

**STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL**

IN THE MATTER OF THE)	SPECIAL RULING
STATUTORY AMENDMENT TO TITLE)	AUTHORIZING CONSUMER
33 PURSUANT TO <u>P.L.</u> 2009, <u>c.</u> 216)	ALCOHOLIC TASTING EVENTS
(Consumer Alcoholic Beverage Tasting)	AND SAMPLINGS PURSUANT TO
Events and Samplings))	STATUTORY AMENDMENT

BY THE DIRECTOR:

New legislation pertaining to the conduct of consumer alcoholic beverage tasting events and samplings was approved on January 16, 2010 to take effect on May 1, 2010. See P.L. 2009, c. 216. The legislation amends previous statutory and regulatory sections which currently permit plenary retail consumption licensees and permittees to conduct consumer tasting events and samplings of wine, beer and spirits for a fee or on a complimentary basis and plenary retail distribution licensees (package goods stores) to conduct complimentary tasting events and samplings of wine, pursuant to the conditions established by the Division of Alcoholic Beverage Control (“Division”).

The most significant change mandated by the new legislation is that tasting events and samplings of beer and distilled spirits will now be allowed in retail distribution licensed premises. Prior to this, only wine could be sampled in these premises. In addition, the new legislation limits the size and amounts of samples which can be given in a 24 hour period in both consumption and distribution licensed premises. The new legislation also sets out definitions of tasting event, sampling and sample, discusses who can serve samples at tasting events and allows advertising of tasting events in any type of media. The legislation also eliminates previous distinctions in the treatment between consumption licensees and distribution licensees, such as the limitation on the number of samples allowed to be served.

In response, the Division will be amending N.J.A.C. 13:2-37.1 to reflect the changes to the conditions by which consumer alcoholic beverage tasting events and samplings may be held, as provided by P.L. 2009, c. 216. In the interim, the Division is providing the following guidelines to the regulated community to ensure compliance with the legislative changes:

1. Pursuant to P.L. 2009, c. 216, the definitions of tasting event and sampling will be treated as revised to conform to the changed definitions in the legislation. Thus, the definitions are as follows:

"Tasting event" means a scheduled event hosted by a licensee or permittee, at which samples may be provided, that may be open to the general public or limited by invitation.

"Sample" means a small amount of an alcoholic beverage.

"Sampling" means a licensee or permittee offering a sample to a consumer for the purpose of inducing or promoting a sale.

2. The legislation limits the size and amounts of samples which can be given in a 24 hour period in both consumption and distribution licensed premises. Specifically, in any one calendar day, servings of alcoholic beverages per person are limited to no more than four three-ounce samples of beer, no more than four one-and-one-half ounce samples of wine or no more than three one-half ounce samples of distilled spirits. Thus, both consumption and distribution licensees will be limited regarding the size and number of samples as follows:

In any one calendar day, servings of alcoholic beverages per person are limited to:

- i. No more than four three-ounce samples of a particular malt alcoholic beverage; or
- ii. No more than four one-and one-half ounce samples of wine; or
- iii. No more than three one-half ounce samples of distilled spirits.

Please note that based on the new legislation, this is a change for consumption licensees since previously there were no limits on the number of samples these licensees could serve.

3. To provide appropriate oversight for the tasting events permitted by the new legislation, a tasting event shall consist of only one category of samples at a time and there must be at least a two-hour interval between tasting events on any licensed premises. The categories for tasting events are: malt alcoholic beverages, wine, or distilled spirits. Specifically, the Division requires:

Tasting events shall be scheduled in advance no later than 12:00 noon of the business day prior to the tasting event and may be limited by invitation or open to the general public. A tasting event shall consist of only one category of samples at a time and there must be a two-hour interval between tasting events on any licensed premises. The categories for tasting events are: malt alcoholic beverages, wine, or distilled spirits.

4. The new legislation provides that, for both consumption and distribution licensees, tasting events may be advertised in any type of media, including but not limited to, print, radio, television, Internet and signs, and these advertisements may include the date, time and location of the event, such as the name and address of the licensed premises and other information regarding the event. Thus, the following will be permitted in conjunction with tasting events and samplings:

Tasting events may be advertised in any type of media, including but not limited to, print, radio, television, Internet and signs, and these advertisements may include the date, time and location of the event, such as the name and address of the licensed premises and other information regarding the event; and

A supplier, manufacturer, importer, wholesaler, solicitor or authorized representative licensed or permitted by the Division of Alcoholic Beverage Control may provide the licensee upon whose premises the tasting event will be held with permissible advertising and promotional materials for use at the event and permissible consumer novelties for distribution to consumers attending the event.

5. N.J.A.C. 13:2-37.1(c) 4, which originally limited the food which could be served on a retail distribution premises at a tasting event to cheese, crackers, chips and dip at a tasting event and only cheese and crackers at a sampling, will be relaxed to permit snack foods and hors d'oeuvres to be served at both tasting events and samplings, but only if the food is provided by the distribution licensee at no cost to consumers. This change will more effectively address the policy considerations of the food limitation (prevention of "happy hour" like events at a distribution premises), by stating the food prohibition in clearer and more general terms. Thus, a licensee shall be considered in compliance with the regulatory prohibition provided that:

Only snack foods or hors d'oeuvres may be served at a tasting event or sampling and all food served must be provided by the retail distribution licensee to consumers without charge.

6. Based on the provisions of the new legislation, solicitors and authorized industry members are permitted to participate in tasting events as follows:

Any supplier, manufacturer, importer, wholesaler, solicitor or an authorized representative licensed or permitted by the Division of Alcoholic Beverage Control may participate in, assist with, and promote consumer wine, beer, and spirits tasting events up to two times per month at a licensed premises, except that samples shall not be served by any employee of a wholesaler. A solicitor employed by a supplier, manufacturer or importer who holds a wholesale license or an authorized representative licensed or permitted by the Division of Alcoholic Beverage Control, with an annual special permit to participate in consumer tasting events may serve samples at a tasting event and provide educational commentary regarding the alcoholic beverages. The fee for the annual special permit for the supplier, manufacturer or wholesaler shall be \$200.00 and an additional \$200.00 permit for each solicitor or duly authorized representative. Ten days prior to participating in the event, the permittee shall file with the Division a consumer tasting request on a form prescribed by the Director describing the place, time and products to be featured at the event.

With regard to revision No. 6 above, the Division notes that the section in the new legislation upon which it is based P.L. 2009, c. 216, Section 3e, contains apparent ambiguities that require a regulatory interpretation. The section provides:

Any supplier, manufacturer, importer, wholesaler, solicitor, or an authorized representative licensed or permitted by the Division may participate in, assist with, and promote consumer wine, beer, and spirits tasting events up to two times per month at the licensed premises, but samples shall not be served by any employee of a wholesaler. A solicitor employed by a supplier, manufacturer or importer who holds a wholesale license, or an authorized representative licensed or permitted by the Division, may serve samples at a tasting event;

At issue is the apparent contradiction posed by the prohibition contained in the first sentence that "... samples shall not be served by any employee of a wholesaler", with the second sentence which allows samples to be served by a solicitor employed by a supplier, manufacturer or importer who holds a wholesale license, or an authorized representative licensed or permitted by the Division ...” The legislative record does not provide guidance to resolve this issue.

Initially, the Division analysis focuses on the phrase "... supplier, manufacturer or importer who holds a wholesale license.” The terms supplier and importer are not defined under State statute nor does the Division issue “supplier” or “importer” licenses. Under Federal regulations, “importer” refers to a person licensed under 27 C.F.R. Subpart C, sec.1.20 that engages in the business of importing alcoholic beverages into the United States. “Supplier” in the New Jersey alcoholic beverage industry is understood to refer a person who sells product to a New Jersey wholesale licensee for distribution to retailers. Unless such entities have a physical presence in New Jersey or have sales of alcohol that take place in New Jersey, they are not required to obtain a New Jersey wholesale license. Likewise, a New Jersey manufacturing licensee is not required to obtain a wholesale license as it already has the ability to wholesale its own products to other wholesalers and retailers. It is therefore apparent that the legislative authorization to pour samples on a retail premises extends only to those entities whose principal business does not primarily involve wholesaling alcoholic beverage products to retailers.

In the Division’s experience, such entities may typically obtain a wholesale license to meet the statutory requirements to engage solicitors to market their products to retailers, while the actual retail order for the product is taken and fulfilled by a New Jersey wholesaler whose principal business is sale and delivery of product to retailers. In order to give meaning to the entirety of the language, the statutory provision can reasonably be interpreted to create a distinction between New Jersey wholesalers whose principal business is wholesale sales to retailers (who cannot pour samples) and New Jersey wholesale licensees whose principal business is as a supplier, manufacturer or importer (who may pour samples).

Therefore, pending adoption of regulations, qualified solicitors, as permitted by Division regulations, employed by a New Jersey wholesale licensee whose principal business is sale and delivery of alcoholic beverage products to retail licensees shall be authorized to participate in,

assist with, and promote consumer wine, beer and spirits tasting events up to two times per month at a retail licensed premises. Qualified solicitors, as permitted by Division regulations, employed by a wholesale licensee whose principal business is importation or supply of alcohol to entities other than retailers, and manufacture of alcoholic beverage products, shall in addition be authorized to pour samples at tasting events in addition to the privileges noted above. Additionally a representative authorized under a "supplier permit" issued by the Division shall be permitted to pour samples at a tasting event pursuant to the terms of such permit.

A question has been raised regarding whether third party marketing companies qualify within the authorized personnel noted above. The plain language of P.L. 2009, c. 216, Section 3e shows that the legislation only authorizes "any supplier, manufacturer, importer, wholesaler, solicitor, or an authorized representative licensed or permitted by the Division" to perform these functions. In the absence of further review and availability of legislative history, this ruling is prepared to implement only the obvious plain language of the statute. It appears that the term "licensed and permitted" refers to individuals that have either a license or a permit to perform work in the alcoholic beverage industry. Consequently, at this time, this section has not been interpreted by the Division to include third party marketing companies, who do not have a license or permit issued by the Division.

Given the language of the statutory provision, the Division welcomes comment from the regulated industry during the period prior to promulgation of implementing regulations.

The Division's proposed amendment to the tasting event and sampling regulation, N.J.A.C. 13:2-37.1, based on the new legislation contained in P.L. 2009, c. 216, is currently being prepared for publication in the New Jersey Register. In recognition of this pending regulatory proposal, and in light of the May 1, 2010 effective date of the new legislation, pursuant to N.J.S.A. 33:1-39, I am allowing New Jersey licensed alcoholic beverage retailers, wholesalers, and suppliers, until adoption of the amendment, to conduct consumer alcoholic beverage tasting events and samplings consistent with the statutory provisions and as described in this Special Ruling.

Accordingly, it is on this ~~30th~~ day of April, 2010,

ORDERED that, until adoption of the proposed amendments to N.J.A.C. 13:2-37.1, reflecting the changed statutory language contained in P.L. 2009, c. 216, New Jersey licensed retailers, wholesalers and suppliers who wish to conduct consumer alcoholic beverage tasting events or samplings shall comply with the statutory changes in the tasting event and sampling law as discussed in this Special Ruling.



JERRY FISCHER
DIRECTOR