

1 STATE OF OKLAHOMA

2 1st Session of the 55th Legislature (2015)

3 SENATE BILL 690

By: Jolley

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5
6 AS INTRODUCED

7 An Act relating to intoxicating liquors; defining
8 terms; limiting application of certain provisions;
9 prohibiting certain termination of distribution
10 agreement with nonresident brewer; providing
11 conditions for termination of agreement; requiring
12 notice for certain terminations; stating reasons for
13 immediate termination; authorizing termination of
14 agreement with certain notice; providing procedure
15 for beer brand transfer to successor; allowing
16 successor to terminate agreement upon certain
17 conditions; requiring good faith distribution until
18 certain time; providing procedure to failure to reach
19 agreement with successor; authorizing arbitration;
20 stating arbitration procedure; providing for
21 determination of fair market value; setting time
22 requirements for arbitration; providing for right to
23 be waived for failure to participate; establishing
24 procedure to nonpayment of settlement or arbitration
award; providing for beer brand transfer without good
cause; authorizing damages caused by violation;
permitting dispute resolution for certain actions;
construing good faith settlements; restricting
required compliance or waiver of rights; prohibiting
inducements for agreements; including modifications
to agreements; amending 37 O.S. 2011, Section 524, as
amended by Section 2, Chapter 382, O.S.L. 2013 (37
O.S. Supp. 2014, Section 524), which relates to
nonresident seller license; providing for certain
brewer and nonresident sellers to have written
distribution agreement; making certain agreements
subject to inspection by ABLE Commission; providing
for codification; providing an effective date; and
declaring an emergency.

24 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

1 SECTION 1. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 525A of Title 37, unless there
3 is created a duplication in numbering, reads as follows:

4 A. For purposes of this act:

5 1. "Brewer" means any person who produces beer inside or out of
6 this state;

7 2. "Nonresident seller" means any person licensed pursuant to
8 Section 524 of Title 37 of the Oklahoma Statutes;

9 3. "Existing nonresident seller" means a nonresident seller who
10 distributes a particular brand of beer at the time a successor
11 brewer acquires rights to manufacture or import the particular brand
12 of beer;

13 4. "Fair market value" means the value that would be determined
14 in a transaction by a willing buyer and a willing seller entered
15 into without duress or threat and includes all elements of value,
16 including goodwill and going-concern value;

17 5. "Good cause" means:

18 a. failure by the nonresident seller to comply with the
19 provisions of a written agreement or understanding
20 with the brewer, or

21 b. failure by the nonresident seller to comply with the
22 duty of good faith;

1 6. "Good faith" means the duty of each party to any franchise
2 and all officers, employees or agents thereof to act with honesty in
3 fact and within reasonable standards of fair dealing in the trade;

4 7. "Successor brewer" means a primary source of supply, a
5 brewer or an importer that acquires rights to a beer brand from a
6 predecessor brewer; and

7 8. "Successor nonresident seller" means one or more nonresident
8 sellers or "Wholesalers," as defined by paragraph 4 of Section 163.2
9 of Title 37 of the Oklahoma Statutes, designated by a successor
10 brewer to replace the existing nonresident seller, for all or part
11 of the existing nonresident seller's territory, in the distribution
12 of the existing beer brand or brands.

13 B. Nothing in this section shall apply to a brewer that
14 produces less than three hundred thousand (300,000) gallons of beer
15 per calendar year.

16 C. 1. Except as provided in subsections D, E and F of this
17 section, no brewer shall terminate a distribution sales agreement
18 with any nonresident seller unless all of the following occur:

19 a. the brewer establishes good cause for such
20 termination,

21 b. the nonresident seller receives written notification
22 by certified mail, return receipt requested, from the
23 brewer of an alleged noncompliance with the
24 distribution sales agreement and is afforded no less

1 than sixty (60) days in which to cure such
2 noncompliance,

3 c. the nonresident seller fails to cure such
4 noncompliance within the allotted cure period, and

5 d. the brewer provides written notice by certified mail,
6 return receipt requested, to the nonresident seller of
7 such continued noncompliance. The notification shall
8 contain a statement of the intention of the brewer to
9 terminate or not renew the distribution sales
10 agreement, the reasons for termination or nonrenewal
11 and the date the termination or nonrenewal shall take
12 effect.

13 2. If a nonresident seller cures an alleged noncompliance with
14 a distribution sales agreement within the cure period provided in
15 subparagraph b of paragraph 1 of this subsection, any notice of
16 termination from a brewer to a nonresident seller shall be null and
17 void.

18 D. A brewer may immediately terminate a distribution sales
19 agreement with a nonresident seller, effective upon furnishing
20 written notification to the nonresident seller by certified mail,
21 return receipt requested, for any of the following reasons:

22 1. The nonresident seller's failure to pay any account when due
23 and upon written demand by the brewer for such payment, in
24 accordance with agreed payment terms;

1 2. The assignment or attempted assignment by the nonresident
2 seller for the benefit of creditors, the institution of proceedings
3 in bankruptcy by or against the nonresident seller, the dissolution
4 or liquidation of the nonresident seller or the insolvency of the
5 nonresident seller;

6 3. The revocation or suspension of, or the failure to renew for
7 a period of more than fourteen (14) days, a nonresident seller's
8 state, local or federal license or permit to sell beer in this
9 state;

10 4. Failure of a nonresident seller to sell his or her ownership
11 interest in the distribution rights to the brewer's beer within one
12 hundred twenty (120) days after such nonresident seller has been
13 convicted of a felony that, in the brewer's sole judgment, adversely
14 affects the goodwill of the nonresident seller or brewer;

15 5. A nonresident seller has been convicted of, found guilty of
16 or pled guilty or nolo contendere to, a charge of violating a law or
17 regulation of the United States or of this state if it materially
18 and adversely affects the ability of the nonresident seller or
19 brewer to continue to sell its beer in this state;

20 6. Any attempted transfer of ownership of the nonresident
21 seller, stock of the nonresident seller or stock of any parent
22 corporation of the nonresident seller, or any change in the
23 beneficial ownership or control of any entity, without obtaining the
24 prior written approval of the brewer, except as may otherwise be

1 permitted pursuant to a written distribution sales agreement between
2 the parties;

3 7. Fraudulent conduct in the nonresident seller's dealings with
4 the brewer or its beer, including the intentional sale of beer
5 outside the brewer's established quality standards; or

6 8. The nonresident seller ceases to conduct business for five
7 (5) consecutive business days, unless conducting the business is
8 prevented or rendered impractical due to events beyond the
9 nonresident seller's reasonable control as a result of an act of
10 God, an insured casualty, war, or a condition of national, state or
11 local emergency.

12 E. The brewer shall have the right to terminate a distribution
13 sales agreement with a nonresident seller at any time by giving the
14 nonresident seller at least ninety (90) days' written notice by
15 certified mail, return receipt requested; provided, the brewer shall
16 give a similar notice to all other nonresident sellers in all other
17 states who have entered into the same distribution sales agreement
18 with the brewer.

19 F. If a particular brand of beer is transferred by purchase or
20 otherwise from a brewer to a successor brewer, the following shall
21 occur:

22 1. The successor brewer shall become obligated to all of the
23 terms and conditions of the distribution sales agreement in effect
24 on the date of succession. The provisions of this subsection shall

1 apply regardless of the character or form of the succession. A
2 successor brewer has the right to contractually require its
3 nonresident seller to comply with operational standards of
4 performance, if the standards are uniformly established for all of
5 the successor brewer's nonresident sellers. A successor brewer may,
6 upon written notice, terminate its distribution sales agreement, in
7 whole or in part, with a nonresident seller of the brewer it
8 succeeded; provided, the successor nonresident seller first pays to
9 the existing nonresident seller the fair market value of the
10 existing nonresident seller's business with respect to the
11 terminated brand or brands;

12 2. If the successor brewer decides to terminate its
13 distribution sales agreement with the existing nonresident seller
14 for purposes of transfer, the successor brewer shall notify the
15 existing nonresident seller in writing of the successor brewer's
16 intent not to appoint the existing nonresident seller. The
17 successor brewer shall mail the notice of termination by certified
18 mail, return receipt requested, to the existing nonresident seller.
19 The successor brewer shall include in the notice the names,
20 addresses, and telephone numbers of the successor nonresident seller
21 or nonresident sellers;

22 3. The successor nonresident seller shall negotiate with the
23 existing nonresident seller to determine the fair market value of
24 the existing nonresident seller's right to distribute the beer. The

1 successor nonresident seller and the existing nonresident seller
2 shall negotiate the fair market value in good faith. The existing
3 nonresident seller shall continue to distribute the beer in good
4 faith until payment of the compensation agreed to under this
5 paragraph, or awarded under paragraph 4 of this subsection, is
6 received; and

7 4. a. If the successor nonresident seller and the existing
8 nonresident seller fail to reach a written agreement
9 on the fair market value within thirty (30) days after
10 the existing nonresident seller receives the notice
11 required pursuant to paragraph 2 of this subsection,
12 the successor nonresident seller or the existing
13 nonresident seller shall send a written notice to the
14 other party requesting arbitration pursuant to
15 Sections 1851 et seq. of Title 12 of the Oklahoma
16 Statutes. Arbitration shall be held for the purpose
17 of determining the fair market value of the existing
18 nonresident seller's right to distribute the beer.

19 b. Notice of intent to arbitrate shall be sent, as
20 provided in this paragraph, not later than forty (40)
21 days after the existing nonresident seller receives
22 the notice required pursuant to paragraph 2 of this
23 subsection. The arbitration proceeding shall conclude
24 not later than sixty (60) days after the date the

1 notice of intent to arbitrate is mailed to a party,
2 unless this time is extended by mutual agreement of
3 the parties and the arbitrator.

4 c. Any arbitration held pursuant to this subsection shall
5 be conducted in a city within this state that:

- 6 (1) is closest to the existing nonresident seller,
7 and
8 (2) has a population of more than twenty thousand
9 (20,000) people.

10 d. Any arbitration held pursuant to this paragraph shall
11 be conducted before one impartial arbitrator to be
12 selected by the American Arbitration Association or
13 its successor. The arbitration shall be conducted in
14 accordance with the rules and procedures of Sections
15 1851 et seq. of Title 12 of the Oklahoma Statutes.

16 e. In determining the fair market value of the existing
17 nonresident seller's right to distribute the beer, the
18 arbitrator shall consider:

- 19 (1) the expected annual sales and earnings of the
20 distribution sales agreement,
21 (2) the length of time the existing nonresident
22 seller has held the distribution sales agreement,
23 (3) the effect of Oklahoma law on the value of a
24 distribution sales agreement in Oklahoma,

1 (4) other relevant elements of value, including
2 goodwill and going concern-value.

3 f. An arbitrator's award in any arbitration held pursuant
4 to this paragraph shall be monetary only and shall not
5 enjoin or compel conduct. Any arbitration held
6 pursuant to this paragraph shall be in lieu of all
7 other remedies and procedures.

8 g. The cost of the arbitrator and any other direct costs
9 of an arbitration held pursuant to this paragraph
10 shall be equally divided by the parties engaged in the
11 arbitration. All other costs shall be paid by the
12 party incurring them.

13 h. The arbitrator in any arbitration held pursuant to
14 this paragraph shall render a written decision not
15 later than thirty (30) days after the conclusion of
16 the arbitration, unless this time is extended by
17 mutual agreement of the parties and the arbitrator.
18 The decision of the arbitrator is final and binding on
19 the parties. The arbitrator's award may be enforced
20 by commencing a civil action in any court of competent
21 jurisdiction. The decision of the arbitrator may be
22 appealed as authorized in Sections 1851 et seq. of
23 Title 12 of the Oklahoma Statutes.
24

1 i. An existing nonresident seller or successor
2 nonresident seller who fails to participate in the
3 arbitration hearings in any arbitration held pursuant
4 to this paragraph waives all rights the existing
5 nonresident seller or successor nonresident seller
6 would have had in the arbitration and is considered to
7 have consented to the determination of the arbitrator.

8 j. If the existing nonresident seller does not receive
9 payment from the successor nonresident seller of the
10 settlement or arbitration award required under
11 paragraph 2 or 3 of this subsection within thirty (30)
12 days after the date of the settlement or arbitration
13 award:

14 (1) the existing nonresident seller shall remain the
15 nonresident seller of the beer in the existing
16 nonresident seller's territory to at least the
17 same extent that the existing nonresident seller
18 distributed the beer immediately before the
19 successor brewer acquired rights to the beer, and

20 (2) the existing nonresident seller is not entitled
21 to the settlement or arbitration award.

22 G. If a particular brand of beer is transferred from the
23 existing nonresident seller to a successor nonresident seller or
24 distributor without good cause and due to a change in the law, the

1 existing nonresident seller and the successor nonresident seller or
2 distributor shall be subject to the provisions of paragraphs 3 and 4
3 of subsection F of this section.

4 H. 1. Any nonresident seller or brewer who is aggrieved by a
5 violation of any provision of subsections C and E of this section
6 shall be entitled to recovery of damages caused by the violation.
7 Except for a dispute arising under subsection E of this section,
8 damages shall be sought in a civil action in any court of competent
9 jurisdiction.

10 2. Any dispute arising under subsections C and E of this
11 section may also be settled by such dispute resolution procedures as
12 may be provided by a written distribution sales agreement between
13 the parties.

14 I. Nothing in this section shall be construed to limit or
15 prohibit good-faith settlements voluntarily entered into by the
16 parties.

17 J. Nothing in this section shall be construed to give an
18 existing nonresident seller or a successor nonresident seller any
19 right to compensation if a distribution sales agreement with the
20 existing nonresident seller or successor nonresident seller is
21 terminated by a successor brewer pursuant to subsections C, D, and E
22 of this section.

23 K. No brewer shall require any nonresident seller to waive
24 compliance with any provision of this section.

1 L. No brewer shall charge or accept any money, property,
2 gratuity, discount, rebate, free goods, allowances, or other
3 inducement from a nonresident seller in exchange for entering into a
4 distribution sales agreement with a nonresident seller.

5 M. This section shall apply to any distribution sales agreement
6 entered into, and any renewals, extensions, amendments, or conduct
7 constituting a modification of an agreement, by a brewer on or after
8 the effective date of this act.

9 SECTION 2. AMENDATORY 37 O.S. 2011, Section 524, as
10 amended by Section 2, Chapter 382, O.S.L. 2013 (37 O.S. Supp. 2014,
11 Section 524), is amended to read as follows:

12 Section 524. A. A nonresident seller license shall be required
13 of all out-of-state distillers, winemakers, brewers, importers,
14 brokers and others who sell alcoholic beverages to wholesalers and
15 Class B wholesalers in Oklahoma regardless of whether such sales are
16 consummated within or without the State of Oklahoma.

17 A nonresident seller license shall authorize the holder thereof
18 to solicit and take orders for alcoholic beverages from the holders
19 of licenses authorized to import the same into this state, and to
20 ship or deliver, or cause to be shipped or delivered, alcoholic
21 beverages into Oklahoma pursuant to such sales.

22 B. A brewer not licensed in this state selling beer to a
23 nonresident seller shall have a written Distribution Sales Agreement
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1 with the nonresident seller. Such agreement shall be subject to
2 inspection by the ABLE Commission.

3 C. The Alcoholic Beverage Laws Enforcement Commission may,
4 subject to the provisions of the Oklahoma Alcoholic Beverage Control
5 Act requiring notice and hearing in the case of sanctions against
6 holders of licenses, suspend or revoke a nonresident seller license
7 for any violation of the Oklahoma Alcoholic Beverage Control Act by
8 the holder thereof.

9 ~~C.~~ D. No licensee in this state authorized to import alcoholic
10 beverages into this state shall purchase or receive any alcoholic
11 beverages from without this state from any person not holding a
12 valid and existing nonresident seller license. Every nonresident
13 seller license shall expire on the June 30 following its issuance or
14 renewal, and shall be eligible for subsequent renewal terms of one
15 (1) year beginning on the July 1 following each expiration. License
16 fees for a new or initial nonresident seller license applied for
17 after July 1 may be prorated through the following June 30 on a
18 quarterly basis.

19 ~~D.~~ E. The holder of a nonresident seller license shall,
20 promptly upon consignment of any alcoholic beverages to an importer
21 in Oklahoma, forward to the ABLE Commission a true copy of the
22 invoice, bill of lading, or other document as the ABLE Commission
23 may by regulations prescribe, showing the details of such shipment.
24

1 ~~E.~~ F. Any person, not otherwise a dealer in alcoholic
2 beverages, coming into possession of any alcoholic beverages as
3 security for or in payment of a debt, or as an insurer (or its
4 transferee or assignee) for the salvage or liquidation of an insured
5 casualty or damage or loss, or as an executor, administrator,
6 trustee or other fiduciary may sell the beverages in one lot or
7 parcel to a duly licensed wholesaler at an agreed-upon price without
8 regard to current posted prices. However, immediately after taking
9 possession of the alcoholic beverages, the person shall register
10 with the Director and furnish to him a detailed list of the
11 alcoholic beverages and post with the Director a bond in such amount
12 as the Director deems sufficient to protect the state from any taxes
13 due on the alcoholic beverages. The person shall pay to the
14 Director a registration fee of Ten Dollars (\$10.00), which fee shall
15 permit the sale of only the alcoholic beverages detailed in the
16 registration request. A wholesaler receiving a lot or parcel of
17 alcoholic beverages pursuant to this subsection may sell it in one
18 lot or parcel or more than one lot or parcel to a licensed package
19 store or mixed beverage licensee or more than one licensed package
20 store or mixed beverage licensee at an agreed-upon price without
21 regard to current posted prices; provided, the total of the lots
22 sold by the wholesaler shall not exceed four (4) lots.

23 SECTION 3. This act shall become effective July 1, 2015.
24

1 SECTION 4. It being immediately necessary for the preservation
2 of the public peace, health and safety, an emergency is hereby
3 declared to exist, by reason whereof this act shall take effect and
4 be in full force from and after its passage and approval.

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