

LEGISLATURE OF NEBRASKA
ONE HUNDRED SEVENTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 1239

Introduced by Vargas, 7.

Read first time January 20, 2022

Committee: General Affairs

1 A BILL FOR AN ACT relating to liquor; to amend sections 53-103.14,
2 53-103.40, 53-123.03, 53-123.09, 53-201, 53-204, 53-211, 53-218, and
3 53-223, Reissue Revised Statutes of Nebraska; to redefine terms; to
4 change provisions relating to agreements between manufacturers and
5 wholesalers and beer suppliers and beer wholesalers; to harmonize
6 provisions; to eliminate a provision prohibiting a wholesaler from
7 waiving certain rights; to repeal the original sections; and to
8 outright repeal section 53-221, Reissue Revised Statutes of
9 Nebraska.
10 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 53-103.14, Reissue Revised Statutes of Nebraska,
2 is amended to read:

3 53-103.14 Franchise or agreement, with reference to the relationship
4 between a manufacturer and wholesaler, must be in writing executed by the
5 manufacturer and wholesaler and must include, at a minimum ~~includes one~~
6 ~~or more of the following:~~

7 (1) The term in years and rights to termination or extension;

8 (2) A list of the manufacturer's brands for which the wholesaler has
9 the right to offer and sell within a specified geographic territory;

10 (3) Terms constituting consideration offered and accepted by each
11 party;

12 (4) Notice provisions identifying the name, address, phone number,
13 and email address for each party; and

14 (5) Terms addressing a sale or other transfer of each party's
15 licensed business.

16 ~~(1) A commercial relationship of a definite duration or continuing~~
17 ~~indefinite duration which is not required to be in writing;~~

18 ~~(2) A relationship by which the wholesaler is granted the right to~~
19 ~~offer and sell the manufacturer's brands by the manufacturer;~~

20 ~~(3) A relationship by which the franchise, as an independent~~
21 ~~business, constitutes a component of the manufacturer's distribution~~
22 ~~system;~~

23 ~~(4) A relationship by which the operation of the wholesaler's~~
24 ~~business is substantially associated with the manufacturer's brand,~~
25 ~~advertising, or other commercial symbol designating the manufacturer; and~~

26 ~~(5) A relationship by which the operation of the wholesaler's~~
27 ~~business is substantially reliant on the manufacturer for the continued~~
28 ~~supply of beer.~~

29 Sec. 2. Section 53-103.40, Reissue Revised Statutes of Nebraska, is
30 amended to read:

31 53-103.40 Territory or sales territory means the wholesaler's area

1 of sales responsibility for the brand or brands of the manufacturer
2 expressly set forth in the franchise.

3 Sec. 3. Section 53-123.03, Reissue Revised Statutes of Nebraska, is
4 amended to read:

5 53-123.03 A beer wholesale license shall (1) allow the wholesale
6 purchase, importation, and storage of beer and sale, including delivery,
7 of the brand or brands described in such license to licensees in this
8 state in the sales territory prescribed in the license for each brand and
9 to such persons outside the state as may be permitted by law, (2) allow
10 the licensed wholesaler to do all things incident to the carrying on of
11 the wholesale beer business, including the sampling of tax-paid beer upon
12 the premises of the licensed wholesaler by a licensed retailer in the
13 manner prescribed by the commission, and (3) allow the sampling of tax-
14 paid beer upon the premises of any retailer, whether the license permits
15 consumption on or off the licensed premises, or both, in a manner
16 prescribed by the commission.

17 The sampling authorized under subdivision (3) of this section shall
18 be limited to persons licensed as wholesalers or retailers and their
19 employees.

20 The license shall designate the territory within which the licensed
21 wholesaler may sell the designated product of any brewer as agreed upon
22 by the licensee and the brewer in a franchise.

23 Sec. 4. Section 53-123.09, Reissue Revised Statutes of Nebraska, is
24 amended to read:

25 53-123.09 (1) It shall be unlawful for any beer wholesaler to
26 deliver beer to any retail licensee located outside the geographic
27 territory designated on the beer wholesaler's license and applicable
28 franchise.

29 (2) If any person violates subsection (1) of this section, such
30 person's license shall be suspended or revoked by the commission in the
31 manner provided by the Nebraska Liquor Control Act.

1 Sec. 5. Section 53-201, Reissue Revised Statutes of Nebraska, is
2 amended to read:

3 53-201 The purpose of sections 53-201 to 53-223 is to provide fair,
4 efficient, and competitive distribution of beer by (1) setting forth the
5 requirements for franchises, including the termination, expiration, and
6 renewal of franchises between beer suppliers and beer wholesalers, (2)
7 promoting a robust, competitive distribution system in which each beer
8 wholesaler will devote reasonable efforts and resources to sales,
9 distribution, and quality control of the beer it sells, (3) promoting the
10 continued availability of good quality beer for the consumers of Nebraska
11 through orderly marketing and vigorous interbrand competition, (4)
12 requiring producers and wholesalers to enter into franchises as provided
13 in such sections, and (5) controlling the sale of malt beverages in this
14 state and facilitating the lawful and orderly marketing of malt beverages
15 pursuant to the police powers of this state ~~regulating the termination,~~
16 ~~expiration, and renewal of distribution agreements between beer suppliers~~
17 ~~and beer wholesalers, (2) promoting a distribution system in which each~~
18 ~~beer wholesaler will devote reasonable efforts and resources to sales,~~
19 ~~distribution, and quality control of the beer it sells, (3) promoting the~~
20 ~~continued availability of good quality beer for the consumers of Nebraska~~
21 ~~through orderly marketing and vigorous interbrand competition, (4)~~
22 ~~preventing a beer supplier from unfairly depriving a beer wholesaler of~~
23 ~~the value of the investment the wholesaler made in its business in terms~~
24 ~~of money, time, effort, and skill, and (5) controlling the sale of malt~~
25 ~~beverages in this state and facilitating the lawful and orderly marketing~~
26 ~~of malt beverages pursuant to the police powers of this state.~~

27 Sec. 6. Section 53-204, Reissue Revised Statutes of Nebraska, is
28 amended to read:

29 53-204 Agreement or franchise means a specific agreement between a
30 beer supplier and a beer wholesaler that must be in writing executed by
31 the beer supplier and beer wholesaler and must include, at a minimum:

1 ~~shall mean any agreement between a wholesaler and a supplier, whether~~
2 ~~oral or written, by which a wholesaler is granted the right to purchase~~
3 ~~and sell a brand or brands of beer sold by a supplier.~~

4 (1) The term in years and rights to termination or extension;

5 (2) A list of the beer supplier's brands for which the beer
6 wholesaler has the right to offer and sell within a specified geographic
7 territory;

8 (3) Terms constituting consideration offered and accepted by each
9 party;

10 (4) Notice provisions identifying the name, address, phone number,
11 and email address for each party; and

12 (5) Terms addressing a sale or other transfer of each party's
13 licensed business.

14 Sec. 7. Section 53-211, Reissue Revised Statutes of Nebraska, is
15 amended to read:

16 53-211 Sales territory shall mean an area of exclusive sales
17 responsibility for the brand or brands and quality thereof granted to a
18 wholesaler by a supplier as designated in a franchise or an agreement
19 between them.

20 Sec. 8. Section 53-218, Reissue Revised Statutes of Nebraska, is
21 amended to read:

22 53-218 (1) Notwithstanding any agreement and except as otherwise
23 provided for in sections 53-201 to 53-223, a supplier or wholesaler shall
24 not amend or modify an agreement, cause a supplier or wholesaler to
25 resign from an agreement, or cancel, terminate, fail to renew, or refuse
26 to continue under an agreement unless the supplier or wholesaler has:

27 (a) Satisfied the applicable notice requirements of subsection (3)
28 of this section;

29 (b) Acted in good faith; and

30 (c) Good cause for the amendment, modification, forced resignation,
31 cancellation, termination, nonrenewal, or discontinuance.

1 (2) For each amendment, modification, cancellation, termination,
2 nonrenewal, or discontinuance, the initiating party ~~supplier~~ shall have
3 the burden of proving that it has acted in good faith, that the notice
4 requirements under this section have been complied with, and that there
5 was good cause for the amendment, modification, cancellation,
6 termination, nonrenewal, or discontinuance.

7 (3) Notwithstanding any agreement and except as to new products and
8 as otherwise provided in this section and in addition to the time limits
9 set forth in subdivision (4)(e) of this section, the initiating party
10 ~~supplier~~ shall furnish written notice of the amendment, modification,
11 cancellation, termination, nonrenewal, or discontinuance of an agreement
12 to the other party ~~wholesaler~~ not less than thirty days before the
13 effective date of the amendment, modification, cancellation, termination,
14 nonrenewal, or discontinuance. The notice shall be sent by certified mail
15 and shall contain:

16 (a) A statement of intention to amend, modify, cancel, terminate,
17 not renew, or discontinue the agreement;

18 (b) A statement of the reason for the amendment, modification,
19 cancellation, termination, nonrenewal, or discontinuance; and

20 (c) The date on which the amendment, modification, cancellation,
21 termination, nonrenewal, or discontinuance shall take effect.

22 (4) Notwithstanding any agreement, good cause shall exist for the
23 purposes of a cancellation, termination, nonrenewal, or discontinuance
24 under subdivision (1)(c) of this section when:

25 (a) There is a failure by a party ~~the wholesaler~~ to comply with a
26 provision of the agreement which is both reasonable and of material
27 significance to the business relationship between the wholesaler and the
28 supplier;

29 (b) The initiating party ~~supplier~~ first acquired knowledge of the
30 failure described in subdivision (a) of this subsection not more than
31 twenty-four months before the date notification was given pursuant to

1 subsection (3) of this section;

2 (c) The other party wholesaler was given notice by the initiating
3 party supplier of failure to comply with the agreement within twenty-four
4 months of such failure;

5 (d) The other party wholesaler was afforded a reasonable opportunity
6 to assert good faith efforts to comply with the agreement within the time
7 limits provided for in subdivision (e) of this subsection; and

8 (e) The other party wholesaler has been afforded thirty days in
9 which to submit a plan of corrective action to comply with the agreement
10 and an additional ninety days to cure such noncompliance in accordance
11 with the plan.

12 (5) Notwithstanding subsections (1) and (3) of this section, a
13 supplier may cancel, terminate, fail to renew, or discontinue an
14 agreement immediately upon written notice given in the manner and
15 containing the information required by subsection (3) of this section if:

16 (a) The wholesaler becomes insolvent, files or has filed against it
17 a petition under any bankruptcy or receivership law, makes an assignment
18 for the benefit of creditors, or is dissolved or liquidated and such
19 action materially affects the wholesaler's ability to remain in business;

20 (b) The wholesaler's state or federal license is revoked or
21 suspended by the appropriate regulatory agency and the wholesaler cannot
22 service the wholesaler's sales territory for more than sixty-one days;

23 (c) The wholesaler or a partner, a member, or an individual who owns
24 ten percent or more of the partnership, the limited liability company, or
25 the stock of a corporate wholesaler has been convicted of a felony under
26 the United States Code or the laws of any state which reasonably may
27 adversely affect the goodwill or interest of the wholesaler or supplier.
28 An existing stockholder, partner, or member or a designated member shall
29 have, subject to the provisions of sections 53-201 to 53-223, the right
30 to purchase the partnership interest, the limited liability company
31 member interest, or the stock of the offending partner or stockholder,

1 and if the sale is completed prior to conviction, the provisions of this
2 subdivision shall not apply; or

3 (d) The supplier and wholesaler agree to a termination.

4 ~~(6) Notwithstanding subsections (1), (3), and (4) of this section,~~
5 ~~upon not less than fifteen days' written notice given in the manner and~~
6 ~~containing the information required by subsection (3) of this section, a~~
7 ~~supplier may cancel, terminate, fail to renew, or discontinue an~~
8 ~~agreement if:~~

9 ~~(a) There was intentional fraudulent conduct relating to a material~~
10 ~~matter on the part of the wholesaler in dealings with the supplier or its~~
11 ~~producers. The supplier shall have the burden of proving intentional~~
12 ~~fraudulent conduct relating to a material matter on the part of the~~
13 ~~wholesaler;~~

14 ~~(b) The wholesaler failed to confine its sales of a brand or brands~~
15 ~~to retailers in its designated sales territory. This subdivision shall~~
16 ~~not apply if there is a dispute between two or more wholesalers as to the~~
17 ~~boundaries of the assigned territory and the boundaries cannot be~~
18 ~~determined by a reading of the description contained in the agreements~~
19 ~~between the supplier and the wholesalers;~~

20 ~~(c) A wholesaler who has failed to pay for beer ordered and~~
21 ~~delivered in accordance with established terms with the supplier fails to~~
22 ~~make full payment within two business days after receipt of written~~
23 ~~notice of the delinquency and demand for immediate payment from the~~
24 ~~supplier;~~

25 ~~(d) A wholesaler intentionally has made a transfer of the~~
26 ~~wholesaler's business, other than a transfer to a designated member or~~
27 ~~pursuant to a loan agreement or debt instrument, without prior written~~
28 ~~notice to the supplier and has failed, within thirty days from the~~
29 ~~receipt of written notice from the supplier of its intent to terminate on~~
30 ~~the ground of such transfer, to reverse the transfer of the wholesaler's~~
31 ~~business;~~

1 ~~(e) A wholesaler intentionally has made a transfer of his or her~~
2 ~~business, other than a transfer to a designated member, although the~~
3 ~~wholesaler has prior to the transfer received from the supplier a timely~~
4 ~~notice of disapproval of the transfer in accordance with sections 53-201~~
5 ~~to 53-223; or~~

6 ~~(f) The wholesaler intentionally ceases or ceases for a period of~~
7 ~~more than thirty-one days to carry on business with respect to any of the~~
8 ~~supplier's brand or brands previously serviced by a wholesaler in its~~
9 ~~sales territory designated by the supplier unless such cessation is due~~
10 ~~to a force beyond the control of the wholesaler or to a labor dispute and~~
11 ~~the wholesaler has made good faith efforts to overcome such events. This~~
12 ~~subdivision shall affect only that brand or brands with respect to which~~
13 ~~the wholesaler ceased to carry on business.~~

14 ~~(7) Notwithstanding subsections (1), (3), (5), and (6) of this~~
15 ~~section, a supplier may cancel, terminate, not renew, or discontinue an~~
16 ~~agreement upon not less than thirty days' written notice if the supplier~~
17 ~~discontinues production or discontinues distribution in this state of all~~
18 ~~the brands sold by the supplier to the wholesaler. Nothing in this~~
19 ~~section shall prohibit a supplier from (a) upon not less than thirty~~
20 ~~days' written notice, discontinuing the distribution of any particular~~
21 ~~brand or package of beer or (b) conducting test marketing of a new brand~~
22 ~~of beer or of a brand of beer which is not currently being sold in this~~
23 ~~state if the supplier has notified the Nebraska Liquor Control Commission~~
24 ~~in writing of its plans to test market. The notice to the commission~~
25 ~~shall describe the market area in which the test will be conducted, the~~
26 ~~name or names of the wholesaler or wholesalers who will be selling the~~
27 ~~beer, the name or names of the brand of beer being tested, and the period~~
28 ~~of time, not to exceed eighteen months, during which the testing will~~
29 ~~take place.~~

30 ~~(6) (8)~~ Each wholesaler who sells beer to a retailer in this state
31 shall service for the purpose of quality control all the beer it sells to

1 that retailer. Each wholesaler shall, to the extent permitted by the
2 Nebraska Liquor Control Act and the rules and regulations adopted and
3 promulgated pursuant to such act:

4 (a) Rotate the beer it sold to a retailer no less frequently than
5 may be specified from time to time by the brand owner so that beer
6 produced first will be sold first;

7 (b) Clean and maintain tap equipment and provide related services as
8 may be specified from time to time by the brand owner;

9 (c) Remove and replace with the same kind of beer any beer it sold
10 to a retailer which has not been resold to a consumer within the time
11 limits specified by the brand owner; and

12 (d) Provide whatever additional quality control services and comply
13 with whatever additional quality control requirements are specified in
14 writing from time to time by the brand owner, subject to the conditions
15 that those services and requirements are reasonable and are reasonably
16 related to promotion of quality control and that the wholesaler has
17 received written notice of the services to be provided and the
18 requirements to be satisfied and has been granted a reasonable time
19 within which to comply.

20 (7) ~~(9)~~ Except in the event of a temporary service interruption, a
21 wholesaler shall not sell beer (a) to a retailer who does not have a
22 location within the wholesaler's sales territory at which the retailer is
23 entitled to resell beer to consumers or who the wholesaler knows or
24 reasonably should know does not have a location within the wholesaler's
25 sales territory at which the retailer is entitled to resell beer or (b)
26 to any person who the wholesaler has reason to believe will sell or
27 supply all or part of such beer to any retailer who does not have a
28 location within the wholesaler's sales territory at which the retailer is
29 entitled to resell beer. During a period of temporary service
30 interruption impacting a particular wholesaler's sales territory, the
31 wholesaler who normally services the sales territory shall file with the

1 Nebraska Liquor Control Commission and serve on his or her suppliers a
2 written notice stating that a temporary service interruption has occurred
3 and indicating the anticipated duration of the temporary service
4 interruption. After receiving such notice the supplier may designate
5 another wholesaler or wholesalers to service the sales territory during
6 the period of temporary service interruption. After the temporary service
7 interruption, the wholesaler who normally services the sales territory
8 shall file with the commission and serve on each wholesaler providing
9 temporary service and each supplier a written notice stating that the
10 temporary service interruption has ended. Each wholesaler providing
11 temporary service shall cease servicing the sales territory after
12 receiving such notice.

13 Sec. 9. Section 53-223, Reissue Revised Statutes of Nebraska, is
14 amended to read:

15 53-223 (1) If a supplier engages in conduct prohibited under
16 sections 53-201 to 53-223, a wholesaler with whom the supplier has an
17 agreement may maintain a civil action against the supplier to recover
18 actual damages reasonably incurred as the result of the prohibited
19 conduct. If a wholesaler engages in conduct prohibited under such
20 sections, a supplier with whom the wholesaler has an agreement may
21 maintain a civil action against the wholesaler to recover actual damages
22 reasonably incurred as the result of the prohibited conduct.

23 ~~(2) A supplier who violates any provision of such sections shall be~~
24 ~~liable for all actual damages, all court costs, and, in the court's~~
25 ~~discretion, reasonable attorney's fees incurred by a wholesaler as a~~
26 ~~result of the violation. A wholesaler who violates any provision of such~~
27 ~~sections shall be liable for all actual damages, all court costs, and, in~~
28 ~~the court's discretion, reasonable attorney's fees incurred by the~~
29 ~~supplier as a result of the violation.~~

30 (2) (3) A supplier or wholesaler may bring an action for declaratory
31 judgment for determination of any controversy arising out of an agreement

1 ~~pursuant to such sections.~~

2 (3) (4) Upon proper application to the court, a supplier or
3 wholesaler may obtain injunctive relief against any violation of such
4 sections. If the court grants injunctive relief or issues a temporary
5 restraining order, bond shall be posted.

6 (4) (5) The remedies provided by such sections are not exclusive,
7 and nothing contained in such sections shall abolish any cause of action
8 or remedy available to the supplier or the wholesaler existing on the
9 effective date of this act ~~April 18, 1989.~~

10 (5) (6) Any legal action taken under such sections or relating to a
11 dispute arising out of an agreement or breach thereof ~~or over the~~
12 ~~provisions of an agreement~~ shall be filed in a state or federal court
13 located in Nebraska, which state court is located in, or which federal
14 court has jurisdiction and venue of, the county in which the supplier
15 ~~wholesaler~~ maintains its principal place of business in this state.

16 Sec. 10. Original sections 53-103.14, 53-103.40, 53-123.03,
17 53-123.09, 53-201, 53-204, 53-211, 53-218, and 53-223, Reissue Revised
18 Statutes of Nebraska, are repealed.

19 Sec. 11. The following section is outright repealed: Section
20 53-221, Reissue Revised Statutes of Nebraska.