

HOUSE BILL REPORT

EHB 2040

As Passed Legislature

Title: An act relating to the work of the joint select committee on beer and wine regulation.

Brief Description: Concerning the work of the joint select committee on beer and wine regulation.

Sponsors: Representatives Conway and Condotta.

Brief History:

Committee Activity:

Commerce & Labor: 2/13/09, 2/20/09 [DP].

Floor Activity

Passed House: 3/9/09, 92-3.

Senate Amended.

Passed Senate: 4/1/09, 45-1.

House Refused to Concur.

Senate Receded.

Passed Senate: 4/22/09, 46-0.

Passed Legislature.

Brief Summary of Engrossed Bill

- Permits financial interests between liquor manufacturers, distributors, and retailers under certain conditions.
- Allows liquor manufacturers and distributors to provide branded promotional items to retailers.
- Eliminates the mandatory 10 percent minimum mark-up for beer and wine manufacturers to charge distributors and for distributors to charge retailers.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass. Signed by 8 members: Representatives Conway, Chair; Wood, Vice Chair; Condotta, Ranking Minority Member; Chandler, Crouse, Green, Moeller and Williams.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Joan Elgee (786-7106)

Background:

In 2008 the Legislature established a Joint Select Committee on Beer and Wine Regulation (Select Committee) to review the laws relating to the manufacturer, distribution, and sale of beer and wine (2ESSCR 8407). The Select Committee met during the 2008 interim and produced a final report with recommendations.

Tied House Law.

The tied house law prohibits certain relationships between the manufacture and distributor tiers of the liquor industry and the retailer tier. Nearly all states and the federal government have some form of tied house law. The laws were intended to prevent inappropriate or coercive business practices among the tiers of the liquor industry.

Financial interest. The financial interest part of the tied house law prohibits a manufacturer, importer, distributor, or authorized representative, or person financially interested, directly or indirectly, in such a business, from having any direct or indirect financial interest in a licensed retailer. In addition, a manufacturer, importer, distributor, or authorized representative may not own any of the property on which a licensed retailer conducts business, and may not hold a retail license or sell at retail.

A number of exceptions have been enacted. For example, wineries and breweries may sell at retail on their premises and a brewery may hold up to two licenses for a restaurant and/or tavern on its premises or at separate locations. A nonprofit association or a wine industry association with an officer, director, owner, or employee of a winery on its board of directors may hold a special occasion license. Other exceptions have been enacted.

"Moneys' worth." The "moneys' worth" part of the tied house law prohibits a manufacturer, importer, distributor, or authorized representative from advancing to a licensed retailer, and a retailer from receiving, moneys or moneys' worth. Exceptions include the following:

- Manufacturers, distributors, and importers may provide display and stocking services, price case goods, and perform other normal business services for retailers.
- Wineries may provide certain personal services at spirits, beer, and wine restaurants; wine and/or beer restaurants; and specialty wine shops.
- Wineries and breweries and retailers may provide information about and link to each other on their websites.

Pricing.

"Post and hold." It is unlawful for a beer or wine manufacturer, importer, or distributor to modify prices without notifying and obtaining Liquor Control Board (Board) approval. A statute states that beer and wine suppliers and distributors must file prices with the Board. Until recently, a rule required suppliers and distributors to adhere to posted prices for at least 30 days. These provisions were known as the "post and hold" requirement. In 2008 the "post and hold" requirements were struck down by the Ninth Circuit Court of Appeals in the *Costco v. Hoehn* litigation.

Minimum mark-up. Beer and wine manufacturers and distributors must mark-up the price of their product to a distributor or retailer, as the case may be, by at least 10 percent above the acquisition/production cost.

Summary of Engrossed Bill:

Intent.

Legislative recognition is made that the three-tier system is a valuable system for the distribution of beer and wine. The Legislature further recognizes that the historical total prohibition on ownership in different tiers as well as the historical restriction on financial incentives and business relationships between tiers are unduly restrictive. The Legislature finds that the modifications adopted are appropriate, because the modifications do not impermissibly interfere with the goals of: (1) orderly marketing of alcohol; (2) encouraging moderation; (3) protecting the public interest and advancing public safety by preventing consumption by minors and other abusive consumption; and (4) promoting the efficient collection of taxes.

Tied House Law.

Overview. The tied house law is repealed and new provisions adopted. In general, financial interests between industry members (manufacturer and distributor tiers) and retailers are permitted. Also, industry members generally continue to be prohibited from advancing, and retailers continue to be prohibited from accepting, moneys' worth. The exceptions to the moneys' worth prohibition are retained with some changes, and an additional exception for branded promotional items is added.

Definitions. Definitions are added, including the following:

An "industry member" is a manufacturer, producer, supplier, importer, wholesaler, distributor, authorized representative, certificate of approval holder (out-of-state manufacturer), warehouse, and any affiliates, subsidiaries, officers, directors, partners, agents, employees, and representatives of any industry member.

"Adverse impact on health or safety" means a practice or occurrence that has resulted or is more likely to result in alcohol being made significantly more attractive or available to minors, or has resulted in or is more likely to result in overconsumption, consumption by minors, or abusive forms of consumption.

"Undue influence" means one retailer or industry member influencing the purchasing, marketing, or sales decisions of another industry member or retailer by any agreement or other business practices or arrangements which result directly or indirectly in circumstances including:

- a retailer on an involuntary basis purchasing less than it would have of another industry member's product;
- purchases made by a retailer or industry member as a prerequisite for purchase of other items;
- a retailer purchasing a specific or minimum quantity or type of a product from an industry member;

- an industry member requiring a retailer to take and dispose of a certain product type or quota of the industry member's products;
- a retailer having a continuing obligation to purchase or otherwise promote or display an industry member's product;
- an industry member having a continuing obligation to sell a product to a retailer;
- a retailer or an industry member having a commitment not to terminate its relationship with the other party with respect to sale and purchase of a particular product;
- an industry member or retailer being involved in each other's day-to-day operations in a manner that violates the provisions; and
- discriminatory pricing practices prohibited by law or other practices that are discriminatory if the product is not offered to all retailers in the local market on the same terms.

Financial interest. It is lawful for an industry member to have a direct or indirect financial interest in another industry member or a retailer unless the interest has resulted in or is more likely than not to result in undue influence over the retailer or industry member or an adverse impact on public health and safety. The standard also applies to financial relationships between manufacturers and distributors. The financial interests between tiers must be structured so that an entity in one tier may not hold a license in another tier in its name. However, the exceptions which allow an entity with a license in one tier to hold a license in or exercise the privileges of another tier are retained.

A complaint process is established. Any person may file a complaint or request for determination with the Liquor Control Board (Board) asserting undue influence or an adverse impact on public health or safety. The Board may investigate and issue an administrative violation notice or notice of intent to deny the license, or both, and the Board may require that a transaction be undone.

Moneys' worth. Industry members may not advance to a retailer, and a retailer may not receive from an industry member, moneys' worth under any business practice or arrangement.

The exceptions in current law are retained with some changes. The personal services exception is broadened to allow wineries to provide personal services for special occasion licensees and private club licensees. Most of the exceptions we made applicable to all industry members.

A new exception allows branded promotional items of nominal value, singly or in the aggregate. Items identified include trays, lighters, blotters, postcards, pencils, coasters, menu cards, meal checks, napkins, clocks, mugs, glasses, hats, and visors, and similar items may be provided. The items must be used exclusively by the retailer or the retailer's employees in a manner consistent with the liquor license, must bear imprinted matter of the industry member only, may not be provided to retail consumers, and may not be targeted to or appeal principally to youth.

A complaint process is established for branded promotional items similar to the complaint process for financial interests. Any person may file a complaint with the Board asserting

undue influence, an adverse impact on public health or safety, or that the provision of the items is otherwise inconsistent with the requirements for promotional items. The Board may investigate and issue an administrative violation notice.

Recordkeeping. Industry members and retailers must keep records for three years of moneys' worth furnished or received and financial ownership or interests between industry members and retailers.

Pricing.

Intent. Intent language in the pricing provisions is deleted.

Posting. The prohibition against modifying prices at the manufacturer or distributor level without notification to and approval of the Board is deleted. The requirement for beer and wine suppliers and distributors to file prices with the Board is deleted. Distributors and suppliers must maintain price lists at their licensed locations.

Minimum mark-up. The requirement that suppliers mark-up prices to distributors or retailers and that distributors mark-up prices to retailers by 10 percent of acquisition/production cost is removed. The prohibition against sales below cost is retained.

Other.

The Board is given rule-making authority.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill is a watershed change which modernizes the law without sacrificing public safety. The three tier system remains intact. The bill removes unnecessary barriers, simplifies the law, and provides flexibility. The bill is progressive and frees up regulation to meet today's commercial environment without allowing youth access or overconsumption. A coalition worked on this over the summer. The focus was on business regulations which cost a lot of money but are not necessary. The 10 percent minimum mark-up is not needed because the mark-up is usually more than 10 percent. Maintaining the prohibition against sales below costs provides the needed protection. The branded promotional items section allows on-site promotional activity and does not allow the items to be distributed to consumers. The financial interest pieces will stir investment. Regulation is kept to assure there is no undue influence. The bill does not do everything stakeholders want but it should be moved forward.

(In support with amendment) Wineries have come to the Legislature for many years to get changes to allow wineries to market their wines. The branded promotional item provisions will allow small wineries to get their names out. Technical amendments are needed.

(With concerns) Some provisions make the bill difficult to support. More flexibility is needed for prohibiting undue influence; the standard is too high. Under the financial interest section, it is not clear that manufacturers can distribute their own product. The piece on financial interest should be deferred or limited to beer and wine. Under current law, in liquor and in other areas, approval is needed before mergers and acquisitions. The bill flips this and allows cross ownership unless there is a complaint. Manufacturers and distributors of spirits do not have information on ownership changes so they will not be able to identify if there is undue influence. Unlike beer and wine, spirits manufacturers do not know about retailers because they provide all of their product through the Liquor Control Board.

The elimination of the minimum mark-up may have the unintended consequence of making alcohol more accessible to youth. The reference to youth in branded promotional items is supported.

(Opposed) None.

Persons Testifying: (In support) Lorraine Lee, Washington State Liquor Control Board; Holly Chisa, Northwest Grocery Association; Carolyn Logue, Washington Food Industry; John Guadnola, Washington Beer and Wine Wholesalers Association; and Carrie Tellefson, Distillery Representatives Association of Washington.

(In support with amendment) Jean Leonard, Washington Wine Institute.

(With concerns) Michael Transue, Washington Restaurant Association; Jeff Gombosky, Anheuser-Busch InBev; Scott Hazlegrove, Hood River Distillers; and Seth Dawson, Washington Association for Substance Abuse.

Persons Signed In To Testify But Not Testifying: None.