

Wisconsin Growler Law: Assessing Existing Policies and Gaps in Policy

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

Background and Overview.

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, 2020.¹ While available, the document provided direction regarding alcohol sales for off-premises consumption to restaurants, including all on-premises licensees.² 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

¹ 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."

² This proposed guidance directed restaurants, including all on-premises licensees, to:

1. Sell the alcohol beverages in a face-to-face transaction [on the premises as described on the alcohol license, per Wisconsin statutes, but for off-premises consumption];
2. Abide by state and municipal closing hours related to face-to-face transactions [for alcohol sales];
3. Only permit patrons to enter the establishment to pay and pick up [food and/or] the alcohol beverage[s];
4. Prohibit lines of 10 or more people; and
5. Abide by the social distancing guidelines of 6 feet or more.

Source: <https://www.natlawreview.com/article/old-fashioned-to-go-alcohol-beverages-may-be-ordered-carry-out-basis-during-covid-19>

on alcohol beverages for off-premises consumption.³

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.⁴ 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.”⁵ 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.”⁶ 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.”⁷

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 container law, allowing these containers in the passenger area of a motor vehicle,”⁸ raising questions about the validity of how a “seal” is defined or left undefined in Wisconsin. The US DOT flagged Iowa’s legislation as noncompliant with open container laws, explaining that, for the law to be permissible, a “container must be fully sealed with no contents removed and sealed in a way that will not allow a driver or passenger in a motor vehicle to open it and remove some of the contents without damaging the seal,” suggesting a tamper-proof or

³ Source: https://madison.com/ct/news/local/govt-and-politics/wisconsin-senate-panel-considers-bipartisan-slate-of-alcohol-bills/article_e433f99f-71d9-59f3-b65b-4c4c5ad34a86.html

⁴ Importantly, 23 U.S. Code § 154, which governs federal open container requirements, does not define the specific sealing requirements.

⁵ Conversely, the Wisconsin DOR informed licensees that they were not permitted to sell pre-made mixed drinks to go.

⁶ 23 U.S. Code § 154(b)(1).

⁷ 23 U.S. Code § 154(a)(3).

⁸ Iowa HF 2540 (2020).

tamper-evident sealing standard.⁹

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.¹⁰

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."¹¹ 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.

The Recommendation: Create Growler Definition and Corresponding Requirements.

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" establishments can also sell growlers—a statewide growler policy should clarify this discrepancy). More comprehensive language may also be achieved by outlining requirements for growler labeling and filling.

⁹ Cocktails To Go Review by US DOT, Letter sent to Iowa by Region 7, September 17, 2020.

¹⁰ Wis. Stat. § 125.29(3)(f).

¹¹ Wis. Stat. § 125.26(1).

The federal government’s Alcohol and Tobacco Tax and Trade Bureau (TTB) regulates growler sales in a limited fashion, and Wisconsin adheres to those limited requirements.¹² Despite the absence of a formal growler definition, common practice in Wisconsin, combined with Wisconsin’s adherence to the federal TTB’s guidelines and regulations, has led to the establishment of a distinction between types of growlers based on the time of filling. The first type of growler is most often a standard jug or bottle-like container purchased empty and typically in bulk by a brewer or licensee, then filled, labeled, sealed, and sold by the licensee for off-premises consumption. Based on the DOR’s conclusion, this type of growler is effectively the same as a “sealed can or bottle of beer” that a customer may purchase to consume at home.¹³ This memorandum will refer to this type of growler as a “bottle growler” so as to distinguish it from the default second type of growler, a “large glass” growler (described below).

The second, default, type of growler is called a “large glass” growler because, like a cup, stein, or glass at a bar, it requires the licensee to fill it at the point of sale, rather than in advance. The term “large glass” refers to the size of the container and that it is filled on premises, not the material used to make the container. A “large glass” growler could be glass, ceramic, plastic, or metal.¹⁴ It also doesn’t refer to the shape of the container – it could be a classic jug, but it could be a bucket or a pitcher. “Large glass” growlers are often characterized by a customer bringing in an empty growler container, which the licensee then fills with a fermented malt beverage.¹⁵ While some customers might bring in sealable bottles, there is no law or regulation in Wisconsin that currently expressly prohibits a customer from bringing in, or a licensee from filling, a makeshift “to-go container,” such as a plastic cup or milk jug.

Per the DOR’s conclusions, licensees that accept customers’ containers may either exchange customers’ containers for one of their own, or “while the customer waits, [licensees can] run that container through their normal growler sanitation and bottling process, seal and label the growler, and sell it to the consumer as an original unopened container,” resembling the process

¹² Correspondence with Tyler Quam, Department of Revenue, 11/18/20.

¹³ Correspondence with Tyler Quam, Department of Revenue, 11/19/20. The full paragraph addressing this issue is as follows:

So, a brewer filling growlers would not be considered a "large glass", if sold for off-premises consumption. Rather, we would look at this the same as we do a sealed bottle or can of beer. It just happens to be a large bottle. So, a brewer could certainly buy a stock of "growlers", fill them with beer, seal and label them, and sell them to consumers. If someone brought in an empty growler to the brewer, the brewer can take that individuals' growler and 1) sell them a new growler that complies with the restrictions I laid out, or 2) they can, while the customer waits, run that growler through their normal sanitation and bottling process, seal and label the growler, and sell it to the consumer as an original, unopened container.

¹⁴ Importantly, a container need not physically be made of glass to qualify as a “large glass” growler.

¹⁵ Correspondence with Tyler Quam, Department of Revenue, 11/18/20.

associated with bottle growlers.¹⁶ As stated by the DOR, however, this option is unavailable to brewers because, “[i]n the case of a brewer, they are only authorized to make retail sales for off-premises consumption of fermented malt beverages in original, unopened containers (§125.29(3)(f), Wis. Stats.).”

As noted above, no concrete language defining--or even explicitly referencing--growlers was found in the State of Wisconsin legislation or regulations.¹⁷ Wisconsin also does not have a law or regulation dedicated to the sanitizing, filling, sealing, labeling, or sale of growlers. This absence stands in contrast to the laws that exist in Wisconsin’s neighboring states: Illinois, Iowa, Minnesota, and Michigan.¹⁸ Further, fourteen states¹⁹ explicitly define the term “growler,” and twenty-three states²⁰ (and many localities nationwide) have some requirements regarding growler filling, sealing, labeling, or sales. The DOR’s temporary Alcohol Beverage Guidelines and Information Related to COVID-19 (first issued as a proposed guidance document on March 20, 2020) and Wisconsin’s brewer, brewpub, and fermented malt beverages labeling statutes (Wis. Stats. §§ 125.29, 125.295, and 125.32(7), respectively) provide limited guidance regarding growler sales. Of particular note, the absence of sealing requirements potentially exposes the state to a withholding of federal highway dollars.

1. Growler Sealing

Wisconsin’s growler sealing requirements are limited. The DOR noted that they “have seen various sealing [...] methods by brewers,” including “everything from wax to shrink wrap [...].”²¹ Licensees in Wisconsin are currently not subject to stringent sealing requirements corresponding to containers holding fermented malt beverages, but brewers may be held to a higher standard given that they “are only authorized to make retail sales for off-premises consumption of fermented malt beverages in original, unopened containers.”²² Similarly,

¹⁶ Correspondence with Tyler Quam, Department of Revenue, 11/19/20.

¹⁷ Relatedly, the term “crowler” was also not defined, but a discussion on crowlers is beyond the scope of this memorandum. Generally, crowlers hold the same fermented malt beverage contents as growlers, but they take the form of one-time-use cans or smaller containers. Laws in Illinois, New Jersey, New Mexico, and the District of Columbia all make some explicit reference to crowlers.

¹⁸ See Appendix 1 for a list of state-level growler laws.

¹⁹ These states include Florida, Hawaii, Illinois, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New Mexico, North Carolina, Rhode Island, and Virginia.

²⁰ These states include Arizona, Arkansas, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, Virginia, Washington, and West Virginia.

²¹ Correspondence with Tyler Quam, Department of Revenue, 11/19/20.

²² Correspondence with Tyler Quam, Department of Revenue, 11/19/20. Wis. Stat. Sec. 125.29(3)(f). Wis. Stat. Sec. 125.29(3)(f) states, *Notwithstanding ss. 125.04 (9) and 125.09 (1), the retail sale to individuals of fermented malt*

sealing requirements may need to be more stringent than a state’s baseline language to ensure consistency with the language of the federal Open Container Law Conformance Criteria.²³ Seals at a minimum must be sturdy enough to not break or open within the passenger area of any motor vehicle, to avoid triggering the Open Intoxicants Act and endangering Wisconsin’s continued eligibility for all the federal highway funds it is entitled to receive.

The below chart summarizes existing state laws pertaining to fermented malt beverage growler sealing requirements in order of increasing stringency. Of note, Illinois, Iowa, and Minnesota all belong to the category representing the most comprehensive growler sealing statutes. Both Illinois and Minnesota require that a growler have a tamper-evident or tamper- proof seal that is placed over a “twist-type closure, cork, stopper, or plug.” Less stringent state laws require that growlers simply be “sealable” or “capped,” and nearly half of all states with growler sealing laws require that growlers be “sealed.”

Approximate Language (Current as of Nov. 25, 2020)	State(s)
Growlers must be “sealable”	Maryland, Washington
Growlers must be “capped”	Delaware
Growlers must be “sealed”	Arizona, Florida*, Indiana, Michigan, Mississippi, Missouri, Montana, North Carolina†, Virginia‡, Washington
Growlers must be “securely covered”	Oregon
Growlers must be “securely sealed”	Hawai’i, Kentucky
Growler seals must be, at minimum, tamper-evident	Arkansas, Illinois, Iowa, Minnesota, Nebraska
*Florida requires that the growler container have an unbroken seal <i>or</i> be incapable of being immediately consumed. Fla. Stat. § 563.06(7)(b).	
†North Carolina requires that growlers be sealed <i>with a closure or cap</i> . 04 NCAC 02T.0309(g).	
‡Virginia considers growlers to be “factory sealed” so long as they are “sealed and sold by a brewery.” Virginia Attorney General Opinion 15-035 (2016).	

beverages, in original unopened packages or containers, that have been manufactured on the brewery premises or on other premises of the brewer for off-premise consumption by individuals, if the sale occurs at the brewery premises or at an off-site retail outlet established by the brewer. This statute tracks with the federal level requirement that vendors pre-fill containers in advance of sale in order for those containers to qualify as “bottles.”

²³ Source: https://one.nhtsa.gov/people/injury/research/opencontainer/open_container_criteria.htm.

2. Labeling

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.”²⁴ 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.”²⁵

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.²⁶ As mentioned above, the

²⁴ 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 with growlers the brewer might subsequently refill under conditions we would consider bottling.”

²⁵ Correspondence with Tyler Quam, Department of Revenue, 11/19/20.

²⁶ However, the tap or keg that dispenses the fermented malt beverage into the “large glass” container must be properly labeled. Correspondence with Tyler Quam, Department of Revenue, 11/18/20, 11/19/20; Wis. Stat. 125.32(7) states:

(7) Labels.

(a) **No fermented malt beverages may be sold**, offered, or exposed for sale, kept in possession with intent to sell, or served on any premises for which a license or permit for the sale of fermented malt beverages has been issued **unless each barrel, keg, cask, bottle, or other container bears a label or other identification with the name and address of the brewer or brewpub that manufactured it.** The possession of any fermented malt beverages which are not so identified on any premises for which a license or permit for the sale of fermented malt beverages has been issued is prima facie evidence that the fermented malt beverages are possessed with intent to sell, offer for sale, display for sale, or give away.

No container containing fermented malt beverages may be sold, offered or exposed for sale, kept in possession with intent to sell or served on any premises for which a license or permit for the sale of

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

3. Growler Preparation

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.²⁸ 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.²⁹ 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.³⁰ Enactment of a statewide growler definition would serve that interest. Although no conclusive evidence

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.**

²⁷ 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.

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

²⁹ 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.

³⁰ 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.³¹ 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”³² and made of “glass, ceramic, plastic, aluminum, or stainless steel.”³³ 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.”³⁴

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,³⁵ 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

³¹ 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/>.

³² Michigan Compiled Laws Sec. 436.1537(8)(b).

³³ Iowa Admin. Code Rule 185-4.6(2).

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

³⁵ 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.

noted in Chapter 125, the Alcohol Beverages Chapter, of the Wisconsin Statutes, the State values “uniform statewide regulation.”³⁶ Appendix 1 contains all of the available state growler laws from across the country, current as of November 25, 2020. It is intended to be used for benchmarking and informational purposes.

Disclaimer: Not legal advice. This review intends to convey general information based upon research and the state of the law in December 2020. Its contents should not be construed as, and should not be relied upon for, legal advice.

³⁶ Wis. Stat. Sec. 125.01.