

**Proponent Testimony of Andrew W. Herf, Executive Director
Ohio Licensed Beverage Association & Ohio Spirits Association
on HB 127 before the
Ohio House State and Local Government Committee
March 24, 2021**

Chair Wiggam, Vice Chair John, Ranking member Kelly and members of the House State and Local Government Committee thank you for the opportunity to testify today.

My name is Andy Herf, and I am here today to offer proponent testimony on HB 127 on behalf of the Ohio Licensed Beverage Association and the Ohio Spirits Association. The Ohio Licensed Beverage Association is made up of bars and taverns across the state and the Ohio Spirits Association is made up of spirituous liquor brokers, which provide all of the product over 42 proof in the state including state agency stores and all of the bars and restaurants in Ohio.

In the past this committee has heard from retailers and liquor attorneys describing the need for HB 127, all of them have laid out the emotional case for the passage of the bill. Today I would like to offer some data points to help guide the policy making process.

To begin, I would like to offer a lookback to March of 2020. Before other businesses were closed, on-premise retailers (bars and restaurants) were closed. In mid May patios were opened and a week later indoor dining returned with social distancing per the Dine Safe Ohio order. During the shutdown, the Cocktails to Go order was issued, which helped many of the businesses I represent survive. The rule number was 4301:1-1-13, which I will refer to later as simply “rule 13.” In late July emergency rule 4301:1-1-80 was passed, which I will refer to as “rule 80.” Emergency Rule 80 was in effect for 120 days, it required businesses to serve last call before 10:00 pm, and required customers to stop drinking alcohol at 11:00 pm. Rule 80 did not require patrons to leave before 2:30 am as long as they were not drinking alcohol. When rule 80 lapsed another health order kicked in in late November which was the Director’s [of Health] Stay at Home Tonight Order, which I will refer to as “the curfew.” The curfew was for 10:00 pm, and in February it was changed to 11:00 pm. Soon after, it was lifted completely.

The reason I mention rule 13, rule 80 and the curfew is twofold. Once the order and rules had lapsed, the industry could assess the total time lost to state mandated closures. The average time lost was 1,987.5 hours of business. Many of these hours—especially the curfew hours are golden hours. A bar makes a lot more money at on a Saturday at midnight than they do at noon on a Tuesday. Another way to look at the nearly 2,000 hours is this—for a 9-5 employee working 40 hours per week, the time lost was an entire year. The other reason to focus on these three mandates is because without COVID, they would not have existed, and retailers would not be out of compliance with anything at all.

Now I would like to turn the committee’s attention to the central point of this testimony, the Liquor Control Commission adjudications going back to last May when on-premise retail reopened. From May 2020 to mid-March 2021 the Liquor Control Commission had adjudicated 424 individual violations. I have provided several spreadsheets to the committee which are color coded— yellow, red and green. Yellow represents the COVID specific violations and they all fall into three specific categories—Rule 13, Rule 80 and Rule 52(B)(1). Red represents non-COVID related offenses such as selling to minors or any other violation that would have been prohibited regardless of the pandemic. Green represents cases that were dismissed. Of the 424 violations represented within this time period, 93 were dismissed, 88 would have been violations before the pandemic, and 243 were COVID related.

When looking at the yellow spreadsheet, there were 20 violations of rule 13, 115 violations of rule 80 and 105 violations of rule 52 (B)(1). Rules 13 and 80 are no longer in existence, so no new citations will be issued, but there could be some citations that are still working their way through the process.

Now I would like to take a moment to focus on rule 52, which is being used to enforce curfew violations and social distancing violations per the Dine Safe Ohio order. To begin, both of these orders were issued by the Director of the Department of Health. Being that they were health orders, not liquor violations, they were tethered to rule 52 to make them liquor violations. OAC 4301:1-1-52 is a storied rule with a colorful history because it deals with a variety of nefarious activities. Nudity, sexual activity, public indecency, food stamp fraud, drug trafficking and human trafficking are all covered in rule 52.

To tether health rules to the liquor rules, there are 3 sentences. The first is the definition of disorderly activities: “Disorderly activities’ are those that harass, threaten or physically harm another person including threats or other menacing behavior, fighting, assaults and brawls or any violations defined by section 2917.11 of the Revised Code.” The jump being made is that standing with a beer, not wearing a mask to the restroom, being the 11th person at a table, or merely being in the building after 10:00 is a menacing threat to physically harm another person. Once the threat is established, paragraphs (B) and (B)(1) kick in. They state:

“(B) Prohibited Activities; no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to:

(1) Engage in any disorderly activities;”

This logic has been employed successfully 105 times so far, and they are separated out on the yellow spreadsheet. To break this down even further, there are two main classifications of rule 52 (B)(1) violations—social distancing and curfews.

Per social distancing, a combination of events converge that justify leeway for the permit holder. The Dine Safe Ohio order was issued on the same day that patios re-opened. Most retailers did not understand the order. For example, retailers were required to manage lines—most businesses thought that meant the lines at the bar, so they required all table service to avoid any lines at the bar. However, the order meant lines outside to get into the bar, which meant that for the first time, retailers were supposed to manage people outside of their establishments on public property. After these facts became clear, retailers began to require reservations to avoid outside lines.

With regard to the curfew, the connection to rule 52 (B)(1) is even more tenuous. The curfew was directed at “All individuals residing within the state.” Luckily for bar owners there was a broad work exemption to the order that allowed citizens to break the curfew, “To engage in employment.” There were no other directions regarding employment—it meant all employment. Therefore, it was legal for the bar owner to be at work as well as, cooks, bartenders and food and cocktails to go delivery drivers. However, a patron would have been breaking curfew by being in the bar. In theory, the patron should receive a citation for breaking curfew, but instead an interpretation was made that the bar owner was permitting people to engage in disorderly activities. Many of the curfew cases have yet to be adjudicated.

To ensure that COVID-specific violations are forgiven, the bill should specifically target violations against rule 13, rule 80 and rule 52 (B) (1). By limiting the focus of HB 127 on these specific types of violations,

COVID infractions could be forgiven without making any changes to the orders against other violations. Our goal is not to forgive violations that would have occurred before the pandemic, or after the pandemic is over. Eliminating the COVID-specific violations would also prevent retailers from having this extraordinary set of violations from compounding into higher penalties and revocations in the future.

In the final analysis, as we begin to see the COVID fog lift across our state, nation and the world, I believe this is the time to revisit these three specific violations—rule 13, rule 80 and rule 52(B)(1). Ohio has 12,000 on-premise retailers, but only 191 unique companies were cited specifically for COVID infractions. That represents 1.6% of all on-premise retailers. According to data provided by the Liquor Control Commission, the total dollar amount of fines represented in this group is less than \$250,000. We worked incredibly hard to get guidance out to retailers and patrons. Realistically, no bar owner can control the action of every patron in every moment. Soon, we will open up completely and the bars will get their customers and their livelihoods back. The owners and their employees have small business loans, they employ people, they pay taxes and rent—but more importantly, they are your neighbors, your voters and they operate establishments where friends and family connect with each other. They faced triple enforcement, they closed first, opened last and lost more hours than any other businesses—and still 98.4% did not commit a single COVID violation. Therefore, I urge your support of HB 127 to support your neighbors and to send a message to bar owners and to their hundreds of thousands of employees that their businesses are valuable, necessary and welcome in Ohio.

Thank you for your time, I am happy to answer questions.