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West Virginia Craft Breweries Adjust to COVID-19 Crisis

On March 18, 2020, West Virginia Governor Jim Justice issued an emergency executive order ordering the closure of on-premises consumption of food and beverages and social gatherings at bars, restaurants, private clubs and taverns, while allowing continued off-premises consumption of food and drinks in the original sealed containers.

The West Virginia Alcohol Beverage Control Administration (“ABCA”) then issued an advisory that suspends existing regulations on an emergency basis that would limit the ability of private clubs, taverns, bars and restaurants to provide off-premises food, beer and wine service. The ABCA clarified that existing retailers that have a growler license (and craft breweries) would still be allowed to sell growlers of craft beer for off-premises consumption provided that they are in appropriately-sealed growler containers. In a second advisory, the ABCA indicated on March 23, 2020 that distillers, mini-distillers, wineries, farm wineries, wine suppliers, wine distributors and beer distributors are essential businesses, and are allowed to remain open per the Governor’s order. Furthermore, the ABCA advised retail liquor outlets to practice social distancing, limit the number of patrons and adopt reasonable per person purchase limits during the COVID-19 crisis.

Overnight, the legal landscape and market for craft beer changed, and craft breweries across West Virginia were forced to make significant adjustments to their operations to continue in business, serve their customers and retain their employees. Numerous craft breweries across the state of West Virginia have had partial or total layoffs, with most limiting existing staff to manage a bare-bones operation. Certain brewers have decided to temporarily shut down brewing operations for the immediate future, and many remain uncertain about future brewing operations until it becomes clear how they should manage channels of distribution and sales during the COVID-19 crisis. Nationwide, the demand for craft beer and spirits beer has increased while other sectors of the economy have

shut down.

The following strategies have emerged among craft breweries to deal with the COVID-19 crisis:

- Craft breweries that can and bottle their craft beer onsite continue to provide canned and bottled beer to existing retail outlets through existing franchise arrangements.
- Craft breweries that supply existing keg craft beer to retail growler stands can also continue to source their craft beer through this channel of distribution.
- Craft brewers that were largely self-distributing craft beer in kegs directly to local retail establishments were forced to terminate this practice due to the closure of on-premises consumption. These brewers have tried to adapt by focusing upon off-premises sales of cans, bottles and growlers. Those that have existing canning and bottling operations are ramping up this part of their business to avoid dumping beer that surpasses storage limits. Those that do not are considering purchasing or renting these packaging options. Brewers that do not have a good supply of growlers are scrambling to purchase them. Some have adopted a policy that they will only fill newly purchased growlers.
- Craft beer bars that were predominantly selling craft beer for on-premises consumption are limited to selling bottles, cans and growlers for off-premises consumption. Some have added the add-on growler license to make this work. Most have had severe layoffs.
- Craft breweries and craft beer bars are not permitted under applicable West Virginia law to provide for home delivery of craft beer and are prohibited from direct shipment of craft beer products in West Virginia. Adjacent states of Maryland, Ohio, Virginia and Kentucky support the delivery or shipment of craft beer to a limited extent. Nationwide, most jurisdictions support one or both options, even among States with restrictive alcohol laws.
- Farm wineries and cideries can ship their products by obtaining a direct shipper's license in West Virginia.

- Certain retail wine shops in West Virginia can deliver gift baskets with wine to homes under certain limited circumstances.
- While existing sales of growlers, cans and bottles of craft beer under existing retail outlets can continue, craft breweries that are either limited to kegging, do not currently can or bottle their beer, or have a limited distribution network suddenly face a huge barrier that threatens their continued existence as a result of the COVID-19 crisis.

West Virginia craft breweries reached out this week to state regulators, legislators and the governor to adopt the severe market forces on an emergency basis during the COVID-19 crisis to:

- Allow home delivery of craft beer (and perhaps take-out food) by brewery employees or retail employees during the crisis. Home delivery is safer than on-premises purchases for off-premises consumption and is something West Virginia consumers and the state can benefit from. Deliveries can be made using gloves, identification can be obtained through doors and windows, transactions can be made remotely, and employees and customers are better protected, while the risk of community transmission is decreased. Home delivery of craft beer results in more appropriate social distancing as compared to customers coming into craft brewery taprooms or other retail establishments.
- [Ohio](#) allows craft breweries with an A1c license to direct ship craft beer to consumers in Ohio, deliver beer they manufacture directly to consumers in Ohio and operate carry-out service of beer that they manufacture. Maryland craft breweries are also able to provide for delivery of craft beer.

On April 3, 2020, in response to urgent requests from stakeholders, the ABCA issued an advisory to allow the delivery of craft beer under the following circumstances:

- Restaurants and bars licensed as private clubs, private wine restaurants, taverns and brewpubs may deliver to a person's home in sealed container bottles, cans and growlers of craft

beer for personal use and consumption (if licensed to sell growlers) when the licensee is delivering take-away food orders.

- Restaurants and bars licensed as private clubs, private wine restaurants, taverns and brewpubs may deliver to a person's home in a sealed container wine in the original sealed container when the licensee is delivering take-away food orders.
- Brewers and resident brewers can deliver beer in a sealed container to a person's home for personal use and consumption and should be in growlers, bottles, cans or kegs and should be properly labeled.
- Wineries, farm wineries and cideries may deliver wine in sealed wine bottles, cans or boxes for personal use and consumption.
- The licensee must verify the age of the person purchasing the alcoholic beverage and that the person is not intoxicated. Licensees should also verify the recipient of the purchase is of age.
- Deliveries may be made using remote purchasing technology, but must be conducted in a safe manner and using social distancing.
- Home deliveries of beer and wine in a cup or other non-original sealed container is not permitted.
- Distilleries and mini-distilleries are not permitted to deliver liquor and delivery of liquor bottles or mixed drinks are not permitted
- Licensees are well-advised to consult with their liability carrier to assure they are covered from Dram Shop liability and automobile liability for off-premises delivery.

Other proposals to respond to the crisis include:

- West Virginia craft breweries starting April 3, 2020 are applying for [SBA loans](#) to serve as a bridge to enable them to maintain their workforce and continue operations until their revenue streams can be restored.

- Craft brewers also propose that craft breweries be allowed to can or bottle craft beer for other West Virginia craft breweries to enable breweries without canning or bottling capacities to maintain a market for their craft beer while preserving existing franchise relationships. Ohio recently announced that brewers can bottle for other brewers in Ohio to fill this gap for smaller breweries and provide a revenue stream for the brewery providing this service.
- Craft breweries are asking for a short-term holiday or delay of barrel taxes. Likewise, wineries and cideries are seeking the same relief from the liter tax to support the cash flow necessary to maintain their operations and staff. Otherwise, many will be forced to pay taxes during a period where they are not receiving revenues to cover expenses. Other longer-term options include a credit for equipment taxes for breweries that maintain their payroll during this crisis.

For more information please contact [Charles M. Johnson](#) or any attorney in Frost Brown Todd's [Manufacturing Industry Team](#).

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Resource Page](#). We have also convened a dedicated Coronavirus Response Team, with attorneys on hand to field questions concerning labor and employment matters, commercial contracts, litigation risks, as well as business succession, continuity and crisis response planning.

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