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North Carolina's Phase Two Reopening Under Executive Order 141: "Restaurants" Versus "Bars" and Justified Confusion Among the Hospitality and Alcoholic Beverage Industries

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This article summarizes the current status of permitted operations for hospitality businesses, with an emphasis on manufacturers and retailers of alcoholic beverages. The restrictions and interpreting guidelines may change, so while every effort has been made to ensure that the information provided is current as of the date of publication, readers should confirm the existence of any subsequent orders, guidelines, or other regulations, both at the state and local level.

On May 20, 2020, Governor Cooper issued Executive Order No. 141 ("EO141"), which officially allowed the reopening under certain conditions of most businesses previously closed or restricted under prior executive orders as a result of COVID-19. While there is no doubt that the spread of COVID-19 continues to pose a significant risk to North Carolina, and certain restrictions are necessary to protect the health of North Carolina citizens, it was unfortunate that EO141 so badly bungled the definitions of various hospitality businesses, such as restaurants, bars, clubs, breweries, wineries, and other retail establishments that serve alcoholic beverages, leaving a storm of confusion in the days leading up to the Memorial Day weekend. The North Carolina Alcoholic Beverage Control ("ABC") Commission, the North Carolina Department of Health and Human Services, and certain advocacy and trade groups, such as the North Carolina Craft Brewers Guild, were left scrambling to interpret EO141. Fortunately, additional guidance benefiting the large number of breweries, wineries, distilleries, and other alcoholic beverage producers throughout our state was eventually secured. Unfortunately, certain types of "bars" (more on that definition later) remain on the outside looking in to a future reopening, presumably in four to six weeks when we enter Phase Three reopening later this summer.

EO141 attempted to draw a bright-line distinction between "restaurants" and "bars" by allowing restaurants to reopen, subject to certain social distancing seating requirements, maximum occupancy limits

(50 percent), and cleaning/sanitization guidelines, while providing that bars must remain closed during Phase Two. However, as noted by the ABC Commission in its recent guidance on EO141, some restaurants call themselves "breweries" or "bars"; some breweries call themselves "restaurants" or "bars"; and some bars call themselves "restaurants" or "breweries." The definitions contained in EO141 did little to prevent this confusion, perhaps highlighting a growing need to completely overhaul and rewrite North Carolina's outdated and overly prohibitive ABC laws. EO141 defines "Bars" as "establishments that are not eating establishments or restaurants as defined in N.C. Gen. Stat. § 18B-1000(2) and 18B-1000(6), that have a permit to sell alcoholic beverages for onsite consumption under N.C. Gen. Stat. § 18B-1001, and that are principally engaged in the business of selling alcoholic beverages for onsite consumption."

The problems were exacerbated by the fact that EO141 made no mention whatsoever of how brewery taprooms that do not otherwise qualify as a restaurant should be classified, a glaring omission given that North Carolina breweries contribute \$800 million to our state's economy and provide at least 10,000 jobs in the face of declining tobacco and textile industries. Adding further to the confusion was the recent creation last summer of a new ABC permit type for "private bars," in addition to the existing permit type for "private clubs," which raised the question of whether certain private and other membership-based establishments were somehow exempt from the prohibitions applicable to drinking establishments open to the general public. Finally, many business owners were left pondering logical questions, such as whether access to a food truck made any difference in the determination of whether they could reopen under imputed classification as a restaurant, whereas their business might otherwise be considered a bar.

In addition to restaurants, under EO141 and the current guidance, breweries, wineries, and distilleries are permitted to reopen in Phase Two. This includes the taprooms

and tasting rooms found on the premises of most alcoholic beverage manufacturers. Similarly, bottle shops and wine shops are permitted to reopen, both to off-premise and on-premise sales, as many of these businesses now offer customers the option to enjoy a pint of beer or a glass of wine on-site while browsing the retail shelves. Certain private, members-only clubs are also permitted to reopen if they meet the definition of a restaurant by serving food (i.e., country clubs, Elks/Moose Lodge, VFW Posts, and American Legions).

However, under our state's current ABC laws, there is no permit type for a "bar," thereby making EO141 extremely difficult to interpret as it relates to bars. Most bars in the traditional sense currently fall into one of two permit categories in North Carolina – either as a private club or a private bar, unless it earns a certain percentage of its revenue (i.e., 30 percent) from food service (in which case, it is a restaurant and can reopen under EO141). A "private bar" is defined as "[a]n establishment that is organized and operated as a for-profit entity and that is not open to the general public, but is open only to the members of the organization and their bona fide guests for the purpose of allowing its members and their guests to socialize and engage in recreation." A "private club" is defined as "[a]n establishment that qualifies under Section 501(c) of the Internal Revenue Code, as amended, 26 U.S.C. § 501(c), and that has been in operation for a minimum of 12 months prior to application for an ABC permit."

Notably, the distinction between private bars and private clubs was created last summer with the passage of Senate Bill 11 that added "private bars" to the ABC permit lexicon. As a result, many businesses that were previously classified as private clubs should now be classified as private bars. Unfortunately, the timing of the passage of SB11 left little time prior to the onset of the COVID-19 pandemic for businesses to adjust and adapt to the new laws, to amend their permits, or for the ABC Commission to issue new regulations or guidance. In fact, the ABC Commission has yet to promulgate new regulations governing private bars, and therefore under current practice, private bars are treated the same as private clubs in most respects. Also, certain bar-like establishments that sell beer and wine only and that do not sell mixed beverages may not be permitted as either a private club or a private bar, and arguments can be made that these establishments are more akin to "retail establishments" that are permitted to reopen under EO141.

According to the ABC Commission, the following criteria are intended to help determine if a private club permittee is acting more like a bar or more like a restaurant, and therefore, can reopen or should remain closed. The more these criteria are satisfied by a permittee, the more likely an establishment will be treated as a restaurant that may

operate pursuant to EO141: (1) avoids people congregating on premises simply to drink alcoholic beverages and socialize; (2) avoids patrons sharing touched spaces; (3) patrons remain seated at tables; (4) does not exceed Emergency Maximum Occupancy (50 percent); and (5) has some type of food/health inspection for on-site food preparation. It is unclear whether this guidance is strictly limited to public club permittees, or can be adopted by other establishments as well.

Despite the foregoing, major questions still remain regarding how the criteria will be applied (i.e., must a permittee satisfy three out of five conditions, or some other number?), the extent of ABC/Alcohol Law Enforcement (ALE) enforcement activities, and the resulting penalties for businesses that do not comply with EO141 and the ABC guidance, whether such non-compliance is intentional or the result of a good-faith misunderstanding or misinterpretation.

It remains to be seen whether further clarification or guidance on the interpretation of EO141 as it relates to "bars" will be forthcoming, either from the Governor's Office, the ABC Commission, North Carolina Department of Health and Human Services (DHHS), or some other authority. Similarly, the next round of restrictions, if any, to be placed upon restaurants and bars in Phase Three will likely depend heavily on the success of Phase Two and our collective efforts in slowing the spread of COVID-19 through social distancing and adherence to other health and safety measures, such as the wearing of masks in public spaces.

Of note, the ABC Commission has promulgated guidance on the temporary extension of premises during Phase Two that allows retail on-premise permit holders to include additional outdoor seating as part of their licensed premises if that space is approved by the appropriate local government entity. An application for a temporary extension does not need to be submitted to the ABC Commission, but if the extension is not covered by a deed or lease, permittee must obtain the written permission of the owner of that property. Other conditions applicable to the extension of premises can be found on the "Announcement" page of the [ABC's website](#) and should be strictly followed by any permittee desiring to take advantage of this guidance intended to maximize usable space while further promoting social distancing.

It is also worth mentioning that an advocacy group called the North Carolina Bar and Tavern Association was recently formed to lobby on behalf of bars for equal treatment under the state's phased reopening plan. A couple of new bills have also been introduced in the state legislature that would even the playing field between bars and restaurants. It is also conceivable that legal action will be taken in the courts to enjoin/restrain the enforcement of the restrictions against bars.

Client Alert

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Finally, regardless of how any specific business is characterized under EO141 or chooses to operate, all businesses should follow the guidelines set forth in EO141 and take such other reasonable precautions to safely operate and to minimize risk to their patrons and their employees. Businesses should also take this opportunity to check their ABC permits to determine their classification, as well as their permit renewal date, and consider whether they are eligible to switch permit types or to obtain additional permits that may authorize expanded operations under EO141 and the Phase Two restrictions.

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