

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I and the amendment of ARM 42.12.106 and 42.12.128 pertaining to industry trade shows, catering endorsements, and catered events ) NOTICE OF ADOPTION AND AMENDMENT ) ) ) ) )

TO: All Concerned Persons

1. On June 7, 2019, the Department of Revenue published MAR Notice No. 42-1000 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 727 of the 2019 Montana Administrative Register, Issue Number 11.

2. On June 28, 2019, a public hearing was held to consider the proposed adoption and amendment. John Iverson, Montana Tavern Association (MTA); Robin Blazer, Willie's Distillery; and Mike Green, Crowley Fleck, PLLP, appeared and testified at the hearing. The department also received written comments from Michael Lawlor, Lawlor & Co., PLLC; Shane Reely, Goodrich Reely, PLLC; Mike Green, Crowley Fleck, PLLP; and Nick Checota, Logjam Presents.

3. The department has adopted and amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (42.12.150) ALCOHOLIC BEVERAGE INDUSTRY TRADE SHOWS (1) An all-beverage licensee or on-premises consumption beer licensee may host an industry trade show at the licensee's licensed premises or may cater an industry trade show pursuant to ARM 42.12.128. Alcoholic beverages provided at an industry trade show are limited by the hosting or catering licensee's type of license.

(2) For the purpose of this rule, an industry trade show means an event sponsored by a nonprofit association representing an alcoholic beverage industry, and where alcoholic beverages are provided to attendees for promotional purposes. An industry trade show shall not be open to the public. A nonprofit association may not sponsor more than ~~one~~ two industry trade shows per year.

(3) All attendees of an industry trade show must be admitted by the event sponsor and ~~have an affiliation to the~~ must be a licensee, a person employed in the alcoholic beverage industry or a related industry, or are a family member or partner of such persons and may include public office holders officers, and candidates for public office, and public employees involved in the alcoholic beverage industry. A related industry includes but is not limited to gambling, food preparation, and other professional services provided to alcoholic beverages licensees.

(4) A vendor, as defined in ARM 42.11.105, with a current vendor permit, as provided in ARM 42.11.213, may request a trade show case from the department for

use at an industry trade show. A trade show case means a case of liquor product used by a registered vendor representative for promoting a vendor's liquor products to attendees of an industry trade show. A liquor product that has not been approved by the department may not be included in a trade show case. For the purposes of this rule, product means a liquor item identified by a unique identification number or stock-keeping unit.

(a) through (c) remain as proposed.

(d) A vendor is limited to providing a maximum of nine ~~liters~~ thousand milliliters of each liquor product per ~~calendar year~~ industry trade show.

(5) ~~An alcoholic beverage~~ A beer manufacturer or a beer manufacturer's employees or agents who intends to provide beer at an industry trade show or a table wine manufacturer or the table wine manufacturer's employees or agents who intend to provide table wine at an industry trade show must purchase the beer or table wine from the licensee hosting the trade show for no more than the ordinary retail price.

(6) and (7) remain as proposed.

AUTH: 16-1-303, MCA

IMP: 16-3-107, 16-4-201, 16-4-204, 16-4-311, MCA

42.12.106 DEFINITIONS The following definitions apply to this chapter:

(1) through (7) remain as proposed.

(8) ~~"Catered event" means a special event for which there is an outcome, conclusion, or result, and~~ where the sale and service of alcoholic beverages is conducted by a licensee who has obtained a catering endorsement.

(9) "Catered event service area" means the area in which the licensee with a catering endorsement may sell and serve alcoholic beverages at retail.

(9) through (14) remain as proposed but are renumbered (10) through (15).

~~(15)~~ (16) "Event barrier" means a barrier enclosing the perimeter of a catered event service area. The construction, installation, and use criteria of an event barrier is provided in ARM 42.12.128.

(16) through (45) remain as proposed but are renumbered (17) through (46).

AUTH: 16-1-303, MCA

IMP: 16-1-302, MCA

42.12.128 CATERING ENDORSEMENT; CATERED EVENTS; EVENT BARRIERS (1) and (2) remain as proposed.

(3) A catered event may have more than one licensee cater the event. Licensees shall prevent the consumption of alcoholic beverages ~~that were not sold or provided at the catered event~~ within their catered event service area that they did not sell or provide.

(4) A catered event may last for a maximum of three days, except a licensee may have one catered event per year that lasts up to seven days for a fair, as defined in ARM 42.12.106. ~~For catered events lasting more than one day, the~~ The storage of alcoholic beverages may occur at the catered event one day prior to the catered event until one day following the conclusion of the catered event if the

alcoholic beverages are in a secured location that prevents ~~service~~ access by anyone other than the licensee or licensee's employees.

(5) remains as proposed.

(6) ~~When a licensee conducts a catered event outdoors, when the indoor venue is an open floorplan where the licensee has no control or limited control of patron access in the venue, or when two or more licensees are catering the same event, if there is not an existing boundary defining the catered event service area, an event barrier shall be required to clearly mark where the sale and service and consumption of each licensee's alcoholic beverages are is allowed. The event barrier:~~

(a) shall be constructed in a manner that directs or impedes ordinary foot traffic and clearly defines the boundary of the catered event service area;

(b) remains as proposed.

(c) shall have a clearly defined entrance permitting access to the catered event service area;

(d) and (e) remain as proposed.

(7) When a licensee caters an event that is within 15 feet of its licensed premises, patrons may take alcoholic beverages between the licensed premises and the area authorized for the catered event if the licensee:

~~(a) notifies the department at least ten days prior to the start of the catered event;~~

(b) and (c) remain as proposed but are renumbered (a) and (b).

~~(d) (c) obtains approval from local government officials for the use of the path or paths, if:~~

(i) the licensee does not already have possessory interest for the area;

(ii) the licensee does not already have conditional use approval from local government officials for the area; or

(iii) there is an ordinance in place prohibiting open containers of alcoholic beverages.

(8) remains as proposed.

(9) On or before the 15th day of each month, the licensee shall electronically report, on a form provided by the department, those events the licensee catered in the previous month and shall include a copy of the notification form signed by local law enforcement ~~and a copy of the executed written agreement between the licensee and event sponsor for each catered event.~~

(10) A copy of the executed written agreement between the licensee and event sponsor for each event catered shall be maintained by the licensee for a period of three years from the date of the event. The department may make an examination of any such agreement at any time.

(10) remains as proposed but is renumbered (11).

AUTH: 16-1-303, MCA

IMP: 16-3-103, 16-4-111, 16-4-204, MCA

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:

COMMENT #1: Mr. Iverson states that the MTA supports the overall goal of New Rule I and the rule reflects the types of events in which the MTA engages. New Rule I adds value to industry members. Ms. Blazer also commented overall support for what New Rule I attempts to accomplish.

RESPONSE #1: The department thanks the MTA and Ms. Blazer for their comments and support of New Rule I.

COMMENT #2: Mr. Lawlor commented that New Rule I(1) should extend hosting and catering to beer/wine licensees. Mr. Lawlor contends that organizations representing breweries or wineries may desire to hold a trade show featuring only their product, so it is unnecessary to limit such events to all-beverage licensees.

RESPONSE #2: Based on the comments received, the department has amended New Rule I(1) to allow on-premises consumption beer licensees the ability to host or cater an industry trade show. Further, necessary clarification was added which mirrors existing law that only the alcoholic beverage types for which the licensee is licensed may be provided at an industry trade show.

COMMENT #3: Ms. Blazer requests the department expand the number of industry trade shows in New Rule I(2) to two events to accommodate regional (i.e., East and West) industry trade shows.

RESPONSE #3: Based on the comments received, the department has amended New Rule I(2) to allow a nonprofit association representing an alcoholic beverage industry to host no more than two industry trade shows per year.

COMMENT #4: Mr. Lawlor requests the department clarify "related industry" in New Rule I(3) as the term is overly broad and comments that the department's use of the term "affiliation" is confusing as the term is defined in ARM 42.12.106. Ms. Blazer also commented that "related industry" is overly broad and she believes more specific verbiage is necessary to achieve consistent, long term interpretation and application of the rule.

RESPONSE #4: Based on the comments received, the department has amended New Rule I(3) by removing the phrase that includes the word "affiliation." In its place, the department has clarified the attendees must be employed in the alcoholic beverage industry or related industry. The department has also provided a non-exhaustive list of related industries.

COMMENT #5: Mr. Lawlor commented that public office holders admitted to industry trade shows should include department and Department of Justice employees.

RESPONSE #5: Based on the comments received, the department has amended New Rule I(3) to clarify that public officers and public employees who are involved in

the alcoholic beverage industry may attend industry trade shows. The terms "public officer" and "public employee" are defined in 2-2-102, MCA. The use of these terms would include employees of the department and Department of Justice.

COMMENT #6: Mr. Lawlor and Ms. Blazer both commented on the proposed trade show case provisions in New Rule I(4).

Mr. Lawlor asks whether a vendor is limited to one trade show case total, regardless of the size of the event. Is the limit of one case of each product?

Ms. Blazer requests the department clarify or revise trade show case to be based by volume; case sizes are not uniform. The department should specify liter or other volume amount. Ms. Blazer comments in New Rule I(4)(d) that the vendor limit for liquor product should be increased from nine liters per year to 18 liters per event.

RESPONSE #6: Regarding Mr. Lawlor's question pertaining to the trade show cases, New Rule I(4) does not limit the total number of trade show cases allowed. Rather, it limits the amount of product that can be requested for trade show purposes. Based on the comments received, the department has amended New Rule I(4) by defining the term "product" as a liquor item and striking three unnecessary references to "liquor" before the word "product."

The department does not object to Ms. Blazer's request to clarify the amount of product that can be used as a trade show case, and based on these comments, the department has amended (4)(d) to 9,000 milliliters per product, which is the equivalent of a 9-liter case. The department is not prescribing the required size of the trade show case, but is prescribing the per product volume that can be requested. A trade show case can contain as many bottles of a product desired but may not exceed 9,000 milliliters for each product.

Based on the comments received, the department has also amended (4)(d) to reflect the industry trade show product limitation is per trade show event, not a calendar year.

COMMENT #7: Ms. Blazer asks if the department needs to clarify whether the tied-house sample restriction for a licensee who purchased product in the last 12 months applies. Is a waiver of that requirement necessary?

RESPONSE #7: The department declines to implement a waiver of the federal tied-house sample restrictions by administrative rule. In providing product at an industry trade show, as with other interactions between industry members and retailers, the registered vendor representative and other industry members must be aware of and comply with federal tied-house provisions. The federal regulations provide an exception in 27 CFR § 6.91 for furnishing or giving samples to retailers who have not purchased the brand within the last 12 months.

COMMENT #8: Mr. Iverson commented that the MTA agrees with the creation of a trade show case and its cost and approach of procurement for industry trade shows.

RESPONSE #8: The department thanks the MTA for its comment.

COMMENT #9: Ms. Blazer comments in New Rule I(5) that the word "manufacturer" is incorrect; and she states it should be "vendor" or "distributor."

RESPONSE #9: Based on the comments received, the department has amended New Rule I(5) to clarify this section applies to beer and table wine manufacturers and their employees and agents.

COMMENT #10: Mr. Iverson commented to New Rule I(7) that the MTA agrees and is in support of the provision reiterating that ultimate responsibility lies with the licensee.

RESPONSE #10: The department thanks the MTA for its comment.

COMMENT #11: Ms. Blazer comments on the department's language in its statement of reasonable necessity about a DOR goal to limit trade shows to prevent overuse. She thinks this is a poor choice of wording for justification of the rule.

RESPONSE #11: The department thanks Ms. Blazer for the comment but disagrees that it should not be a department goal to prevent overuse of industry trade shows or that the department's wording in its statement of reasonable necessity is incorrect.

In its statement of reasonable necessity for New Rule I, the department justifies proposing certain limitations on industry trade show events because industry trade shows are not currently provided in either statute or administrative rule and operating similar events in a fully-compliant manner has proven to be logistically difficult. The department wants to accommodate industry trade events but in a way that does not violate federal regulations or Montana law regarding vendor/manufacturer and retailer relationships, or catering.

The department directs Ms. Blazer to her oral hearing comment of general support summarized in Comment # 1, and further directs her to Comment ## 3, 6, and 7. These comments, and the department's responses and additional changes, support necessity for the rule's provisions. The department believes New Rule I, as amended, addresses only those areas of operating an industry trade show that could be subject to overuse or violate federal and state laws if these restrictions were not present.

COMMENT #12: The department received comments regarding the proposed amendment of ARM 42.12.106(8). Ms. Blazer commented that the words 'special event' should be stricken. Mr. Green comments that the language ". . . for which there is an outcome, conclusion, or result, and. . ." should be stricken as it is unnecessarily duplicative of (40). Mr. Lawlor comments that the language is incorrect. Events that have an outcome, etc. are sporting events. Similar to Mr. Green's comment, Mr. Lawlor recommends striking redundant language in (8).

RESPONSE #12: Based on the comments received, the department has amended the definition of catered event in ARM 42.12.106(8) to remove the redundant language.

COMMENT #13: Mr. Iverson and Ms. Blazer both commented that proposed ARM 42.12.128(3) which provides that a licensee shall prevent the consumption of alcoholic beverages that were not sold or provided at the catered event places an unrealistic and undue hardship on a licensee.

Mr. Iverson also commented that the department does not take into consideration that many towns do not have open container laws, which extends into the proposed (6), which the MTA infers is overreaching.

Mr. Iverson suggests a rule text edit to (3) to bring the intent of the rule into a realistic application.

RESPONSE #13: Based on the comments received, the department has amended ARM 42.12.128(3) to clarify that preventing the consumption of outside alcohol is only the licensee's responsibility within their own catered event service area.

COMMENT #14: Mr. Reely and Mr. Checota comment on proposed ARM 42.12.108(4) that it is common for licensees to cater multiple events at the same location and current requirements for alcoholic beverage storage are burdensome and costly - in the form of increased labor and transportation costs. Mr. Reely and Mr. Checota both propose similar amendments to proposed (4) that would permit a licensee the ability to securely store alcohol inventory at a frequented event location.

Mr. Iverson also questioned whether under (4) if licensees can store alcohol in their trailer, if secured, given the late hours and manual nature of inventory movement to and from catered events.

RESPONSE #14: Unlike a licensed premises, locations where catered events are conducted do not go through an investigation and approval process. Ensuring alcoholic beverages are properly stored and not accessible to unauthorized individuals is important for public safety and the department contends the extended storage of alcoholic beverages should remain prohibited. However, based on the comments received, the department has amended ARM 42.12.128(4) further to allow the storage of alcoholic beverages one day prior to the catered event starting through one day following the conclusion of the catered event. This additional storage time should reduce the burden on licensees that may have occurred the day the catered event would have started or would have ended.

COMMENT #15: Mr. Iverson commented on ARM 42.12.128(4) recommending replacing ". . . the licensee or licensee's employees" with ". . . those authorized" which is more consistent with the proposed expansion of proposed alcoholic beverages servers described in (8).

RESPONSE #15: Based on the comments received, the department has amended ARM 42.12.128(4) to clarify the storage of alcohol at the catered event shall only be accessible by the licensee or licensee's employees. Although the department has expanded the list of individuals who may serve alcoholic beverages at the catered event, access to stored alcoholic beverages remains with the licensee and licensee's employees as it is the licensee who is ultimately responsible for complying with all alcoholic beverage laws and regulations.

COMMENT #16: The department received the following comments to proposed ARM 42.12.128(6):

Mr. Green commented that barrier requirements create confusion with multiple licensees—for example, a barrier within a barrier or where local government has approved open containers for the event. Event barriers are not required by law, although there may be circumstances where local government requires it because of open container laws. In all other applications, this proposed requirement exceeds the department's authority and (6) should be removed in its entirety.

Mr. Lawlor commented that event barriers create an unnecessary, burdensome requirement that would even apply at an outdoor wedding on private property. Event barriers for large events with multiple licensees create logistical complications and encourage overdrinking because the public will feel required to stay within the perimeter versus mingling through the event grounds. This requirement is not based in law.

RESPONSE #16: Based on the comments received, the department has amended ARM 42.12.128(6) to clarify that if there is an existing boundary defining the catered service event area, no additional event barrier is required. This should ease the concern about events such as outdoor weddings on private property needing an additional barrier. The department has further amended the rule to clarify that the event barrier or other existing barrier defines the boundaries of the area in which a licensee's alcoholic beverages are sold and served by defining "catered event service area." Licensees are still required to prevent the consumption of alcoholic beverages they did not sell or serve within the licensee's catered event service area, and current law provides that it is the licensee who catered the event that is ultimately responsible for ensuring compliance with all alcoholic beverage laws and regulations, including any local ordinances restricting the consumption of alcoholic beverages.

COMMENT #17: Mr. Iverson and Mr. Green both commented positively on the department's proposed ARM 42.12.128(7). Mr. Green additionally commented that in contrast to (6), this application of an event barrier concept is appropriate as the licensee is temporarily expanding its service area beyond the licensed premises.

RESPONSE #17: The department thanks the MTA and Mr. Green for their comments.



COMMENT #18: Mr. Lawlor made multiple comments on the department's proposed ARM 42.12.128(7). The substance of the comments are that the provisions in (7)(a) and (7)(d) are another burden placed on local government and the licensee. As an example, the notification requirements in (7)(a) prevent event scheduling on short notice or rescheduling of a catered event. Finally, the proposed requirements not required under statute are unnecessary.

RESPONSE #18: Based on the comments received, the department has amended ARM 42.12.128(7)(a) to remove the advanced department notification for these types of catered events. Additionally, the department has amended (7)(d) to only require a licensee obtain local law enforcement approval when the licensee does not already have possessory interest in the catered event area, the licensee does not already have conditional use approval for the catered event area, or there is an ordinance prohibiting open containers of alcoholic beverages.

COMMENT #19: Mr. Iverson and Mr. Green both commented positively on the department's proposed ARM 42.12.128(8).

RESPONSE #19: The department thanks the MTA and Mr. Green for their comments.

COMMENT #20: The department received the following comments to proposed ARM 42.12.128(9):

Mr. Iverson and Ms. Blazer commented that electronic notification is undue hardship on licensees. Mr. Iverson commented that this proposed requirement impacts rural licensees who cannot file electronically and that the value of this regulation is not worth the burden.

Mr. Iverson also commented that the MTA does not agree with the signed notification of local law enforcement and providing a copy of the signed contract between the licensee and its customer.

Mr. Green comments that he has concerns over notification; whether DOR is looking to adopt and incorporate the catering reporting form by reference. He questions the department's authority because the proposed rule seeks to add substantive requirements that are not included in the governing statutes and they create substantial practical and compliance challenges for event sponsors and licensees.

Mr. Green also comments about the legal basis for catering form and even reporting catering to the department. Mr. Green requests citation for legal authority for imposing these requirements. Mr. Green contends that requiring licensees to file copies of their event contracts violates the rights of event sponsors as the document submission will improperly convert private contracts into public documents. Mr. Green suggests removal of proposed (9).

Mr. Lawlor comments that proposed ARM 42.12.128(9) is another burden placed on local government and the licensee. It is not required under statute and is unnecessary. DOR already has authority to request and inspect supporting documentation for a licensee's monthly catering report. The requested information for every caterer's catered event will be burdensome for the licensee and for the department to review, process, and store in its files.

RESPONSE #20: Based on the comments received, the department has amended ARM 42.12.128(9) to remove the requirement that a licensee submit a copy of each written catering agreement. Rather, the department will require the licensee to maintain these agreements for a period of three years and make them available to the department as they are requested.

Regarding the electronic submittal of the catering report and notification form, the department adopts this requirement as originally proposed. Avenues exist for licensees to use electronic platforms for doing business. The department's electronic platform is safe, secure, and already being used by many licensees.

Regarding the authority of the department to require the reporting of catering events on a department form, the department has general rulemaking authority, as provided for in 16-1-303, MCA, to efficiently administer the Montana Alcoholic Beverage Code. This authority includes ". . . prescribing forms to be used for the purpose of this [C]ode or the [department's] rules and the terms and conditions for permits and licenses issued and granted under the code." 16-1-303, MCA. Requiring the use of a form provided by the department is a uniform means for the department to receive the catering information needed to comply with the Montana Alcoholic Beverage Code and department rule. The department declines to amend the rule to remove the requirement that licensees report catered events to the department on a department form.

Regarding the local law enforcement signed notification form, both 16-4-111 and 16-4-204, MCA, require the licensee to notify local law enforcement of the catered event. To confirm this statutory requirement was completed, the form provides for an authorized representative of the local law enforcement agency to verify in writing that the local law enforcement agency was notified of the catered event. The department declines to amend the rule to remove the requirement that licensees notify local law enforcement where the catered event will be held using a form provided by the department.

COMMENT #21: Mr. Iverson made comments regarding the general state of catering, as viewed by the MTA, regarding burdensome regulation and increased costs of doing business that lead to fewer caterers. Mr. Iverson commented that the Montana Gambling Industry Association concurs in the substance of the MTA's comments.

RESPONSE #21: The department understands the importance of a catering endorsement to a licensee and does not want to place burdensome regulations on

licensees. However, some regulations are necessary and important to ensure public safety. The department has amended ARM 42.12.128, where warranted, when specific comments were provided.

COMMENT #22: Mr. Checota commented that the department should change its catering rules to allow catering up to a distance of 250 miles from the licensee's licensed premises, or even permit catering statewide.

RESPONSE #22: The department thanks Mr. Checota for his comment, however, a licensee's 100-mile catering restriction is in statute - 16-4-204(11)(c), MCA. Amending the distance restriction is outside the rulemaking authority of the department and requires enactment of legislation by the Montana Legislature.

/s/ Todd Olson  
Todd Olson  
Rule Reviewer

/s/ Gene Walborn  
Gene Walborn  
Director of Revenue

Certified to the Secretary of State July 30, 2019.