



BY THE GROWLER | DECEMBER 18, 2012 · 4:33 PM

Ten Key Legal Steps You Need to Take to Start Your Own Brewery

Like 28 Tweet 10 +1 2

14

So You Want to Start Your Own Brewery?

By Gregory B. Perleberg and Jeffrey C. O'Brien, [Lommen Abdo Law Firm](#)



Owning a brewery can be a lifelong dream come true. No more gray cubicles, and the ability to get paid to do something you love: make beer. Starting a brewery, however, can be a daunting task. Besides purchasing equipment and supplies, owners also have to navigate the myriad of legal issues in this heavily regulated industry. Without proper planning and advice, you may end up back at square one (or worse: back in that gray cubicle). Here are ten key steps to start your brewery business on a sound legal foundation:

STEP #1: CHOOSE A NAME

Before any document is filed with a government office, you must determine if the desired name of your brewery is available. Nothing could be worse than paying additional fees to change a name that conflicts with an existing brewery, reprint letterhead and business cards, or dealing with a cease and desist demand from another brewery's lawyer.

The easiest and cheapest way to clear your proposed name is to Google the proposed name. Also check your state Secretary of State's website for similarly named business entities or assumed names, and the United States Patent and Trademark Office's trademark database for similar trademarks. These databases are limited in scope and for additional expense you can perform a comprehensive search that will more conclusively show whether you can proceed with your selected brewery name (and beer brands).



STEP #2: FORM AN ENTITY

Use of a business entity serves two primary purposes: (1) your personal assets are shielded from the liabilities of your new venture; and (2) where you have multiple owners, clear and unambiguous agreements amongst the owners as to who owns what, what rights each of the owners have, and what happens if an owner wishes to leave, help minimize later disputes.

Most business owners choose either the limited liability company and the Subchapter S corporation for their entity form. Use of LLCs or corporations can be a valuable planning and asset protection tool for business owners, and most attorneys can form these entities at reasonable fees in a short period of time.

STEP #3: FILE A TRADEMARK FOR YOUR BREWERY NAME

A trademark is any individual or combination of words, phrases, symbols or designs that identifies or distinguishes the source of goods of one party from those of another. A service mark does for services what a trademark does for goods. Trademarks protect the goodwill that owners create to identify goods and services, not the goods and services themselves. Trademarks can also exist indefinitely (subject to ongoing use and renewal requirements).

The process of registering a trademark or service mark begins by filing an application with the USPTO. The USPTO employs attorneys who will review the application for proper legal and procedural grounds. In many cases, the examining attorney responds to the application with an “office action.” The attorney highlights any conflicts with the proposed mark, or any other objections to granting registration in the office action. The applicant has the opportunity to respond to any conflicts or problems noted in the office action within six months. After six months, if the applicant does not respond, the application is deemed “dead.” If the application either receives no objections for registration, or if the applicant overcomes any objections within the six month period, the USPTO publishes the mark for opposition. Any party, who may contest the registration of the mark, must do so within 30 days of the publication date. If no one contests the mark, then the USPTO will register the mark, typically 12 weeks following the publication date. Once you select a mark, the overall USPTO process from start to finish averages between 12 and 18 months.

Careful trademark and service mark management can lead to a successful brand development and greatly increase the value of a company or product. However, use and registration of trademarks and service marks can be a complicated and treacherous landscape. The knowledge of an experienced attorney can help navigate the terrain of trademark law, and lead to an outcome of branding success.



STEP #4: FILE TRADEMARKS FOR YOUR BEER

NAMES

With new craft breweries launching every day, the competition for beer names is fierce. Once you select the names and design logos, you need to file trademark for these as well (NOTE: if you have your beer names selected at the time you apply for a Federal trademark for the brewery name you can submit the applications for the beer names at the same time – up to 36 months before the launch of the beer itself).

STEP #5: LEASE A SPACE FOR YOUR BREWERY

As the old cliché goes, in real estate it's all about "location, location, location", and this is especially true for a brewery business. If you're looking to be the neighborhood brewery, you'll need to find a suitable space close to home. Should you have larger ambitions, you may seek a more strategic location amenable to later expansion. Whatever the case may be, you'll need to have a space secured in order to complete the licensing process.

A new brewery owner will most likely lease a building at the start, and negotiating a suitable lease is a crucial step in the process.

Commercial lease agreements typically come in one of two varieties: "triple net" and "gross."

In a triple net, the tenant pays rent to the landlord, as well as a pro rated share of taxes, insurance and maintenance expenses. In the typical triple net lease, the tenant pays a fixed amount of base rent each month as well as an "additional rent" payment which constitutes 1/12 of an estimated amount for taxes, insurance and maintenance expenses (also called CAM or common area maintenance expenses). At the end of the lease year, the estimated amounts are compared to actual expenses incurred and adjusted depending upon whether the tenant paid too much or too little through its monthly payments.

In a "gross" lease, the landlord agrees to pay all expenses which are normally associated with ownership. The tenant pays a fixed amount each month, and nothing more.



STEP #6: HAVE YOUR BREWER AND OTHER KEY EMPLOYEES

SIGN EMPLOYMENT AGREEMENTS

Most employees in Minnesota and other states are “at will” employees; that is, they can leave their employment whenever they wish, for any reason or no reason. If a business owner has a key employee that is integral to its success, that employee should have a written employment agreement that provides for a fixed term of employment. A covenant not to compete can be included to deter a key employee from leaving to work for a competitor. Absent this type of agreement, the key employee can leave at any time.

A written employment agreement is imperative for your head brewer who knows a brewery’s formulas could do the most damage to the business working for the competition. Hence, a master brewer employment agreement should include a covenant not to compete and provisions that clearly state that the beer formulas are “trade secrets” and thus the property of the brewery.

Covenants not to compete must be narrowly tailored to balance the interests of employer and employee. The employer must show (i) the covenant not to compete was supported by consideration when it was signed (if the consideration for the covenant is the continued employment of the employee, then the covenant must be signed prior to the start of employment to be valid); (ii) the covenant protects a legitimate business interest of the employer; and (iii) the covenant is reasonable in duration and geographic scope to protect the employer without being unduly burdensome on the former employee’s right to earn a living.

STEP #7: IF YOU’RE RAISING MONEY, COMPLY WITH FEDERAL AND STATE SECURITIES LAWS

Finding suitable financing for a startup venture such as a new brewery can be difficult. Perhaps that’s why many startup brewery operators are turning to private funding sources for their new venture.

When private funds are sought, federal and state securities laws must be complied with. The definition of a “security” is very broad and not limited to shares of stock. It includes partnership and LLC interests, promissory notes and many other financing instruments. Securities must either be registered or exempt from the registration requirements of state and federal laws. Certain written disclosures and information must be made or made available to investors so they can have the appropriate information to make an investment decisions. Whenever possible, focus on “accredited investors”, which are essentially those persons who have a million dollar net worth excluding their house. The disclosure requirements are the least for these sophisticated investors. However, even if you have an exemption from registration, liability for any fraud by the issuer still remains.

The consequences for not complying with federal and state securities laws are severe and can include administrative, civil and criminal penalties. Thus, before seeking private financing for your new brewery, be sure to consult with an attorney knowledgeable and qualified to handle securities matters.



STEP #8: APPLY FOR YOUR BREWER'S NOTICE WITH THE TTB

Perhaps the most important – and most time consuming – step along the path to owning and operating your own brewery is the process by which you obtain a license for the brewery from the Alcohol and Tobacco Trade and Tax Bureau ("TTB"). TTB collects Federal excise taxes on alcohol, tobacco, firearms, and ammunition and assures compliance with Federal tobacco permitting and alcohol permitting, labeling, and marketing requirements to protect consumers.

If you intend to make beer for other than family or personal use, TTB must approve your operations, recipes, beer labels and the like. You have to send in a Brewer's Notice and a Brewer's Bond and TTB must approve your operations before you begin to make beer. TTB may initiate an on-site inspection of the proposed premises and operations prior to the issuance of your Brewer's Notice. Background checks on directors, officers and significant owners are also required. This process typically takes 6-12 months to complete.

STEP #9: APPLY FOR APPLICABLE STATE AND LOCAL LICENSES

Besides TTB approval, a new brewery will need to apply for a state wholesaler's license as well as any licenses required by the municipality in which the brewery will operate. An example of the latter is a taproom license. In Minnesota, if the brewery intends to construct and operate a taproom where patrons can purchase pints of beer onsite at the brewery, the taproom license must be issued through the municipality, not the State of Minnesota.

STEP #10: CHOOSE DISTRIBUTORS CAREFULLY

Distribution is one of the most important, yet commonly overlooked components in the operation and success of a craft brewery. One option brewers have is to distribute themselves. Self-distribution has the advantage of personal, hands-on selling that beer distributors cannot give to most. Self-distribution, however, is very time and resources intensive. In many cases, small brewers start with self-distribution for the first few years to gain good product representation and placement, and then turn the distribution over to a beer wholesaler as sales and demand for their beers increase.

Normally, each market will contain two to three major distributors, who do business with virtually all restaurants, bars and liquor stores. They have excellent contacts within the retail trade, including important chain store buyers. The disadvantage for the craft brewer is that most distributors manage huge portfolios of beer, and your beer may be just a blip on the radar. Of particular note, due to laws imposed in most states, it is often very difficult to terminate a brewery/distributor agreement. Once you enter an agreement with a distributor (whether or not written), these laws protect the distributor from suppliers terminating at will.

When selecting a distributor, choose one that not only suits your needs now, but that will also be appropriate down the road. Before letting a distributor promote your beer, obtain price sheets from each wholesaler so you know which distributors carry the various brands in the market. Talk to retailers to gain insight into which distributor they prefer dealing with. Ask questions about service, product knowledge, enthusiasm, etc., of the salespeople and which distributor understands and sells craft beers the best. Look around the retail accounts and festivals to find out which distributor seems have the more meaningful presence, has the most draft handles and best shelf positioning for craft beers. Talk with other craft brewers in that market to get their opinion from the supplier side. Once you have chosen a distributor willing to carry your products, be sure to have your attorney draft a written distribution agreement

CONCLUSION

The ever-changing legal requirements for properly establishing a new brewery are numerous and complex and they can become a distraction from routine business operations if not handled properly. That's why working with an attorney knowledgeable in these issues is essential as you can focus on developing delicious beers and catering to customers, versus dealing with what seem to be a never-ending array of legal issues. Based on our experience, if you integrate your lawyers into your brewery team early, you will hopefully avoid monster issues down the road.

Gregory B. Perleberg and Jeffrey C. O'Brien are attorneys with the Minneapolis-based Lommen Abdo Law Firm. They have handled a wide variety of legal issues for several local craft breweries. Mr. Perleberg can be reached at (612) 336-9320 or via email at greg@lommen.com. Mr. O'Brien can be reached at (612) 336-9320 or via email at jobrien@lommen.com. For more information on the Lommen Abdo Law Firm, please visit www.lommen.com.

