



VIA EMAIL AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED

May 18, 2020

OAL Reference Attorney and
300 Capitol Mall, Suite 250
Sacramento, CA 95814

Department of Alcoholic Beverage Control
3927 Lennane Drive, Suite 100
Sacramento, CA 95834

E-mail: staff@oal.ca.gov

E-mail: RPU@abc.ca.gov

RE: Comments on the Department of Alcoholic Beverage Control's Proposed Emergency Regulation Procedures for Administrative Actions Against Alcohol Licenses

Introduction – The “Emergency Regulations” Are Not Limited to Emergencies, are Not Necessary and Violate the APA and the California Constitution

This letter comments upon the Department of Alcoholic Beverage Control's (the “ABC”) May 11, 2020 “notice of proposed emergency rulemaking changes in the alcohol industry due to the COVID-19 pandemic and state of emergency” and the rulemaking changes announced by the ABC as effective five working days from May 11, 2020. Today is the 5th working day from the Monday May 11, 2020 release of the rulemaking changes.

The changes deny Due Process to licensees, eliminate long established protections for licensees outlined in relevant and binding statutes and regulations, including the Administrative Procedures Act (“APA”) and are not necessary for the purpose stated.

The rule changes confer broad new powers on the ABC not limited to time periods when Shelter-In-Place and similar emergency orders are in effect and not limited to emergency situations. There is no justification for the invocation of “emergency” powers during non-emergency conditions, and there is no justification for overriding the statutory and administrative due process protections provided to licensees by the California Constitution, the Government Code and the Administrative Procedure Act solely for the convenience of the ABC.

Sufficient police powers already exist to address any licensee, or any other person, willfully violating any legitimate order of a government authority.

There are No Facts or Evidence Cited by the ABC in its Notice - Much Less the “Specific Facts and Substantial Evidence” Required by Government Code Section 11460.20

The ABC has not presented facts or evidence sufficient to show an emergency exists related to ABC enforcement, nor has it demonstrated a need for the immediate adoption of the proposed

regulations. The authority cited by the ABC to justify this action, Government Code section 11460.20, does not permit the adoption of these emergency regulations unless the ABC provides ***specific facts and substantial evidence*** of the necessity of the emergency regulation. The examples in subsection (b) of the proposed regulation describe nothing more than enforcement situations already commonly (and normally) addressed by the ABC in its regular day to day enforcement work across the state.

ABC enforcement agents already cooperate with local police when necessary and respond when requested to enforcement situations. There is no evidence of any new developments or other justifications for stripping licensees of the opportunity to defend themselves against ABC enforcement actions.

Subsection (b) Disciplinary Action and Offenses – Why Due Process Matters

ABC disciplinary actions have serious financial impacts on licensees and their employees; penalties can include fines, license suspensions, license revocations and criminal liability. The very right of a licensed winery, brewery, distillery, restaurant, hotel, entertainment venue, sports stadium or other licensed business to survive is at stake. If their basic right to sell alcoholic beverages is subject to being revoked at the whim of an angry neighbor, overzealous local police department or competitor filing a false or misleading claim on any of the unlimited grounds listed in the proposed emergency regulations.

Can there be a broader grant of unlimited “emergency” authority than (9) of the proposed emergency regulations?

(9) Any other conduct that has a similar impact on to the public health, safety, and welfare as the foregoing list.

That list, items (1) through (8) on the notice of proposed emergency regulations are similarly flawed, unnecessary and are not emergencies.

Consider the nature of each listed offense that would be punishable almost instantly under the emergency regulation (rather than having to be proved as an offense in a hearing where there is pre-hearing discovery, witnesses are subject to cross-examination, and the Judge’s ruling is subject to correction on appeal), how it can be abused and the standard of proof typically required to state a violation:

(b) If occurring on a licensed premises, any adjoining property rented or leased by a licensee, or reasonably connected to the operation of a licensed business, the department has determined the following circumstances constitute an immediate threat to the public health, safety, or welfare that requires immediate administrative action through an emergency decision:

Comment: what does “reasonably connected to the operation of a licensed business” mean? relationships with vendors? actions of employees? actions of service providers? There is no limit on the authority granted here to charge a licensee for responsibility of the actions of others.

(1) The licensee, or an employee or agent of the licensee, sells, or negotiates the sale of controlled substances or dangerous drugs;

Comment: cannabis is a controlled substance. Does this mean a licensee can be shut down if someone employed by a licensee sells, or is involved in the sale of, cannabis off the licensed premises? The ABC regularly charges licensees with a violation for permitting cannabis use on licensed premises but this extends the offense to personal use and sale off the premises.

(2) The licensee, or an employee or agent of the licensee, permits the sale or negotiation for the sale of controlled substances, or dangerous drugs;

Comment: This is even broader than the offense in item (1). This means (under ABC decisional law) that the sale (or offer of sale, that’s what “negotiation” means) happened whether the licensee knew about the sale or negotiation, or not. Not taking adequate steps to prevent a violation is “permission” as far as the ABC is concerned. And, as in (1), this is not limited to activities on the licensed premises.

(3) The licensee, or an employee or agent of the licensee, permits conditions to exist that create an immediate risk of violence against an employee, visitor, guest, or customer of the licensed premises;

Comment: This is classic “disorderly house” conduct. Loud music, unruly patrons making noise when leaving, excessive calls for police services and the like. This authorizes immediately closing premises where the local police (or neighbors) do not like the crowd attracted to the location. Typically, excessive police call cases turn out to be clashes between venue owners and neighbors objecting to the entertainment being offered and the patrons attracted to that entertainment. However, accusations have also been used against activities such as unruly wedding parties and tour bus visitors to wineries, breweries, or distilleries. The typical result of such actions are conditions on exercising license privileges limiting hours or operation, type of entertainment and number of permitted patrons. The nature and characteristics of these offenses are subject to much dispute between the complaining parties and the licensees that can be sorted out in the administrative hearing process. These are not emergencies that justify license suspension without full hearing and appeal rights.

(4) The licensee, or an employee or agent of the licensee, engages in or permits activities that directly relate to human trafficking;

Comment: There are few reported human trafficking cases at the ABC level; although if this refers to prostitution cases those need to be proved as criminal cases before being subject to liability as an ABC matter, and that is not an emergency,

(5) The licensee is convicted of, or pleads guilty to, a crime that reasonably shows the licensee is a danger or immediate threat to employees, visitors, guests, or customers of the licensed premises;

Comment: Conviction of a crime is grounds for suspension or revocation of an ABC license and, typically, all that is required to prove the violation is a copy of the conviction. We presume that the reference to "danger or immediate threat" might mean conviction for a criminal offense involving assault or battery. If that occurs the ABC licensee may defend him or herself at the hearing, or to arrange for the license to be transferred. In no cases could a plea of guilty to such an offense be considered an emergency.

(6) The licensee, or an employee or agent of the licensee, bribes, or attempts to bribe, a department employee or other public official;

Comment: Bribery of a public official is a serious offense but what bribery is, and how it occurs, is the subject of an entire body of criminal jurisprudence. Is offering a drink to a police officer, or the local Mayor bribery? How about a campaign contribution? The contribution might be a crime depending on the pre-existing relationship, the nature of what was offered, and the manner offered. This is not an emergency that justifies suspending due process rights.

(7) While a license is under suspension, or while an accusation for a violation is pending against a license, a violation of the ABC Act occurring based on conduct like that which is the basis of the suspension, or pending accusation, and is likely to continue or reoccur; and

Comment: This refers to successive violations for similar conduct; for example, successive sales to minor results in increasing discipline up to an including revocation for a third offense in 36 months. This typically results in sequential discipline but never is an emergency justifying abrogation of due process rights. This may also be conduct related to promotional activity that the ABC has determined is unlawful or the continuance of tied house violations that the licensee believes is permitted and the ABC does not. Having a license suspended while such policies and alleged offenses are being challenged is a complete deprivation of due process.

(8) The licensee or an employee or agent of the licensee acts in a manner in conflict with limits established by an order of a federal, state, or local official during a state of emergency to protect the public health, safety, and welfare.

Comment: This is a policy that should be enforced by the local police and state officials charged with responsibility for enforcing COVID 19 orders. The nature and scope of the orders are subject to much controversy throughout the state and the ABC is singularly unequipped to make such a determination.

(9) Any other conduct that has a similar impact on to the public health, safety, and welfare as the foregoing list.

Comment: Can there be a broader grant of unlimited authority to take whatever action that the ABC wants, without due process, than this?

Punish First – Ask Questions Later, and Ditch the ABC Appeals Board

The rulemaking changes do not protect licensees against charges brought improvidently or wrongfully. Rather, the approach of the Emergency regulations is “punish first” then allow a defense later.

The ABC also obviates the historic, and constitutional oversight role of the ABC Appeals Board, which exists because of excesses of ABC enforcement before the adoption of Article 20, Section 22 of the California Constitution. If the ABC wants to repeal Article 20, Section 22, do it through the legislature and a vote of the people, not through a backdoor “emergency regulation” declaring that every ABC enforcement action is an “emergency.” The history of the corruption in the enforcement of the alcohol laws that led to the adoption of Article 20, Section 22, of the California Constitution can be found in official website for the Board of Equalization (the predecessor to the ABC).

https://www.boe.ca.gov/info/pub216/1954_amendment.html

The “emergency regulations” are an open invitation to favoritism and corruption in the enforcement of the ABC Act.

THE ABC'S PROPOSED EMERGENCY REGULATION OVERRIDES LONG ESTABLISHED DUE PROCESS PROCEDURES FOR LICENSEES

There is no question the ABC has authority to enforce ABC law and regulations. Yet statutes and caselaw also provide for a “fair trial” and due process for licenses and their employees, including the right to notice and the opportunity to be heard at an open hearing, as well as the right to cross-examine witnesses. (*See e.g.*, Cal. Civ. Proc. Code § 1094.5; Cal. Government Code §§ 11435.05, 11425.10, 11425.30, 11425.40, 11425.50, 11425.60.)

The proposed Emergency Regulation would bypass these due process safeguards.

Under current statutory law, licensees generally are allowed a reasonable time to correct objectionable conditions before the issuance of an accusation requiring a hearing.¹ The proposed Emergency Regulation would eliminate this “correction period” before requiring an immediate hearing to suspend or revoke a license.

Subsections (c) through (o) eliminate all the important due process safeguard procedures in the statutes. The only reason for this is to expedite the proceedings because of some undefined “emergency” rather than requiring filing an accusation, allowing the licensee time to fully respond, holding a noticed hearing, and allowing an appeal to the ABC Appeals Board if appropriate.

Subsections (d) and (e) state:

¹ Business & Professions Code section 24200.

(d) The department in its exclusive discretion shall consider scheduling all Hearings on Emergency Action at a time, including evening hours, and at a place convenient to all parties to the proceeding, including those witnesses required to be present, and the public affected. The hearing may be conducted as an informal hearing using electronic communication by the parties.

(e) If practicable, the department shall give the licensee notice of the Hearing on Emergency Action, whether oral or written, including by telephone, facsimile transmission, or other electronic means. In giving notice, if the department uses a mailing address, phone or facsimile number, or email address which the licensee has placed on file with the department, notice is presumed to be effective.
(Emphasis added).

These sections effectively deny licensees the right to confront witnesses, conduct live cross-examination and (the "*if practicable*" language) even be present at a hearing where their right to continue in business is being adjudicated. These sections are unconscionable violations of Due Process.

Subsection (j) of the proposed Emergency Regulation strips licensees of the right to appeal to the ABC Appeals Board and directs instead that the only appeal may be made to the California Superior Court; which never hears ABC cases and is singularly unprepared to do so.

(j) Any emergency decision issued by the department under this section may only be reviewed by the superior court of the county where the licensed premises is located.

The California Constitution created the ABC Appeals Board to facilitate appeals of ABC decisions affecting licensed businesses:

When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the [Appeals] board shall review the decision subject to such limitations as may be imposed by the Legislature. CA Constitution, Article 20, section 22.

Both the unreasonable shortening of time and the proposed elimination of the right to appeal a decision to the ABC Appeals Board place unacceptable financial and time burdens on licensees and substantially impinge on licensee's due process rights.

The intent is clear – the ABC does not appreciate licensees defending themselves and wants to make it difficult to do so.

THE ABC MUST DEMONSTRATE THE EXISTENCE OF AN EMERGENCY TO JUSTIFY AMENDING EXISTING DUE PROCESS STATUTES

Government Code 11342.545 defines an "emergency" as a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. Under this section, to justify adoption of an emergency regulation, the ABC must present specific facts supported by substantial evidence demonstrating the existence of an emergency and the need for immediate adoption of the proposed regulation.

Government Code section 11346.1(b)(2) further states:

In addition, if the emergency existed and was known by the agency in sufficient time to have been addressed through nonemergency regulations, the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations. **A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, is not adequate to demonstrate the existence of an emergency** (*emphasis added*).²

In addition, the ABC must identify each study or report upon which it relies to justify this radical amendment to the due process safeguards for licensees. For a finding of the existence of an emergency to justify amending the statutes, 1 CCR 50(a)(5)(B)(2) requires:

(B) A statement by the submitting agency confirming that the emergency situation addressed by the regulations clearly poses such an immediate, serious harm that delaying action to allow notice and public comment would be inconsistent with the public interest. The statement shall include: ...

2. Specific facts demonstrating by substantial evidence that the immediate adoption of the proposed regulation by the rulemaking agency can be reasonably expected to prevent or significantly alleviate that serious harm. (Emphasis added)

Any emergency regulations may be found invalid if:

(b)(1)The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

Government Code section 11350(b)(1) (*emphasis added*). Here, the ABC has failed to provide sufficient evidence (indeed, any evidence) to support its finding that the proposed Emergency Regulation is reasonably necessary. It also has not shown why the enforcement procedures as

² See also, *California Medical Association v. Brian* (1973) 30 Cal.App.3d 637, 657 (fiscal constraints on the DHCS Agency was not sufficient to create an emergency.)

outlined in the current statutes are not sufficient to maintain enforcement and why repealing the statutory due process safeguards is necessary.

THE ABC HAS NOT ESTABLISHED THE NEED FOR RULEMAKING CHANGES

The ABC has provided no description of the emergency requiring the proposed amendments to the due process safeguards currently in the statutes. The **only** justification the ABC provides to support these proposed radical amendments to the statutes is found in subsection (a) of the Proposed Emergency Resolution:

(a) The department may issue an emergency decision temporarily suspending a license, temporarily suspending specific licensed privileges, or temporarily imposing conditions on a license in situations involving an immediate threat to the public health, safety, or welfare that requires immediate action, pursuant to the provisions of Article 13 of Chapter 4.5 of the Government Code (commencing with section 11460.10).

One can only assume that the ABC is attempting to use the Governor's COVID-19 emergency declaration as the basis for justifying these proposed amendments. However, even if so, the ABC must still: (1) present specific facts explaining why this COVID-19 emergency would justify amending due process safeguards; and (2) because the emergency has existed for many weeks now, explain the department's failure to address the situation through nonemergency regulations. (Government Code section 11346.1(b)(2).)

The ABC has not provided the required written statement with specific facts to support its proposed radical amendments to the due process safeguards in the statutes. No specific facts or circumstances are provided because none exist.

CONCLUSION

The Proposed Emergency Regulations should not, and may not, be adopted. Should the ABC persist in attempting to obviate licensee rights to due process under the guise of addressing COVID-19 concerns just as the Governor is implementing opening protocols in various counties of the state the result will be chaos in the courts, an enormous drain on ABC and licensee resources and a plethora of lawsuits.

This is not the time to do away with administrative due process in the name of expediency; especially when the effort is doomed to fail and will only result in the alienation of the licensing community from the ABC.

We finally observe that Section 23001 of the ABC Act states:

*It is hereby declared that the subject matter of this division involves in the highest degree the **economic, social, and moral well-being and the safety of the State and of all its people.** All provisions of this division shall be liberally construed for the accomplishment of these purposes.*

Licensees are people and their economic well-being is one of the core responsibilities of the ABC. The right to due process is a core “economic, social, and moral” value that supports the economic, social, and moral well-being of the licensees of this state.

Respectfully submitted,

Hinman & Carmichael LLP

By: 

John A. Hinman