

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1161 Malt Beverages  
**SPONSOR(S):** Business & Professions Subcommittee, Roach  
**TIED BILLS:** IDEN./SIM. **BILLS:** SB 962

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	14 Y, 0 N, As CS	Willson	Anstead
2) Government Operations & Technology Appropriations Subcommittee	12 Y, 0 N	Helpling	Topp
3) Commerce Committee			

### SUMMARY ANALYSIS

In Florida, the Beverage Law regulates the manufacture, distribution, and sale of wine, beer, and liquor by manufacturers, distributors, and vendors, as well as the business relations between beer distributors and manufacturers. The Division of Alcoholic Beverages and Tobacco (Division) within the Department of Business and Professional Regulation (DBPR) administers and enforces the Beverage Law.

Florida's "Tied House Evil Law," s. 561.42, F.S., prohibits a manufacturer or distributor of alcoholic beverages from having a financial interest, directly or indirectly, in the establishment or business of a licensed vendor, and prohibits a manufacturer or distributor from giving gifts, loans, property, or rebates to retail vendors.

Division rules allow retail vendors of alcoholic beverages to return damaged and undamaged products under certain circumstances. The sale of alcoholic beverages on consignment sales or under a similar arrangement is prohibited under Division rules and federal law.

Some brewers assign a coded "pull date" or "freshness date" to their product as a quality control tool to prevent stale or outdated product from remaining in the marketplace. Federal regulations allow for the return (exchange, refund or credit) of malt beverages for freshness reasons, under certain circumstances.

The bill defines terms and establishes a framework for the return of malt beverage products that are damaged, undamaged, and out of code, including the return of product for freshness reasons. These provisions are similar to provisions in federal law and Division rules. The bill also prohibits consignment sales.

The bill provides that the Department of Business and Professional Regulation (DBPR) is authorized to impose and collect fines not to exceed \$1,000, resulting in an insignificant positive fiscal impact. The bill provides DBPR with rulemaking authority, which can be accomplished within existing resources.

The bill provides an effective date of July 1, 2019.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation

##### **Beverage Law**

In Florida, the Beverage Law<sup>1</sup> regulates the manufacture, distribution, and sale of wine, beer, and liquor by manufacturers, distributors, and vendors. The Division of Alcoholic Beverages and Tobacco (Division) within the Department of Business and Professional Regulation (DBPR) administers and enforces the Beverage Law.<sup>2</sup>

“Alcoholic beverages” are defined in s. 561.01, F.S., as “distilled spirits and all beverages containing one-half of 1 percent or more alcohol by volume.” “Malt beverages” are brewed alcoholic beverages containing malt.<sup>3</sup>

Section 561.14, F.S., specifies license and registration classifications used in the Beverage Law:

- “Manufacturers” are those “licensed to manufacture alcoholic beverages and distribute the same at wholesale to licensed distributors and to no one else within the state, unless authorized by statute.”
- “Distributors” are those “licensed to sell and distribute alcoholic beverages at wholesale to persons who are licensed to sell alcoholic beverages.”
- “Importers” are those “licensed to sell, or to cause to be sold, shipped, and invoiced, alcoholic beverages to licensed manufacturers or licensed distributors, and to no one else in this state.”
- “Vendors” are those “licensed to sell alcoholic beverages at retail only” and may not “purchase or acquire in any manner for the purpose of resale any alcoholic beverages from any person not licensed as a vendor, manufacturer, bottler, or distributor under the Beverage Law.”

##### **Three-Tier System and Tied House Evil**

Since the repeal of Prohibition in 1933, regulation of alcohol in the United States has traditionally been based upon what is termed the “three-tier system.” The system requires separation of the manufacture, distribution, and sale of alcoholic beverages. The manufacturer creates the beverages, and the distributor obtains the beverages from the manufacturer to deliver to the vendor. The vendor makes the ultimate sale to the consumer.<sup>4</sup> Generally, only licensed vendors are permitted to sell alcoholic beverages directly to consumers at retail, and manufacturers, distributors, and exporters<sup>5</sup> are generally prohibited from holding a vendor’s license.<sup>6</sup> Manufacturers, distributors, and vendors are generally prohibited from being licensed or having an interest in more than one tier.

The three-tier system is deeply rooted in the perceived evils of the “tied house” in which a retail vendor is owned or operated by a manufacturer or the manufacturer exercises undue influence over the retail vendor.<sup>7</sup>

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<sup>1</sup> Section 561.01(6), F.S., provides that the “The Beverage Law” means chs. 561, 562, 563, 564, 565, 567, and 568, F.S.

<sup>2</sup> S. 561.02, F.S.

<sup>3</sup> S. 563.01, F.S.

<sup>4</sup> S. 561.14, F.S.

<sup>5</sup> S. 561.01(16), F.S. “Exporter” means any person that sells alcoholic beverages to persons for use outside the state and includes a ship’s chandler and a duty-free shop

<sup>6</sup> S. 561.22(1), F.S.; s. 561.14(3), F.S. However, see the exceptions provided in ss. 561.221 and 565.03, F.S.

<sup>7</sup> See Andrew Tamayo, *What's Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina's Craft Breweries*, 88 N.C. L. REV. 2198 (2010), <http://scholarship.law.unc.edu/nclr/vol88/iss6/6>.

Florida's "Tied House Evil Law," s. 561.42, F.S., prohibits a manufacturer or distributor of alcoholic beverages from having a financial interest, directly or indirectly, in the establishment or business of a licensed vendor, and prohibits a manufacturer or distributor from giving gifts, loans, property, or rebates to retail vendors. Additionally, s. 563.022(4), F.S., prohibits unfair methods of competition and unfair or deceptive practices in the conduct of the manufacturing, importing, distribution, sale, wholesaling, and franchising of beer.

### **Product Returns – Federal Law**

Federal regulations prohibit the sale or purchase of any alcoholic beverage products on consignment, under conditional sale, with privilege of return, on any basis other than a bona fide sale, or if the sale involves an agreement to acquire other products.<sup>8</sup> However, transactions involving the bona fide return of products for "ordinary and usual commercial reasons arising after the merchandise has been sold" are not prohibited.<sup>9</sup> Under federal regulations, ordinary and usual commercial reasons include:

- Defective product,
- Shipment error,
- A change in law preventing the sale of the product,
- Termination of the buyer's business,
- Change in product from that in inventory,
- Product in inventory is discontinued, or
- Possible spoilage of product during the offseason of a seasonal retail dealer.<sup>10</sup>

Such returns are optional. The distributor is not required to accept the return.<sup>11</sup> Returns or exchanges of products that are merely overstocked, slow-moving, or seasonal in nature are not considered ordinary and usual commercial reasons.<sup>12</sup>

### *Freshness Dating*

Some brewers assign a coded "pull date" or "freshness date" to their product as a quality control tool to prevent stale or outdated product from remaining in the marketplace.<sup>13</sup> Federal regulations allow for the return (exchange, refund or credit) of malt beverages for freshness reasons under the following circumstances:

- The brewer has policies and procedures in place that specify the date the retailer must pull the product.
- The policies and procedures are readily verifiable and consistently followed by the brewer.
- The container has identifying markings that correspond with this date.
- The malt beverage product pulled by the distributor or retailer may not re-enter the retail marketplace.
- If the product is returned for exchange, it must be for an identical quantity of the same brand.<sup>14</sup>

Federal regulation prohibits the use of freshness provisions as "mere subterfuge to violate these same consignment sales and/or tied house provisions."<sup>15</sup>

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<sup>8</sup> 27 U.S.C. § 205(d).

<sup>9</sup> *Id.*

<sup>10</sup> 27 C.F.R. §§ 11.32–11.39.

<sup>11</sup> Alcohol and Tobacco Tax and Trade Bureau (TTB) Ruling, *2017-2 Revised – Freshness Dating and Allowable Returns of Malt Beverage Products under the FAA Act* (Sept. 29, 2017). In the case of malt beverages, trade practice provisions of the Federal Alcohol Administration Act (FAA Act) apply only if the laws of the state into which the malt beverage products are sold or shipped impose similar requirements.

<sup>12</sup> *Id.*; 27 C.F.R. § 11.45 & 11.46.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

## Product Returns – Division Rules

The Beverage Law does not explicitly regulate the return of malt beverage products to distributors by vendors. However, the Division has adopted rules to provide guidance to the industry.

### *Return of Damaged Products*

Rule 61A-1.0107, F.A.C., regulates the return of damaged products. Products are considered damaged if they, through no fault of the vendor or customer, exhibit product deterioration, leaking containers, damaged labels, or missing or mutilated tamper-evident closures. Damaged products can be returned for exchange, cash, or a credit when the vendor makes the request within 15 days of delivery. Distributors are required to keep detailed transaction records of such returns.<sup>16</sup>

If the vendor does not make the return request within 15 days of delivery, damaged product may not be returned unless:

- The product is part of a manufacturer recall that affects multiple unaffiliated vendors; or
- Through no fault of the vendor, the product has deteriorated due to manufacturing or packaging problems.

### *Return of Undamaged Products*

Rule 61A-1.0108, F.A.C., regulates the return of undamaged products. A vendor may receive cash or credit for the return of undamaged product if the request is made within 10 days of delivery. Distributors are required to keep detailed transaction records of such returns.

If the vendor does not make the request within 10 days of delivery, undamaged product may not be returned unless:

- The product may no longer be lawfully sold.
- The vendor goes out of business.
- There is a change in product, such as a change in formula, proof, label, or container.
- The product is discontinued; or
- The vendor is only open for a portion of the year, and the remaining product will spoil in the off-season.<sup>17</sup>

Additionally, distributors are prohibited from making consignment sales to vendors, and vendors may not attempt to return or exchange overstocked or slow-moving product.<sup>18</sup>

## Violations and Penalties

Section 562.45(1), F.S., provides that the false entry of any record required under the Beverage Law or violation of the excise tax provisions, when done intentionally, is a felony of the third degree, punishable as provided in ss. 775.082, 775.083, or 775.084, F.S. For violations of the Beverage Law where no penalty is provided, first-time offenses are guilty of a misdemeanor of the second degree and a felony of the third degree for any subsequent offenses thereafter.

Section 561.29, F.S., authorizes the Division to issue civil penalties for violations of the Beverage Law and rules issued thereto. Such penalties may not exceed \$1,000 per transaction. The Division is also authorized to suspend the license of a licensee that fails to pay a civil penalty.

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<sup>16</sup> Section 561.55(3)(a), F.S., requires a manufacturer, distributor, broker, agent, and importer licensed under the Beverage Law to maintain and keep, for a period of three years at the licensed place of business, such records of alcoholic beverages received, sold, or delivered within or without this state as may be required by the Division

<sup>17</sup> R. 61A-1.0108(4), F.A.C.

<sup>18</sup> *Id.*

## Effect of the Bill

The bill creates s. 563.061, F.S., relating to the return of malt beverage products.

### *Consignment Sale Prohibited*

The bill prohibits the sale of malt beverages on consignment or any other basis other than a “bona fide sale.” Once a sale is made, only “bona fide returns” are allowed for the “ordinary and usual commercial reasons” authorized in the bill. The terms “bona fide sale” and “bona fide return” are not defined in the bill. The bill also specifies that product may not be returned simply because it is overstocked, slow-moving, or has limited or seasonal demand, such as holiday decanters or other specialized containers.

### *Product Returns*

The bill outlines situations where a vendor is permitted to return product for an exchange, a credit, or a refund. The bill does not condition the return of product for a credit or a refund, but product returned for an exchange may only be exchanged for:

- the exact same quantity of product,
- of near or equal value,
- made by the same manufacturer, and
- in the same size container or keg.

### *Return of Undamaged Product*

The bill defines "undamaged product" as malt beverage product that is not damaged or out of code. Undamaged product may be returned for exchange or credit. The vendor must make their return request within 7 days of delivery. However, there is no time frame for a distributor to accept the return of undamaged product if:

- Due to a change in regulations, the vendor is no longer permitted to sell a particular brand or product size. (For credit or refund.<sup>19</sup>)
- The vendor terminates operations. (For credit or refund.)
- The product is returned for “purposes of ensuring quality control or freshness” even if it is not yet out of code. (For exchange only.)
- A manufacturer issues a recall affecting multiple vendors that are not: under common ownership, members of the same pool buying group, or members of the same advertising cooperative. (For exchange or credit.)
- Production or importation of the product is discontinued. (For credit or refund.)
- The vendor is only open for part of the year, and the inventory at closing would go bad before the vendor reopens. (For credit or refund.)

When undamaged product is returned more than 7 days after delivery, documentation of the qualifying exception must be kept with the transaction record maintained by the distributor.

### *Return of Damaged Product*

The bill defines “damaged product” to mean a malt beverage product delivered to a vendor exhibiting product deterioration, defective seals, leaking, damaged labels, or missing or mutilated tamper-evident closures. The bill establishes the following guidelines for damaged product:

- Return requests must be made within 7 days of delivery.
- The distributor must verify that the product is damaged.
- Product that is damaged by the vendor or their customers may not be returned.

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<sup>19</sup> Type of return allowed is indicated in parentheses.

- Damaged product may be returned for exchange of product or credit.

#### *Return of Out-of-Code Product*

The bill defines "out-of-code product" as malt beverages that have exceeded the manufacturer's code date and, according to the manufacturer's policies, must be removed and replaced with fresh product for purchase in the retail market.

The bill defines "manufacturer's code date" to mean a coded best-by date, expiration date, or other designated date or dating system established by a manufacturer to signify freshness that is printed on the malt beverage container or, in the case of a keg, marked on a cap, collar, tag, or label affixed directly to the keg.

A distributor may accept out-of-code product if:

- The bill requires distributors to verify that the product is out-of-code.
- The manufacturer has established written guidelines relating to product removal.
- Such policies and procedures are readily available, verifiable, and consistently applied by the manufacturer.
- The manufacturer's code date is printed or marked on the product container.
- The out-of-code product that is removed by the distributor does not reenter the retail market.

Out-of-code product may be returned for exchange only.

#### *Distributor Requirements*

The bill authorizes, but does not require, distributors to accept returns. When a distributor does accept a return, the distributor is required to:

- Provide the exchange, credit, or refund to the vendor at the time the product is picked up.
- Pick up damaged or undamaged product within 14 days of a vendor's return request.
- The bill does not specify when a distributor must pick up product that is out-of-code.

The bill requires distributors to maintain detailed transaction records for returned product for 3 years and provide a copy to the vendor.

#### *Additional Provisions*

The bill specifies that, for the purposes of the Tied-House Evil Law, the returns authorized in the bill are not considered gifts, loans, or any other form of prohibited financial aid or assistance. The bill requires the Division to impose a fine not to exceed \$1,000 for each violation of the bill or a rule authorized by the bill. The bill authorizes the Division to adopt rules to administer and enforce the provisions of the bill.

## B. SECTION DIRECTORY:

**Section 1.** Creates s. 563.061, F.S.; providing definitions; prohibiting consignment sales of malt beverages between a distributor and vendor; authorizing bona fide returns of malt beverages under certain conditions; providing applicability; authorizing distributors to accept returns of certain products under specified conditions; providing distributor requirements for such returns; providing requirements for exchanges of product; providing recordkeeping requirements; specifying that authorized returns are not gifts, loans, or other prohibited forms of financial aid or assistance; providing penalties; and providing for rulemaking.

**Section 2.** Provides for an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill provides that the Department of Business and Professional Regulation is authorized to impose and collect fines not to exceed \$1,000, resulting in an insignificant positive fiscal impact.

#### 2. Expenditures:

The bill provides DBPR with rulemaking authority, which can be accomplished within existing resources.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

For some manufacturers and distributors, the bill may have a positive economic impact due to an increase in consumer sales, stemming from the ability to move product between vendors for “freshness” purposes.

For other manufacturers and distributors, the bill may have a negative economic impact to the extent that their brands become less attractive to vendors as compared to brands for which there is a freshness policy.

For vendors, the bill may have a positive economic impact for those with difficult to sell inventory, and may have a negative impact to the extent that the narrowing of the window for returns and the addition of a freshness policy affects a vendor’s ability to return or sell certain products.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

#### 2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

The bill authorizes the Division of Alcoholic Beverages and Tobacco to adopt rules to administer the provisions of the bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 19, 2019, the Business & Professions Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The committee substitute removed definitions for the terms:

- “Division” – This term is already defined in the Beverage Law.
- “Malt Beverage Product” – Removal of this definition expands the applicability of the bill to all malt beverage products regardless of size, and not just those products in containers larger than 1 gallon.