

June 25, 2010

POLICY MEMORANDUM 2001 - 4 (Revised)

Subject: Restrictions and Allowable Duties for Employees and Salespersons with Disqualifying Convictions.

1. **Purpose:** The purpose of this memorandum is to provide clarification of the statutes and regulations as they pertain to restrictions and allowable duties for employees with disqualifying convictions.
2. **Applicability:** All Retail Liquor Stores, Farm Wineries, Microbreweries, Drinking Establishments, Clubs, Caterers, Hotels, Temporary Permit Holders, Cereal Malt Beverage Retailers and Salespersons.
3. **Discussion:**
 - a. **Licenses issued under the Club and Drinking Establishment Act.** (Drinking Establishments, Clubs, Caterers, Hotels and Temporary Permit Holders)
 1. One of the most frequently asked questions we receive from licensees and temporary permit holders operating under the club and drinking establishment act, K.S.A. 41-2601 *et seq.*, is "I have an employee who recently received a DUI [or other disqualifying] conviction. Can he still work here, and if so, what duties can he perform?"
 2. The answer is found in K.S.A. 41-2610(b) and (c), which make it unlawful for licensees and temporary permit holders to "employ knowingly or continue in employment any person *in connection with the dispensing or serving* of alcoholic liquor or the *mixing of drinks* containing alcoholic liquor. . . ." if such person has a felony or morals charge conviction or has been convicted of an intoxicating liquor law (Emphasis added).
 3. Essentially, it means that an employee with a disqualifying conviction **cannot**:
 - o tend bar;
 - o purchase alcoholic liquor for the licensee or sign for delivery of alcoholic liquor;
 - o mix, dispense or serve alcoholic beverages; or
 - o manage or supervise anyone working in such a capacity.

Most of the terms discussed above are self-explanatory. However, questions often arise as to how "*serve or serving*" alcoholic beverages is defined. Basically serving is defined as **any** of the following acts being performed: taking an order for an alcoholic beverage, delivering an alcoholic beverage, AND collecting monies for alcoholic beverages.

4. It does **not**, however, altogether prevent the employee from working in the establishment. Some positions an employee with a disqualifying conviction **can** hold include:
 - o cook;
 - o janitor;
 - o dishwasher;
 - o table busser (which may include removing leftover glasses and bottles containing alcoholic liquor);
 - o host or hostess;
 - o Bar back (stock, rotate, tap kegs, and clean behind the bar area);
 - o kitchen manager (as long as the person has NO responsibility for managing any staff involved in mixing, dispensing or serving alcoholic beverages;

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- sales clerk or cashier (as long as the person is *exclusively* ringing up sales, and isn't also serving liquor to patrons at their tables, and then ringing up the sales); or
- any other capacity that neither consists of or is in connection with *mixing, dispensing or serving* alcoholic beverages.

5. Note that there is a distinction between paragraphs (b) and (c) of K.S.A 41-2610, in that persons who've been convicted of a **felony or of any crime involving a morals charge** cannot mix, dispense or serve alcoholic beverages – **indefinitely** – unless or until the disqualifying conviction is expunged from their record. Persons convicted of an **intoxicating liquor law**, on the other hand, are prohibited from being employed in connection with mixing, dispensing or serving only for a **two-year period** immediately following the conviction.

6. A morals charge is defined in K.S.A. 41-2601(m) as: “a charge involving prostitution; procuring any person; soliciting of a child under 18 years of age for any immoral act involving sex; possession or sale of narcotics, marijuana, amphetamines or barbiturates; rape; incest; gambling; illegal cohabitation; adultery; bigamy; or a crime against nature.”

7. The term “intoxicating liquor law” is not statutorily defined, but has been held to include any charge of driving under the influence (DUI); minor in possession of cereal malt beverage or alcohol (MIP); furnishing alcohol to a minor; social hosting; or violation of any provision of the Club and Drinking Establishment Act or the Liquor Control Act.

b. Licenses issued under the Liquor Control Act (Retailers, Farm Wineries, Microbreweries, Manufacturers, Distributors and Salespersons)

1. Retail Liquor Stores. The provisions applicable to liquor **retailers** – unlike those applicable to licensees operating under the club and drinking establishment act – do not prevent a retailer from employing someone convicted of an intoxicating liquor law (i.e. a DUI) or morals conviction. Rather, K.S.A. 41-713 and K.A.R. 14-13-5(c)(2) prohibit liquor retailers from employing **any** person adjudged guilty of a **felony** in connection with the operation of the retail establishment. This is true regardless of the nature of the crime or the length of time since the conviction, and regardless of the position in which they are employed by the licensee. Therefore, no one with a felony conviction is allowed to work in these establishments **in any capacity**.

2. Farm Wineries and Microbreweries. These licensees are guided as are retail liquor stores above. K.S.A 41-308a and 41-308b specifically state the licensees shall not “*employ any person in connection with the manufacture or sale of alcoholic liquor if the person has been convicted of a felony.*”

3. Manufacturers and Distributors. The Liquor Control Act contains no prohibitions pertaining to the employees of Manufacturers and Distributors, so whether such persons have felony, morals charge or intoxicating liquor law convictions is not a restriction on employment.

4. Salespersons. According to K.S.A. 41-334, no person shall be issued a salesperson's permit if such person:

- has been convicted of keeping a house of prostitution, or is currently keeping a house of prostitution; or
- has been convicted of gambling, pandering or any other crime opposed to decency and morality.

The statute also provides the ABC Director *discretion* to deny a salesperson's permit to any person who has been convicted of:

- a felony; or
- a violation of the Liquor Control Act or the State's cereal malt beverage laws.

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c. Licenses issued under the Cereal Malt Beverage Act (CMB Retailers and Taverns)

Cereal malt beverage retailers (which include both those who sell CMB for on-premise consumption – such as taverns – and those who sell CMB for off-premise consumption – such as grocery and convenience stores and supermarkets) are prohibited by K.S.A. 41-2708(10) from employing “in connection with the *sale, serving or dispensing* of cereal malt beverages” any person convicted in the preceding two years of a felony or of any intoxicating liquor law.

The terms “serving or dispensing” are construed just the same as under the Club and Drinking Establishment Act and the Liquor Control Act (see above). The term “sale” is self-explanatory; no employee with a disqualifying conviction can ring up sales or serve as a sales clerk or cashier of any CMB products (whether for consumption on or off the licensed premises). It is important to note that, where CMB retailers are concerned, the prohibition against employing anyone with a disqualifying conviction in the forbidden capacities applies **only for two years** following the conviction, *regardless* of whether the conviction was of a *felony* or an *intoxicating liquor law*.

3. Additional Comments:

a. Timing of Disqualification. Employees are not actually disqualified until they are convicted of the disqualifying violation. Employees charged with a disqualifying violation may continue working until actually convicted. If the employee receives a diversion, they may continue working so long as the diversion is in effect and they complete all of the requirements spelled out in the diversion.

b. Consequences of non-compliance

Failure to comply with the applicable statutes, regulations and/or this policy memorandum, may result in administrative action for violation of the liquor laws.

Alcoholic Beverage Control Enforcement Agents will verify compliance with the provisions of the applicable statutes, regulations and this policy memorandum.

4. Clarification of Policy: All clarification requests to this policy should be directed **in writing** to this office via mail, fax, or submitted to the agency's email at abc_mail@kdor.state.ks.us

5. Effective Date of this policy: This policy is effective from the date of signature until further notice.

Original Signed and On File

Thomas W. Groneman

cc: Assistant Attorney General
Chief of Enforcement
Licensing Supervisor
Compliance Supervisor
Administration Supervisor
Enforcement Agents