

CHAPTER 34

(SB 15)

AN ACT relating to microbreweries.

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

➔Section 1. KRS 243.157 is amended to read as follows:

- (1) A microbrewery license shall authorize the licensee to perform the following functions:
- (a) Engage in the business of a brewer under the terms and conditions of KRS 243.150, provided that production of malt beverages at the microbrewery shall not exceed fifty thousand (50,000) barrels in one (1) year;
 - (b) Serve on the premises complimentary samples of malt beverages produced by the microbrewery in amounts not to exceed sixteen (16) ounces per patron, provided the microbrewery is located in wet territory or a precinct that has authorized the sale of alcoholic beverages at microbreweries under KRS 242.1239;
 - (c) Sell malt beverages produced on the premises of the microbrewery to licensed distributors;
 - (d) Sell malt beverages produced on the premises of the microbrewery for on- and off-premises purposes in accordance with subsection (3)(b) and (c) of this section, pursuant to the following:
 1. Without restriction on the amount of malt beverages sold by the drink for on-premises consumption provided the microbrewery is located in wet territory or a precinct that has authorized the sale of alcoholic beverages at microbreweries under KRS 242.1239; and
 2. With a restriction on the amount of malt beverages sold for off-premises consumption, in an aggregate amount not to exceed thirty-one (31) gallons per person per day that shall not include more than three (3) cases in case format; ~~and~~
 - (e) Sell:
 1. Unlimited amounts of malt beverages by the drink; and
 2. Not more than one (1) case of packaged malt beverages;

produced on the premises of the microbrewery to consumers at fairs, festivals, and other similar types of events located in wet territory, in accordance with subsection (3)(b)2. and (c)2. of this section; **and**
 - (f) ***Sell and deliver up to two thousand five hundred (2,500) barrels of malt beverages annually to any retail license holder, provided that:***
 1. ***Any products sold and delivered under this paragraph that are not otherwise registered by a licensed distributor shall be registered with the department by the microbrewery; and***
 2. ***The microbrewer notifies the distributor of any self-distribution delivery by electronic or other means.***
- (2) A microbrewery license shall not be deemed to be incompatible with any other license except for a distributor's license under the provisions of KRS 243.180.
- (3) In accordance with the provisions of this section, a microbrewery license holder may:
- (a) Hold retail drink and package licenses both on and off the premises of the microbrewery. The holder of a microbrewery license is exempt from the provisions of KRS 244.570 and 244.590 as applied to any retail licenses held by the microbrewery license holder, and from any other sections which would restrict the co-ownership of the microbrewery license and any retail licenses described in this section;
 - (b) Sell malt beverages produced on the premises of the microbrewery for on-premises purposes without having to transfer physical possession of those malt beverages to a licensed distributor provided:
 1. The microbrewery possesses a retail drink license for those premises; and

2. The microbrewery reports and pays all taxes required by subsection (5)(a) and (b) of this section to the Department of Revenue at the time and in the manner required by the Department of Revenue in accordance with its powers under KRS 131.130(3); and
- (c) Sell malt beverages produced on the premises of the microbrewery for off-premises purposes without having to transfer physical possession of those malt beverages to a licensed distributor provided that:
 1. The microbrewery possesses a retail package license for those premises; and
 2. The microbrewery reports and pays all taxes required by subsection (5)(a) and (b) of this section to the Department of Revenue at the time and in the manner required by the Department of Revenue in accordance with its powers under KRS 131.130(3).
- (4) The provisions of subsection (3)(b) and (c) of this section shall apply only to malt beverages that are produced by the microbrewery at its licensed premises and:
 - (a) Offered for sale by the microbrewery at that same premises under the microbrewery's retail drink or package license; or
 - (b) Offered for sale by the microbrewery at a fair, festival, or other similar type of event as authorized under subsection (1)(e) of this section.

All other malt beverages produced by the microbrewery which are offered for retail sale shall be sold and physically transferred to a licensed distributor in compliance with all other relevant provisions of KRS Chapters 241 to 244, and a licensed microbrewery shall not otherwise affect sales of malt beverages directly to retail customers except as provided in subsection (3)(b) and (c) of this section under KRS 243.027 to 243.029 if the microbrewery holds a direct shipper license.

- (5) (a) A microbrewery selling malt beverages in accordance with **subsection (1)(f) or**~~subsection~~ (3)(b) and (c) of this section shall pay all wholesale sales taxes due under KRS 243.884. For the purposes of this subsection, "wholesale sales" means a sale of malt beverages made by a microbrewery under **subsection (1)(f) or**~~subsection~~ (3)(b) and (c) of this section, as applicable.
- (b) A microbrewery shall pay the excise tax on malt beverages in accordance with KRS 243.720(3) and 243.730 and shall be entitled to the credit set forth in KRS 243.720(3)(b).
- (6) A microbrewery shall not be located in dry territory.
- (7) An employee of a microbrewery may sample the products produced by that microbrewery for purposes of education, quality control, and product development.
- (8) This section does not exempt the holder of a microbrewery license from the provisions of KRS Chapters 241 to 244, nor from any rules of the board as established by administrative regulations, nor from regulation by the board, except as expressly stated in this section. The provisions of this section shall not be deemed inconsistent with the provisions of KRS 244.602.
- (9) Nothing in this section shall be construed to vitiate the policy of this Commonwealth, as set forth in KRS 244.167 and 244.602, supporting an orderly three (3) tier system for the production and sale of malt beverages.

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

- (1) *As of the effective date of this Act, KRS 244.602 to 244.606 shall not apply to any new distribution agreement, or the renewal of an existing distribution agreement, between a distributor of malt beverages and a microbrewery. Any existing distribution agreement between a distributor of malt beverages and a microbrewery shall be deemed to renew upon the earlier of January 1, 2022, or the renewal date set forth in that agreement.*
- (2) *Every distribution agreement providing for and specifying the rights and duties of a microbrewer and distributor with and in regard to the sale of the products of the microbrewer within the Commonwealth of Kentucky shall be in writing. The terms and provisions of the agreement shall comply with and conform to this section.*
- (3) *A distribution agreement between a microbrewer and a distributor shall not:*
 - (a) *Require the microbrewer or distributor to agree to renew the distribution agreement at the expiration of a term;*

- (b) *Except as set forth in subsection (4) or (9) of this section, permit a microbrewer or distributor to terminate a distribution agreement without first giving written notice of any alleged deficiency and giving the other party a reasonable opportunity to cure the alleged deficiency. For purposes of this paragraph, a reasonable opportunity to cure shall be sixty (60) days from the date a notice of an alleged deficiency is received;*
 - (c) *Permit the assignment of the distribution agreement, in part or in whole, without first obtaining the consent of the other party, which shall not be unreasonably withheld provided the assignee possesses the financial, technical, and operational skills necessary to perform under the distribution agreement;*
 - (d) *Permit the microbrewer or distributor to unilaterally amend a distribution agreement, or any document referred to or incorporated by reference in the distribution agreement;*
 - (e) *Require a microbrewer or distributor to mediate or arbitrate disputes which may arise between them, though nothing shall prohibit the parties from resolving the dispute by retaining an independent mediator or arbitrator while equally sharing the cost; or*
 - (f) *Prohibit a microbrewer or distributor from litigating in state or federal courts located in Kentucky or from litigating under the laws of the Commonwealth.*
- (4) *A microbrewer may terminate a distribution agreement according to the terms of the agreement or in any of the following instances:*
- (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 law;*
 - (b) *The felony conviction of a distributor, or any of its owners who participate in the distributor's management which, in the sole judgment of the microbrewer, may adversely affect the goodwill or interests of the microbrewer;*
 - (c) *Fraudulent or discriminatory conduct of the distributor in any of its dealings with a microbrewery or a microbrewer'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 distribution agreement in accordance with KRS 244.585;*
 - (f) *Without microbrewer consent, the distributor effectuates a change in ownership or possession of ownership interests, establishes a trust or other ownership interest, enters into buy-sell agreements, or grants an option to purchase an ownership interest; provided, however, this right of termination shall not apply to the transfer, creation, sale, gift, or grant of an ownership interest, or option thereon, of a total aggregate of less than ten percent (10%) of the total existing ownership or possession of ownership interest of the distributor or intrafamily transfer; or*
 - (g) *In the case of a microbrewer whose products represent five percent (5%) or less of a distributor's gross annual sales, the giving of a forty-five (45) day notice of termination and the payment to the distributor of reasonable compensation, which shall be equivalent to the fair market value of the distributor's total investment in the microbrewer's products being terminated. For purposes of this subsection, fair market value shall be calculated based on a multiple of the distributor's gross profits from the sale of the microbrewer's products in the twelve (12) months immediately prior to the date of the microbrewer's written notice of intent to terminate. The fair market valuation shall be based on an arm's length transaction entered into without duress or threat of termination, and shall include all elements of value, including goodwill and going-concern value. If the parties are unable to agree on the fair market valuation, the dispute shall be resolved as provided in Section 3 of this Act. A microbrewer terminating an agreement under this paragraph may do so not more than once in a thirty-six (36) month period and shall not be deemed to be in violation of subsection (5)(b) of this section.*
- (5) *A microbrewer or a distributor of malt beverages shall not:*

- (a) *Unreasonably discriminate or retaliate against the other party in the application or performance of the terms of a distribution agreement;*
 - (b) *Require or request payment, convey money or other consideration, or accept any sum of money or other consideration in exchange for the right to distribute the product or products of the microbrewer in a designated territory, provided that the following items shall not be prohibited:*
 - 1. *A microbrewer's request to a distributor to pay or contribute any sum of money for or toward the cost of marketing the product or products of the microbrewer so long as the money contributed by the distributor is spent by the microbrewer in a manner and at such times as agreed to in writing by the microbrewer and the distributor; and*
 - 2. *Any payment pursuant to subsection (4)(g) of this section;*
 - (c) *Unreasonably withhold timely consent to a proposed sale or transfer, in part or whole, of the stock or assets of the microbrewer or distributor, and in no event shall the microbrewer or distributor take more than thirty (30) days to approve or disapprove the proposed sale or transfer after the microbrewer or distributor has received written notice of the proposal and received all requested information to enable the microbrewer or distributor to pass upon the purchaser's or transferee's financial, technical, and operational skills necessary to perform under the distribution agreement; or*
 - (d) *Fail to give at least thirty (30) days' advance notice of a change in ownership or possession of an ownership interest, whether by sale, transfer, gift, or grant of an option.*
- (6) *A distributor of malt beverages shall not:*
- (a) *Refuse to enter into a distribution agreement with a microbrewery, in whole or in part, except for good cause and in good faith; or*
 - (b) *Continue to distribute the microbrewer's products thirty (30) days after receiving a notice of termination of a distribution agreement. However, any sums owed to the distributor by the microbrewer or another distributor assuming the obligation to distribute the microbrewer's product within the territory encompassed by the terminated distribution agreement shall still be owed.*
- (7) *A microbrewer shall not enter into a contract with more than one (1) distributor to sell any of its products or brands within the same territory or area at the same time. This subsection shall not apply to contracts entered into prior to January 1, 2004, or future renewals of those contracts to the extent the existing contract and the future renewal allow different distributors to sell some but not all of the brewer's or importer's brands or brand extensions within the same territory or area at the same time.*
- (8) *A distributor that enters into or renews a distribution agreement with a microbrewer following the effective date of this Act shall maintain physical facilities and personnel so that:*
- (a) *The product and brand of the microbrewer are reasonably represented in the territory of the distributor for which the distribution agreement applies;*
 - (b) *The reputation and trade name of the microbrewer are reasonably promoted and protected; and*
 - (c) *The public is fully serviced.*
- (9) *A distributor may terminate a distribution agreement according to the terms of the agreement or in any of the following instances:*
- (a) *The assignment or attempted assignment by the microbrewer for the benefit of creditors, the institution of proceedings in bankruptcy by or against the microbrewer, the dissolution or liquidation of the microbrewer, or the insolvency of the microbrewer;*
 - (b) *The felony conviction of a microbrewer, or any of its owners who participate in the microbrewer's management which, in the sole judgment of the distributor, may adversely affect the goodwill or interests of the distributor;*
 - (c) *Fraudulent or discriminatory conduct of the microbrewer in any of its dealings with a distributor or a distributor's brands;*
 - (d) *Revocation or suspension for more than thirty-one (31) days of the microbrewer's federal basic permit or any state or local license required of the microbrewer for the normal operation of its business;*

- (e) *Without distributor consent, the microbrewer effectuates a change in ownership or possession of ownership interests, establishes a trust or other ownership interest, enters into buy-sell agreements, or grants an option to purchase an ownership interest; provided, however, this right of termination shall not apply to the transfer, creation, sale, gift, or grant of an ownership interest, or option thereon, of a total aggregate of less than ten percent (10%) of the total existing ownership or possession of ownership interest of the microbrewer or intrafamily transfer; or*
- (f) *In the case of a microbrewer whose products represent five percent (5%) or less of a distributor's gross annual sales, the giving of a forty-five (45) day notice of termination and payment to the microbrewer of reasonable compensation, which shall be determined to be a sum equal to five (5) times the monthly average of purchases from the microbrewer over the twelve (12) months prior to the termination.*
- (10) *In the event of a termination of a contract between a microbrewer and a distributor, the microbrewer shall repurchase all of its product still in the distributor's inventory upon return from the distributor, provided that the "best by", "expiration", or other similar printed date is greater than thirty (30) days after the date of the return of the product.*
- (11) *Any microbrewer or distributor that violates any provision of this section shall pay the injured party all reasonable damages sustained as a result of the microbrewer's or distributor's violations, together with the costs and attorneys' fees incurred by the microbrewer or distributor in protecting its right.*

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

In the event the microbrewer and distributor cannot agree on the fair market value as set forth in subsection (4)(g) of Section 2 of this Act, then the parties shall arbitrate in accordance with the following:

- (1) *If the parties fail to reach an agreement not later than thirty (30) days after the distributor receives the microbrewer's written notice to terminate, the distributor or microbrewer 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 distributor's total investment in the microbrewer's products being terminated. 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.*
- (2) *Notice of intent to arbitrate shall be sent, as provided in paragraph (1) of this section, not later than thirty-five (35) days after the distributor receives written notice to terminate. 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.*
- (3) *Any arbitration held pursuant to this subsection shall be conducted in the city within Kentucky that:*
 - 1. *Is closest to the distributor; and*
 - 2. *Has a population of more than twenty thousand (20,000).*
- (4) *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.*
- (5) *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.*
- (6) *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.*
- (7) *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.*

- (8) *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.*
- (9) *Nothing in this section shall be construed to limit or prohibit good-faith settlements voluntarily entered into by the parties.*

→Section 4. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Signed by Governor March 17, 2021.