PENNSYLVANIA BREWING &

LIQUOR LAW OUTLINE

(2nd Edition, January 2020)

ZK
Zimmer Kunz PLLC
Attorneys at Law

ZIMMER KUNZ

PROFESSIONAL LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW

310 GRANT STREET, SUITE 3000
PITTSBURGH, PA 15219

(412) 281-8000
FAX (412) 281-1765

GEORGE N. STEWART (PA & WV)
JONI M. MANGINO (PA, NY, OH & WV)
JOSEPH W. SELEP (PA & WV)
JOHN W. ZOTTER (PA & OH)
JEFFREY A. RAMALEY (PA & OH)
DANIEL E. KRAUTH (PA)
CHRISTOPHER T. YOSKOSKY (PA)
SHARON Z. HALL (PA &WV)
JOSEPH F. BUTCHER (PA, OH & WV)
MATTHEW G. BRENEMAN (PA & WV)
RYAN A. ZELI (PA, NY, OH & WV)

DARA A. DECOURCY (PA & WV)
MACEL E. RHODES (WV)
KERRI A. SHIMBORSKE-ABEL (PA & WV)
JOSEPH R. PETRINA (PA & WV)
GREGORY C. SCHEURING (PA & WV)
CHRISTIAN W. WRABLEY (PA & WV)
DAVID F. RYAN (PA, OH & WV)
DANIEL J. CUDDY (PA)
JOHN J. GAUGHAN (PA)
AARON H. WEISS (PA & WV)
BRIAN M. LUCOT (PA, OH & WV)

ADAM S. AUCHEY (PA & WV)
MALLORY P. GOLD (PA)
DANIELLE N. ZIETAK (PA)
THOMAS F. COCCHI JR. (PA & WV)
ERIN K. CORCORAN (PA)
ALLISON M. ERNDL (PA)
R. BEN MCGIFFIN (PA)

OF COUNSEL
HARRY J. ZIMMER

MORGANTOWN OFFICE:
1280 SUNCREST TOWNE CENTRE
MORGANTOWN, WV 26505
(304) 292-8531
FAX (304) 292-7529

GREENSBURG OFFICE:
132 SOUTH MAIN STREET, SUITE 400
GREENSBURG, PA 15601
(724) 836-5400
FAX (724) 836-5149

Aaron H. Weiss, Esquire and the attorneys of Zimmer Kunz, Professional Limited Liability Company have prepared these materials for the confidential use of our clients and prospective clients.

In the identification and discussion of legal and factual issues, the materials reflect the views of the authors. The authors do not intend these materials to substitute for legal advice concerning specific cases, involving what may appear to be similar legal issues and factual circumstances. Such questions should be addressed to counsel.

We welcome your questions about the subject matter contained in these materials. Please contact any attorney at Zimmer Kunz who will assist you or refer you to another Zimmer Kunz attorney who has experience in this area of practice.

PLEASE FEEL FREE TO E-MAIL ATTORNEY WEISS AND/OR ANY OTHER ZIMMER KUNZ ATTORNEY WITH YOUR QUESTIONS REGARDING THESE MATERIALS OR ANY OTHER TOPIC YOU WOULD LIKE TO DISCUSS. SEND YOUR E-MAIL TO "lastname@zklaw.com" (i.e. Weiss@zklaw.com).

PENNSYLVANIA BREWING & LIQUOR LAW OUTLINE
(2nd Edition, January 2020)

I. OBTAINING A LIQUOR LICENSE

A. TYPES OF LICENSES

1. General Licenses

i. Restaurant (R) License

An "R" licensed establishment's primary purpose must be to provide food service to the public, whereas the service of alcohol products must be secondary. The interior dimensions must be no less than 400 square feet, and the establishment must be equipped with at least 30 chairs, or the equivalent seating, at tables for public use. An "R" establishment may not sell any open container alcoholic beverage for consumption outside of the establishment.

The operational hours for an "R" establishment are restricted by the following:

- Open for business and alcohol sales Monday – Saturday from 7:00 AM until 2:00 AM.
- No sales of alcoholic, malt, or brewed beverages after 2:00 AM.
- All unfinished alcoholic beverages must be collected and all patrons must depart the premises by 2:30 AM.
- All entertainment must stop at 2:00 AM.
- Establishments with a Sunday Sales Permit (SS) may begin serving alcoholic beverages on Sundays at 9:00 AM and remain open until 2:30 AM on Monday.
- Establishments without a Sunday Sales Permit (SS) may serve alcoholic beverages beginning at 1:00 PM on Super Bowl Sunday, and St. Patrick's Day and New Year's Eve, if occurring on a Sunday.
- Open regular hours on Election Day.

ii. Club (C) and Catering Club (CC) License

"C" and "CC" licensed establishments must operate for the good of club membership and in a fraternal sense. The sale of alcoholic beverages must be secondary to the purpose of the club. Additionally, the incorporated club must exist for a minimum of one year prior to applying for a liquor license, while unincorporated clubs must exist for a minimum of ten years prior to a license being granted.

A club is not an organization used to accommodate a private bar operation. Rather, the club must meet certain requirements, such as: (1) having an original charter; (2) holding regular meetings open to its members; (3) conducting legitimate business through elected officers, (4) admitting members by written application, investigation, and ballot; (5) charging and collecting dues; and (6) maintaining records. No individual is allowed to own a club.

"CC" licensees may allow groups in the establishment for weddings or private affairs. Private clubs cannot sell alcoholic beverages for take-out purposes.

The operational hours for "C" and "CC" establishments are restricted by the following:

- Sales and furnishing of alcohol may begin at 7:00 AM.
- Sales and furnishing of alcohol must stop at 3:00 AM.
- All unfinished alcoholic beverages must be collected and all patrons off the premises by 3:30 AM.
- May be open 7 days a week.
- May be open on Election Day.

iii. Distributor (D) License

"D" licenses relate to beer distributors. Sales of alcohol must be for off-premises consumption only, and they must be made in original containers of at least one case of 24 containers (each container with at least 7 ounces). While 12 packs are acceptable, single containers of beer must be at least 24 ounces. Additionally, single containers holding more than 128 ounces are acceptable, such as kegs of beer.

An Importing Distributor is a variation of the "D" license. Importing Distributors are large operations, maintaining large amounts of beer products, that usually only sell to other smaller "D" licensees, not the public. This license is restricted by the County-Quota Law.

The operational hours for "D" establishments are restricted by the following:

- May open at 2:00 AM Monday and remain open continuously, 24 hours per day, until midnight Saturday.
- Must remain closed from 12:00 AM Sunday through 2:00 AM Monday.
- May be open on Election Day.

iv. Eating Place (E) License

The primary purpose of an "E" establishment must be the regular preparation and service of food. The interior dimensions must be no less than 300 square feet, and it must be equipped with at least 30 chairs, or the equivalent seating, at tables for public use. "E" licensees may only sell beer, or its variants. Liquor and wine sales are prohibited. The licensee can sell up to 192 fluid ounces of beer products, in original containers, for take-out purposes. However, "E" licensees may not sell any single, open container of alcoholic beverage for consumption outside the establishment.

The operational hours for "E" establishments are restricted by the following:

- Open for business and alcohol sales Monday – Saturday from 7:00 AM until 2:00 AM the following morning.

- No sales of alcoholic, malt, or brewed beverages can take place after 2:00 AM.
- All unfinished alcoholic beverages must be collected and all patrons must depart the premises by 2:30 AM.
- All entertainment must stop at 2:00 AM.
- Establishments with a Sunday Sales Permit (SS) may begin serving alcohol on Sundays at 11:00 AM and remain open until 2:30 AM on Monday. The licensee may start selling malt or brewed beverages at 9:00 AM if they provide a meal at that time.
- If New Year's Eve falls on a Sunday, establishments without a Sunday Sales Permit (SS) may serve alcoholic beverages beginning at 1:00 PM.
- May be open during regular hours on Election Day.
- Establishments without a Sunday Sales Permit (SS) may not be open Super Bowl Sunday, or St. Patrick's Day if it falls on a Sunday.

v. Hotel (H) License

An "H" licensee must operate the dining and alcohol service areas in the same manner as an "R" licensee. The "H" licensed establishment must have 12 to 50 permanent bedrooms for public use, depending on the population. Additionally, the "H" establishment must have a separate dining room for at least 30 people and a separate kitchen. This type of establishment covers anything from a hotel to a corner bar. The differences between an "R" and "H" license are mandatory sleeping accommodations and a kitchen on the premises.

The operational hours for an "H" establishment are restricted by the following:

- Open for business and alcohol sales Monday – Saturday from 7:00 AM until 2:00 AM the following morning.
- No sales of alcoholic, malt, or brewed beverages can take place after 2:00 AM.
- All unfinished alcoholic beverages must be collected and all patrons must depart the premises by 2:30 AM.
- All entertainment must stop at 2:00 AM.
- Establishments with a Sunday Sales Permit (SS) may begin serving alcoholic beverages on Sundays at 9:00 AM and remain open until 2:30 AM on Monday.
- Establishments without a Sunday Sales Permit (SS) may serve alcoholic beverages beginning at 1:00 PM on Super Bowl Sunday, and St. Patrick's Day and New Year's Eve if occurring on a Sunday.
- Open regular hours on Election Day.

vi. Sunday Sales (SS) Permit

Holders of an "SS" permit may open at 9:00 AM Sunday and remain open until 2:00 AM Monday. To qualify for this permit, the licensee must certify that the establishment sells a minimum of 40% food and non-alcoholic beverages on an annual basis.

2. Malt and Brewed Beverage Licenses

i. Malt Brewed Manufacturer's License and Storage License

Those who want to produce and manufacture brewed beverages for transportation, selling, and delivering from the place of manufacture must apply for a manufacturer's license. With this license, malt and brewed beverages can only be produced, manufactured, transported, and sold in quantities of 128 ounces or more, which may be sold separately. In order to qualify for this license, the applicant must hold a Federal brewer's notice registration.

If a manufacturer has multiple storage facilities separate from the manufacturing facility, the Board will issue a holder of a manufacturer's license no more than two storage licenses per manufacturer. The storage facilities may be used to receive, store, repackage, sell, and distribute malt or brewed beverages in the same manner as it can at its place of manufacture. A separate written application must be filed to receive a storage license.

ii. Alternating Brewer's License

The holder of an alternating brewer's license has all the rights and is subject to the same conditions as those imposed on holders of a manufacturer's license. However, a holder of an alternating brewer's license is not required to have a separate manufacturing premises. Instead, the alternating brewer's license is valid at premises that are licensed by another entity under a Pennsylvania manufacturer's license. In order to qualify for this license, the applicant must hold a brewer's notice registration.

Malt and brewed beverages manufactured under the authority of an alternating brewer's license must be distributed only through specific importing distributors who must first have distributor rights for such products.

iii. Brand Registration Permit and Distributor's License

A holder of a manufacturer's license may obtain a brand registration permit to sell and deliver malt and brewed beverages to a trade buyer in Pennsylvania.

Holders of a distributor's license can use their premises for the sale of malt or brewed beverages not for consumption on the premises. With this license, the holder is permitted to sell alcohol in quantities greater than or equal to 128 ounces.

iv. Brewery License

The holder of a brewery license may sell malt or brewed beverages produced and owned by the brewery for consumption on the licensed premises in any container or package of any volume, and to hotel, restaurant, club, and public service liquor licensees. Additionally, a brewery licensee can open a restaurant or brewery pub on the licensed premises. The brewery

may sell wines it purchased from the holder of a Pennsylvania limited winery license or from the Board. This wine must be consumed on the premises of the brewery.

A brewery licensee may use brewery storage and distribution facilities for receiving, storing, and distributing malt or brewed beverages manufactured outside of Pennsylvania if they are distributed through specific importing distributors given rights for the products. Additionally, a holder of a brewery license may have a hotel, restaurant, or malt and brewed beverages liquor license to sell for consumption on the premises. If the licensee chooses to have a hotel, restaurant, or malt and brewed beverages license, they must brew at least 250 barrels per year.

v. Brewery Pub License

A brewery pub license is issued to the premises immediately adjacent to, but separate and distinct from the brewery premises. Sales of alcohol at the brewery pub is limited to sales of malt or brewed beverages produced at and owned by the adjacent brewery, or brewery under common control with the brewery pub. A brewery pub may sell wine for consumption on the premises if the wine is manufactured by the holder of a Pennsylvania limited winery license.

A brewery pub license may not be issued to a brewery that has already acquired a restaurant, hotel, or malt and brewed beverage retail dispenser license. If a brewery pub applies for and acquires such a license, the brewery pub license will be cancelled.

B. PROCESS TO OBTAIN A LICENSE

Anyone wishing to distribute or sell alcoholic beverages in Pennsylvania must obtain a state liquor license. Breweries and malt brew manufacturers must also obtain a federal liquor license. Prior to applying for a license, applicants will need a location for the licensed premises and meet proper zoning requirements. This is a lengthy process with a lot of steps and strategic considerations. It is strongly suggested that new businesses seeking these licenses consult with an attorney to ensure everything is completed properly and the business obtains the license that fits best with its business model.

1. Federal License Application

To obtain a federal license, an application must be submitted to the Alcohol and Tobacco Tax and Trade Bureau (TTB).

i. Application Document Requirements for a Brewery or Brewpub

a. Documents Required

Corporations must provide a copy of the Articles of Incorporation and/or Certificate of Incorporation.

Limited Liability Companies must provide a copy of the Articles of Organization and/or Certificate of Organization.

Partnerships must provide a copy of the partnership agreement.

If the business is leasing the property where it will be conducting its operation, it must submit a copy of its signed and dated lease agreement. The agreement must show that the property owner is aware of how the business wants to use the property and consents to using the building or land for this purpose.

If the business owns the property, then it must provide proof of ownership, such as a deed.

b. Signing Authority Authorization

The business must supply proof that the persons who will sign documents, forms, reports, etc. in correspondence with the TTB about the business have legal authority to do so. Proof of signing authority includes:

- An excerpt from the Articles of Incorporation
- An excerpt from the Articles of Organization
- An excerpt from the Partnership Agreement
- Copies of a relevant resolution
- Official company meeting minutes
- TTB Form 5100.1, Signing Authority for Corporate and LLC Officials
- TTB Form 5000.8, Power of Attorney – if someone other than an employee will act on behalf of the business

c. Diagram of the Brewery

The diagram of the premises must include:

- The dimensions of the premises in feet and inches.
- The location of equipment and serial number and capacity of all tanks.
- The location of all doors.
- If applicable, the location of the brewpub or tasting room.

d. Source of Funds Documentation

Each owner of the business must supply documentation to show the source of the funds the owner is investing in the business. Examples or sources of funds include:

- Financial Gifts

- Include the name of any individual making a gift as well as the amount of the gift. Additionally, a statement from the individual in which the individual declares that he or she has no control or ownership in the business.
- A financial record or bank statement showing receipt of the gift.

- Loans
  - Provide a copy of a promissory note or statement from any entity providing a loan.
  - Submit a financial record or bank statement showing receipt of the loan.
- Bank Account Records
  - If the source of funds is a savings account, checking account, or other type of financial account, a current statement showing a balance that includes the amount being invested, and statements for each of the three prior months.

2. State License Application

To obtain a liquor license in Pennsylvania, an application must be submitted to the state's Bureau of Licensing to be reviewed by the Board. The cost of a liquor license for a brewery is $2,125.00. The entire process of obtaining a license can take six months after filing.

i. Application Requirements

- **Legal names** of the applicant and owner of the place where business under the license will be carried on, with their residence addresses by street and number. This must be provided of each separate partner of a partnership and each individual officer of a corporation.
- The **exact location** of the place of business and every place to be occupied or used in connection with the business.
- The **productive capacity** of each plant where any alcohol or liquor is to be manufactured, produced, distilled, rectified, blended, developed or used in the process of manufacture, denatured, redistilled, recovered, or reused.
- The **capacity of every warehouse** or other place where such alcohol, liquor, malt, or brewed beverage is to be held in bond or stored for hire, or the equipment to be used where a transportation business is to be carried on under the license.
- Each of the applicants must be a **citizen of the United States**.
- The application must be verified by an **affidavit** of the applicant made before any officer legally qualified to administer oaths.

ii. Pennsylvania Liquor Control Board Investigation Requirements

In most cases, the Pennsylvania Liquor Control Board (PLCB) will conduct a thorough investigation to determine whether the business and premises should be licensed. To help investigators process this request, there are several documents that should be prepared, and made available for review by the PLCB investigator in the field at the time of interview. These documents should be original copies and must be properly signed and dated.

a. Required Documentation for the Individual Applicants

- Identification (driver's license, passport, etc.).
- Naturalization papers or alien ID (if applicable).
- Residence information for the previous five years; if applicable, this must include the name of the county police department/law enforcement agency responsible for that jurisdiction so an out-of-state criminal record check can be completed.
- Employment information for the previous five years, including dates employed and the name and address of the employer(s).

b. Required Documentation for the Premises to be Licensed

- Physical and mailing address information.
- Current property owner/lessor name, address and contact information, including the phone number of the premises to be licensed.
- Documentation to verify the corporate business structure of the property landlord.
- Current health license.
- Lease between current property owner and applicant/applicant entity, signed and dated (if applicable).
- Lease assignment (if applicable).
- If premises has already been purchased, evidence to support the assertion that the applicant has the legal right to occupy the premises (bill of sale or agreement of sale, recorded deed).
- Hotel register (Hotel license applicants only).
- If the premises is not constructed or not yet ready for operation, prior approval may be requested by having ready for review plans that show all areas to be licensed. Plans need not be professionally drawn and should include width and length of each room to be licensed. They are to be submitted on 8.5" by 11" paper. Note: a final inspection of the completed premises will be conducted by a Licensing investigator before operational authority is granted.

- For applicants not to be considered under prior approval, the premises must be ready for operation and have adequate seating, utensils and food for 30 patrons.

c. Required Documentation for Finances and Agreements

- Evidence to support that the entire purchase price (excluding real estate) is properly held in escrow by a financial institution or attorney in the form of cash or legal obligation, payable to the seller for the applicant listed on the application for all items to be ultimately owned by the applicant only.
- A copy of a manager's contract or agreement (if applicable).
- All original sources of funds for the purchase of the license, licensed business, fixtures, equipment and property must be provided and verified. Additionally, if real estate was purchased by applicant/applicant principal/entity within the previous year, evidence of the purchase and information about the source of funding for purchase should be provided.
- An Individual Financial Disclosure Affidavit (PLCB-1842) for each individual applicant, a corporation, limited liability company (LLC), partnership or club must be prepared. The completion of this affidavit may be held until the time of the interview so the licensing analyst can provide assistance.
- Copies of bank statement(s), checking accounts, etc., for the last six months.
- Documents regarding the source of funds used in the transaction (judgment notes, loan commitments, settlement sheets, original source of any monies held in savings accounts, etc.).

d. Required Documentation for an Applicant Entity, Property Owner Entity, and/or Any Applicant Principal Involved (Including Parent Organizations)

- Corporations
  - Articles of incorporation. If it is an out-of-state corporation, the date of issuance of authority to do business in Pennsylvania is also required for the applicants (but not the parent organization).
  - Minute book.
  - Stock transfer ledger and stock certificates (cancelled stock certificates must be marked "cancelled" on their face).
  - All officers, directors, and stockholders must be interviewed.
- Limited Liability Companies (LLC)
  - Certificate of organization.
  - Operating agreement.
  - Certificates of ownership (if they have been issued).
  - All members and managers must be interviewed.

- Limited Partnerships
  - Certificate of limited partnership.
  - Limited partnership agreement, including amendments.
  - All general partners and limited partners must be interviewed.

II. OTHER COMPLIANCE REQUIREMENTS

A. CERTIFICATE OF LABEL APPROVAL

1. Federal Requirements

A Certificate of Label Approval (COLA) authorizes an applicant to bottle and remove the product identified on the Certificate from the plant(s) identified on the Certificate where it was bottled or packed, or to remove products in containers from Customs' custody. 27 C.F.R. §§ 4.50 (wine), 5.51 (distilled spirits), 7.41 (malt beverages).

To obtain a COLA, an applicant must apply with the Alcohol Labeling and Formulation Division of the Alcohol and Tobacco Tax and Trade Bureau (TTB). Generally, every brand label must contain the brand name, class, name and address of the bottler or importer, net contents, and alcohol content for malt beverages that contain any alcohol derived from added flavors or other added non-beverage ingredients (other than hop extracts) containing alcohol. 27 C.F.R. § 7.22. Additional requirements include the size and lettering of the alcohol warning label. Samples of the labels for which the applicant is seeking approval must be attached to all applications. A TTB officer will usually notify the applicant of approval or denial within 90 days of receipt. *Id.*

NOTE: A federal COLA is required if a business is selling its alcohol across state lines.

2. State Requirements

Generally, brands of malt or brewed beverages sold in Pennsylvania must be registered with the PLCB. 47 P.S. § 4-445(a). In order to register brands, the applicant must submit an application and an annual fee of $75 per brand or a single annual fee of $150 for up to 20 brands so long as 100 barrels or less are produced on an annual basis. *Id.* In addition, a registration application must be filed simultaneously with:

(1) A label or copy of a label for each brand registered and a Federal label approval [i.e. COLA] containing a copy of the label.
(2) A copy of a territorial franchise agreement between the manufacturer and each Pennsylvania importing distributor.
(3) If the brand registrant is an out-of-State importer/wholesaler the following:
  (i) A copy of the agreement designating the United States importer/wholesaler as the authority to market in this Commonwealth.
  (ii) A copy of the territorial/franchise agreements between the importer/wholesaler and each Pennsylvania importing distributor. The

agreement shall contain the written consent and approval of the out-of-State domestic or nondomestic manufacturer to the appointment of the Pennsylvania importing distributor and the rights conferred thereunder.

(4) If the brand registrant is a licensed Pennsylvania importing distributor holding an agreement as franchisee with a nondomestic manufacturer, a copy of the agreement with the nondomestic manufacturer.

40 Pa. Code § 9.108.

The PLCB will accept a brand registration application from an applicant who does not have a COLA only if the application is for the sale of malt or brewed beverages to non-licensees (i.e. consumers) for on-premises and off-premises consumption. Pa. Liquor Control Bd., Advisory Opinion No. 17-458, p. 2 (2017). The reasoning behind this exception is that a COLA is only required for businesses selling alcohol across state lines and, thus, some businesses may not be able to produce a COLA for brand registration purposes. *Id.*

B. OFF SITE PREMISES PERMITS

There are different types of permits that a business can obtain to sell and/or provide its alcohol outside of the location where it is produced. The most common examples include (1) off-premises catering permits, (2) malt or brewed beverages and food expositions, and (3) farmers market permits.

1. Off-Premises Catering Permits

Act 116 of 2012 provides that holders of restaurant liquor licenses, hotel liquor licenses, eating place retail dispenser licenses, and brew pub licenses may apply for and obtain an off-premises catering permit. 47 P.S. §§ 4-406(f), 4-442(f), 4-446(b). This permit allows a licensee to:

> hold a catered function off the licensed premises and on otherwise unlicensed premises where the licensee may sell wine produced by a licensed limited winery and malt or brewed beverages produced by the brewery by the glass, open bottle or other container together with food, and in any mixture, for consumption on those premises.

47 P.S. § 4-446(b). However, these permits are subject to the following conditions:

- Any licensee applying for an off-premises catering permit must notify the PLCB at least 60 days in advance of the first catered function and pay the permit fee by March 1 of each calendar year, regardless of whether the licensee has scheduled catered events. 47 P.S. §4-493(33). Failure to do so will preclude the licensee from obtaining the permit for that calendar year.

- The licensee must provide written notice to the PLCB at least 14 days before each catered function. Notice must include the location, time, and host of the function in addition to general information regarding the expected guests. (This may be waived, at the board's discretion, if the applicant has previously conducted functions that meet the requirements of this Act, is in good standing, pays a late fee of $100, and notification was received at least 7 days before the catered function.) 47 P.S. § 4-446(b)(10).

- The local police and the enforcement bureau must be given the same written notice at least 7 days before a catered function. 47 P.S. § 4-446(b)(9).

- Alcohol may only be provided during the days and hours that the licensee may otherwise sell alcohol, and may not be taken from the permitted location by any patron. 47 P.S. § 4-446(b)(1), (8).

- All servers at the off-premises catered function must be in compliance with the Responsible Alcohol Management Provisions (RAMP) program. 47 P.S. § 4-446(b)(2).

- A catered function shall not last longer than one day or be held at a location that is already subject to the applicant's or another licensee's license. 47 P.S. § 4-446(b)(3), (4).

- A licensee shall not hold more than 52 catered functions each year for use with a particular license. 47 P.S. § 4-446(b)(3).

- No catered function may be held for more than 5 hours per day and must end by midnight, unless the catered function occurs on December 31 on which date the catered function must end by 2:00 AM. 47 P.S. § 4-446(b)(13).

2. Malt or Brewed Beverages and Food Expositions

Malt or brewed beverages and food expositions are "affairs held indoors or outdoors with the intent of educating attendees of the availability, nature, and quality of malt or brewed beverages in conjunction with suitable food displays, demonstrations, and sales." 47 P.S. § 4-446(c)(1).

In order to participate in such expositions, brewery license holders must apply for and obtain a special permit and pay a fee of $30 per day for each day of permitted use, not to exceed 30 consecutive days and 100 days total for any calendar year. *Id.*

Special permits entitle the holders to provide individually portioned tasting samples of malt or brewed beverages no larger than 4 fluid ounces, and sell malt or brewed beverages by the glass, growler, bottle or package. Samples may be sold or offered free of charge. Malt or brewed beverages sold must be those produced by the permit holder, under the authority of its brewery license, and each individual sale may not to exceed 192 fluid ounces. *Id.*

3. Farmers Market Permits

A farmers market includes any building, structure, or other place owned, leased, or in the possession of a person, municipal corporation, or public or private organization located in Pennsylvania that is used or intended to be used by two or more farmers or an association of farmers certified by the Department of Agriculture to participate in the Farmers Market Nutrition Program for the purposes of selling agricultural commodities produced in Pennsylvania directly to consumers and is not open for business more than 12 hours each day. 47 P.S. § 4-446(c)(2)(i)-(iii).

In order to participate in a farmers market, a brewery must apply for and obtain a farmers market permit and pay of an annual fee of $250. 47 P.S. § 4-446(c)(2). These permits are only available to breweries that qualify as manufacturers. 47 P.S. § 4-446(c)(3). Written notice of the date, time, and location the permit is to be used must be provided by the permit holder to the enforcement bureau at least 2 weeks before the event.

A farmers market permit entitles the holder to participate in more than one farmers market at any given time and an unlimited number throughout the year where the permittee may sell malt or brewed beverages by the glass, growler, bottle or package during the standard hours of operation of the farmers market. 47 P.S. § 4-446(c)(2). Malt or brewed beverages sold must be those produced by the permittee under the authority of its brewery license, and each individual sale may not to exceed 192 fluid ounces.

III. RECENT LEGISLATION

A. ACT 13 OF 2019 (THE BEER TAX)

Article II of Pennsylvania's Tax Reform Code imposes, upon each separate sale at retail of tangible personal property or services, a 6% tax of the purchase price. 72 P.S. § 7202(a). This tax is collected by the vendor and remitted to the Commonwealth. *Id.* An additional 1% or 2% tax is imposed by Allegheny County and Philadelphia County, respectively. *See* Sales and Use Tax Bulletin 2019-02 (issued July 16, 2019). Retail sales include those made by a manufacturer of malt or brewed beverages to any person for any purpose, except retail sales to a distributor or importing distributor. 72 P.S. § 7201(k)(10).

Act 13 of 2019 now requires manufacturers of malt or brewed beverages to pay a use tax on all malt or brewed beverages sold directly to consumers for consumption on or off premises. *See* Sales and Use Tax Bulletin 2019-02. The base of this use tax is 25% of the retail purchase price of all malt or brewed beverages sold directly to consumers for on or off premises consumption. This Act only applies to such sales made by a manufacturer under its manufacturing license, which includes a brewery license, brewery storage license, and brew pub license.

1. Example Applications of Act 13

Brew Co. is licensed as a manufacturer (G license) of malt or brewed beverages by the Pennsylvania Liquor Control Board (PLCB). Brew Co. holds no other licenses from the PLCB. In the normal course of business, Brew Co. manufacturers and sells malt or brewed beverages to a variety of customers, including importing distributors, holders of restaurant liquor licenses, and consumers at its onsite taproom. Brew Co. makes the following sales of its own malt or brewed beverages:

(a) Twenty cases, five one-half barrel kegs, and ten one-sixth barrel kegs to XYZ, Inc., an importing distributor. Brew Co. charges XYZ a total of $2,500 for all of the products.
(b) Four cases and two one-sixth barrels to DEF, LLC, an establishment holding a restaurant liquor license. Brew Co. charges DEF a total of $320.
(c) Two hundred pints, 25 crowlers, ten cases, and two one-sixth barrels to various individual customers who will be the ultimate consumer of the products for consumption on or off premises. Brew Co. charges its customers a total of $1,000.

In transaction (a), Brew Co. does not need to charge and separately state the Commonwealth's Sales Tax on an invoice provided to XYZ. Sales from a manufacturer to an importing distributor or distributor are exempt from the sales tax.

In transaction (b), Brew Co. must charge and separately state the Commonwealth's Sales Tax on an invoice provided to DEF. The total Sales Tax that must be collected by Brew Co. is $19.20 ($320 x 6%). If Brew Co. is located in either Allegheny or Philadelphia County, it must also collect the local sales tax on the entire purchase price. DEF does not charge sales tax on its sale of the malt or brewed beverages to its customers.

In transaction (c), Brew Co. must remit Use Tax on the malt or brewed beverages sold from its taproom directly to the ultimate consumer for consumption on or off premises. Since this is a Use Tax and the duty to pay and remit the tax is on the manufacturer, the manufacturer cannot separately state the tax on a receipt provided to the ultimate consumer. Instead, the manufacturer must remit the Use Tax when it files its Sales and Use Tax return with the Department. The manufacturer must calculate its Use Tax liability in the following manner:

Total of Retail Sales:	$1,000
Purchase Price for Use Tax Purpose (Total Retail Sales x 25%):	$250
Use Tax Due (Purchase Price x 6%):	$15

If Brew Co. is located in either Allegheny or Philadelphia County, it must also remit the local use tax on the purchase price. The results above will be the same whether Brew Co. makes the sales from its brewery facility, brewery storage facility, or brew pub facility. *See* Sales and Use Tax Bulletin 2019-02.

B. ACT 86 OF 2019

In November 2019, Governor Wolfe signed Act 86 into law. Act 86 made changes to multiple sections of the Liquor Code impacting breweries, distilleries, and limited distilleries, which were effective immediately.

1. Breweries

Subject to 47 P.S. § 4-446(a)(2), brewery licensees may sell malt and brewed beverages and alcohol for on-premises consumption Monday - Saturday from 9:00 AM - midnight and Sundays from 9:00 AM - 11:00 PM.

2. Distilleries

A distillery licensee may sell liquors produced on its licensed premises to the PLCB, those licensed by the PLCB, and the public Monday - Saturday from 9:00 AM - midnight and Sundays from 9:00 AM - 11:00 PM. 47 P.S. § 505.4(c)(1). (Previously, such sales were permitted Monday - Sunday from 9:00 AM - 11:00 PM.)

Additionally, a distillery licensee may provide tasting samples of liquor on its licensed premises Monday - Saturday from 9:00 AM - midnight and Sundays from 9:00 AM - 11:00 PM. 47 P.S. § 505.4(c)(2). Samples may be sold or provided free of charge, and may not exceed 1.5 fluid ounces. *Id.*

3. Limited Distilleries

A limited distillery licensee may sell liquors produced on its licensed premises to the Board, those licensed by the Board, and the public Monday - Saturday from 9:00 AM - midnight and Sundays from 9:00 AM - 11:00 PM. 47 P.S. § 505.4(b)(1). Samples may be provided of liquor on its licensed premises and Board-approved locations Monday - Saturday from 9:00 AM - midnight and Sundays from 9:00 AM - 11:00 PM. 47 P.S. § 505.4(c)(2).

C. ACTS 45, 48, AND 57 OF 2019

In July 2019, Governor Wolfe signed Acts 45, 48, and 57 into law. Act 45 changed nine sections of the Liquor Code and one PLCB Regulation. Act 48 changed Section 472 of the Liquor Code regarding local options. Act 57 changed three sections of the Liquor code regarding tourist development project licenses. The key changes from these Acts are summarized below:

1. Alcoholic Cider

"Alcoholic cider" is no longer defined as being sourced from "any fruit or fruit juice." It is a beverage produced through alcoholic fermentation which is primarily derived from one of four things: apples, apple juice concentrate and water, pears, or pear juice concentrate and water. "Fermented fruit beverages" now encompass products made from other fruits. 47 P.S. § 1-102.

Limited distilleries may apply for a "liquor and food exposition permit" to participate in alcoholic cider, liquor, and food expositions off their licensed premises. 47 P.S. § 505.4(b)(8).

2. Fermented Fruit Beverage

A "fermented fruit beverage" is similar to alcoholic cider in that its alcoholic content range is the same—at least 0.5% but not greater than 8.5%. Distinguishingly, it is derived from "fruit, fruit juice, fruit juice concentrate and water with or without flavorings." It is a malt or brewed beverage that can be sold in bottles, cases, kegs, cans, or other containers of the type used for the sale of malt or brewed beverages. It cannot, however, be sold or marketed as a wine. 47 P.S. §§ 1-102, 744-1001.

The Liquor Code also allows for the sale of fermented fruit beverages by those licensees who are already permitted to sell alcoholic cider, such as breweries, limited wineries, limited distilleries, and distilleries. Fermented fruit beverage are now included in the total production amount of 200,000 gallons per year for limited wineries. 47 P.S. §§ 4-446(a)(2), 5-505.2(a), (b), 505.4(b), (c)(1).

3. Local Option

Municipalities have the option to vote on whether or not to allow certain manufacturing licenses to be permitted to operate within their municipality. The new ballot questions provided by Act 48 are for brewery, brewery storage, limited distillery, limited distillery satellite locations, limited winery, and limited winery satellite locations licenses. 47 P.S. § 4-472(a). Distillery licenses, farmers market permits, and exposition permits are not affected by this change.

4. Nonalcoholic Malt or Brewed Beverage

Any nonalcoholic malt or brewed beverage that is produced by an out-of-state manufacturer of malt or brewed beverages, or is produced by a Pennsylvania manufacturer of malt or brewed beverages that has designated an importing distributor under Section 431 of the Liquor Code, must also be distributed pursuant to this Section. A "nonalcoholic malt or brewed beverage" includes "any beverage intended to be marketed or sold as nonalcoholic beer having at least a trace amount of alcohol content but which does not contain one-half of one per centum (0.5%) or more alcohol by volume." 47 P.S. § 4-431(g)(2).

5. Tourist Development Project

A "tourist development project" is defined as "a planned development situated on at least [90] acres of land, constructed since January 1, 2019, that is dedicated primarily to tourism with at least [500,000] square feet of actual or proposed development, with a mix of entertainment and retail uses." 47 P.S. § 102. This area must be within a municipality that allows for issuance and transfer of restaurant liquor licenses. 47 P.S. § 461(b.5)(3).

A tourist development project is permitted to have exterior serving areas, regardless of whether such areas are immediately adjacent to the licensed premises, provided that employees may enter unlicensed areas to deliver alcohol to patrons who are seated in such licensed exterior serving areas. 47 P.S. § 4-461(b.4)(4). Holders of a restaurant liquor license that is part of a tourist development project may not sell beer for off-premises consumption, but patrons may take wine, spirits, and beer off the licensed premises, if it remains in the area designated as a tourist development project. 47 P.S. § 4-461(b.5)(9).

i. Issuance of Restaurant Liquor License

Any interested party at any time may file an application for a tourist development project restaurant liquor license, which must be accompanied by a municipal resolution or ordinance indicating the municipality's approval of the request to have the area designated a tourist development project by the PLCB, a map of the proposed project area, and any other information that the PLCB needs. 47 P.S. § 4-461(b.5)(2). The application must also indicate the number of restaurant liquor licenses the applicant is seeking, with a maximum of 75. The application fee is $1,000,000 with a $65,000 surcharge for each restaurant liquor license due upon Board approval of the request. 47 P.S. § 4-461(b.5)(2), (4).

Once approved, the restaurant liquor license(s) will be held in safekeeping until the applicant files a formal transfer application. The restaurant liquor license is subject to additional safekeeping fees after four years of safekeeping. If the applicant does not file an application for transfer prior to the four-year deadline, the restaurant liquor licenses will be revoked, upon which there is no refund. The revoked license will be reassigned to the county from which it came and once again be available for purchase at auction. 47 P.S. § 4-461(b.5)(7).

ii. Transfer of Restaurant Liquor License

A restaurant liquor license transferred as part of a tourist development project may not obtain a wine expanded permit under Section 415 of the Liquor Code. 47 P.S. § 4-461(b.5)(9). The restaurant liquor licenses available for auction under Section 470.3 of the Liquor Code may be transferred to the tourist development project. 47 P.S. §§ 4-461(b.5)(1), 468(a)(1). No more than 75 liquor licenses may be transferred to be used in the tourist development project, and may not be transferred outside of the tourist development project area. 47 P.S. § 461(b.5)(4), (8). The applicant may assign the rights to file a formal transfer application to a third party. 47 P.S. § 4-461(b.5)(7).

The PLCB may choose which licenses will be available for transfer, but must choose licenses from a saturated county, if available, up to the maximum that can be accepted from that saturated county. 47 P.S. § 4-461(b.5)(6). A "saturated county" is defined as "a county with more than one restaurant liquor license per 3,000 inhabitants in the top 25 highest ratios of restaurant liquor licenses to county population in the Commonwealth." 47 P.S. § 1-102.

The maximum number of licenses that can be accepted from a county is equal to the total number of restaurant liquor licenses in the county minus a number equal to 2.64 times the county population divided by 3,000. 47 P.S. § 4-461(b.5)(6). The county quota does not include licenses

issued to mixed-use town development projects, nor those licenses issued and transferred to a new county for a tourist development project. are not included in the county quota. 47 P.S. § 4-461(a), (b.5)(10). A transferred license's renewal and validation dates will be changed to correspond to the receiving county's renewal and validation dates. 47 P.S. § 4-461(b.5)(11).

6. Wine and Spirits Auction Permit

Donations of wine or spirits are permitted by anyone who has legally acquired it and who legally possesses it in Pennsylvania. Donated wine or spirits from out-of-state may be imported as a gift, subject to PLCB procedures and fees. Wine and spirits auction permittees are responsible for paying the appropriate taxes and processing fee to the PLCB if the wine or spirits is purchased from an entity other than the PLCB. 47 P.S. § 4-408.12(g), (i).

D. ACT 75 OF 2017

Governor Wolf signed Act 75 of 2017 into law in December 2017. The key changes from this Act are summarized below:

1. Compliance Checks

The Pennsylvania State Police, Bureau of Liquor Control Enforcement (BLCE) may use minors to purchase, attempt to purchase, possess or transport liquor or malt or brewed beverages as part of compliance checks at licensed establishments. The minor must be at least 18 years old; an officer, employee or intern of the BLCE; and trained by the BLCE. 47 P.S. § 2-211(g).

2. Breweries

Malt or brewed beverages produced for the holder of a brewery license under a contract brewing agreement with an out-of-state brewery may be sold to a non-licensee for on-premises or off-premises consumption. 47 P.S. § 4-446(a)(1).

3. Interlocking Interests

The holder of a retail (hotel, restaurant, or club) license, and/or its officers, directors, or stockholders, are permitted to lease land or buildings to the holder of a manufacturer license. 47 P.S. § 4-411(d), (e).

A person who has ownership interest in a limited winery license may be employed by an entity that holds a hotel, restaurant, eating place, or club license, so long as the person is not employed as alcohol service personnel or manager. 47 P.S. §§ 4-411(e), 4-493(11).

E. ACTS 42 AND 44 OF 2017

In October 2017, Governor Wolf signed Acts 42 and 44 into law. Act 42 made changes to gaming laws and Act 44 made changes to the Fiscal Code. The key changes from these Acts are summarized below:

1. License Suspension for Deficiency

Establishment of a process for immediate suspensions of the licensing privilege under certain conditions. If the PLCB finds that the licensee does not meet a requirement under the Liquor Code or PLCB Regulations, the PLCB may immediately suspend the operating privileges of the licensee. The PLCB must give written notice to the licensee of the exact deficiency and the suspension will remain in effect until the licensee can establish that the deficiency has been corrected. P.L. 725, No. 44, § 1799.6-E.

2. Sales by Distilleries and Limited Distilleries

Distilleries or limited distilleries may continue to sell liquor they produce directly to other PLCB licensees or permit holders, but are now subject to an aggregate (calendar) yearly cap of 50,000 gallons to such entities. P.L. 725, No. 44, § 1799.5-E.

3. Slot Machines

Holders of a Category 4 slot machine license will be able to apply for a new restaurant liquor license or eating place retail dispenser license. P.L. 419, No. 42, § 1305.1.

4. Sports Wagering

Holders of slot machine licenses may conduct sports wagering and provide free liquor and malt or brewed beverages to patrons engaged in sports wagering. P.L. 419, No. 42, § 13C26.

F. ACT 166 OF 2016

In November 2016, Governor Wolf signed Act 166 of 2016 into law. The changes affecting licensees went into effect in January 2017. The key changes from this Act are summarized below:

1. Alcoholic Cider

The definition of alcoholic cider has been amended by changing the maximum carbonation level from .392 of a gram per 100 milliliters to 6.4 grams per liter. 47 P.S. § 1-102.

2. Beer Taps

Licensees no longer need to label their taps, as long as the brand label is located somewhere in full sight of the customer. 47 P.S. § 4-493(6).

3. Brand Registration / Beer Sales Reporting

Any person selling malt or brewed beverages must report the volume of the malt or brewed beverages sold to the PLCB. The monthly report must be made no later than 60 days after the end of each calendar month. The report must show product volumes broken down by brewer, and must be reported in 31 gallon barrel equivalents. The PLCB is required to post the reports on the internet for public view for a period of two years.

4. Breweries

"Growler" is defined as a refillable container for malt or brewed beverages that can be resealed.

A brewery may sell cider and malt or brewed beverages produced by another PLCB licensed manufacturer for consumption on its premises. However, the combined sales of wine, liquor, and malt or brewed beverages produced by another manufacturer may not exceed 50% of the on-premises sales of its own malt or brewed beverages for the calendar year. The brewery does not need a brewery pub license to sell the products of other licensed breweries, limited wineries, limited distilleries, and distilleries. 47 P.S. § 4-446(a)(2).

Finally, breweries can now produce and sell mead, which is defined as a malt or brewed beverage. 47 P.S. § 1-102.

5. Direct Malt or Brewed Beverage Shipper

A direct malt or brewed shipper license (DBS) was created to allow out of state shipment of malt and brewed beverages to Pennsylvania residents. 47 P.S. § 4-448(a). This license is available to any person licensed by another state or country as a wholesaler or retailer of malt or brewed beverages.

The license permits the shipment of up to 192 fluid ounces per month of any malt or brewed beverage when a Pennsylvania resident, 21 years or older, orders the beverage. No more than 96 fluid ounces of a specific brand may be shipped to any one Pennsylvania resident within one calendar year.

To obtain a DBS license, the applicant must file an application, pay a $250 fee, provide a copy of the applicant's current alcohol beverage license, provide documentation that the applicant has obtained a sales tax number from the Department of Revenue, and provide other information as required by the PLCB. 47 P.S. § 4-448(c).

6. Distilleries

Product distilleries may sell cider produced by a PLCB licensed limited winery and liquor produced by another PLCB licensed distillery for on-premises consumption. The combined sales of wine, liquor, and malt or brewed beverages produced by other manufacturers may not exceed 50% of the on-premises sales of the distillery's own sales of liquor for the calendar year.

7. Distributors

A distributor may sell malt or brewed beverages in any package configuration to a non-licensee for off-premises consumption. However, a distributor may not sell or deliver malt or brewed beverages to any licensee whose licensed premises is located within the designated geographical area granted to an importing distributor other than the importing distributor that sold the beer to the distributor. If a licensee violates this provision, there will be a suspension of at least 30 days.

8. Exterior Entrances

The PLCB cannot require an exterior entrance to the licensed premises as a condition for approving a license or renewal, as long as the licensee's hours of operation do not exceed the hours for an unlicensed premises for which the PLCB has approved interior connection. 47 P.S. § 4-468(e).

9. Interlocking Business Prohibitions

An officer, director, or stockholder of any hotel, restaurant, or club license may own land or buildings which are leased to a holder of an eating place retail dispenser license, a distillery license, or a limited distillery license. The Act also changes the exception for ownership of 5% or less of a restaurant or eating place retail dispenser license, and now allows a 10% or less ownership of a retail license.

10. Mug Clubs

Mug clubs no longer require that every member of a mug club be provided a mug or container to be used when purchasing alcohol. The mug club annual fee and renewal fee are now optional. 47 P.S. § 1-102.

11. Sunday Sales

Act 166 permits restaurant, hotel, municipal golf course restaurant liquor, and privately-owned public golf course licensees to sell alcohol on Sundays at 9:00 AM instead of 11:00 AM. 47 P.S. § 4-406(a)(3). The requirement that a licensee offer a meal beginning at 9:00 AM is removed. However, holders of an eating place retail dispenser license are still subject to the meal requirement.

12. Wine Expanded Permits

Holders of wine expanded permits must sell wine-to-go through a register at which malt or brewed beverages and restaurant food sales are made on the licensed premises. Permit holders must also have a RAMP-trained cashier at the register. 47 P.S. § 4-415(a)(9).

G. ACT 39 OF 2016

In June 2016, Governor Wolf signed Act 39 of 2016 into law. The Act became effective in August 2016. The Act changed many of the PLCB's responsibilities. The key changes from this Act are summarized below:

1. Wine to Go

Hotel and restaurant license holders may apply for permits to sell limited quantities of wine to go. 47 P.S. § 4-415(a)(2).

2. Direct Wine Shipping

Pennsylvania residents may receive up to 36 cases of wine per year for personal use, shipped by a wine producer licensed by the PLCB as a direct wine shipper. 47 P.S. § 4-488(b).

3. Special Liquor Orders

The PLCB mark-up on special liquor orders is reduced to 10%. 47 P.S. § 2-207(b).

4. Sunday Hours

Restrictions on Sunday hours and the number of Fine Wine & Good Spirits stores allowed to be open on Sundays were removed. 47 P.S. §§ 1-102, 3-304.

5. Retail Marketing Abilities

The PLCB is granted common retail marketing abilities such as pricing flexibility, a customer loyalty program, and couponing opportunities. 47 P.S. §§ 2-207(m), 3-305(b).

6. Liquor License Auction

The PLCB is authorized to auction restaurant liquor licenses that have expired since 2000. 47 P.S. §§ 4-470.3(a), (a.1).

IV. DRAM SHOP / SOCIAL HOST LIABILITY

A. GENERAL STANDARD FOR LIABILITY

The Pennsylvania Liquor Code (Dram Shop Act), 47 P.S. §§ 4-493, 4-497, provides the foundation to establish liability for negligent service of alcohol by liquor licensees. With respect to patrons of the business:

> It shall be unlawful . . .
>
> (1) For any licensee or the board, or any employee, servant or agent of such licensee or the board, or any other person, to sell, furnish, or give any liquor or malted or brewed beverages, or to permit any liquor or malted or brewed beverages to be sold, furnished or given, to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known untampered habits.

47 P.S. § 4-493(1). Whereas, for third parties who are injured by a patron:

> No licensee shall be liable to third persons on account of damages inflicted upon them off the licensed premises by customers of the licensee unless the customer who inflicts the damages was sold, furnished or given liquor or malted or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated.

47 P.S. § 4-497.

Under the Dram Shop Act, an injured patron must prove two things to prevail against a licensee: (1) that he was served alcoholic beverages by a licensee while visibly intoxicated, and (2) that the violation proximately caused his injuries. *Johnson v. Harris*, 615 A.2d 771, 777 (Pa. Super. 1992). It is impermissible to infer from a person's presence at an establishment that serves alcoholic beverages that a defendant was served alcoholic beverages. *Id*. Further, it is not enough for an injured plaintiff to produce evidence that alcoholic beverages were served to other patrons. *See Holden v. Fez Inc*., 656 A.2d 147, 148 (Pa. Super. 1995).

When determining whether a person was "visibly intoxicated," the Pennsylvania Dram Shop Act displays considerable logic in placing stress upon what can be seen. *Johnson*, 615 A.2d at 771, 776. Visible intoxication is determined by an objective standard of appearances. *Id.* The law does not hold licensees responsible based on blood alcohol content or anything that is not visibly apparent; "the practical effect of the law is to insist that the licensee be governed by appearance, rather than by medical diagnoses." *Id.* This threshold applies to causes of action under both common law negligence and the Dram Shop Act.

The testimony of a person that he or she was visibly intoxicated is not sufficient to create an issue of material fact as to visible intoxication. In *McDonald v. Marriot Corp.*, 564 A.2d 1296, 1299 (Pa. Super. 1989), the plaintiff testified that she believed she was visibly intoxicated.

Id. at 1299. However, the Superior Court affirmed the trial court's decision to grant defendant's motion for summary judgment on the basis that plaintiff's intoxication was not apparent to anyone else. *Id.* The court found that the record revealed no one had asked the plaintiff to leave, to keep quiet, or even to quit drinking. *Id.* at 1299. Moreover, the plaintiff did not allege whether she exhibited this behavior before she was served her last drink or if anyone, let alone an employee, saw her exhibit such behavior. *Id.* Finally, the plaintiff did not offer the testimony of any witness to corroborate her version of the events; thus, even if she thought she was visibly intoxicated, there was no evidence that her intoxication was apparent to anyone else. *Id.*

B. RESPONSIBILITY FOR ALL DAMAGES IF LIABILITY IS FOUND

If liability under the Dram Shop Act is attributed to more than one defendant, each licensee defendant is liable for the *full amount* of damages, regardless of its degree of fault. 42 Pa.C.S. § 7102(a.1)(3)(v). For instance, even if a licensee is found only 1% liable for Plaintiff's injuries, that defendant is still responsible for *all* of the damages.

C. STATUTE OF LIMITATIONS

Claims under the Dram Shop Act are generally subject to the 2 year statute of limitations for personal injuries. 42 Pa.C.S. § 5524(2); *Am. States Ins. Co. v. Am. States Ins. Co.*, 918 A.2d 750, 751 (Pa. Super. 2007).

D. WAYS TO LIMIT LIABILITY

1. Training

Train employees to refrain from serving alcohol to patrons who appear intoxicated. Inform employees on how to identify a visibly intoxicated patron, and how to refuse service courteously. Further, provide training to staff by certified trainers. The staff should attend training regularly to understand what visible intoxication looks like, when to refuse service, and how to refuse service. Staff should also understand the importance of abiding by the law.

2. Written Procedures

Draft a written policy that demonstrates the establishment's commitment to responsible service. In this policy, describe the specific service policies and procedures, as well as how to implement them. Identify the people responsible for implementing these procedures, and establish a chain of command. Specify the penalties for violating these procedures and policies. Employers should supervise employees to oversee compliance with these procedures, and enforce penalties when needed.

E. DEFENSES

1. Contributory Negligence

Under the Dram Shop Act, contributory negligence is a valid defense in actions brought by third parties in certain situations, such as where the third party accepted a ride from a visibly intoxicated person. *Terwilliger v. Kitchen*, 781 A.2d 1201 (Pa. Super. 2001); *Miller v. The Brass Rail Tavern*, 707 A.2d 1072 (Pa. Super. 1997). In Pennsylvania, a plaintiff is barred from recovery if his or her comparative negligence exceeds that of the defendant's negligence. *Terwilliger*, 781 A.2d at 1205.

In *Miller*, the decedent and his friends arrived at the Brass Rail Tavern after consuming alcoholic beverages. *Id.* at 1707. They stayed at Brass Rail Tavern until "last call." Hours after the decedent left the tavern, he was involved in a car accident, and later the estate of the decedent filed suit against the tavern. *Id.* at 1077. The court found that the trial court should have permitted the tavern to raise the defense of contributory negligence, and remanded the action to determine whether the decedent's negligence barred recovery. *Id.* at 1081.

In *Terwilliger*, the estate of a passenger, who died in a fatal car accident, brought suit against the club who served the driver alcohol, under the Dram Shop Act. 707 A.2d at 1204. The court found that the passenger was contributorily negligent because he agreed to ride with the visibly intoxicated driver. *Id.* at 1209. However, because the passenger's contributory negligence did not exceed the club's negligence, the passenger was not barred from recovery. *Id.*

2. No Third Party Claims for Common Law Negligence

A licensee is not liable to a third party for damage caused outside of the licensee's premises by customers of a licensee unless (1) the customer who inflicts the damage was sold or given alcohol by the licensee or an employee of the licensee, and (2) the customer was given the alcohol while visibly intoxicated. 47 P.S. § 4-497; *Druffner v. O'Neill*, 2011 WL 1103647, *1, *2 n.1 (E.D. Pa. Mar. 24, 2011).

In *Druffner*, the plaintiff was hit by an intoxicated individual, who was served alcohol at a bar while visibly intoxicated. *Id.* at *1. The plaintiff brought a cause of action against the bar under both the Dram Shop Act and common law negligence. *Id.* The court dismissed the common law negligence claim against the bar, finding that the third party could not prevail in a cause of action against the bar absent a showing of a special relationship. *Id.* at *4. Because there was no special relationship between the bar and the third party, the bar did not owe a duty to the third party. *Id.* at *5. Therefore, the plaintiff's theory under common law negligence failed. *Id.* at *7.

Based upon the ruling in *Druffner*, Pennsylvania only permits a remedy under the Dram Shop Act for injuries to third parties resulting from the sale of alcohol. *Id.* Therefore, when a third party plaintiff brings a claim against a licensee for common law negligence relating to the sale of alcohol, preliminary objections should be filed.

3. No Evidence of Visible Intoxication

For civil liability to attach to a licensee under the Dram Shop Act, there must be evidence showing that the individual was served alcohol while visibly intoxicated. 47 P.S. § 4-493(1). If there is no evidence showing the individual was served alcohol while visibly intoxicated, the licensee cannot be held liable. However, direct eye witness evidence is not required to establish liability under the Act. *Fandozi v. Kelly Hotel, Inc.*, 711 A.2d 524, 527 (Pa. Super. 1998). Rather, both direct evidence and circumstantial evidence of invisible intoxication may be used to establish liability. *Id.*

4. Precluding Evidence of Blood Alcohol Level

Under the Dram Shop Act, the plaintiff must present evidence of visible intoxication to prevail in a cause of action. However, while evidence of blood alcohol level may be relevant to a showing that a person was intoxicated, such evidence is not relevant, for proof of visible intoxication under Pennsylvania Law. *See Suskey v. Loyal Order of Moose Lodge No. 86*, 472 A.2d 663 (Pa. Super. 1984). Therefore, a licensee may move to preclude evidence of blood alcohol content in a cause of action against it under the Dram Shop Act.

F. INSURANCE

Because Pennsylvania permits responsibility for all damages, even if the licensee is only 1% liable (see Section IV(B) above), businesses should consider whether it is wise to purchase a Liquor Liability insurance policy. Depending on the insurer and policy, this may cover defense costs and payment to parties who sue the business, the owner(s), and/or the employee(s). Many insurers allow businesses to add their attorney(s) to the list of approved counsel to handle their defense. (For considerations regarding General Liability insurance, see Section V(F), below.)

G. RECENT CASE LAW

***Pennsylvania State Police, BLCE v. Jet-Set Restaurant, LLC*, 2018 WL 3995918 (Pa. 2018).**

A liquor licensee may not engage in a course of conduct of allowing minors to sit at a bar or serving alcoholic beverages at a table containing unsupervised minors. Additionally, a licensee may not engage in a course of conduct of allowing minors to be present in a licensed premises without the requisite number of supervisors.

***Jusczczyszyn v. Taiwo*, 113 A.3d 853 (Pa. Super. 2015).**

A Police officer – who was responding to a disturbance call at a bar during the performance of his official duties – was not part of a protected class under the Dram Shop Act when he was responding to a call at the bar and fully aware of the potential risks posed by the allegedly intoxicated person. The bar owners were not responsible for injuries the officer received when he physically engaged an intoxicated patron.

The officer was determined to be a licensee, as opposed to a business invitee, for purposes of premises liability. (NOTE: see the premises liability section below for an analysis regarding trespassers, licensees, and invitees.) Therefore, the bar owners were required only to warn him of dangerous hidden conditions.

***Bartolomeo v. Marshall*, 69 A.3d 610 (Pa. Super. 2013).**

An allegation that a defendant should have known alcohol was being served on its premises is insufficient to sustain a cause of action, because the defendant must have knowingly furnished intoxicants to the minor.

***Pennsylvania State Police v. S&B Restaurant Inc.*, 52 A.3d 513 (Pa. Commw. 2012).**

A liquor licensee did not have good faith defense to serving alcohol to underage patron, so as to avoid suspension and fine for violation of Liquor Code, even though patron had taken a wristband issued to an of-age drinker and placed it on her own wrist so that she would be served, when the licensee did not require the patron to produce a valid ID.

V. OTHER PERTINENT AREAS OF LAW FOR ENTITIES SERVING ALCOHOL

A. NUISANCE

1. General Standard for Liability

Generally, there are two types of nuisance: (1) public nuisance and (2) private nuisance. A public nuisance is an unreasonable interference with a right common to the general public, whereas a private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of their land. Restatement (Second) of Torts §§ 821B, 821D. For both public and private nuisances, the alleged invasion must cause significant harm. Restatement (Second) of Torts § 821F. That is, significant harm of the kind that would be suffered by a person of normal or reasonable sensitivities in the particular locality. *Id.* Thus, a slight inconvenience or annoyance is not actionable. *Id.*, cmt. c. Instead, the invasion must be definitively offensive, seriously annoying, or seriously intolerable for it to be significant. *Id.*

i. Public Nuisance

An interference with a public right may be unreasonable in the following circumstances:

(a) the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
(b) the conduct is proscribed by a statute, ordinance or administrative regulation, or
(c) the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B.

An individual may recover civil damages in an action for public nuisance only if they suffered harm of a kind different from that suffered by other members of the public while exercising the right common to the general public that was the subject of the interference. Restatement (Second) of Torts § 821C.

An action requesting an injunction to abate a public nuisance may only be brought by a party who has a right to civil damages, authority as a public official or agency to represent the state, or standing to sue as a representative of the general public as a citizen in a citizen's action or as a member of a class in a class action. Restatement (Second) of Torts § 821C.

ii. Private Nuisance

Under Pennsylvania law, a business is subject to liability for a private nuisance if:

(1) the defendant engaged in conduct consisting of either
    (a) an affirmative act; or
    (b) failed to act where he had a duty to take affirmative action to prevent or abate the invasion of plaintiff's private interest.
(2) such conduct was the legal cause
(3) of an invasion of the plaintiff's interest in the private use and enjoyment of his land; and
(4) the invasion is either:
    (a) intentional and unreasonable; or
    (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Kembel v. Schlegel, 478 A.2d 11, 14-15 (Pa. Super. 1984) (adopting Restatement (Second) of Torts § 822). A private nuisance action may be brought by those who have property rights and privileges in respect to the use and enjoyment of the land affected. Restatement (Second) of Torts § 821E. Thus, in the context of alcohol, this type of claim is usually brought by neighbors.

An invasion is intentional if the defendant either acts for the purpose of causing the invasion or knows that the invasion is resulting or is substantially certain to result from his conduct. Restatement (Second) of Torts § 825. Such an intentional invasion is further unreasonable if the gravity of the harm outweighs the utility of the defendant's conduct or the harm caused by the conduct is serious and the financial burden of compensating for this would make the continuation of the conduct not feasible. Restatement (Second) of Torts § 826. In balancing these interests, courts consider factors such as (1) the extent and character of the harm involved, (2) the social value that the law attaches to the type of use or enjoyment invaded, (3) the suitability of the particular use or enjoyment invaded to the character of the locality, (4) the burden on the person harmed of avoiding the harm, (5) the social value that the law attaches to the primary purpose of the conduct, (6) the suitability of the conduct to the character of the

locality, and (7) the impracticability of preventing or avoiding the invasion. Restatement (Second) of Torts §§ 827-828.

2. Statute of Limitations

Nuisance actions are generally subject to a 2 year statute of limitations period. 42 Pa.C.S. § 5524(7); *Cassel-Hess v. Hoffer*, 44 A.3d 80, 88 (Pa. Super. 2012).

3. Possible Defenses / Issues to Consider

Once a nuisance is established the burden shifts to the defendant to prove that his conduct is unavoidable or cannot be prevented without an expenditure that would substantially deprive him of the use of his own property (i.e. the problem defies the solution). *Chase v. Eldred Borough*, 902 A.2d 992, 998-99 (Pa. Commw. 2006). In other words, the defendant must prove that it is not possible for him to use his property without causing injury to the plaintiff.

4. Remedies

The existence of a nuisance may result in the granting of a civil injunction and/or monetary damages. Restatement (Second) of Torts § 821C.

i. Injunctions

An injunction is a judicial order restraining a party from beginning or continuing a certain action. Injunctive relief is an extraordinary remedy, which should be granted only in limited circumstances. *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1426-27 (3d Cir. 1994). Injunctions may be preliminary or permanent. A preliminary injunction only provides interim relief that is ordered to protect the parties during the pendency of the action, whereas a permanent injunction amounts to an affirmative, permanent remedy to a situation. *Soja v. Factoryville Sportsmen's Club*, 522 A.2d 1129, 1132 (Pa. Super. 1987). Additionally, a party seeking a preliminary injunction must pay a bond to the court that is surrendered if they are ultimately unsuccessful in their claim. *Walter v. Stacy*, 837 A.2d 1205, 1208 (Pa. Super. 2003).

Injunctions must be carefully tailored to remedy only the harm proven and be no broader than necessary to prevent reoccurrence of the harm. *Chase*, 902 A.2d at 999. The reasoning behind this is that "[n]o one is entitled to absolute quiet in the enjoyment of his property. He may only insist upon a degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells." *Collins v. Wayne Iron Works*, 227 Pa. 326, 76 A. 24 (1910). Accordingly, the personal comfort of residents in neighborhoods with businesses close by is subject to the commercial necessities of those businesses. *Molony v. Pounds*, 64 A.2d 802, 803-04 (Pa. 1949). Therefore, "a strong effort will be made to conserve the rights of all parties" where the invasion of another's interest arises from a lawful business. *Id.* at 804.

ii. Monetary Damages

In addition to injunctions, courts can award a plaintiff monetary damages based upon the perceived value of the nuisance that a plaintiff has had to endure.

5. Key Cases Regarding Alcohol Establishments

***SPTR, Inc. v. City of Phila.*, 150 A.3d 160, 168 (Pa. Commw. 2016).**

The mere existence of a commercial beer garden in a residential zone did not render it a nuisance *per se* because, "[a]lthough our courts have recognized inherent problems resulting from the sale and consumption of alcoholic beverages, they have not declared the sale, service or consumption of alcoholic beverages a nuisance *per se*." Instead, for a business to constitute a nuisance *per se*, it must be inherently injurious to property and health in a particular locality, regardless of how it is operated.

***Reid v. Brodsky*, 156 A.2d 334 (Pa. 1959).**

A lawful taproom-restaurant was held to be a nuisance where the patrons of such business participated in conduct unreasonable in the area, such loud music, public urination, obscene and vulgar language, immoral and vulgar conduct in parked cars, physical altercations, sexual misconduct, and the leaving behind of contraceptive devices in the area. This conduct took place around the clock for eleven consecutive weeks and was conducted, at times, in front of children. The defendant's argument that the significant harm suffered by the neighborhood was caused by patrons, not the business, failed because the harm was a direct result from the operation of the business.

***Molony v. Pounds*, 64 A.2d 802, 804 (Pa. 1949).**

Where a restaurant in a partly commercial neighborhood stopped playing music and serving alcoholic beverages between 1:00 – 6:00 AM, the noises resulting from loud talking of patrons coming and going, slamming of car doors, and honking of car horns was unavoidable. These noises were out of the control of the restaurant owners. Therefore, that portion of the lower court's decree enjoining business operations between 1:00 – 6:00 AM was eliminated.

***61 West 62 Owners Corp. v. CGM EMP, LLC*, 906 N.Y.S.2d 549 (N.Y. App. Div. 2010).**

A roof-top bar's playing of music, at a level in violation of the City Noise Control Code, constituted a private nuisance to the plaintiff who owned the apartment building next door and whose property value was diminished and his residents' quality of life was degraded as a result thereof.

***Biglane v. Under The Hill Corp.*, 949 So.2d 9 (Miss. 2007).**

Unreasonably loud music played by a saloon constituted a private nuisance to the neighbors who lived next door, even though the saloon was itself a lawful business. The saloon was ordered to keep its doors and windows closed while playing music.

B. PREMISES LIABILITY

1. General Standard for Liability

If a person is injured on a licensee's property, that individual can bring a claim against the licensee as a negligence action. To establish a cause of action for negligence, a plaintiff must establish that: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of that duty was the proximate cause of the plaintiff's injury, and (4) the plaintiff was injured. *Petrongola v. Comcast-Spectacor, L.P.*, 789 A.2d 204 (Pa. Super. 2001). The scope of the duty property owners owe to an individual hurt on their land can fall into three categories, depending on the type of person the visitor is. Generally the determination of whether an individual is (1) an invitee, (2) a licensee, or (3) a trespasser is one of fact for the jury. *Mancini v. Giant Food Stores, Inc.*, 16 Pa. D. & C.5th 281, 298 (C.P. 2010).

i. Duty Owed

a. Invitee

First, an invitee can be either a public invitee or a business visitor. A public invitee is a person invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. Restatement (Second) of Torts § 332; *Ott v. Unclaimed Freight Co.*, 577 A.2d 894, 899 (Pa. Super. 1990). Whereas a business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with the business dealings with the possessor of the land. Restatement (Second) of Torts § 332; *Ott*, 577 A.2d at 899. The particular duty owed to a business invitee must be determined on a case-by-case basis. *Campbell v. Eitak, Inc.*, 893 A.2d 749, 751 (Pa. Super. 2006). Pennsylvania courts have held the scope of duty property owners owe to business invitees is controlled by the Restatement (Second) of Torts Section 343, which provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, if but only if, he:
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk to such invitees,
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

Campisi v. Acme Mkts., 915 A.2d 117, 119 (Pa. Super. 2006) (quoting Restatement (Second) of Torts § 343).

b. Licensee

Second, a licensee – or social guest – is defined as "person who is privileged to enter or remain on land only by virtue of the possessor's consent." *Farrell v. Bonner*, 227 A.2d 683, 684 (Pa. 1967) (citing Restatement (Second) of Torts § 330 (1965)). The scope of duty property

owners owe to a licensee is controlled by the Restatement (Second) of Torts Section 342, which provides:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

Restatement (Second) of Torts § 342 (1965); *Alexander v. City of Meadville*, 61 A.3d 218, 221-22 (Pa. Super. 2012).

c. Trespasser

Third, property owners owe a lesser duty to trespassers. "A trespasser is one who enters the land of another without any right to do so or who goes beyond the rights and privileges which he or she has been granted by license or invitation." *Oswald v. Hausman*, 548 A.2d 594, 598 (Pa. Super. 1988). Under Pennsylvania law, "a trespasser may recover for injuries sustained on land only if the possessor of land was guilty of wanton or willful negligence or misconduct." *Rossino v. Kovacs*, 718 A.2d 755, 756 (Pa. 1998). However, if the trespasser is a child, then a stronger duty is required:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Carrasquillo v. Lawrence, 1986 WL 501548 (C.P. Phila. Dec. 30, 1986), *reversed on other grounds*, 538 A.2d 935 (Pa. Super. 1987).

2. Statute of Limitations

Slip and falls are generally subject to the 2 year statute of limitations for personal injuries. 42 Pa.C.S. § 5524(2); *Daniel v. City of Phila.*, 86 A.3d 955, 956 (Pa. Commw. 2014).

3. Possible Defenses / Issues to Consider

There are many common arguments a defendant may raise to challenge responsibility for a plaintiff's injury.

i. Whether the Defendant Possessed the Property

Liability is premised primarily on possession and control, and not merely ownership. *Deeter v. Dull Corp.*, 617 A.2d 336, 339 (Pa. Super. 1992). For a party to be liable to an invitee it must first be a "possessor" of land. *Blackman v. Fed. Realty Inv. Trust*, 664 A.2d 139 (Pa. Super. 1995). To be a "possessor" of land, a party must fit one of the following descriptions: (1) it must be in occupation of land with intent to control it; (2) it must be in occupation of land with intent to control it if no other party has done so subsequently; or (3) it must be entitled to immediate occupation if neither of the other alternatives apply. Restatement (Second) of Torts §328E.

A lessor of land is not liable for the physical harm caused by conditions of the land, natural or artificial, that arose before or after the transfer of possession under the lease. *Dinio v. Goshorn*, 270 A.2d 203, 206 (Pa. 1969); *Deeter*, 617 A.2d at 336; Restatement (Second) of Torts §§ 355-356. There are exceptions to this rule, including:

> (1) if he has reserved control over a defective portion of the demised premises;
> (2) if the demised premises are so dangerously constructed that the premises are a nuisance per se;
> (3) if the lessor has knowledge of a dangerous condition existing on the demised premises at the time of transferring possession and fails to disclose the condition to the lessee;
> (4) if the landlord leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is transferred to the lessee;
> (5) if the lessor undertakes to repair the demised premises and negligently makes the repairs; or
> (6) if the lessor fails to make repairs after having been given notice of and reasonable opportunity to remedy a dangerous condition existing on the leased premises.

Dorsey v Continental Assoc., 591 A.2d 716, 718 (Pa. Super. 1991).

ii. Whether the Defect was Obvious

"Neither the mere existence of a harmful condition in a store nor the mere happening of an accident due to such a condition evidences a breach of the proprietor's duty of care or raises a

presumption of negligence." *Neve v. Insalaco's*, 771 A.2d 786, 790 (Pa. Super. 2001). The Restatement provides that no liability exists when the dangerous condition is known or obvious to the invitee unless the proprietor should anticipate the harm despite such knowledge. Restatement (Second) of Torts § 343A(1). Comment (e) states:

> [i]f [the invitee] knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

Restatement (Second) of Torts § 343A cmt. e. A business owner is not an insurer of the invitee's safety. Thus, the plaintiffs were required to prove that a breach of a duty proximately resulted in the Appellant-invitee's injuries. *Campbell v. Eitak, Inc.*, 893 A.2d 749, 751 (Pa. Super. 2006).

iii. Whether the Defendant had Actual or Constructive Notice of the Dangerous Condition

Possessors of land have a duty to protect invitees from foreseeable harm. *Craig v. Franklin Mills Assocs., L.P.*, 555 F. Supp. 2d 547, 549 (E.D. Pa. 2008). However, that duty is only owed when the possessor "knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee." *Id.* (citing Restatement (Second) of Torts § 343). Further, "the possessor of the land must have 'actual or constructive notice' of the dangerous condition." *Id.* (citing *Estate of Swift v. Ne. Hosp.*, 690 A.2d 719, 723 (Pa. Super. 1997). To impose liability, a plaintiff must produce evidence that the condition that caused the injury is traceable to the possessor of land or his agents and not an unassociated individual. *Myers v. Penn Traffic Co.*, 606 A.2d 926 (Pa. Super. 1992).

The question of whether a danger is known or obvious is usually a question for the jury, however, the question may be decided by the court where reasonable minds cannot differ as to the conclusion. *Carrender v. Fitterer*, 469 A.2d 120, 124 (Pa. 1983).

Some factors the Pennsylvania Courts look at to determine constructive notice include, (1) the size and physical condition of the premises, (2) the nature of business conducted on the premises, the number of persons using the premises and frequency of such use, (3) the nature of defect and its location on the premises, (4) its probable cause, and (5) the opportunity which defendant, as a reasonable prudent person, had to remedy it. *Lanni v. Pa. R.R. Co.*, 88 A.2d 887 (Pa. 1952). One of the most important factors to be taken into consideration is the time elapsing between the origin of the defect or hazardous condition and the accident. *Neve v. Insalaco's*, 771 A.2d 786 (Pa. Super. 2001). The duration of the hazard is an important factor because if a hazard only existed for a very short period of time before causing any injury, then the possessor of land,

even "by the exercise of reasonable care" would not discover the hazard, and thus would owe no duty to protect invitees from such a hazard. Restatement (Second) of Torts § 343.

iv. Whether the Condition was Weather Related

In Pennsylvania, a possessor of land need not keep property free of ice and snow at all times. "An owner or occupier of land is not liable for general slippery conditions, for to require that one's walks be always free of ice and snow would be to impose an impossible burden in view of the climatic conditions in this hemisphere." *Wentz v. Pennswood Apts.*, 518 A.2d 314, 316 (Pa. Super. 1986). *See also Roland v. Kravco*, 513 A.2d 1029 (Pa. Super. 1986) (finding no liability to an invitee for general slippery conditions on the surface of a parking lot). To prove a landowner's liability for injury resulting from conditions of ice and snow, a plaintiff must establish:

> (1) that snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians travelling thereon;
> (2) that the property owner had notice, either actual or constructive, of the existence of such condition;
> (3) that it was the dangerous accumulation of snow and ice which caused the plaintiff to fall.

*Gilligan v. Villanova Uni*v., 584 A.2d 1005, 1007 (Pa. Super. 1991). Thus, under the hills and ridges doctrine, a property owner is to act within a reasonable amount of time after notice to remove snow and ice creating a dangerous condition on their property. *Biernacki v. Presque Isle Condominiums Unit Owners Assn., Inc.*, 828 A.2d 1114, 1116 (Pa. Super. 2003).

However, this doctrine is subject to exceptions. It does not apply when the hazard is "a localized patch of ice[,]" rather than the result of a general slippery condition prevailing in the community. *Tonik v. Apex Garages, Inc.*, 275 A.2d 296 (Pa. 1971). It also does not apply "when an icy condition is caused by the defendant's neglect, as where a city maintains a defective hydrant, water pipe, drain, or spigot[.]" *Bacsick v. Barnes*, 341 A.2d 157, 160 (Pa. Super. 1975). *See also Keiser v. Phila. Transp. Co.*, 356 Pa. 366, 368 (1947) (imposing liability on the government where a sewer was clogged, causing water to flow onto a crosswalk and freeze into ice). The key distinction is that the doctrine does not apply where the condition is artificial, rather than natural.

v. Whether the Defect was Trivial

Although property owners have a duty to maintain their sidewalks in a safe condition, property owners are not responsible for trivial defects that exist in the sidewalk. The law does not require that sidewalks be as free of defects, imperfections, irregularities, unevenness, etc., as the floors of buildings. *German v. City of McKeesport*, 8 A.2d 437 (Pa. Super. 1939). *See e.g. McGlinn v. Phila.*, 322 Pa. 478, 186 A. 747 (1936) (finding a difference or discrepancy of 1 ½ inches between two abutting curbstones did not impose liability on the defendant); *Lucacos v. Tzinis*, 76 Pa. D.& C.4th 404 (C.P. 2005) (granting summary judgment for the defendant where

plaintiff alleged that she fell as a result of a deviation of between ¾ inches and 1 ½ inches between and area where a sidewalk met a driveway).

C. FIGHTS / INADEQUATE SECURITY

1. General Standard for Liability

Under Pennsylvania law, "the owner of a bar or inn is not an insurer of the safety of its customers or members and is liable only for negligence, i.e. the lack of reasonable care under the circumstances." *Bahoric v. St. Lawrence Croatian, No. 13 of Steelton, Pa.*, 230 A.2d 725 (Pa. 1967).

A possessor of land is subject to liability to members of the public for bodily harm caused to them by accidental, negligent or harmful acts of third persons if the possessor by the exercise of reasonable care could have (a) discovered that such acts were being done and (b) protected the members of the public by (i) controlling the conduct of third persons or (ii) giving a warning adequate to enable them to avoid the harm. *Harkins v. McBeardey*, 1992 WL 1071438 (C.P. Phila. Nov. 6, 1992) (citing Restatement (Second) of Torts § 348).

2. Statute of Limitations

Negligent security claims are also generally subject to the 2 year statute of limitations for personal injuries. 42 Pa.C.S. § 5524(2).

3. Possible Defenses / Issues to Consider

Pennsylvania, imposes a duty on the business to secure the premises for business invitees when it knows or has reason to know there is a pattern of crimes occurring on the premises which places him on notice crimes are likely to occur again. *Moran v. Valley Forge Drive-In Theatre*, 246 A.2d 875 (Pa. 1968); *Murphy v. Penn Fruit*, 418 A.2d 480 (Pa. Super. 1979). Thus, plaintiffs have the burden of proving the criminal acts of third parties were foreseeable. *Id.*

Factors that a court or jury may consider in evaluating the adequacy of security include: security personnel, background checks, and training; lighting and security systems; bag and/or weapons policies; prior incidents / security enhancements as a result.

D. CONTRACTS

There are many common areas of running a business that involve the need for contracts. For example, in the context of a bar or brewery, contracts are important when dealing with suppliers, distributors, independent contractors, employees, etc.

1. Interpretation of a Contract

When interpreting a contract, the whole instrument must be viewed together in arriving at contractual intent. *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429-30 (Pa. 2001). When a writing is clear and unequivocal, its meaning is to be determined by its contents alone. *Id.* However, ambiguous language in a contract is to be construed against the drafter. *Rusiski v. Pribonic*, 515 A.2d 507, 510 (Pa. 1986). The Supreme Court of Pennsylvania has defined ambiguity as follows:

> A contract contains an ambiguity if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. This question, however, is not resolved in a vacuum. Instead, contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.

Murphy, 777 A.2d at 429-30. The interpretation of a contract is generally a question of law to be decided by a judge. *Stephan v. Waldron Elec. Heating & Cooling LLC*, 100 A.3d 660, 665 (Pa. Super. 2014).

i. Parol Evidence

Under the parol evidence rule, when a complete agreement is put into writing, the writing itself is considered the only evidence of the agreement. All preliminary negotiations, conversations, and verbal agreements are merged into the written agreement, absent a showing of fraud, accident, or mistake. *DeArmitt v. New York Life Ins.*, 73 A.3d 578 (Pa. Super. 2013). Therefore, if a contract is a complete, written agreement, evidence of prior agreements containing contradictory or additional terms will not be admissible. The parol evidence rule only applies to writings that constitute the entire contract between the parties. *Id.* Whether a writing constitutes the entire contract is a question of completeness to be determined by the court. *Kehr Packages, Inc. v. Fidelity Bank, Nat. Assn.*, 710 A.2d 1169 (Pa. Super. 1998).

Thus, when preparing contracts or entering into contracts it is important to ensure that all of the necessary language is contained within the contract itself. For example, the contract should completely explain (1) what each party's duties are, (2) the terms of payment, (3) how the contract can be ended, (4) what happens if one party breaches the contract, (4) what law will govern the interpretation of the contract, and (5) how any disputes under the contract will be resolved.

2. Statute of Limitations

Claims for breach of contract – whether it is a written or oral contract – are generally subject to a 4 year statute of limitations. 42 Pa.C.S. §5525(a); *Sadtler v. Jackson-Cross Co.*, 587 A.2d 727, 730 (Pa. Super. 1991). This time frame can be reduced by written agreement of the parties, so long as the shortened time is not "manifestly unreasonable." *Q. Vandenberg & Sons, N. V. v. Siter*, 204 A.2d 494, 498 (Pa. Super. 1964).

3. Standard for Proving Breach of Contract

Under Pennsylvania law, parties seeking damages for a breach of contract must allege the following three elements: (1) the existence of a contract, including its essential terms; (2) a breach of the duty imposed by the contract; and (3) resultant damages. *CoreStates Bank, N.A. v. Cutillo,* 723 A.2d 1053, 1058 (Pa. Super. 1999).

4. Damages

There are three main types of damages that are awarded in breach of contract actions: expectation damages, reliance damages, and restitution damages. Restatement (Second) of Torts § 347.

First, expectation damages cover the loss the non-breaching party incurred as a result of the defendant's breach. The purpose of expectation damages is to make the plaintiff whole, as if the contract had been performed. Restatement (Second) of Torts § 347. Expectation damages include any lost profits or consequential harm suffered as a result of the breach. *Id.*

Second, reliance damages cover the loss caused by reliance on the contract being performed. Restatement (Second) of Torts § 349. The purpose of reliance damages is to put the non-breaching party in the position he would have been in had the contract not been made. *Id.* Reliance damages compensate the plaintiff for any reasonably foreseeable costs incurred in reliance on the promise that was broken. *Id.*

Finally, restitution damages restore the non-breaching party for the value of any benefit he has given to the breaching party. Restatement (Second) of Torts § 344. The purpose of restitution damages is to return the plaintiff to the position he held before the parties' contract by removing the gain from the breaching party, rather than by compensating the plaintiff. *Id.*

E. NON-DISCLOSURE AND NON-COMPETE AGREEMENTS

Businesses frequently rely on restrictive covenants to protect their business interests, such as company recipes, secrets, valuable employees, etc. These agreements generally take on of two forms: (1) Non-Disclosure and (2) Non-Compete. *Hess v. Gebhard & Co. Inc.*, 808 A.2d 912, 917 (Pa. 2002).

"[A] non-disclosure covenant limits the dissemination of proprietary information by a former employee, while [a] non-competition covenant precludes the former employee from competing with his prior employer for a specified period of time and within a precise geographic area." *Id.*

Generally, such agreements are enforceable under Pennsylvania law if they are pertinent to an employment relationship between the parties, the restrictions imposed are reasonably necessary for the protection of the employer's legitimate business interest, and they are reasonably limited in duration and geographic extent. *Id.* at 917. Pennsylvania courts have found that the phrase legitimate business interest does include trade secrets or confidential information,

unique or extraordinary skills, customer good will, and investments in an employee specialized training program. *WellSpan Health v. Bayliss*, 869 A.2d 990, 996 (Pa. Super. 2005). However, eliminating competition to gain an economic advantage, is not enforceable. *Id.* (citing *Hess*, 808 A.2d at 920-21).

Courts will balance a business' legitimate business interest against an employee's interests in earning a living. *Id.* at 999. This is done based upon a test of reasonableness. *Id.* The court may also balance the employer and employee's interests with those of the public. *Id.* (citing *Hess*, 808 A.2d at 920). When drafted with all parties' interests in mind, Non-Disclosure and Non-Compete agreements can serve as a valuable tool to ensure the interests of all parties are protected.

F. INSURANCE

Businesses should consider whether it is wise to purchase a General Liability insurance policy in regard to the legal issues addressed in Section IV of this Booklet. Depending on the insurer and policy, this insurance may cover defense costs and payment to parties who sue the business, the owner(s), and/or the employee(s) for claims such as slip and falls, inadequate security, and/or breaches of contract. Many insurers allow businesses to add their attorney(s) to the list of approved counsel to handle their defense. (For considerations regarding Liquor Liability insurance, see Section IV(F), above.)