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## PROVISION

When the pandemic forced restaurants and bars to close the front of the house, New York was the first state to temporarily authorize takeout and delivery sales of alcoholic beverages. Cocktails to go helped many businesses in many states weather the ...

**Gail Cole** • May. 29, 2022

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By **Gail Cole.**

When the pandemic forced restaurants and bars to close the front of the house, New York was the [first state](#) to temporarily [authorize takeout and delivery sales of alcoholic beverages](#). Cocktails to go helped many businesses in many states weather the worst of the COVID-19 storm.

Once restrictions on in-house dining were lifted, [New York was one of the first states to revoke the temporary privileges](#). Shortly after former Gov. Cuomo announced the end of the state disaster emergency, on June 23, 2021, the New York State Liquor Authority (SLA) tweeted that the pandemic-related privileges for alcohol delivery and takeout would end “after June 24, 2021.” This came as a shock to many, since the [SLA previously had tweeted](#) that to-go and delivery privileges would be extended to July 5, 2021.

A lot has happened since then, including the spread of new coronavirus variants and

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The governor didn't get quite what she wanted, but the New York Legislature did authorize cocktails to go for three years. Bars, restaurants, and taverns throughout New York are free to sell alcohol for off-premise consumption effective April 9, 2022 (the date the bill was signed into law). If you're one of these businesses, here's what you need to know.

### **To-go alcohol must be sold with “a substantial food item”**

The [drinks-to-go law](#) ([Senate Bill S8005C](#)) specifies that “any purchase for takeout or delivery must be accompanied by a purchase of a substantial food item.”

The SLA offers more clarity in [Advisory 2022-2](#): “A substantial food item is defined as sandwiches, soups, or other foods, whether fresh, processed, precooked, or frozen. Other foods are foods which are similar in quality and substance to sandwiches and soups.”

Hot dogs, salads, and wings meet the “substantial food” test. A bag of chips, bowl of nuts, or candy do not.

Any “obvious efforts to circumvent the law,” such as selling unreasonably small portions or a serving of canned beans, will be “treated as a violation of the law.” In other words, take the food requirement seriously.

### **To-go alcohol must be securely sealed but can't be in an original container**

The alcoholic beverages must be packaged in a container with a secure lid or cap sealed in a manner designed to prevent consumption without removing the lid/cap or breaking the seal. They must comply with any applicable state and municipal laws, ordinances, regulations, or rules related to open containers.

New York does not allow retail licensees (i.e., bars, restaurants, and taverns) to sell

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cocktail, “but not in the original container as purchased from a wholesaler.”

### **No special deals for to-go drinks**

Businesses may not offer special deals for off-premises beverages. “The price per serving shall be the same as if consumed on-premises and shall not be sold as part of any promotion or special unless such promotion or special is also available for consumption on premises.”

However, if you offer a deal on an in-house drink, you may extend the deal to sales for off-premise consumption.

### **Transportation and delivery requirements**

Per existing [New York law](#), transporting open containers of alcoholic beverages in a motor vehicle is prohibited. Alcohol must be transported in a vehicle's trunk or behind the last upright seat. If a vehicle doesn't have a trunk, the alcohol should be kept “in an area not normally occupied by the driver or passenger.”

Deliveries must be made in a vehicle owned and operated, or hired and operated, by the licensee or its employees. Employees may use their own vehicles. A copy of the permit or license must be present in any vehicle while making deliveries.

Delivery must be to a residential address to a person 21 years of age or older who is not intoxicated at the time of delivery. The deliverer must require the recipient to provide a valid form of photographic identification indicating they're at least 21. [States take age verification seriously.](#)

Neither the law nor the guidance from the SLA mentions third-party delivery services. However, the [Distilled Spirits Council of the United States](#) (DISCUS) says third-party delivery is permitted.

## Cocktails to go permanently allowed in 18 states and counting

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New York is one of many states interested in permanently legalizing cocktails to go, and close to 20 states already have. According to [DISCUS](#):

- **35 states temporarily allowed restaurants and/or bars to sell alcohol to go** during the worst of the pandemic, via executive order or other temporary measure
- **18 states and the District of Columbia have passed laws making those provisions permanent:** Arizona, Arkansas, Delaware, Iowa, Florida, Georgia, Kansas, Kentucky, Missouri, Montana, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island, Texas, West Virginia, Wisconsin and the District of Columbia
- **13 states have passed laws extending temporary provisions:** California (expires December 31, 2026), Colorado (expires July 1, 2025), Connecticut (expires June 4, 2024), Illinois (expires January 3, 2024), Maine (expires March 30, 2025), Maryland (local option – expires June 30, 2023), Massachusetts (expires April 1, 2023), Michigan (expires December 31, 2025), New York, Tennessee (expires July 1, 2023), Vermont (expires July 1, 2023), Virginia (expires July 1, 2024) and Washington (expires July 1, 2023)

Virginia's temporary provision was set to sunset on July 1, 2022, but the recent enactment of [Senate Bill 254](#) gives restaurants and bars two more years of takeout and delivery privileges.

### **Policies — and taxes — differ from state to state**

Rules and regulations governing alcohol to-go privileges are different in every state. For example, while New York requires the price per drink to be the same for both on-premises and off-premises sales, [Virginia allows restaurants to set different prices for to-go cocktails](#), provided “the discount is not below cost and there is no advertising that entices illegal actions like intoxication or underage consumption.” However, any such discounted prices must end at 9 p.m.



Tax policies on cocktails to go also differ. During the [National Council of State](#)

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tax. For example, Texas levies two mixed beverages taxes based on the sale, preparation, or service of alcoholic beverages and mixes: The seller must pay the mixed beverage gross receipts tax to the state and collect mixed beverage sales tax from the customer. But wine, beer, and ale are subject to state and local sales and use tax instead of the mixed beverage taxes.

Delivery can further complicate tax compliance. If a restaurant makes a delivery sale to a consumer based in a neighboring tax jurisdiction, which tax rate applies? The rate in effect at the restaurant or the rate in effect at the point of delivery?

And then there's the use of third-party deliverers. Are delivery charges subject to tax? Who's liable for collecting and remitting the tax due when a sale is made through a third party? John Bodnovich, executive director of American Beverage Licenses, says restaurants and bars are concerned about liability when a third-party delivery is involved. "They have no control over what that third-party driver is going to do. Is he going to ask for ID? Leave it on the doorstep?"

These are just some of the issues state and local governments must contend with when they allow restaurants, bars, and taverns to sell alcohol for takeout and delivery. Learn more about issues facing alcohol marketplaces in this [five-part blog series](#) by Jeff Carroll, General Manager of Beverage Alcohol at Avalara, and Rebecca Stamey-White, partner of Hinman & Carmicheal LLP.

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Gail Cole is a sales tax expert for [Avalara](#) with a penchant for digging through the depths of BOE sites and discovering and reporting rate changes across the country.

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