

# Legal Issues in the Craft Beverage Business



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# General Roadmap

- Formation
- Financing
- Location
- Permits
- Labeling/Permits
- Intellectual Property



This purpose of this presentation is to provide a general overview of legal issues that one may encounter when operating a craft beverage business and is not intended to be nor should it be construed as legal advice.

# Formation 1: Questions to Ask:

- Is the business involved in production, wholesaling, retail or a combination?
- Is there more than 1 person involved? If yes, will everyone have the same management power?
- How will the enterprise be funded?
- Will land be required?
- What are the liability concerns?

# Formation 2: NY corporate forms

<b>TYPE</b>	<b>LIABILITY</b>	<b>TAXES</b>	<b>EXPENSE</b>	<b>MGMT.</b>
Sole-proprietorship	No protection	1 level (individual)	None	Self
Partnerships	No protection	1 level	None	No limit
Limited Partnership (LP)	Limits liability for the limited partner	If structured with pass thru entities, then only taxed at 1 level	Publication Multiple entities	No limit on partners/investors
Limited Liability Company (LLC)	Limits liability for all members	1 level of taxation	Publication	No limit on members
Subchapter S corporation	Limits liability for all shareholders	1 level (must elect on IRS form)		Shareholders limited to 100
Subchapter C corporation	Limits liability for all shareholders	2 levels: (C taxed on income, SH taxed on receipt of distributions)		No limit on shareholders

**Talk to an accountant and Insurance provider!**

# Formation 3: Internal Governance

- Step 1: File documents with NYDOS; world is on notice of your name; allows you to sue
- Step 2: publication if applicable
- Step 3: Internal documents: operating agreements, shareholders agreements, bylaws: not required by state, but CRUCIAL for successful future operations
- Step 4: Consider segregating risk to protect assets if your business is involved in more than one level of operation (ex. hold title to land in one entity, and operating assets into another)

# Financing: Debt or Equity?

## Debt

- Loan from a bank (or other business (i.e. manufacturer)
- Retain management: does not dilute ownership and owner maintains 100% interest in business
- Need good credit history and personal guaranty
- Line of credit



Why is this important? Funding will play a role in determining your choice of entity

## Equity

- Funded by investors
- Friends and family: get IN WRITING; conflicts of interest issues
- Dilutes ownership (investors get a stake)
- Good option if no credit history; can be expensive because introduces state and federal security laws

# Federal Designation of Beer, Mead and Cider

- Cider is treated like wine (27 CFR 24)
- Mead is treated like 'agricultural wine'; *agriculture wine may be produced on bonded wine premises from suitable agricultural products other than the juice of fruit; agricultural wine may not be colored or flavored*
  - Application: Application to Establish and Operate Wine Premises (determine if establishing a bonded winery, bonded wine cellar or taxpaid wine bottling house); bond; power of attorney
- Beer is beer (27 CFR 25)
  - Application: Brewer's Notice; bond; power of attorney
- Special permission to create more than 1 kind of alcoholic beverage in the same premises; alternation of brewery and bonded or taxpaid wine premises may be permitted by TTB on case by case basis (27 CFR 25.81; 27 CFR 24 111)
- Note: categorization of the above is going to determine the amount of excise tax (consider ABV, carbonation levels, etc.)



# Location 1: Is the use allowed?

→ Is a cidery, brewery or distillery a permitted use for the given area?

Alcohol is regulated on 3 levels:

- Federal (TTB)
- State (NYS Liquor Authority)
- Local (city or county)

All 3 levels of government may determine whether your enterprise is an acceptable use for its proposed location in NYS



# Location 2: TTB

- **Location:** a brewery may not be established or operating in any dwelling house or on board any vessel or boat or in any building or on any premises where the revenue will be jeopardized or the effective administration of this part will be hindered 27 CFR § 25.21 (2016)
- **Tavern:** a brewer desiring to operate a tavern as an alternate use of brewery premises shall submit a Brewer's Notice. If TTB officer finds that the operation of the the tavern on the brewery premises will not jeopardize the revenue,.... the approval of the Brewer's Notice shall constitute approval of the alternate use of the brewery premises. 27 CFR § 25.25 (2016)
- **Buildings:** Brewery buildings shall be arranged and constructed to afford adequate protection to the revenue and to facilitate inspection by appropriate TTB officers 27 CFR § 25.31 (2016)
- **Bonded Winery:** Description of premises: application will include a description of each tract of land comprising wine premises (by direction and distances) with sufficient particularity to enable ready determination of the bounds of the wine premises. 27 CFR 24.111

# Location 3: NYS



- 200' rule: ABC Law prohibits certain licenses from being issued if the location is on the same street and within 200 ft. of a building that is used exclusively as a school, church synagogue or other place of worship; applies to any retail establishment where sold for on premises consumption;
  - Measured on a straight line from the center of the nearest entrance of the school/place to the center of the nearest entrance of the establishment
- 500' rule: restrictions on the approval of certain on premises liquor licenses if the location is within 500' radius of certain other establishments with on-premises liquor licenses
  - ONLY in cities, towns or villages with a population of 20,000+; Applies to full liquor licenses; can brew beer, but need to be a restaurant too
- NYS will also have a say in the location of the craft beverage operation apart in addition to the rules above; NYS wants to know: (i) your right to the premises; (ii) landlord's information; (iii) zoning; (iv) type of building; (v) interior of premises (where will alcohol be stored, access to interior, etc.); (vi) premises diagram; *from Farm Distiller Branch Office Permit Application*

# Location 4: Local Zoning

- Breweries, cideries, wineries and distilleries are also regulated at the local level re: location:
- Steps: (1) is your enterprise agricultural or commercial? (2) is the use defined in local code? (3) if yes, in what 'use'? (4) if no, does it fall under another use? (5) refer to zoning map
- Milford (Otsego County): manufacturing/industrial district
- Gorham (Ontario County) need a special permit to operate a brewery in the general commercial district; 'by right use' in farmland district
- New Scotland (Albany County) commercial breweries NOT in the zoning code BUT farm breweries are open (Indian Ladder; *accessory use*)
- Highland (Sullivan County) includes farm brewery as a special permitted use in the commercial district
- If the use is not expressly stated or permitted, there are options to obtain a use variance or request an amendment to zoning

# Location 5: farm enterprises; “craft”

The Craft New York Act (2014): “*to further develop the industry and raise the profile of New York’s beverage producers*”

- NY farm distilleries, breweries and cideries do not have to be located on a farm; it is about *product* and not *location*
- Farm cidery: maximum of 250,000 gal./year; NY labeled cider
- NYS labeled beer: *by 2018, at least 20% of hops and 20% of all other ingredients must be grown in NYS; 2023, 60% hops and 60% other ingredients; 2024 90% hops and 90% other ingredients*
- NYS labeled cider: *means cider made exclusively from apples or other pome fruits grown in NYS*
- NYS labeled liquor: *liquors made from fruit, vegetables, grain and grain products, at least 75% the volume of which were grown in NYS*
- Exemption from costly and burdensome tax filing requirements and permits; can sell directly to consumer; lowering the food requirement that must be met by manufacturers when offering tastings on premises; may not necessarily impact location and zoning restrictions

# Location 6: NYS Agricultural Districts

- Agriculture and Markets Law (AML) determines whether farms which produce, prepare and market crops for wine, beer and distilled spirits are protected as a “farm operation”
- *Farm operation*: means the land and on-farm buildings, equipment... and practices which contribute to production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise
- *Crops, livestock and livestock products* includes corn, wheat, oats, rye, barley hops; *fruits*: apples, peaches, grapes, cherries
- Distilled or brewed products, cider or wine must be composed of 51% or more of on-farm produced grains, hops, grapes or other fruit
- \*\*\* Farm operations must keep sufficient records to prove that these requirements are met
- **AML protects farm operations; ABC provides the standards that must be met for farm brewery, cidery, winery and distillery licenses; Licensees must still comply with ABC to qualify for their licenses**

# Location 7: to lease or buy?

- Whether leasing or buying, TTB and NYS will want to approve the layout and configuration of the brewery
- Cannot apply for TTB permit until the lease is signed or premises otherwise secure (submit with Brewer's Notice or Application to Establish and Operate Wine Premises)
- Lease must state that premises will be used for a brewery or other alcohol production
- Consider including a permit contingency
- Make sure the Landlord knows all about your build-out and infrastructure requirements; utilities and water issues
- Fixtures: need to expressly state that all of the fixtures belong to you, and at the end of the lease, you get to take them with you
- Real estate brokers are free to the tenant and can be helpful if knowledgeable

# Liability

- You are a business! Get the right insurance.
- NY Dram shop law: it is illegal for businesses to serve alcohol to persons who are visibly intoxicated (left to discretion of the employees serving the alcohol);
- Patrons may not sue the establishments, but the bar or tavern may be held liable for damages caused to third parties injured by patrons of the bar
- Bar is liable if patron injures a pedestrian
- Employees are prohibited from serving alcohol to persons known to be habitual drunkards

# Licenses and Labels

Licenses to operate any alcohol enterprise are required at the federal and state level: TTB and NYSLA; can apply for both at the same time

- TTB: Brewer's Notice; Brewer's Bond, Power of Attorney (70 days)
- NYSLA: (i) brewer, (ii) micro brewer, (iii) farm brewer (iv) farm brewery; wholesale application

Labeling: approval required by federal and NYS

- NY: Brand Label Registration: *to ensure that the labels sold in NY are in compliance with both the state and federal label regulations; (ii) that the product in the container to which the label is attached is safe for consumption; and (iii) to ensure that no deceptive health / benefit claims are present on label*
- Requires for all liquor, beer, wine products and wine specialties sold in NY and for wines containing 7% alcohol or less
- TTB: "COLA" (certificate of label approval) wine, malt beverage and distilled spirits all have different requirements; average processing time is 20 calendar days (TTB has up to 90 days to process)



#### DRAFT/DRAUGHT

The presence of "Draft/Draught" on a label generally means that the product has not been pasteurized and some other method of removing or inhibiting the growth of bacteria has been utilized. However, pasteurized beer may be described as "Draft Brewed" or "Draft Beer Flavor" as long as the label discloses that the beer is pasteurized. The term may also be used if the beer is packaged in containers of one gallon or larger and the contents are to be drawn off through a tap, spigot, faucet, or similar device.

#### NAME AND ADDRESS

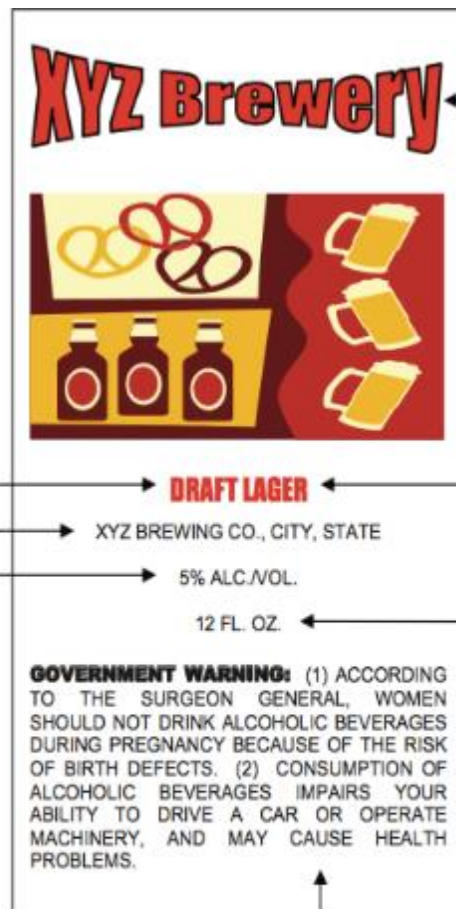
The name and address of the bottler or importer must appear on the brand label. However, the address of the bottler's principal place of business may be used instead of the actual location where the bottling took place. It is also permissible for a bottler/importer to use a duly authorized trade name in place of its usual operating name.

#### ALCOHOL CONTENT

An optional statement of alcohol content expressed in percent by volume may appear on the label. Federal regulations require the alcohol content to appear on the labels of flavored malt beverages that derive alcohol from added flavors. However, some State laws have their own requirements with regard to alcohol content statements.

#### LITE/LIGHT/LOW-CARB

A malt beverage may be labeled with a caloric representation (such as "Light" or "Lite") as long as a statement of average analysis appears on the label. This statement must include the amount per serving of calories, carbohydrates, protein, and fat. In addition, a malt beverage may be labeled as "Low-Carbohydrate" if the label includes a statement of average analysis and the product contains no more than 7 grams of carbohydrates per 12-ounce serving.



#### HEALTH WARNING STATEMENT

By law, this statement is required on all alcohol beverages containing 0.5% or more alcohol by volume.

#### BRAND NAME

The brand name is used to identify and market a malt beverage. A brand name may not mislead the consumer about the age, identity, origin, or other characteristics of the malt beverage.

#### CLASS DESIGNATION

The brand label of a malt beverage must contain the class designation of the product. Examples of class designations are beer, ale, and lager. Ale, stout, and porter are classes that must be fermented at a comparatively high temperature. Products labeled "Wheat Beer" must be made from a fermentable base that consists of at least 25% by weight malted wheat.

When a malt beverage is made with the addition of spices, fruit, honey, or natural flavors, it requires specific labeling to indicate the class designation. These malt beverages must be labeled with a statement of composition that reflects the base malt product and the added ingredients, unless otherwise known to the trade under a particular designation. Examples of statements of composition that you might see on malt beverage labels include "Premium malt beverage with natural flavors," "Ale fermented with spices," or "Belgian-style Wheat Ale brewed with natural flavors." These products must also bear a distinctive or fanciful name (such as "Tammy's Treat"). A malt beverage must derive at least 51% of its alcohol content from the fermentation of brewing ingredients, with stricter limits for products with an alcohol content of more than 6 percent alcohol by volume.

#### NET CONTENTS

The net contents of a malt beverage container must be stated in English units of measure (e.g., pints, fluid ounces).

#### COUNTRY OF ORIGIN

Pursuant to regulations issued by U.S. Customs and Border Protection, a Country of Origin statement is required on containers of imported malt beverages. Acceptable statements include "Product of (insert name of country)" or "Produced/Brewed in (insert name of country)."

# Trademarks and IP

- Once you figure out your name, you should consider filing a trademark with the USPTO; make sure the name you choose is not already taken (NYDOS, Google, etc.)
- Ultimate question is *whether there is a “likelihood of confusion” to consumers*, i.e. would they believe your beer is another brand?
- Successful brand management and building is essential in competitive market; tradeoff: federal IP law can be complicated and time consuming
- You can submit applications for name and logos up to 36 months before the launch of the beer/brewery itself (called an ‘intent to use trademark’ application)

