

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 42.12.222 and 42.13.101) PROPOSED AMENDMENT
pertaining to department procedures)
involving penalties against alcoholic)
beverages licenses)

TO: All Concerned Persons

1. On June 22, 2022, at 10:00 a.m., the Department of Revenue will hold a public hearing in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, located at 125 North Roberts, Helena, Montana, to consider the proposed amendment of the above-stated rules. The conference room is most readily accessed by entering through the east doors of the building.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, please advise the department of the nature of the accommodation needed, no later than 5 p.m. on June 3, 2022. Please contact Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or todd.olson@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

42.12.222 PROCEDURE UPON REVOCATION, LAPSE, OR SUSPENSION OF LICENSE (1) When any alcoholic beverages license is suspended or revoked by the department, the department shall cause a notice to be posted on the inside of the licensed premises so that the notice can be seen from the outside, stating that the license has been suspended or revoked. The notice must identify the number of the license, the name of the licensee, the reason for the suspension or revocation, and the period of suspension. The suspension or revocation notice issued by the department must be dated and signed. The notice must be posted at all times during the period of suspension. In the case of a revocation, the notice must be posted on the premises for a period of 10 days. If the notice is removed or caused to be removed by the licensee or any employee of the licensee during a period of suspension, the license shall be permanently revoked and the licensee must be so notified in writing at the time the notice is posted. The license or licenses suspended will be held by the department during the period of suspension. The department may waive the notice and posting requirements for revocations provided in this rule.

(2) A revoked or lapsed license affects a license quota area as follows:

(a) if an action against the license causes the creation of the last remaining license for that license type in the quota area, the department shall publish the

availability of a retail alcoholic beverage license in accordance with ARM 42.12.502;
or

(b) if the number of licenses issued for a quota area exceeds statutory limitations, the license will cease to exist and the department will adjust the license quota accordingly.

(3) If a revoked or lapsed beer license originally issued within an incorporated city quota area before October 1, 1997, is reinstated, the license may not be used for premises where gambling is conducted.

AUTH: 16-1-303, MCA

IMP: 16-1-303, 16-4-406, 16-4-430, MCA

REASONABLE NECESSITY: The department proposes to amend (1) to include an exception to revocation notice posting requirements. The department finds the proposed amendments necessary to address circumstances where it may be impossible or impractical for the department to post a notice, such as when a licensee no longer operates the business associated with the license or, in the case of leased space, when an entirely different tenant and business occupies the space. The result will also allow the department to expedite quota area license adjustments described in proposed (2).

The department proposes (2) and (3), which comprise language relocated from ARM 42.13.101 to 42.12.222, to improve rule clarity through the removal of industry jargon, which is a department goal in the implementation of the Governor's Red Tape Relief Initiative. The amendments are topically better suited in ARM 42.12.222 than in ARM 42.13.101.

The department proposes (2)(a) to align department processes for a last available license based on a revocation or lapse with the competitive bidding process provided in 16-4-430, MCA, and ARM 42.12.502. Section 16-4-430, MCA, requires licenses available under these circumstances to go through the competitive bidding process.

Lastly, the department has added 16-4-430, MCA, as an implementing citation which is necessary for the rule to comply with 2-4-305(3), MCA.

42.13.101 COMPLIANCE WITH LAWS AND RULES (1) remains the same.

(2) Proof of violation by a licensee, a concessionaire, or the licensee's or concessionaire's agent or employee of any of the provisions of the above laws, ordinances, or rules is sufficient grounds for revocation or suspension of the license or ~~department~~ termination of a concession agreement, and a licensee, a concessionaire, or both, may be reprimanded or assessed a civil penalty in accordance with 16-4-406, MCA.

(3) The department may use a range of progressive and proportional penalties for any combination of violations of any laws, ordinances, and rules. The progressive penalty schedule is not an exhaustive list of the grounds for administrative action. The schedule does not preclude the department's use of discretion to propose a penalty greater or less than those listed based upon aggravating or mitigating circumstances, non-exhaustive examples of which are described in ~~(10)~~ (4) and ~~(11)~~ (5). For purposes of determining penalties under the

progressive penalty schedule, the department uses a three-year lookback. Proposed penalties are assessed based upon the date the violation occurs. For violations that occur over time, such as an undisclosed ownership interest, the violation date shall be the date the department issues its notice of proposed department action. The department may seek license revocation based upon a combination of any four violations during a three-year period. If a violation jeopardizes health, welfare, and safety, or there is not a cure in place, the department may revoke or refuse to grant the renewal of a license, concession agreement, or both.

Progressive Penalty Schedule

Violation	1st Offense	2nd Offense	3rd Offense	4th Offense
Sale to Underage Person	\$250	\$1,000	\$1,500/20-day Suspension	Revocation
Sale to Intoxicated Person	\$250	\$1,000	\$1,500/20-day Suspension	Revocation
Open after Hours	\$150	\$600	\$1,000/12-day Suspension	Revocation
Sale or Consumption after Hours	\$150	\$600	\$1,000/12-day Suspension	Revocation
Refilling of Bottles	\$250	\$1,000	\$1,500/20-day Suspension	Revocation
Unapproved Premises Alteration	\$300	\$600	\$1,000/12-day Suspension	Revocation
Undisclosed Location Manager	\$150	\$600	\$1,000/12-day Suspension	Revocation
Improper Use of Catering Endorsement	\$150	\$600	\$1,000/12-day Suspension	Revocation
Accept More than 7 Days Credit	\$250	\$1,000	\$1,500/20-day Suspension	Revocation
Extend More than 7 Days Credit	\$250	\$1,000	\$1,500/20-day Suspension	Revocation

Exceed Sample Room Service Limits	\$150	\$600	\$1,000/12-day Suspension	Revocation
Undisclosed Ownership Interest	\$1,500/Revocation			
Denial of Inspection of Premises or Records	\$1,500/Revocation			

<u>Violation</u>	<u>Penalty</u>
<u>1st Violation</u>	<u>Up to a \$250 monetary penalty</u>
<u>2nd Violation</u>	<u>Up to a \$600 monetary penalty</u>
<u>3rd Violation</u>	<u>Up to a \$1,000 monetary penalty, up to a 2-day suspension, or both</u>
<u>4th Violation</u>	<u>Up to a \$1,500 monetary penalty, up to a 5-day suspension, or both</u>
<u>5th Violation</u>	<u>Up to a \$1,500 monetary penalty, up to a 7-day suspension, or both</u>
<u>Subsequent Violations</u>	<u>In accordance with 16-4-406, MCA</u>

~~(4) When a license has been revoked or lapsed, the department shall not accept an application from those owners vetted pursuant to 16-4-401, MCA, for one year from the date of revocation or lapse. After the one-year moratorium, an application will only be accepted if the applicant demonstrates to the department's satisfaction that sufficient steps were taken to prevent future violations or to operate a going establishment.~~

~~(5) A revoked or lapsed license affects a license quota area as follows:~~

~~(a) if it causes the area to be under quota, a notice of availability of a license will be published in the newspaper of general circulation in the quota area and invite applications for the available license; or~~

~~(b) if the area is over quota, the revoked or lapsed license will cease to be available for issuance.~~

~~(6) A revoked or lapsed beer license issued within a city quota area before October 1997, if reinstated, will not allow any gaming or gambling activity on the premises.~~

~~(7) The failure of an employee to possess a valid alcohol server training certificate constitutes a violation, the penalty for which is assessed against the licensee. Multiple untrained employees on a particular date shall constitute a single violation; continued noncompliance shall constitute an additional violation. Regardless of other violations within the three-year period, the civil penalties assessed for a violation of the Responsible Alcohol Sales and Service Act shall be \$50 for the first offense, \$200 for the second offense, and \$350 for the third offense.~~

~~(8) A licensee shall receive a reprimand for the violation of selling to an underage person only if:~~

~~(a) it is the licensee's first offense of any kind under that license in the past three years;~~

~~(b) the person who made the sale possesses a valid proof of training document; and~~

~~(c) the licensee has not previously received a reprimand for sale to an underage person under that license.~~

~~(9) In the event a reprimand is issued:~~

~~(a) the incident shall not be considered to be a first offense for purposes of the progressive penalty schedule unless the licensee or concessionaire commits the same offense within one year; and~~

~~(b) the department shall still assess the monetary penalty associated with the offense.~~

~~(10) (4) Aggravating circumstances may result in the imposition of maximum monetary penalties, maximum suspension time or revocation, and will not bind the department to the progressive penalty schedule. Aggravating circumstances include, but are not limited to:~~

~~(a) and (b) remain the same.~~

~~(c) involvement of a licensee, a location manager, a concessionaire, or both a combination thereof, in the violation;~~

~~(d) and (e) remain the same.~~

~~(f) lack of cooperation by a licensee, a location manager, a concessionaire, or both a combination thereof, in an investigation; and~~

~~(g) a violation's significant negative effect on the health, and welfare, and safety of the community in which the licensee, the concessionaire, or both, operate; and~~

~~(h) those instances provided in 16-4-406, MCA.~~

~~(11) (5) Mitigating circumstances may result in the adjustment of monetary penalties, amount of suspension time, or revocation, and will not bind the department to the progressive penalty schedule. Mitigating circumstances include, but are not limited to:~~

~~(a) the admissions of either the licensee, a location manager, or concessionaire regarding violations of the code or a rule of the department prior to the department commencing investigation of the licensee or concessionaire; ~~or~~ and~~

~~(b) remains the same.~~

~~(12) remains the same, but is renumbered (6).~~

AUTH: 16-1-303, ~~16-4-1009~~, MCA;

IMP: 16-1-302, 16-3-301, 16-4-406, ~~16-4-1004~~, ~~16-4-1008~~, 16-6-314, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.13.101 primarily for the implementation of House Bill 705 (2021).

Section (3) is proposed for amendment due to statutory change in penalties the department may propose when a licensee or concessionaire has violated a provision of the Montana Alcoholic Beverage Code. Amendments to (3) reflect new requirements found in 16-4-406(2), MCA, that revocations or refusals to renew a license or concession agreement occur only when a violation jeopardizes health, welfare, and safety, or there is not a cure in place. Further, the department finds that the existing progressive penalty schedule does not adequately represent the new penalty structure of 16-4-406(2), MCA. The proposed amendment of the progressive penalty schedule is also consistent with industry feedback that the existing system is too inflexible, does not take into consideration the public harm, or lack thereof, associated with the violation, and suspension or revocation of the license is administratively required, regardless of the types of violations the licensee committed. Penalties are now determined in accordance with a new progressive penalty schedule which allows the department flexibility to consider the public harm of a violation, or lack thereof. A representative example might be where a licensee had two prior violations in the last three years and submitted a catering report five days late. Under the current progressive penalty schedule as a third offense, the department would have been administratively required to pursue a \$1,000 penalty and a 12-day suspension. With the amendment of the progressive penalty schedule, the department may exercise its discretion to consider a less severe penalty.

After additional legal review of statutory penalty provisions, the department also proposes the removal of current (4) which is inconsistent with 16-4-408, MCA.

As described in the statement of reasonable necessity for the amendments to ARM 42.12.222, the department proposes to relocate the content of current (5) and (6) into ARM 42.12.222.

The department proposes to remove current (7) because the penalties prescribed for failing to possess valid alcohol server training are present in 16-4-1008, MCA.

Sections (8) and (9) are no longer necessary and are proposed for removal because the department may exercise its discretion to reprimand licensees and concessionaires for violations under 16-4-406(2)(a), MCA, and because certain contrived events are excluded from penalties with the passage of Senate Bill 129 (2021) which are administered in accordance with 16-4-406(5), MCA.

The department proposes to amend proposed (4)(c) and (4)(f) to add a location manager's involvement in a violation or lack of cooperation in an investigation as aggravating circumstances because location managers are responsible for providing general oversight of the alcoholic beverage operations and ensuring compliance with alcoholic beverage laws and regulations. The department believes it is necessary to inform licensees, and those employed as location managers, that the department considers this non-compliance as an aggravating circumstance. Section (4)(g) proposes to include safety of the community to conform to HB 705. Section (4)(h) proposes to include the statutory aggravating

circumstances for necessary attribution to statute and to inform licensees that the aggravating circumstances are not limited to those described in rule.

The department proposes to amend proposed (5)(a) to add a location manager's admission prior to the commencement of an investigation as a mitigating circumstance because location managers are responsible for providing general oversight of the alcoholic beverage operations and ensuring compliance with alcoholic beverage laws and regulations.

Lastly, the department is removing the Responsible Alcohol Sales and Service Act (RASS) implementing citations for this rule, which is necessary because the penalties for violations of RASS are included in that Act.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail todd.olson@mt.gov and must be received no later than 5:00 p.m., June 30, 2022.

5. Todd Olson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

6. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. A written request may be mailed or delivered to the person in number 4 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

7. An electronic copy of this notice is available on the department's web site at www.mtrevenue.gov, or through the Secretary of State's web site at sosmt.gov/ARM/register.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor of House Bill 705, Representative Buttrey, was contacted by email on July 21, 2021 and May 13, 2022. The primary bill sponsor of Senate Bill 129, Senator Hertz, was contacted by email on February 3, 2022.

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules may significantly and directly impact small businesses, but the department contends the impacts are attributable to the implementation of HB 705 and SB 129 but any impacts based on the proposed rules are likely to be positive in nature due to simplified and more flexible penalty process.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Brendan Beatty
Brendan Beatty
Director of Revenue

Certified to the Secretary of State May 17, 2022.