

CHAPTER 55

PROFESSIONS AND OCCUPATIONS

HOUSE BILL 07-1103

BY REPRESENTATIVE(S) Buescher, King, and McFadyen;
also SENATOR(S) Veiga, Taylor, and Tochtrop.

AN ACT

**CONCERNING THE WHOLESALE SUPPLY OF MALT BEVERAGES, AND, IN CONNECTION THEREWITH,
SETTING FORTH REQUIREMENTS FOR THE RELATIONSHIP BETWEEN A SUPPLIER AND A
WHOLESALE OF MALT BEVERAGES.**

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Part 4 of article 47 of title 12, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

12-47-406.3. Termination of wholesalers - remedies - definitions.

(1) (a) EXCEPT AS PROVIDED IN SUBSECTIONS (2) TO (4) OF THIS SECTION, NO SUPPLIER SHALL TERMINATE AN AGREEMENT WITH A WHOLESALER UNLESS ALL OF THE FOLLOWING OCCUR:

(I) THE WHOLESALER FAILS TO COMPLY WITH A PROVISION OF A WRITTEN AGREEMENT BETWEEN THE WHOLESALER AND THE SUPPLIER;

(II) THE WHOLESALER RECEIVES WRITTEN NOTIFICATION BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, FROM THE SUPPLIER OF THE ALLEGED NONCOMPLIANCE AND IS AFFORDED NO LESS THAN SIXTY DAYS IN WHICH TO CURE SUCH NONCOMPLIANCE;

(III) THE WHOLESALER FAILS TO CURE SUCH NONCOMPLIANCE WITHIN THE ALLOTTED SIXTY-DAY CURE PERIOD; AND

(IV) THE SUPPLIER PROVIDES WRITTEN NOTICE BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE WHOLESALER OF SUCH CONTINUED FAILURE TO COMPLY WITH THE AGREEMENT. THE NOTIFICATION SHALL CONTAIN A STATEMENT OF THE INTENTION OF THE SUPPLIER TO TERMINATE OR NOT RENEW THE AGREEMENT, THE

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

REASONS FOR TERMINATION OR NONRENEWAL, AND THE DATE THE TERMINATION OR NONRENEWAL SHALL TAKE EFFECT.

(b) IF A WHOLESALER CURES AN ALLEGED NONCOMPLIANCE WITHIN THE CURE PERIOD PROVIDED IN SUBPARAGRAPH (II) OF PARAGRAPH (a) OF THIS SUBSECTION (1), ANY NOTICE OF TERMINATION FROM A SUPPLIER TO A WHOLESALER SHALL BE NULL AND VOID.

(2) A SUPPLIER MAY IMMEDIATELY TERMINATE AN AGREEMENT WITH A WHOLESALER, EFFECTIVE UPON FURNISHING WRITTEN NOTIFICATION TO THE WHOLESALER BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, FOR ANY OF THE FOLLOWING REASONS:

(a) THE WHOLESALER'S FAILURE TO PAY ANY ACCOUNT WHEN DUE AND UPON WRITTEN DEMAND BY THE SUPPLIER FOR SUCH PAYMENT, IN ACCORDANCE WITH AGREED PAYMENT TERMS;

(b) THE ASSIGNMENT OR ATTEMPTED ASSIGNMENT BY THE WHOLESALER FOR THE BENEFIT OF CREDITORS, THE INSTITUTION OF PROCEEDINGS IN BANKRUPTCY BY OR AGAINST THE WHOLESALER, THE DISSOLUTION OR LIQUIDATION OF THE WHOLESALER, OR THE INSOLVENCY OF THE WHOLESALER;

(c) THE REVOCATION OR SUSPENSION OF, OR THE FAILURE TO RENEW FOR A PERIOD OF MORE THAN FOURTEEN DAYS, A STATE, LOCAL, OR FEDERAL LICENSE OR PERMIT TO SELL PRODUCTS IN THIS STATE;

(d) FAILURE OF AN OWNER OF A WHOLESALER TO SELL HIS OR HER OWNERSHIP INTEREST IN THE DISTRIBUTION RIGHTS TO THE SUPPLIER'S PRODUCTS WITHIN ONE HUNDRED TWENTY DAYS AFTER SUCH OWNER OF A WHOLESALER HAS BEEN CONVICTED OF A FELONY THAT, IN THE SUPPLIER'S SOLE JUDGMENT, ADVERSELY AFFECTS THE GOODWILL OF THE WHOLESALER OR SUPPLIER;

(e) A WHOLESALER HAS BEEN CONVICTED OF, FOUND GUILTY OF, OR PLED GUILTY OR NOLO CONTENDERE TO, A CHARGE OF VIOLATING A LAW OR REGULATION OF THE UNITED STATES OR OF THIS STATE IF IT MATERIALLY AND ADVERSELY AFFECTS THE ABILITY OF THE WHOLESALER OR SUPPLIER TO CONTINUE TO SELL ITS PRODUCTS IN THIS STATE;

(f) ANY ATTEMPTED TRANSFER OF OWNERSHIP OF THE WHOLESALER, STOCK OF THE WHOLESALER, OR STOCK OF ANY PARENT CORPORATION OF THE WHOLESALER, OR ANY CHANGE IN THE BENEFICIAL OWNERSHIP OR CONTROL OF ANY ENTITY, WITHOUT OBTAINING THE PRIOR WRITTEN APPROVAL OF THE SUPPLIER, EXCEPT AS MAY OTHERWISE BE PERMITTED PURSUANT TO A WRITTEN AGREEMENT BETWEEN THE PARTIES;

(g) FRAUDULENT CONDUCT IN THE WHOLESALER'S DEALINGS WITH THE SUPPLIER OR ITS PRODUCTS, INCLUDING THE INTENTIONAL SALE OF PRODUCTS OUTSIDE THE SUPPLIER'S ESTABLISHED QUALITY STANDARDS;

(h) THE WHOLESALER CEASES TO CONDUCT BUSINESS FOR FIVE CONSECUTIVE BUSINESS DAYS, UNLESS SUCH CESSATION IS THE RESULT OF AN ACT OF GOD, WAR,

OR A CONDITION OF NATIONAL, STATE, OR LOCAL EMERGENCY; OR

(i) ANY SALE OF PRODUCTS, DIRECTLY OR INDIRECTLY, TO CUSTOMERS LOCATED OUTSIDE THE TERRITORY ASSIGNED TO THE WHOLESALER BY THE SUPPLIER. THIS PARAGRAPH (i) SHALL NOT PROHIBIT WHOLESALERS FROM MAKING SALES TO LICENSED RETAILERS WHO BUY OFF THE WHOLESALER'S DOCK, SO LONG AS THE RETAILER'S LICENSED LOCATION IS WITHIN THE WHOLESALER'S ASSIGNED TERRITORY.

(3) THE SUPPLIER SHALL HAVE THE RIGHT TO TERMINATE AN AGREEMENT WITH A WHOLESALER AT ANY TIME BY GIVING THE WHOLESALER AT LEAST NINETY DAYS' WRITTEN NOTICE BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, WITH COPIES BY FIRST-CLASS MAIL TO ALL OTHER WHOLESALERS IN ALL OTHER STATES WHO HAVE ENTERED INTO THE SAME DISTRIBUTION AGREEMENT WITH THE SUPPLIER.

(4) IF A PARTICULAR BRAND OF PRODUCTS IS TRANSFERRED BY PURCHASE OR OTHERWISE FROM A SUPPLIER TO A SUCCESSOR SUPPLIER, THE FOLLOWING SHALL OCCUR:

(a) THE SUCCESSOR SUPPLIER SHALL NOTIFY THE EXISTING WHOLESALER OF THE SUCCESSOR SUPPLIER'S INTENT NOT TO APPOINT THE EXISTING WHOLESALER FOR ALL OR PART OF THE EXISTING WHOLESALER'S TERRITORY FOR THE PRODUCT. THE SUCCESSOR SUPPLIER SHALL MAIL THE NOTICE OF TERMINATION BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE EXISTING WHOLESALER. THE SUCCESSOR SUPPLIER SHALL INCLUDE IN THE NOTICE THE NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF THE SUCCESSOR WHOLESALERS.

(b) (I) THE SUCCESSOR WHOLESALER SHALL NEGOTIATE WITH THE EXISTING WHOLESALER TO DETERMINE THE FAIR MARKET VALUE OF THE EXISTING WHOLESALER'S RIGHT TO DISTRIBUTE THE PRODUCT IN THE EXISTING WHOLESALER'S TERRITORY IMMEDIATELY BEFORE THE SUCCESSOR SUPPLIER ACQUIRED RIGHTS TO THE PARTICULAR BRAND OF PRODUCTS. THE SUCCESSOR WHOLESALER AND THE EXISTING WHOLESALER SHALL NEGOTIATE THE FAIR MARKET VALUE IN GOOD FAITH.

(II) THE EXISTING WHOLESALER SHALL CONTINUE TO DISTRIBUTE THE PRODUCT UNTIL PAYMENT OF THE COMPENSATION AGREED TO UNDER SUBPARAGRAPH (I) OF THIS PARAGRAPH (b), OR AWARDED UNDER PARAGRAPH (c) OF THIS SUBSECTION (4), IS RECEIVED.

(c) (I) IF THE SUCCESSOR WHOLESALER AND THE EXISTING WHOLESALER FAIL TO REACH A WRITTEN AGREEMENT ON THE FAIR MARKET VALUE WITHIN THIRTY DAYS AFTER THE EXISTING WHOLESALER RECEIVES THE NOTICE REQUIRED PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (4), THE SUCCESSOR WHOLESALER OR THE EXISTING WHOLESALER SHALL SEND A WRITTEN NOTICE TO THE OTHER PARTY REQUESTING ARBITRATION PURSUANT TO THE UNIFORM ARBITRATION ACT, PART 2 OF ARTICLE 22 OF TITLE 13, C.R.S. ARBITRATION SHALL BE HELD FOR THE PURPOSE OF DETERMINING THE FAIR MARKET VALUE OF THE EXISTING WHOLESALER'S RIGHT TO DISTRIBUTE THE PRODUCT IN THE EXISTING WHOLESALER'S TERRITORY IMMEDIATELY BEFORE THE SUCCESSOR SUPPLIER ACQUIRED RIGHTS TO THE PARTICULAR BRAND OF PRODUCTS.

(II) NOTICE OF INTENT TO ARBITRATE SHALL BE SENT, AS PROVIDED IN

SUBPARAGRAPH (I) OF THIS PARAGRAPH (c), NOT LATER THAN THIRTY-FIVE DAYS AFTER THE EXISTING WHOLESALER RECEIVES THE NOTICE REQUIRED PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (4). THE ARBITRATION PROCEEDING SHALL CONCLUDE NOT LATER THAN FORTY-FIVE DAYS AFTER THE DATE THE NOTICE OF INTENT TO ARBITRATE IS MAILED TO A PARTY.

(III) ANY ARBITRATION HELD PURSUANT TO THIS SUBSECTION (4) SHALL BE CONDUCTED IN A CITY WITHIN THIS STATE THAT:

(A) IS CLOSEST TO THE EXISTING WHOLESALER; AND

(B) HAS A POPULATION OF MORE THAN TWENTY THOUSAND.

(IV) ANY ARBITRATION HELD PURSUANT TO THIS PARAGRAPH (c) SHALL BE CONDUCTED BEFORE ONE IMPARTIAL ARBITRATOR TO BE SELECTED BY THE AMERICAN ARBITRATION ASSOCIATION OR ITS SUCCESSOR. THE ARBITRATION SHALL BE CONDUCTED IN ACCORDANCE WITH THE RULES AND PROCEDURES OF THE UNIFORM ARBITRATION ACT, PART 2 OF ARTICLE 22 OF TITLE 13, C.R.S.

(V) AN ARBITRATOR'S AWARD IN ANY ARBITRATION HELD PURSUANT TO THIS PARAGRAPH (c) SHALL BE MONETARY ONLY AND SHALL NOT ENJOIN OR COMPEL CONDUCT. ANY ARBITRATION HELD PURSUANT TO THIS PARAGRAPH (c) SHALL BE IN LIEU OF ALL OTHER REMEDIES AND PROCEDURES.

(VI) THE COST OF THE ARBITRATOR AND ANY OTHER DIRECT COSTS OF AN ARBITRATION HELD PURSUANT TO THIS PARAGRAPH (c) SHALL BE EQUALLY DIVIDED BY THE PARTIES ENGAGED IN THE ARBITRATION. ALL OTHER COSTS SHALL BE PAID BY THE PARTY INCURRING THEM.

(VII) THE ARBITRATOR IN ANY ARBITRATION HELD PURSUANT TO THIS PARAGRAPH (c) SHALL RENDER A WRITTEN DECISION NOT LATER THAN THIRTY DAYS AFTER THE CONCLUSION OF THE ARBITRATION, UNLESS THIS TIME IS EXTENDED BY MUTUAL AGREEMENT OF THE PARTIES AND THE ARBITRATOR. THE DECISION OF THE ARBITRATOR IS FINAL AND BINDING ON THE PARTIES. THE ARBITRATOR'S AWARD MAY BE ENFORCED BY COMMENCING A CIVIL ACTION IN ANY COURT OF COMPETENT JURISDICTION. UNDER NO CIRCUMSTANCES MAY THE PARTIES APPEAL THE DECISION OF THE ARBITRATOR.

(VIII) AN EXISTING WHOLESALER OR SUCCESSOR WHOLESALER WHO FAILS TO PARTICIPATE IN THE ARBITRATION HEARINGS IN ANY ARBITRATION HELD PURSUANT TO THIS PARAGRAPH (c) WAIVES ALL RIGHTS THE EXISTING WHOLESALER OR SUCCESSOR WHOLESALER WOULD HAVE HAD IN THE ARBITRATION AND IS CONSIDERED TO HAVE CONSENTED TO THE DETERMINATION OF THE ARBITRATOR.

(IX) IF THE EXISTING WHOLESALER DOES NOT RECEIVE PAYMENT FROM THE SUCCESSOR WHOLESALER OF THE SETTLEMENT OR ARBITRATION AWARD REQUIRED UNDER PARAGRAPH (b) OR (c) OF THIS SUBSECTION (4) WITHIN THIRTY DAYS AFTER THE DATE OF THE SETTLEMENT OR ARBITRATION AWARD:

(A) THE EXISTING WHOLESALER SHALL REMAIN THE WHOLESALER OF THE PRODUCT IN THE EXISTING WHOLESALER'S TERRITORY TO AT LEAST THE SAME

EXTENT THAT THE EXISTING WHOLESALER DISTRIBUTED THE PRODUCT IMMEDIATELY BEFORE THE SUCCESSOR WHOLESALER ACQUIRED RIGHTS TO THE PRODUCT; AND

(B) THE EXISTING WHOLESALER IS NOT ENTITLED TO THE SETTLEMENT OR ARBITRATION AWARD.

(5) (a) ANY WHOLESALER OR SUPPLIER WHO IS AGGRIEVED BY A VIOLATION OF ANY PROVISION OF SUBSECTIONS (1) AND (3) OF THIS SECTION SHALL BE ENTITLED TO RECOVERY OF DAMAGES CAUSED BY THE VIOLATION. EXCEPT FOR A DISPUTE ARISING UNDER SUBSECTION (4) OF THIS SECTION, DAMAGES SHALL BE SOUGHT IN A CIVIL ACTION IN ANY COURT OF COMPETENT JURISDICTION.

(b) ANY DISPUTE ARISING UNDER SUBSECTIONS (1) AND (3) OF THIS SECTION MAY ALSO BE SETTLED BY SUCH DISPUTE RESOLUTION PROCEDURES AS MAY BE PROVIDED BY A WRITTEN AGREEMENT BETWEEN THE PARTIES.

(6) NOTHING IN THIS SECTION SHALL BE CONSTRUED TO LIMIT OR PROHIBIT GOOD-FAITH SETTLEMENTS VOLUNTARILY ENTERED INTO BY THE PARTIES.

(7) NOTHING IN THIS SECTION SHALL BE CONSTRUED TO GIVE AN EXISTING WHOLESALER OR A SUCCESSOR WHOLESALER ANY RIGHT TO COMPENSATION IF AN AGREEMENT WITH THE EXISTING WHOLESALER OR SUCCESSOR WHOLESALER IS TERMINATED BY A SUCCESSOR SUPPLIER PURSUANT TO SUBSECTIONS (1) TO (3) OF THIS SECTION.

(8) NOTHING IN THIS SECTION SHALL APPLY TO A MANUFACTURER THAT PRODUCES LESS THAN THREE HUNDRED THOUSAND GALLONS OF MALT BEVERAGES PER CALENDAR YEAR.

(9) AS USED IN THIS SECTION:

(a) "EXISTING WHOLESALER" MEANS A WHOLESALER WHO DISTRIBUTES A PARTICULAR BRAND OF PRODUCTS AT THE TIME A SUCCESSOR SUPPLIER ACQUIRES RIGHTS TO MANUFACTURE OR IMPORT THE PARTICULAR BRAND OF PRODUCTS.

(b) "FAIR MARKET VALUE" MEANS THE VALUE THAT WOULD BE DETERMINED IN A TRANSACTION ENTERED INTO WITHOUT DURESS OR THREAT OF TERMINATION OF THE EXISTING WHOLESALER'S RIGHT AND SHALL INCLUDE ALL ELEMENTS OF VALUE, INCLUDING GOODWILL AND GOING-CONCERN VALUE.

(c) "PRODUCTS" MEANS FERMENTED MALT BEVERAGES AND MALT LIQUORS.

(d) "SUCCESSOR SUPPLIER" MEANS A PRIMARY SOURCE OF SUPPLY, A BREWER, OR AN IMPORTER THAT ACQUIRES RIGHTS TO A PRODUCT FROM A PREDECESSOR SUPPLIER.

(e) "SUCCESSOR WHOLESALER" MEANS ONE OR MORE WHOLESALERS DESIGNATED BY A SUCCESSOR SUPPLIER TO REPLACE THE EXISTING WHOLESALER, FOR ALL OR PART OF THE EXISTING WHOLESALER'S TERRITORY, IN THE DISTRIBUTION OF THE EXISTING PRODUCT OR PRODUCTS.

(f) "SUPPLIER" MEANS ANY PERSON, PARTNERSHIP, CORPORATION, ASSOCIATION, OR OTHER BUSINESS ENTERPRISE THAT IS ENGAGED IN THE MANUFACTURING OR IMPORTING OF PRODUCTS.

(g) "WHOLESALER" MEANS THE HOLDER OF A COLORADO WHOLESALER'S BEER LICENSE OR WHOLESALER'S LICENSE TO SELL FERMENTED MALT BEVERAGES.

SECTION 2. Applicability. This act shall apply to any agreement entered into, and any renewals, extensions, amendments, or conduct constituting a modification of an agreement, by a supplier on or after the effective date of this act and to any contract of indefinite duration that may be terminated by the supplier without cause on or after said date.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: March 26, 2007