

By Monica Delgado, JD, Sarah Davis, JD, MPA, and Julia Sherman, Founder of the Wisconsin Alcohol Policy Project, February 13, 2021.

Wisconsin has a statutory and regulatory gap surrounding growler sales. The surge in alcohol sales for off-premises consumption in Wisconsin during the lockdown phase of the COVID-19 pandemic exposed this gap. This document first assesses the March 2020 events that revealed a gap in Wisconsin's alcohol laws. Second, it identifies the consequences of those events. Third, it further explains the gap as illustrated by comparison to Wisconsin's neighboring states and other states across the country. Finally, the document suggests state legislative or administrative solutions to close the growler gap in Wisconsin alcohol law.

Corresponding to The State of Wisconsin Department of Health Services' Emergency Order #8, the Wisconsin Department of Revenue (DOR) first issued a proposed guidance document regarding off-premises alcohol sales on March 20, 2020 and removed the document from its website on December 18, 2020.<sup>1</sup> While available, the document provided direction regarding alcohol sales for off-premises consumption to restaurants, including all on-premises licensees.<sup>2</sup> The DOR's guidance lapsed with the termination of Emergency Order #8. But concerns remain surrounding the guidance, and particularly concerns lingering over the use or absence of seals

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<sup>1</sup> Correspondence with Tyler Quam, Department of Revenue, 1/28/21. Mr. Quam explained that "[t]he document was removed from the department's website on December 18, 2020, because the document provided clarity to Emergency Order #8 regarding the sale of alcohol beverages during the 60-day emergency period beginning on March 17, 2020."

<sup>2</sup>

on alcohol beverages for off-premises consumption.<sup>3</sup>

To ensure compliance with statewide alcohol-related laws, and particularly to avoid violation of open container laws, licensees and municipalities commonly ask the Wisconsin Department of Revenue what sorts of containers are permissible under federal and Wisconsin state law.<sup>4</sup> All on-premises licensees were informed that, in order to sell tap beer for off-premises consumption, they had the legal ability to sell containers full of beer to customers in “growlers.”<sup>5</sup> The term “growler” is not defined in the Wisconsin Statutes, and this lack of a definition presents several issues for both licensees and law enforcement.

Importantly, 23 U.S. Code § 154, which governs federal open container requirements, does not affirmatively define the specific sealing requirements necessary for state compliance. Rather, the statute “**prohibits the possession of any open alcoholic beverage container**, or the consumption of any alcoholic beverage, in the passenger area of any motor vehicle (including possession or consumption by the driver of the vehicle, located on a public highway, or the right-of-way of a public highway, in the State.”<sup>6</sup> An “open alcoholic beverage container” is defined as “any bottle, can, or other receptacle...that contains any amount of alcoholic beverage; and [either] that is open or has a broken seal; or...the contents of which are partially removed.”<sup>7</sup>

The US Department of Transportation (DOT) interpreted Iowa’s HF 2540 to have impermissibly “treat[ed] certain non-original containers for wine and beer as an exception to the state’s open

tamper-evident sealing standard.<sup>9</sup>

As the law currently stands, Wisconsin law allows brewers to receive authorization to [sell to individuals] fermented malt beverages, in original unopened packages or containers, that have been manufactured on the brewery premises or on other premises of the brewer for off-premises consumption by individuals, if the sale occurs at the brewery premises or at an off-site retail outlet established by the brewer.<sup>10</sup>

Wisconsin's statute corresponding to Class "B" licenses similarly "authorizes retail sales of fermented malt beverages to be consumed either on the premises where sold or off the premises."<sup>11</sup> Neither statute mentions growlers by name, but they may encompass some aspects of growler sales at Wisconsin alcohol establishments. Based on other states' definitions across the country, growlers are containers typically filled with a fermented malt beverage at the point of sale for off-premises consumption. This document proceeds with the assumption, unless otherwise noted by the term "bottle growler," that Wisconsin growlers are similarly filled at the point of sale.

When compared to other states, particularly the bordering states of Illinois, Iowa, Michigan, and Minnesota, Wisconsin fails to provide adequate controls on these sales for the safety of the consumer and the community. Wisconsin could address the need for these controls in a way that achieves greater alignment with our neighboring states while still allowing localities to retain a certain degree of deference. A growler policy could provide licensees and permittees with clearer understanding of when and how beer can be sold in a growler, and could help the State to avoid sanctions as severe as loss of federal highway dollars.

At a minimum, Wisconsin's growler definition should outline (1) the nature of the permitted containers (material and volume capacity); (2) permissible sealing processes or methods, to ensure compliance with open container laws; and (3) to whom the definition applies (growlers have traditionally been a function of brewpubs, but recent DOR guidance suggests Class "B"

The federal government's Alcohol and Tobacco Tax and Trade Bureau (TTB) regulates growler





## 2.

According to the federal TTB, the requirements that accompany growlers correspond with the time at which they are filled and can vary based on the type of establishment. As a best practice, the TTB recommends “that brewers silkscreen or label [all of] their growlers with all of the mandatory label information to avoid potential problems with growlers the brewer might subsequently refill.”<sup>24</sup> Based on current federal requirements, however, “large glass” growlers filled at the point of sale are formally subject to less stringent labeling requirements than “bottle growlers” filled in advance of sale.

Because the DOR has concluded that a container filled on demand is considered a “large glass,” there may be differences in labeling requirements depending on who fills the growler (i.e., retailer, brewpub, brewer). Regardless, licensees and permittees must follow Wisconsin’s fermented malt beverage labeling law, which requires “the name and address of the brewer or brewpub that manufactured it,” as well as “a statement of its contents in fluid ounces” to be placed on each “barrel, keg, cask, bottle, or other container.” The DOR noted that they “have seen various [...] labeling methods by brewers,” including “labels hanging from a string on the neck of the bottle [known as growler tags] to nicely designed adhesive labels affixed to the bottle.”<sup>25</sup>

Wisconsin law is unclear as to whether “large glass” growlers must be labeled. In practice, per the DOR, a customer’s own container is considered a “large glass” that need not be labeled so long as it is filled on-demand and sold for off-premises consumption.<sup>26</sup> As mentioned above, the

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<sup>24</sup> Source: <https://norrismclaughlin.com/11b/2016/08/31/the-dos-and-donts-of-growler-labeling/>; Nonetheless, the TTB recommends “that brewers silkscreen or label their growlers with all of the mandatory label information to avoid potential problems

TTB suggests that all growlers meet the most stringent bottling requirements as a best practice.<sup>27</sup>

### 3.

Wisconsin does not lay out explicit language with regard to sanitary requirements surrounding the filling of growlers in Chapter 125. “Class B” liquor licensees must comply with restaurant sanitation requirements in all of their operations, to obtain a license or permit, but similar requirements were not found with respect to other licensees and permittees.<sup>28</sup> One may suggest, however, that the general food code applies, despite the fact that the application of the food code under these circumstances contradicts broader notions that the general food code does not encompass alcohol-related sanitation or hygienic processes.<sup>29</sup> In contrast, Illinois, Kentucky, Missouri, North Carolina, and West Virginia, for example, provide specific and explicit sanitization instructions for growlers within their growler legislation and regulations. This growler-specific scheme is particularly important when one considers that some establishments permit customers to bring their own unsterilized containers to fill with fermented malt beverages for off-premises consumption.

#### **Suggestion: Wisconsin Should Enact a Comprehensive Statewide Growler Definition.**

Wisconsin possesses a statewide safety interest in reducing binge-drinking events.<sup>30</sup> Enactment of a statewide growler definition would serve that interest. Although no conclusive evidence

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fermented malt beverages has been issued **unless there is a label or other identification on the container bearing a statement of its contents in fluid ounces in plain legible type.**

<sup>27</sup> This guidance anticipates that growlers will be legally refilled and resold, but it does not account for labeling and other requirements in circumstances where a customer brings a growler purchased from one licensee and fills it at another.

<sup>28</sup> The sanitation requirement for “Class B” liquor licensees may be found at Wis. Stat. § 125.68(5)

<sup>29</sup> The Wisconsin Food Code does not mention alcohol, nor does it reference bottling of any liquid substances besides drinking water. Additionally, alcohol is not food but it appears in locations, including restaurants, that are governed by the Wisconsin Food Code.

<sup>30</sup> According to a 2013 scholarly paper by Dr. Howard B. Moss, M.D., a clinical professor of psychiatry at the University of California, Riverside School of Medicine with expertise in addiction psychiatry, “Alcohol is the most common drug used among adults in the United States. The use of alcohol is associated with an increased risk of injuries and accidents. Even a single episode of excessive drinking can lead to a negative outcome. Alcoholism and chronic use of alcohol are associated with numerous medical, psychiatric, social, and family problems.” Available at <https://pubmed.ncbi.nlm.nih.gov/23731412/>. Binge drinking events have increased during COVID- 19 “among those who were considered binge drinkers,” making some degree of state government intervention even more permissible. <https://www.healthline.com/health-news/60-percent-of-binge-drinkers-drink-even-more-during-covid-19-lockdowns>.



yet suggests that the enactment of a state law defining growlers causally reduces the prevalence and severity of binge-drinking events, federal and state governments have historically implemented various programs and policies in an effort to limit such occurrences.<sup>31</sup> Similarly, specifications such as bar closing times, distilled spirits sales cut-offs, open container laws, and drinking age requirements have all been implemented with strong public health and public safety rationales. A state-wide growler definition serves public health interests if it sets a maximum serving size, requires appropriate sterilization, and limits the licensees permitted to sell fermented malt beverages in a growler.

Based on a November 2020 review of available statewide growler laws, growler definitions typically first mention the sort of container that qualifies as a growler. These containers are often specified as being “refillable and resealable”<sup>32</sup> and made of “glass, ceramic, plastic, aluminum, or stainless steel.”<sup>33</sup> Many statewide definitions also specify that growlers are restricted to a certain volume capacity (ranging from approximately ½ gallon to 2 gallons, and most commonly approximately 1 gallon), filled with fermented malt beverage or beer, and “sealed on premises by the licensee for off-premises consumption.”<sup>34</sup>

Regardless of whether these growler requirements are listed within the definition language, some states also include further statutory or regulatory language detailing growler sealing, labeling, and filling requirements. Further statutory language akin to the language found in Illinois, Iowa, Michigan, and Minnesota would help Wisconsin establish a more comprehensive and consistent growler sales system across the state’s counties and municipalities. In recognition of municipalities’ degree of home rule,<sup>35</sup> Wisconsin’s growler definition should also include language explaining that, so long as a municipality permits growlers, the outlined specifications apply as baseline requirements that municipalities are permitted to surpass. As

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<sup>31</sup> A similar example of these efforts may be found by examining federal and state efforts to reduce underage drinking rates. <https://www.ncbi.nlm.nih.gov/books/NBK37583/>.

<sup>32</sup> Michigan Compiled Laws Sec. 436.1537(8)(b).

<sup>33</sup> Iowa Admin. Code Rule 185-4.6(2).

<sup>34</sup> 235 Illinois Compiled Stats. Sec. 5/6-6.5(b).

<sup>35</sup> Claire Silverman, in her assessment of Municipal Home Rule in Wisconsin, explains that “[t]he courts have interpreted the constitutional home rule amendment as doing two things:

- (1) It directly grants legislative power to municipalities by expressly giving cities and villages the power to determine their local affairs and government; and
- (2) It limits the legislature in its enactments in the field of local affairs of cities and villages.”

<http://www.lwm-info.org/DocumentCenter/View/948/6-16-Claire-Legal-Comment-home-rule-june-2016?bidId>. That said, per *Milwaukee Police Station v. City of Milwaukee* (2016), “a legislative enactment can trump a city charter ordinance when the enactment either [1] addresses a matter of statewide concern, or [2] with [facial] uniformity affects every city or village.” Both a statewide safety interest and an interest in maintaining uniformity across localities are present with regard to Wisconsin growler sales.

