

Microbrewers and Brewpubs in Wisconsin: Knowing the Restrictions is Half the Battle

Wisconsin and other state governments regulate the distribution of beer through three independent tiers: manufacturers, wholesale distributors, and retailers. Originally devised following Prohibition, this system was developed to protect against monopolies and to provide clearly accountable sales and tax records.



Steven Anderson,
Attorney at Ruder Ware

But not everyone is happy with this model. Many brewers and brewpubs find themselves between a rock and a hard place when it comes to selling their product. For the “big boy” brewers producing more than 300,000 barrels of beer a year, selling beer means having to contract with a single distributor per brand, per designated sales territory—which is no problem if you’re Miller-Coors and you want to keep Anheuser-Busch from buying up Wisconsin distributors. But if you’re a smaller brewer, or a microbrewer, and you want to take advantage of distributors’ economies of scale—you’ve got to make a bit of a devil’s deal.

Microbrewers—particularly brewers which produce less than 300,000 barrels of beer per calendar year—may opt to sell directly to retailers without going through a wholesale distributor. But then they’ve got to pay shipping costs, drivers, salespeople—and for some microbrewers, it makes much more sense to contract with a distributor, pay a certain portion of the profits from retailers, and not have to worry about the costs of distribution. But microbrewers need to be careful before signing on the dotted line with a distributor.

Unless a distributor engages in fraud or some other bad faith, Wisconsin law prohibits a brewer from continuing to sell its beer through a “successor” distributor after firing its original distributor—until the “successor” distributor pays the “terminated” distributor “fair market value” for the rights to distribute that brewer’s beer. “Fair market value” is not well defined, and as such is simply the negotiated price between two distributors. What does this mean for a microbrewer? It means that it can be very difficult to get out of a contract with a distributor—oftentimes, when microbrewers sign up with a distributor, they’re stuck with that distributor. As a microbrewer, if you’re unhappy with your distributor, you’ve got to find another distributor to pay “fair market value” to your current distributor—whatever that means—before you can switch. Finding a “successor” distributor can be a

Without question, the greatest invention in the history of mankind is beer. Oh, I grant you the wheel was also a fine invention, but the wheel does not go nearly as well with pizza.

—Dave Barry

very difficult proposition, particularly with distributor consolidation in attractive markets.

Wisconsin law also restricts brewers’ flexibility in sales to end-consumers. Statutes authorize retail sales for on-site consumption on the brewery premises, for example, or sales for off-site consumption in “original unopened packages or containers.” But what about refillable growlers? Forget it, if you have a brewer’s license. To sell growlers, you need to be a “brewpub.” To be a brewpub under Wisconsin law, you must have a brewpub license. And to get a brewpub license, all of the following must be true:

- The brewpub manufactures less than 10,000 barrels of beer a year.
- The entire process for manufacturing beer occurs on the brewpub premises.
- There is a restaurant on the premises for which a restaurant permit is issued.
- The brewpub holds a Class “B” license for the restaurant (meaning it can sell alcohol to be consumed on or off the premises), and that restaurant must offer for sale, in addition to its own brews, beers produced by another brewer.

Microbrewers and brewpubs are restricted in what they can sell to end-consumers, and in how they can distribute their own beer. They cannot, for example, form their own distribution company (because wholesalers and brewpubs cannot simultaneously own a brewer’s license). Nor can they sell directly to retailers if they brew more than 300,000 barrels of beer in a year. All of these restrictions—besides hindering microbreweries and brewpubs from branching out into new markets—create a regulatory environment in which microbrewers and brewpubs have to be very careful in how they conduct their operations. Knowing the law—as unsavory as it may be—can become a major competitive advantage for any company in the business of making and selling beer.