

Let's face it: people love to drink.

Blame it on what you will, but the alcohol industry is expanding rapidly with new niches to quench a thirsty market. Flavored liquors, regional wines and craft beers are all the rage – and their operations require a new level of sophistication that the industry has never before seen. Since the repeal of Prohibition, Kentucky has made changes to its alcohol-related laws on an incremental basis. As a result, Kentucky had “a patchwork of laws and regulations that are duplicative, outdated and cumbersome to administer”¹ and more license types than almost any other state in the nation, which created an administrative nightmare and confused licensees.

In response to industry growth, increased number of wet cities and counties, and the need for a comprehensive act, Gov. Steve Beshear appointed a task force to study Kentucky's alcoholic beverage control laws in July of 2012 task force, the first of its kind since 1933 when Gov. Ruby Laffoon appointed a liquor control committee to address the issues raised by the repeal of Prohibition.² The task force was comprised of 22 members that included members of the Department of Alcoholic Beverage Control (Kentucky ABC), Kentucky legislators and various industry groups as well as other groups that deal with alcoholic beverage control issues.³ Many volunteers also participated in the task force. The Governor directed the task force to focus its work on three areas: the number

and types of licenses issued by the state and what activities each license should authorize, the effectiveness of local option elections and the enhancement of public safety and compliance with regulatory requirements.⁴ Based upon its research, the task force approved 34 recommendations, which were incorporated into Senate Bill 13 (“SB 13”), along with other alcohol related items. SB 13 and House Bill 315, which contained proposed legislation permitting breweries to give samples along the same lines permitted by microbreweries, were enacted as law on June 25, 2013.

To effectuate the task force's recommendations, SB 13 consolidated similar license types and both state and local licensing fees, simplified the licensing process and modernized local option laws and laws regarding sales on election days.⁵ SB 13 also strengthened the Kentucky ABC's and local government's public protection powers, reinforced protection of Kentucky's three-tier alcohol distribution system relating to microbreweries, and made fees uniform for the same license types while attempting to keep costs and fees low and maintain revenue neutrality.⁶

LICENSE TYPES

The following license types were changed to simplify the licensing process and/or consolidate similar license types:

Distiller's license – The former souvenir retail liquor license allowed distillers located in wet territory to engage in retail sou-

venir package sales (up to three liters per visitor per day) to consumers at a gift shop or other retail outlet on their licensed premises.⁷ The privileges under the former souvenir retail liquor license have simply been added to the privileges of a distiller's license⁸ so that only one license is now needed. Since almost every distiller located in wet territory held a souvenir retail liquor license, the licenses were merged to eliminate paperwork. Thus, if a distiller is located in wet territory, the distiller automatically has the right to engage in such souvenir package sales; however, a distiller located in dry or moist territory would not have the right to engage in souvenir package sales under this license, or any other license, because the distiller's location in dry or moist territory prohibits retail package sales.

Winery license – The previously named “vintner license” caused confusion because most people associated wine production with a “winery,” not a vintner. It was also difficult to connect with its counterpart, the “Small Farm Winery license,”⁹ which allows licensees to produce up to 50,000 gallons of wine in a calendar year. Because of the difference in names, applicants could not easily identify that the holder of the former vintner's license operated a winery producing more than 50,000 gallons of wine in a calendar year. The name of this license was simply changed to “Winery.”¹⁰

Brewer's license – HB 315 permitted in-state brewer's license holders to offer free samples of

malt beverages in an amount not to exceed 16 ounces per patron, per day if the brewery is located in wet territory.¹¹

Out-of-State Distilled Spirits/Wine Producer/Supplier license – Out-of-state distilled spirits/wine producers/suppliers must now obtain licenses and register products for sale in Kentucky based on the amount of gallons the licensee imports into Kentucky.¹²

Quota Retail Package license and Quota Retail Drink license – Only the names of these licenses have changed from “Retail Liquor Package license” to “Quota Retail Package license”¹³ and “Retail Liquor Drink license” to “Quota Retail Drink license.”¹⁴ These quota licenses are limited in number and set by quota regulations as opposed to non-quota licenses that are infinite in number.¹⁵

NQ1, NQ2 and NQ3 Retail Drink licenses – Several existing non-quota (NQ) licenses were bundled and new types created to simplify and reduce the number of license types. Former license types were grouped together based upon similar costs, qualifications and privileges, but the qualifications and privileges themselves did not change. There are other non-quota licenses, but the NQ designation is not necessarily included in their name. The NQ1, NQ2 and NQ3 retail drink licenses are combo licenses, which means that, with one exception, the holder needs only to hold one license in order to sell all three types of alcoholic

LIFTING THE SPIRITS OF KENTUCKY: HOW THE 2013 LEGISLATIVE CHANGES IMPACT THE ALCOHOL INDUSTRY

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beverages - distilled spirits, wine and beer. An NQ1 license combines the former convention center, horse track, automobile racetrack and the air/rail system licenses. The NQ1 license grants the right to sell distilled spirits, wine and malt beverages.¹⁶ An NQ2 drink license includes the former restaurant drink, motel drink, restaurant wine, airport drink and riverboat licenses.¹⁷ Although the NQ2 license is also a combo license, you should advise your clients that the "combo" designation only adds the privilege to sell malt beverage. Accordingly, a licensee that previously qualified for a restaurant wine license (restricted to wine sales only) will now be allowed to sell only wine and beer, not distilled spirits. All other holders of an NQ2 license that previously qualified to hold a restaurant drink, motel drink, airport drink or a riverboat license have the right to sell distilled spirits, wine and malt beverages. An NQ3 license now contains what was previously known as the special private club, dining car liquor and dining car beer licenses; these holders have the right to sell distilled spirits, wine and malt beverages.¹⁸

NQ4 Retail Malt Beverage Drink license/NQ Retail Malt Beverage Package license – SB 13 created the NQ4 retail malt beverage drink and the NQ retail malt beverage

package licenses by dividing the privileges of the former retail malt beverage license. The NQ4 retail malt beverage drink license permits malt beverage drink sales only for consumption on a licensed premises.¹⁹ The NQ retail malt beverage package license permits malt beverage package sales only for consumption off the licensed premises.²⁰ It is possible to simultaneously hold both licenses.²¹ The two separate retail malt beverage licenses were created to eliminate the licensing scheme conflict with retail distilled spirits and wine license types, which separated its retail license types by either by the drink allowing consumption only on the premises or by the package allowing consumption only off the premises prior to SB 13.

Special Temporary Distilled Spirits and Wine Auction license – SB 13 clarified that a caterer may cater an event for which a special temporary distilled spirits and wine auction license has been issued.²²

Bonds – Bonds were eliminated as a requirement to the following licensing types: distiller's, winery, brewer's, rectifier's, non-resident distilled spirits/wine transporter, wholesaler's, and bottling house. Bonds are still required by federal law for some licensees.

Master Files – SB 13 amended KRS 243.380 to allow a business with more than two licensed premises in Kentucky to submit common information about ownership, management and

criminal background checks (if current) only once for all separately licensed premises in one master file. Such businesses only need to amend the master file information for material changes required by KRS 243.390(2) or ownership changes described in KRS 243.360.

Bundling of License Types – The "bundling" of the following license types eliminated unnecessary licenses without changing the qualifications and privileges of the former license types:

Rectifier's license – The former blender's license was eliminated and its privileges were consolidated into the rectifier's license.²³

Special Agent or Solicitor's licenses – The nonresident special agent or solicitor's license was eliminated and its privileges consolidated into a general license for both in-state and out-of-state licensees.²⁴

Transporter's license – The following six licenses types were consolidated into one transporter's license²⁵: the transport non-resident, Through transporter's, freight forwarder's, transporter's (for liquor), transporter (malt beverage) and special beer transporter's.

Malt Beverage Storage license – The following three licenses types were consolidated into one malt beverage storage license²⁶: the malt beverage warehouse, distributor's storage and the off-premise retail storage.

Distilled Spirits/Wine Storage license – The special storage or warehouse license and the bonded warehouse license were consolidated into one distilled spirits/wine storage license.²⁷

Special Non-Beverage Alcohol license – The special non-industrial alcohol license and special industrial alcohol license were consolidated into the non-beverage alcohol license.²⁸ The holder of the new special non-beverage alcohol license is permitted to make ethanol fuel.²⁹

Special Temporary license – Special events held on unlicensed premises have been required to obtain certain types of "temporary" licenses to sell alcoholic beverages for just that special event. The former special temporary malt beverage license, special temporary wine license and special temporary liquor/wine license were consolidated into the special temporary license.³⁰ The special temporary license includes only the privileges contained in the former licenses and only authorizes alcoholic beverage sales types that are permissible in the territory in which the event is held. Specifically, a special temporary license only authorizes distilled spirits drink sales if the qualifying special event occurs in a wet territory where quota retail drink licenses are permitted.³¹ In all other cities and counties, the holder of a special temporary license may only sell wine or malt beverages by the drink.³²



Historically, the concept was that the “special event” was a county fair, city festival, or similar type of civic or community event. Applicants abused the license, however, and applied for events outside the intended scope of the license. Although the qualifications for non-profit or charitable groups have not changed, to prevent abuses, “for-profit” applicants may now only obtain a temporary license for a bona fide civic event. For-profit applicants are now required to submit written documentary evidence supporting the civic nature of the event and showing the local government’s knowledge and support of the event. The Kentucky ABC requires a resolution from the local government, a letter from a mayor or similar local official with authority, or a newspaper article detailing the civic nature of the event. Marketing materials such as brochures and advertisements will not suffice. A different type of temporary license, the special temporary distilled spirits and wine auction, remains unchanged by and did not merge into this new license.

MODIFICATIONS TO STATE LICENSING FEES AND THE ANNUAL RENEWAL SCHEDULE

SB 13 further attempted to correct inconsistencies and inequalities in license fees. Prior to SB 13, licensees had as many as four different state licensing fees depending upon the type of license and the class of city or county in which a licensee was located. For example, under the former KRS 243.030, the license fee for the retail liquor drink license was \$1,000 for a county containing a city of the first class or consolidated government (e.g., Louisville); \$700 for a county containing a city of the second class (e.g., Lexington); \$600 for a county containing a city of the third class (e.g., Independence); and \$500 for a county containing a city of the fourth class (e.g., Bardstown).³³ There is now only one fee for the same license type, regardless of location. Accordingly, a licensee in the aforementioned example

would now only pay \$620 to the state for a quota retail drink license regardless of whether located in Louisville, Lexington, Independence or Bardstown.³⁴

SB 13 also modified the licensing fee amounts in an effort to remain revenue neutral. Based on the task force’s recommendations, a serious attempt was made to calculate fees equitably across all license types, and changes were not made for the purpose of increasing state licensing fees. Notably, some license fees actually decreased. Consolidated fees remained low in an effort to protect licensees in smaller class cities and counties that may not generate as much revenue as their counterparts located in larger cities and counties.

The state licensing renewal schedule was simplified, and state renewals are now scheduled by month for specific counties instead of by zip code. Previously, retailers in the same city with different zip codes, but literally located across the street from one another, had different license renewal dates, and that caused confusion when wholesalers and distributors attempted to fill orders. These changes mainly affect licensees in larger cities, such as Louisville and Lexington.

To incorporate the statutory modifications into licensing, the Kentucky ABC recently issued replacement state licenses to all existing license holders. The replacement licenses show the new license types in place of the eliminated ones, but the expiration dates of these licenses remain the same. Licensees are required to replace their old state licenses with the new ones and correct licensing numbers on the exterior windows or doors. You should advise your clients that their failure to do so by Sept. 1, 2013, could result in violations issued by the Kentucky and/or local ABCs.

If a licensee’s renewal schedule does change, the Kentucky ABC will phase in the new renewal schedule by requiring the li-

icensee to renew twice in the next year. Licensees should receive their state renewal notices as normal even if the expiration month is changing. The renewal form will permit a licensee to renew the licensee’s existing licenses and pay a pro-rated fee to keep the licenses active during the transition period this year. The second renewal form will allow the licensee to renew on the full year schedule as anticipated by the statutory modifications. Since local governments are not required to renew local licenses based on the state’s licensing renewal schedule, the local renewal date may not mirror the state renewal schedule.

Holders of producer, wholesaler and distributor licenses now have the option to renew their respective licenses for a one-year or a two-year licensing period, instead of just a one-year license as was required prior to SB 13.³⁵ This two-year licensing period and renewal option, however, is not available to retail licensees.

MODIFICATIONS TO LOCAL LICENSES AND FEES

Courts have held that since the alcoholic beverage laws in KRS Chapters 241-244 are a comprehensive body of law, statutory authority for city and county ordinances must be specific and unequivocal. The legislative body of any wet or moist county or city may impose local license fees for the privilege of manufacturing and trafficking in alcoholic beverages,³⁶ but only those license types listed in KRS 243.060 and KRS 243.070 may be issued at the local level. Local license types were also revised to be consistent with the new state license types.³⁷ Cities and counties were advised to amend their local ordinances to reflect the new license types to avoid court challenges that local ABC approval was no longer required and that the applicable cities and counties could no longer charge an applicant a licensing fee for a license type that no longer exists.

Unlike state license fees, local li-

cence fees were not standardized to one fee for the same license type. SB 13, however, did reduce the number of different fees for the same license type from four to two,³⁸ although not all local licenses have different fees. For those license types with two different fee amounts, the different fees are based upon whether the licensed premises is located in a county containing a consolidated local government or located in some other county.³⁹

In consolidating the four fees, the maximum license fee amounts permitted will increase for some counties and cities. To protect licensees from drastic increases in county and city fees, current fees may not be increased by more than 5 percent during any five-year period.⁴⁰

NEW STATE LAW ALLOWING RETAIL ALCOHOL SALES ON ELECTION DAYS

Prior to the passage of SB 13, Kentucky was one of only four states left in the nation to prohibit the sale of alcohol on primary and general election days while the polls were open.⁴¹ To modernize Kentucky’s laws, SB 13 amended KRS 244.290 and KRS 244.480 to permit licensees to sell alcoholic beverages on any primary, regular, local option or special election days as the default state law. SB 13 authorized cities of the first four classes, and counties containing cities of the first four classes, to adopt local ordinances to prohibit alcoholic beverages sales, or limit the hours of sales, on any primary, regular, local option or special election day if such locale desires to prohibit such sales.⁴² Although counties and cities are not required to enact such ordinances, if prohibition is desired on election days by an authorized local government that did not previously have an ordinance to that effect in place, an ordinance must be passed to prohibit such sales. If no local ordinance exists, whether currently in effect or enacted with the passage of SB 13, retail alcohol sales will be permitted, by default, under state law.⁴³

LOCAL OPTION ELECTION LAW CHANGES

What are local option election laws? Following the repeal of Prohibition, Kentucky Constitution Section 61 provided local communities with the right to choose whether to legalize the sale of alcoholic beverages.

Many communities decided to remain dry or partly dry (moist), which meant that alcohol sales were banned or restricted. To this day, more than 50 percent of Kentucky geographically remains dry or moist. Citizens in a community can hold a local option election and decide to legalize or prohibit the sale of alcoholic beverages, or authorize a limited form of alcoholic beverage sale (moist).

SB 13 attempted to correct many problems in Kentucky's existing local option election laws. For the sake of convenience, all local option election laws were placed in KRS Chapter 242, and any laws dealing with unrelated issues such as licensing and ordinances were moved to KRS Chapters 243 or 244. KRS Chapter 242 now better explains which territories can have local option elections and how petitions should be worded. KRS Chapter 242 specifically addresses new "moist" territories where voters only approve a limited form of alcoholic beverage sales in a territory. Although the term "moist" was previously used in the industry, it held different meanings for various industry members. It has now been defined by SB 13 to mean "a territory in which a majority of the electorate voted to permit limited alcohol sales by any one (1) or a combination of special limited local option elections. . . ."⁴⁴ Limited alcohol sales (moist) elections are held only for limited restaurants, golf courses, small farm wineries, qualified historic sites, and horse race-tracks.⁴⁵ The local option election rules were also modernized to more closely follow KRS Chapter 117 dealing with primary and general elections. KRS 242.125, dealing with city elections to become wet separate

from the county, was amended to be more comprehensible. All possible combinations of "wet," "dry" and "moist" status of cities and counties to permit those cities and counties to hold full wet elections are now recognized under amended KRS 242.125.

PUBLIC SAFETY AND PROTECTION

SB 13 expanded the scope of the disorderly premises statute, KRS 244.120, to provide the Kentucky ABC and local ABC administrators with additional powers to protect the public. Specifically, KRS 244.120 was amended to prohibit disorderly conduct by licensees' employees because the Franklin Circuit Court held in *Hofbrauhaus Newport, LLC v. Department of Alcoholic Beverage Control*, Civil Action No. 11-CI-1345, that the prior language of the statute only applied to patrons' conduct, and not the conduct of the licensee's employees. The court held that the Kentucky ABC was powerless to reprimand a licensee whose premises became disorderly by virtue of the licensee's own employees' conduct, which was ironic since licensees can legally exhibit more control over an employee's behavior than they can

a patron's behavior. Further, in addition to existing prohibitions, the acts constituting disorderly conduct were enlarged to include: creating a public nuisance; engaging in criminal activity that would constitute a capital offense, felony, or misdemeanor; and failing to maintain the minimum health, fire, safety, or sanitary standards established by the state or a local government, or by state administrative regulations, for the licensed premises.⁴⁶

Following a rising trend in other states, SB 13 created a new medical amnesty law.⁴⁷ Its purpose is to encourage individuals to seek needed emergency medical attention for a minor or others due to alcohol poisoning. If certain strict requirements are met, the law would provide immunity from criminal prosecution to both minors and adults for less serious offenses such as alcohol intoxication, drinking alcoholic beverages in a public place, and possession of alcoholic beverages by an individual under 21 years of age, but not for more serious offenses such as driving under the influence. Based on discussions with various university representatives, the task force learned that after

a night of binge drinking, college students failed to call for medical help for themselves or for a friend because of the fear of punishment from law enforcement. The expectation is that the universities will educate their students about this law and it will save lives.

THREE-TIER SYSTEM PROTECTIONS RELATING TO MICROBREWERIES

To deter business activities and abuse which resulted from Prohibition, Kentucky and other states have adopted a three-tier alcohol distribution system. The basic structure of that system is that producers (the makers of the alcohol) can sell their products only to wholesalers or distributors who then sell to retailers, and only retailers may sell to consumers. The three-tier system is designed to encourage competition and protect a retailer from being forced to only carry only one producer's product.

Under prior law, a microbrewery produced malt beverages but was also granted the special privilege of obtaining the former retail malt beverage license to authorize retail beer sales at the microbrewery. Because of the separation of the former retail

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malt beverage license, micro-breweries are now required to obtain one or both of the new retail malt beverage license types in order to sell malt beverages at retail. Furthermore, SB 13 now permits microbreweries to sell limited amounts of malt beverages (288 ounces per customer per day) produced on the premises without having to transfer physical possession of those malt beverages to a licensed distributor, and then back to itself as retailer.⁴⁸ To protect the three-tier system, micro-breweries are required to file monthly reports and collect and provide all taxes due to licensed distributors.⁴⁹

Although SB 13 corrected many of the problems and inconsistencies that troubled Kentucky's statutory alcohol scheme, it did not solve all of them. Among others, the task force emphasized that further study was required to prevent abuses by applicants attempting to hide

foreign or disqualifying ownership in multi-level entity structures.⁵⁰ That said, the passage of SB 13, a bill devoted solely to alcohol, reduced state license types from 88 types to 44 types without eliminating existing license privileges. And *that* in and of itself deserves a toast. **B&B**

¹ Governor's Task Force on the Study of Kentucky Alcoholic Beverage Control Laws, Executive Summary at i (January 2013).
² Minutes of the Governor's 2012 Task Force on the Study of Kentucky's Alcoholic Beverage Control Laws dated August 16, 2012.
³ A complete list of the 22 members of the Task Force can be found in the Amended Exec. Order no. 2012-590 (August 14, 2012).
⁴ Exec. Order no. 2012-683 (July 18, 2012).
⁵ 2013 Ky. Acts 518.
⁶ *Id.*
⁷ KRS 243.0305 (amended 2013).
⁸ KRS 243.0305.
⁹ KRS 243.155.
¹⁰ KRS 241.010(63), 243.120, and 243.130.
¹¹ KRS 243.150(3).
¹² KRS 243.212.
¹³ KRS 243.240.
¹⁴ KRS 243.250.

¹⁵ KRS 241.065 and 804 KAR 9:010, Section 1 and Section 2.
¹⁶ KRS 243.082.
¹⁷ KRS 243.084.
¹⁸ KRS 243.086.
¹⁹ KRS 243.088.
²⁰ KRS 243.280(1)(a).
²¹ KRS 243.280(3).
²² KRS 243.033(4).
²³ KRS 243.120 and 243.130.
²⁴ KRS 243.340.
²⁵ KRS 243.205.
²⁶ KRS 243.353.
²⁷ KRS 243.355.
²⁸ KRS 243.320.
²⁹ KRS 243.320(4).
³⁰ KRS 243.260.
³¹ KRS 243.260(3).
³² KRS 243.260(4).
³³ KRS 243.030(8).
³⁴ KRS 243.030.
³⁵ KRS 243.090(4).
³⁶ KRS 243.060 and KRS 243.070.
³⁷ *Id.*
³⁸ KRS 243.060 and 243.070.
³⁹ *Id.*
⁴⁰ KRS 243.060(2) and 243.070(16).
⁴¹ The other states that still prohibit alcohol sales while the polls are open on election days are Alaska, Massachusetts and South Carolina, although local governments can exempt their communities from the prohibition in Alaska and Massachusetts.

⁴² KRS 244.290 and KRS 244.480.
⁴³ *Id.*
⁴⁴ KRS 241.010(36).
⁴⁵ See KRS 242.1244, 242.123, 242.124, 242.1242 and 242.1238.
⁴⁶ KRS 244.120.
⁴⁷ KRS 244.992.
⁴⁸ KRS 243.157.
⁴⁹ *Id.*
⁵⁰ Governor's Task Force on the Study of Kentucky Alcoholic Beverage Control Laws at xxvii and xxviii (January 2013).



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