

21 QUESTIONS ABOUT  
OPENING A BREWERY IN  
THE UNITED STATES  
A FEDERAL PRIMER

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# About 21 Questions About Opening a Brewery in the United States

We are a husband and wife team. In early 2008, we left our gigs as a CPA and an attorney to pursue our beer and entrepreneurial passions. We have always wanted to experience the gratification of creating a unique product and sharing it with others.

The idea for a series of Brewer's Primers to alcohol and beverage laws was sparked from our journey to open a small package brewery. We are currently working with a friend to open a package brewery in Fort Collins, CO. Before coming to Fort Collins, we put a lot of energy into determining the feasibility of breweries in Arizona, Vermont, and south Florida.

Unfortunately, after many hours of research, our business ideas for a small package brewery were often snuffed out by the minefield of federal and state laws and regulations. Then we thought: "Wouldn't it be great if there was a guide to the laws of each state?"

Such a guide would give brewers interested in opening or expanding breweries a quick glance at the issues they might face, and allow them to be more productive with business plans. So, we began to create our own series of primers to the alcohol and beverage laws affecting breweries in the United States.

Our Primers are focused on providing brewers with a basic understanding of what issues might arise in opening or expanding a brewery. They also help a brewer identify what questions to ask about the alcohol and beverage laws, and where to find the answers; thus, freeing the brewer to focus on generating innovative business ideas.

This Primer is the third Primer in our series. Instead of being focused on individual states, like our other products, this Primer is focused on the federal laws. It also gives a brewer an overview of things to watch out for at the state level when starting a brewery.

If you are a startup brewery, or an established brewery looking to expand, we are sure you will find our series helpful. We would appreciate any input you have on this product or any of our other products.

Thank you!

Anda & Brad Lincoln  
support@darktrainink.com

## Question 1

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**What is alcohol control all about?** Or, the perceived evils that lead to a legal maze.

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The United States has an interesting history with alcohol control, leading to the adoption of the Eighteenth Amendment prohibiting manufacture, sale, and transportation of alcoholic beverages (it did not prohibit consumption outright). Prohibition was a means to control the perceived evils of alcohol, namely over consumption and crime. Prohibition as a means to control alcohol consumption famously failed. It only led to the rise of organized crime, bootlegging, and rum running; alcohol consumption even rose during the Prohibition years. The Twenty-First Amendment repealed the unpopular law thirteen years later.

The repeal of Prohibition returned power to the states to deal with the “evils” of alcohol. The goals of most states in enacting alcohol control legislation were to control consumption, eliminate crime, and raise state revenues. Some states focused more on certain goals of alcohol control than others. The resulting patchwork of archaic laws, both state and federal, attempt to meet alcohol control goals through state and federal licensing processes, mandated three-tier distribution systems, extensive background checks on license applicants, and excise taxes.

Prior to Prohibition, most manufactures and retailers were often vertically integrated; retailers selling alcohol to consumers were often owned by their upstream suppliers. The vertical integration model created lower prices for a re-

tailer, and guaranteed a return to a manufacturer wanting to capture a certain market. This is still the distribution system widely used in Germany, Ireland, and other nations. Because this method is often more profitable, it created alleged excessive promotion of alcohol which led to alleged over indulgence.

The states and federal government, in order to deal with the perceived evils, opted to prohibit tied houses in the United States (manufacturers and wholesalers are generally prohibited from owning any interest in, or from providing anything of value to, a retailer). The states also created a three-tier distribution system whereby manufacturers are generally prohibited from selling to retailers and consumers, and may only sell to wholesalers.

The three-tier system is also intended to control crime in the industry. Criminal background checks at the state and federal level are used to keep persons with criminal convictions, or with financially unstable businesses, from opening or operating an alcohol based business. Many states prohibit anyone with a felony conviction, or with convictions for prostitution, violations of alcohol or other “moral” laws from obtaining licenses to run an alcohol based business.

Excise taxes, again both at the state level and the federal level, are also used to control the perceived evils of drinking and corruption. Excise taxes control the price of alcohol so that it does not become too cheap and easily accessible. These taxes also provide the state and federal government with a steady stream of revenue.

The patchwork of laws regulating the alcohol industry extend to advertising and label requirements and prohibitions. The alcohol industry cannot operate businesses the way other industries can. Even how an alcohol business can be purchased by a new owner is often controlled by the alcohol and beverage laws.

At a state level, there are “control states” and “license states.” Eighteen states (the control states) have opted to control the sale of all or some alcoholic beverages (Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming). Some control states, such as Alabama, control all wholesale and retail sales of moderate and high alcohol content beverages (fortified wine and beer, and spirits). Others are hybrids; such as Oregon, which allows the sale of beer and wine by private enterprise. In control states, restaurants serving spirituous liquors must also purchase alcohol from the alcoholic beverage control board. The license states, on the other hand, have created complex licensing systems to allow private enter-

prises to sell alcohol to consumers. The licensing systems mandate three-tier distribution systems similar to the ones imposed in the control states, often with varying exceptions.

This publication is focused on some (but definitely not all) of the laws governing breweries and brewpubs in the United States. This publication is not (nor is it intended to be) an inclusive guide to the alcoholic beverage laws of the United States, or any state, the District of Columbia, or United States territories. It is provided for informational purposes only, and as an introductory guide to some of the general issues a brewer might face in starting and operating a brewery or brewpub in the United States. The state law examples provided throughout this publication are provided as illustrations of how divergently the states deal with the same alcohol control issues. The state law examples are not, nor are they intended to be, guides to how the states administer alcohol control laws.

When working with any laws, but especially alcohol and beverage laws, it is important to remember that even if an action is not explicitly forbidden by law or regulation (either federal, state, or local), the action may still not be allowed by the governing authorities. When in doubt, or moving into uncharted waters, it is best for a brewery to work with a competent licensed attorney and to contact the TTB and the alcohol board for the state in which it is conducting business.

## Question 2

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### **What are the laws that govern brewers and breweries?** Or, where the headaches start.

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The alcohol industry is one of the most regulated industries in the United States. There are federal laws, state laws, and local county and municipal laws that regulate the manufacture, sale, shipment, delivery, use, and even possession of alcoholic beverages. The various laws supplement each other. So, in any given city the federal laws, the state laws, the county laws, and the city laws will all apply. On a federal level, all brewers wishing to sell their beer need to be aware of at least the following groups of laws:<sup>1</sup>

- The Internal Revenue Code (the “IRC,”) contained in the United States Code (“USC”), Title 26, Chapter 51;
- The Federal Alcohol Administration Act (the “FAA Act,”) contained in Title 27 of the USC, Chapter 8;

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<sup>1</sup> Links to the federal laws can all be found at <http://www.ttb.gov/beer/beer-regs.shtml>

- The Federal Code of Regulations (“CFRs”), Chapter 27, Parts:
  - 6 (Tied House),
  - 7 (Labeling and Advertising of Malt Beverages),
  - 8 (Exclusive Outlets),
  - 10 (Commercial Bribery),
  - 11 (Consignment Sales),
  - 13 (Labeling Proceedings),
  - 16 (Alcoholic Beverage Health Warning Statement), and
  - 25 (Beer).

The CFRs set out the federal regulations dealing with all aspects of beer production and sale. There are specific rules for what a brewery can be used for, as well as beer formulas, label, and advertising regulations. Certain trade practices are also prohibited on a federal level, such as consignment sales, exclusive outlets, and tied houses.

Each state, the District of Columbia, and each United States territory has its own set of laws governing and regulating alcoholic beverages. The state laws are applicable not only to breweries located in those states, but also to breweries selling their out of state manufactured beer in that state. As a third, and sometimes fourth, layer of confusion, there are often additional county and municipal laws and regulations that apply to alcoholic beverages (such as sales taxes, time of day sales laws, and location regulations, among others).

Unfortunately, there is no uniform set of laws that apply throughout any two states (except for the federal laws that apply in all the states). The specific state and local laws are important to know before choosing a state in which to open a brewery. It is also important to consider different state laws when outlining a business plan that includes distribution of beer to other states.

The laws described in this publication are not the only laws a brewer needs to be familiar with in opening or operating a brewery. A brewer also needs to be familiar with other related federal laws and regulations on alcohol, as well as related state and local laws and regulations. The local laws (set forth by the states, counties, and cities) regulate everything from who is eligible to brew beer, to the time of day alcohol may be sold, and the building codes for constructing a brewery. The state, local, and federal laws are all equally important and need to be followed to be a successful law abiding brewery.

There are also additional federal, state, and local business laws, employment laws, advertising laws, insurance laws and regulations, water rights laws, contract and commercial laws, zoning laws, environmental laws, and tax laws, among others, that a brewer must be familiar with when starting and operating an alcohol based business in any state. All of these laws are beyond the scope of this publication. It is important for every brewer to obtain advice from a competent licensed attorney in his or her state before opening any kind of alcoholic beverage based business.

## Question 3

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**Who is in charge?** Or, where it would be nice to have a friend.

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On a federal level, the Alcohol and Tobacco Tax and Trade Bureau (the “TTB”), is charged with administering the laws and regulations governing alcohol, tobacco, firearms, and ammunition, and to collect excise taxes on those products. There are divisions within the TTB that are responsible for the regulation and collection of excise taxes, for approving and regulating alcoholic beverage businesses, as well as for label and formula approval and regulation. There are regional offices responsible for the regulation of alcohol based businesses for groups of several states. Generally, a brewer will be dealing with the regional office responsible for his or her state.

The TTB’s general contact information is:

E-mail: [ttbquestions@ttb.treas.gov](mailto:ttbquestions@ttb.treas.gov)  
Telephone: 202-453-2000  
U.S. Mail: Alcohol and Tobacco Tax and Trade Bureau  
Public Information Officer  
1310 G Street, NW, Suite 300  
Washington, D.C. 20220

On a state level, each state has an alcoholic beverage control board or division. The state alcohol control divisions regulate the production, sale, shipment, use, and possession of alcoholic beverages. They provide licenses and collect excise taxes from alcohol based business.

A list of the alcohol control divisions by state and their contact information can be found on the TTB's web site at: [http://www.ttb.gov/wine/control\\_board.shtml](http://www.ttb.gov/wine/control_board.shtml). Please note that the contact information on the TTB's web site is subject to change and may not always be the most up-to-date contact information for each state.

## Question 4

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**What is beer?** Or, why beer in one state is not necessarily beer in another state.

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The first step in determining how the alcohol laws apply to a brewery is to figure out what beer is. The definition of beer is important to understand because it determines which laws and regulations apply. In some cases, the definition will also determine how a brewery's product can be sold.

Beer is an alcoholic beverage containing water, malted barley, hops and yeast. Right? Of course, legislators have found many different ways to define beer. Each state, territory, and the federal government has a definition of beer.

### **Alcoholic Beverage**

First, beer is an alcoholic beverage. An alcoholic beverage, as far as the federal government is concerned, "includes any beverage in liquid form which contains not less than one-half of one percent of alcohol by volume and is intended for human consumption." See §27 USC 214(1). Most states have a similar definition of alcoholic beverages.

## Beer

Beer, or a malt beverage, under the federal laws is “a beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, [of] malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption.” See §27 USC 211(a)(7). In other words, beer is any “beer, ale, porter, stout, and other similar fermented beverages (including sake and similar products) of any name or description containing one-half of one percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute for malt.” See §27 CFR 25.11.

According to the federal regulations, beer must contain malt or malt substitutes (rice, grain of any kind, bran, glucose, sugar, and molasses). But, may also include fermentable and non-fermentable adjuncts (honey, fruit, fruit juice, fruit concentrate, herbs, spices, and other food materials). See §27 CFR 25.15(a). Flavors and non-beverage ingredients containing alcohol, can also be used to make beer, so long as these additives do not contribute more than 49% of the overall alcohol content of the finished beer. For example, a finished beer that contains 5% ABV may only derive 2.45% ABV from the alcohol containing flavors. See §27 CFR 25.15(b).

## Cider and Mead

Cider and mead, since they are not made with malt, both fall under the federal wine definition. At a federal level, wine includes “sparkling and carbonated wine, wine made from condensed grape must, wine made from other agricultural products than the juice of sound, ripe grapes, imitation wine, compounds sold as wine, vermouth, cider, perry, and sake.” See §27 CFR 1.10. Mead, made from honey, an agricultural product, is an “agricultural wine,” or wine “made from agricultural products other than the juice of fruit.” See §26 USC 5387.

## Beer and the States

The state definitions of beer vary from state to state, of course. We have included below some examples of different variations on the state definitions. The definitions below are provided as examples only, and may not be used as guides to the state definitions of beer, cider, or mead. As previously mentioned,

each state has its own definition of beer, and a brewery needs to be familiar with the definition in its home state as well as the definition in any state in which it wishes to sell beer.

The state definitions of beer might be simple. In Florida, for example, beer is “all brewed beverages containing malt.” *See Florida Statutes §563.01*. In other states, the definition of beer includes an alcohol by volume limit. Any beers over that ABV limit are considered spirituous liquors. In Oregon, beer means “an alcoholic beverage obtained by the fermentation of grain that contains not more than 14 percent alcohol by volume.” *See Oregon Revised Statutes §471.001(6)(a)-(c)*. Alabama recently increased its ABV limit on beer from 6% to 13.9%, but only certain retailers and brewpubs may sell the higher alcohol beer. *See the Code of Alabama §28-3-1 (as revised)*. Vermont’s definition of beer is even more complicated: beer is “all fermented beverages of any name or description manufactured for sale from malt, wholly or in part, or from any substitute ... containing not less than one percent nor more than 16 percent of alcohol by volume at 60 degrees Fahrenheit. However, if such a beverage has an alcohol content of more than six percent and has a terminal specific gravity of less than 1.009, it shall be deemed to be a spirit and not a malt beverage.” *See Vermont Statutes Title 7, Chapter 1, §2(14)*.

## **Cider, Mead, and the States**

The categorization of cider and mead in the states varies widely as well. In Florida, cider, because it is made from fruit, falls under the state’s wine regulations. *See Florida Statutes §564.01(1)*. Mead, on the other hand, does not neatly fall into any of the Florida defined alcoholic beverage categories. The question in Florida, and other states that do not include “other agricultural products” in the definition of wine, is: is mead a liquor by default? In Florida, if mead is treated as a spirituous liquor, only the state run ABC stores would be able to sell it.

In Oregon, the definition of beer specifically does not include cider “or an alcoholic beverage obtained primarily by fermentation of rice, such as sake.” Wine in Oregon means “any fermented vinous liquor or fruit juice, or other fermented beverage fit for beverage purposes that is not a malt beverage [and also excluding cider], containing more than one-half of one percent of alcohol by volume and not more than 21 percent of alcohol by volume.” *See Oregon Revised Statutes §471.001(10)*. Mead would likely fall under this catch-all definition. Cider in Oregon has its own definition: “an alcoholic beverage made from the fermentation of the juice of apples or pears that contains not more than seven percent of alcohol by volume, including, but not limited to, flavored, sparkling or carbonated cider.” *See Oregon Revised Statutes §471.023*.

In Vermont, wines are “all fermented beverages of any name or description manufactured or obtained for sale from the natural sugar content of fruits, or other agricultural product, containing sugar, the alcoholic content of which is not less than one percent nor more than 16 percent by volume at 60 degrees Fahrenheit.” See Vermont Statutes Title 7, Chapter 1, §2(23). This definition of wine, by including “other agricultural product[s]” squarely puts cider and mead in the wine category.

## **Why Should I Care?**

Beer, wine, and spirituous liquors, on both a federal level and a state level, are treated differently. Wineries often have more rights as to how they can sell their wine and to whom. Distilleries are often the most restricted category of manufacturer, and in the control states, only the state may sell a distillery’s products. So, it is important to understand into which category an alcohol manufacturer’s product will fall.

To simplify matters, this publication assumes that a brewery is producing beer, and not wine, nor a beer so high in alcohol content that it would be considered a spirituous liquor in some states. Several additional volumes could be written to deal with the regulations related to wines and high alcohol beers.