



TO: North Carolina Retail Merchants Association Members
FROM: Andy Ellen, President and General Counsel
DATE: May 22, 2020
RE: Application of Governor Cooper's Executive Order 141 to certain alcohol permittees

THIS DOCUMENT IS NOT INTENDED TO SERVE AS LEGAL ADVICE BUT IS AN ANALYSIS OF GOVERNOR COOPER'S EXECUTIVE ORDER 141 AND ITS APPLICATION TO CERTAIN ALCOHOL PERMITTEES. BUSINESSES NEEDING ADDITIONAL LEGAL ADVICE SHOULD CONSULT LEGAL COUNSEL.

On May 20, 2020, Governor Roy Cooper issued Executive Order 141 which becomes effective on May 22, 2020 at 5:00 pm EST. In Executive Order 141, Governor Cooper allows for certain businesses to resume providing food and beverage for on-site consumption as long as certain requirements - including occupancy maximums, sanitation and social distancing - are complied with by the business. While Executive Order 141 allows certain businesses to resume providing food and alcoholic beverages for on-site consumption, Executive Order also prohibits businesses meeting the definition of a bar from resuming providing alcoholic beverages for on-site consumption. Which businesses may or may not resume providing beverages Executive Order 141 has generated a number of questions from various types of alcohol permittees.

These issues are outlined below.

Which ABC permittees must remain closed and cannot operate under its ABC permits?

It is absolutely clear that an ABC permittee that qualifies as a "restaurant" as defined in Section 1 of Executive Order 141 may resume its activities of serving food and beverages for on-premises consumption. It is also clear that under Section 8B of Executive Order 141 a "bar" must remain closed and cannot resume its normal activities allowed pursuant to its ABC permits issued by the North Carolina ABC Commission under G.S. 18B-1001.

What is a "bar"?

In Section 1.1. of Executive Order 141, a "bar" is defined as "establishments that are not eating establishments or restaurants as defined in N.C. Gen. Stat §§ 18B-1000(2) and 18B-1000(6), that have a permit to sell alcoholic beverages for onsite consumption under N.C. Gen. Stat § 18B-1001, and that are principally engaged in the business of selling alcoholic beverages for onsite consumption." This definition of a "bar" differs from the definition of the same term in Executive Order 138 issued by Governor Cooper on May 5, 2020.

In Executive Order 138, a "bar" was defined as "establishments that are not eating establishments or restaurants as defined in N.C. Gen. Stat §§ 18B-1000(2) and 18B-1000(6)) and have a permit to sell alcoholic beverages for onsite consumption under N.C. Gen. Stat § 18B-1001." It should be noted that the

definition of what constitutes a “bar” is much less inclusive in Executive Order 141 than in Executive Order 138 meaning that there were some ABC permittees that were classified as a “bar” and ordered to be closed in Executive Order 138 and not operate under their ABC permits that no longer meet the definition of a “bar” under Executive Order 141.

Under Executive Order 141, the key determination that an ABC permittee must determine before selling malt beverages or wine for on-premise consumption is whether or not they “are principally engaged in the business of selling alcoholic beverages for onsite consumption.”

Are Wine Shops and Bottle Shops Bars?

Whether or not a wine shop or a bottle shop qualifies as a “bar” under Executive Order 141 is an analysis that must be looked at on a case-by-case basis by each individual wine shop or bottle shop that maintains on-premises permits under G.S. 18B-1001. Generally a wine shop or bottle shop will not qualify as an eating establishment or a restaurant under G.S. 18B-1000(2) or 18B-1006(6) so what you are trying to determine is whether or not the wine shop or bottle shop is principally engaged in the business of selling alcoholic beverages for **onsite** consumption. The term “principally engaged” is widely viewed to mean fifty-one percent (51%) of your business. One method of determining whether or not a wine shop or bottle shop meets this principally engaged threshold of fifty-one percent (51%) is to compare the total off-premises sales of malt beverages and wine and other goods and services versus on-premises sales of malt beverages and wine. If a wine shop or bottle shop generally derives fifty-one percent (51%) of its sales from on-premises sales of malt beverages or wine, then the wine or bottle shop qualifies as a “bar” and cannot reopen. If the wine shop or bottle shop does not derive fifty-one percent (51%) of its sales from on-premises sales of malt beverages or wine then the wine or bottle shop does not meet the definition of a “bar” and therefore may operate under its current alcohol permits issued by the North Carolina Alcoholic Beverage Control Commission under G.S. 18B-1001 including selling malt beverages and wine for on-premises consumption.

It should be noted that all occupancy, sanitation and social distancing requirements contained in Executive Order 141 should be adhered to by the wine or bottle shop. Additionally, it would be recommended that the wine or bottle shop also follow all recommended guidelines for restaurants as determined by the North Carolina Department of Health and Human Services.

Are Grocery Stores “Bars” and/or do Grocery Stores qualify as “Eating Establishments”

Grocery stores should conduct an analysis similar to the analysis for wine shops and bottle shops with one caveat. If a grocery store or a convenience store meets the definition of a “restaurant” under Executive Order 141 then the grocery store or convenience store is able to resume serving food and beverages including alcohol for on-premises consumption.

A grocery store or convenience store should first determine whether or not they meet the definition of a restaurant under Executive Order 141. Under Section 1.7 a “restaurant” is defined as “permitted food establishments under N.C. Gen. Stat §§ 130A-248 and other establishments that both prepare and serve food. Under N.C. Gen. Stat §§ 130A-248 “establishments that prepare or serve drink or food for pay and establishments that prepare and sell meat food products or poultry products” must be permitted by the North Carolina Commission on Public Health and are subject, for instance, to rules and regulations including the United States Food and Drug Administration Food Code. If a grocery store or convenience store is required to obtain a permit from the Commission pursuant to N.C. Gen. Stat §§ 130A-248 it is deemed a restaurant and may resume serving food and beverages including malt beverages and wine

pursuant to Section 6C of Executive Order 141. Every grocery store and convenience store should fall under this section.

If for some reason a grocery store or convenience store does not meet the definition of a restaurant under Executive Order 141, then the grocery store or convenience store would need to determine whether or not the grocery store meets the definition of a “bar” as contained in Executive Order 141. This determination will be made by analyzing whether or not the grocery store or convenience store is “principally engaged” in the sale of malt-beverages or wine for on-premises consumption. The term “principally engaged” is widely viewed to mean fifty-one percent (51%) of your business. One method of determining whether or not a grocery store or convenience store meets this principally engaged threshold of fifty-one percent (51%) compare the total off-premises sales of malt beverages and wine and other goods and services sold by the grocery store or convenience store versus on-premises sales of malt beverages and wine. If the grocery store or convenience store generally derives fifty-one percent (51%) of its sales from on-premises sales of malt beverages or wine, then the grocery store or convenience store qualifies as a “bar” and cannot reopen. If the grocery store or convenience store does not derive fifty-one percent (51%) of its sales from on-premises sales of malt beverages or wine then the grocery store or convenience store does not meet the definition of a “bar” and therefore may operate under its current alcohol permits issued by the North Carolina Alcoholic Beverage Control Commission under G.S. 18B-1001 including selling malt beverages and wine for on-premises consumption.