HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1165 Beverage Law
SPONSOR(S): Commerce Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: 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. The Division of Alcoholic Beverages and Tobacco in the Department of Business and Professional Regulation (DBPR) administers and enforces the Beverage Law.

Relating to alcoholic beverage container sizes, the bill:

- Repeals s. 564.05, F.S., relating to wine container size limitations.
- Repeals s. 564.055, F.S., relating to cider container size limitations.
- Amends s. 564.09, F.S., to clarify when an unfinished bottle of wine may be taken home by a restaurant patron.

Relating to craft distilleries, the bill:

- Clarifies that a craft distiller may blend their product with other distilled spirits.
- Increases the maximum production threshold for craft distilleries from 75,000 to 250,000 gallons.
- Authorizes the issuance of up to 3 vendor's licenses for the sale of alcoholic beverages at a craft distillery's licensed premises.
- Specifies that a craft distillery must have a vendor's license to ship its product to consumers located in Florida.
- Allows a craft distillery to sell, from its souvenir gift shop, up to 75,000 gallons of branded product per year. The craft distillery may not be licensed as a vendor, and such sales must be made in either a face-to-face transaction from the gift shop or as a shipment to a consumer located outside the state.
- Allows a craft distillery to be licensed as a distributor or exporter if the distillery is open to the public for tours, tastings, and sales at least 30 hours per week.
- Specifies that any alcoholic beverages not manufactured on-site by the distillery must be obtained through a licensed distributor, broker, agent or importer.
- Allows a craft distillery to receive a permit to conduct tastings and sales of its liquor products at fairs, trade shows, exhibitions, and festivals, subject to certain conditions.
- Authorizes a craft distillery to conduct liquor tastings anywhere that liquor may be sold.

The bill amends the Tied House Evil Law allowing certain vendors and manufacturers to enter into brand-naming rights agreements under certain conditions.

The bill authorizes certain beverage law licensees to allow dogs in certain areas under certain conditions.

The bill defines terms and establishes a framework for the return of malt beverage products that are damaged, undamaged, or out of code, including the return of product for freshness reasons. These provisions are similar to provisions in federal law and Division rules. The bill also prohibits consignment sales.

DBPR estimates there will be additional resources needed to implement the bill. The bill may have a positive fiscal impact on state revenues and for certain entities involved in the production or sale of wine, cider and distilled spirits. See *Fiscal Analysis & Economic Impact Statement*.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Beverage Law – Background

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]

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.[4]

Generally, only licensed vendors are permitted to sell alcoholic beverages directly to consumers at retail, and manufacturers, distributors, and exporters[5] are generally prohibited from holding a vendor's license.[6] Manufacturers, distributors, and vendors are generally prohibited from being licensed or having an interest in more than one tier. Limited exceptions, subject to certain conditions, include the ability for a craft brewery to hold a vendor's license (tap room), a restaurant to hold a manufacturer's license (brew pub), and a winery to hold up to three vendor's licenses.[7]

Exceptions to the three-tier regulatory system allow certain in-state wineries,[8] craft breweries,[9] and craft distilleries to sell directly to consumers.[10] Further, certain restaurants may be granted a vendor's license to manufacture a limited quantity of malt beverages which can be sold to consumers for consumption on premises.[11]

Wineries may receive up to 3 vendor's licenses on property contiguous to the manufacturing premises of the winery.[12] Section 599.004, F.S., establishes the Florida Farm Winery Program within the Department of Agriculture and Consumer Services. The requirements for certification include that a winery produce or sell less than 250,000 gallons of wine annually of which 60% is made from state agricultural products, maintain a minimum of 5 acres of owned or managed land in Florida which produces commodities used in the production of wine, be open to the public for tours, tastings, and sales at least 30 hours each week, and pay an annual application and registration fee of $100.

[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. 561.14, F.S.
[5] S. 561.01(16), F.S. "Exporter" means any person that sells alcoholic beverages to persons for use outside the state.
[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] *See* ss. 561.22, F.S.; 561.24, F.S.; 561.14(1), F.S.; and 563.022(14), F.S.
[8] *See* s. 561.221(1), F.S.
[9] *See* s. 561.221(2), F.S.
[10] *See* s. 565.03, F.S.
[11] *See* s. 561.221(3), F.S.
[12] See s. 561. 221(1), F.S.

Section 565.17, F.S., provides an exemption to the Tied-House Evil Laws, authorizing vendors and liquor distributors to conduct liquor tastings at any location that is allowed to sell liquor by the package or for consumption on premises. The tastings must be directed toward the of-age general public.

Section 561.24, F.S., prohibits the licensing of a manufacturer as a distributor or exporter. Wineries that qualify as a certified Florida Farm Winery are the sole exception to this prohibition. Additionally, the Division may issue permits for a certified Florida Farm Winery to conduct tasting and sales of its wines at Florida fairs, trade shows, expositions, and festivals. The permit is limited to the length of the event. The certified Florida Farm Winery is required to pay all entry fees and must have a winery representative present during the event.

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.[13]

A craft brewery which also holds a vendor's license is specifically prohibited from making deliveries under this law.[14]

Distilleries and Craft Distilleries – Current Situation

Section 565.01, F.S., defines the terms "liquor," "distilled spirits," "spirituous liquors," "spirituous beverages," or "distilled spirituous liquors" to mean "that substance known as ethyl alcohol, ethanol, or spirits of wine in any form, including all dilutions and mixtures thereof from whatever source or by whatever process produced."

A "distillery" is a manufacturer of distilled spirits, and a "craft distillery" is a licensed distillery that produces 75,000 or fewer gallons of distilled spirits per calendar year on its premises. A craft distillery must notify the Division in writing of its decision to qualify as a craft distillery.[15]

A distillery engaged solely in the business of manufacturing distilled spirits, or a person engaged in the business of blending and rectifying distilled spirits must pay a state license tax of $4,000 for each plant or branch operating in Florida. The license tax for a craft distillery is $1,000. Persons who engage in the business of distilling spirits may also rectify and blend spirituous liquors without paying an additional license tax.[16]

According to the Division, 61 of the 64 licensed distilleries operating in Florida produce less than 75,000 gallons of distilled spirits.[17]

A craft distillery is allowed to sell to consumers branded products,[18] distilled on the licensed premises, in factory-sealed containers that are filled at the distillery and sold for off-premises consumption only. The sales must occur at the distillery's souvenir gift shop located on private property contiguous to the licensed distillery premises, and included on the sketch submitted with the license application. Sales must be in face-to-face transactions with consumers who are making a purchase of no more than six individual containers of each branded product.[19] The craft distillery is not required to obtain a vendor's license to sell to consumers from their souvenir gift shop.

[13] S. 561.57(1) & (2), F.S.
[14] Ss. 561.221 (2)(d), and 565.57(1), F.S.
[15] Ss. 565.03(1)(b) & (c), F.S.
[16] S. 565.03(2)(b), F.S.
[17] Department of Business and Professional Regulation, Agency Analysis of 2020 HB 583, p. 5-6 (Dec. 6, 2019).
[18] Section 565.03(1)(a), F.S., defines "branded product" to mean "any distilled spirits product manufactured on site, which requires a federal certificate and label approval by the Federal Alcohol Administration Act or federal regulations."
[19] S. 565.03(1)(c), F.S.

The Division must approve any subsequent revisions to a craft distillery's sketch to verify that the souvenir gift shop location operated by the craft distillery is "owned or leased by the craft distillery and on property contiguous to the craft distillery's production building."[20]

Section 565.03, F.S., imposes the following requirements and prohibitions for craft distilleries:

- A craft distillery may not ship, arrange to ship, or deliver distilled spirits to consumers, but may ship, arrange to ship, or deliver distilled spirits to manufacturers of distilled spirits, wholesale distributors of distilled spirits, state or federal bonded warehouses, and exporters.
- A craft distillery may not transfer its license or any ownership interest to any individual or entity with a direct or indirect interest in another distillery licensed in any other state, territory, or country. However, a craft distillery may be affiliated with another distillery that produces 75,000 or fewer gallons per calendar year of distilled spirits on its premises or in any other state, territory, or country.
- A craft distillery must report to the Division within 5 business days after it has reached the 75,000-gallon production limit and cease making sales to consumers on the day after it reaches the production limit.
- A craft distillery must submit beverage excise taxes on distilled spirits sold to consumers in its monthly report to the Division.
- Containers must comply with the container limits in s. 565.10, F.S., which prohibits the sale and distribution of distilled spirits in any size container in excess of 1.75 liters or 59.18 ounces.

Distilleries and Craft Distilleries – Effect of the Bill

The bill amends s. 561.221, F.S., to:

- Authorize the issuance of up to three vendor's licenses to a craft distillery for the sale of alcoholic beverages on the distillery's licensed premises.
- Allow a craft distillery to conduct tastings and sales of their product at fairs, trade shows, expos, and festivals.

The bill also amends s. 565.17, F.S., to allow craft distilleries to conduct liquor tastings at any licensed premises authorized to sell liquor.

The bill amends s. 561.24, F.S., to allow a craft distillery to be licensed as a distributor or exporter if the craft distillery is open to the public for tours, tastings, and sales at least 30 hours a week.

The bill amends s. 565.03, F.S., to:

- Clarify the definition of "branded product" to allow craft distillers to blend their product with distilled spirits that are not manufactured on site.
- Increase the maximum production threshold for craft distilleries from 75,000 to 250,000 gallons.
- Allow a craft distillery to sell up to 75,000 gallons of branded product per year from its souvenir gift shop and removes the limitations on the number of bottles per brand per consumer that may be sold per year.
    - For sales made from the craft distillery's souvenir gift shop, the craft distillery may not be licensed as a vendor under s. 561.221, F.S., and such sales must be made in either a face-to-face transaction from the gift shop or as a shipment to a consumer located outside the state, subject to the laws of the receiving state.
- Specify that a craft distillery can transfer up to 75,000 gallons of its product from its federal bonded space, nonbonded space, or storage areas to its souvenir gift shop, per year.
- Prohibit a craft distillery that does not have a vendor's license under s. 561.221, F.S., from shipping its distilled spirits to consumers located in the state.
- Remove restrictions relating to the sale, transfer, or ownership affiliation for craft distilleries.

Wine and Cider Container Limitations – Current Situation

[20] *Id.*

Section 564.05, F.S., prohibits the sale of wine in an individual container that holds more than one gallon of wine, unless it is in a reusable container of 5.16 gallons, which may also be sold. Distributors and manufacturers may sell wine to other distributors and manufacturers in containers of any size. Any person who violates the prohibition in s. 564.05, F.S., commits a second degree misdemeanor.[21]

Section 564.055, F.S., prohibits the sale of cider by vendors at retail in any individual container of more than 32 ounces. However, cider may be packaged and sold in bulk, in kegs or barrels, or in any individual container of one gallon or more, regardless of container type. The Beverage Law does not provide for the sale of cider in growlers.

Wine and Cider Container Limitations – Effect of the Bill

The bill repeals s. 564.05, F.S., relating to limitations on the size of individual wine containers.

The bill repeals s. 564.055, F.S., relating to the retail sale of individual cider containers.

Merlot to Go – Current Situation

Restaurants licensed to sell wine on the premises may permit patrons to remove one bottle of wine for consumption off the licensed premises under the following conditions:

- The patron must have purchased a full-course meal consisting of a salad or vegetable, entrée, a beverage, and bread and consumed a portion of the bottle of wine with the meal;
- Before the partially-consumed bottle of wine is removed from the premises, the bottle must be securely resealed by the licensee, or the licensee's employee, and placed in a bag or other container that is secured in such a manner that it is visibly apparent if the container has been opened or tampered with after having been sealed;
- A dated receipt for the wine and meal must be attached to the container; and
- The container must be placed in a locked glove compartment, trunk, or other area behind the last upright seat of a motor vehicle that does not have a trunk.[22]

Merlot to Go – Effect of the Bill

The bill amends s. 564.09, F.S., simplifying the requirement that a patron's meal be a "full course meal consisting of salad or vegetable, entrée, a beverage, and bread" to just "a meal."

Dogs in Bars and Restaurants – Current Situation

The Division of Hotels and Restaurants (Division) within DBPR is authorized to administer laws and rules relating to the inspection and regulation of food service establishments for the purpose of safeguarding the public health, safety and welfare, in accordance with ch. 509, F.S. [23] The law expressly limits the general home rule powers of a local government as it relates to the regulation of such businesses.[24]

Pursuant to its rulemaking authority, the Division has adopted the 2017 Food Code (Code) published by the U.S. Food and Drug Administration (FDA).[25] The Code prohibits live animals on the premises of

[21] Section 775.082, F.S., provides the penalty for a misdemeanor of the second degree is a term of imprisonment not exceeding 60 days. Section 775.083, F.S., provides the penalty for a misdemeanor of the second degree is a fine not to exceed $500.
[22] S. 564.09, F.S.
[23] The Florida Department of Health is responsible for regulations related to food service protection and environmental health. Current regulations prohibit live animals inside food service establishments, vehicles used to transport food, and any other area or facility used to conduct food service operations. R. 64E-11.003(6)(c), F.A.C. An exception exists for service animals, as provided under s. 413.08, F.S. *See also* ss. 381.006 and 381.0072, F.S.
[24] S. 509.032(7), F.S.
[25] U.S. Department of Health and Human Services, Public Health Service, Food & Drug Administration, *Food Code*, (2017), https://www.fda.gov/media/110822/download (last visited Jan. 8, 2019). According to the FDA, "the purpose of maintaining an updated model food code is to assist food control jurisdictions at all levels of government by providing them with a scientifically sound technical and legal basis for regulating the retail segment of the food industry."

food service establishments.[26] "Premises" is defined to mean the physical facility, its contents, and the contiguous land or property under the control of the permit holder.[27] There are limited exceptions to this prohibition including those for patrol dogs accompanying police or security officers, and service animals controlled by persons with disabilities.[28]

The service animal law authorizes an individual with a disability the right to be accompanied by a trained service animal (a dog) in all areas of public accommodations that the public is normally allowed to occupy.[29] A public accommodation is required to modify its policies, practices, and procedures to permit use of a service animal by an individual with a disability.

The service animal law defines a "service animal" as an animal that is trained to do work or perform tasks for an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work done or tasks performed must be directly related to the individual's disability. A service animal is not a pet. It is also not a comfort animal.

Generally, only service animals are permitted to be inside bars and restaurants in Florida. However, Florida law allows local governments to establish a local exemption to the prohibition on having live animals inside food service establishments. Specifically, local governments may authorize local food service establishments to decide whether to designate outdoor portions of the establishment for "patrons' dogs." Participating establishments are required to apply for and receive a permit from the governing body of the local government. Local governments are authorized to include additional regulations and limitations to protect the health, safety and general welfare of the public.[30]

The local ordinances must include the following requirements:

- All public food service establishment employees must wash their hands promptly after touching, petting, or otherwise handling dogs. Employees shall be prohibited from touching, petting, or otherwise handling dogs while serving food or beverages or handling tableware or before entering other parts of the public food service establishment.
- Patrons in a designated outdoor area must be advised that they should wash their hands before eating. Waterless hand sanitizer shall be provided at all tables in the designated outdoor area.
- Employees and patrons must be instructed that dogs are prohibited from contact with serving dishes, utensils, tableware, linens, paper products, or any other items involved in food service operations;
- Patrons must keep their dogs on a leash and under reasonable control at all times;
- Dogs are prohibited on chairs, tables, or other furnishings;
- All table and chair surfaces must be cleaned and sanitized with an approved product between seating of patrons. Spilled food and drink must be removed from the floor or ground between seating of patrons;
- Accidents involving dog waste must be cleaned immediately and the area sanitized with an approved product. A kit with the appropriate materials for this purpose must be kept near the designated outdoor area;
- A sign or signs reminding employees of the applicable rules must be posted on premises in a manner and place as determined by the local permitting authority;
- A sign or signs reminding patrons of the applicable rules must be posted on premises in a manner and place as determined by the local permitting authority; and
- A sign or signs must be posted in a manner and place as determined by the local permitting authority that places the public on notice that the designated outdoor area is available for the use of patrons and patrons' dogs.[31]

[26] *Id.* at s. 6-501.115(A).
[27] *Id.* at s. 1-201.10(B).
[28] *Id.* at s. 6-501.115(B).
[29] S. 413.08(3), F.S.
[30] S. 509.233, F.S.
[31] S. 509.233(3)(c), F.S.

Regarding where dogs are allowed to travel or pass through, the local ordinances must include the following requirements:

- Dogs are prohibited from traveling through indoor portions of the public food service establishment;
- Dogs are prohibited from traveling through nondesignated outdoor portions of the public food service establishment; and
- Access to the designated outdoor portions of the public food service establishment must not require entrance into or passage through any indoor area of the food establishment.[32]

Dogs in Bars and Restaurants – Effect of the Bill

The bill creates s. 562.65, F.S., authorizing the owner of a certain premises licensed under the Beverage Law to allow dogs in designated areas, including certain indoor areas, subject to the following conditions:

- No more than 10% of gross revenues are derived from the sale of food that is consumed on the licensed premises. For the purpose of the bill, ice is not considered food.
- Dogs must be kept on a leash and under control at all times.
- Dogs are not allowed on tables, bar tops, or other furnishings.
- Dogs are not allowed in any area where food is stored or prepared.
- Dog waste must be cleaned immediately and the area sanitized.

An individual may be held liable for failure to comply with the dog-related conditions if such failure results in injury or damage. The bill also authorizes the Division to adopt rules to administer this law.

Tied House Evil – Current Situation

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.[33]

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.

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. [34]

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.).[35]

[32] *Id.*
[33] *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.
[34] S. 561.42, F.S.

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.[36]

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.[37]

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.[38]

Tied House Evil – Effect of the Bill

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:

- equal to or greater than the fair market value of the merchandise;
- not combined with any sale or purchase of alcoholic beverages;
- separately itemized from the sale or purchase of alcoholic beverages; and
- both the seller and purchaser maintain records.

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;

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[35] S. 561.42(14), F.S.

[36] *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.

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

[38] S. 561.42(8), F.S.

- 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 brand-naming rights or cooperative advertising 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.

Return of Malt Beverages – Current Situation
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. Additionally, s. 563.022(4), F.S., prohibits unfair methods of competition and unfair or deceptive practices in the conduct of the manufacturing, importing, distribution, sale, wholesaling, and franchising of beer.

Product Returns – Federal Law

Federal regulations prohibit the sale or purchase of any alcoholic beverage products on consignment, under conditional sale, with privilege of return, on any basis other than a bona fide sale, or if the sale involves an agreement to acquire other products.[39] However, transactions involving the bona fide return of products for "ordinary and usual commercial reasons arising after the merchandise has been sold" are not prohibited.[40] Under federal regulations, ordinary and usual commercial reasons include:
- Defective product,
- Shipment error,
- A change in law preventing the sale of the product,

[39] 27 U.S.C. § 205(d).
[40] *Id.*

- Termination of the buyer's business,
- Change in product from that in inventory,
- Product in inventory is discontinued, or
- Possible spoilage of product during the offseason of a seasonal retail dealer.[41]

Such returns are optional. The distributor is not required to accept the return.[42] Returns or exchanges of products that are merely overstocked, slow-moving, or seasonal in nature are not considered ordinary and usual commercial reasons.[43]

Freshness Dating

Some brewers assign a coded "pull date" or "freshness date" to their product as a quality control tool to prevent stale or outdated product from remaining in the marketplace.[44] Federal regulations allow for the return (exchange, refund or credit) of malt beverages for freshness reasons under the following circumstances:

- The brewer has policies and procedures in place that specify the date the retailer must pull the product.
- The policies and procedures are readily verifiable and consistently followed by the brewer.
- The container has identifying markings that correspond with this date.
- The malt beverage product pulled by the distributor or retailer may not re-enter the retail marketplace.
- If the product is returned for exchange, it must be for an identical quantity of the same brand.[45]

Federal regulation prohibits the use of freshness provisions as "mere subterfuge to violate these same consignment sales and/or tied house provisions."[46]

Product Returns – Division Rules

The Beverage Law does not explicitly regulate the return of malt beverage products to distributors by vendors. However, the Division has adopted rules to provide guidance to the industry.

Return of Damaged Products

Rule 61A-1.0107, F.A.C., regulates the return of damaged products. Products are considered damaged if they, through no fault of the vendor or customer, exhibit product deterioration, leaking containers, damaged labels, or missing or mutilated tamper-evident closures. Damaged products can be returned for exchange, cash, or a credit when the vendor makes the request within 15 days of delivery. Distributors are required to keep detailed transaction records of such returns.[47]

If the vendor does not make the return request within 15 days of delivery, damaged product may not be returned unless:

- The product is part of a manufacturer recall that affects multiple unaffiliated vendors; or
- Through no fault of the vendor, the product has deteriorated due to manufacturing or packaging problems.

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[41] 27 C.F.R.§§ 11.32–11.39.

[42] Alcohol and Tobacco Tax and Trade Bureau (TTB) Ruling, *2017-2 Revised – Freshness Dating and Allowable Returns of Malt Beverage Products under the FAA Act* (Sept. 29, 2017). In the case of malt beverages, trade practice provisions of the Federal Alcohol Administration Act (FAA Act) apply only if the laws of the state into which the malt beverage products are sold or shipped impose similar requirements.

[43] *Id.; 27 C.F.R.* § 11.45 & 11.46.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Section 561.55(3)(a), F.S., requires a manufacturer, distributor, broker, agent, and importer licensed under the Beverage Law to maintain and keep, for a period of three years at the licensed place of business, such records of alcoholic beverages received, sold, or delivered within or without this state as may be required by the Division

Return of Undamaged Products

Rule 61A-1.0108, F.A.C., regulates the return of undamaged products. A vendor may receive cash or credit for the return of undamaged product if the request is made within 10 days of delivery. Distributors are required to keep detailed transaction records of such returns.

If the vendor does not make the request within 10 days of delivery, undamaged product may not be returned unless:

- The product may no longer be lawfully sold.
- The vendor goes out of business.
- There is a change in product, such as a change in formula, proof, label, or container.
- The product is discontinued; or
- The vendor is only open for a portion of the year, and the remaining product will spoil in the off-season.[48]

Additionally, distributors are prohibited from making consignment sales to vendors, and vendors may not attempt to return or exchange overstocked or slow-moving product.[49]

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.

Return of Malt Beverages – Effect of the Bill

The bill creates s. 563.061, F.S., relating to the return of malt beverage products.

Consignment Sales Prohibited

The bill prohibits the sale of malt beverages on consignment or any other basis other than a "bona fide sale." Once a sale is made, only "bona fide returns" are allowed for the "ordinary and usual commercial reasons" authorized in the bill. The terms "bona fide sale" and "bona fide return" are not defined in the bill. The bill also specifies that product may not be returned simply because it is overstocked, slow-moving, or has limited or seasonal demand, such as holiday decanters or other specialized containers.

Product Returns

The bill outlines situations where a vendor is permitted to return product for an exchange, a credit, or a refund. The bill does not condition the return of product for a credit or a refund, but product returned for an exchange may only be exchanged for:

- the exact same quantity of product,
- of near or equal value,
- made by the same manufacturer, and
- in the same size container or keg.

Return of Undamaged Product

[48] R. 61A-1.0108(4), F.A.C.
[49] *Id.*

The bill defines "undamaged product" as malt beverage product that is not damaged or out of code. Undamaged product may be returned for exchange or credit. The vendor must make their return request within 7 days of delivery. However, there is no time frame for a distributor to accept the return of undamaged product if:

- Due to a change in regulations, the vendor is no longer permitted to sell a particular brand or product size. (For credit or refund.[50])
- The vendor terminates operations. (For credit or refund.)
- The product is returned for "purposes of ensuring quality control or freshness" even if it is not yet out of code. (For exchange only.)
- A manufacturer issues a recall affecting multiple vendors that are not: under common ownership, members of the same pool buying group, or members of the same advertising cooperative. (For exchange or credit.)
- Production or importation of the product is discontinued. (For credit or refund.)
- The vendor is only open for part of the year, and the inventory at closing would go bad before the vendor reopens. (For credit or refund.)

When undamaged product is returned more than 7 days after delivery, documentation of the qualifying exception must be kept with the transaction record maintained by the distributor.

Return of Damaged Product

The bill defines "damaged product" to mean a malt beverage product delivered to a vendor exhibiting product deterioration, defective seals, leaking, damaged labels, or missing or mutilated tamper-evident closures. The bill establishes the following guidelines for damaged product:

- Return requests must be made within 7 days of delivery.
- The distributor must verify that the product is damaged.
- Product that is damaged by the vendor or their customers may not be returned.
- Damaged product may be returned for exchange of product or credit.

Return of Out-of-Code Product

The bill defines "out-of-code product" as malt beverages that have exceeded the manufacturer's code date and, according to the manufacturer's policies, must be removed and replaced with fresh product for purchase in the retail market.

The bill defines "manufacturer's code date" to mean a coded best-by date, expiration date, or other designated date or dating system established by a manufacturer to signify freshness that is printed on the malt beverage container or, in the case of a keg, marked on a cap, collar, tag, or label affixed directly to the keg.

A distributor may accept out-of-code product if:

- The distributor verifies that the product is out-of-code.
- The manufacturer has established written guidelines relating to product removal.
- Such policies and procedures are readily available, verifiable, and consistently applied by the manufacturer.
- The manufacturer's code date is printed or marked on the product container.
- The out-of-code product that is removed by the distributor does not reenter the retail market.

Out-of-code product may be returned for exchange only.

Distributor Requirements

The bill authorizes, but does not require, distributors to accept returns. When a distributor does accept a return, the distributor is required to:

- Provide the exchange, credit, or refund to the vendor at the time the product is picked up.

[50] Type of return allowed is indicated in parentheses.

- Pick up damaged or undamaged product within 14 days of a vendor's return request.
- The bill does not specify when a distributor must pick up product that is out-of-code.

The bill requires distributors to maintain detailed transaction records for returned product for 3 years and provide a copy to the vendor.

Additional Provisions

The bill specifies that, for the purposes of the Tied-House Evil Law, authorized returns are not considered gifts, loans, or any other form of prohibited financial aid or assistance. The bill authorizes the Division to impose a fine of up to $1,000 for each violation. The bill authorizes the Division to adopt rules to administer and enforce the provisions.

The bill provides an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1 Amends s. 561.221, F.S.; authorizing the division to issue vendor's licenses to certain craft distilleries for the sale of alcoholic beverages on the distillery's licensed premises; requiring certain information be included on sketches approved by the division; requiring the division to issue permits to craft distilleries for conducting tastings and sales at certain events; requiring craft distilleries to pay entry fees for such events and have a representative of the distillery present at each event; requiring that certain alcoholic beverages be obtained through a licensed distributor, a licensed broker or sales agent, or a licensed importer.

Section 2 Amends s. 561.24, F.S., authorizing a craft distillery to be licensed as a distributor under certain circumstances.

Section 3 Amends s. 561.42, F.S., revising terms; creating exemptions and penalties relating to the Tied House Evil Law.

Section 4 Creates s. 562.65, F.S.; providing definitions; authorizing certain licensed vendors of alcoholic beverages to allow dogs in certain designated areas on licensed premises; providing requirements; providing for liability; authorizing the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation to adopt rules.

Section 5 Creates s. 563.061, F.S.; providing definitions; prohibiting consignment sales of malt beverages between a distributor and vendor; authorizing bona fide returns of malt beverages under certain conditions; providing applicability; authorizing distributors to accept returns of certain products under specified conditions; providing distributor requirements for such returns; providing requirements for exchanges of product; providing recordkeeping requirements; specifying that authorized returns are not gifts, loans, or other prohibited forms of financial aid or assistance; providing penalties; and providing for rulemaking.

Section 6 Repeals s. 564.05, F.S., relating to limitations on the size of individual wine containers.

Section 7 Repeals s. 564.055, F.S., relating to limitations on the size of individual cider containers.

Section 8 Amends s. 564.09, F.S., revising provisions that authorize a restaurant to allow patrons to remove partially consumed bottles of wine from a restaurant for off-premises consumption.

Section 9 Amends s. 565.03, F.S.; redefining the terms "branded product" and "craft distillery"; revising the requirements for the sale of branded products by a licensed craft distillery to

consumers; deleting a provision that prohibits a craft distillery from selling more than six individual containers of a branded product to a consumer; etc.

Section 10 Amends s. 565.17, F.S., authorizing a craft distillery to conduct spirituous beverage tastings on specified licensed premises under certain circumstances.

Section 11 Provides for an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill may result in an insignificant positive fiscal impact from revenue generated by craft distilleries obtaining up to three vendor's licenses. The bill authorizes DBPR to impose and collect fines, not to exceed $1,000, relating to the return of malt beverages.

   The bill provides for an indeterminate positive fiscal impact through the creation of new civil penalties as listed in the Tied House Evil section, above.

2. Expenditures:

   To implement the bill, the Division estimates the need for two additional Tax Auditor positions for a total of $143,875 in the first year and $131,925 recurring thereafter.[51]

   However, currently there are 2 Tax Auditor positions within DBPR that are vacant over 300 days. These positions could be transferred to the Division to address the requirements of the bill.[52]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive economic impact on certain entities in the wine and cider industry, due to the reduction or elimination of regulatory constraints relating to container sizes.

The bill may have a positive economic impact for many craft distilleries, due to the removal of many current regulatory constraints, resulting in enhanced brand recognition, increased sales volume, opportunities for collaboration, and access to new markets and consumers.

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.

For some manufacturers and distributors, the bill may have a positive economic impact due to an increase in consumer sales, stemming from the ability to move product between vendors for "freshness" purposes. For other manufacturers and distributors, the bill may have a negative economic

[51] Department of Business and Professional Regulation, Agency Analysis of 2020 HB 1165, p. 6 (Jan. 30, 2020).
[52] Department Vacancy Report, Jan. 30, 2020, on file with the Government Operations and Technology Appropriations Subcommittee.

impact to the extent that their brands become less attractive to vendors as compared to brands for which there is a freshness policy. For vendors, the bill may have a positive economic impact for those with difficult to sell inventory, and may have a negative impact to the extent that the narrowing of the window for returns and the addition of a freshness policy affects a vendor's ability to return or sell certain products

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:

The bill authorizes the Division of Alcoholic Beverages and Tobacco to adopt rules to administer the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES