

PROHIBITION ON “IRRESPONSIBLE PROMOTIONS”



JOELSON WILSON LLP
Solicitors
30 Portland Place
London W1B 1LZ

T: (+44) (0)20 7580 5721
F: (+44) (0)20 7580 2251
E: info@joelsonwilson.com
W: www.joelsonwilson.com
DX: 9001 West End

PROHIBITION ON “IRRESPONSIBLE PROMOTIONS” IN FORCE FROM 6 APRIL

Three of the new mandatory conditions that attach to the premises licence for all on-licensed premises come into effect on April 6. One outlaws the free dispense of alcohol and another imposes a requirement to provide free tap water to customers. However it is doubtless the third new condition forbidding “irresponsible” drinks promotions that will cause the greatest concern to operators, especially in the run-up to the World Cup. The Licensing Act 2003 (Mandatory Licensing Conditions) Order 2010 (“the Order”) provides that certain activities and “similar activities” will be considered to be “irresponsible promotions”. Sadly, the way in which the Order has been drafted means that there is huge potential for confusion. Matters have not been improved by the publication by the Home Office of its own guidance on the subject. If anything, the Home Office guidance has made the situation worse, differing as it does in a number of respects from the new section of the Secretary of State’s guidance under s 182 of the Licensing Act 2003 that has been drafted to deal with promotions.

The Order defines “irresponsible promotions” as a number of specified activities, “or similar activities”, which are “carried on for the purpose of encouraging the sale or supply of alcohol for consumption on the premises in a manner which carries a significant risk of leading or contributing to crime and disorder, prejudice to public safety, public nuisance, or harm to children”. It is important to realise that, in order for a promotion to be considered irresponsible and therefore unlawful, there is an overarching requirement that it is being carried on in such a manner as to present a significant risk to one or more of the licensing objectives. It seems that it will be for the licensing authority, Police or Trading Standards to decide whether such a risk exists. It is therefore essential to ensure that you have suitable due diligence measures in place. We return to this below.

The Order provides that the following, or similar, activities will be forbidden:

- games or other activities which require or encourage, or are designed to require or encourage, individuals to—
 - (i) drink a quantity of alcohol within a time limit (other than requiring customers to finish their drinks before the premises close), or
 - (ii) drink as much alcohol as possible (whether within a time limit or otherwise);
- provision of unlimited or unspecified quantities of alcohol free or for a fixed or discounted fee to the public or to a group defined by a particular characteristic (other than any promotion or discount available to an individual in respect of alcohol for consumption at a table meal);
- provision of free or discounted alcohol or any other thing as a prize to encourage or reward the purchase and consumption of alcohol over a period of 24 hours or less;
- provision of free or discounted alcohol in relation to the viewing on the premises of a sporting event, where that provision is dependent on—
 - (i) the outcome of a race, competition or other event or process,
or

- (ii) the likelihood of anything occurring or not occurring; and
- selling or supplying alcohol in association with promotional posters or flyers on, or in the vicinity of, the premises which can reasonably be considered to condone, encourage or glamorise anti-social behaviour or to refer to the effects of drunkenness in any favourable manner.

So what do the 2 sets of guidance say?

In relation to the first category of prohibited activity above, the guidance produced by the Secretary of State under s182 sets out that drinking games such as “drink downing” competitions may be prohibited under the new rules, if they carry a significant risk to the licensing objectives. The Home Office guidance, though, goes further, stating that premises are now necessarily prohibited from organising a yard of ale competition.

Are “happy hours” to be regarded as “other activities” which require or encourage individuals to drink a quantity of alcohol within a time limit, or to drink as much as possible? The same question arises in respect of “2 for 1” offers – will they be prohibited if they are offered up until 10pm, say? Both sets of guidance are at pains to point out that the intention is not to ban happy hours *per se*. The Home Office guidance goes on to explain that only “happy hours” that are “promoted and organised in an irresponsible way” will fall foul of the new condition – which rather begs the question of how this will be judged. Again, having appropriate due diligence measures in place is key.

The second category of prohibited activity throws up a number of problems of interpretation which, if anything, the two sets of guidance compound. The Order itself is very plain in prohibiting only the provision of unlimited or unspecified quantities of free or discounted alcohol. The section of the Home Office guidance covering this subject is entitled “large quantities of alcohol for free or at a discounted price” and then goes on to cite “10 pints for £10” and “pay £5 entry and then drink up to 12 shots” as examples of promotions that are now banned. Whilst these quantities are undoubtedly large, they are certainly specified. The Order itself does not ban the discounting of large quantities, however large – it prohibits the discounting of unlimited or unspecified quantities. The relevant section of the Secretary of State’s s182 guidance is entitled “large quantities of alcohol for free or a fixed price” but actually specifically encourages specifying the quantity of alcohol included in promotions as part of “a common sense approach”. It seems that the Home Office guidance equates large quantities with unlimited or unspecified quantities and to that extent the 2 sets of guidance differ. It is worth bearing in mind that the guidance is just that - only guidance, and does not have the force of law. It seems likely that sooner or later there will be a test case on the issue of promotions involving specified quantities of alcohol.

Both the Home Office and s182 guidance refer to avoiding targeting promotions at groups that might become “more vulnerable”, or more likely to cause crime or disorder as a result of excessive consumption of alcohol. Examples such as women, under 25s, students and fans of a specific sporting team are cited. It is noteworthy that the legislation itself does not mention the issue of “vulnerability”. It does, however, mention promotions targeted at “the public or to a group defined by a particular characteristic”. This means that any discounts whatsoever involving unspecified quantities of alcohol have the potential to be unlawful if they present a significant risk of leading, or contributing, to the undermining of the licensing objectives.

JOELSON WILSON

In practice, it appears that amongst others the following types of promotion, if they present a significant risk to the licensing objectives, may be subject to challenge:

- “Speed drinking” competitions (but asking people to finish their drinks during “drinking up time” will remain legal);
- “Drink a bottle of wine during Happy Hour and we’ll give you an extra glass free”;
- “Drink as much as you like for £10”;
- “Women drink free”;
- “Nurses’ drinks discounted by 30%” (unless quantities limited or specified);
- “All wines half-price” (unless with a table meal or unless the quantities of alcohol are limited or specified);
- “Complete the Pub-Crawl challenge and we’ll give you a bottle of Tequila for £5”;
- “Collect all the points on our ‘one pint for 10’ Loyalty Card today and the eleventh pint is on us”;
- “All drinks £1 if Chelsea score in the first half”;
- “Free pint of Brains Bitter if Wales beat France”; and
- “You’re more likely to pull with your beer goggles on”.

It is important to note that this is not intended to be an exhaustive list. It should also be borne in mind that no promotion will be unlawful unless it presents a significant risk of leading or contributing to the undermining of the licensing objectives. This means that, in order for a promotion to be unlawful, there must be a direct or indirect causal link between the promotion and the act or omission on the part of the customer that undermines those objectives.

It appears to be in relation to the manner of consumption that the assessment of risk falls to be made. Use of the adjective “significant” indicates that the assessment must point to the extent of risk being appreciably more than a hypothetical risk. In all the circumstances of any particular case, it must constitute a real risk – and the assessment of this will take into account the efficacy of all practices and policies that have been adopted and implemented by the operator to minimise the risk.

It is therefore essential that operators running drinks promotions are able to show that practices and procedures are in place (and that all staff have been fully trained in relation to the same) to minimise the risk – to the extent that it does not become a significant risk – of the manner of consumption (by any person) of alcohol in connection with the promotion leading to or contributing to crime and disorder, prejudice to public safety, public nuisance or harm to children.

JOELSON WILSON

It will be necessary for operators to show, when seeking to rely on the defence of due diligence, that they have procedures in place to avoid running irresponsible promotions and that they are being implemented. Examples of matters which should be addressed are listed below. However, the list is not exhaustive, since the circumstances of each case will require different considerations:

- a full and detailed risk assessment has been carried out;
- arising from that risk assessment, policies and practices are in place to supervise the promotion and the manner in which alcohol purchased pursuant to it is consumed on the premises;
- all staff have been trained in relation to the implementation of such policies and practices (including supervision of junior staff by more senior staff members and management);
- a record is kept and maintained at the premises of occasions on which sales of alcohol pursuant to a promotion have been declined and/or customers warned about their behaviour;
- appropriate measures have been adopted to minimise the risk (such that it does not become a significant risk) of persons ejected from the premises behaving in a manner which would lead to or contribute to one or more of the licensing objectives being undermined (and that a full record in this respect, relating to all such ejections, is kept and maintained); and
- senior management conduct regular reviews of all such records with a view to implementing disciplinary measures in the event that it becomes apparent that the policies and procedures are not being implemented properly.

Should you require any advice or assistance generally regarding how to run drinks promotions lawfully, or wish to know whether a particular promotion is likely to fall foul of the new rules, please do not hesitate to contact a member of the Licensing and Gambling Team.

“This value-for-money practice provides an excellent level of service”, “a steady firm that will deliver consistently high results”, “truly proactive practitioners”– Chambers & Partners Guide to the UK Legal Profession 2010. For information/advice on gaming, betting, lotteries or remote gambling, or alcohol and entertainment licensing matters, please contact:

David Clifton or Suzanne Davies
Joelson Wilson LLP
30 Portland Place, London W1B 1LZ
Telephone: +44 (0) 20 7580 5721
Fax: +44 (0) 20 7580 2251
e-mail: drqc@joelsonwilson.com or scd@joelsonwilson.com
Web: www.joelsonwilson.com

This document is not intended to be a comprehensive review of all developments in the law or practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions.