

VOLUME NO. 38

OPINION NO. 15

ALCOHOLIC BEVERAGES - Employment of 18 year olds in establishments selling at retail;
EMPLOYMENT - Permissibility of 18 year olds being employed to serve alcoholic beverages;
MINORS - Employment of 18 year olds to serve alcoholic beverages;
MONTANA CODE ANNOTATED -- Sections 16-6-305(1), 39-2-306(1), 45-5-623, 45-5-624

HELD: A person who is eighteen years old may be employed as a bartender, waiter, or waitress to serve customers purchasing alcoholic beverages in establishments which sell alcoholic beverages at retail.

13 April 1979

Laury M. Lewis, Acting Director
Department of Revenue
S.W. Mitchell Building
Helena, Montana 59601

Dear Mr. Lewis:

You have requested my opinion on the following question:

May a person who is eighteen years old be employed as a bartender, waiter, or waitress to serve customers purchasing alcoholic beverages in establishments which sell alcoholic beverages at retail?

Legislative Referendum No. 74, passed by Montana voters in the general election of November 7, 1978, raised the legal age for consuming and possessing alcoholic beverages to nineteen, and made it a criminal offense to give or sell such beverages to persons under that age. The pertinent parts of sections 94-5-609 and 94-5-610, R.C.M. 1947 (currently sections 45-5-623 and 45-5-624, MCA), were amended to read as follows:

94-5-609. Unlawful transactions with children.
(1) A person commits the offense of unlawful transactions with children if he knowingly:

(c) sells or gives alcoholic beverages to a person under 19 years of age....

94-5-610. Unlawful possession of intoxicating substance by children. (1) ... A person under the age of 19 commits the offense of possession of an intoxicating substance if he knowingly has in his possession an alcoholic beverage, except that he does not commit the offense when in the course of his employment it is necessary to possess alcoholic beverages.

Referendum No. 74 did not specifically amend section 41-1135, R.C.M. 1947, (currently section 39-2-306(1), MCA). At present that statute provides:

No person under 18 years of age shall be employed as a bartender, waiter, or waitress whose duty it is to serve customers purchasing liquors, beer or wine in any establishment which sells liquors, beer or wine at retail.

In the past, this statute has been amended by the Legislature to comport with the legal drinking age. Although there has been no similar amendment by the current Legislature, the question remains whether the statute was impliedly amended or repealed by Referendum No. 74.

The referendum process is basically legislative in nature. Fitzpatrick v. State Board of Examiners, 105 Mont. 234, 240, 70 P.2d 285, 288 (1937). Therefore, the rules of construction applied to statutes passed by the Legislature are equally applicable to laws enacted by referendum. A basic rule of statutory construction is that repeal by implication is not favored. State v. Lagerquist, 152 Mont. 21, 31, 445 P.2d 910, 915 (1968). As stated in Fletcher v. Paige, 124 Mont. 114, 119, 220 P.2d 484, 487 (1950): "[A]n implied repeal results only from an enactment, the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act."

In the case of the amended drinking age statutes and section 39-2-306(1), MCA, there is no necessary inconsistency or repugnancy in terms or in operation. Section 45-5-624, MCA, provides an explicit exception to its general prohibition for possession of alcoholic beverages by a person under the age of nineteen "when in the course of his employment it is necessary to possess alcoholic beverages." Prior to the passage of the referendum, the possession exception was more circumscribed, excepting only the bagging and transporting of beer during employment at a grocery store. § 94-5-610, R.C.M. 1947 (amended 1978). The deletion of this explicit language from the statute necessarily implies an expansion of the recognized exception to the ban on possession of alcoholic beverages by those under the age limit imposed by the statute. Because section 39-2-306(1) allows employment of eighteen year olds as bartenders and section 45-5-624 allows possession of alcoholic beverages in the course of employment, there is no necessary inconsistency between the two statutes.

Sections 16-6-305(1) and 45-5-623, MCA, do not contain explicit employment exceptions to their prohibitions on the sale or gift of alcoholic beverages to persons under nineteen. However, in order to give meaning to the statutory sanction of possession of liquor for employment purposes, the same exception must necessarily be read into the sale and gift statutes. Without such an integrated interpretation of the statutes, a person under nineteen could legally possess alcoholic beverages during his employment but no one could legally place those beverages into his possession.

From a reading of all the applicable statutes together, it is clear that Referendum No. 74 did not impliedly repeal or amend section 39-2-306(1), MCA. Therefore, pursuant to the specific language of that statute, a person who is eighteen may be employed to serve customers in establishments selling alcoholic beverages.

THEREFORE, IT IS MY OPINION:

A person who is eighteen years old may be employed as a bartender, waiter, or waitress to serve customers purchasing alcoholic beverages in establishments which sell alcoholic beverages at retail.

Very truly yours,

MIKE GREELY
Attorney General