



TITLE 4. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL PROPOSED REGULATIONS: RESPONSIBLE BEVERAGE SERVER TRAINING PROGRAM

September 20, 2019

By Certified Mail and email

Responsible Beverage Service Training Program
Department of Alcoholic Beverage Control
3927 Lennane Drive, Suite 100
Sacramento, CA 95834

Re: Comments of Hinman & Carmichael LLP

We support the goals of the Responsible Beverage Service Training Act of 2017 (“the Act”) and the significant efforts of the Department of Alcoholic Beverage Control (“Department” or “ABC”) to adopt regulations to implement the Act.

The Act affects millions of Californians employed in the alcoholic beverage industry. The implementing regulations are some of the most significant the Department has ever proposed. They must be carefully developed according to the goals of the Act. Other important considerations include privacy of licensee employee information, enforcement considerations, any unintended consequences of adopting regulatory definitions that affect other parts of the ABC Act, and the constantly changing science surrounding the consumption of alcohol.

Our recommendations are: (1) the proposed implementing rules should be shortened, (2) the paperwork burden should be on the private instructional programs to protect employee privacy, and (3) the curriculum-related regulations should be simplified so that they do not make passing the exam unnecessarily difficult or prevent course content from being quickly updated with the most modern data about alcohol consumption (which also would have unintended side effects on other statutes, such as Section 25660).

Request for Extension of Comment Period and Public Hearing

We have reviewed the draft of the proposed regulations (new Rules 160 to 173, encompassing 23 pages of single-spaced regulations) and consulted with our colleagues and clients affected by the proposed new rules. The regulations are detailed and extensive. They affect the daily business practices of licensees big and small, and they will have a significant financial impact. The California Administrative Practice Act¹ mandates public participation and Comment in the rule making process, but the deadline for Comments (within 45 days of a proposal released on August 9th during the summer

¹ Government Code §§ 11340, *et seq.*

vacation season) does not allow all affected parties sufficient time to review the 23 pages of proposed regulations and present informed Comments. The period is simply too short.

Therefore, we respectfully request an extension of the comment period for the proposed regulations and a public hearing on this major new regulation². An extension of the comment period would allow affected parties the time necessary to carefully review the proposed regulations, consider the impact of the regulations on their business and submit thoughtful and informed Comments.

Summary of Serious Questions

- The proposed regulations contain many detailed course curriculum requirements that reach far beyond the scope and intent of the Act.
- Both the State Administrative Manual (“SAM”) and relevant case law place limits on the Department regarding the scope of the regulations it may adopt to implement a statute.
- Some of the proposed regulations are not reasonably necessary to effectuate the purpose and intent of the Act, and they place an unfair burden on the millions of servers and businesses who must comply.
- In adopting these Proposed Regulations, the SAM limits the Department’s authority to “reasonable compliance” which the SAM explains is the “prudent person test”.³
- The SAM dictates that The Department evaluate each instance separately and determine what “reasonable compliance” would be given the intent of the Act and the estimate developed must clearly indicate the mode or level of activity it has assumed would achieve such compliance.⁴
- The Department must provide more facts and evidence to support the cost and need for many of the proposed regulations.
- The Department should expand its Statement of Reasons to provide the rationale it used and the process by which it conducted the cost-benefit analysis.
- The SAM requires the Department to consider alternatives and describe the reason for adopting or rejecting each alternative. The Department’s Final Statement of Reasons addresses two alternatives regarding the final exam only. It also should address alternatives for the proposed regulations concerning the course curriculum.

² A “major regulation” is one that will have an economic impact on California businesses and individuals in an amount exceeding \$50 million. 1CCR 2000(g).

³ SAM § 6200 explains the “prudent person test”: “For example, if an agency is required by regulation to provide transportation for certain persons, it clearly would not be appropriate to purchase limousine-type luxury automobiles to do so. On the other hand, it would not be appropriate to provide the service by purchasing tandem bicycles. Reasonable compliance can be achieved with some mode of transportation between the two extremes cited.”

⁴ SAM § 6200.

- The Department's Release of Proposed Regulations contains an extensive list of the "topics" and "subtopics" to be included in the curriculum. The "subtopics" raise questions about the extent of knowledge a server must have to pass the certification test required before he/she may be employed.
- The proposed regulations as now drafted are simply much too onerous. Compliance would impose an undue, and unnecessary, burden on the servers and businesses in the state.

I. GOVERNMENT CODE SECTION 11346.3 REQUIRES GREATER CONSIDERATION OF LESSENING THE ECONOMIC IMPACT ON BUSINESSES

Procedures and rules governing the Department's adoption of the proposed regulations are set by the California Administrative Procedure Act, California Government Code sections 11342.2 and 11346.3(c)(1), and related case law. Government Code section 11346.3(c)(1)(a) states:

(a) A state agency proposing to adopt, amend, or repeal any administrative regulation shall **assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements.** For purposes of this subdivision, assessing the potential for adverse economic impact shall require agencies, when proposing to adopt, amend, or repeal a regulation, to adhere to the following requirements, to the extent that these requirements do not conflict with other state or federal laws:

(1) The proposed adoption, amendment, or repeal of a regulation shall be based on adequate information concerning the need for, and consequences of, proposed governmental action.

(2) The state agency, prior to submitting a proposal to adopt, amend, or repeal a regulation to the office, shall consider the proposal's impact on business, with consideration of industries affected including the ability of California businesses to compete with businesses in other states. For purposes of evaluating the impact on the ability of California businesses to compete with businesses in other states, an agency shall consider, but not be limited to, information supplied by interested parties.

(3) An economic impact assessment prepared pursuant to this subdivision for a proposed regulation that is not a major regulation or that is a major regulation proposed prior to November 1, 2013, shall be prepared in accordance with subdivision (b), and shall be included in the initial statement of reasons as required by Section 11346.2. An economic assessment prepared pursuant to this subdivision for a major regulation proposed on or after November 1, 2013, shall be prepared in accordance with subdivision (c), and shall be included in the initial statement of reasons as required by Section 11346.2. (emphasis added)

The California Supreme Court explained the obligations under Government Code section 11346.3:

“Furthermore, “[t]he proposed adoption, amendment, or repeal of a regulation shall be based on adequate information **concerning the need for, and consequences of, proposed governmental action.**” (*Id.*, § 11346.3, subd. (a)(1).) ... “[T]he agency **must provide in the record any ‘facts, evidence, documents, testimony, or other evidence’ upon which it relies for its initial determination.** (Gov. Code, §§ 11346.5, subd. (a)(8), 11347.3, subd. (b)(4).) ... **These provisions plainly call for an evaluation based on facts.**” (*Maxwell–Jolly*, at p. 306, 131 Cal.Rptr.3d 692”.

Western States Petroleum Assn. v. Board of Equalization, 57 Cal.4th 401, 427-428 (2013) (emphasis added).

Our concern is that the Department’s Notice and Initial Assessment does not explain what facts and evidence upon which the Department relied in developing this major regulation and that much of the detail in the proposed regulation might be based more on “belief” that the regulations are reasonable and necessary rather than on facts or evidence that each detail in the regulation is necessary.

The Court’s decision in *Western* quoted from *California Assn. of Medical Products Suppliers v. Maxwell–Jolly* (2011) 199 Cal.App.4th 286 discussing what the APA required in developing the economic impact assessment. Quoting from that case, the Court in *Western* noted:

“[M]ere speculative belief is not sufficient to support an agency declaration of its initial determination about economic impact.” (*Id.* at pp. 305–306, 131 Cal.Rptr.3d 692.) ... Rather, “the agency must provide in the record any ‘facts, evidence, documents, testimony, or other evidence’ upon which it relies for its initial determination. (Gov. Code, §§ 11346.5, subd. (a)(8), 11347.3, subd. (b)(4).) *Western*, at 428.

The Department’s initial determination about economic impact fails to sufficiently provide facts or evidence to support its determination of the economic impact of this major regulation or the “reasonable necessity” for the content of the regulation. An extension of time for Comments and a public hearing could correct these omissions and develop a solid record supporting the new regulation.

A. The ABC did not provide enough evidence to support its estimates of costs and benefits of the proposed regulations

Government Code section 11346.3 contains the requirement that the Department carefully conduct an economic impact assessment of the Proposed Regulations and particularly its effect on small businesses. Most businesses affected by these regulations are small businesses and the Department’s Final Statement of Reasons fails to adequately include sufficient evidence describing the methods, procedures, and alternatives considered in determining the economic costs and benefits. The economic costs and benefits have a significant impact in determining whether the Proposed Regulations are “reasonably necessary.”

The Appellate Court recently addressed the role of the economic assessment:

“Once the initial [economic] assessment is complete, ‘affected parties may comment on the agency’s initial determination and supply additional information relevant to the issue.’ (*Ibid.*) **The agency ‘must respond to the public comments and either change its proposal in response to the comments or explain why it has not.’** (*Ibid.*) *John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.*, 20 Cal.App.5th 77, 112 (2018) (emphasis added).

The Department merely submitted the Department of Finance pre-printed form “Economic and Fiscal Impact Statement” containing minimum information. Although the ABC’s Final Statement of Reasons fills in some of the information, even the Final Statement of Reasons provides no substantial information or evidence to support the ABC’s Initial Assessment of the costs and benefits from the Proposed Regulations.

What is worrisome is the estimated cost for each small business is \$2,121.40 for the first year and \$1,060.70 for ongoing annual costs (years 2022-2024). This is a very large and significant new expense for a small business. Similarly, for a “typical business” the initial cost the first year is \$10,607 and annual ongoing costs \$5,303.50 (years 2022-2024). The ABC needs to explain how it arrived at these costs, what is included, and what less expensive alternatives the ABC considered and why it rejected them.

Further, with no detail supporting the statement, the ABC estimates total statewide benefits of the regulation over its lifetime to be \$3.5 Billion by reducing the cost for overuse of alcohol on the California economy which is \$35 Billion/year. The ABC claims the cost benefit of \$3.5 Billion will result from the regulations package reducing the costs of overuse of alcohol by 10% by the year 2024.

The Department then states: “The Department of Finance (DOF) stated that it ‘generally concurs with the methodology used to estimate the annual economic impacts under the proposed regulations’.” (Notice of Proposed Rulemaking August 9, 2019 -(emphasis added)

What the public needs to see is how the Department actually calculated the costs and benefits in order to have full public participation in the adoption of a major regulation. The public needs to see what each alternative to the course curriculum the ABC considered and why it was accepted or rejected.

II. THE PROPOSED REGULATIONS MUST BE CONSISTENT WITH THE PURPOSE OF THE ACT

The concern we raise in these Comments is that the regulations go into far more detail than is “reasonably necessary” to achieve the purpose of the Act and therefore, are not fully consistent with the purpose of the Act. We submit that the Proposed Regulations, if not revised, cannot withstand legal scrutiny.

A. Some proposed regulations exceed the purpose of the Act

The Court in *GMRI, Inc. v. California Dept. of Tax & Fee Administration*, 21 Cal.App.5th 111 (2018) clarified the role of a regulation meant to implement a statute:

“A ministerial officer may not ... under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute.’ [Citation.] And, a regulation which impairs the scope of a statute must be declared void.” [Citations.]” *GMRI* 21 Cal.App.5th at 123-124.

The purpose of the Act was described in the Analysis of the Assembly Government Organization Committee dated April 19, 2017:

“The Purpose: The author states this bill “seeks to help individuals who serve alcohol to meet their statutory requirement to not serve obviously intoxicated patrons and minors by requiring participation in a mandatory RBS training course... The author contends this bill “will ensure that all servers learn the necessary skills to protect the patron, public, server and business. We know drunk driving ruins lives and kills too many innocent people. That is why we need to make sure those on the front line are equipped to help.”

The key focus of the Act is to develop regulations to train servers to prevent sales to minors and to observe intoxication to prevent sales to intoxicated persons to prevent drunk driving.

We are concerned that many proposed regulations specify a level of curriculum detail that far exceeds the scope and intent of the Act and could seriously disrupt the entire hospitality industry serving alcoholic beverages.

The Proposed Regulations correctly require every server to take a training course and pass the exam before they may qualify to serve alcohol. However, the regulations are so extensive and contain many unnecessary provisions that will make passing the exam more difficult than necessary. Further, if a server doesn’t pass the exam, he/she may not work as a server. This is a serious consequence and will affect millions of jobs in California involving every business that provides some form of alcohol service.

Further, some proposed regulations mandate methodologies and scientific information subject to reasonable dispute. Some of the scientific information is likely to change over time as the science of alcohol consumption evolves, but the status quo regulations would prevent trainers from updating the curriculum over time.

B. The Subtopics in the ABC’s Draft Copy of the Proposed Regulations Should be Designed to Create Effective Servers, Not Scientific Experts on Medical Science

One problem with the proposed regulations as currently drafted is that although a server must have basic information regarding observing intoxication, the ABC’s proposed course curriculum is entirely too onerous for most servers to pass. For example, proposed §163 alone requires the student to learn more than an average high school curriculum would cover. And, in reviewing the “subtopics” that the ABC listed in its Proposed RBS Curriculum, the content of the proposed curriculum reaches far beyond the intent of the legislature to simply inform beverage servers of the symptoms and signs of intoxication in order to decrease drunk driving.

The draft of proposed regulations containing the “subtopics” provides additional insight into the detail the Department proposes to include in the curriculum. The proposed regulations add an explanation to each “primary topic” by including “sub-topics”. For example the section entitled “Physiology of alcohol on the human body” includes such subtopics as: what percentage of alcohol is absorbed through stomach lining, what percentage passes through the small intestine, discusses the Pyloric valve, percentage of alcohol that leaves the body through urine, sweat glands, and breathing, how alcohol is metabolized through the liver, and the symptoms and characteristics of a person at various Blood Alcohol levels.

The Department cannot expect to make each server an expert nor is it a reasonable expectation that every server could pass an exam on this section alone as drafted. This is a critical issue because no one can be employed as a server unless he/she passes the exam and is certified.⁵ These burdens will be magnified for servers and licensees with language barriers.

The purpose of the statute is not to create experts; rather, it is to create training programs covering the basics in such a fashion that a person of ordinary intelligence can recognize the common signs, and consequences, of intoxication.

The legislature has clearly defined the problem it intended to address in passing this Act: preventing sales to minors and intoxicated persons to reduce drunk driving. The legislature also clearly presented its solution in the Act: the server should be trained in five basic subjects⁶ to learn methods on how to avoid sales to minors and intoxicated persons in an effort to reduce drunk driving. Training in these five subjects is not immutable and should all be part of well-designed commercial training programs that can be adapted as new information may be developed.

The role of the Department is simply to implement the Act as written. The Department may not “enlarge” the Act through excessive regulation and detailed definitions. The Proposed Regulations, however, do “enlarge” the scope of the Act in many of the regulatory sections. The legislature did not state every beverage server must become expert on the detail about how alcohol is absorbed in the body or the role of different organs in metabolizing alcohol. The Act merely requires the training to inform servers of the signs of intoxication and how to handle refusing to serve patrons if they appear intoxicated to reduce drunk driving.

The regulations must be simplified to implement the purpose of the Act as defined by the legislature. The purpose of the Act may be achieved in a far simpler fashion by adopting a regulation citing the statute and mandating that each service provider conducting a training program certify, subject to Department approval and examination of the curriculum, that its training program meets the requirements of the statute.

⁵ Business & Professions Code § 25683.

⁶ Business & Professions Code 25680: (1) Social impact of alcohol, (2) Impact of alcohol on the body, (3) State laws and regulations related to driving under the influence, (4) Intervention techniques to prevent the service of state of alcohol to underage or intoxicated patrons, (5) Instruction on the development of management policies supporting the prevention of service or sale of alcohol to underage or intoxicated patrons.

III. THE PROPOSED REGULATIONS MUST BE “REASONABLY NECESSARY”

Government Code § 11342.2 addresses the validity of regulations and the requirement that the regulations are “reasonably necessary” to implement the authorizing statute:

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and **reasonably necessary to effectuate the purpose of the statute** (emphasis added).

The California Supreme Court explained in *Western States Petroleum Assoc. v. Board of Equalization*, 57 Cal.4th 401 (2013):

“When a regulation is challenged on the ground that it is not “reasonably necessary to effectuate the purpose of the statute,” our inquiry is confined to whether the rule is arbitrary, capricious, or without rational basis [citations omitted] **and whether substantial evidence supports the agency’s determination that the rule is reasonably necessary** (Gov.Code, § 11350, subd. (b)(1). *Western* 57 Cal. 4th at 415 (Emphasis added).

“... **The APA was born out of the Legislature’s perception there existed too many regulations imposing greater than necessary burdens on the state and particularly upon small businesses.** [citation omitted] *Western* 57 Cal. 4th at 425 (emphasis added).

Comparing the rigors of the proposed curriculum and exam for beverage servers as described above with, for example, the Department of Motor Vehicles written driving exam, the prospects of the average beverage server passing are dim. Several reports on the pass rate for the DMV written test suggest that between 44 and 55% fail the first time.⁷ Driving is important and passing the driver’s written exam is an important part of obtaining a driver’s license. However, passing the beverage servers exam is critical to each person’s employment and livelihood.

The amount of detail in the proposed regulation is wholly unnecessary to achieve the goal of having servers trained to avoid serving minors and intoxicated persons and it places an undue burden on the servers to learn such complicated physiology, statistics and regulations unrelated to addressing the problem of drunk driving. Servers are not studying to become experts, they are just being trained to serve alcohol with the legislature’s goal of helping to prevent drunk driving.

The detailed curriculum proposed by the Department in the regulations simply is not reasonably necessary to achieve the Act’s purpose of reducing overconsumption of alcohol and drunk-driving. The sections in the proposed regulations need to be carefully reviewed and pared down to the statutory

⁷ For example, CBS news reported a survey in 2013 showing 44% failed the written test and a 2015 study reflected a 55% fail rate for the written drivers test. The California DMV released a survey showing that 64% of English speaking and 75% of Spanish speaking persons failed the written test. (Source LA Times, 2-25-1999)

requirements (especially given the “subtopics” suggested in the Draft) and simplified based on the legal standard of “reasonably necessary” to implement the statute.

IV. THE PROPOSED REGULATIONS RAISE ISSUES REGARDING EMPLOYEE PRIVACY RIGHTS AND INCREASE COSTS TO BUSINESSES

A. Server/Employees Have Broad Federal & State Privacy Rights

California Constitution Article 1, section 1 sets forth the basic right of all Californians to privacy:

“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

Scores of court cases uphold the right to privacy and the right of employees to an expectation of privacy regarding their personal information. ABC’s proposed internet site which will keep every server’s certification records and personal information on file seems to be an overreach increasing the chances that every server’s private information could be compromised.

Under the Proposed Regulations, to apply to take the server’s exam, the individual must provide the Department with his/her (1) legal name, (2) birthdate, (3) email, (4) zip code of current address, and (5) personal identification information (driver’s license, social security number, or similar employment identification number). The ABC states that approximately 1 million employees must be certified statewide. It is highly likely in this day of cyber security attacks, that some, or all, of these employees’ private information could be at risk.

The constitutional question in determining when a request for an individual’s private data is acceptable or invades that person’s right to privacy is if there is a compelling state need compared to the public interest in maintaining an individual’s right to privacy.⁸

Business & Professions Code section 25681 only requires each certified Training Provider to maintain a record of each server certification it issues. Section 25681 does not authorize the Department to develop an extensive internet site to maintain certification data on every server that has passed a certified training program anywhere in the state. This idea was developed by the ABC *sua sponte*. And, as noted above, the ABC intends to keep a large amount of personal identification information for each server on its new internet site.

Beverage servers desiring to be employed correctly expect privacy regarding their confidential personal information. It is the employer who should maintain the server’s certification record as part of the employee’s record and produce the certification if requested for a state investigation.

Businesses have developed their own employee recordkeeping systems. Including a copy of the server certification and presenting it to a state agent upon request is not an undue cost or burden on the business. Certainly not over \$1,000 annually. Nearly all regulatory schemes require the business to keep records and present them to a federal or state regulator on demand. This should

⁸ See, e.g., the discussion of compelling interest versus privacy rights in *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 5 and 22 (1994)

likewise be the standard for the RBS.

Department documents provided do not provide substantive facts to support its desire to not only create a massive internet filing system, but to also require each server to provide personal information for which each expects privacy. Employers are well versed in protecting employees' confidential personal information and this is how the recordkeeping should be accomplished. Requiring over a million employees to submit confidential personal information to a large internet site that could be vulnerable to hacking (as is every internet site in today's world) is irresponsible if there is a more secure method of accomplishing the same purpose.

The significant costs incurred by developing such a massive internet filing site could be saved for enforcement activities, including ABC agents inspecting businesses serving alcoholic beverages for compliance with the Responsible Beverage Server Training Program.

The ABC should advise the public what alternatives it had considered and why developing a massive internet filing site was chosen over other alternatives considered.

V. CONCLUSION – MORE PEOPLE NEED TO BE HEARD FROM AND THE PROPOSED REGULATIONS MUST BE SHORTENED AND MADE MORE LICENSEE-FRIENDLY

The ABC should be congratulated for its hard work in developing the first draft of these required regulations. However, under the Administrative Practice Act and the SAM, public participation is critical to this process to develop these major Regulations. For the reasons stated above, and to allow full public participation, we respectfully request the ABC grant an extension of time to allow all affected parties the opportunity to fully review the Proposed Regulations and submit Comments.

This project is a major positive step forward in encouraging training of alcohol servers in California. This will affect not only every restaurant, night club, hotel, tourist park, stadium and business in the state that offers hospitality but every winery, brewery and distillery with a tasting room, and every event held in this state in any location that in any way involves the service of alcohol.

The implementing rules must be considerably shortened, the paperwork burden put on the training providers and licensees rather than on the state and the instructional program left to private industry (subject to the reasonable approval of the Department) rather than dictated in detail in inflexible ABC regulations that cannot be easily changed as new information and scientific developments update our understanding of the science of alcohol consumption.

We are looking forward to the Department's response to our comments.

Sincerely,



Hinman & Carmichael LLP