

LIQUOR CONTROL ACT: Does not confer on cities the power to tax
salesmen soliciting orders at wholesale
from retailers.

3-22
March 22, 1934.



Midwestern Wholesalers & Importers,
428 Dwight Building,
Kansas City, Missouri.

Attention: Mr. Jas. P. Rees

Gentlemen:

This department is in receipt of your letter of
March 13, 1934 requesting an opinion as to the following state
of facts:

"We find that various small towns
and cities have ordinances asking
for licenses from \$50.00 to \$500.00
for the mere solicitation and se-
curing of orders at wholesale from
the retailers within the municipal
limits. It is our belief that the
imposition of such licenses is
illegal."

I.

There is no authority granted by
reason of the Liquor Control Act
of Missouri for cities to license
salesmen.

Section 25 of the Liquor Control Act of Missouri
provides:

"The Board of Aldermen, City Council
or other proper authorities of incor-
porated cities may charge for licenses
issued to manufacturers, distillers,
brewers, wholesalers, and retailers
of all intoxicating liquor, within
their limits, fix the amount to be
charged for such license, and provide
for the collection thereof, make and
enforce ordinances for the regulation

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and control of the sale of all intoxicating liquor within their limits, not inconsistent with the provisions of this act, and provide for penalties for the violation thereof."

The question here before us for determination is whether or not a mere salesman or agent is within the purview of Sec. 25 of the Liquor Control Act. "The most characteristic feature of an agent's employment, in a legal sense, is that he is employed primarily to bring about business relations between his principal and third persons." 2 C.J. 421. In other words, in the case here submitted, the wholesale liquor salesman are merely employed to bring about a sale, and the actual sale is not made until the wholesaler ships the liquor and the price is paid.

In the case of City of Albany v. Newark Shoe Stores Co., (Sup. Ct. Ga.) 110 S.E. 282, the Newark Shoe Stores Company conducted a retail shoe business in a storehouse in the city of Albany. It had paid all taxes due by it to the city for conducting that business. The corporation employed a salesman and manager to work both at its storehouse and also at intervals to go out into said city from house to house, exhibit samples of shoes, and solicit customers to visit the store and buy shoes, the samples of which he had displayed. The Court held:

"Such solicitation of trade did not constitute a business separate and distinct from that of selling merchandise, but was merely an instrumentality in or an incident to that business, being in its nature incapable of such separate existence as to constitute in itself a business in either the legal or commercial sense."

In the case of Lowenthal v. Underdown, (Sup. Ct. Tenn.) 179 S.W. 129, the Court held that one who merely displays samples and takes orders, which he forwards to his employer for approval, collecting no money or delivering no goods, is a mere "solicitor" and not liable for a merchants license fee.

In the case of State v. Bristow, 109 N.W. 199, the Supreme Court of Iowa held (I.c. 200):

"A vendor (vender) is one who transfers the exclusive right of possession of property, either his or that of another, for some pecuniary equivalent. A soliciting

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agent who takes orders subject to the approval of his principal is not ordinarily regarded as a vendor. While some conflict, the weight of authority seems to support this proposition. It would doubtless be competent for the Legislature to tax and license all soliciting agents if, in its wisdom, it saw fit to do so; but the act in question does not seem to cover them."

CONCLUSION

In view of the foregoing, it is the opinion of this department that under the Liquor Control Act of Missouri cities have only the authority to license manufacturers, distillers, brewers, wholesalers and retailers of intoxicating liquor, and this authority does not confer upon cities the power to tax salesmen engaged only in the business of soliciting orders at wholesale from the retailers within the municipal limits.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General