

Matthew G. Bevin
Governor

K. Gail Russell
Secretary



PUBLIC PROTECTION CABINET
1003 Twilight Trail
Frankfort, Kentucky 40601
502-564-4850 (o)
502-564-7479 (f)

Carol Beth Martin
Acting Commissioner

ADVISORY OPINION REQUEST 2019-001

March 26, 2019

Subject: Definition of “food” relating to required food sales percentages for NQ-2 licensed restaurants and licensed caterers.

Requested by: Leo F. Camp
Attorney, Wyatt, Tarrant & Combs, LLC

Syllabus: “Food” means “nutrients in solid form prepared and served for immediate consumption at a meal (restaurant) or a catered event (caterer).”

Statutes construed: KRS 241.010(11); KRS 241.010(50); KRS 243.033

Legal authority: KRS 446.080(4); *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004); *Alliant Health Sys. v. Ky. Unemployment Ins. Comm'n*, 912 S.W.2d 452 (Ky. App. 1995).

Opinion of the Department of Alcoholic Beverage Control

Food service businesses holding a caterer’s license and restaurants holding a Nonquota Type 2 (“NQ2”) retail drink license are statutorily required to maintain certain food sales percentages. *See* KRS 241.010(50); KRS 243.033. Although KRS 241.010(2) defines “alcoholic beverages” for purposes of calculating the required total sales percentages, “food” is not defined. These requirements therefore beg an important question: “What constitutes ‘food’ for the purpose of determining the required percentages for food versus food and alcohol gross receipts for caterer’s and NQ-2 (restaurant) licensing purposes?”

By way of background, the Department is authorized to issue an NQ-2 retail drink license to a “restaurant.” *See KRS 243.084(1)(b).* A “restaurant” is “a facility where the usual and customary business is the **preparation** and serving of **meals** to consumers, that has a bona fide kitchen facility, and that receives at **least fifty percent (50%)** of its **food** and alcoholic beverage receipts from the sale of **food** at the premises.” KRS 241.010(50) (emphasis added). The Department is also authorized to issue a caterer’s license to a “caterer,” KRS 243.033(1)-(2). A “caterer” is “a person operating a food service business that **prepares food** in a licensed and inspected commissary, transports **the food** and alcoholic beverages to the caterer’s designated and inspected banquet hall or to an agreed location, and **serves the food** and alcoholic beverages pursuant to an agreement with another person[.]” KRS 241.010(11) (emphasis added).

While these licenses permit alcohol sales, the General Assembly clearly conditioned the use of these licenses on the significant sale of “food.” Defining “food” will further the Department’s public protection mission and its laudable goal of impartial, reasonable, and fair enforcement. The General Assembly’s intent is the Department’s guiding light and touchstone. *See MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009) (“[T]he cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect.”). Of course, “statutes should [also] be construed in such a way that they do not become meaningless or ineffectual.” *Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky. 2000). Furthermore, when a statute uses a word that is not defined, that word is to be construed in accordance with its common and approved use of language. *See KRS 446.080(4); St. Clair v. Commonwealth*, 140 S.W.3d 510, 570-71 (Ky. 2004) (using “ordinary and popular meaning”);

Alliant Health Sys. v. Kentucky Unemployment Ins. Comm'n, 912 S.W.2d 452, 454 (Ky. App. 1995) (using "common usage").

Although legislative intent is not always easy to determine, food sales requirements serve an important purpose: they exist because minors are permitted to accompany parents to restaurants and catered events but minors are not permitted in bars. *See KRS 244.085(5)*. The General Assembly objectively distinguishes restaurants and caterers from bars by the statutory food sales requirements.

With this guiding principle, the Department next considers the statutory framework as a whole to determine whether other definitions inform the definition of the term "food." *See Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005). Restaurants are required to prepare and serve meals.¹ *See KRS 241.010(50)*. Caterers are also required to prepare and serve food for immediate consumption at catered events, which usually only last for a few hours. *See KRS 243.033*. Since the definitions in KRS 243.280(5)² and 804 KAR 4:270 § 2³ specifically exclude "food products prepared for immediate consumption," those definitions are not applicable to restaurants and caterers and our search for a definition must continue. Therefore, our analysis next turns to the dictionary, which defines "food" as:

1: **material** consisting essentially of protein, carbohydrate, and fat used in the body of an organism to sustain growth, repair, and vital processes and to furnish energy also: such food together with supplementary substances (such as minerals, vitamins, and condiments);

¹ "Meals," similar to "food" is not defined. But the dictionary defines "meal" as "an **act** or the time **of eating** a portion of food to satisfy appetite." "Meal." *Merriam-Webster.com*. 2019. available at <https://www.merriam-webster.com/dictionary/meal> (last accessed Jan. 3, 2019)(emphasis added).

² In examining KRS 243.280 as whole, it is also apparent that the definition in subsection (5) applies only to subsection (4) of that section.

³ 804 KAR 4:270, Section 2 specifically provides that its definition of "staple groceries" only applies to KRS 243.230(5).

2: nutriment in **solid form**;

3: **something that nourishes**, sustains, or supplies.

“food.” *Merriam-Webster.com*. 2019. Available at <https://www.merriam-webster.com/dictionary/food> (last accessed Jan. 3, 2019) (emphasis added). These definitions suggest that the term “food” contemplates the act of eating solids rather than drinking liquids. This seems consistent with the General Assembly’s intent, which can broadly be described as seeking responsible consumption of alcohol. Accordingly, the Department’s reasoned analysis suggests that “nutrients in solid form” best comports with a common understanding of the term “food” and the General Assembly’s intent in setting forth the food and alcohol percentage requirements.

For these reasons, and humbly seeking to best carry out the will and intent of the General Assembly, the Department interprets “food” for purposes of an NQ-2 restaurant’s and caterer’s gross food sales percentages to mean “nutrients in solid form prepared and served for immediate consumption at a meal (restaurant) or catered event (caterer).” The Department notes, by way of example, that soups, chowders, bisques and related food products are “food” because each contains or is created from “nutrients in sold form.”



Carol Beth Martin
Acting Commissioner
Department of Alcoholic Beverage Control

Advisory Opinion Request Form
July 2017



ALCOHOLIC BEVERAGE CONTROL
COMMONWEALTH OF KENTUCKY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
1003 Twilight Trail
Frankfort, Kentucky 40601-8400
502-564-4850 phone
502-564-1442 fax
<http://abc.ky.gov>

Date received _____

AOR NO.: _____
FOR ABC USE ONLY

ADVISORY OPINION REQUEST FORM

Attach additional pages as necessary and any documentation, research, or other evidence that you request the Department to consider.

Name of Requestor (individual or business entity): Leo F. Camp, Wyatt, Tarrant & Combs, LLP

Address: 500 West Jefferson Street, Suite 2800

City: Louisville

State: KY

County: Jefferson

Zip Code: 40202

Phone Number: 502-562-7552

Email: Icamp@wyattfirm.com

The above individual or business entity requests an: Advisory opinion Reconsideration request

If this is a reconsideration request or comment, the application Advisory opinion number: _____

Question or issue to be addressed: What constitutes "food" for purposes of determining the required percentages for food vs. food and alcohol gross receipts for caterer's and NQ-2 (restaurant) licensing purposes?

Applicable statutes, regulations, ordinances, or other authority: KRS 243.033 and KRS 243.084

Proposed response, comment, or basis for reconsideration request: For purposes of KRS 243.033 and KRS 243.084, "food" shall mean any and all food and beverages or food products intended for human consumption, other than alcoholic beverages or tobacco, including food prepared for immediate consumption and prepackaged or pre-prepared food and beverages, regardless of whether such food or beverage was prepared by the license holder.

To your knowledge, is the question for which you request an advisory opinion or reconsideration pending before, under investigation by, or recently decided by a court or government entity? Yes No

If yes, please identify the court or government agency, any case or proceeding number, and filing dates of the proceeding or investigation _____

Signature of Requestor or Requestor's Agent X

Date 8/29/18

Signer's Name and title if requestor is a business entity _____

Date _____