

Patrick Sharrock, Director
Alcoholic Beverage Control Board

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AS 04.16.015 and practice
of giving free "birthday
drinks" to patrons

Teresa Williams
Assistant Attorney General
Commercial Section-Anchorage

I. Introduction and Short Answer

You have requested our opinion of whether it is a violation of AS 04.16.015 for a licensee to give free birthday drinks to patrons under any circumstances, or whether the board has discretion to decide whether such a practice violates the law on a case-by-case basis.

There is clear legislative intent to allow licensees (and their agents and employees) to give patrons free drinks when such an act is not a "marketing device." When determining whether the "free drink" practices of a licensee are a marketing device in violation of AS 04.16.015, the particular facts must be evaluated. Under the fact pattern you pose, the licensee has a policy, advertised by a poster on the wall of the premises, of providing a free birthday drink or a pitcher of beer to anyone who can show that it is his or her birthday. As discussed below, this practice would not be permissible because it is a "marketing device."

II. Discussion

AS 04.16.015(a)(1) provides that "on licensed premises where alcoholic beverages are sold by the drink, a licensee or a licensee's agent or employee may not offer or deliver, as a marketing device to the general public, free alcoholic beverages to a patron." AS 04.16.015(b) provides that a "licensee or licensee's agent or employee may not advertise or promote in any way, either on or off the premises, a practice prohibited under (a) of this section."

In your request, you stated that many members of the public are aware that, on their birthdays, they may go to certain premises and obtain a free alcoholic beverage in the form of a pitcher of beer or a drink. Some of these persons "make the rounds" on their birthdays to those licensed premises where it is customary to provide free alcohol to any patron on his or her birthday, and not just to regular customers.

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You have also advised me that your agency has not taken any enforcement action against a licensee for providing a free drink for any reason if the decision to do so was made on an individual basis. However, your agency has taken enforcement action if the licensee provides free birthday drinks as a customary practice. It is only in this setting that the subject of providing a free drink has arisen.

The legislative history of Section 1, chapter 68, SLA 1986, shows that the bill's purpose was to limit certain practices that encourage excessive drinking. The original bill would have precluded a licensee from giving a free drink under any circumstances. The Senate State Affairs Committee substitute limited the prohibition to "as a promotional device" and the Senate Finance Committee substitute changed that modification to "as a marketing device to the general public."

During the Senate State Affairs Committee hearing on the bill, someone questioned whether a licensee would be precluded from buying drinks for good customers. The committee's consensus was that a bar owner should not be precluded from buying a courtesy drink in situations such as a team celebrating a victory, a private club initiating a new member, or a friend celebrating his birthday. The committee adopted the amendment, adding the words "as a promotional device" to reflect this intent.

The Senate Finance Committee's substitute language was generated by negotiations between Alaska Cabaret, Hotel, Restaurant and Retailers Association (CHARR) and the Coalition for Moderate Alcoholic Consumption that took place prior to its second committee hearing. During the hearing, the comment was made that "marketing" was a more valid state-of-the-art term than "promotional." The legislation subsequently enacted contained the Senate Finance Committee's version of AS 04.16.015(a)(1).

The following year, the House Labor and Commerce Committee met to discuss proposed changes to AS 04.16.015. Apparently, no bill was before the committee, but a written draft of proposed changes had been prepared. One of the proposed provisions would have deleted AS 04.16.015(a)(1) and substituted language that a licensee couldn't "advertise or promote or give public notice that free alcoholic beverages are being given to customers." A CHARR spokesperson advised the committee that the Alcoholic Beverage Control Board was strictly construing the existing language to preclude a licensee from giving a couple a free bottle of champagne on their anniversary or giving a customer a free drink if a cocktail waitress spilled something on the customer's lap. There also was a suggestion that licensees should be able, as an internal policy, to give free drinks as a promotion

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on the premises, but not be able to advertise to the general public that free drinks are available.

The sentiment of the committee was that licensees should be allowed, under certain circumstances, to give free drinks to patrons. Chairperson Donley appointed himself, Rep. Menard, and Rep. Furnance as a subcommittee to prepare amendments to AS 04.16.015. However, apparently no further action was taken.

The central issue posed by you is whether the act of a licensee in giving a free drink has become a "marketing device." This term is not used anywhere else in the Alaska Statutes. The words "marketing" and "device" are defined in dictionaries, but not the term "marketing device." Courts are in the habit of referring to the term in a variety of applications without defining it. I spoke with Dr. William Blachman and Dr. Stan Scott at the University of Alaska School of Business. I learned that the term is actually a 1940's term, and that "sales promotion" is the current term. They stated that a marketing device is an incentive to attract customers or sales. "Sales promotion" is defined by Professors Berkowitz, Karin, and Rudelius as a "short-term inducement of value offered to arouse interest in buying a product."¹

In the instance you discuss, the licensee publicizes, through the use of a wall poster, that it will give a free drink to any member of the public (who is of age and not a drunken person) who can document that that day is his or her birthday. The free drink is not contingent on anything else, such as friendship or regular patronage of the establishment. This practice can enhance the business of the licensee in a number of ways. In addition to the good will generated, the practice may bring in new customers. Additionally, the patron may purchase additional drinks or other products after receiving a free drink. The "birthday" person would often be accompanied by friends. The purpose of the AS 04.16.015 was to limit certain practices that encourage excessive drinking, and excessive drinking may result if persons "barhop" between establishments that offer free birthday drinks or drink more than usual due to the free drink. The practice you describe appears to fall within the definition of a marketing device, as the free drink is promoted through the poster and attracts customers and other sales of the products offered by the licensee.

¹Berkowitz, Karin, and Rudelius, Marketing [p.698] (2d ed. 1989).

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III. Summary

The question whether the provision of a free drink by a licensee is a "marketing device" in violation of AS 04.16.015 will depend in each instance on the particular facts involved. AS 04.16.015 does not allow a licensee to promote a customary practice of providing free drinks to patrons on their birthdays.

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