STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL April 6, 2018	No. I18-008 (R17-016) Re: The sale and delivery of alcohol by unlicensed businesses using mobile device applications

To: John Cocca, Director
Arizona Department of Liquor Licenses and Control

Questions Presented

(1) Does an unlicensed mobile device application "sell" spirituous liquor, as that term is defined in Ariz. Rev. Stat. ("A.R.S.") § 4-101(32), in violation of the service hour restrictions in A.R.S. § 4-244(15), when a consumer can visit the application twenty-four hours a day and order alcohol and delivery services, but the consumer's account is not debited and the alcohol is not delivered until lawful service hours?

(2) Assuming that in one transaction, different persons order, pay for, and receive delivery of the alcohol, does a licensee "sell" alcohol, as that term is defined in A.R.S. § 4-101(32), to all three individuals?

(3) Does a business operating a mobile device application have "reason to question" whether someone is under legal drinking age pursuant to A.R.S. § 4-241(A), given that the business cannot see the individual?

(4) Is a delivery service that is an independent contractor of the unlicensed entity that runs a mobile device application treated as an employee of the licensed retailer pursuant to A.R.S. § 4-203(J), even if the delivery service has no contract directly with the licensed retailer?

(5) Is it of any legal import whether a consumer pays the retailer directly or through the unlicensed entity that runs a mobile device application, if the retailer receives one hundred percent of the price of the alcohol?

Summary Answer

(1) To the extent that a mobile device application qualifies as an "on-sale retailer" or an "off-sale retailer," it violates A.R.S. § 4-244(15) when it "sells" spirituous liquor between 2:00 a.m. and 6:00 a.m. by receiving an order during this time, even if it does not debit the consumer account or deliver alcohol during those hours.

(2) Yes. If, in a single alcohol purchase transaction, a business receives an order from, receives payment from, and delivers to different people, the business "sells" alcohol to each of them.

(3) Whether a business has "reason to question" if someone is under legal drinking age pursuant to A.R.S. § 4-241(A) is a factual question that the Attorney General is unable to resolve as a matter of law on the current record.

(4) No. A delivery service which is an independent contractor of an unlicensed entity, but which has no contractual relationship with a licensed retailer, is not treated as an employee of a licensed retailer with off-sale privileges under A.R.S. § 4-203(J).

(5) Yes. It is legally significant whether a consumer pays a retailer directly or pays an unlicensed entity for spirituous liquor—even if the retailer ultimately receives one hundred percent of the sell price.

Background

As described in the request for this opinion,[1] certain businesses, without a liquor license, operate websites or mobile device applications through which a consumer can purchase alcohol ("Unlicensed Entities"). Licensed retailers then supply the alcohol available for purchase through the Unlicensed Entities. In some instances, the Unlicensed Entity itself provides the delivery service from the licensed retailer's establishment to the consumer's home. In other instances, the Unlicensed Entity contracts with a third-party service to deliver the alcohol ordered.

The method of purchase also varies. Sometimes a consumer's payment for the alcohol purchase goes directly to the licensed retailer and the Unlicensed Entity charges and collects a separate delivery charge. Other times the consumer pays both the cost of the alcohol and the delivery charge to the Unlicensed Entity. The Unlicensed Entity then remits one hundred percent of the price of the alcohol to the licensed retailer.

None of the Unlicensed Entities at issue store alcohol for retailers or keep it in their possession longer than necessary for delivery. The Unlicensed Entities also deliver alcohol only between the lawful service hours of 6:00 a.m. to 2:00 a.m. The Unlicensed Entity may, however, remain live and accept orders twenty-four hours a day. Some Unlicensed Entities debit consumer accounts when they receive the order, regardless of the time of day. Other Unlicensed Entities collect payment information at the time of the order, but only debit consumer accounts during lawful service hours.

[1] The facts described herein are derived from the opinion request.

Analysis

Principles of statutory interpretation guide the analysis into spirituous liquor licensing requirements. The first place to look is the language of the statute itself. *Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003). The plain language of a statute must be applied "without resorting to other methods of statutory interpretation, unless application of the plain meaning would lead to impossible or absurd results." *Id.* (quotes and citation omitted).

Arizona Revised Statute § 4-244(1) makes it unlawful for a person to "sell or deal in" spirituous liquors without a license. The term "sell" is defined to "include[] soliciting or receiving an order for, keeping or exposing for sale, directly or indirectly delivering for value, peddling, keeping with intent to sell and trafficking in." A.R.S. § 4-101(32).

Generally, Arizona law permits licensees to "sell or deal in spirituous liquors only at the place and in the manner provided in the license." A.R.S. § 4-203(B). But, if a retail licensee has "off-sale privileges," then the licensee can "deliver spirituous liquor off of the licensed premises in connection with the sale of spirituous liquor." A.R.S. § 4-203(J). A licensee with off-sale privileges can deliver the spirituous liquor itself or it can contract with an independent contractor to make the delivery. *Id.* If the licensee contracts with a third-party to make deliveries, the independent contractor (including its employees) "is deemed to be an employee of the licensee when making a sale or delivery of spirituous liquor for the licensee." *Id.* Regardless of whether a licensee maintains its own delivery service or contracts with an independent contractor, the licensee is "liable for any violation committed in connection with any sale or delivery of spirituous liquor." *Id.*

Licensees must comply with numerous regulations and may face discipline for noncompliance. For example, A.R.S. § 4-244(15) makes it unlawful for a retailer or its

employees to "sell, dispose of, deliver, or give spirituous liquor" between 2:00 a.m. and 6:00 a.m. As another example, A.R.S. § 4-241(A) requires a licensee to follow certain procedures when it "has reason to question" that a person ordering, purchasing, or attempting to purchase spirituous liquor is under the legal drinking age.

I. Question #1: Does an Unlicensed Entity "sell" spirituous liquor, as that term is defined in A.R.S. § 4-101(32), in violation of the service hour restrictions in A.R.S. § 4-244(15), when a consumer can visit the entity's website or application twenty-four hours a day and order alcohol and delivery services, but the consumer's account is not debited and the alcohol is not delivered until lawful service hours?

Arizona Revised Statute § 4-244(15) makes it unlawful "[f]or an on-sale or off-sale retailer or an employee of such retailer to sell, dispose of, deliver or give spirituous liquor to a person between the hours of 2:00 a.m. and 6:00 a.m." The critical issue presented by this question is whether a business "sells" alcohol by "receiving an order." A.R.S. § 4-101(32) expressly answers this question.

Under A.R.S. § 4-101(32), the definition of "sell" not only includes "directly or indirectly delivering for value," it also expressly includes "soliciting or receiving an order." Nothing in the phrase "soliciting or receiving an order" requires that the licensee simultaneously debit a consumer's account to fall within the broad definition of "sell" in A.R.S. § 4-101(32). Thus, a business (whether licensed or unlicensed) "sells" spirituous liquor as defined under A.R.S. § 4-101(32) when it receives an order for spirituous liquor—even if the business does not debit a consumer's account or deliver the alcohol at that time. As such, assuming that the Unlicensed Entity qualifies as an "on-sale retailer" or an "off-sale retailer," *see* A.R.S. § 4-101(24)–(25), it violates A.R.S. § 4-244(15) by receiving orders for spirituous liquor between 2:00 a.m. and 6:00 a.m. In any event, whether or not A.R.S. § 4-244(15) applies, A.R.S. § 4-244(1) makes it illegal

at any time, for any person, to sell alcohol without a license, except as permitted under A.R.S. § 4-203(J).

II. Question #2: Assuming that in one transaction, different persons order, pay for, and receive delivery of the alcohol, does a licensee "sell" alcohol, as that term is defined in A.R.S. § 4-101(32), to all three individuals?

A business "sells" alcohol when its conduct falls within the definition of A.R.S. § 4-101(32). This definition "includes" a broad range of activities rather than a single culminating transactional event. As such, a business may "sell" to different people in a single transaction.

The statute expressly answers two parts of the question. The term "sell" expressly includes a business's conduct in "receiving an order for" and "delivering" spirituous liquor. A.R.S. § 4-101(32) ("sell" includes "receiving an order" and "delivering for value").

The statute, however, does not expressly include "receiving payment" within the definition of "sell." A.R.S. § 4-101(32). This omission is not dispositive of the question asked. The definition of "sell" does not purport to be exhaustive. *Id.* (stating that the definition of sell "***includes*** soliciting or receiving an order for, keeping or exposing for sale, directly or indirectly delivering for value, peddling, keeping with intent to sell and trafficking in") (emphasis added). Although the definition in A.R.S. § 4-101(32) does not expressly mention "receiving payment for" alcohol, receiving a method of payment is implicitly included within the statutory phrase "delivering ***for value***." A.R.S. § 4-101(32) (emphasis added). Further, receiving payment is a normal part of "receiving an order." *See also* Webster's Third New International Dictionary 2061 (1993) (defining "sell" as "to give up (property) to another *for money or other valuable consideration*") (emphasis added). Thus, the definition of "sell" in A.R.S. § 4-101(32) also encompasses "receiving payment for" spirituous liquor.

Accordingly, if in one transaction, a business receives an order from, receives payment from, and delivers to different people, the business "sells" alcohol to all three individuals.

III. Question #3: Does a business have "reason to question" whether someone is under legal drinking age pursuant to A.R.S. § 4-241(A), if the business cannot see the individual?

A.R.S. § 4-241 provides that if a seller "questions or has reason to question" whether a purchaser of alcohol is under the legal drinking age, the seller must follow certain procedures. Whether a person has "reason to question" something is generally a fact question. *See Verduzco v. Am. Valet*, 240 Ariz. 221, 225, ¶¶ 11–12 (Ct. App. 2016) ("Whether a person has 'reason to know' something is a fact question . . . ."); *Plowman v. Arizona State Liquor Bd.*, 152 Ariz. 331, 336 (Ct. App. 1986) (court bound by factual finding about whether licensee should have known person was under legal drinking age).

If a business operating a website or mobile application sells alcohol to someone the business cannot see, it certainly raises a question under A.R.S. § 4-241(A). Nevertheless, the Attorney General's authority to issue opinions is generally limited to questions of law. A.R.S. § 41-193(A)(7) (department of law shall, "[u]pon demand by the legislature, or either house or any member thereof, any public officer of the state or a county attorney, render a written opinion upon *any question of law* relating to their offices") (emphasis added). Here, the limited factual record, as well as the inherently factual nature of the inquiry, preclude the Attorney General from offering an opinion about whether a business has "reason to question" the legal drinking age of a purchaser anytime that the purchaser is not physically present.

IV. Question #4: Is a delivery service that is an independent contractor of the unlicensed entity that runs a mobile device application treated as an employee of the licensed retailer pursuant to A.R.S. § 4-203(J), even though the delivery service has no contract directly with the licensed retailer?

A delivery service that is an independent contractor of an Unlicensed Entity, but that has no contractual relationship with a licensed retailer, is not treated as an employee of a licensed retailer with off-sale privileges under A.R.S. § 4-203(J).[2] This section provides in part: "For purposes of this subsection, an independent contractor or the employee of an independent contractor is deemed to be an employee of the licensee when making a sale or delivery of spirituous liquor for the licensee." To qualify as an employee of the licensee under this sentence, a third-party delivery service must be an independent contractor of the ***licensee***. This is evident from the language requiring the sale or delivery to be made "for the licensee"—rather than "for" some other business or person.

Consistently, A.R.S. § 4-203(J) treats only "an independent contractor or the ***employee*** of an independent contractor" as an employee of the licensee. (Emphasis added). It does not go one step further and state that any ***independent contractor*** of an independent contractor is also treated as an employee of the licensee.[3] *See Sw. Iron & Steel Indus., Inc. v. State*, 123 Ariz. 78,

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[2] This opinion assumes that the independent contractor of the Unlicensed Entity does not otherwise qualify as an employee of either (1) the licensee or (2) the licensee's independent contractor. This opinion also does not address the factual question about when a person is an employee rather than an independent contractor.

[3] "[U]nless the context otherwise requires," A.R.S. § 4-101(15) defines "employee" to mean "any person who performs any service ***on licensed premises*** on a full-time, part-time or contract basis ***with consent of the licensee***, whether or not the person is denominated an employee, independent contractor or otherwise." (Emphasis added). This definition does not make an independent contractor of an independent contractor an employee of a licensee for purposes of A.R.S. § 4-203(J). By its terms, A.R.S. § 4-203(J) applies to the delivery of "spirituous liquor ***off*** of the licensed premises," (emphasis added), making the definition of employee under A.R.S. § 4-101(15) inapplicable to the extent the independent contractor of an independent contractor performs services ***off*** the licensed premises or ***without*** the consent of the licensee. Further showing that the use of "employee" in A.R.S. § 4-203(J) is context specific, A.R.S.

79 (1979) ("[T]he expression of one or more items of a class and the exclusion of other items of the same class implies the legislative intent to exclude those items not so included."). Further, it is contrary to the plain meaning of A.R.S. § 4-203(J) to find that a third-party is an independent contractor of a licensee when the licensee has no contractual relationship with the third-party. Some kind of contractual relationship is inherent in the meaning of the term "independent contractor," which is defined as one "'who contracts with another to do something for [the other] but who is not controlled by the other nor subject to the other's right to control with respect to [the] physical conduct in the performance of the undertaking.'" *Se. Ariz. Med. Ctr. v. Ariz. Health Care Cost Containment Sys. Admin.*, 188 Ariz. 276, 282 (Ct. App. 1996) (quoting Restatement (Second) of Agency § 2(3) (1958) (alterations in original)).

Finally, licensees are liable under A.R.S. § 4-203(J) for violations of their employees. To find, contrary to the language of the statute, that a delivery service is an employee of a licensed retailer even when the delivery service has no contractual relationship with the licensed retailer could improperly expand the scope of the licensed retailer's liabilities. *See State ex rel. Morrison v. Anway*, 87 Ariz. 206, 209 (1960) (courts "will not enlarge, stretch, expand, or extend a statute to matters not falling within its express provisions"). Further, A.R.S. § 4-203(J) is an exception to the general rule in A.R.S. § 4-244(1) prohibiting persons without a license from selling or dealing in spirituous liquors. Treating all subcontractors (no matter how remote the relationship) as an "employee" of licensees could improperly expand the scope of those exempted from regulation under Arizona's liquor licensing laws, potentially allowing the narrow exception in A.R.S. § 4-203(J) to swallow the general rule.

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§ 4-203(J) expressly delineates "[f]or the purposes of this subsection" when someone "is deemed to be an employee of the licensee."

V. Question #5: Is it of any legal import whether a consumer pays the retailer directly or through the unlicensed entity that runs the app, if the retailer receives one hundred percent of the price of the alcohol?

It is legally significant who a consumer pays for spirituous liquor. As set forth in response to Question 2 above, "selling" includes receiving payment for spirituous liquor. To be authorized to "sell" liquor—and therefore, to receive payment for liquor—an entity must be properly licensed or fall within the exception in A.R.S. § 4-203(J). Arizona law contains no additional provision allowing an entity to "sell" liquor without a license as long as it distributes one hundred percent of the proceeds to the licensee. The term "sell" is defined in A.R.S. § 4-101(32) by how a business interacts with the consumer, not by which business profits from the transaction.

Conclusion

A.R.S. § 4-244(1) makes it unlawful for a person to "sell or deal in" spirituous liquors without a license. This law requires all businesses that sell spirituous liquor, including those operating websites and/or mobile device applications, to be properly licensed, except as provided in A.R.S. § 4-203(J).

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