

ORDER OF THE DEPARTMENT OF REVENUE RENUMBERING, AMENDING, AND CREATING RULES

The Wisconsin Department of Revenue adopts an order to: **renumber** Tax 7.23 (1) (a) to (d); **amend** Tax 7.23 (title), (1) (intro.), and (3) (intro.); and **create** Tax 7.23 (1) (a), (c), (d), (e), and (f), (2) (title), (4), and (5); **relating to** the activities of brewers, bottlers, out-of-state shippers, and wholesalers.

The scope statement for this rule, SS 018-11, was approved by the Governor on August 16, 2011, published in Register No. 669 on September 14, 2011, and approved by the Secretary of Revenue on September 26, 2011.

Analysis by the Department of Revenue

Statutes interpreted: ss. 125.02 (2), 125.28(5) (e), 125.29, and 139.01 (2), Stats.

Statutory authority: ss. 125.02 (2), 125.03 (1), 125.28 (5) (e), and 227.11 (2) (a), Stats.

Explanation of agency authority: Section 125.02 (2), Wis. Stats., provides statutory authority to include recipe-brewers under brewer's permit requirements. Prior to the change, various combined recipe-brewer/wholesalers operated with wholesale licenses. There was inquiry as to whether such operators who no longer qualified for wholesale permits could qualify for a brewer's permit. Section 125.02 (2), Wis. Stats., definition of "brewer" includes those persons who employ an agent to brew fermented malt beverages.

Section 125.03(1), Stats., provides "[t]he department, in furtherance of effective control, may promulgate rules consistent with this chapter and ch. 139."

Section 125.28(5)(e), Stats., as created by 2011 Wisconsin Act 32, provides "[t]he department shall promulgate rules to administer and enforce the requirements under this subsection. The rules shall ensure coordination between the department's issuance and renewal of permits under this section and its enforcement of the requirements of this subsection, and shall require that all applications for issuance or renewal of permits under this section be processed by department personnel generally familiar with activities of fermented malt beverages wholesalers. The department shall establish by rule minimum requirements for warehouse facilities on premises described in permits issued under this section and for periodic site inspections by the department of such warehouse facilities."

Section 227.11 (2) (a), Stats., provides that each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation.

Related statute or rule: section 125.54, Stats., authorizes the Department of Revenue to issue wholesalers' permits for the sale of intoxicating liquor to retailers, wholesalers and manufacturers, Chapters Tax 8.61 and 8.63, Wis. Adm. Code, provide

the requirements for processing intoxicating liquor wholesalers' permits by the department and the minimum requirements for intoxicating liquor warehouse facilities.

Plain language analysis: This rule does the following:

- Establishes the requirements for issuance and renewal of fermented malt beverage wholesalers' permits
- Describes the minimum requirements for fermented malt beverage wholesaler warehouse facilities.
- Details the process for applying for wholesalers' permits.
- Provides guidance regarding eligibility for out-of-state shippers' permits.
- Details the requirements for obtaining a brewer's permit and clarifies the permits required in contract brewing arrangements.

Summary of, and comparison with, existing or proposed federal regulation:

Federal law, 27 U.S.C. Chapter 8, the Federal Alcohol Administration Act (FAAA) provides for the regulation of persons engaged in the alcohol beverage industry, and for the protection of consumers. The FAAA includes provisions to require a permit for those who engage in the business as a producer, importer, or wholesaler of alcohol beverages, and to ensure that labeling and advertising of alcohol beverages provides adequate information to consumers. Sections 7805 and 5051 of the Internal Revenue Code of 1986 authorize the Secretary of the Treasury to administer requirements for qualifying a brewery, operating a brewery, and for paying tax and labeling beer removed from a brewery. These duties are the responsibility of the Alcohol and Tobacco Tax and Trade Bureau of the U.S. Department of the Treasury (TTB). Regulations in 27 CFR part 25 implement the IRC beer provisions and include requirements on brewers that cover the production, removal, and tax payment of beer. TTB has issued Industry Circular Number 2005-2 providing guidance to brewers who wish to obtain TTB approval of a contract brewing arrangement. According to the Industry Circular, "a 'contract brewing arrangement' is a business relationship in which one person, such as a wholesale or retail dealer or a brewer, pays a brewing company, the 'contract brewer' to produce beer for him or her. The contract brewer is entirely responsible for producing the beer, keeping appropriate brewery records, labeling the beer with its name and address, obtaining necessary certificates of label approval (COLAs), and paying tax at the appropriate rate upon removal of the beer from the brewery. TTB considers contract brewing arrangements to be ordinary commercial arrangements." In a contract brewing arrangement, only one person, the contract brewer, must qualify as a brewer under 27 CFR part 25. The beer may be sold back to the person on whose behalf the beer was produced under contract, or to wholesalers, retailers, or to the ultimate consumer. If the person on whose behalf the beer is produced under contract resells the beer to a dealer, that person must hold a federal basic permit from TTB as a wholesaler under the FAAA.

Comparison with rules in adjacent states:

The Iowa Alcoholic Beverages Division of the Iowa Department of Commerce issues permits for the manufacture and sale of alcoholic beverages, including fermented malt beverages, as authorized by the Iowa Administrative Code Chapter 185.

The Illinois Liquor Control Commission issues brewer's licenses to any person who is engaged in the manufacture of beer, as authorized by Illinois Compiled Statutes

(235ILCS5/) the Illinois Liquor Control Act and rules in Illinois Administrative Code, Title 11, Subtitle A, Part 100.

The Michigan Liquor Control Commission issues beer manufacturer licenses to brewers authorizing the licensee to manufacture and sell the beer they brew. (Michigan Compiled Laws Sections 436.1105 through 436.1113, 436.1201, and 436.1203, and administrative code sections 436.1601 through 436.1659.)

The Minnesota Department of Public Safety Alcohol and Gambling Enforcement Division issues manufacturer's licenses to brewers, who may also be issued a wholesaler's license to sell the brewer's product at wholesale provided the brewer was selling their own products at wholesale in Minnesota on January 1, 1991. A licensed brewer may sell the brewer's products at wholesale only if the brewer has been issued a wholesaler's license. (2011 Minnesota statutes 340A.301, and Minnesota Administrative Rule Chapter 7515).

Summary of factual data and analytical methodologies: 2011 Wisconsin Act 32 amended numerous sections in Chapter 125 Subchapter II affecting the three-tier system regulating the production, distribution and sale of fermented malt beverages (beer) in Wisconsin. The amendments converted the municipal beer wholesaler's license from a license issued by a local municipality to a statewide permit issued by the Department of Revenue. Act 32 also changed the requirements for obtaining a beer wholesaler's permit and for obtaining an out-of-state shipper's permit, and restructured the brewer's permit.

In consultation with manufacturers, wholesalers and retailers of fermented malt beverages, the department has created this rule order to satisfy the above requirements. No other data was used in the preparation of this rule order or this analysis.

Analysis and supporting documents used to determine effect on small business: This rule is created in accordance with 2011 Wisconsin Act 32 to administer and enforce statutory requirements relating to the production, distribution and sale of fermented malt beverages, consistent with the legislature's support for the three-tier system and with the Federal Alcohol Administration Act as implemented by the Alcohol and Tobacco Tax and Trade Bureau (TTB). As explained above, the rule is created to reflect changes to Wisconsin law regulating fermented malt beverages. The rule itself does not have a financial or other effect; any effect is attributable to the underlying statutory provisions the proposed rule concerns. As such, the department has determined that the rule does not affect small businesses.

Anticipated costs incurred by private sector: This rule does not have a fiscal effect on the private sector. Any fiscal effect is attributable to the underlying statutory provisions the proposed rule concerns.

Effect on small business: This rule does not affect small businesses.

Agency contact person: Please contact Dale Kleven at (608) 266-8253 or dale.kleven@revenue.wi.gov, if you have any questions regarding this rule.

SECTION 1. Tax 7.23 (title) and (1) (intro.) are amended to read:

Tax 7.23 (title) **Activities of brewers, bottlers, out-of-state shippers, and wholesalers.**

(1) (intro.) In this ~~rule~~ section and in ss. 125.02, 125.06, 125.28, 125.29, 125.295, 125.30, 125.33, 125.34, and 139.01, Stats.:

SECTION 2. Tax 7.23(1)(a) to (d) are renumbered 7.23(1)(b) and (g) to (i)

SECTION 3. Tax 7.23(1)(a), (c), (d), (e), and (f) and (2)(title) are created to read:

Tax 7.23(1)(a) "Brewer" has the meaning given in ss. 125.02 (2) and 139.01 (2), Stats., and includes a recipe-brewer.

(c) "Out-of-state shipper" means the holder of an out-of-state shipper's permit issued under s. 125.30, Stats., and includes a holder of a Federal Basic Importer's Permit.

(d) "Ownership interest" is a level of ownership in a sole proprietorship, partnership, tax option corporation, limited liability company, corporation, estate, or trust as an individual, partner, shareholder, member, or beneficiary.

(e) "Production brewer" means a brewer who directly manufactures fermented malt beverages for another brewer.

(f) "Recipe-brewer" means a person who contracts with an agent to directly manufacture fermented malt beverages for sale or transportation by that person.

(2)(title) BREWER'S PERMIT RESTRICTION AND EXCEPTIONS.

SECTION 4. Tax 7.23(3)(intro.) is amended to read:

Tax 7.23(3)(intro.) Subject to the limitations in sub. (2) (a) and (b), examples of conduct prohibited by s. 125.33 (1), Stats., and this section include, ~~but are not limited to:~~

SECTION 5. Tax 7.23(4) and (5) are created to read:

Tax 7.23(4) BREWER'S PERMIT REQUIREMENTS. (a) A brewer producing or selling fermented malt beverages in this state shall file an application for a brewer's permit with the department in the manner prescribed by the department.

(b) A production brewer is required to obtain federal label approval and a federal brewer's notice from the federal alcohol and tobacco tax and trade bureau.

(c) 1. An application filed under par. (a) shall include a certification by the recipe-brewer as to both of the following:

a. The recipe-brewer is contracting with a production brewer to produce fermented malt beverages.

b. The contract between the recipe-brewer and production brewer specifically provides that the production brewer is an agent of the recipe-brewer and the recipe-brewer has retained the right to control the work contracted for.

2. Upon request of the department, a recipe-brewer shall provide the department with the contract under subd. 1. a. and b. for the department's inspection.

3. A contract under subd. 1. a. and b. may be contingent upon the recipe-brewer receiving a permit under s. 125.29, Stats.

(d) An application filed under par. (a) shall designate the premises where the fermented malt beverages will be manufactured as the exclusive permitted brewery premises and provide the permit number of the production brewer.

(e) 1. All applications for issuance or renewal of permits under s. 125.29, Stats., shall be processed by department personnel generally familiar with activities of fermented malt beverage brewers. The issuance and renewal of permits shall be done in coordination with the enforcement of the requirements of s. 125.29 (1) and (2), Stats.

2. A permit issued or renewed under this paragraph is specific to the premises of the production brewer. If the recipe-brewer seeks to have fermented malt beverages manufactured at multiple locations, it shall submit brewer's permit applications for each new premise.

(f) For purposes of s. 139.05 (2), Stats., the recipe-brewer is the brewer that is required to file tax returns.

(g) A recipe-brewer shall include fermented malt beverages manufactured in a contract brewing arrangement in the report required under s. 139.11 (2), Stats. A production brewer shall exclude fermented malt beverages manufactured in a contract brewing arrangement from the report required under s. 139.11 (2), Stats.

(h) For purposes of the eligible producers tax credit under s. 139.02, Stats., the recipe-brewer is the producer.

(5) FERMENTED MALT BEVERAGE WHOLESALER WAREHOUSE FACILITIES. (a) *Minimum requirements for warehouse facilities.* The premises described in a permit issued under s. 125.28, Stats., shall be a minimum of 1,000 square feet of floor space and shall be located in a free-standing building that is not part of or connected to a premises covered by a retail license or permit issued under s. 125.25, 125.26, or 125.27, Stats.

(b) *Exception to minimum requirements.* The secretary of revenue may waive the requirement that a premises described in a permit issued under s. 125.28, Stats., be a minimum of 1,000 square feet of floor space when the secretary determines that the waiver is fair and equitable, if the applicant or permittee does both of the following:

1. Submits a written request for a waiver along with the application for issuance or renewal of a permit.

2. Indicates how the requirements described in par. (a) and s. 125.28 (5) (a), Stats., other than the requirement that the premises described in the permit be a minimum of 1,000 square feet of floor space, will be or have been met.

(c) *Purchases by a wholesaler.* Every permittee under s. 125.28, Stats., shall retain invoices covering all purchases of fermented malt beverages stored at the premises described in the permit for 4 years from the date of the invoice. The invoices shall be retained on the premises described in the permit for 2 years from the date of the

invoice, and shall be open to inspection at all reasonable times by any representative of the department.

(d) *Inventory records.* Every permittee under s. 125.28, Stats., shall complete a written inventory listing the entire stock of fermented malt beverages stored at the premises described in the permit as of the close of business on the last day of every month. A copy of the inventory listing shall be retained by the permittee for 4 years from the date the inventory is completed. The inventory listing shall be retained on the premises described in the permit for 2 years from the date the inventory is completed, and shall be open to inspection at all reasonable times by any representative of the department.

(e) *Inspections of warehouse facilities.* Before issuing a permit under s. 125.28, Stats., the department shall conduct a site inspection of the premises described in the permit application to determine if such premises meets the minimum requirements described in par. (a). The department shall also conduct periodic site inspections of premises described in permits issued under s. 125.28, Stats. Site inspections shall be conducted by department personnel generally familiar with activities of fermented malt beverage wholesalers.

(f) *Background investigations of applicants.* Before issuing a permit under s. 125.28, Stats., the department shall conduct a background investigation to determine whether the applicant is qualified to hold the permit. The background investigation shall be limited to obtaining information that is necessary to enable the department to verify that the applicant meets the eligibility requirements described in s. 125.28 (1) (a) and (2) (b), Stats.

(g) *Processing of permits by the department.* All applications for issuance or renewal of permits under s. 125.28, Stats., shall be processed by department personnel generally familiar with activities of fermented malt beverage wholesalers. The issuance and renewal of permits shall be done in coordination with the enforcement of the requirements of s. 125.28 (5) (e), Stats.

SECTION 6. Effective date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

Final Regulatory Flexibility Analysis

This rule order does not affect small businesses.

DEPARTMENT OF REVENUE

Dated: _____

By: _____
Richard G. Chandler
Secretary of Revenue

E:Rules/723 Final Order