

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

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About 21 Questions About Opening a Winery 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 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 Primers to alcohol and beverage laws was sparked from our journey to open a small package brewery (that would also produce cider and mead - both considered wine). 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 such a venture in Arizona, Vermont, and south Florida.

Unfortunately, after many hours of research, our business ideas 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 alcoholic beverage laws?"

As the craft wine, spirits, and beer markets grow, such a guide would give wine makers and brewers interested in opening or expanding wineries and 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 in the United States.

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

This Primer is the fourth Primer in our series. It is focused on the federal laws related to opening a winery. It also provides an overview of things to watch out for at the state level when opening a winery.

If you are a startup winery, or a brewery looking to make cider or mead, 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!

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Question 1

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

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 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 retailer, 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 an alleged excessive promotion of alcohol which led to alleged over indulgence.

Three Tiers of Complication

The states and federal government, to deal with the perceived evils, opted to prohibit tied houses in the United States (manufacturers and wholesalers are 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 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 control laws, or other “moral” laws from obtaining licenses to run an alcohol based business.

Excise Taxes

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. They also provide the state and federal government with a steady stream of revenue.

Advertising

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.

The State Systems

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 wine, and spirits). Others are hybrids, such as Oregon, which allows the sale of wine and beer 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 enterprises to sell alcohol to consumers. The licensing systems mandate three-tier systems similar to the ones imposed in the control states, often with varying exceptions. Within the license state systems, there are many variations on the degree of state control of high alcohol beer and wine, and spirits.

Our Focus

This publication is focused on some (but definitely not all) of the laws governing alcoholic beverages 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 territories. It is provided for informational purposes only, and as an introductory guide to some of the general issues a winery founder might face in starting and operating a winery 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 winery 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.

Why should brewers be concerned with the laws governing wineries?

Generally, brewers need to comply with the laws applicable to breweries. Unless, however, the brewer wants to also make cider or mead. Both cider and mead fall under the federal definitions of wine, rather than wine.

A winery making anything other than wine needs to also hold an appropriate license to make the other alcoholic beverage (brandy, for example). Likewise, a winery that wishes to make a fermented malt beverage needs to obtain a brewery license, and comply with all the regulations governing breweries.

Question 2

What are the laws that govern wineries? Or, where the headaches start.

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.

Federal Laws & Regulations

On a federal level, all vintners wishing to sell their wine need to be aware of at least the following groups of laws¹:

- 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 ;

¹ Links to the federal laws can all be found at: http://www.ttb.gov/wine/wine_regs.shtml

- The Federal Code of Regulations (“CFRs”), Chapter 27, Parts:
 - 1 (Basic Permit),
 - 4 (Labeling and Advertising of Wine),
 - 9 (American Viticultural Area),
 - 10 (Commercial Bribery),
 - 11 (Consignment Sales),
 - 12 (Foreign Nongeneric Names of Geographic Significance)
 - 13 (Labeling Proceedings),
 - 16 (Alcoholic Beverage Health Warning Statement), and
 - 24 (Wine).

Code of Federal Regulations (CFRs)

The CFRs set out the federal regulations dealing with all aspects of wine production and sale. There are specific rules for how a winery can be used, as well as permits, label, and advertising regulations. There are requirements for geographic names associated with wines. Certain trade practices are also prohibited on a federal level, such as consignment sales, exclusive outlets, and tied houses. The list above is not inclusive. There are several CFR sections relating to the importation and exportation of alcohol that are not included in, and are beyond the scope of, this publication.

State & Local Laws

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 wineries located in those states, but also to wineries selling their out of state manufactured wine in that state. For example, a Colorado winery selling wine in Maryland must comply, not only with the Colorado laws, but also with the Maryland laws (which are, most likely, different).

As a third, and sometimes fourth, layer of confusion, there are often additional county and municipal laws and regulations that regulate alcoholic beverages (such as sales taxes, time of day sales laws, and location regulations, among

others). Local zoning laws, as well as county health codes (usually applicable when a winery has a tasting room), also play a role in what a winery can, cannot, and must do.

Know the laws before opening

Unfortunately, there is no uniform set of laws that apply throughout any two states (except for the federal laws which apply in all the states). The specific state and local laws are important to know before choosing a location in which to open a winery. There may be production restrictions in some states, as well as ABV limits in other states.

It is also important to consider different state laws when outlining a business plan that includes distribution of wine to other states. While self distribution of wine is generally more liberal than self distribution of beer or spirits, there are states with stronger restrictions than others. If one must distribute through a wholesaler, this needs to be calculated into an operating budget from the beginning.

Other Laws

The laws described in this publication are not the only laws a vintner needs to be familiar with in opening or operating a winery. There are 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 make wine, to the time of day alcohol may be sold, and the building codes for constructing a winery. The state, local, and federal laws are all equally important and need to be followed to be a successful law abiding winery.

There are additional federal, state, and local business laws, employment laws, general advertising laws, insurance laws and regulations, water rights laws, contract and commercial laws, zoning laws, health and safety regulations and requirements, environmental laws, and tax laws, among others, that a one must be familiar with when starting and operating any alcohol based business in any state.

All of these laws are beyond the scope of this publication. It is very important to obtain advice from a competent licensed attorney in one's area before opening any kind of alcoholic beverage based business.

We also advise all readers of this publication to seek the advice of business and financial professionals prior to opening an alcohol based business, as there are tax issues as well as other financial considerations particular to an alcohol based business that must be considered.

Question 3

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

Federal Alcohol Control Authority

On the 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 in several states. Generally, a vintner 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
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

State Alcohol Control Authority

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 website.² Please note that the contact information on the TTB's website is subject to change and may not always be the most up-to-date contact information for each state.

² At: http://www.ttb.gov/wine/control_board.shtml.

Question 4

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

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

Wine is an alcoholic beverage made from fermented grapes or fruit. Right? Legislators, of course, have found many different ways to define wine. Each state, territory, and the federal government has a definition of wine, that may, or may not, be the same as each other.

Alcoholic Beverage

First, wine 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."³ Most states have a similar definition of alcoholic beverages.

3 See §27 USC 214(1).

Wine at the Federal Level

Wine generally includes “every kind (class and type) of product produced on bonded wine premises from grapes, other fruit (including berries), or other agricultural products and containing not more than 24 percent of alcohol by volume.”⁴ 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.”⁵ The federal definition of wine includes the following wine types, or categories: agricultural wine, fruit wine, grape wine, hard cider, must, natural wine, and sparkling wine or Champagne.

Wine with an alcohol by volume (“ABV”) percent higher than 24, would be classified as a fortified wine, or spirit. This distinction is important for taxation purposes, as well as licensing and selling purposes.

Cider

Cider, or hard cider is “wine derived primarily from apples or apple concentrate and water ([apple juice] must represent 50 percent of the volume of the finished product) containing no other fruit product nor any artificial product which imparts a fruit flavor other than apple; containing at least one-half of 1 percent and less than 7 percent alcohol by volume; having the taste, aroma, and characteristics generally attributed to hard cider; and sold or offered for sale as hard cider.”⁶

Notice that there is an ABV limit to hard cider. Cider that is above seven percent ABV, is a fruit wine, or a wine “made from the juice of sound, ripe fruit... berries, or wine made from a combination of grapes and other fruit (including berries).”⁷ This distinction is important for tax purposes, as well as for manufacturing, labeling, and advertising purposes.

Agricultural Wine

Mead, made from honey, an agricultural product, is an “agricultural wine,” or wine “made from agricultural products other than the juice of [grapes, berries, or other] fruits.”⁸

4 See §27 CFR 24.10.

5 See §27 CFR 1.10.

6 See §27 CFR 24.10.

7 See §27 CFR 24.10.

8 See §§ 26 USC 5387 and 27 CFR 24.10.

Beer

Beer, or a malt beverage, on the other hand, 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, or 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.”⁹

Cider and mead fall under the wine definitions because they do not include any malt, or malt substitutes.

Wine at the State Level

The state definitions of wine vary from state to state. We have included below some examples of different variations on the state definitions. The definitions below are provided as examples only, and are not guides to the state definitions of wine, cider, or mead. As previously mentioned, each state has its own definition of wine, and a winery 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 wine.

Wine

In most states, wine is an alcoholic beverage made by fermenting fruits or other agricultural products. In some states, the definition of wine includes an ABV limit. Any wines over that ABV limit are treated like spirituous liquors in terms of sales, taxes, and other regulations. Some states do not include other agricultural products as part of the wine definition, leaving mead and sake technically uncategorized.

In California, wine means an alcoholic beverage obtained from fermentation of grapes, fruit, or other agricultural products “containing natural or added sugar or any such alcoholic beverage to which is added grape brandy, fruit brandy, or spirits of wine, which is distilled from the particular agricultural product or products of which the wine is made and other rectified wine products ... which contains not more than 24 percent of alcohol by volume, and includes vermouth and sake.”¹⁰

9 See §27 USC 211(a)(7).

10 See California Alcohol Beverage Control Act § 23007.

In Florida, wine is “all beverages made from fresh fruits, berries, or grapes...,” it becomes fortified wine (which is treated as a spirit) when the ABV exceeds 17.259 percent.¹¹

In Oregon, wine means “any fermented vinous liquor or fruit juice, or other fermented beverage... that is not a malt beverage, containing more than one-half of one percent of alcohol by volume and not more than 21 percent.”¹²

In Washington, wine is also “any alcoholic beverage obtained by fermentation of fruits ... or other agricultural product containing sugar ... and containing not more than twenty-four percent of alcohol by volume.” Washington legislators have further broken out the definition of wine into separate classes: table wine is “any beverage containing no more than fourteen percent of alcohol by volume,” and fortified wine is “any beverage containing alcohol in an amount more than fourteen percent by volume.” Fortified wine, however, “does not include: (i) [w]ines that are both sealed or capped by cork closure and aged two years or more; and (ii) wines that contain more than fourteen percent alcohol by volume solely as a result of the natural fermentation process and that have not been produced with the addition of wine spirits, brandy, or alcohol.”¹³

In Vermont, a 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.”¹⁴

Cider and Mead

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.¹⁵ 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 spirit, only the state run ABC stores would be eligible to sell it.

11 See Florida Statutes §564.01.

12 See Oregon Revised Statutes §471.001.

13 See Revised Code of Washington §66.04.010.

14 See Vermont Statutes Title 7, Chapter 1, §2(23).

15 See Florida Statutes §564.01(1).

In Oregon, mead falls into the catch-all definition of wine: “or other fermented beverage fit for beverage purposes...”¹⁶ The definition of wine, however, specifically does not include cider. 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.”¹⁷ Note, that the ABV limit in Oregon is the same as the federal requirement for cider. Once above the ABV limit, it is a different class of wine, and must be sold in state licensed liquor stores.

The Importance of Definition

Wine, beer, 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 winery is producing wine (fruit wine, grape wine, cider, or mead). We will not discuss higher alcohol (or fortified) wine, which is often treated as a spirituous liquor. Several additional volumes could be written to deal with the regulations related to spirits and high alcohol wines.

16 See Oregon Revised Statutes §471.001(10).

17 See Oregon Revised Statutes §471.023.