

## Florida Beer Wholesalers Association

April 24, 2012

To: FBWA Members

From: Mitch Rubin

Re: Employee Qualifications

**Introduction:** At the recent FBWA Human Resources Personnel Conference, a HR Manager asked, in a sidebar conversation, about an employment policy against hiring applicants with a felony conviction or who fail to meet the qualification of “good moral character” under state and federal law. The question arises because of the United States Equal Opportunity Commission’s longstanding ruling that it is illegal under the Civil Rights Act for employers to exclude people from employment based on arrest or conviction records—unless there is a compelling business reason to do so. One such compelling reason would be that the employment policy is needed to comply with federal or state law or regulation, such as being a federally permitted and state licensed distributor of alcoholic beverages.

This Memorandum addresses the question about employment of individuals with felony convictions or who fail to meet the qualification of good moral character. This Memorandum does not address issues of state or federal employment law, and specifically does not address whether a company policy against employment because of felony convictions or lack of good moral character could be based on other grounds. As to employment law implications, Members are advised to consult counsel or employment law experts.

**Issue:** Whether a distributor may employ a person who would not qualify to hold a beverage license because of criminal convictions or not satisfying the good moral character qualifications required of a licensee under state and federal alcohol beverage laws?

**Brief answer:** Yes. Employees are not licensees.

**Analysis:** Section 561.15(1), Florida Statutes, in relevant part, provides the basic qualifications for all alcoholic beverage licenses:

Licenses shall be issued only to persons of good moral character who are not less than 21 years of age. Licenses to corporations shall be issued only to corporations whose officers are of good moral character and not less than 21 years of age.

Section 561.15 (2), Florida Statutes, provides a list of specific disqualifying criminal "convictions."

No license under the Beverage Law shall be issued to any person who has been convicted within the last past 5 years of any offense against the beverage laws of this state, the United States, or any other state; who has been convicted within the last past 5 years in this state or any other state or the United States of soliciting for prostitution, pandering, letting premises for prostitution, or keeping a disorderly place or of any criminal violation of chapter 893 or the controlled substance act of any other state or the Federal Government; or who has been convicted in the last past 15 years of any felony in this state or any other state or the United States; or to a corporation, any of the officers of which shall have been so convicted. The term "conviction" shall include an adjudication of guilt on a plea of guilty or nolo contendere or the forfeiture of a bond when charged with a crime.

In addition to the prohibition against criminal convictions, Rule 61A-1.017 Moral Character, F.A.C., implements section 561.15, Florida Statutes, by defining the meaning of "good moral character." Florida's Beverage Law contains qualifications regarding criminal convictions and good moral character. The Rule provides:

- (1) For purposes of the Beverage Law, a person of "good moral character" shall mean a person who:
  - (a) Has the ability to distinguish between right and wrong and the character to observe the difference;
  - (b) Observes the rules of right conduct; and
  - (c) Acts in a manner that indicates and establishes the qualities of trust

and confidence that is generally acceptable to the state.

(2) Conduct that does not establish the qualities of trust and confidence include the following:

(a) Being penalized for a criminal act in this country or a foreign country that is punishable by imprisonment for a term exceeding 1 year when the act is related to alcoholic beverages, failure to pay taxes, unlawful drugs or controlled substances, prostitution, or injuring another person in the preceding 15 years;

(b) Committing two or more crimes in this country or a foreign country that are punishable by imprisonment for a term exceeding 1 year, unless found not guilty by a court of competent jurisdiction, during the preceding 5 years;

(c) Committing an unlawful lewd, lascivious, or indecent assault or act upon or in the presence of a person under the age of 16, unless found not guilty by a court of competent jurisdiction, during the preceding 5 years;

(d) Having a delinquent child support obligation which has resulted in issuance of a court order for collection within the preceding 5 years;

(e) Committing two or more acts of prostitution or lewdness, unless found not guilty by a court of competent jurisdiction, during the preceding 5 years;

(f) Committing an act of unlawful battery, unless found not guilty by a court of competent jurisdiction, during the preceding 5 years;

(g) Committing an act of selling, delivering, giving, or possession with the intent to sell, give, or deliver unlawful controlled substances or drugs, unless found not guilty by a court of competent jurisdiction, during the preceding 5 years;

(h) Committing two or more acts in violation of alcoholic beverage laws, unless found not guilty by a court of competent jurisdiction, during the preceding 5 years;

(i) Committing perjury or giving false information under oath to a government agency or court, unless found not guilty by a court of competent jurisdiction during the preceding 5 years;

(j) Engaging in a pattern of fraud as defined in Section 409.327, Florida Statutes, unless found not guilty by a court of competent jurisdiction during the preceding 5 years; and

(k) Having had an ownership interest or managed a business whose

alcoholic beverage license or permit was revoked by a government agency for a violation of a criminal law that is punishable by imprisonment for a term exceeding 1 year or four violations of the same law during the preceding 3 years.

(3) Mitigation the division will consider in determining a person's good moral character when there is evidence of the conduct described in subsection (2) of this rule includes:

(a) An affidavit explaining the circumstances of past conduct and evidence of the qualities of trust and confidence, the ability to distinguish between right and wrong, and the character to observe the difference; and

(b) Character references from people who have personal knowledge of the applicant's or licensee's qualities of trust and confidence, the ability to distinguish between right and wrong, and the character to observe the difference. References may not include spouses, sons, daughters, or anyone employed by the applicant or licenses.

(c) Evidence of good citizenship and improving the quality of life in their community.

(4)(a) Licensee's who fail to continue meeting the good moral character standard will be issued an administrative action to determine if the license should be revoked.

(b) Corporate and partnership licenses shall not be revoked when there are adversely affected people having an ownership interest if the licensee:

1. Terminates the employment of the person who is not of good moral character;

2. Does not give or sell additional ownership interest in the enterprise to the person who is not of good moral character where it has the legal right to restrict such purchase of additional ownership interest;

3. Prohibits the person who is not of good moral character from being on the licensed premises or talking with any employee of the licensee, except at scheduled shareholder's meeting, unless the division has approved a petition or stipulation agreeing to vary from this restriction; and

4. Demonstrates to the satisfaction of the division that the conduct by an owner was not on a licensed premises owned by the corporation or partnership.

Similarly, 27 Code of Federal Regulations (CFR) 1.24, provides, in relevant part, the qualifications for permit applicants.

The application of any person shall be granted and the permit issued by the appropriate TTB officer if the applicant proves to the satisfaction of the appropriate TTB officer that:

(a) Such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has not, within 5 years prior to the date of application, been convicted of a felony under Federal or State law, and has not, within 3 years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; and

Like the qualifications that licensees must meet under Florida's Beverage Law, the qualifications that basic permittees must meet under federal law apply to the person or to officers of a corporation—not to employees.

There is one instance, however, when an employee must satisfy the criminal convictions and good moral character qualifications--when the employee is applying for a license from the Division of Alcoholic Beverages and Tobacco (DABT) to sell wine or spirits. In this instance, the qualification is not for employment; it is to obtain a license to sell wine or liquor. As discussed above, this is a requirement of all licensees under section 561.15, Florida Statutes. The specific provisions for licensing salespersons of wine and spirits are provided in section, 561.68, Florida Statutes. It is a distributor violation to have unlicensed employees selling wine or spirits.

Distributors should pay special attention to the circumstances where an employee, who would not satisfy the criminal convictions and good moral character qualifications, might be in line to become an officer of the corporation.

**Conclusion:** Neither state nor federal alcoholic beverage law prohibits a licensed distributor from employing a person who fails the criminal convictions and good moral character qualifications.