

Sober Server and Impaired Server Ordinances in Wisconsin

What are “Sober Server” or “Impaired Server” ordinances?

Many states have statutes, rules, or regulations prohibiting individuals selling or serving alcohol from drinking on the job or working while intoxicated.¹ Many establishments, including chains and franchise operations, ban servers from drinking or working when intoxicated. Wisconsin does not have any state-wide law or rule limiting server alcohol consumption. However, local ordinances prohibiting intoxicated or impaired servers have been adopted by some communities.

Limiting and prohibiting servers from being impaired or drinking on the job isn’t an uncommon business practice. Many establishments, including chains and franchise operations, have a blanket ban on servers drinking or working when intoxicated for both legal and financial reasons. Individual businesses are able to set individual policies for server alcohol consumption as long as those policies are not inconsistent with local ordinance. For example, if a community establishes a ceiling on the acceptable blood alcohol level for servers the establishment may set a higher standard or prohibit alcohol consumption on duty.

Why are impaired and intoxicated servers a problem?

Impaired servers may be unable to perform the duties assigned them on behalf of the licensee, such as refusing to serve underage or intoxicated patrons. Server impairment contributes to a range of problems that occur when they are unable to meet their responsibilities to the licensee and the public.

When a municipality licenses a person or business to sell and serve alcohol, the licensee assumes specific responsibilities. Two of the most important responsibilities fall primarily on servers and serving staff: 1) refusing alcohol to individuals who are intoxicated (cutting people off); and 2) determining that customers have reached the minimum legal drinking age (with narrow

¹ A few examples of states that ban intoxicated servers or drinking on duty include:

- Arkansas Administrative Code bans owners, licensees, and “crowd control employees” from consuming alcohol or being “under the influence” of alcohol on duty. AR ADC 006.02.1-1.79.
- North Carolina Administrative Code does not allow consumption while on duty, in the premises if the employee will return to duty, or while wearing a work uniform. 4NCAC 2S.0212.
- Oregon Administrative Rules prohibit employees, including individuals checking identification, and agents from drinking or being “under the influence” of alcohol on duty. OR ADC 845-006-0345.
- Michigan Liquor Control Code, Administrative Rule 436.1707(3) prohibits a licensee or employee from being intoxicated on licensed premises.

exceptions) before serving alcohol to them (checking ID).

According to the Centers for Disease Control and Prevention (CDC), a person with a Blood Alcohol Concentration (BAC)² between 0.02 percent to 0.08 percent experiences impaired judgment, lowered alertness, and a decline in their ability to perform two tasks at the same time.³ Even when only mildly impaired, servers may be less likely to recognize intoxication in others, carefully review ID for age, or respond appropriately in an emergency.

Impaired servers also present a risk for law enforcement. For example, in testimony before the Wausau City Council, Police Chief Jeff Hardel estimated that his officers find an impaired server approximately half the time police respond to a problem at a bar or tavern. He noted that impaired servers are often uncooperative and belligerent.⁴

What do the Sober Server or Impaired Server ordinances adopted in Wisconsin prohibit?

While the specific language varies, these ordinances may do any combination of the following:

- 1) prohibit drinking on duty
- 2) limit acceptable levels of blood alcohol concentration (BAC) while on duty
- 3) prohibit use while on duty of any controlled substances that impair judgment
- 4) prohibit working while having any detectable amount of a controlled substance in the blood

The primary distinction between communities setting limits on consumption is that some communities simply prohibit serving alcohol or working in an establishment while “under the influence” of alcohol, drugs, or a combination of both substances; while others set a threshold BAC for a violation, such as 0.04 or 0.08 percent.

What level of impairment is allowed?

The 2021 report from the Wisconsin State Council on Alcohol and Other Drug Abuse, recommends that municipalities adopt sober server ordinances that require those who sell or serve alcohol to be unimpaired and have a BAC under 0.04 percent while working.⁵ The Ad Hoc Alcohol Prevention

² Blood alcohol concentration (BAC) is expressed as either: a) the number of grams of alcohol per 100 milliliters of a person’s blood; or b) the number of grams of alcohol per 210 liters of a person’s breath. Wis. Stat. §340.01(1v). Both calculations produce the same number, which is commonly expressed as a percentage, e.g., 0.08 percent.

³ Centers for Disease Control and Prevention, Impaired Driving: Get the Facts: What are the effects of blood alcohol concentration (BAC)? Webpage, <https://www.cdc.gov/transportationsafety/impaired/driving>, accessed 12-29-2021.

⁴ Testimony of Police Chief Hardel, Wausau City Council, January 14, 2014.

⁵ Alcohol Prevention Ad-Hoc Workgroup. (2021). *Moving Forward: Policies and Strategies to Prevent and Reduce Excessive Alcohol Use in Wisconsin*. Wisconsin State Council on Alcohol and Other Drug Abuse, Prevention

Committee selected the 0.04 percent threshold due to the impaired judgment that already happens at that blood alcohol concentration. Some communities may prefer to use a threshold BAC of 0.08 percent for impairment for servers to mirror Wisconsin’s Operating While Intoxicated (OWI or drunk driving) standard for most drivers. However, Wisconsin law provides other more appropriate examples for persons who are on duty or working. For example, driving or operating a commercial motor vehicle with a BAC of 0.04 percent is sufficient for a person to be charged with OWI while driving a commercial motor vehicle.⁶ In addition, employees working for the state on public works or utility projects are considered to be under the influence of alcohol if they have a BAC of 0.04 percent or higher.⁷

A Few Examples:

A number of communities in Wisconsin have sober server ordinances. A few representative examples follow:

- Kenosha prohibits a licensee, the licensee’s agent, and the licensee’s employees from being “under the influence,” which it defines based on the effects of using alcohol or a controlled substance:

Under the influence means that the person has consumed a sufficient amount of alcohol, controlled substance or combination of alcohol and controlled substance, to cause the person to be less able to exercise clear judgment and reasonable care in the exercise of services performed.⁸

- Madison prohibits the licensee or employee of a licensed establishment from being “under the influence of an intoxicant, or a controlled substance or a combination of an intoxicant and a controlled substance, while performing services on the licensed premises”⁹; but specifies that “under the influence” means:

not only all the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of

Committee. p. 20.

⁶ In Wisconsin, a person who operates or drives a commercial vehicle with a blood alcohol concentration of 0.04 or more but less than 0.08 may be charged with operating a commercial vehicle while having a prohibited alcohol concentration. Wis. Stat. §346.63(5). A person may not operate, drive, or be on duty time with respect to a commercial vehicle in Wisconsin with any measurable BAC or within 4 hours of consuming any alcohol beverage. Wis. Stat. §346.63(7).

⁷ Wis. Stat. §103.503(2).

⁸ Kenosha Code of Ordinances 10.05 C. 2. Neenah uses a similar definition. Neenah Code of Ordinances 4.95 (g).

⁹ Madison Code of Ordinances 38.06 (8).

indulging to any degree in alcohol beverages and which tends to deprive a person of the clearness of intellect and control of himself or herself which he or she would otherwise possess.¹⁰

- Jackson prohibits a licensee or agent of the licensee from serving alcohol beverages while intoxicated, with intoxication defined as having a BAC of 0.08 or more.¹¹
- Wausau uses a similar definition of “under the influence” as Madison, but also adopts a presumption that testing with a BAC of 0.04 percent or more is proof of intoxication by the licensee, agent, or employee of the licensee.¹²

Who does a Sober Server ordinance apply to?

Most sober server ordinances in Wisconsin apply to all serving staff, bartenders, wait staff, including the licensee or agent when on duty. Some apply only to the licensee and agent or only to the servers. Some state rules or statutes require security and crowd control staff to remain sober.

Who is sanctioned under a Sober Server Ordinance?

Each municipality has the authority to create a standard and penalty for impaired servers. Most communities choose to sanction the server; but several retain the option of sanctioning the licensee.

How are these ordinances enforced?

Some communities allow law enforcement to request a preliminary breath test (PBT) upon belief the server is impaired or intoxicated. The initial determination is possible during a visit for any of the frequent reasons law enforcement may enter a licensee such as: responding to a call for service; conducting alcohol age compliance checks; conducting a bar “walk through” (a common law enforcement practice where uniformed officers simply walk through a licensed establishment looking for signs of underage drinking, over-serving and dangerous impaired customers); or checking compliance with license conditions. Communities with this ordinance have not undertaken specific operations to identify violators.

¹⁰ Madison Code of Ordinances 38.02.

¹¹ Jackson Code of Ordinances 4-87.

¹² Wausau Code of Ordinances 5.64.034. (Full ordinance in Appendix A).

Are Sober Server ordinances effective?

Defining the impact of a single specific alcohol policy is often difficult. Not all outcomes are evident, unintended consequences may occur and not all outcomes are equally valued by the community. None of the sober or impaired server ordinances in Wisconsin have been evaluated by an independent evaluator or reviewer. However, it is known that a “complementary system of strategies” engaging a number of evidence-based policies and practices is more likely to be effective in the long term.¹³ A sober server ordinance *alone* will - at best - have minimal impact on drunk driving or binge drinking rates. However, the same ordinance may reduce both underage drinking and violence in licensed establishments and improve the ability of law enforcement to sanction uncooperative or obstructionist licensees.

Wisconsin Alcohol Policy Project

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¹³ Babor, T., Caetano, R., Casswell, S. et al. (2014). *Alcohol: No Ordinary Commodity: Research and Public Policy* (2nd ed.). Oxford University Press, Page 251

Appendix A: Wausau's Sober Server Ordinance

Wausau Code of Ordinances 5.64.034 Restriction on Servers.

- (a) *Prohibition.* It shall be unlawful for a licensee or an agent or employee of the licensee to serve or supervise the service of alcohol beverages in a licensed premises while under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog. Controlled substance and controlled substance analog shall have the meaning as these terms are defined in [section 9.04.026](#). Under the influence means not only all the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging to any degree in alcohol beverages and which tends to deprive a person of the clearness of intellect and control of himself or herself which he or she would otherwise possess.
- (b) *Presumption.* A test of the person's breath, blood, or urine, including a preliminary breath test, that shows the person has an alcohol concentration of 0.04 or more is prima facie evidence that he or she is under the influence. Law enforcement officials shall be allowed to ask for a preliminary breath test upon reasonable suspicion. Refusal to submit to a requested test may be considered by the Common Council as grounds for revocation, non-issuance, or non-renewal of the server's operator's license.
- (c) *Effect of violation on premises.* If the principal business of the licensed premises is the sale of alcohol beverages, law enforcement officials will order it closed until such time as another licensed server or the licensee who is not in violation of this section shall take charge of such premises. It shall be a violation of this subsection for any licensed premises to be open contrary to such order of law enforcement officials.