The Appeals Court reversed and remanded the district court’s decision on a challenge to the Ohio importation restrictions and the Direct Ship Restriction with instructions that:

“the district court shall consider the facts and evidence presented in this case and determine whether the challenged statutes (1) “can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground,” and whether (2) their “predominant effect” is “the protection of public health or safety,” rather than “protectionism.” Tenn. Wine, 139 S. Ct. at 2474.³

The District Court had ruled for Ohio in a Retailer Shipping Challenge finding that there were legitimate nonprotectionist grounds for the Ohio law and the predominate effect of the law was not protectionist. The challenge is to an Ohio law that allows Ohio retailers to do “take orders of wine and deliveries” in Ohio but prohibits a retailer in Illinois from doing the same.

¹ <https://supreme.justia.com/cases/federal/us/588/18-96/>

² The United States Court of Appeals for the Sixth Circuit (in case citations, 6th Cir.) is a federal court with appellate jurisdiction over the district courts in the following districts: Kentucky, Michigan, Ohio, and Tennessee. Same appeals court as Granholm and Tennessee Wine cases.

³ <https://www.alcoholawreview.com/wp-content/uploads/2022/09/Block-v-Canepa-6th-Cir-Opinion-7.17.2023.pdf> This is the cases that required Kansas to eliminate the restriction that prohibited non-residents from holding a retail liquor store license.

The Appeals Court court noted that:

The Commerce Clause’s restriction against State protectionism is sometimes at odds with § 2 of the Twenty-first Amendment, which “delegates to each State the choice whether to permit sales of alcohol within its borders and, if so, on what terms and in what way.” *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 869 (6th Cir. 2020). Thus, although the Supreme Court “has acknowledged that § 2 grants States latitude with respect to the regulation of alcohol, . . . [it] has repeatedly declined to read § 2 as allowing the States to violate the ‘nondiscrimination principle’” of the dormant Commerce Clause. *Tenn. Wine*, 139 S. Ct. at 2470. To that end, the Supreme Court and this Court “have frequently said that the Twenty-first Amendment permits a three-tier system of alcohol distribution, and the Commerce Clause does not impliedly prohibit it.” *Lebamoff*, 956 F.3d at 869; see *Granholtm v. Heald*, 544 U.S. 460, 489 (2005) (calling the three-tier system “unquestionably legitimate”). At the same time, however, the Supreme Court has also emphasized that “the Twenty-first Amendment does not immunize all [alcohol] laws from Commerce Clause challenge.” *Tenn. Wine*, 139 S. Ct. at 2470 (quoting *Heald*, 544 U.S. at 488)

As such since the District Court had made its decision based on what is called “summary judgment” (no trial) the Appeals Court ruled that the District Court:

On remand, the district court shall consider the facts and evidence presented in this case and determine whether the challenged statutes (1) “can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground,” and whether (2) their “predominant effect” is “the protection of public health or safety,” rather than “protectionism.” *Tenn. Wine*, 139 S. Ct. at 2474.

The impact ultimately could be (1) district court rules Ohio law constitutional and the state can allow in-state deliveries while restricting out-of-state deliveries and Appeals Court affirms or (2) district court rules Ohio law unconstitutional and the state if it allows in-state deliveries cannot restrict out-of-state deliveries and Appeals Court affirms. Either way the case could also go to the US Supreme Court.

It is our understanding as of November 2023 that there are currently eight different direct-to-consumer alcohol shipping cases being pursued across the United States. The outcome of these cases is important to consumers, retailers, and both domestic and foreign producers. These cases range from winery and brewer direct shipping to retailer shipping. Similar retailer shipping cases are in Arizona, Indiana, Illinois, New Jersey, Rhode Island and Washington.

As a practical matter, Kansas may want to learn from these cases whether it can allow in-state delivery and prohibit out-of-state delivery before enacting any delivery law so as to avoid any unintended effects or negative consequences.

Thank you for your attention to and consideration of this matter.