

2020
WineLaw
Updates
for Shasta Cascade
Viticulture Association
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Outline

1. Independent Contractors No More.
2. Everyone must be able to use your website.
3. Responsible Beverage Service... what you must do and learn.
4. TTB Consignment and Change in Control.
5. Wine and Weed.
6. Other Reminders.

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INDEPENDENT CONTRACTOR NO MORE

* AB 5 says that if an entity (individual, partnership, LLC, corporation) hires an individual to perform tasks and those tasks are within the scope of the entity's core business, then the hired individual is an employee who must be afforded all entitlements and benefits of being an employee, including payroll deductions, employee handbook, wage and hour requirements, meal breaks, sick time.

*(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.*

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WHO IS THE WINERY EMPLOYEE?

(Note that one person may be an employee part of the time and an independent contractor part of the time)

YES - THESE ARE NOW EMPLOYEES	NO - THESE ARE STILL INDEPENDENT CONTRACTORS
Grape pickers	Entities who are LLC's or Corporations
Grape processors	Individuals who provide maintenance or construction to the physical plant such as gardeners, painters, plumbers and electricians
Winemakers	Individuals who train winery personnel to perform winery tasks.
Cellar maintenance personnel	
Wine sellers	
Bookkeeper	
Tasting room staff	

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Guidelines from AB- 5 as to not an employee

*(A) The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity. Nothing in this subdivision prohibits an individual from choosing to perform services at the location of the hiring entity.

(B) If work is performed more than six months after the effective date of this section, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession.

(C) The individual has the ability to set or negotiate their own rates for the services performed.

(D) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.

(E) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.

(F) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.*

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Links for More Information

https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200AB170

<https://www.sfoxaminer.com/news/newsoms-ca-budget-includes-20-million-for-ab-5-enforcement/>

[https://en.wikipedia.org/wiki/California_Assembly_Bill_5_\(2019\)](https://en.wikipedia.org/wiki/California_Assembly_Bill_5_(2019))

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ADA Compliant Websites

Website accessibility for the impaired

- vision
- hearing
- communication issues
- movement issues
- cognitive issues

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ADA Compliant Websites

Website Accessibility for those with disabilities

Use of software with alternative text that contains a code that describes images on a page

Captions on Photos

Screen reading software that does allow the visually impaired to read online content.

Braille Adaption

Sip and Puff Technology

Keyboard only web sites

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ADA Compliant Websites

User must be able to perceive and understand all web content, no matter their disability

User must be able to operate all elements such as buttons, scrolling, and hover text.

User must be able to correctly interpreting graphics, audio, text and other content.

User's use of assistive technologies (screen readers/pointer alternatives) must be assumed

Goal website exposure with to maximum number of people with and without disabilities.

THE POINT IS THAT YOU WANT THESE PEOPLE TO BUY YOUR WINE!

CONTACT LOCAL DISABILITY ASSOCIATION WITH QUESTIONS

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ADA Compliant Websites

Failure to Act

Non compliance allegation "failure to design, construct, maintain and operate its website to be fully accessible and independently usable by (Plaintiff) and other visually impaired people." in Federal Court ADA Lawsuit against 25 New York Wineries



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Links for More Information

- <https://www.w3.org/WAI/WCAG21/quickref/?versions=2.0>
- <https://wineindustryadvisor.com/2019/06/03/wineries-struggle-ada-website-compliance-lawsuits>
- <https://en.wikipedia.org/wiki/Sip-and-puff>
- <https://wineandcraftbeveragenews.com/ada-accessibility-extends-to-your-website/>
- <https://foxrunvineyards.com/accessibility/>
- <https://www.winemag.com/2018/10/31/winery-lawsuits-visually-impaired/>
- <https://www.pbmediacreatives.com/ada>

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ABC Responsible Beverage Service Registration Requirement ("RBS")

ABC has been mandated by the state legislature to make Responsible Beverage Service Training Program. The purpose is "to ensure servers and their managers of alcoholic beverages are educated on the dangers of serving alcohol to minors and over-serving alcohol to patrons with the intention of reducing alcohol related harm to local communities."

The new mandate creates a new training requirement for an estimated 1,000,000 on-premises alcohol servers, their managers, and licensees beginning in 2021.

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RBS – Course Topics

- "The social impact of alcohol.
- The impact of alcohol on the body.
- State laws and regulations relating to alcoholic beverage control, including laws and regulations related to driving under the influence.
- Intervention techniques to prevent the service or sale of alcoholic beverages to underage persons or intoxicated patrons.
- The development of management policies that support the prevention of service or sale of alcoholic beverages to underage persons or intoxicated patrons"

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Ramifications of RBS

- Creation of new sub-dept of ABC as a large as the DMV
- Every alcohol server in the state must submit personal information to a state data base
- No expectation of Privacy as to participation in database or personal information
- Expansion of topics and mandated course detail
- Class and Exam which may be difficult for ordinary citizen to pass because of the mandated (by ABC) requirements, such as the metabolic effect of alcohol on humans and the detection of drug use, exceeds what would be reasonably necessary to carry out the legislative mandate and as such people who fail the test will have to be fired.
- Since the class curriculum creates better practices than are now the law
 - Servers to fully and completely examine ID's and compare to exemplar data bases before the sale can occur by using electronic id checkers (contrary to for example B and P Section 25660: reliance upon bona fide proof of identification).
 - Servers to detect legal or illegal drug use.



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Links for More Information

- <https://alcoholjustice.org/images/downloadables/CAPA-Summit-2018/ABC-RBS-fact-sheet.pdf>
- <https://www.abc.ca.gov/education/rbs/>
- https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180A:B1221
- <https://viage.com/cav-3200-barcode-magnetic-stripe-id-rl-reader-with-memory>

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TTB: Consignment Sales

- Unlawful to sell, offer to sell, or contract to sell alcohol beverages to trade buyer (or for trade buyer to purchase or offer/contract to purchase) on consignment, or under conditional sale, or with the privilege of return such as for overstocked, slow moving or seasonal products.
 - No returns by trade buyer
 - No avoiding payment by trade buyer until trade buyer sells product
- Exceptions
 - Error in delivery
 - Defective product
 - Product unlawful to sell
 - Termination of trade buyer business
 - Discontinued or substantial change in product



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TTB: Consignment Sales

- TTB has enlarged the definition of consignment to include extended terms, i.e., offering trade buyers time to pay for product despite the fact that title has passed and an obligation to pay remains.
- Extended terms (over 30 days) are specifically prohibited between suppliers and retailers but permitted (with no specific time limit in the regulations) between the manufacturer and wholesaler.

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TTB: Change in Control?

- 50% of owner has changed
 - May have to do some math!
 - 1 change at a time
 - multiple family trusts and their respective beneficiaries as you might not notice a change
 - New investors
- 
- Report to California ABC
 - Report to TTB
 - Report to other certain other states where you have direct to consumer license.
 - 30 day limit
 - Penalty:
 - ABC ?
 - TTB takes the position that your Federal Basic Permit expires – **family excuse**
 - TTB Amnesty.

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Links for More Information

<https://www.law.cornell.edu/cfr/text/27/part-11>

<https://www.ttb.gov/wine/change-in-propietorship-or-control>

<https://s3-us-west-2.amazonaws.com/brewersassoc/wp-content/uploads/2019/03/Power-Hour-2019-Federal-Trade-Practices.pdf>

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Wine & Weed: A Perfect Pairing?

- Wine & cannabis cannot be produced or sold **from the same licensed premises**
- Cannabis cannot be sold **without a cannabis retail license**
- Wine cannot be sold **without a winery/alcohol retail license**



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Vineyard Use for Marijuana Plants

- Federal liability issues
 - Asset forfeiture / seizure
 - Aiding & Abetting
 - Money laundering
- Local licensing considerations
 - Zoning
 - Neighbor lawsuits
 - Use permits
 - Construction Permits
- Real world problems
 - Banking
 - Insurance
 - Mortgage
 - Security
 - Title Insurance
 - International investors



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Co-Marketing Opportunities – yes

- **Brand Co-Ownership allowed**
 - Cannabis producer/retailer can own winery
 - Cannabis producer/retailer can own wine distribution company
 - Cannabis producer/retailer can own bar, restaurant, off-premise retailer
- **Shared IP – yes with cautions**
 - Not registerable
 - Related good
 - Geographical indications
- **Purely private event – yes with cautions**
 - No financial transactions
 - Not open to the public
 - Not advertised
 - Not on licensed premise



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Co-Marketing Opportunities – no

- No Commingled alcohol products and cannabis products on same premises for sale.

Due to the restrictions on licensing and permissible activities, premises may not be licensed with both an ABC license and a license issued under MAUCRSA, even though a licensee may hold licenses (at separate premises) under both statutory schemes. –

California ABC Advisory – January 2018

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Co-Marketing Opportunities – no

- No mixology as between cannabis and alcohol
 - Violates the rule that cannabis and alcohol can't be sold from same retail premises so anyone who commits the mixology on an ABC license premise – winery or bar is selling alcohol and cannabis
 - Violates California Code of Regulations 17 CCR § 40300

California Health and Safety Code § 40300. The following types of products shall not be sold as edible cannabis products: Alcoholic beverages, as defined in section 23004 of the Business and Professions Code. Tinctures that do not meet the definition of "alcoholic beverage" in section 23004 of the Business and Professions Code are not prohibited;

California Business and Professions code 23004. "Alcoholic beverage" includes alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of 1 percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances. "Alcoholic beverage" does not include "powdered alcohol," as defined in Section 23003.1.

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Hospitality Law – Treating Customers Legally

- Customers may not use Cannabis on Licensed Premise
 - Use by customers at licensed premise - argument
 - Customer Rights I can use cannabis
 - *because I am entitled*

§ 11362.1. Possession of cannabis by persons 21 years of age or older (a) Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to: ...[4] Smoke or ingest cannabis or cannabis products; and....
(c) Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.

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Hospitality Law – Treating Customers Legally

- Customers may not use Cannabis on Licensed Premise
 - Use by customers at licensed premise - argument
 - Customer Rights I can use cannabis
 - Because I have a medical prescription

As noted, Mower analogized the right to use marijuana for medical purposes granted by section 11362.5 to the right to use a prescription drug. "As a result of the enactment of section 11362.5(d), the possession and cultivation of marijuana is no more criminal—so long as its conditions are *1444 satisfied—than the possession and acquisition of any prescription drug with a physician's prescription." (Mower, supra, 28 Cal.4th at p. 482, 122 Cal.Rptr.2d 326, 49 P.3d 1067.) Citing (People v. Mower (2002) 28 Cal.4th 457, 482, 122 Cal.Rptr.2d 326, 49 P.3d 1067 People v. Tilehkooh Eyeglasses (2003) 113 Cal.App.4th 14337 Cal.Rptr.3d 226

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Hospitality Law – Treating Customers Legally

- Customers may not use Cannabis on Licensed Premise
 - Use by customers at licensed premise - argument
 - Hospitality Provider Rights to deny use–
 - Private Entity Allowance

§ 11362.45. Section 11362.1 does not amend, repeal, affect, restrict, or preempt:.... The ability of an individual or private entity to prohibit or restrict any of the actions or conduct otherwise permitted under Section 11362.1 on the individual's or entity's privately owned property.

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Hospitality Law – Treating Customers Legally

Customers may not use Cannabis on Licensed Premise

- Use by customers at licensed premise - argument
 - Hospitality Provider Rights to deny use–
 - ABC says so. – But what is public place?

Health and Safety Code section 11362.3 prohibits the smoking or ingesting of cannabis or cannabis products in a public place, except as authorized under Business and Professions Code section 26200 Businesses (including premises authorizing the sale or consumption of alcoholic beverages under both retail and non-retail licenses) licensed under the ABC Act are considered "public places" for this purpose (this also includes premises licensed under club licenses, or any other premises to which entry may otherwise be limited). This restriction applies even if the ABC licensee is not exercising the privileges of the license, such as after hours, while closed, or if the ABC license is surrendered or suspended

California ABC Advisory – January 2018

'Public' is sometimes defined as 'Common to all or many; general; open to common use.' Black's Law Dict., 3d ed., 146. PC 707 204 9593

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Hospitality Law – Treating Customers Legally

Customers may not use Cannabis on Licensed Premise

- Use by customers at licensed premise - argument
 - Hospitality Provider Rights to deny use–
 - Is ABC Right? Are wineries public places. Not according to this section.

§ 23039. (a) "Public premises" means: (may be immaterially modified by 2018 (A.B. 1217)(WEST))
(1) license licensed with any type of license other than an on-sale beer license, and manufactured and approved for the selling or serving of alcoholic beverages to the public for consumption on the premises, and in which food shall not be sold or served to the public in a bona fide public eating place, but upon which premises food products may be sold or served incidentally to the sale or service of alcoholic beverages, in accordance with rules prescribed by the department;
(2) premises licensed with an on-sale beer license, in which food shall not be sold or served to the public in a bona fide public eating place, and in which production, storage, assembly, and other food service shall not be sold or served in accordance with rules prescribed by the department.
(b) "Public premises" does not include railroad dining or club cars, passenger ships, airplanes, or buses that allow after the club has been formally operated by or for the use of passengers in a public park, casino, amusement facility, or other place where the club has been formally operated by or for the use of passengers; nor does it include nonprofit theater companies licensed pursuant to Section 20645.7, nor does it include theaters licensed pursuant to Section 20645.7; nor does it include authoria, neighborhood, or recreational, nor does it include nonprofit theater companies licensed pursuant to Section 20645.7, nor does it include theaters licensed pursuant to Section 20645.7; nor does it include winegrowers' premises.

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Hospitality Law – Treating Customers Legally

- Customers may not use Cannabis on Licensed Premise
 - Use by customers at licensed premise - argument
 - Hospitality Provider Rights to deny use–
 - But it is hard to get over this

Chippendale's is undisputedly a business establishment within the meaning of the Unruh Civil Rights Act. (In re Cox (1970) 3 Cal.3d 205, 90 Cal.Rptr. 24, 474 P.2d 992; see also Stoumen v. Reilly (1951) 37 Cal.2d 713, 234 P.2d 969; Evans v. Fong Poy (1941) 42 Cal.App.2d 320, 108 P.2d 942.) It has been granted a license which permits it to sell and serve "alcoholic beverages to the public for consumption on the premises." (Bus. & Prof.Code, § 23039, subd. (a)) (1 - Eesebe Enterprises, Inc. v. Alcoholic Bev. etc. Appeals, Bd (1983) 141 Cal. App. 3d 982

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Hospitality Law – Treating Employees Legally

- Use and/or possession by employees at licensed premise
 - Employer Rights
 - *Section 11362.1 does not amend, repeal, affect, restrict, or preempt: (f) The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace, or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees, or prevent employers from complying with state or federal law.* West's Ann.Cal.Health & Safety Code § 11362.45
 - COTTO v. ARDAGH GLASS PACKING, INC. Civil No. 18-1037 (RBK/AMD) THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY - medical marijuana law exempts from criminal prosecution and is not an entitlement to use

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Hospitality Law – Treating Employees Legally

- Use and/or possession by employees at licensed premise
 - *Ross v. Ragingwire Telecomm., Inc.*, 174 P.3d 200, 209-211 (Cal. 2008) Plaintiff, whose physician recommended he use marijuana to treat chronic pain, was fired when a preemployment drug test required of new employees revealed his marijuana use
 - We conclude the lower courts were correct. Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and duties of employers and employees. Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 882-883, 59 Cal.Rptr.2d 696, 927 P.2d 1200.)

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Hospitality Law – Penalties and Enforcement

- ABC Licensee subject to
 - Monetary penalties
 - License Suspension
 - License Forfeiture
 - Federal TTB License issues?
 - Attorneys fees
 - Civil Rights and employment lawsuits
 - Strict Liability
 - Sting operations?

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Other Reminders

- Make sure your permits/licenses match your physical space
- Make sure you keep your corporate minutes and maintain your corporate books separate from family finances
- Make sure to trademark and maintain your marks with the USPTO
- Make sure to use written contracts and not handshakes
- Make sure if you need investors you use proper disclosures
- Make sure your estate plan matches your current needs and make sure you have a trust
- Make sure you have the right kind and amount of insurance
- Make sure you have met all employment, environmental and other business requirements
- Make sure to keep making good wine and keeping the community happy!

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