

Emergency Amendments to Rule 33.5: Food and Beverage Certificates

The Texas Alcoholic Beverage Commission (TABC) adopts on an emergency basis amended Rule §33.5 in response to COVID-19. As authorized by Government Code §2001.034, the Commission may adopt an emergency rule without prior notice or hearing upon finding that imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of the emergency adoption is to support the Governor's proclamation, originally issued on March 13, 2020, and extended on July 10, 2020, certifying that the COVID-19 virus poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In the proclamation, the Governor authorized the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster and directed that government entities and businesses would continue providing essential services. The Commission accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this Emergency Rule modifying the qualifications for a Food and Beverage Certificate.

The emergency amendments to §33.5 would enable retailers who sell alcoholic beverages for on-premises consumption to more easily qualify for a food and beverage certificate. The amendments remove some of the more difficult and costly requirements for qualification for the food and beverage certificate so that these businesses can qualify without making major changes to their business models or investing in expensive equipment. Making the food and beverage certificate available to more businesses encourages them to operate in a manner more akin to a restaurant, serving food as well as beverages.

Many establishments that would have otherwise remained shuttered will be able to reopen and operate in a safe manner due to these amendments. This result will not only help mitigate the economic crisis in the State of Texas resulting from the COVID-19 disaster, it will also protect the welfare of thousands of members of the regulated industry and their employees who rely upon the income from these establishments to support themselves and their families. Without the option offered by this rule amendment, many of these establishments will be forced to close permanently within the next 30 days. Thus, the commission finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice.

STATUTORY AUTHORITY

The emergency rule is adopted under Government Code §2001.034 and Alcoholic Beverage Code §5.31. Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Alcoholic Beverage Code §5.31 authorizes the Alcoholic Beverage Commission to prescribe and publish rules necessary to carry out the provisions of the Code.

§33.5. Food and Beverage Certificates.

- (a) This rule relates to §§ 25.13, 28.18, 32.23 and 69.16 of the Texas Alcoholic Beverage Code.

(b) Each applicant for an original or renewal food and beverage certificate shall include all information required by the commission to ~~ensure~~ ~~insure~~ compliance with all applicable statutes and rules. Further, each applicant for an original or renewal food and beverage certificate shall comply with all applicable executive orders of the Governor and all minimum standard health protocols in the Governor's Open Texas Checklist for restaurants.

(c) Application for the certificate shall be upon forms prescribed by the commission.

(d) The biennial certificate fee for each location is \$200.00 and must be submitted in the form of a cashier's check, U.S. postal money order, or company check made payable to the Texas Alcoholic Beverage Commission. A certificate expires upon expiration or cancellation of the primary permit or license. No prorated certificate fees will be given and no refunds made for issuance of the food and beverage certificate for less than two years.

(e) The following words and terms, when used in this section, shall have the following meaning unless the context clearly indicates otherwise:

(1) Food service—the cooking, preparing, serving, or assembling of food on the location. ~~primarily for consumption at the location.~~ Commercially pre- packaged items purchased off of the location ~~which require no cooking or assembly~~ do not constitute food service under this section.

(2) Entree—main dish or course of a meal.

(3) Food service facilities—a designated permanent portion of the licensed location, ~~including commercial cooking equipment,~~ where food is stored and/or prepared primarily for consumption at the location.

(4) Premise—the designated area at a location that is licensed by the commission for the sale, service or delivery of alcoholic beverages.

(5) Location—the designated physical address of a premise, but also including all areas at that address where the permit or license holder may sell, serve or deliver alcoholic beverages for immediate consumption at the address, regardless of whether some of those areas are occupied by other businesses, as long as those businesses are contiguous.

(f) An applicant is qualified for a food and beverage certificate if the following conditions, in addition to other requirements, are satisfied:

(1) multiple entrees are available to customers; and

(2) permanent food service facilities are maintained at the location.

(g) The hours of operation for sale and service of food and of alcoholic beverages are the same except that food may be sold or served before or after the legal hours for sale of alcoholic beverages.

(h) If the applicant is a hotel that maintains separate area restaurants, lounges or bars, food service facilities must exist for each of the designated licensed premises.

(i) An applicant for an original food and beverage certificate shall furnish the following, as well as any other information requested by the commission to ensure compliance:

(1) the menu or, if no menu is available, a listing of the food and beverage items;

(2) hours of operation of food service and hours of operation for sale or service of alcoholic beverages;

(3) sales data (including complimentary drinks, as recorded pursuant to subsection (n)(3)) or, if not available, a projection of sales. The sales data or projection of sales should include sufficient breakdown of revenues of food, alcoholic beverages and all other major sales categories (e.g. tickets, merchandise, retail goods, etc.) at the location; and

~~(4) listing of commercial cooking equipment used in the preparation and service of food; and~~

~~(45) copies of floor plans of the location indicating the licensed premise and permanent areas devoted primarily to food service the preparation and service of food.~~

(j) Applicants for renewal of food and beverage certificates shall submit sales data described in

subsection (n). The commission may request additional information or documentation to indicate that the licensed location has permanent food service facilities for the preparation and service of multiple entrees.

(k) The commission may review the operation at the location to determine that food service with food service facilities for the preparation and service of multiple entrees is maintained. In doing so the commission may review such items as required in the original or renewal application as well as advertising, promotional items, changes in operations or hours, changes in floor plans, ~~prominence of food items on the menu as compared to alcoholic beverages,~~ name of the business at the location, ~~number of transactions with food components,~~ copies of city or county permits or certificates relating to the type of business operation, and any other item deemed necessary or applicable.

(l) Failure to provide documentation requested or accurately maintain required records is prima facie evidence of non-compliance.

(m) In verifying that food service is being maintained at the location, the commission may examine all books, papers, records, documents, supplies and equipment of the certificate holder.

(n) The following recordkeeping requirements apply to certificate holders:

(1) records must be maintained to reflect separate totals for alcoholic beverage sales or service, food sales, and all other ~~major~~ sales categories at the location;

(2) purchase invoices must be maintained to reflect the total purchases of alcoholic beverages, food and other major purchase categories at the location;

(3) complimentary alcoholic beverages must be recorded and included in the total alcoholic beverage sales as if they were sold and clearly marked as being complimentary; and

(4) all records must be maintained for four years and made available to authorized representatives of the commission upon reasonable request.

(o) In considering alcoholic beverage sales, the dollar value of complimentary drinks shall be added to total sales or service of alcoholic beverages in determining the percentage of alcoholic beverage sales or service on the licensed premises.

(p) In determining the permanent food service facilities requirement under subsection (f)(2), the gross receipts of all business entities sharing the location (~~as identified in the original or a supplemental application~~) will be considered. For audit purposes, it shall be the responsibility of the food and beverage certificate holder to provide financial and accounting records related to food, alcohol, and other ~~major~~ sales categories of all business entities sharing the location. For audit purposes, if such information that is provided is deemed insufficient to determine if a permit or license holder qualifies for issuance of a food and beverage certificate at the location, the computation and determination of the percentage of alcohol sales or service fees to total gross receipts at the licensed location may be based upon any available records of information.

The agency certifies that legal counsel has reviewed the emergency adoption and found it to be within the state agency's legal authority to adopt. Filed with the Office of the Secretary of State on August 25, 2020.