

Texas Alcoholic Beverage Commission
Quarterly Update to the Senate Business and Commerce Committee
October 15, 2013

IMPLEMENTATION OF BEER-RELATED LEGISLATION

TABC has implemented, without significant problems or concerns, all beer-related legislation that went into effect following the 83rd Legislative Session.

SB 515 by Eltife authorizes a brewpub to manufacture up to 10,000 barrels a year instead of 5,000. Authorizes brewpubs to sell their own malt beverages to wholesalers and distributors. Authorizes brewpubs holding a BG permit who only sell their own product to sell to retailers (up to 1,000 barrels), and to any qualified person outside of Texas. Effective 6-14-13.

Brewpubs who wish to sell their products to distributors must submit a territorial agreement to TABC and receive label approval on the products. At this time, no brewpubs have submitted territorial agreements. Five brewpubs have obtained label approval for products, indicating that they expect to sell their product to retailers, distributors, or ship to qualified persons outside of Texas.

Three new brewpub licenses have been issued since May 1, 2013, which is consistent with previous growth. There are now 50 brewpubs in Texas. 28 with Wine and Beer Permits (BGs) and 22 with Mixed Beverage Permits (MBs or RMs).

One brewery, Jester King in Austin, has turned in their brewery permit and obtained a brewpub license. Benefits of being a brewpub include the additional authority to sell their product for off-premise consumption, sell other people's wine and beer for on- and off-premise consumption, and to obtain temporary permits to sell other products at a location away from the licensed premises. As a brewery or brewpub, they could sell for on-premise consumption, sell to distributors, and in some cases, sell to retailers.

Two issues have been raised relating to this new legislation which perhaps were not fully understood by brewpubs until the new laws were in place. First, although SB 515 authorizes certain brewpubs to sell directly to retailers, it does not give them the authority to transport their product. Because no special permit is required to transport beer (up to 4% ABW), the brewpubs can make those deliveries. However, a permit is required to transport ale (over 4% ABW); therefore brewpubs will need to contract with the holder of a carrier's permit to deliver those products to retailers.

Second, the Alcoholic Beverage Code authorizes brewpubs to sell their own products only at the licensed location. Therefore, if a brewpub obtains a temporary permit or caterer's permit for a special event away from the brewpub, they are not authorized to sell their own beer or ale – only other brewery products. They would have to sell their own product to a distributor, and then purchase it back, having the distributor deliver the product to the location where the special event is being held.

SB 516 and SB 517 by Eltife changed the limits on small brewers and manufacturers selling directly to retailers. Under previous law, a brewer or manufacturer who made less than 75,000 barrels annually could self-distribute any amount. Under SB 516 and SB 517, a brewer or manufacturer who makes less than 125,000 barrels annually can obtain a self-distribution permit or license and sell up to 40,000 barrels to retailers annually. Effective 6-14-13.

These new laws have not been implemented yet. Although SB 516 and SB 517 went into effect June 14th, TABC was unable to begin issuing the new permit and license types until a rule was passed establishing a surcharge. The new rule will become effective October 24, 2013, and the agency will begin accepting applications and issuing the licenses and permits. In the meantime, those brewers and manufacturers who were already selling direct to retailers have been allowed to continue these sales without the new license/permit through January 1, 2014, when they will have had adequate opportunity to obtain the new license/permit.

SB 518 by Eltife authorizes manufacturers and brewers who produce less than 225,000 barrels of malt beverages annually to sell up to 5,000 barrels annually of malt beverages produced on the premises to visitors at the brewery for on-premises consumption. Effective 6-14-13.

Brewers and manufacturers who were previously providing free malt beverages to visitors at the brewery are now charging for these drinks. TABC has not been made aware of any problems created by this new authority. However, the agency will be reviewing TABC Administrative Rule 45.103 On-Premise Promotions. Currently, this rule applies to retailers and prohibits happy hour practices and drink specials that can be construed as encouraging excessive consumption. Because all members of the manufacturing level now have the authority to act as retailers, the agency believes the same restrictions should apply to breweries, wineries and distilleries.

Six new breweries have been issued permits since May 1, 2013, and another application is pending. This is consistent with previous industry growth. There are currently 71 total breweries in Texas; 66 are craft brewers and five are very large breweries.

An issue that has arisen that may not have been considered prior to implementation was that when breweries were given the authority for retail sales, it placed additional restrictions on applicants. This includes having to have an application for a new permit certified by the city and county to state that the location is wet for the sale of malt beverages for on-premise consumption. If the brewer/manufacturer intends to sell for on-premise consumption, a city *might* refuse to certify (or protest upon renewal) if location isn't wet for on-premise consumption.

A sign is required to be posted at the premises for 60 days before TABC can issue a permit, notifying the community that the application is being filed. Notification must be

provided to any residences and homeowner's associations within 300 feet of the brewery that the application is being filed.

SB 639 by Carona clarifies the prohibition on reach-back pricing and prohibits a manufacturer from accepting payment for a territorial agreement. Nothing in section 102.75 AB Code shall interfere with the rights of a manufacturer or distributor from entering into contractual agreements that could be construed as governing ordinary business transactions. Nothing in the Code prohibits contractual agreements between members of the same tier who hold the same licenses and permits. Effective 6-14-13.

Although this new legislation has resulted in many discussions about legislative intent and the precise meaning of language in the bill, there have been no complaints filed and no contractual agreements called into question.

HB 3307 by Geren defines alternating brewery proprietorship and contract brewing arrangement and authorizes brewers, nonresident brewers, manufacturers and nonresident manufacturers to engage in these activities, removing the requirement that they have been in business on May 1, 2005. A bond is required for an entity involved in these activities that does not own a fee interest in a brewing facility.

A brewer, nonresident brewer, manufacturer and nonresident manufacturer shall verify to TABC on an annual basis that a brewing or manufacturing facility owned or controlled by the permit or license holder is not used to produce malt beverages primarily for a specific retailer or the retailer's affiliates. Effective 9-1-13.

TABC has issued one permit to a new brewery location in Fort Worth that we believe intends to provide contract brewing services to other entities. There are a number of brewery locations outside of Texas that hold TABC permits and will likely participate in contract brewing.

IMPLEMENTATION OF DISTILLERY-RELATED LEGISLATION

SB 828 by Van de Putte created a Distiller's Agent's Permit for employees of a distillery so they can represent the distiller, solicit and take orders from wholesalers and conduct free tastings for consumers at package stores. Effective 9-1-13.

This new law has not been implemented yet. Although SB 828 went into effect September 1st, TABC was unable to begin issuing the new permit type until a rule was passed establishing a surcharge. The new rule will become effective October 24, 2013, and the agency will begin accepting applications and issuing the permits.

SB 905 by Van de Putte authorizes a distillery located in a wet area to sell distilled spirits manufactured by the permit holder to the ultimate consumer:

- for consumption on the licensed premises (up to 3,000 gallons annually) and
- for consumption off the premises (up to 3,500 gallons annually)

- in unbroken packages containing no more than 750 ml
- no more than two 750 ml bottles or the equivalent to the same consumer in a 30-day period.

Hours of sale are the same as a mixed beverage or package store permit, depending on whether sale is for on- or off-premises consumption. No shipping or delivery or buying for someone else. The bottle must “bear a notice affixed to the bottle that” says the bottle is commemorative, states the month and year the bottle is sold and is signed by an agent/employee of the permit holder. Effective 9-1-13.

An issue that has arisen that may not have been considered prior to implementation was that when distilleries were given the authority for retail sales, it placed additional restrictions on applicants. This includes having to have an application for a new permit certified by the city and county to state that the location is wet for the sale of distilled spirits for on- or off-premise consumption. If the distiller intends to sell for on-premise consumption, a city *might* refuse to certify (or protest upon renewal) if location isn’t wet for on-premise consumption. The same applies for off-premise sales.

A sign is required to be posted at the premises for 60 days before TABC can issue a permit, notifying the community that the application is being filed. Notification must be provided to any residences and homeowner’s associations within 300 feet of the brewery that the application is being filed.

IMPLEMENTATION OF OTHER LEGISLATION

HB 2806 by Geren states that a retail/winery account is not “delinquent” if the payment is received by the wholesaler not later than the fourth business day after the date payment is due under the credit law system. Effective 6-14-13.

An issue has arisen regarding how to handle payments received after the fourth business day if they are paid by a check that has insufficient funds. In the past, if a payment had not been made by the due date, it would have to be made by cash or cash equivalent to prevent a bounced check after it was too late to add the entity to the delinquent list. Under the new law, because the payment is not delinquent until four days after the due date, it does not provide the additional time necessary to discover a check has bounced and report the retailer to TABC to be placed on the delinquent list. TABC and industry parties are working together to resolve this issue through rulemaking and possibly a change in TABC’s reporting system..

HB 2818 by Sheffield changed the statutes regarding the effect of local option elections. Current law states that if a justice precinct (JP) holds an election, the only way to over-ride that election is to hold a subsequent election within the same boundaries of the JP at the time of the first election, even if the boundaries have changed or the precinct no longer exists. HB 2818 authorizes a new election to be held using the current justice precinct boundaries.

HB 2818 also authorizes the issuance of wine and beer retailer (on- and off-premise) permits (BGs), retail dealer's on-premises licenses (BEs), or late hours licenses (BLs), in an area that has approved the sale of mixed beverages (spirits, wine, and beer for on-premises consumption), and approved the sale of wine and beer for off-premises consumption.

Finally, HB 2818 authorizes the issuance of wine and beer retailer (on- and off-premise) permits (BGs), retail dealer's on-premises licenses (BEs), or late hours licenses (BLs), to restaurants that hold a Food and Beverage Certificate in an area that has approved the sale of mixed beverages in a restaurant that holds a Food and Beverage Certificate and approved the sale of wine and beer for off-premises consumption. Effective 9-1-13.

An unintended consequence of this legislation is that it authorizes late hours licenses based on local option status, whether or not the city or county has legalized late hours. We are working with cities and counties to ensure that TABC does not issue any late hours permits where late hours has not been legalized either automatically based on population or via a local ordinance. This is an issue that TABC believes needs to be clarified during the next legislative session.

SB 1035 by Carona was intended to streamline the licensing process by 1) having license applicants pay state fees directly to TABC instead of the county tax assessor-collector; 2) eliminating the requirement of hearings before the county judge in non-contested cases (no protests) but increasing the fee from \$5 to \$25; 3) codifying the practice of TABC giving 5% of the license fee to the county; 4) requiring that notice of application be posted in a newspaper by the applicant instead of the county clerk. Effective 9-1-13.

TABC has been meeting with city and county clerks, judges and tax assessor collectors training employees on the new license process. Implementation has been delayed awaiting new rules to become effective, but we expect the new processes to be positive for everyone involved.