

MESSAGE FROM GENERAL COUNSEL

To: Pennsylvania Distillers Guild – Leadership and Member Distilleries

From: Anthony M. Brichta, Esq., General Counsel

Date: July 22, 2024

Re: SB 688 (“Ready to Drink” beverage reform)(signed into law July 17, 2024)
HB 829 (Omnibus amendments to the Liquor Code)(signed into law July 15, 2024)

This message summarizes two (2) recent bills that have been signed into law that directly affect Pennsylvania Distilleries and Limited Distilleries. The Pennsylvania Distiller’s Guild will be scheduling a legal call to address these bills, however, Guild Members with questions in the interim are free to contact us with any questions or concerns in the meantime (ambrichta@norris-law.com or 484-765-2256).

The two (2) bills passed are the highly controversial SB 688 dealing with Ready-To-Drink Cocktails (“RTDs”) and HB 829 which was the omnibus bill offering a variety of amendments to the Liquor Code. Our intent for the summary of those bills below is to answer any questions concerning this legislation and to clarify a lot of misinformation that is being published. This summary includes the new provisions and gives context with current laws.

Special note is made of the efforts of the efforts of Pennsylvania Distiller’s Guild leadership over the years to advocate for parity with respect to beverage promotion boards which has culminated in the Pennsylvania Distilled Spirits Industry Promotion Board with an annual grant budget of \$1 Million.

A. SB 688 Summary (“Ready to Drink” Beverage Reform)(effective September 15)

1. **The RTD.** For the purpose of the new distribution channels discussed below, RTDs are distilled spirits (not wine) mixtures packaged in original containers not exceeding 16 oz. and 12.5% ABV. This means that RTDs cannot be mixed on site by retail accounts and must be sealed in a 16 oz. or less container. Any other spirit based ready-to-drink cocktails exceeding a 16 oz. package can only be sold by the PLCB State Stores, direct to consumers by a PA Distillery, or direct to a restaurant or hotel licensee by a PA Distillery for on premise consumption. Any items which meet the definition of RTD will now be able to be sold to go by restaurant and hotel licensees in addition to distributors (“Ds”) and importing distributors (“IDs”) that have retail outlets for off-premises consumption. RTDs “to-go”

cannot be adulterated which means, among other things, they cannot be poured into slushy machines and be resold.

2. **New Channels of Distribution.** RTDs are now allowed to be distributed in new channels for off-premises consumption to consumers only by hotels, restaurants, Ds and IDs with retail stores. These retailers must obtain RTD permits like the Wine Expanded Permit (“WEP”) and will allow restaurants and hotels to sell up to 192 oz. in a single transaction and Ds and IDs are allowed to sell unlimited quantities. For restaurants and hotels, RTD sales may be bundled with wine and malt beverage purchases, i.e., up to 192 oz. of RTD, 4 bottles of wine, 192 oz. of beer.
3. **Ds and IDs cannot resell RTDs to other licensed retailers.** Ds and IDs are strictly limited in selling RTDs only to non-licensees, i.e., consumers. This means that the only reason an RTD can appear on a D or ID truck is if the D or ID is picking up the RTD from the State Store for resale at its own store or it is delivering to a consumer’s home.
4. **PA Distillers Selling Direct.** Pennsylvania limited distilleries and regular distilleries who were licensed (either as a limited distillery or distillery) by July 1, 2024, can sell directly to RTD permit holders and avoid passing the sale through the State Store system. However, the State Store can opt to carry the Pennsylvania distillery’s product and sell it which will then price restrict the PA distillery. In fact, the law provides that a PA Distiller “must, upon request, offer to sell to the Board” any RTD made by the distiller.

NOTE: Given how new this law is, there is no clarity on how the PLCB intends to roll out this requirement. Likely, the PLCB will be monitoring data from distilleries (see below) and making direct requests to the distilleries to offer their products for sale to the Board based on what products are selling best.

If the State Store sells a Pennsylvania distillery’s product, the Pennsylvania distillery cannot sell that same product “at a price which is lower than that charged by the Board”. This means Pennsylvania distilleries which have a product sold by the State Store can only sell to retailers at a price sold by the Board and tax must be charged on the transaction to the retailer just like the State Store; however, the retailer must also charge sales tax but can recoup a credit for the sales tax already paid.

5. **Reporting Requirements for PA Distillers.** The carveout for PA Distillers to sell direct is an important feature for our members, however, we understand that legislators and the PLCB will be monitoring data as RTDs are sold to determine what impact is present in allowing PA Distillers to sell direct. To that end, the new law includes a reporting requirement that PA Distillers who sell to RTD Permit Holders must now file quarterly reports with the PLCB as to 1) the quantity of product sold to each permittee, 2) the purchase price, and 3) the name of brand of the product sold.

NOTE: Currently, the PLCB has not distributed forms or otherwise provided how distilleries will be required to report their sales to RTD Permit Holders. We anticipate that it may be several months until such process is clarified and will communicate any further updates. In the meantime, we strongly encourage distilleries to keep records of their sales to RTD Permit Holders so that the records and data can be supplied to the PLCB when needed.

6. **Example on Pricing.** This new model will put a tremendous burden on RTD pricing unless manufactured by Pennsylvania distillers selling directly to retailers at prices which are not restricted by the State Store listing. Currently, a High Noon 12-pack is \$29.00 at the State Store. With the 10% discount, the price to wholesale will be approximately \$26.00. The total case price at wholesale will be approximately \$52.00. While some retailers may price it as a loss leader at low to no margins, a margin of 15% by the retailer will translate to a High Noon case cost of approximately \$60.00 plus sales tax. PA Distillers may choose to create product offerings that are distinct from what they sell through the state stores to maintain pricing flexibility, however, such products will always be subject to being sold by the PLCB.
7. **Delivery an Issue.** The State Store does not deliver, so retailers must pick up from a store or arrange for separate delivery. Retailers cannot pick up from PA distilleries and PA distilleries will need to directly deliver to retailers or arrange for transporter for hire deliveries.
8. All Pennsylvania licensees can continue to sell RTDs **for on-premises consumption only** without obtaining a Ready-To-Drink Cocktail permit. Similarly, Pennsylvania limited distilleries can continue to offer pre-mixed or hand-mixed cocktails at their premises which can be taken “to-go” by consumers without any additional permit or restriction provided such beverages are made with their own products.

9. **RTD Rules.** RTD rules follow WEP rules. Transaction scan devices must be utilized and records maintained. Restaurant and hotel licensees may sell RTDs to-go until 11:00 P.M. (9:00 P.M. on Sundays for D's and ID's). Like WEPs, in order to obtain an RTD permit, you have to be RAMP certified as a facility and, generally, RTD qualifications, storage, and sales are the same as WEP requirements.

10. **RTD Permit Costs.** The initial application fee for the first year is \$2,500.00 and the renewal fee is 2% of the cost of the RTD purchased by the licensee which is sold only for the off-premises consumption, i.e., you have to keep records for your sales for off-premises sales vs. your on-premises sales. Note the 2% renewal fee now includes purchases made directly from Pennsylvania manufacturers whereas WEPs do not.

11. **Private Label Products:** RTD holders cannot sell private label products.

12. **RTD Permit Holders List:** Once RTD Permits are active, the Guild should be able to obtain a list of RTD Permit Holders to distribute to Guild Members. Currently, the PLCB publishes a periodic list of Wine Expanded Permit Holders and a similar list of RTD Permit Holders may be published.

B. Pennsylvania HB 829 Summary (Omnibus Amendments to Liquor Code)(Effective September 15, 2024)

1. **Extended Sales Hours:** Pennsylvania distillers can now sell after midnight on New Year's Eve (Dec. 31 into Jan. 1) and one other night per year upon application. Sales can continue until 2:00 AM, and the fee for this additional night is \$50.00. New Year's Eve is automatic with no fee and notice to local police is required for any other permitted extension.

2. **Temporary Outdoor Permits:** Permits created during the COVID-19 pandemic are permanently extended, but distilleries and other licensees must renew these permits annually. This is for outdoor areas and includes areas within 100 feet of your main building **even if it crosses over a public thoroughfare.**

3. **Extended Happy Hours:** The number of happy hours per week has increased from 14 to 24. Please note distilleries are not really affected here as they are permitted wide latitude in discounting practices.

4. **The PA Malt and Brewed Beverages and Wine and Marketing Research Program Industry Promotion Board:** grants will now be decided by the Department of Agriculture.

5. **Event Ticket and Drink Combos.** Retailers can include up to two drinks in a ticket for an event as long as the event is scheduled 24 hours in advance. This becomes effectively three drinks since licensees can always give away one per person per day for free.

6. **Happy Hour Combinations:** Discounts may now include food and drink combination specials for no more than two combinations on any day.

7. **Interlocking Business Prohibition:** Modifications allow the owner of a retail license to work at a manufacturer such as a distillery. Also, an employee (but not a PLCB approved manager) can work for a retailer, a distributor, and a manufacturer.

8. **Nonalcoholic Beverage Display:** Clear signage is required when alcoholic and nonalcoholic beverages with similar branding are displayed adjacent to each other. Specifically, any class of licensee must ensure that any alcoholic beverage placed immediately adjacent to a nonalcoholic beverage with the same or similar brand name, logo, or packaging, must have clear and distinct signage identifying which products are alcoholic and which are nonalcoholic.

9. **Point-of-Sale Advertising:** Manufacturers or licensees can provide point-of-sale advertising to trade buyers, with specified limits.

10. **Quantity Discounts:** Ds and IDs can offer and advertise quantity discounts on malt or brewed beverages.

11. **Promotion and Marketing:** Establishment of the Pennsylvania Distilled Spirits Industry Promotion Board with a \$1 million annual budget. This will likely function similar to the promotion boards for wine and beer (Example: <https://www.agriculture.pa.gov/Food/ag-commodity-marketing-boards/Pages/PA-Malt-and-Brewed-Beverage-Industry-Promotion-Program.aspx>).

NOTE: The Guild intends to distribute more information about this program as it becomes available.

12. **Bulk Discounts:** Limited Wineries can now offer bulk discounts to consumers, and this is something breweries and distillers should pursue.

13. **Rental of Equipment:** Ds and IDs can now rent draft beer equipment.