

# **An Update on Laws Prohibiting Alcohol Sales to Intoxicated Persons**

**James F. Mosher, JD  
Elena N. Cohen, JD  
Elizabeth Dahl, JD  
Alcohol Policy Consultations  
December 2011**

**Prepared for:  
Center on Alcohol Marketing and Youth,  
Bloomberg School of Public Health, Johns Hopkins University**

This report was supported by Cooperative Agreement 5U58DP002072 from the Centers for Disease Control and Prevention. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of Centers for Disease Control and Prevention.

# **An Update on Laws Prohibiting Alcohol Sales to Intoxicated Persons**

## **I. Introduction**

In June 2009, the National Highway Traffic Safety Administration (NHTSA) published a report entitled “Legal Research Report: Laws Prohibiting Alcohol Sales to Intoxicated Persons” (NHTSA Report).<sup>1</sup> The report summarized the public health and safety rationale for these laws, including their role in preventing alcohol-related motor vehicle crashes and presented findings from legal research on the status of the laws in all 50 States and the District of Columbia as of January 1, 2007.

This update summarizes recent research on sales to intoxicated person (SIP) laws (also referred to as over-service) and changes to SIP statutes and regulations as of January 1, 2011. As described in more detail below, only a small number of changes were enacted in the subsequent four years. Five states made seven significant changes: South Carolina, Tennessee, and Vermont strengthened or expanded SIP regulation, New Hampshire adopted a provision that may have the effect of weakening SIP regulation, and Michigan enacted one provision that strengthened and one that weakened SIP regulation.

The NHTSA Report showed that enforcement of SIP laws was rare, and found that burdensome statutory requirements were one contributing factor. In particular, SIP laws tend to (a) have strict evidentiary requirements; (b) be limited in types of alcohol servers to whom they apply; (c) be limited in the acts that they prohibit; and (d) contain unstructured penalty provisions. Legal Best Practices in the NHTSA Report recommended changes to statutes, regulations and administrative guidelines to help address these problems. The few changes made by the States to their SIP laws between 2007 and 2011 suggest that there has been little progress toward enacting these recommended reforms.\*

## **II. The Public Health Significance of Laws Regulating Service to Intoxicated Persons**

Alcohol service and sales practices play a key role in addressing the risk of injury and other harms that arise from excessive alcohol consumption.<sup>2</sup> Research findings set forth in the NHTSA Report (p. 4) make this case:

“Approximately 50 percent of drinking drivers start their intoxicated journey from licensed establishments.<sup>3</sup> Serving alcohol to intoxicated people can also result in other risky behavior and criminal outcomes.<sup>4</sup> One out of 10 alcohol-involved violent incidents occurs in a bar or restaurant.<sup>5</sup> Excessive alcohol consumption also leads to law enforcement ‘calls for service’ for a variety of problems, including motor vehicle crashes, assaults, alcohol poisoning, vandalism and disorderly conduct.<sup>6</sup>”

---

\* This report does not update the status of administrative penalty guidelines or enforcement practices discussed in the 2007 report, focusing instead of the legal research aspect of the previous report.

These data show a link between intoxicated persons at on-sale alcohol retail establishments (bars, restaurants and other businesses where alcohol is served and consumed on the premises) and serious public health and social harms, and strongly suggest that the enforcement of well-designed SIP laws would provide significant public health and safety benefits. Despite this, little research has been devoted to evaluating this prevention strategy. (SIP laws typically apply to off-sale establishments as well (business where alcohol is sold for consumption off the premises.)) The Community Preventive Services Task Force (Task Force), an independent, non-federal, unpaid panel of public health and prevention experts that provides evidence-based findings and recommendations about community preventive services, programs, and policies to improve health. The Task Force conducted a thorough review of the research literature in 2010 and released its findings in 2011. It found only two studies that met its criteria for inclusion in its analysis. It concluded:

“[There is] insufficient evidence to determine the effectiveness of overservice law enforcement initiatives as a means to reduce excessive alcohol consumption and alcohol-related harms, because of the small number of available studies and inconsistent findings.”<sup>7</sup>

The Task Force suggested that implementation of NHTSA Report best practices recommendations “... may assist in the development of more effective procedures for the reduction of the harms associated with excessive alcohol consumption in the U.S.”<sup>8</sup>

Another indication of the potential effectiveness of SIP law enforcement comes from the Task Force’s assessment of dram shop (or commercial host) liability laws, which was released concurrently with its SIP law analysis. The Task Force (at p. 345) found strong evidence to support its conclusion that: “[D]ram shop liability is effective in preventing and reducing alcohol-related harms.”<sup>9</sup> Dram shop liability and SIP enforcement initiatives are based on a similar principle – holding alcohol retail licensees responsible for harms caused by overservice of alcohol. In fact, commercial host liability in many States is dependent on a finding that a SIP law has been violated.<sup>10</sup> In its overservice review, the Task Force focused on the enforcement of SIP laws, largely ignoring the critical role played by the specific provisions found in the SIP laws themselves. Thus the evidence of commercial host liability effectiveness suggests that targeted enforcement of an effective SIP law would have similar positive impacts.

As noted in the introduction, the NHTSA Report identified key barriers to effective enforcement in most State laws that need to be addressed through legislative reform before positive public health and safety benefits can be anticipated. The next sections describe the key elements of SIP laws and what steps States took over the four years covered in this report to address these barriers.

### **III. Key Elements of Laws Regulating Service to Intoxicated Persons**

The NHTSA Report (p. 9) identified six key statutory/regulatory elements of SIP laws:

- 1) **Types of law:** SIP laws may be either criminal or administrative in nature. Most States have both types of statutes. Nevada and Florida do not have SIP laws, and Wyoming's law is very limited; it applies only to licensees with drive-up windows.
- 2) **Defendants:** The majority of States with criminal SIP statutes hold both commercial and noncommercial alcohol servers potentially liable for overservice, although in some States they are only applicable to commercial servers. All States with SIP laws include administrative provisions that are applicable to licensees. States that have mandatory responsible beverage service (RBS) programs may also impose administrative penalties on service staff (e.g., bartenders, clerks).
- 3) **Definition of intoxication.** Some statutes set out a definition of intoxication for purposes of determining whether a server provided alcohol to an intoxicated person, listing specific behaviors and characteristics that, if present, should result in service refusal. Other statutes state only that an "obviously" intoxicated" person (or similar terminology, e.g. "apparently" intoxicated) may not be served. This phrase is less clear than a detailed definition, but has frequently been interpreted to provide a "reasonable person" standard, i.e., whether a reasonable person would find that a person was obviously intoxicated at the time of alcohol service.
- 4) **Prohibited activities:** Some statutes ban sales of alcoholic beverages to an intoxicated person, while others go further, prohibiting any transfer of a beverage, in some cases even to a person accompanying an intoxicated person. Some statutes also prohibit a licensee from allowing an intoxicated person to remain on the premises.
- 5) **Evidentiary requirements:** Evidentiary standards affect the likelihood of a violation being successfully prosecuted. Many States impose strict standards by requiring evidence that a server "recklessly disregarded" the risk of serving to an intoxicated person or that the server actually knew that a patron was intoxicated. This latter standard is particularly difficult to prove since it involves the subjective state of mind of the server. Many States rely on the "reasonable person" standard derived from common law, requiring that a server reasonably should have known that a patron was intoxicated. States may also require direct observations of the illegal service and not allow a violation to be based on indirect evidence. New Mexico's law creates a rebuttable presumption of illegal service if the patron in question has a .14 or higher blood alcohol concentration (BAC) within one hour of departing the establishment. This shifts the burden of proof to the licensee, increasing the likelihood that a violation will be established.
- 6) **Penalties:** The type of penalty is dependent in part on the type of SIP law involved. Criminal laws impose criminal sanctions (e.g., fines or imprisonment) and administrative laws impose administrative sanctions (e.g., fines, suspension or revocation of a business license). In general, administrative sanctions create a more effective deterrent for two reasons. First, they are more likely to create a perception among licensees that violations will result in penalties being imposed because administrative agencies are more likely to take action than the criminal justice system when violations are detected. Second, administrative penalties are more likely to be imposed in a relatively swift manner when compared to criminal penalties. Perceived certainty and swiftness of penalties being imposed are two key elements of deterrence theory.<sup>11</sup>

#### IV. Changes in State SIP Laws between 2007 and 2011

Only five States enacted meaningful changes in their SIP laws since the 2009 NHTSA Report was released. These changes are discussed below, separated into three of the above categories: (1) prohibited acts; (2) definition of intoxication; and (3) evidentiary requirements.

### **Prohibited Activities**

**Michigan** now prohibits allowing a person who is in an intoxicated condition to consume alcoholic beverages or loiter in a licensed retail establishment.<sup>12</sup> The statute, amended in 2009, includes an exception for intoxicated persons who are not being served but are eating food, seeking medical attention, arranging transportation other than driving, or for any other circumstances where requiring the intoxicated person to vacate the premises immediately would be dangerous to that person or the public.

**South Carolina** amended its statute in 2007 to prohibit sales of liquor by the drink to intoxicated persons.<sup>13</sup> Its statutory prohibition previously applied only to liquor served in mini-bottles.

**Tennessee** now prohibits retailers licensed to sell beer and alcoholic beverages containing less than 5 percent alcohol from selling to visibly intoxicated persons.<sup>14</sup> Tennessee's SIP provision previously did not apply to beer sold for off-premises consumption.

**Vermont**, which previously prohibited allowing intoxicated persons to loiter on licensed premises, has adopted an exception to that prohibition "under certain circumstances when supervised by licensees or their employees."<sup>15</sup>

### **Definition of Intoxication**

**New Hampshire** deleted its definition of "intoxicated individual" in 2009. Its statute now prohibits service to "an individual who is visibly intoxicated or who a reasonable and prudent person would know is intoxicated."<sup>16</sup>

**Vermont** has adopted a new regulation adding a definition of "under the influence", which means intoxication to the degree that it would be unsafe or illegal for a patron to undertake normal and expected activities upon leaving the licensed premises.<sup>17</sup> The new regulation also specifies that licensees or their employees may not serve alcoholic beverages to a person "whom it would be reasonable to expect would be under the influence as a result of the amount alcohol served to that person."<sup>18</sup>

### **Evidentiary Requirements**

The **South Carolina** Supreme Court modified the evidentiary requirements for its State SIP law in a 2010 criminal case involving a bartender. The court held that patron intoxication can be inferred if the patron has a BAC of .10 or greater at the time of service. The statute does not require that visible intoxication be shown. Rather, the server must have knowingly provided alcohol to a person that he/she reasonably should have known was intoxicated.<sup>19</sup>

**Michigan** adopted a statutory provision in 2008 stating that the BAC of an intoxicated person cannot be used as evidence of that person's intoxication.<sup>20</sup> Rather, a person's intoxication must

be proved through direct observation of a law enforcement officer or other witness.

## **V. Progress in Enacting Legal Best Practice Recommendations**

The 2009 NHTSA Report identified five Legal Best Practice recommendations that, if adopted by States, would facilitate more effective enforcement of SIP laws. This reports tracks four of these recommendations, which are described below together with a discussion of what if any progress has been made in their adoption since the 2009 NHTSA Report was published.<sup>†</sup>

**Legal Best Practice #1:** *SIP laws should be enacted in all States and they should apply to all servers and sellers, whether in commercial or noncommercial settings.*

Progress toward this best practice is reflected in South Carolina’s expansion of its SIP law to sales of liquor by the drink, and Tennessee’s expansion of its SIP law to off-premises sales of beer and alcoholic beverages containing less than 5% alcohol. However, no progress was made toward expanding SIP regulation to noncommercial settings, Florida and Nevada still have no SIP laws, and Wyoming’s law remains very limited, applying only to retailers with drive-up windows.

**Legal Best Practice #2:** *The definition of obvious or visible intoxication found in State SIP laws should include a non-inclusive list of signs of intoxication that can be used as evidence.*

New Hampshire removed the definition of “intoxicated individual” from its statute, replacing it with a “visibly intoxicated” or “negligence” standard. Vermont added a definition of “under the influence” in its regulation but it does not include a non-inclusive list of signs of intoxication. These are the only two changes to State law made during the study period and neither represents progress toward implementing this Legal Best Practice recommendation.

**Legal Best Practice #3:** *State SIP laws should explicitly include “gifts” and other non-sale exchanges and should require servers to remove any alcohol being consumed by an obviously intoxicated person. Laws prohibiting servers from allowing intoxicated people to remain or loiter on commercial premises should be reviewed to determine whether they may inadvertently create unnecessary risks for public health and safety.*

Some progress on this recommendation has been made by Michigan and Vermont, both of which have adopted provisions providing for an exception to the requirement that intoxicated people must leave commercial premises. In Michigan’s case, a detailed exception provides that an intoxicated person who is arranging for safe transportation home, eating, or seeking medical care may remain on the premises. The exception takes into consideration whether removal from the premises would endanger the intoxicated person or the public.

---

<sup>†</sup> Legal Best Practice Recommendation #5 involves the development of penalty guidelines. These are internal administrative documents that do not involve statutes and regulations. Our research therefore does not track the status of these guidelines.

Vermont's exception allows an intoxicated person to remain on the premises "when supervised by licensees or their employees." This exception appears to also take into consideration the risks of removing an intoxicated person.

**Legal Best Practice #4:** *State SIP laws should establish explicit evidentiary requirements that differentiate between administrative and criminal proceedings. For administrative proceedings, the law should explicitly state that indirect evidence of illegal service is sufficient to support a violation, and a rebuttable presumption that a patron with a .14 or higher BAC within an hour of the service should be established. Criminal proceedings should be held to stricter evidentiary standards.*

No State adopted administrative regulations that allow indirect evidence of illegal service, or create a rebuttable presumption that a patron with a .14 or higher BAC within one hour after service was intoxicated at the time of service. However, South Carolina's Supreme Court did make clear that, in a criminal case, a jury could draw the inference that a person with a BAC of .10 percent was intoxicated. This holding likely would be applied in administrative hearings.

Michigan made it more difficult to establish a violation of State SIP laws, by making breathalyzer or BAC test results inadmissible, and by requiring that a person's intoxicated condition at the time of sale must be proven by direct observation of law enforcement personnel or other witness statements or corroborating evidence.

These were the only two States to address this best practice recommendation. Michigan's law is a significant move away from this Legal Best Practice recommendation, while South Carolina's court decision represents modest progress towards it.

Table 1 provides an updated summary of key SIP provisions and Appendices A and B provide detailed descriptions of SIP laws (statutes and regulations) and court opinions (case law), respectively, for the 50 States and the District of Columbia. These laws and rulings together comprise the body of legal provisions regulating SIP law as of January 1, 2011.

## **VI. Conclusion**

Little progress was made in implementing the 2009 NHTSA Report recommendations during the four subsequent years examined in this report. In general, it appears that this aspect of alcohol policy law has not been addressed by States, including the three States that have no or extremely limited SIP laws. Policy makers should be educated about the details and effectiveness of this strategy, and state and local health departments, licensing and enforcement agencies, and public safety departments could play a role in informing others about its potential public health benefits.

## References

- <sup>1</sup> Mosher J, Hauck A, Carmona M, et al. (2007). *Legal Research Report: Laws Prohibiting Alcohol Sales to Intoxicated Persons*. Washington, DC: NHTSA.  
[www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811142.pdf](http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811142.pdf).
- <sup>2</sup> Babor, T. et al. (2010). *Alcohol: No Ordinary Commodity*. New York, NY: Oxford University Press.
- <sup>3</sup> Mosher, J. (1996). A public health approach to alcohol and other drug problems: Theory and practice. In Principles of public health practice. Scutchfield, F., & Keck, C. (Eds.). Albany, NY: Delmar Publishers.
- <sup>4</sup> Parker, R., & Rebhun, L. (1995). *Alcohol & homicide: A deadly combination of two American traditions*. Albany: State University of New York Press.
- <sup>5</sup> Greenfeld, L. (1998, April). Alcohol and crime: An analysis of national data on the prevalence of alcohol involvement in crime. National Symposium on Alcohol Abuse and Crime, Washington, DC.
- <sup>6</sup> Sparks, M. (2000). Outcomes – Police Calls for Service/Incidents City Wide Residentially Zoned. Slide set 13 in Problem Prevention Strategies: Motivating Communities and Law Enforcement to Work Together. Vallejo, CA: Fighting Back Partnership; Maguire, M. & H. Nettleton, H. (2003, March). Home Office Research Study 265: Reducing alcohol-related violence and disorder: An evaluation of the ‘TASC’ project. London: Home Office Research, Development and Statistics Directorate, March.
- <sup>7</sup> Rammohan, V., Hahn, RA, Elder, R., Brewer, R. Fielding, J., Hingson, R., Naimi, T., Toomey, TL, Zometa, C., Task Force on Community Preventive Services (2011). Effects of dram shop liability and enhanced overservice law enforcement initiatives on excessive alcohol consumption and related harms: Two Community Guide systematic reviews. *Am J. Prev. Med.* 20: 334-343.
- <sup>8</sup> *Id.* at 342.
- <sup>9</sup> Task Force on Community Preventive Services (2011). Recommendations on dram shop liability and overservice law enforcement initiatives to prevent excessive alcohol consumption and related harms. *Am J. Prev. Med.* 20: 344-347.  
[www.thecommunityguide.org/alcohol/dramshop.html](http://www.thecommunityguide.org/alcohol/dramshop.html). Last updated: 11/30/2010
- <sup>10</sup> “Negligence per se” is the legal principle that permits dram shop liability that is based on a violation of a statute prohibiting sales to an intoxicated person. For discussion, see Mosher, J. et al. *Liquor Liability Law* §13.04. New Providence, NJ: Matthew Bender, 2011.
- <sup>11</sup> Ross, H.L. (1992). *Confronting Drunk Driving*. New Haven, CT. Yale University Press
- <sup>12</sup> Mich. Comp. Laws § 436.1707
- <sup>13</sup> S.C. Code § 61-6-2220.
- <sup>14</sup> Tenn. Code. Ann. § 57-5-301.
- <sup>15</sup> Vt. Code R. 26-020-001, § 3.17
- <sup>16</sup> N.H. Rev. Stat. § 179.5.
- <sup>17</sup> Vt. Code R. 26-020-001, § 3.17a.
- <sup>18</sup> *Id.*
- <sup>19</sup> *Hartfield v. The Getaway Lounge & Grill*, 697 S.E.2d 558 (S.C. 2010).
- <sup>20</sup> Mich. Comp. Laws § 436.2025.