



November 4, 2019

By Certified Mail and email

Responsible Beverage Service Training Program
Department of Alcoholic Beverage Control
3927 Lennane Drive, Suite 100
Sacramento, CA 95834

Re: Comments of Hinman & Carmichael LLP to October 18, 2019 RBS
Notice

We, and our client base of licensees, are extremely concerned with the Department's proposed RBS regulations. We submitted detailed Comments, participated in a workshop, attended the October 11, 2019 Public Hearing and have offered to work with the Department to develop more reasonable regulations. We do support the goals of the Responsible Beverage Service Training Act of 2017 ("the Act") and the significant efforts of the Department of Alcoholic Beverage Control ("Department" or "ABC") to adopt regulations to implement the Act.

We have expressed important concerns with the regulations as proposed by the Department, and many others have expressed similar concerns. Unfortunately, the Department has rejected these concerns and the alternative proposals from us and from others. Our comments are not intended to be just criticism; they are submitted in good faith to assist in the development of a fairer and less costly program.

As we all well know, the Act will affect millions of Californians employed in the hundreds of thousands of alcoholic beverage licensed hospitality businesses in every part of the state. The implementing regulations are some of the most significant the Department has ever proposed. The Department's proposals as revised in the October 18, 2019 Notice continue to reach far beyond the dictates of the statute requiring the development of regulations and create an unreasonable burden on the alcoholic beverage servers who must take the mandated course and pass a final exam through the Department.

Further, and just as important, is that the Department is steadfast in creating a massive new data system that will be costly to each business in the state, will create massive confusion and will jeopardize employee private information.

We incorporate by reference our Comments filed in this proceeding on September 20, 2019 and October 10, 2019.

Summary of Serious Questions

- The proposed regulations continue to contain a detailed course curriculum requiring servers to learn meticulous scientific details regarding the consumption of alcohol that reach far beyond the scope and intent of the Act.
- Both the State Administrative Manual (“SAM”) and relevant case law place limits on the Department regarding the scope of the regulations it may adopt to implement a statute. Although this has been pointed out in earlier Comments, the Department continues to move ahead ignoring these mandates to adopt only reasonably necessary regulations.
- In adopting these Proposed Regulations, the SAM limits the Department’s authority to “reasonable compliance” which the SAM explains is the “prudent person test”.¹ The proposed regulations fail the “prudent person test” in several sections.
- The Department has failed to provide sufficient facts and evidence to support the cost and need for many of the proposed regulations, particularly the high costs all businesses will incur to pay for the extensive new bureaucratic entity the Department proposes to create.
- The Department apparently believes adding a single disclaimer sentence to the proposed regulations will alleviate the serious concern that the regulations will, in practice, create new obligations on businesses under the law by creating new standards.

I. THE ABC SHOULD REVISE THE PROPOSED REGULATIONS TO ADOPT A MORE REASONABLE COST TO BUSINESSES.

Procedures and rules governing the Department’s adoption of the proposed regulations are set by the California Administrative Procedure Act, California Government Code sections 11342.2 and 11346.3(c)(1), and related case law.

The California Supreme Court explained the obligations under Government Code section 11346.3:

“Furthermore, “[t]he proposed adoption, amendment, or repeal of a regulation shall be based on adequate information **concerning the need for, and consequences of,** proposed governmental action.” (*Id.*, § 11346.3, subd. (a)(1).) ... “[T]he agency must provide in the record any ‘facts, evidence, documents, testimony, or other

¹ SAM § 6200 explains the “prudent person test”: “For example, if an agency is required by regulation to provide transportation for certain persons, it clearly would not be appropriate to purchase limousine-type luxury automobiles to do so. On the other hand, it would not be appropriate to provide the service by purchasing tandem bicycles. Reasonable compliance can be achieved with some mode of transportation between the two extremes cited.”

evidence" upon which it relies for its initial determination. (Gov.Code, §§ 11346.5, subd. (a)(8), 11347.3, subd. (b)(4)). ... These provisions plainly call for an evaluation based on facts." (*Maxwell-Jolly*, at p. 306, 131 Cal.Rptr.3d 692". *Western States Petroleum Assn. v. Board of Equalization*, 57 Cal.4th 401, 427-428 (2013) (emphasis added).

We have seen no facts or evidence that the Department has carefully considered the Comments asking what facts the Department relies on for the need for creating such a new extensive data base and bureaucracy and the consequences of such actions as required.

A primary concern is the estimated cost for each California business serving alcoholic beverages whether in a bar, restaurant, hotel or even a tasting room because of creating this new bureaucracy. The Department's estimate for small businesses is \$2,121.40 for the first year and \$1,060.70 for ongoing annual costs (years 2022-2024). Similarly, for a "typical business" the initial cost the first year is \$10,607 and annual ongoing costs \$5,303.50 (years 2022-2024). The Department merely states the costs result from the legislature's mandate. We maintain that the Department has vastly underestimated the costs from this program on the human resources departments of the affected licensees.

We continue to contend that the less costly alternative of having the training provider provide both the course material and the test and keep each record of certification securely in its records is a much fairer and cost effective alternative and the proposed regulations should be revised. We do not believe the Legislature, in adopting this statute, envisioned nor intended to have the Department create a new bureaucracy. The Legislature did not intend such a significant economic impact on all businesses. The cost of creating this new bureaucracy will inevitably put small hospitality businesses out of business!

II. THE PROPOSED REGULATIONS MUST BE CONSISTENT WITH THE PURPOSE OF THE ACT

In earlier Comments, the purpose of the Act was described in the Analysis of the Assembly Government Organization Committee dated April 19, 2017:

"The Purpose: The author states this bill "seeks to help individuals who serve alcohol to meet their statutory requirement to not serve obviously intoxicated patrons and minors by requiring participation in a mandatory RBS training course... The author contends this bill "will ensure that all servers learn the necessary skills to protect the patron, public, server and business. We know drunk driving ruins lives and kills too many innocent people. That is why we need to make sure those on the front line are equipped to help."

The key focus of the Act is to develop regulations to train servers to prevent sales to minors and to observe intoxication to prevent sales to intoxicated persons to prevent drunk driving.

We continue to be concerned that many proposed regulations specify a level of curriculum

detail that far exceeds the scope and intent of the Act and could seriously disrupt the entire hospitality industry serving alcoholic beverages. The proposed curriculum is much more detailed and difficult than is necessary to train a server regarding detecting intoxication and will result in passing the exam being more difficult than necessary.

Adding the responsibility to observe medication or drug use in conjunction with serving alcohol goes beyond the scope of the statute, creates a new standard of conduct and a new form of liability. Notwithstanding the Department's proposed solution to not creating new standards or liabilities by inserting a one sentence disclaimer in Section 161², the reality is that should a server fail to observe a customer might have taken medicine or drugs and then was served alcohol by the business, the most likely outcome will be that it could or would be argued that the server/business was liable for not observing this and serving that customer.

Further, the Department fails to recognize that not every server is academically prepared to learn such scientific detail as is now included in the curriculum. The Department's suggestion that allowing an open book exam will alleviate this issue does not resolve it. Clearly some students will not do well on a difficult exam even if allowed to take an open book exam. If the Department insists on keeping detailed scientific data in the curriculum, the Department should, at a minimum, develop the exam so it is only focused on the general facts necessary to observe intoxication as is done in most reasonable beverage server training courses.

We submit the Department's proposed regulations and curriculum go far beyond the straightforward mandate of the Legislature to train servers to avoid serving alcohol to intoxicated customers and/or minors to reduce drunk driving.

III. THE DEPARTMENT HAS NOT RESOLVED THE ISSUES RELATING TO SECURITY OF EMPLOYEE PRIVATE INFORMATION RELATED TO THE DEPARTMENT'S INSISTANCE ON CREATING A NEW DATA BASE TO KEEP ALL EMPLOYEE INFORMATION.

As noted in earlier Comments, servers have a basic right to privacy under the California Constitution. Scores of court cases uphold the right to privacy and the right of employees to an expectation of privacy regarding their personal information. The Department estimates approximately 1 million employees will need to be certified as passing the Beverage Server's Training Program. We contend that the number will be far higher (perhaps by a factor of ten) based on the number of licensed hospitality business in the state. As we pointed out earlier, if the Department continues with its plan to create the huge new database to keep all employee information for this certification, there is a definite risk in maintaining the privacy of the employees' personal information.

² Proposed revision to Section 161: "(d) None of the curriculum topics described in California Code of Regulations Title 4 §§162 -166 shall be interpreted as imposing new or changing existing requirements on licensees, but instead only define course content requirements for RBS training courses."

Under the initially Proposed Regulations, to apply to take the server's exam, the individual would have to provide the Department with his/her (1) legal name, (2) birthdate, (3) email, (4) zip code of current address, and (5) personal identification information (driver's license, social security number, or similar employment identification number).

The Department's attempt to resolve this issue is to revise number (5) above to limit providing the identification number by only using the last four digits or characters of the number. Even if that could be considered sufficient protection (which we do not believe it does), each server must still submit their legal name, birthdate, and email address.

As we noted in earlier Comments, the constitutional question in determining when a request for an individual's private data is acceptable or invades that person's right to privacy is if there is a compelling state need compared to the public interest in maintaining an individual's right to privacy.³

There simply is no compelling public interest requiring the Department to create this massive database. Business & Professions Code section 25681 only requires each certified Training Provider to maintain a record of each server certification it issues. Section 25681 does not authorize the Department to develop an extensive internet site to maintain certification data on every server that has passed a certified training program anywhere in the state. This idea was developed by the ABC *sua sponte*. And, as noted above, the ABC intends to keep a large amount of personal identification information for each server on its new internet site.

Notwithstanding the arguments presented not only by us, but by many others, against developing this new massive database because of both employee privacy concerns and the costs to businesses, the Department is steadfastly wed to creating this database. This is a significant error and is dangerous to the personal rights of millions of California citizens.

V. CONCLUSION

The most unfortunate part about this whole rulemaking, is that the majority of the millions who will be affected by it are not even aware of the Department's proposed regulations. The Department went to great lengths to list the workshops it held throughout the state beginning in September 2018.

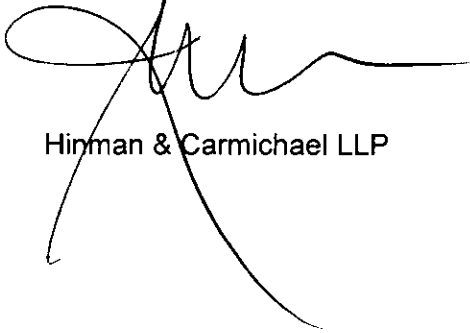
Unfortunately, the only notices that went out for the workshops were through the ABC's website and emails to persons who signed up for email alerts. This group represents a small minority of employees and businesses who will be affected. Even industry associations were not fully aware of this proceeding until late; and many still are not aware. As search of both Google and Bing revealed there was NOT ONE newspaper article or notice regarding the proposed regulations. This is supported by the fact that only a handful of people/ associations have filed Comments or attended a workshop or the October 11th

³ See, e.g., the discussion of compelling interest versus privacy rights in *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 5 and 22 (1994)

Public Hearing.

The ABC has worked hard on developing these regulations and we support beverage server training, however, the rules/regulations as drafted improperly enlarge the Department's statutory mandate, create an unnecessary and costly new bureaucracy, impose significant costs on businesses and create a curriculum and exam that will jeopardize many good hardworking employees' employment. The Department will not have fulfilled the statutory mandate to create a reasonable program unless the proposed regulations are meaningfully revised before final adoption.

Sincerely,

A handwritten signature in black ink, appearing to be a stylized 'J' or 'H' followed by a long horizontal line and a downward stroke.

Hinman & Carmichael LLP