

PROPOSED RULEMAKING

LIQUOR CONTROL BOARD

[40 PA. CODE CH. 5]

Duties and Rights of Licensees

The Liquor Control Board (Board), under the authority of section 207(i) of the Liquor Code (47 P.S. § 2-207(i)), proposes to amend §§ 5.30 and 5.32 (relating to definitions; and restrictions/exceptions) to read as set forth in Annex A.

Summary

This proposed rulemaking updates and amends §§ 5.30 and 5.32 of the Board's regulations. This proposed rulemaking is undertaken as part of an ongoing effort to review and update the Board's regulations.

This proposed rulemaking amends § 5.30 to expand existing definitions and add new definitions to provide clarity for the regulated community. These amendments stem from questions posed by the regulated community to the Board's Office of Chief Counsel, which provided answers through advisory opinions issued under section 211.1 of the Liquor Code (47 P.S. § 2-211.1).

This proposed rulemaking amends § 5.32 for the purpose of clarity and improved readability. The first two subsections are reserved; therefore, the amendments begin at subsection (c), which states that a licensee may not directly or indirectly hire or permit a minor under 18 years of age to act as an entertainer and does not identify any exceptions. Because the entire text of subsection (c) is being replaced, this proposed rulemaking deletes subsection (c) and creates subsection (c.1).

Proposed subsection (c.1) provides that employment or engagement of a minor under 18 years of age as an entertainer must be in accordance with the Child Labor Act (43 P.S. §§ 40.1—40.14).

This proposed rulemaking amends subsection (d)(4) for the purpose of legal accuracy. In paragraph (4)(i), the definition of "charitable organizations" is no longer available in 49 Pa. Code Part I, Subpart B, because that regulation was deleted in 1997. See 27 Pa.B. 2934 (June 21, 1997). This proposed rulemaking now cites to the Solicitation of Funds for Charitable Purposes Act (10 P.S. §§ 162.1—162.23), which is cited in paragraph (4)(ii). In paragraph (4)(ii), the legal citation to the Local Option Small Games of Chance Act (10 P.S. §§ 328.301—328.308) is updated.

This proposed rulemaking deletes subsection (e)(1), which prohibits "lewd, immoral or improper conduct by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants." The case of *Conchatta, Inc. v. Miller*, 458 F.3d 258 (3d Cir. 2006), held that the prohibition on "lewd, immoral or improper conduct" was unconstitutional on the basis that it is substantially overbroad. *Conchatta* was not based on subsection (e)(1) of the Board's regulation, but a different subsection—subsection (b)—that has since been reserved. See 43 Pa.B. 7082 (December 7, 2013). Since the phrase "lewd, immoral or improper conduct" is legally unenforceable, this proposed rulemaking deletes it from subsection (e)(1).

This proposed rulemaking adds a sentence to subsection (e)(3), providing that no amount of liquor, alcohol, or malt or brewed beverages may be offered as a prize for

participating in an event, contest or tournament, whether for on-premises or off-premises consumption. Similar language exists in subsection (h), for sweepstakes prizes.

In subsection (e)(5), this proposed rulemaking replaces the word "charity" with "charitable organization," to be consistent with the language used in subsection (d)(4).

This proposed rulemaking amends subsection (e)(7) to increase the total value of prizes for any event, tournament or contest from \$1,000 to \$2,000, and to increase the total value of prizes awarded in a 7-day period from \$25,000 to \$35,000. These amendments are consistent with the limits provided in the Local Option Small Games of Chance Act.

The final subsection addressed by this proposed rulemaking is subsection (g), which provides that "municipalities may petition the Board for exemption from the Board's regulations regarding the enforcement of subsection (a) for all licensees within an identifiable area in accordance with section 493.1(b) of the Liquor Code (47 P.S. § 4-493.1(b))." (Emphasis added). Subsection (a) prohibited a licensee from using or permitting to be used, inside or outside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard on the outside of the licensed premises. The act of December 22, 2011 (P.L. 530, No. 113) and the act of July 5, 2012 (P.L. 1007, No. 116) amended the Liquor Code (47 P.S. §§ 1-101—10-1001) to render subsection (a) obsolete, and thereafter, the Board submitted a final-omitted rulemaking to rescind subsection (a). See 43 Pa.B. 7082. The final-omitted rulemaking overlooked subsection (g), but the Board rescinds it with this proposed rulemaking.

Affected Parties

As of January 13, 2023, there were approximately 18,500 licensees who may be affected by this proposed rulemaking.

Paperwork Requirements

This proposed rulemaking will not require any additional paperwork to be filed.

Fiscal Impact

This proposed rulemaking is not anticipated to have any fiscal impact.

Effective Date

This proposed rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*.

Public Comments

Interested persons are invited to submit written comments about this proposed rulemaking to Rodrigo Diaz, Chief Counsel, Jason M. Worley, Deputy Chief Counsel, or Norina Foster, Assistant Counsel, Office of Chief Counsel, Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001, or RA-lblegal@pa.gov, within 30 days after publication of this proposed rulemaking in the *Pennsylvania Bulletin*. E-mail is preferred. When commenting, individuals should indicate if they wish to be apprised of future developments regarding this proposed rulemaking, and include a name, address and e-mail address. Comments submitted by facsimile will not be accepted.

Public comments will be posted on the Independent Regulatory Review Commission's (IRRC) web site. Personal information will not be redacted from the public comments received.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 25, 2023, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to IRRC and to the Chairpersons of the House Liquor Control Committee and Senate Committee on Law and Justice. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the Board, the General Assembly and the Governor.

TIM HOLDEN,
Chairperson

Fiscal Note: 54-104. No fiscal impact; recommends adoption.

Annex A

TITLE 40. LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 5. DUTIES AND RIGHTS OF LICENSEES

Subchapter C. AMUSEMENT AND ENTERTAINMENT

§ 5.30. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Audio/video playback device—A device which emits a musical recording, or in the case of a video jukebox, emits a musical recording accompanied by recorded video images on a screen that does not exceed 24 inches by 30 inches.

Dancing—Moving one's body in rhythm, usually accompanied by tonal music or percussion. Dancing may be performed by a scheduled entertainer or by customers on the licensed premises.

Event/tournament/contest—A competitive endeavor involving skill, **chance**, speed, strength [**or**], endurance **or knowledge**. The term includes a competitive endeavor involving physical attributes of contestants. **The term also includes trivia contests.**

Floor shows—Live entertainment involving musical, dance or comedy acts. To constitute a musical act, there must be a vocalist or singer, more than two instrumentalists or a disc jockey.

Game—A device, such as a pinball, shuffleboard, bowling [**or**], video machine **or electronic tablet** which provides the player with amusement and no other form of award excepting free plays.

Instrumental music—Music generated by instruments played by [**musicians**] **no more than two instrumentalists** without vocal accompaniment.

Sweepstakes—A chance promotion in which tickets or game pieces are distributed and the winner or winners are selected in a random drawing.

Theatricals—The performance of a play, musical or drama. The term includes poetry readings.

§ 5.32. Restrictions/exceptions.

(a) [Reserved].

(b) [Reserved].

(c) **[A licensee may not directly or indirectly employ a minor person under 18 years of age as an entertainer in the licensed establishment, or in a room or place connected therewith, nor may a licensee permit in the establishment, room or place, a minor person under 18 years of age to act as an entertainer.] [Reserved].**

(c.1) A licensee may only employ or engage a minor under 18 years of age as an entertainer if it does so in accordance with the Child Labor Act (43 P.S. §§ 40.1—40.14).

(d) A hotel, restaurant, club, privately-owned public golf course, privately-owned private golf course, municipal golf course, brew pub or malt beverage eating place licensee may not hold or permit to be held, on the licensed premises an event, tournament or contest; nor advertise, offer, award or permit the award on the licensed premises of trophies, prizes or premiums, for any purpose except as follows:

(1) A hotel, restaurant, club or malt beverage eating place licensee may permit to be held within the licensed premises an event sanctioned by the State Athletic Commission under 5 Pa.C.S. Part I, [**Subparts A and B**] **Subpart B** (relating to [**general provisions; and boxing**] **Boxing Act**) or under 5 Pa.C.S. Part I, Subpart C (relating to Wrestling Act). Only malt or brewed beverages, as generally permitted by the class of license involved, may be sold, served or delivered on that portion of the licensed premises where the event is held, and not sooner than 1 hour before, and not later than 1 hour after the event. Service of malt or brewed beverages at these events will be conducted only with the prior written approval of the State Athletic Commission filed with the Board. Drinks shall be dispensed in that portion of the licensed premises where the event is conducted only in paper or plastic cups.

(2) A hotel, restaurant, club or malt beverage eating place licensee may hold or permit to be held within the licensed premises or in a bowling alley immediately adjacent thereto as provided in sections 406(a)(1) and 442(b) of the Liquor Code (47 P.S. §§ 4-406(a)(1) and 4-442(b)), a bowling tournament or bowling contest. Liquor and malt or brewed beverages, as generally permitted by the class of license involved, may be served, sold or delivered at the bowling tournament or bowling contest by the licensee.

(3) A hotel, restaurant, club, privately-owned public golf course, privately-owned private golf course, municipal golf course, brew pub or malt beverage eating place licensee may permit the conduct of events on the licensed premises by groups constituting a league. Liquor and malt or brewed beverages, as generally permitted by the class of license involved, may be sold, served or delivered at the events on the licensed premises.

(4) Hotel, restaurant, club, privately-owned public golf course, privately-owned private golf course, municipal golf course, brew pub or malt beverage eating place licensees may permit the conduct of tournaments and contests on the licensed premises for the benefit of, and officially sponsored by, bona fide charitable organizations. **The following apply:**

(i) A charitable organization for the purposes of this section is defined [**as one qualified, approved by and registered with the Department of State and operated under 49 Pa. Code Part I, Subpart B (relating to charitable organizations)] as in the Solicitation of Funds for Charitable Purposes Act (10 P.S. §§ 162.1—162.23).**

(ii) Charitable organization functions shall be operated in accordance with the Solicitation of Funds [**For] for Charitable Purposes Act [(10 P.S. §§ 162.1—162.24)] and, if applicable, the Local Option Small Games of Chance Act [(10 P.S. §§ 311—327)] (10 P.S. §§ 328.301—328.308), and the Bingo Law (10 P.S. §§ 301—308.1).**

(5) Hotel, restaurant, club, privately-owned public golf course, privately-owned private golf course, municipal golf course, brew pub and malt beverage eating place licensees may conduct self-sponsored tournaments, events or contests on their own licensed premises so long as the activities are in conformance with the applicable provisions of this subchapter.

(e) For an activity conducted under this subchapter, the following apply:

(1) [**There may not be lewd, immoral or improper conduct by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants.] [Reserved].**

(2) There may not be unlawful gambling directly or indirectly associated with an activity on the licensed premises. A licensee will be held strictly liable for unlawful gambling on the licensed premises.

(3) There may not be an event, contest or tournament which involves the consumption of alcoholic beverages by an event, tournament or contest participant. **In addition, no amount of liquor, alcohol, or malt or brewed beverages may be offered as a prize for participating in an event, contest or tournament, whether for on-premises or off-premises consumption.**

(4) The price of a ticket or evidence of admission to an event, tournament or contest may not include a charge or assessment for alcoholic beverages or entitle the holder thereof to receive an alcoholic beverage anywhere on the licensed premises except for alcoholic beverages included in a meal package offering as provided for in Chapter 13 (relating to promotion).

(5) A licensee or sponsoring [**charity] charitable organization** may advertise an event, tournament or contest.

(6) Hotel, restaurant, club, privately-owned public golf course, privately-owned private golf course, municipal golf course, brew pub and malt beverage eating place licensees, as well as governing bodies of professional golf, skiing, tennis, bowling, pocket billiards and nonlicensee sponsors as provided in subsection (e) may award prizes to contestants or participants of events, tournaments or contests.

(7) The total value of all prizes for any given event, tournament or contest may not exceed [**\$1,000] \$2,000. The total value of all prizes awarded in any 7-day period may not exceed [**\$25,000] \$35,000. An event, tournament or contest conducted under the authority of the Local Option Small Games of Chance Act [(10 P.S. §§ 328.101—328.707)] or the Bingo Law [(10 P.S. §§ 301—308.1)] is subject to the prize limits in these acts.****

(8) Golf, skiing, tennis, pocket billiards or bowling events, tournaments, contests and events sanctioned by the State Athletic Commission are exempted from the prize value restrictions in this section.

(9) Licensees shall maintain on the licensed premises for 2 years, from the date of the event, an itemized list of all prizes for each event, tournament, contest indicating each prize, its value and the name and address of the recipient.

(f) The restrictions in this section apply not only to the licensee, but to partners, officers, directors, servants, agents and employees of a licensee.

(g) [**Municipalities may petition the Board for exemption from the Board's regulations regarding the enforcement of subsection (a) for all licensees within an identifiable area in accordance with section 493.1(b) of the Liquor Code (47 P.S. § 4-493.1(b)).] [Reserved].**

(h) A manufacturer, manufacturer's representative or licensee may sponsor sweepstakes promotions. Permissible sweepstakes shall provide that the following conditions apply:

(i) No purchase is necessary to enter.

(ii) Entrants shall be 21 years of age or older.

(iii) Retail licensed premises may only be involved as pick-up or drop-off points for entry forms and not for the conducting of drawings or the awarding of prizes.

(iv) Alcoholic beverages may not be part of the prize.

[Pa.B. Doc. No. 23-666. Filed for public inspection May 19, 2023, 9:00 a.m.]