

CHAPTER 142**(SB 73)**

AN ACT relating to malt beverages.

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

Section 1. KRS 243.155 is amended to read as follows:

- (1) A small winery license shall authorize the licensee to perform the following functions without having to obtain separate licenses, except that each off-premises retail site shall be separately licensed:
 - (a) Manufacture wines and bottle wines produced by that small winery in an amount not to exceed fifty thousand (50,000) gallons in one (1) year;
 - (b) Serve on the premises or at off-premise retail sites complimentary samples of wine produced by it in amounts not to exceed six (6) ounces per patron per day, if the small winery or off-premise retail site is located in wet territory;
 - (c) Sell by the drink or by the package on premises, at off-premise retail sites, and at fairs, festivals, and other similar types of events, wine produced on the premises of the small winery or produced by a licensed farm winery, at retail to consumers if all sales sites are located in wet territory;
 - (d) Sell and transport wine produced on the premises of the small winery to wholesale license holders and to retail package or retail drink license holders, if the wine has been offered for sale to wholesale license holders and the wine is sold at the wholesale price to the retail package or retail drink license holders;
 - (e) Consume on the premises wine produced by the small winery or a licensed farm winery and purchased by the drink or by the package at the licensed premises, if the small winery is located in wet territory; and
 - (f) Ship to a customer wine produced by a small winery or a farm winery if:
 1. The wine is purchased by the customer in person at the small winery;
 2. The wine is shipped by licensed common carrier; and
 3. The amount of wine shipped is limited to two (2) cases per customer.
- (2) In accordance with administrative regulations promulgated by the board, the holder of a small winery license or farm winery license, upon affidavit filed with the board that grapes, grape juice, other fruits, other fruit juices, or honey produced in Kentucky are not obtainable, may apply for a permit to import these products. The burden of proof shall be upon the applicant to show that the grapes, grape juice, other fruits, other fruit juices, or honey are not available from any other source within the Commonwealth of Kentucky.
- (3) If a licensed small winery is located in a dry territory, KRS 242.230 to 242.430 shall apply, unless a local option election is held in accordance with the provisions of this subsection. A limited sale precinct election may be held in a precinct containing a licensed small winery in a dry territory. The election shall be held in the same manner as prescribed by KRS 242.010 to 242.040 and 242.060 to 242.120. The proposition to be voted on shall state, "Are you in favor of the sale of wine at the (name of the licensed small winery or wineries)?" If the

proposition is approved, a small winery within the precinct may sell wine in accordance with subsection (1) of this section.

- (4) Other provisions of this chapter and KRS Chapter 244 notwithstanding, a small winery license holder may also hold a restaurant wine license and a retail malt beverage license, provided the issuance of these licenses is in connection with the establishment and operation of a restaurant, hotel, inn, bed and breakfast, conference center, or any similar business enterprise the purpose of which is to promote viticulture, enology, and tourism. ***The retail malt beverage license issued under this subsection shall limit the licensee to the sale of malt beverages for consumption on the premises only.***
- (5) This section shall not exempt the holder of a small winery license from the provisions of KRS Chapters 241, 242, 243, and 244, nor from the administrative regulations of the board, nor from regulation by the board at all premises licensed by the small winery, except as expressly stated in this section.

Section 2. KRS 243.156 is amended to read as follows:

- (1) A farm winery license shall authorize the licensee to perform the following functions without having to obtain separate licenses:
- (a) Manufacture wines and bottle wines at a winery located on a Kentucky farm with a producing vineyard, orchard, or similar growing area, in an amount not to exceed twenty-five thousand (25,000) gallons in one (1) year;
 - (b) Serve on the premises or at an off-premise retail site complimentary samples of wine produced by it in amounts not to exceed four (4) ounces per patron per day, if the farm winery or off-premise retail site is located in wet territory;
 - (c) Sell wine produced on the premises of the farm winery or produced by a licensed small winery by the drink or by the package at retail to consumers, if the farm winery or off-premise retail site is located in wet territory and the wine produced by the small winery is made with Kentucky products;
 - (d) Sell and transport wine produced on the premises of the farm winery to wholesale liquor license holders and to retail package or retail drink license holders, if the wine has been offered for sale to wholesale license holders and the wine is sold at the wholesale price to the retail package or retail drink license holders;
 - (e) Serve complimentary samples or sell wine produced on the premises of the farm winery at another farm winery or small winery sales site, if the other farm winery or small winery sales site is located in wet territory;
 - (f) Consume on the premises wine produced by the farm winery or a small winery and purchased by the drink or by the package at the licensed premises, if the farm winery is located in wet territory;
 - (g) Sell by the drink or by the package wine produced by the farm winery or a licensed small winery at a fair, festival, or other similar type of event, if the event is held in a wet territory; and
 - (h) Ship to a customer wine produced by a farm winery or a small winery if:
 - 1. The wine is purchased by the customer in person at the farm winery;
 - 2. The wine is shipped by licensed common carrier; and

3. The amount of wine shipped is limited to two (2) cases per customer.
- (2) A licensed farm winery may establish one (1) off-premise retail sales outlet, if it is located in wet territory.
- (3) All of the fresh fruits, fruit juices, or honey used to manufacture wine at a farm winery shall be grown or produced in the Commonwealth of Kentucky.
- (4) If a licensed farm winery is located in a dry territory, KRS 242.230 to 242.430 shall apply, unless a local option election is held in accordance with the provisions of this subsection. A limited sale precinct election may be held in a precinct containing a licensed farm winery in a dry territory. The election shall be held in the same manner as prescribed by KRS 242.010 to 242.040 and 242.060 to 242.120. The proposition to be voted on shall state, "Are you in favor of the sale of wine at the (name of the licensed farm winery or wineries)?" If the proposition is approved, a farm winery within the precinct may sell wine in accordance with subsection (1) of this section.
- (5) Other provisions of this chapter and KRS Chapter 244 notwithstanding, a farm winery license holder may also hold a restaurant wine license and a retail malt beverage license, provided the issuance of these licenses is in connection with the establishment and operation of a restaurant, hotel, inn, bed and breakfast, conference center, or any similar business enterprise the purpose of which is to promote viticulture, enology, and tourism. ***The retail malt beverage license issued under this subsection shall limit the licensee to the sale of malt beverages for consumption on the premises only.***
- (6) This section shall not exempt the holder of a farm winery license from the provisions of KRS Chapters 241, 242, 243, and 244, nor from administrative regulations of the board, except as expressly stated in this section.

Section 3. KRS 244.604 is amended to read as follows:

As used in KRS 244.602 to 244.606, unless the context requires otherwise:

- (1) ***"Distributor" means any person who distributes or sells at wholesale malt beverages for the purpose of being sold at retail.***
- (2) ***"Existing distributor" means a distributor who distributes a particular brand or brands of malt beverage at the time a successor brewer or importer acquires rights to manufacture or import the particular brand or brands of malt beverage.***
- (3) "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, ***except as provided under KRS 244.606(2)***; 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.

- ~~(4)(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.
- (5) *"Malt beverage" means any fermented undistilled alcoholic beverage of any name or description, manufactured from malt wholly or in part, or from any substitute for malt, exceeding five-tenths of one percent (0.5%) alcohol by volume.*
 - (6) *"Successor" means a brewer or importer that acquires the right to manufacture or import a particular brand or brands of malt beverage.*
 - (7) *"Successor's designee" means one (1) or more distributors designated by a successor to replace the existing distributor, for all or part of the existing distributor's territory, in the distribution of a particular brand or brands of malt beverage.*

Section 4. KRS 244.606 is amended 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 KRS 244.602 to 244.606 and to all other applicable statutes.
- (2) *If a particular brand or brands of malt beverage are transferred by purchase or otherwise from a brewer or importer, the successor brewer or importer, and the successor brewer or importer's designee, shall comply with the following:*
 - (a) *The successor brewer or importer shall notify the existing distributor of the successor's intent not to appoint the existing distributor for all or a part of the existing distributor's territory for the product. The successor shall mail the notice of termination by certified mail, return receipt requested, to the existing distributor. The successor shall include in the notice the names, addresses, and telephone numbers of the successor's designees.*
 - (b) *A successor's designee shall negotiate with the existing distributor to determine the fair market value of the existing distributor's right to distribute the product in the existing distributor's territory immediately before the successor acquired rights to the particular brand or brands of malt beverage. For the purposes of this paragraph, fair market value shall be the value that would be determined in an arm's length transaction entered into without duress or threat of termination of the existing distributor's right and shall include all elements of value, including goodwill and going-concern value.*

- (c) *The existing distributor shall continue to distribute the product until payment of the compensation agreed to under paragraph (b) of this subsection or awarded under paragraph (d) of this subsection is received.*
- (d) *The successor's designee and the existing distributor shall negotiate in good faith. If the parties fail to reach an agreement not later than thirty (30) days after the existing distributor receives the notice under paragraph (a) of this subsection, the successor's designee or the existing distributor may send a written notice to the other party and the American Arbitration Association or its successor in interest, declaring the party's intention to proceed with final and binding arbitration administered by the American Arbitration Association under the American Arbitration Association's Commercial Arbitration Rules. Thereafter, an arbitration shall be held for the purpose of determining the fair market value of the existing distributor's right to distribute the product in the existing distributor's territory immediately before the successor acquired rights to the particular brand or brands of malt beverage. For the purpose of this paragraph, fair market value shall be the value that would be determined in an arm's length transaction entered into without duress or threat of termination of the existing distributor's right and shall include all elements of value, including goodwill and going-concern value.*
- (e) *Notice of intent to arbitrate shall be sent, as provided in paragraph (d) of this subsection, not later than thirty-five (35) days after the existing distributor receives notice under paragraph (a) of this subsection. The arbitration proceeding shall conclude not later than forty-five (45) days after the date the notice of intent to arbitrate is mailed to a party.*
- (f) *Any arbitration held pursuant to this subsection shall be conducted in the city within Kentucky that:*
 - 1. *Is closest to the existing distributor; and*
 - 2. *Has a population of more than twenty thousand (20,000).*
- (g) *Any arbitration held pursuant to this subsection shall be conducted before one (1) impartial arbitrator to be selected by the American Arbitration Association. The arbitration shall be conducted in accordance with the rules and procedures of the American Arbitration Association.*
- (h) *An arbitrator's award in any arbitration held pursuant to this subsection shall be monetary only and shall not enjoin or compel conduct. Any arbitration held pursuant to this subsection shall be instead of all other remedies and procedures.*
- (i) *The cost of the arbitrator and any other direct costs of any arbitration held pursuant to this subsection shall be equally divided by the parties engaged in the arbitration. All other costs shall be paid by the party incurring them.*
- (j) *The arbitrator in any arbitration held pursuant to this subsection shall render a decision not later than thirty (30) days after the conclusion of the arbitration unless this time period is extended by mutual agreement of the parties or by the arbitrator. The decision of the arbitration is final and binding on the parties. Under no circumstances may the parties appeal the decision of the arbitrator.*
- (k) *A party who fails to participate in the arbitration hearings in any arbitration held pursuant to this subsection waives all rights the party would have had in the*

arbitration and is considered to have consented to the determination of the arbitrator.

- (l) *If the existing distributor does not receive payment from the successor's designee of the compensation under paragraph (b) or (d) of this subsection not later than thirty (30) days after the date of the settlement or arbitration award:*
 - 1. *The existing distributor shall remain the distributor of the product in the existing distributor's territory to at least the same extent that the existing distributor distributed the product immediately before the successor's designee acquired rights to the product; and*
 - 2. *The existing distributor is not entitled to the settlement or arbitration award.*
- (m) *Nothing in this section shall be construed to limit or prohibit good-faith settlements voluntarily entered into by the parties.*
- (n) *Nothing in this section shall be construed to give the existing distributor or a successor's designee any right to compensation if the existing distributor or successor's designee is terminated by a brewer or importer pursuant to subsection (4) of this section.*
- (3) The terms or provisions of any contract or agreement among any brewers, importers, or distributors, including contracts or agreements entered into after July 13, 2004, and any renewals or extensions of contracts existing prior to July 13, 2004, shall not permit a brewer or importer of malt beverages to, ***nor may any brewer or importer:***
 - (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) ***Unreasonably discriminate or*** 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.
- (4)~~(3)~~ Notwithstanding the provisions in subsection (3)~~(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.

(5){(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 July 13, 2004, 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.

(6){(5)} Any brewer, importer, or distributor who violates any provision of this section shall pay the injured brewer, *importer*, 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 *and attorney's fees* incurred by the brewer, *importer*, or distributor in protecting its right. If a brewer or importer violates subsection (3){(2)}(a), (3){-or-}(b), *or* (3)(g) 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.]~~

Approved March 18, 2005.