

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 261 Beverage Law
SPONSOR(S): Tomkow, Josie
TIED BILLS: IDEN./SIM. **BILLS:** SB 242

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	8 Y, 7 N	Willson	Anstead
2) Government Operations & Technology Appropriations Subcommittee			
3) Commerce Committee			

SUMMARY ANALYSIS

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.

The bill amends s. 561.42, F.S., clarifying certain terms, prohibitions, and exemptions contained in the tied-house evil law.

The bill creates s. 561.42(16), F.S., providing that the tied house evil prohibition does not apply to a written agreement for brand naming rights, including the right to advertise collectively, between a manufacturer or importer of malt beverages and a vendor if:

- The agreement is negotiated at arm's length for no more than fair market value;
- The vendor operates places of business where consumption on the premises is permitted, which premises are located within a theme park complex comprised of at least 25 contiguous acres owned and controlled by the same business entity and which contains permanent exhibitions and a variety of recreational activities and has a minimum of 1 million visitors annually through a controlled entrance and exit;
- The agreement does not involve the sale or distribution of malt beverages;
- The vendor does not give preferential treatment to the alcoholic beverage brands of the manufacturer or importer;
- The agreement does not limit, directly or indirectly, the sale of alcoholic beverages of another manufacturer, importer or distributor;
- Within 10 days after execution of the agreement, the vendor files a description of the written agreement for brand naming rights which includes the location, dates, and the name of the manufacturer or importer that entered into the agreement.

The bill prohibits a distributor from paying any portion of the agreement, and specifies that the agreement may not in any way obligate or place responsibility, financial or otherwise, on a distributor.

The bill provides that a manufacturer, importer or vendor that violates the written agreement for brand-naming rights and associated cooperative advertising provisions is subject to certain civil penalties.

The bill does not have a fiscal impact on state or local governments.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Beverage Law, Generally

In Florida, the Beverage Law¹ 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, 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 are generally prohibited from holding a vendor’s license.⁶ Manufacturers are also generally prohibited from having an interest in a vendor and from distributing directly to a vendor.⁷

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.⁸

¹ Section 561.01(6), F.S., provides that 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. 561.22(1), F.S.; s. 561.14(3), F.S. However, see the exceptions provided in ss. 561.221 and 565.03, F.S.

⁷ Ss. 563.022(14) and 561.14(1), F.S.

⁸ 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 prohibits a licensed manufacturer or distributor from:

- having any direct or indirect financial interest in any vendor;
- assisting any vendor using gifts, loans, money or property of any description (except for bottles, barrels or other containers necessary for the transportation of beverages);
- giving any rebates of any kind whatsoever;
- engaging in cooperative advertising with a vendor;
- naming a vendor in any advertisement for a malt beverage tasting; and
- paying for particular placement, signage, or other brand promotion within a vendor premises for malt beverages produced by the manufacturer.⁹

However, the Tied House Evil Law authorizes a manufacturer or distributor of malt beverage to:

- Sell, at not less than cost, **branded expendable retailer advertising specialties** to a vendor (trays, coasters, mats, menu cards, napkins, cups, glassware, thermometers, etc.).
- Lend without charge, rent, or sell **durable retailer advertising specialties** which bear advertising matter to a vendor (clocks, pool table lights, etc.).
- Sell, at not less than cost, **consumer advertising specialties** to a vendor (ashtrays, T-shirts, bottle openers, shopping bags, etc.).¹⁰

Additionally, a distributor of malt beverages is allowed to:

- sell, at not less than cost, draft equipment and tapping accessories to a vendor;
- exchange, or provide without charge, any parts that are not compatible with a competitor's system and are necessary to dispense the distributor's brands;
- provide, without charge, replacement parts of nominal intrinsic value (washers, gaskets, tail pieces, hoses, hose connections, clamps, plungers, and tap markers, etc.); and
- provide, without charge, up to ten cases of glassware to a vendor licensed to sell malt beverages for on-premises consumption, subject to certain conditions.¹¹

Signage

A vendor is prohibited from displaying any sign advertising any brand of alcoholic beverages outside of or on the outside of their establishment, and a manufacturer or distributor may not directly or indirectly give, lend, rent, sell or furnish a vendor with any outside sign. However, a vendor is allowed to display signs and other advertising materials for brands that are sold by the vendor on the interior of their licensed premises.¹²

The Division is authorized to adopt rules and require reports in order to enforce the limitations established under the Tied House Evil Law relating to credits, coupons, and other forms of assistance.¹³

⁹ S. 561.42, F.S.

¹⁰ S. 561.42(14), F.S.

¹¹ *Id.* Specifically, a distributor that receives glassware at no charge on a no-charge invoice from a malt beverage manufacturer or importer may give such glassware to a vendor licensed to sell malt beverages for on-premises consumption. Each piece of glassware given to a vendor by a distributor must bear a permanent brand name intended to prominently advertise the brand. A distributor may not give a vendor more than 10 cases of glassware per calendar year per licensed premises. A vendor that receives a gift of glassware from a distributor may not sell the glassware or return it to a distributor for cash, credit, or replacement. A manufacturer or importer who sells or gives glassware to a distributor, a distributor who sells or gives glassware to a vendor, and such vendor, must maintain records of such sale or gift of glassware.

¹² s. 561.42(10)-(12), F.S. However, only one neon, electric, or similar sign per manufacturer may be displayed in a window.

¹³ S. 561.42(8), F.S.

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.

Effect of the Bill

The bill amends s. 561.42, F.S., clarifying certain terms, prohibitions, and exemptions contained in the tied-house evil law.

Sale or Purchase of Merchandise

The bill amends s. 561.42, F.S., to specify that a manufacturer, distributor, importer, primary American source of supply, or brand owner or registrant, or any broker, sales agent, or sales person thereof, may not “directly or indirectly” assist any vendor by “furnishing, supplying, selling, renting, lending, buying for, or giving to any vendor any vehicles, equipment, furniture, fixtures, signs, supplies, credit, fees slotting fees of any kind, advertising or cooperative advertising, or services” unless the manufacturer, distributor, etc., “regularly sells merchandise to vendors” and:

- the sale or purchase is for not less than the fair market value of the merchandise;
- such sale or purchase is not combined with any sale or purchase of alcoholic beverages;
- the sale or purchase is separately itemized from the sale or purchase of alcoholic beverages; and
- both the seller and purchaser maintain records of such sales or purchases.

The bill defines the term “merchandise” as commodities, supplies, fixtures, furniture, or equipment. The term does not include alcoholic beverages or a motor vehicle or trailer requiring registration under ch. 320, F.S.

Written Agreements for Brand-Naming Rights and Associated Cooperative Advertising

The bill provides that, notwithstanding any other provision of the tied house evil law, a manufacturer or importer of malt beverages and a vendor may enter into a written agreement for brand-naming rights and associated cooperative advertising if:

- The agreement is negotiated at arm’s length for no more than fair market value;
- The vendor operates places of business where consumption on the premises is permitted, which premises are located within a theme park complex comprised of at least 25 contiguous acres owned and controlled by the same business entity and which contains permanent exhibitions and a variety of recreational activities and has a minimum of 1 million visitors annually through a controlled entrance to and exit;
- The agreement does not involve the sale or distribution of malt beverages;
- The vendor does not give preferential treatment to the alcoholic beverage brand(s) of the manufacturer or importer;
- The agreement does not limit, directly or indirectly, the sale of alcoholic beverages of another manufacturer, importer or distributor; and
- Within 10 days after execution of the agreement, the vendor files with the division a description of the written agreement for brand naming rights which includes the location, dates, and the name of the manufacturer or importer that entered into the agreement.

The bill prohibits a manufacturer or importer from soliciting or receiving, and prohibits a distributor from paying, any portion of the agreement. The bill also specifies that such an agreement may not in any way obligate or place responsibility, financial or otherwise, on a distributor.

The bill defines "negotiated at arm's length" as the negotiation of a business transaction by independent parties acting in each party's own individual self-interest and conducted as if the parties were strangers, so that no conflict of interest may arise.

The bill provides that a manufacturer, importer or vendor that violates the written agreement for brand-naming rights and associated cooperative advertising provisions is subject to:

- First violation: A civil penalty up to \$25,000 or the financial value of the brand-naming rights agreement, whichever is greater.
- Second violation: A civil penalty up to \$100,000 or the financial value of the brand-naming rights agreement, whichever is greater.
- At the discretion of the division, in lieu of or in addition to the second civil penalty, suspension or revocation of the alcoholic beverage license for a third or subsequent violation occurring within 36 months after the date of the first violation.

The bill provides that a violation occurring more than 36 months after a first violation is deemed a first violation.

B. SECTION DIRECTORY:

Section 1 Amends s. 561.42, F.S., prohibiting certain entities and persons from directly or indirectly assisting any vendor in certain ways; prohibiting a licensed vendor from accepting certain items and services; authorizing the Division to impose administrative sanctions for a violation of certain limitations established in the Beverage Law; prohibiting a vendor from displaying certain signs in the window or windows of his or her licensed premises; authorizing certain entities and persons to give, lend, furnish, or sell certain advertising material to certain vendors; defining the term "decalcomania"; providing exemptions relating to tied house evil for certain sales and purchases of merchandise; providing conditions for the exemptions; defining the term "merchandise"; prohibiting a manufacturer or importer of malt beverages from soliciting or receiving any portion of certain payments from its distributors; defining the term "negotiated at arm's length"; specifying that a brand-naming rights agreement does not obligate or place responsibility upon a distributor; providing civil penalties for violations by manufacturers or importers of malt beverages or vendors; providing applicability; and prohibiting the division from imposing certain civil penalties that are greater than the financial value of a brand-naming rights agreement.

Section 2 Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate. The bill requires DBPR to register financial transactions between manufacturers and vendors. It is unclear at this point how many transactions will occur and it is unclear what, if anything, the bill requires DBPR to do with the transactions once they are received.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Manufacturers and importers of malt beverages and qualified vendors will no longer be prohibited from entering into agreements for brand naming rights under certain circumstances. This relaxation of the Tied House Evil Law may allow certain licensees to benefit financially while negatively impacting other licensees.

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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It may prove difficult for DBPR to determine whether a given financial transaction will, in the future, potentially limit the sale of alcoholic beverages from another manufacturer. Similarly, it is unclear how one would prove that a given transaction has or has not indirectly limited the alcoholic beverage sales of another manufacturer.

Additionally, while the bill narrowly defines the scope of vendors that qualify for the written agreement for brand-naming rights exemption, it does not limit or otherwise specify where such advertising may occur.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES