

**CHAPTER 120****(HB 362)**

AN ACT relating to alcoholic beverages.

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

SECTION 1. A NEW SECTION OF KRS CHAPTER 244 IS CREATED TO READ AS FOLLOWS:

*The General Assembly finds that Sections 1 to 3 of this Act are necessary in order to:*

- (1) Provide an orderly three (3) tier system for the distribution and sale of quality malt beverages in the Commonwealth of Kentucky;*
- (2) Promote the public health, safety, and welfare of the people of the Commonwealth of Kentucky; and*
- (3) Provide a distribution system of malt beverages that will facilitate the collection and accountability of state and local taxes.*

SECTION 2. A NEW SECTION OF KRS CHAPTER 244 IS CREATED TO READ AS FOLLOWS:

*As used in Sections 1 to 3 of this Act, unless the context requires otherwise:*

- (1) "Good cause" means failure by a distributor to comply with the provisions of an agreement as delineated therein, which provisions are not unconscionable. Good cause shall not include:*
  - (a) The failure or refusal of the distributor to engage in any trade practice or activity which would violate federal or state law;*
  - (b) The failure or refusal of the distributor to take any action which would be contrary to these provisions;*
  - (c) The sale or purchase of a brewer or importer; and*
  - (d) The implementation by a brewer or importer of a national or regional policy of consolidation unless the policy:*
    - 1. Is reasonable, nondiscriminatory, and essential;*
    - 2. Results in a contemporaneous reduction in the number of a brewer's or importer's distributors not only for a brand in this state, but also for that brand in contiguous states or in a majority of the state in which the brewer or importer sells that brand; and*
    - 3. Was previously disclosed in writing and in reasonable detail by the brewer or importer implementing the policy to all affected distributors at least one hundred eighty (180) days prior to the implementation of the policy.*

*The term "affected distributor" means distributors who may reasonably be expected to experience a loss or diminishment of a right to distribute a brand, in whole or in part as a consequence of a proposed consolidation policy.*

- (2) "Good faith" means honesty in fact and the observance of reasonable commercial standard of fair dealing in the trade, as defined under KRS Chapter 355.*

SECTION 3. A NEW SECTION OF KRS CHAPTER 244 IS CREATED TO READ AS FOLLOWS:

- (1) *Every brewer and importer of malt beverages shall contract and agree in writing with each of its distributors to provide and specify the rights and duties of the brewer, the importer, and the distributor with and in regard to the sale of the products of the brewer or the importer within the Commonwealth of Kentucky. The terms and provisions of the contracts shall comply with and conform to Sections 1 to 3 of this Act and to all other applicable statutes.*
- (2) *The terms or provisions of any contract or agreement among any brewers, importers, or distributors, including contracts or agreements entered into after the effective date of this Act and any renewals or extensions of contracts existing prior to the effective date of this Act, shall not permit a brewer or importer of malt beverages to:*
  - (a) *Terminate, refuse to renew, or refuse to enter into an agreement, in part or in whole, with a distributor, except for good cause and in good faith;*
  - (b) *Terminate, refuse to renew, or refuse to enter into an agreement, in part or in whole, with a distributor without first giving the distributor written notice of any alleged deficiency on the part of the distributor and giving the distributor a reasonable opportunity of sixty (60) to one hundred twenty (120) days to cure the alleged deficiency;*
  - (c) *Unreasonably withhold timely consent to a proposed sale or transfer, in part or whole, of the stock or assets of the distributor, and in no event shall the brewer take more than thirty (30) days to approve or disapprove the proposed sale or transfer after the brewer has received written notice of the proposal from the distributor and received all requested information from the distributor to enable the brewer to pass upon the proposed sale or transfer;*
  - (d) *Assign an agreement, in part or in whole, with a distributor, except with consent from the distributor which shall not be unreasonably withheld. No consent is required where the distributor has proposed to transfer an ownership interest in its business and the brewer exercises its right to purchase this ownership interest in accordance with a written agreement between the brewer and distributor, subject to the brewer or its designee purchasing the ownership interest at the price and on the conditions applicable to the proposed change.*
  - (e) *Enter into a contract with more than one (1) distributor to sell any of its products or brand within the same territory or area at the same time. This paragraph shall not apply to contracts entered into prior to January 1, 2004, or future renewals of such contracts, to the extent the existing contract and the future renewal allow different distributors to sell certain but not all of the brewer's or importer's brands or brand extensions within the same territory or area at the same time;*
  - (f) *Unilaterally amend its agreement or any document referred to or incorporated by reference in its agreement, with any distributor, except modifications contemplated by the brewer-distributor agreement which modifications occur after written notice to the distributor or amendments that occur by a brewer after having consulted with an advisory panel of distributors;*

- (g) *Terminate an agreement with a distributor because the distributor refuses or fails to accept an unreasonable amendment to the agreement proposed by the brewer or importer;*
  - (h) *Require a distributor to arbitrate disputes which may arise between it and the brewer or the importer unless mutually agreed to by the parties to the agreement;*
  - (i) *Preclude a distributor from litigating in state or federal courts located in Kentucky or from litigating under the laws of the Commonwealth;*
  - (j) *Retaliate against its distributor in the application of the terms of a written agreement;*
  - (k) *Unreasonably fail to consent to the distributor's designation of an individual as the distributor's manager or successor-manager in accordance with nondiscriminatory and reasonable qualifications and standards; or*
  - (l) *Withdraw approval of an individual as the distributor's manager or successor-manager without just cause.*
- (3) *Notwithstanding the provisions in subsection (2) of this section, a brewer or importer of malt beverages may terminate an agreement with a distributor if any of the following occur:*
- (a) *The assignment or attempted assignment by the distributor for the benefit of creditors, the institution of proceedings in bankruptcy by or against the distributor, the dissolution or liquidation of the distributor, the insolvency of the distributor or the distributor's failure to pay for malt beverages in accordance with the agreed terms;*
  - (b) *Failure of any owner of the distributor to sell his or her ownership interest within one hundred twenty (120) days after the later of the owner having been convicted of a felony which, in the sole judgment of the brewer, may adversely affect the goodwill or interests of the distributor or the brewer, or the brewer learns of the conviction;*
  - (c) *Fraudulent conduct of the distributor in any of its dealings with the brewer or the brewer's products;*
  - (d) *Revocation or suspension for more than thirty-one (31) days of the distributor's federal basic permit or any state or local license required of the distributor for the normal operation of its business;*
  - (e) *Sale of malt beverages by a distributor outside its sales territory prescribed by the brewer in accordance with KRS 244.585; or*
  - (f) *Without brewer consent, the distributor engaging in changes in ownership or possession of ownership interests, the establishment of trusts or other ownership interest, entering into buy-sell agreements, or granting an option to purchase an ownership interest.*
- (4) *During the term of a contract or agreement between the brewer or importer and a distributor, including contracts or agreements in existence prior to the effective date of this Act, the distributor shall, in accordance with the provisions of such contract or agreement, maintain physical facilities and personnel so that the product and brand of the brewer or importer are properly represented in the territory of the distributor, the*

*reputation and trade name of the brewer or importer are reasonably protected, and the public is serviced. The brewer, importer, and distributor shall act in good faith at all times during the term of the contract or agreement.*

- (5) *Any brewer, importer, or distributor who violates any provision of this section shall pay the injured brewer or distributor all reasonable damages sustained by it as a result of the brewer's, importer's, or distributor's violations, together with the costs incurred by the brewer or distributor in protecting its right. If a brewer or importer violates subsection (2)(a) or (b) of this section, the injured distributor's reasonable damages shall be the fair market value of the distributor's business, unless there are liquidated damages agreed by the parties in the agreement. In determining the fair market value of the wholesaler's or distributor's business, proper and full consideration shall be given to all elements of value, including goodwill and going-concern value. The court may in its discretion consider attorney's fees reasonably incurred as a result of the prohibited conduct.*

Section 4. KRS 244.590 is amended to read as follows:

No brewer or distributor shall induce through any of the following means any malt beverage retailer to purchase any malt beverages from him to the exclusion in whole or in part of malt beverages sold or offered for sale by other persons, if the brewer or distributor engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in commerce in malt beverages:

- (1) By acquiring or holding, after the expiration of any existing license, any interest in any license with respect to the premises of the retailer;
- (2) By acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business;
- (3) By furnishing, giving, renting, lending or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other things of value, except as the administrator of the malt beverage unit, having regard for the public health, the quantity and value of the articles involved, the prevention of monopoly and the practice of deception, may by regulation otherwise prescribe;
- (4) By paying or crediting the retailer for any advertising, display or distribution service subject to the exceptions which the administrator may by regulation prescribe;
- (5) By guaranteeing any loan or the repayment of any financial obligation of the retailer; ~~{or}~~
- (6) By requiring the retailer to take and dispose of a certain quota of any malt beverages;
- (7) *Notwithstanding any provisions in KRS Chapter 244 and this section, a brewer or distributor may:*
  - (a) *Give, rent, loan, or sell to a malt beverage retailer signs, posters, placards, designs, devices, decorations or graphic displays, bearing advertising matter and for use in windows or elsewhere in the interior of a retail malt beverage establishment; and*
  - (b) *Provide or furnish draught line cleaning or coil-cleaning service to a malt beverage retailer either directly or indirectly with the consent of the distributor.*

**Approved April 9, 2004**