

BOOZY ICE CREAM AS THE RESPITE TO FINANCIAL UNCERTAINTY? NEW YORK SAYS YES

Hodgson Russ Food & Beverage Alert
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You read that right! In an effort to help curb financial woes associated with the pandemic, New York has encouraged businesses to create (and profit from) mouthwatering boozy desserts that allow their customers to eat, drink, and be merry all at once. ***But before your development team gets too merry at the local distillery, your business needs to ensure it is compliant with New York and Federal law.***

On August 3, 2020, New York Gov. Andrew Cuomo signed legislation (S7013/A8732) permitting the manufacture and sale of ice cream and other frozen desserts made with liquor in New York State. The legislation limits the percentage of alcohol in ice cream to not more than 5% of alcohol by volume and requires the same product labeling and warning statements that are already present on confectionary that contain beer, wine, and cider.

This good news comes at a time when dairy farmers across New York State have encountered ever-mounting debts, persistently low commodity prices, and other difficulties. With the ability to enhance an already delectable treat with some boozy additives, Governor Cuomo hopes that New York State's dairy farmers may be able to catch a break.

Typically, alcohol is seen as a supplement to a recipe – shrimp scampi made with a nice white wine; cheese infused with a bit of the perfect beer; or even vodka-soaked candies. Alternatively, perhaps as a complement to an already delicious meal – a nice glass of cabernet sauvignon with a filet; a cold beer with some chicken wings; or a vodka soda with just a hint of lime paired with a light-fare salad. Now, though, alcohol and food do not have to be separate – you can add the booze directly ***into*** ice cream and other frozen treats!

New York State Law

Be alert, however! New York heavily regulates the production, distribution, and sale of alcohol, including food items made ***with*** it. The good news, though, is that ice cream and other frozen desserts made ***with*** liquor, wine, beer, and or cider are not subject to the same rigorous standards that a typical “alcoholic beverage” is. Article 1, § 3 of New York's Alcoholic Beverage Control Law exempts “ice cream and other

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frozen desserts” and, instead provides that New York Agriculture and Markets Law § 200(15) applies. Section § 200(15) is lengthy, but necessary to understand in order to ensure that your new boozy business endeavor is compliant with New York law.

If your business decides that boozy frozen desserts are the next best endeavor to boost sales, there are a variety of concerns to be mindful of:

- What is the alcohol by volume percentage of my yummy treat?
- Can I send the boozy dessert in a sealed package?
- How am I going to market the product? What is the label going to look like?
- Is my business going to ship the boozy treat interstate or intrastate?
- Once the boozy treat hits the stores, how will it be presented to consumers? If outside New York, what are the laws and regulations governing displays?

See N.Y. Agri & Mkts § 200(15).

Another advertising caveat! Be mindful that New York law precludes manufacturers and distributors of ice cream and other frozen desserts made with alcohol (or other alcoholic beverages) from selling to a person or business who intends to re-sell individual servings of such desserts at retail or for consumption at such establishment.

Federal Law

The Federal Government also has oversight on your boozy dessert endeavor pursuant to the Federal Alcohol Administration Act (“FAA”). The FAA requires your business to obtain a permit from the Department of the Treasury’s Alcohol and Tobacco Tax and Trade Bureau (“TTB”) before engaging in business. The TTB regulates labeling and advertising, among other alcohol-related concerns.

These factors may leave you wondering how to best change the trajectory of your business to utilize alcohol in production or, alternatively, whether it is even worth doing so. The attorneys at Hodgson Russ, LLP can help you navigate this complicated space and identify how best to protect your business, employees, customers, and your new boozy ice cream products. To learn more, please contact Reetuparna Dutta (716.848.1626), Andrew Freedman (716.848.1332) or James Zawodzinski, Jr. (716.848.1595).