



Kim Reynolds *Governor of Iowa*
Adam Gregg *Lieutenant Governor*

Stephen Larson *Administrator*

MEMORANDUM

November 15, 2022

TO: Members of the General Assembly

FR: Alcoholic Beverages Division

RE: Alcoholic Beverages Division 2023 Cocktails To-Go Bill

The Alcoholic Beverages Division (ABD) 2023 Cocktails To-Go bill is an act that will make cocktails to-go subject to Iowa's open container laws regardless of container and sealing method used. If enacted, this law change will allow ABD to rescind its cocktails to-go rule as it will no longer be necessary. It will also allow bars, restaurants, and other licensees authorized to sell cocktails to-go more choices in the types of containers and sealing methods used. Finally, if enacted, this law change will bring Iowa into compliance with Federal open container law requirements under 23 U.S.C. §154 and its implementing regulations in 23 CFR Part 1270.

This memo provides background information on recent law changes related to the sale of cocktails-to-go, the impact of noncompliance with Federal open container law requirements, including the fiscal impact of noncompliance to Iowa. Next, it provides proposed legislative language that has been reviewed by the National Highway Traffic Safety Administration (NHTSA). Finally, it contains the full text of NHTSA's preliminary review of the proposed legislative language for compliance with the requirements of Section 154.

BACKGROUND

Governor Reynolds on June 29, 2020, signed HF2540 and made Iowa the first state in the nation to make Cocktails-To-Go, a temporary measure in response to COVID-19, permanent law. Emergency rulemaking by ABD that strictly limited the sealing methods for cocktails sold in to-go containers ensured that Iowa remained in compliance with Federal open container law requirements under 23 U.S.C. §154 and its implementing regulations in 23 CFR Part 1270.

Law changes made in 2021 expanded the containers and sealing methods allowed to be used for cocktails to-go beyond what was allowed in administrative rule by ABD. ABD initiated rulemaking in January 2022 to update its cocktails to-go rule to conform with the law changes and prescribe additional sealing methods compliant with state and federal open container laws. NHTSA reviewed ABD's proposed rulemaking and determined that, if adopted, Iowa would no longer comply with federal open container laws. NHTSA also verbally communicated to ABD and Iowa Department of Transportation (DOT) that it would not be possible for ABD to update its rule to conform with law changes and remain in compliance with federal open container laws.

THE IMPACT OF NONCOMPLIANCE

According to NHTSA, "[a] State that does not comply with the requirements of Section 154 for the current fiscal year is subject to a transfer of an amount equal to 2.5 percent of the funds to be apportioned to the

State on that date under each of paragraphs (1) and (2) of 23 U.S.C. § 104(b) if the State was also determined to be noncompliant on October 1 of the previous fiscal year. 23 U.S.C. 154(c)(2)(A)(i)-(ii).

In other words, if the State is determined to be out of compliance on October 1, 2023, and if the State remains out of compliance on October 1, 2024, the State will be subject to a transfer penalty for Fiscal Year 2025.”

On November 8, 2022, NHTSA’s Office of the Chief Counsel (NCC) completed a preliminary review of ABD’s proposed legislative language for compliance with Federal open container law requirements under 23 U.S.C. §154 and the implementing regulations at 23 CFR Part 1270. NCC preliminarily concludes that if the proposed legislative language is enacted in its current form, and assuming that no other changes have been made to the law, Iowa will continue to comply with the requirements of Section 154.

FISCAL IMPACT TO THE STATE OF IOWA

If enacted, the Cocktails To-Go bill will not have a fiscal impact on the State of Iowa. However, in the absence of legislative action, a formal finding of noncompliance with federal open container laws is anticipated from NHTSA, jeopardizing the use of approximately \$14 million per year in federal funding intended for bridge and construction repair projects in Iowa.

PROPOSED LEGISLATIVE LANGUAGE

Section 1. Amend section 123.49, subsection 2, paragraph d, subparagraph 3 as follows:

(3) Mixed drinks or cocktails mixed on premises covered by a class “C” retail alcohol license for consumption off the licensed premises may be sold if the mixed drink or cocktail is ~~immediately filled in a sealed container~~ packaged upon receipt of an order by a consumer of legal age in a container bearing a lid or other method of securing the contents of the container and is promptly taken from the licensed premises prior to consumption of the mixed drink or cocktail. A mixed drink or cocktail that is sold ~~in a sealed container~~ in compliance with the requirements of this subparagraph ~~and rules adopted by the division~~ shall ~~not~~ be deemed an open container subject to the requirements of sections 321.284 and 321.284A ~~if the sealed container is unopened and the seal has not been tampered with, and the contents of the container have not been partially removed.~~

Sec. 2. Amend section 123.49, subsection 2, paragraph d, subparagraph 4 by striking the subparagraph.

~~(4) For purposes of this paragraph:~~

~~(a) “Sealed container” means a vessel, including a substantial or sturdy plastic container and a vacuum or heat-sealed pouch, containing a mixed drink or cocktail that is designed to prevent consumption without removal of a tamper-evident lid, cap, or seal. “Sealed container” does not include a container with a sipping hole or other opening for a straw, unless the hole or other opening includes a tamper evident seal, but a straw may be separately provided with a sealed container to the consumer for off-premises consumption.~~

~~(b) “Tamper evident” means a lid, cap, or seal that visibly demonstrates when a container has been opened.~~

Sec. 3. EFFECTIVE DATE: This Act, being deemed of immediate importance, takes effect upon enactment.

NHTSA PRELIMINARY REVIEW

From: deCourcy, Susan (NHTSA) <Susan.deCourcy@dot.gov>

Sent: Tuesday, November 8, 2022 3:55 PM

To: Jerman, Renee <Renee.Jerman@iowadot.us>

Subject: Preliminary Review of Iowa Proposed 2023 legislative language for Compliance with Section 154

NHTSA's Office of the Chief Counsel (NCC) has completed a preliminary review of the draft amendment to Iowa Administrative Code (I.A.C.) § 123.49, submitted by State of Iowa, for compliance with the Federal open container law requirements under 23 U.S.C. § 154 and the implementing regulations at 23 CFR Part 1270. We preliminarily conclude that if the draft amendment to I.A.C. § 123.49 is enacted in its current form and assuming that there have been no other changes in Iowa's law, the State will continue to comply with the requirements of Section 154.

Section 154 Compliance Requirements

To comply with Section 154, a State must prohibit the possession of any open alcoholic beverage container and the consumption of any alcoholic beverage in the passenger area of any motor vehicle located on a public highway or the right-of-way of a public highway in the State. 23 CFR § 1270.4(a). The State's law must apply to: (1) the possession of any open alcoholic beverage container and the consumption of any alcoholic beverage; (2) the passenger area of any motor vehicle; (3) all alcoholic beverages; (4) all occupants of a motor vehicle; and (5) all motor vehicles located on a public highway or the right-of-way of a public highway. *Id.* § 1270.4(b). A State's law must also provide for primary enforcement. *Id.* § 1270.4(c).

A State's open container law must further prohibit possession in the passenger area of a motor vehicle "any bottle, can, or other receptacle that: (1) contains any amount of alcoholic beverage; and (2) is open or has a broken seal or the contents of which are partially removed (regardless of whether it has been closed or resealed)." 23 CFR 1270.3(e). There is an exception for transporting open alcoholic beverage containers by motor vehicle if the alcohol is placed in "a locked container (such as a locked glove compartment), or, in a motor vehicle that is not equipped with a trunk, either behind the last upright seat or in an area not normally occupied by the driver or a passenger." 23 CFR 1270.3(d). Any State that enacts a law forbidding possession in all but these areas will be "deemed to have in effect a law that applies to the passenger area of any vehicle." *Id.*

Background and Iowa's Open Container Law

Since early 2020, NCC has provided several preliminary reviews regarding Iowa's compliance with Section 154. Initially, NCC determined that the State's exception of certain to-go cocktails from its open container laws did not comply with the Federal requirements. However, NCC later

determined that the State was compliant because of an emergency rulemaking by the Alcoholic Beverages Division that strictly limited the sealing methods that could be used for a to-go container. *See* I.A.C. § 185-4.10(3). These methods were determined compliant with the Federal requirements.

NCC provided further technical assistance to the State regarding legislation that would amend the sealing methods acceptable for a to-go container such that the container would be considered “closed” for the purpose of compliance with Section 154. Ultimately, the State continued to comply with Section 154 because the acceptable sealing methods were limited to those contained in I.A.C. § 185-4.10(3), which we had previously approved.

NCC also provided technical assistance on a proposed rulemaking that would have amended I.A.C. § 185-4.10(3) to include two additional sealing methods. The first sealing method allowed the use of “a lid permanently affixed to the vessel with a can seamer;” and the second sealing method allowed the use of “[a] vessel containing the mixed drink or cocktail...securely sealed inside a clear, transparent bag bearing a self-adhesive strip or other seal that must be broken open to remove the vessel and cannot be resealed.” For this method, “[i]f the lid of the vessel bears a sipping hole or other opening for a straw, the sealing method . . . shall be the only sealing method allowed.” *Id.* NCC preliminarily concluded that the first sealing method would comply with the Section 154, but the second method would not. The State did not adopt the proposed rulemaking and remained in compliance with Section 154.

Currently, I.A.C. § 321.284 states that “A driver of a motor vehicle... shall not possess in the passenger area of the motor vehicle an open or unsealed bottle, can, jar, or other receptacle containing an alcoholic beverage.” Similar language in I.A.C. § 321.284A applies to passengers in a motor vehicle. Open containers may be transported in “the trunk of the motor vehicle...[or] behind the last upright seat of the motor vehicle if the motor vehicle does not have a trunk.” *Id.* These locations align with the Federal requirements for transport of open containers. *See* 23 CFR § 1270.34(d)(1). However, a different section of the State’s law exempts to-go mixed drinks from this prohibition, so long as they are “sold in a sealed container in compliance with the requirements of this subparagraph and rules adopted by the [Alcoholic Beverages Division]. . . .” I.A.C. § 123.49(d)(3).

Proposed Changes

The draft amendment to I.A.C. § 123.49 would continue to allow food establishments, licensed to sell distilled spirits for consumption on the premises, to sell “mixed drinks or cocktails” for off-premises consumption, but would amend the language to delete “immediately filled in a sealed container” and insert in its place “packaged upon receipt of an order by a consumer of legal age in a container bearing a lid or other method of securing the contents of the container....” Furthermore, the draft amendment would modify the language to state that such mixed drinks or cocktails “shall be deemed an open container subject to the requirements of sections 321.284 and 321.284A.” Finally, the draft amendment would delete I.A.C. § 123.49(2)(d)(4), which defines the terms “sealed container” and “tamper evident.”

If the draft amendment is enacted, “mixed drinks and cocktails” prepared by food establishments intended for off-premises consumption, regardless of the method utilized to secure the container, would be considered open containers subject to the requirements of I.A.C. § 321.284 and 321.284A. Because the modifications to I.A.C. § 123.49 would not allow drivers or passengers to possess such alcoholic beverage containers within the passenger areas of a vehicle, requiring them to be transported in “the trunk of the motor vehicle...[or] behind the last upright seat of the motor vehicle if the motor vehicle does not have a trunk” consistent with existing State law (I.A.C. § 321.284A), we preliminarily conclude that the State of Iowa would continue to comply with the requirements of Section 154 if the draft amendment is enacted in its current form.

Impacts of Noncompliance

A State that does not comply with the requirements of Section 154 for the current fiscal year is subject to a transfer of an amount equal to 2.5 percent of the funds to be apportioned to the State on that date under each of paragraphs (1) and (2) of 23 U.S.C. § 104(b) if the State was also determined to be noncompliant on October 1 of the previous fiscal year. 23 U.S.C. 154(c)(2)(A)(i)-(ii).

In other words, if the State is determined to be out of compliance on October 1, 2023, and if the State remains out of compliance on October 1, 2024, the State will be subject to a transfer penalty for Fiscal Year 2025.

This preliminary review does not bind the agency to a particular course of action or represent a final determination. A copy of the proposed legislation that we reviewed is attached. We welcome any additional requests for technical assistance. The State should submit those requests via the NHTSA regional office.

Susan DeCourcy



Susan DeCourcy

Regional Administrator

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