HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 903 Beverage Law
SPONSOR(S): DiCeglie and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1304

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	11 Y, 4 N	Willson	Anstead
2) Government Operations & Technology Appropriations Subcommittee	8 Y, 3 N	Helpling	Topp
3) Commerce Committee		Willson	Hamon

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. Generally, only licensed vendors are permitted to sell alcoholic beverages directly to consumers at retail, and manufacturers, distributors, and exporters are generally prohibited from holding a vendor's license. Manufacturers, distributors, and vendors are generally prohibited from being licensed or having an interest outside of their respective tier. There are limited exceptions, subject to certain conditions, including the ability for a craft brewery to hold a vendor's license, a restaurant to hold a manufacturer's license (brew pub), and a winery to hold up to three vendor's licenses.

The bill authorizes limited self-distribution for certain brewers, as follows:

- Allows a craft brewery whose annual total production volume is less than 7,000 kegs (~108,500 gallons) per year to sell, transport, and deliver (distribute) its own beer from its licensed premises to vendors in a standard keg or similar container.
    - A craft brewery with an existing franchise agreement with a distributor to distribute its product anywhere in the state is not eligible for this exemption.
- Requires that the craft brewer comply with certain distribution-specific laws when acting as a distributor, and exempts the craft brewer from the "come-to-rest requirement."
- Allows brew pubs to transfer beer to a restaurant, of common owner affiliation, which is a part of a restaurant group of not more than 15 restaurants.

The bill provides for limited exemptions to the current regulations regarding agreements between beer distributors and manufacturers, as follows:

- Exempts small breweries (i.e. total production volume does not exceed 150,000 gallons of malt beverages a year) from the beer franchise relations law.
- Allows any brewer to provide 120 days written notice and terminate their distributor franchise agreement, but only if the beer manufacturer accounts for 10% or less of the distributors total sales.

The bill may have an insignificant negative fiscal impact on the Department of Business and Professional Regulation by requiring modifications to current software applications. The modifications can be accomplished within existing resources. The bill may have a positive fiscal impact on the private sector.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Beverage Law

In Florida, the Beverage Law[1] 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.[2]

"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.[3]

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.[4]
- "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.[5]

Generally, only licensed vendors are permitted to sell alcoholic beverages directly to consumers at retail, and manufacturers, distributors, and exporters[6] are generally prohibited from holding a vendor's license.[7] Manufacturers, distributors, and vendors are generally prohibited from being licensed or having an interest in more than one tier. Limited exceptions exist, subject to certain conditions, such as the ability for a craft brewery to hold a vendor's license, a restaurant to hold a manufacturer's license (brew pub), and a winery to hold up to three vendor's licenses.[8]

[1] Section 561.01(6), F.S., provides that the "The Beverage Law" means chs. 561, 562, 563, 564, 565, 567, and 568, F.S.
[2] S. 561.02, F.S.
[3] S. 563.01, F.S.
[4] S. 561.01(5), F.S.
[5] S. 561.14, F.S.
[6] 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
[7] 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.
[8] *See* ss. 561.22, F.S.; 561.24, F.S.; 561.14(1), F.S.; and 563.022(14), F.S.

The three-tier system is deeply rooted in the perceived evils of the "tied house" in which a bar is owned or operated by a manufacturer or the manufacturer exercises undue influence over the retail vendor.[9]

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.

Craft Breweries

Section 561.221(2), F.S., allows a brewery to receive up to eight vendor's licenses for the sale of alcoholic beverages on property consisting of a single complex that includes a brewery, which may be divided by no more than one public street or highway. These vendor's licenses are an exception to the three-tier system described in ss. 561.14 and 561.22, F.S., and to the tied house evil restrictions in s. 561.42, F.S.

A craft brewery with multiple manufacturing licenses may transfer malt beverages that it produces between its breweries, up to 100 percent of the yearly production of the receiving brewery. Alcoholic beverages that the craft brewery does not make must be obtained through a distributor, an importer, sales agent, or broker.

Come-to-Rest Requirement

Section 561.5101, F.S., requires, for purposes of inspection and tax-revenue control, all malt beverages to come to rest at the licensed premises of an alcoholic beverage wholesaler in this state before being sold to a vendor by the wholesaler. The come-to-rest requirement does not apply to malt beverages that a craft brewery manufacturers and sells to consumers as a vendor, or to malt beverages manufactured and sold by a brew pub. It is a felony of the third degree[10] for any person in the business of selling alcoholic beverages to knowingly and intentionally sell malt beverages in a manner inconsistent with the come-to-rest requirement.

Alcoholic Beverage Deliveries

Vendors, but not manufacturers or distributors, are allowed to make deliveries away from their place of business for sales actually made at their licensed place of business. Telephone, electronic, and mail orders received at a vendor's licensed place of business are construed as a sale actually made at the vendor's licensed place of business. Deliveries may be made in vehicles that are owned or leased by the vendor, or in a third-party vehicle pursuant to a contract with a third party with whom the vendor has contracted to make deliveries, including, but not limited to, common carriers.[11]

Manufacturers and distributors are allowed to make deliveries in vehicles that they own or lease.

For compliance purposes, all licensees' vehicles are subject to search and inspection without a search warrant by authorized employees of the Division, sheriffs, deputy sheriffs, and police officers during business hours or other times the vehicle is being used to transport or deliver alcoholic beverages.[12]

Craft breweries that also hold a vendor's licenses are specifically prohibited from making deliveries under this law.[13]

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[9] *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.
[10] Punishable as provided in ss. 775.082, 775.083, or 775.084, F.S.
[11] S. 561.57(1)–(2), F.S.
[12] *Id.*
[13] Ss. 561.221 (2)(d), F.S.; 565.57(1), F.S.

Business Relations between Beer Distributors and Manufacturers (Franchise Law)

Section 563.022, F.S. governs the relationship between manufacturers of malt beverages and their distributors. This relationship is highly regulated, and apart from the limited exceptions mentioned previously, Florida brewers are required[14] to enter into a "beer distribution agreement" or "franchise agreement" with a distributor to sell their product in this state. The agreement must be in writing, filed with the state, and conform to statutory requirements.[15]

The Franchise Law specifies that distributors, but not brewers, are prohibited from waiving any of the rights granted to them under the Franchise Law.[16] Section 563.021, F.S., requires an exclusive sales territory agreement for each brand that the distributor sells for a brewer, which must be filed with the Division. A brewer may not enter into more than one distribution agreement for a given brand in a given territory.

Under the Franchise Law, brewers:

- May provide good faith, written notice that the distributor is in default of any agreement.[17]
- May terminate, cancel or refuse to renew the distribution agreement for "good cause."
- May not terminate, cancel, or fail to renew a distribution agreement without "good cause," regardless of the time period specified in the franchise agreement.[18]
    - "Good cause" exists if:
        - The distributor fails to comply with a reasonable and material provision of the agreement;
        - The brewery provided written notice to the distributor within 18 months of the failure;
        - The distributor was given a reasonable opportunity to make a good faith effort to comply with the agreement; and
        - The distributor was given 30 days to submit a corrective action plan, and an additional 90 days to cure in accordance with the plan.[19]

A brewer may terminate for cause, upon 15 days' notice, if the distributor:

- Files for bankruptcy, is insolvent, or is otherwise unable to remain in business.
- Has their state or federal license revoked for more than 60 days.
- Is convicted of a felony, but only if it has an adverse effect on the good will or interest of the distributor or brewer.
- Commits fraudulent conduct on a matter material to the brewer.
- Intentionally sells the brewer's products outside of their exclusive sales territory.
- Fails to pay for products 15 business days after receiving a demand for immediate payment.
- Sells, transfers, or assigns their interest in the distributorship without the written consent of the brewer.[20]

The burden is on the brewery to show that it has acted in good faith, that the notice requirements have been complied with, and that there was good cause for the termination, cancellation, nonrenewal, or discontinuance.[21]

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[14] S. 563.022(15), F.S. The Franchise Law applies to all written or oral agreements between a manufacturer and beer distributor in existence on June 4, 1987, as well as agreements entered into or renewed after June 4, 1987.
[15] *See* Brewer's Law, *Florida Distribution Agreement Guide*, http://brewerslaw.com/wp-content/uploads/2014/06/Florida-Beer-Distribution-Guide.pdf (last visited March 8, 2019).
[16] S. 563.022(13), F.S.
[17] S. 563.022(5)(b)3., F.S.
[18] S. 563.022(5)(b)4., F.S.
[19] S. 563.022(7), F.S.
[20] S. 563.022(10), F.S.
[21] S. 563.022(8), F.S.

A brewer is required to pay reasonable compensation for the diminished value of the distributor's business if the brewer cancels, terminates or fails to renew their agreement, or refuses to consent to the sale of a distributor's interest in the distributorship, without good cause.[22]

If a brewer sells or transfers their interest in the brewery, their successor is also bound by the terms and conditions of the distribution agreement.[23] The Franchise Law allows a brewer to get out of a distribution agreement if they go out of business or stop making the products covered by the agreement, upon not less than 30 days' prior written notice.[24]

In the event of a dispute arising under the Franchise Law, the prevailing party is entitled to recover costs and attorney fees.[25]

Effect of the Bill

Limited Self-Distribution for Craft Brewers

The bill:

- Allows a craft brewery whose annual total production volume is less than 7,000 kegs (~108,500 gallons) per year to sell, transport, and deliver (distribute) its own beer from its licensed premises to vendors in one of the standard keg sizes or similar containers.
    - However, a craft brewery with an existing franchise agreement with a distributor to distribute its product anywhere in the state is not eligible for this exemption.
- Requires that the craft brewer comply with certain distribution-specific laws when acting as a distributor, and exempts the craft brewer from the "come-to-rest requirement."
- Allows brew pubs to transfer beer to a restaurant, of common owner affiliation, which is a part of a restaurant group of not more than 15 restaurants.

Franchise Law - Termination Exemption for Small Accounts

The bill allows any brewery to terminate a franchise agreement with their distributor, after 120 days written notice, but only if the brewer accounts for 10% or less of the distributor's total sales. This provision is available to any brewer, regardless of size or annual production volume.

Franchise Law - Craft Brewery Exemption

The bill exempts small breweries (i.e. total production volume does not exceed 150,000 gallons of malt beverages a year) from the requirements imposed under the Franchise Law.

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

B. SECTION DIRECTORY:

Section 1: Amends s. 561.221, F.S., authorizing a manufacturer who possesses a vendor's license to sell, transport, and deliver to vendors under certain circumstances; providing applicability; authorizing vendors licensed as manufacturers to transfer malt beverages to certain restaurants with common ownership affiliations.

Section 2: Repeals s. 561.5101, F.S.; revising construction relating to come-to-rest requirements.

[22] S. 563.022(17), F.S.
[23] S. 563.022(16), F.S.
[24] S. 563.022(11), F.S.
[25] S. 563.022(18)(c), F.S.

Section 3: Amends s. 561.57, F.S.; authorizing certain manufacturers to transport malt beverages in vehicles owned or leased by certain persons other than the manufacturer.

Section 4: Amends s. 563.022, F.S.; revising the definition of the term "manufacturer"; revising construction; authorizing a manufacturer to terminate a contract with a distributor under certain circumstances.

Section 5: Provides an effective date July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill may require modifications to the Electronic Data Submission system used by the Department of Business and Professional Regulation. The Department has sufficient resources to make the modifications.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may have a positive economic impact on new or small breweries and brew pubs by providing relief from certain regulatory constraints, which will allow them to operate more freely and develop during their early growth stages.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   None.

2. Other:

   The bill amends the Franchise Law to allow any brewery to terminate a franchise agreement with their distributor, after 120 days written notice, but only if the brewer accounts for 10% or less of the distributor's total sales.

   Additionally, the bill exempts small breweries (i.e. total production volume does not exceed 150,000 gallons of malt beverages a year) from the requirements imposed under the Franchise Law.

Article I, section 10 of the Florida Constitution prohibits the passage of any law which impairs the obligation of contracts. Cases interpreting Florida law have held that the application of the Franchise Law, and similar statutes, to contracts existing prior to the enactment of the statutes to be unconstitutional.[26]

However, the Florida Supreme Court has held that, relating to the interpretation of substantive changes to statutory law, the general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively but not retroactively.[27] Florida courts have also held that "Even where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty."[28]

Thus, the provisions in the bill affecting the Franchise Law may be interpreted to apply prospectively.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[26] *Gulfside Distributors, Inc. v. Becco, Ltd.*, 985 F.2d 513, 515 (11th Cir. 1993).

[27] *Smiley v. State*, 966 So. 2d 330, 336 (Fla. 2007). *See also* Eric Glazer and Louis Goetz, *Florida Community Association Law: Contracts Clause Application In An Ever-Changing Legislative Landscape*, Florida Bar Journal, Vol. 89, No. 8 (Sept./Oct. 2015). "In Florida, all laws are presumed to apply prospectively, unless they are remedial in nature, or designed to clarify law already in effect, and the legislature clearly expresses its intention that the law is to apply retroactively."

[28] *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So.3d 873 (Fla. 2010).