

Date: July 1, 2015

To: All Local Health Departments & Other Indiana Food Regulatory Agencies

From: Krista Click
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Subject: Guidance on House Enrolled Act 1311

Purpose

This document is provided for awareness and guidance to local health departments (LHDs), and all other Indiana food regulatory agencies regarding House Enrolled Act (HEA) 1311, attached, which was passed in the recently concluded legislative session and becomes effective July 1, 2015.

HEA 1311 states that vendors meeting certain requirements may provide wine or beer by sample or the glass at a festival, fair, or other temporary location without being considered a food establishment. This means that a local health department cannot require a food permit for these vendors. In addition, HEA 1311 affects the options of a brewer permitted to sell beer by the glass to make food available for consumption on the premises.

Background

Generally, except for some food safety and sanitation aspects in production and serving facilities, Indiana public health agencies do not regulate the production or distribution of alcoholic beverages. These activities are delegated in statute to the Indiana Alcohol and Tobacco Commission (ATC). The ATC regulates production, distribution and taxation of alcoholic beverages, but does not regulate the sanitary manufacturing or local serving in the context of food safety. Indiana Code (IC) 7.1-2-3-14 addresses standards of sanitation under the ATC, and states, "The commission shall have the power to require the aid of the state department of health, any local board of health, and any health officer in this state to fix and enforce these standards." ISDH is also referenced in 905 IAC 1-9-5 regarding sanitation under ATC.

ATC has an expectation for ISDH/LHDs to regulate for food safety and has no issues with requiring permits to do so. Based on past legal advice, ISDH/LHDs have no authority over alcoholic beverages sales and distribution; however, these agencies do have authority to inspect the manufacture and storage of alcoholic beverages to safeguard public health and promote the public welfare of citizens.

Discussion

Consider the following regarding food establishments/retail food establishments (RFEs) making/serving/selling alcoholic beverages:

- "Food" is defined in IC 16-18-2-135. From a public health perspective, alcoholic beverages are food.
- The term "food establishment" is defined in IC 16-18-2-137. Food establishments are generally regulated under IC 16-42-5.

- RFEs are a subtype of food establishment. RFEs are regulated primarily by 410 IAC 7-24.
- Temporary events (14 days or less, according to 410 IAC 7-24) involve RFEs which commonly prepare/serve open food, including beverages (sodas or pop, coffee, tea, beer, wine, etc.). Distinctions usually are not made between types of open food served, although the relative food safety hazard is acknowledged, such as for beverages containing milk or other potentially hazardous food (phf) ingredients compared to beverages with no phf ingredients.
- LHDs regulate most RFEs. ISDH regulates some RFEs & most non-meat & poultry/non-dairy wholesale food establishments in Indiana. Most LHDs issue permits and charge fees to support their overall public health mission. ISDH registers & does not issue permits or charge fees. A “certificate of registration” is issued for facilities under ISDH regulation, reflecting that a food establishment complies with IC 16-42-1-6.
- By definition in 410 IAC 7-24-79, facilities serving only prepackaged, non-phf are not RFEs. Facilities selling open food, such as open beverages are RFEs.
- Facilities selling only alcoholic beverages in unopened containers are still food establishments under IC 16-42-5 as defined in IC 16-18-2-137, but they are not RFEs. Some food establishments are commonly regulated, from a public health perspective, on a “complaint-only” basis due to a recognized relative low food safety hazard.
- Bars, taverns, restaurants, are regulated as RFEs. Typically, liquor stores are not issued permits as long as they only sell pre-packaged, non-phf food. If they sell open food or do any food preparation, they are regulated the same as all other RFEs. It is not uncommon for there to be contamination concerns, from pests (rodents, birds, insects) or when some retail/wholesale producers of alcoholic beverages are not diligent with sanitation.

Among other changes, HEA 1311 requires certain alcoholic beverage facilities that are permitted by ATC to sell beer by the glass to make food available for consumption on the premises. Prior to the effective date of HEA 1311, the law required these facilities to furnish the minimum food requirements as prescribed by the ATC. “Consumption on the premises” may be accomplished by:

1. allowing a vehicle of transportation that is a food establishment (as defined in IC 16-18-2-137) to serve food near the brewers licensed premises;
2. placing menus in the brewers licensed premises; or
3. providing food prepared at the brewery.

HEA 1311 adds section 30 to the Food Establishment Act, IC 16-42-5, and modifies the definition of “food establishment” found in IC 16-18-2-137 to exclude as a food establishment... “the holder of a farm winery permit under IC 7.1-3-12-5 or a brewer’s permit under IC 7.1-3-2-7(5) if the requirements of 16-42-5-30 are met”. The new law provides that the holder of a ATC permit that provides only alcoholic beverages by the glass at a festival, fair, or other temporary location authorized by the ATC permit holder’s permit under IC 7.1 and **does not provide other food** is exempt from the sanitation requirements governing food establishments/RFEs, including lhd inspection, permitting/licensure, registration, or certification.

Conclusion

This guidance is being sent to all Indiana Food Regulatory agencies to provide awareness of HEA 1311, effective July 1, 2015. Except for sanitation/food safety purposes, ISDH/LHDs do not regulate the production or distribution of alcoholic beverages. The new law changes the food requirements for certain RFEs selling/serving alcoholic beverages. Instead of only requiring the establishment to furnish the minimum food requirements established by ATC under the law prior to the effective date of HEA 1311, these facilities will now also have the option to make food available by:

- allowing a mobile RFE to serve food near the facilities’ ATC licensed premises;
- placing menus in the facilities’ premises of restaurants that will deliver food to the facility; or
- providing food prepared at the ATC permit holders premises.

The new law also excludes as a food establishment an ATC permit holder who meets the requirements of newly added IC 16-42-5-30. The requirements can be met by furnishing alcoholic beverages by the glass or by samples, and **not** serving any food, including any fruit, condiment, flavoring, or garnish added to the beverage after the beverage is poured from its original container.

Any questions may be directed to your ISDH Food Protection Program field representative or to Dan Miller at dmiller@isdh.in.gov.

First Regular Session of the 119th General Assembly (2015)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in this style type, and deletions will appear in this style type.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in this style type. Also, the word NEW will appear in this style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in this style type or this style type reconciles conflicts between statutes enacted by the 2014 Regular Session and 2014 Second Regular Technical Session of the General Assembly.

HOUSE ENROLLED ACT No. 1311

AN ACT to amend the Indiana Code concerning alcohol and tobacco.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 7.1-3-2-7, AS AMENDED BY SEA 297-2015, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 7. The holder of a brewer's permit or an out-of-state brewer holding either a primary source of supply permit or an out-of-state brewer's permit may do the following:

- (1) Manufacture beer.
- (2) Place beer in containers or bottles.
- (3) Transport beer.
- (4) Sell and deliver beer to a person holding a beer wholesaler's permit issued under IC 7.1-3-3.
- (5) If the brewer manufactures, at all of the brewer's breweries located in Indiana, an aggregate of not more than ninety thousand (90,000) barrels of beer in a calendar year for sale or distribution within Indiana, the permit holder may do the following:
 - (A) Sell and deliver a total of not more than thirty thousand (30,000) barrels of beer in a calendar year to a person holding a retailer or a dealer permit under this title. The total number of barrels of beer that the permit holder may sell and deliver under this clause in a calendar year may not exceed thirty thousand (30,000) barrels of beer.

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- (B) Be the proprietor of a restaurant.
- (C) Hold a beer retailer's permit, a wine retailer's permit, or a liquor retailer's permit for a restaurant established under clause (B).
- (D) Transfer beer directly from the brewery to the restaurant by means of:
 - (i) bulk containers; or
 - (ii) a continuous flow system.
- (E) Install a window between the brewery and an adjacent restaurant that allows the public and the permittee to view both premises.
- (F) Install a doorway or other opening between the brewery and an adjacent restaurant that provides the public and the permittee with access to both premises.
- (G) Sell the brewery's beer by the glass for consumption on the premises. Brewers permitted to sell beer by the glass under this clause must furnish the minimum food requirements prescribed by the commission: make food available for consumption on the premises. A brewer may comply with the requirements of this clause by doing any of the following:
 - (i) Allowing a vehicle of transportation that is a food establishment (as defined in IC 16-18-2-137) to serve food near the brewer's licensed premises.
 - (ii) Placing menus in the brewer's premises of restaurants that will deliver food to the brewery.
 - (iii) Providing food prepared at the brewery.
- (H) Sell and deliver beer to a consumer at the permit premises of the brewer or at the residence of the consumer. The delivery to a consumer may be made only in a quantity at any one (1) time of not more than one-half (1/2) barrel, but the beer may be contained in bottles or other permissible containers.
- (I) Sell the brewery's beer as authorized by this section for carryout on Sunday in a quantity at any one (1) time of not more than five hundred seventy-six (576) ounces. A brewer's beer may be sold under this clause at any address for which the brewer holds a brewer's permit issued under this chapter if the address is located within the same city boundaries in which the beer was manufactured.
- (J) With the approval of the commission, participate:
 - (i) individually; or
 - (ii) with other permit holders under this chapter;



in a trade show or an exposition at which products of each permit holder participant are displayed, promoted, and sold. The commission may not grant to a holder of a permit under this chapter approval under this clause to participate in a trade show or exposition for more than forty-five (45) days in a calendar year.

(K) Store or condition beer in a secure building that is:

- (i) separate from the brewery; and
- (ii) owned or leased by the permit holder.

A brewer may not sell or transfer beer directly to a permittee or consumer from a building described in this clause.

(6) If the brewer's brewery manufactures more than ninety thousand (90,000) barrels of beer in a calendar year for sale or distribution within Indiana, the permit holder may own a portion of the corporate stock of another brewery that:

- (A) is located in the same county as the brewer's brewery;
- (B) manufactures less than ninety thousand (90,000) barrels of beer in a calendar year; and
- (C) is the proprietor of a restaurant that operates under subdivision (5).

(7) Provide complimentary samples of beer that are:

- (A) produced by the brewer; and
- (B) offered to consumers for consumption on the brewer's premises.

(8) Own a portion of the corporate stock of a sports corporation that:

- (A) manages a minor league baseball stadium located in the same county as the brewer's brewery; and
- (B) holds a beer retailer's permit, a wine retailer's permit, or a liquor retailer's permit for a restaurant located in that stadium.

(9) For beer described in IC 7.1-1-2-3(a)(4):

- (A) may allow transportation to and consumption of the beer on the licensed premises; and
- (B) may not sell, offer to sell, or allow sale of the beer on the licensed premises.

SECTION 2. IC 7.1-3-9-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 6. ~~Certain Local Ordinances Proscribed:~~ (a) A city, or town, township, or county shall not enact an ordinance, resolution, policy, or rule which in any way, directly or indirectly, regulates, restricts, enlarges, or limits the operation or business of the holder of a liquor retailer's permit as

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provided in this title.

(b) A city, ~~or town, township, or county~~ shall not enact an ordinance, ~~resolution, policy, or rule~~ covering any other business or place of business for the conduct of it in such a way as to prevent or inhibit the holder of a liquor retailer's permit from being qualified to obtain or continue to hold the permit, or operate to interfere with or prevent the exercise of the permittee's privileges under the permit.

SECTION 3. IC 7.1-3-9-7 IS REPEALED [EFFECTIVE JULY 1, 2015]. ~~Sec. 7. Ordinance Sent to Commission: The city clerk or town clerk of a city or town in which an ordinance proscribed by IC 1971, 7.1-3-9-6, has been enacted, shall, immediately upon the enactment, certify a copy of the ordinance and mail it by registered mail to the commission. The commission, out of its expenses, shall pay the clerk one dollar (\$1.00), for his services in the matter.~~

SECTION 4. IC 7.1-3-27-5, AS AMENDED BY SEA 297-2015, SECTION 5, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 5. (a) Except as provided in section 7 of this chapter, an applicant for an artisan distiller's permit must meet all the following requirements to be eligible for an artisan distiller's permit:

(1) The permit applicant must hold one (1) of the following permits for the three (3) year period immediately preceding the date of the application:

- (A) A farm winery permit under IC 7.1-3-12.
- (B) A brewer's permit issued under IC 7.1-3-2-2(b).
- (C) A distiller's permit under IC 7.1-3-7.

(2) The permit applicant may not have more than one (1) violation of this title during the three (3) year period immediately preceding the date of the application.

(3) The permit applicant may not have any violation of this title during the twelve (12) month period immediately preceding the date of the permit application.

(b) As used in this subsection, "qualifying permit" means a farm winery, brewer's, or distiller's permit under subsection (a)(1)(A), (a)(1)(B), or (a)(1)(C) that is required in order to hold an artisan distiller's permit. The same persons must directly or indirectly own and control ~~one hundred percent (100%)~~ more than fifty percent (50%) of the entity that holds the qualifying permit and the artisan distiller's permit.

SECTION 5. IC 16-18-2-137, AS AMENDED BY P.L.86-2009, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 137. (a) "Food establishment", for purposes of IC 16-42-5 and IC 16-42-5.2, means any building, room, basement,

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vehicle of transportation, cellar, or open or enclosed area occupied or used for handling food.

(b) The term does not include the following:

(1) A dwelling where food is prepared on the premises by the occupants, free of charge, for their consumption or for consumption by their guests.

(2) A gathering of individuals at a venue of an organization that is organized for educational purposes in a nonpublic educational setting or for religious purposes, if:

(A) the individuals separately or jointly provide or prepare, free of charge, and consume their own food or that of others attending the gathering; and

(B) the gathering is for a purpose of the organization.

Gatherings for the purpose of the organization include funerals, wedding receptions, christenings, bar or bat mitzvahs, baptisms, communions, and other events or celebrations sponsored by the organization.

(3) A vehicle used to transport food solely for distribution to the needy, either free of charge or for a nominal donation.

(4) A private gathering of individuals who separately or jointly provide or prepare and consume their own food or that of others attending the gathering, regardless of whether the gathering is held on public or private property.

(5) Except for food prepared by a for-profit entity, a venue of the sale of food prepared for an organization:

(A) that is organized for:

(i) religious purposes; or

(ii) educational purposes in a nonpublic educational setting;

(B) that is exempt from taxation under Section 501 of the Internal Revenue Code; and

(C) that offers the food for sale to the final consumer at an event held for the benefit of the organization;

unless the food is being provided in a restaurant or a cafeteria with an extensive menu of prepared foods.

(6) Except for food prepared by a for-profit entity, an Indiana nonprofit organization that:

(A) is organized for civic, fraternal, veterans, or charitable purposes;

(B) is exempt from taxation under Section 501 of the Internal Revenue Code; and

(C) offers food for sale to the final consumer at an event held for the benefit of the organization;

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if the events conducted by the organization take place for not more than fifteen (15) days in a calendar year.

(7) An individual vendor of a farmer's market or roadside stand if the individual meets the requirements of IC 16-42-5-29.

(8) The holder of a farm winery permit under IC 7.1-3-12-5 or a brewer's permit under IC 7.1-3-2-7(5) if the requirements of IC 16-42-5-30 are met.

SECTION 6. IC 16-42-5-30 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 30. (a) As used in this section, "permit holder" means the holder of:

(1) a farm winery permit under IC 7.1-3-12-5; or

(2) a brewer's permit under IC 7.1-3-2-7(5).

(b) A permit holder that sells or furnishes alcoholic beverages by the glass at a festival, fair, or other temporary location authorized by the permit holder's permit under IC 7.1, is not considered to be a food establishment and is exempt from the requirements of this title that apply to food establishments, if the following requirements are met:

(1) The holder of a farm winery permit furnishes only the following for consumption on the premises, regardless of whether there is a charge:

(A) Wine samples.

(B) Wine by the glass.

The holder may not serve or furnish any food, including any fruit, condiment, flavoring, or garnish added to the wine after the wine is poured from its original container.

(2) The holder of a brewer's permit furnishes only the following for consumption on the premises, regardless of whether there is a charge:

(A) Beer samples.

(B) Beer by the glass.

The holder may not serve or furnish any food, including any fruit, condiment, flavoring, or garnish added to the beer after the beer is poured from its original container.

(c) A local unit of government (as defined in IC 14-22-31.5-1) may not require any licensure, registration, or certification of a permit holder as a condition of providing alcoholic beverages at a festival, fair, or other temporary location authorized by the permit holder's permit under IC 7.1, if the permit holder meets the requirements of this section.

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