

Memorandum

From: Don Harris, Chief Legal Counsel, Department of Administration

To: Scott Sales, Director, Montana Lottery

Date: November 2, 2022

Re: Courier Service

Issue

Question: Does Montana law prohibit delivery of lottery tickets to customers for a fee when the customer initiates the purchase but is not physically present at the time of sale, provided that the purchase is made from a licensed sales agent and the customer is verified to meet eligibility requirements.

Short Answer: No. As required by Admin. R. Mont. 2.63.1002(1), customers pay a lottery sales agent only the “face value” price for the ticket itself and an additional fee to the courier service for delivery of the purchased ticket. All purchases are made at the physical location of a sales agent as provided in Admin. R. Mont. 2.63.401 and 2.63.604(3) who meets the qualifications set by the Lottery and is licensed as a sales agent under Mont. Code Ann. § 23-7-301 and Admin. R. Mont. 2.63.401. Tickets are sold only to customers who are physically present in Montana at the time of sale and who meet the age and other eligibility requirements of the Lottery as provided in Mont. Code Ann. § 23-7-302 and Admin. R. Mont. 2.63.410.

Background & Facts

The Montana Lottery has received and approved applications from businesses that provide a “courier service” delivering lottery tickets to customers in Montana who purchase tickets from licensed sales agents via the courier service.

Based on representations of the couriers, and in the absence of evidence to the contrary, for the sake of this memorandum, the following information is taken as true:

- Tickets are purchased via a website or application provided by the courier.
- Tickets are sold at face value. The courier charges a fee for facilitating ordering and delivery of the ticket.
- Customers must be physically present in Montana at the time of sale. Customers’ presence is verified by “geofencing,” a technology that uses the location information on a customer’s device to confirm the customer’s location in a particular area.
- Customers’ age and eligibility to purchase lottery tickets is verified by the courier.
- Tickets ordered by a customer are purchased at a licensed sales agent location. The courier receives a physical lottery ticket. The ticket is scanned, the image is shared with the customer, and the ticket is held in a secure location until the time of the drawing.
- Couriers who are licensed as sales agents do not operate exclusively as sales agents. They carry on other businesses, separate from selling lottery tickets.

- The licensed sales agent who sells the ticket must satisfy all requirements to operate as a sales agent and comply at all times with Lottery statutes and rules.

Applicable Law

There are many laws pertaining to who may sell lottery tickets and where they may be sold.

“Lottery tickets, chances, wagers, or bets may be sold only by a sales agent licensed by the director in accordance with this section.” Mont. Code Ann. § 23-7-301(1). “A license as an agent to sell lottery tickets, chances, or wagers and bets may not be issued to any person to engage in business exclusively as a lottery ticket, chance, or sports wagering sales agent.” Mont. Code Ann. § 23-7-301(3)(c). “‘Lottery license’ means a license issued by the state lottery that authorizes a sales agent to sell lottery tickets at a fixed place of business.” Mont. Code Ann. § 23-7-103(4). “‘License’ means the document issued by the lottery which authorizes a sales agent to sell lottery tickets at a fixed place of business.” Admin. R. Mont. 2.63.203(2). “Each location for which an application is submitted must be a fixed location.” Admin. R. Mont. 2.63.604(3).

“The state lottery and sports wagering agency may provide products sold only through an authorized device at a sales agent location licensed by the director.” Mont. Code Ann. § 23-7-102(1). Administrative rules further define qualifications for lottery sales agents.

Lottery tickets or chances may be sold at any place of business in Montana:

- (a) that is licensed by the lottery;
- (b) that is not engaged in business exclusively as a lottery ticket or chance sales agent;
- (c) that is financially responsible;
- (d) that is accessible to the public and meets ADA standards;
- (e) whose owner has not been convicted of a felony or a gambling-related offense; and
- (f) whose owner does not have a financial interest in any gaming supplier.

Admin. R. Mont. 2.63.401(1)

The price paid to a sales agent for selling lottery tickets is determined by the State Lottery and Sports Wagering Commission (“Commission”). “Sales agents are entitled to a commission of no more than 10% of the face value of tickets and chances that they purchase from the lottery and do not return.” Mont. Code Ann. § 23-7-301(10).

Lottery tickets must be sold for price listed on the ticket. “The price of each lottery game ticket, chance, wager, or bet must be clearly stated on the ticket, chance, wager, or bet.” Mont. Code Ann. § 23-7-302(1). “The price of a lottery ticket is determined by the lottery commission. A sales agent may not sell a lottery ticket for more than the price printed on the ticket.” Admin. R. Mont. 2.63.1002(1).

There are also restrictions on who may purchase lottery tickets. “Tickets, chances, wagers, or bets may not be sold to or purchased by persons under 18 years of age.” Mont. Code Ann. § 23-7-302(2). “Each sales agent shall ensure all persons purchasing or cashing lottery products are 18 years of age or older.” Admin. R. Mont. 2.63.410(1)

Analysis

There is no express provision of Montana law prohibiting courier businesses that facilitate the purchase and delivery of lottery tickets through Internet-based applications. Provided that courier businesses and their customers comply with all other statutes and rules pertaining to “lottery games,” the Montana Lottery is not empowered to regulate or restrict their activities. Questions have been raised about whether courier services are violating statutes and rules regulating the purchase price of lottery tickets, locations where tickets may be sold, and the restriction on operating solely as a lottery sales agent. Based on the information known to the Lottery, the courier services operating in Montana are in compliance with Montana law.

The legality of courier services must be considered against the backdrop of the Lottery’s purpose and mandate. The Lottery was created by the voters of Montana in 1986 to support and fund education. The purpose of the “Montana State Lottery Act of 1985 and Sports Wagering Lottery Amendment of 2019,” codified at Montana Code Annotated Title 23, chapter 7, (“Act”) is to “allow lottery games and sports wagering in which the player purchases from the state, through the administrators of the state lottery and sports wagering agency, a chance to win a prize.” Mont. Code Ann. § 23-7-102(1). The Commission is required to “maximize the net revenue paid to the state general fund and to the Montana STEM . . . account . . . and ensure that all policies and rules adopted further revenue maximization.”

A court, confronted with a statutory interpretation problem, will “interpret statutes consistently with the Legislature’s intent as crystallized in the statute’s plain language.” *In re Marriage of Rudolf*, 2007 MT 178, ¶ 41, 338 Mont. 226, 164 P.3d 907. A court’s role is “simply to ascertain and declare what is in the terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” Mont. Code Ann. § 1-2-101. It is “not [a court’s] prerogative to read into a statute what is not there.” *Bates v. Neva*, 2014 MT 336, ¶ 13, 377 Mont. 350, 339 P.3d 1265.

According to the couriers operating in Montana, their activities are in accordance with the letter of the law. Sales agents must sell lottery tickets for the price printed on the ticket. Admin. R. Mont. 2.63.1002. Couriers sell lottery tickets at face value. Customers pay an additional amount for the services provided by the courier, i.e., ordering and taking delivery from the courier. The only fee a courier or sales agent receives for the sale of a lottery ticket is the commission allowed by Mont. Code Ann. § 23-7-301(10).

Lottery tickets may only be sold by licensed sales agents who sell tickets at a “fixed place of business.” Admin. R. Mont. 2.63.203(2) and 2.63.604(3). Tickets are actually purchased at licensed sales agent locations. A customer may order a ticket through a courier via a mobile application, but the actual purchase occurs when the courier, on behalf of the customer, buys the ticket from a licensed sales agent at the sales agent’s approved location. Lottery tickets must be sold at a “place of business in Montana. Admin. R. Mont. 2.63.401(1). Through technology, the courier can confirm that each order is placed in Montana, and the actual purchase of a ticket always occurs at a licensed sales agent location within Montana.

Lottery sales agents may not “engage in business exclusively as a lottery ticket, chance, or sports wagering sales agent.” Mont. Code Ann. § 23-7-301(3)(c). Couriers represent they are engaged

in businesses other than selling lottery tickets. Prior to licensing each courier, the Lottery verified each courier's claims.

Lottery tickets may not be sold to "persons under 18 years of age." Mont. Code Ann. § 23-7-302(2). Screening for age and other eligibility requirements is the responsibility of the sales agent. Admin. R. Mont. 2.63.410(1). Couriers confirm that they take appropriate steps to determine purchasers of lottery tickets meet age and eligibility requirements.

Challengers to the Lottery's decision to allow courier services have pointed to the Lottery's broad authority to regulate lottery games and sales agent licensing and have asked the Lottery to determine that courier services may not operate in Montana. The Lottery declines the challengers' invitation to read into statutes a prohibition that does not exist.

Similar questions were raised to the First Judicial District Court in *Arete Group, LLC, v. Montana Lottery*, CDV-2019-1634 (First Jud. Dist. Ct., Lewis and Clark Co. 2019). In *Arete*, the district court determined the Lottery's administrative rule requiring sports wagering licensees to also possess an "appropriate alcoholic beverage license" was not consistent with the legislation authorizing sports wagering. The court did not agree with the Lottery's argument that its authority under Mont. Code Ann. §§ 23-7-202 and 23-7-301 allowed the Lottery to restrict sports wagering sales agent licenses to businesses that also held alcoholic beverage licenses.

As noted by the Court in *Arete*, in the absence of an express statutory provision authorizing a restriction or prohibition, the Lottery's general authority to regulate lottery games does not allow it to "engraft additional requirements" on the Act.

Challengers have also raised concerns regarding the gambling provisions in Montana Code Annotated Title 23, chapter 5. Such concerns are not germane to the lottery courier questions, however, because they expressly apply only to the gambling activities under chapter 5, not to the lottery activities subject to chapter 7. Moreover, the prohibition on operating an "illegal gambling enterprise" under Mont. Code Ann. § 23-5-152(1)(b), which includes "internet gambling" as defined in Mont. Code Ann. § 23-5-112(23)(a), does not include "lottery games" which are expressly excluded from the definition of "internet gambling" in Mont. Code Ann. § 23-5-112(23)(b).

Conclusion

Absent an express prohibition in statute or rule restricting the use of a lottery "courier service," the Lottery does not have authority to deny licensure to applicants who otherwise meet sales agent licensing requirements or to curtail activities of couriers that are otherwise legal.