

CHAPTER 5-04

BEER WHOLESALER AND BREWER RELATIONSHIPS

5-04-01. Definitions. As used in this chapter, unless the context otherwise requires:

1. "Agreement" means one or more of the following:
 - a. A commercial relationship between a licensed beer wholesaler and a licensed brewer of a definite or indefinite duration which is not required to be evidenced in writing.
 - b. A relationship whereby the beer wholesaler is granted the right to offer and sell a brand or brands of beer offered by a brewer.
 - c. A relationship whereby the beer wholesaler, as an independent business, constitutes a component of a brewer's distribution system.
 - d. A relationship whereby the beer wholesaler's business is substantially associated with a brewer's brand or brands, designating the brewer.
 - e. A relationship whereby the beer wholesaler's business is substantially reliant on a brewer for the continued supply of beer.
 - f. A written or oral arrangement for a definite or indefinite period whereby a brewer grants a license to a beer wholesaler to use a brand, trade name, trademark, or service mark, and in which there is a community of interest in the marketing of goods or services at wholesale or retail.
2. "Ancillary business" means a business owned by a wholesaler, a stockholder of a wholesaler, or a partner of a wholesaler, the primary business of which is directly related to the transporting, storing, or marketing of the brewer's products with whom the wholesaler has an agreement.
3. "Beer wholesaler" or "wholesaler" means any licensee, as outlined in section 5-03-01, importing or causing to be imported into this state or purchasing or causing to be purchased within this state, any beer for sale or resale to retailers or wholesalers licensed pursuant to chapter 5-02 or 5-03, without regard to whether the business of the person is conducted under the terms of an agreement with a licensed brewer.
4. "Brand" means any word, name, group of letters, symbol, or combination thereof, that is adopted and used by a brewer or importer to identify a specific beer product, and to distinguish that beer product from another beer product.
5. "Brand extension" is any brand that incorporates all or a substantial part of the unique features of a preexisting brand of the same brewer or importer and which relies to a significant extent on the goodwill associated with that preexisting brand.
6. "Brewer" means every licensed brewer or importer of beer located within or without this state who enters into an agreement with any beer wholesaler licensed to do business in this state.
7. "Person" means a natural person, corporation, limited liability company, partnership, trust, agency, or other entity as well as the individual officers, directors, or other persons in active control of the activities of each such entity. "Person" also includes heirs, assigns, personal representatives, conservators, and guardians.

8. "Territory" or "sales territory" means the area of primary sales responsibility designated by any agreement between any beer wholesaler and brewer for the brand or brands of any brewer.

5-04-02. Inducement or coercion prohibited. No brewer may:

1. Induce or coerce, or attempt to induce or coerce, any beer wholesaler to accept delivery of any alcoholic beverage or any other commodity which has not been ordered by the beer wholesaler.
2. Induce or coerce, or attempt to induce or coerce, any beer wholesaler to enter any agreement or take any action that would violate any law or rule of this state by threatening to amend, cancel, terminate, or refuse to renew any agreement existing between a brewer and a beer wholesaler.
3. Require a wholesaler to assent to any condition, stipulation, or provision limiting the wholesaler's right to sell any other brewer's product anywhere in this state, provided the sale of another brewer's product does not materially impair the quality of service or quantity of sales of the existing brand or brands of the brewer seeking to impose the condition, stipulation, or provision.
4. Require a wholesaler to submit specific, confidential information regarding competitive brands, as a condition of renewal or continuation of an agreement.
5. Fail to provide each wholesaler of its brands with a written contract which conforms to this chapter and embodies the brewer's agreement with each wholesaler.

5-04-03. Dual distributorship prohibited. No brewer who designates a sales territory for which a wholesaler shall be primarily responsible shall enter into an additional agreement with any other beer wholesaler for its brand or brands of beer in the same territory. No wholesaler may deliver beer to a retail account outside a sales territory designated by the brewer of a particular brand or brands.

5-04-04. Agreement cancellation. Notwithstanding the terms, provisions, or conditions of any agreement, no brewer may amend, cancel, terminate, or refuse to renew any agreement, or cause a wholesaler to resign from an agreement, unless good cause exists for amendment, termination, cancellation, nonrenewal, noncontinuation, or causing a resignation. "Good cause" does not include the sale or purchase of a brewer. "Good cause" includes, but is not limited to, the following:

1. Revocation of the wholesaler's license to do business in this state.
2. The wholesaler's bankruptcy or insolvency.
3. Assignment for the benefit of creditors or similar disposition of the wholesaler's assets.
4. The wholesaler's failure to comply, without reasonable excuse or justification, with any reasonable and material requirement imposed upon the wholesaler by the brewer.

In any dispute over an amendment, cancellation, termination, or nonrenewal, the brewer has the burden of proving the existence of good cause. If a wholesaler initiates a civil action, the brewer bears the burden of proving the existence of good cause after a prima facie showing by the wholesaler that good cause does not exist.

5-04-05. Notice of intent to terminate. Except as otherwise provided in this section, a brewer shall provide a wholesaler with at least ninety days prior written notice of any intent to amend, terminate, cancel, or not renew any agreement. The notice must state all the reasons for

the intended amendment, termination, cancellation, or nonrenewal. The wholesaler has ninety days after receiving notice in which to rectify any claimed deficiency. If the deficiency is rectified within ninety days of notice, the proposed amendment, termination, cancellation, or nonrenewal is void. The notice provisions of this section do not apply if the reason for the termination, cancellation, or nonrenewal is:

1. The wholesaler's bankruptcy or insolvency.
2. An assignment for the benefit of creditors or similar disposition of the business assets.
3. Revocation of the wholesaler's license.
4. Conviction or a plea of guilty or no contest to a charge of violating a law relating to the business that materially affects the wholesaler's ability to remain in business.

5-04-06. Assignment, transfer, or sale of business. No brewer may unreasonably withhold consent to any assignment, transfer, or sale of the wholesaler's business whenever the wholesaler to be substituted meets the material and reasonable qualifications and standards required of the brewer's wholesalers.

No brewer may unreasonably refuse, withhold, or unduly delay its approval of the issuance, sale, or transfer by a corporate beer wholesaler of its capital stock or any other corporate equity or debt security.

5-04-07. Reasonable compensation for wrongful cancellation.

1. Any brewer which amends, cancels, terminates, or refuses to renew any beer agreement, or causes a wholesaler to resign from an agreement, unless for "good cause" as defined by section 5-04-04, or which unreasonably withholds consent to any assignment, transfer, or sale of a wholesaler's business, shall pay the wholesaler reasonable compensation for the value of the wholesaler's business with relationship to the terminated brand or brands. The value of the wholesaler's business includes, but is not limited to, the fair market value of the wholesaler's business with respect to the terminated brand or brands, including the value of any ancillary business of the wholesaler and the goodwill of the business or ancillary business. The value of the wholesaler's business may not exceed the wholesaler's actual damages.
2. If the brewer and the beer wholesaler are unable to mutually agree on reasonable compensation for the value of the wholesaler's business, the matter must be submitted to a neutral arbitrator to be selected by the parties or, if they cannot agree, by the presiding district judge of the district in which the wholesaler's main office is located. All arbitration costs shall be divided equally between the wholesaler and the brewer. The award of the neutral arbitrator shall be final and binding on the parties.

5-04-08. Judicial remedies. If a brewer engages in conduct prohibited under this chapter, a wholesaler, with whom the brewer has an agreement pursuant to this chapter, may maintain a suit against the brewer. The venue of any legal action taken under this section, or pursuant to a dispute arising out of an agreement or breach thereof, or over the provisions of an agreement, is a court, state or federal, located in North Dakota, or where the wholesaler maintains its principal place of business in this state. The court may grant equitable relief as is necessary to remedy the effects of conduct which it finds to exist and which is prohibited under this chapter, including, but not limited to, declaratory judgment and injunctive relief. The court may award actual damages and costs. If the court finds the brewer has acted in bad faith in invoking amendment, termination, cancellation, or nonrenewal under this chapter or has unreasonably withheld its consent to any assignment, transfer, or sale of the wholesaler's agreement, the court may also award reasonable attorney's fees.

5-04-09. Product price. No brewer, whether by means of a term or condition of an agreement or otherwise, may fix or maintain the price at which the wholesaler sells any alcoholic beverage.

5-04-10. Retaliatory action prohibited. A brewer may not take retaliatory action against a wholesaler who files or manifests an intention to file a complaint of alleged violation of state or federal law or regulation by the brewer with the appropriate state or federal regulatory authority. "Retaliatory action" includes, but is not limited to, refusal without good cause to continue the agreement, or a material reduction in the quality of service or quantity of products available to the wholesaler under the agreement.

5-04-11. Wholesaler management. No brewer may require or prohibit any change in management or personnel of any wholesaler unless the current or potential management or personnel fails to meet essential, reasonable, and nondiscriminatory requirements.

5-04-12. Discrimination prohibited. No brewer may discriminate among its North Dakota wholesalers in the price of beer sold to the North Dakota wholesalers or in price promotions. No wholesaler may refuse to sell to any licensed alcoholic beverage retailer in its sales territory. No wholesaler may discriminate among the licensed alcoholic beverage retailers in its sales territory in the price of beer sold to the retailers or in price promotions.

5-04-13. Waiver prohibited. No brewer may require any wholesaler to waive compliance with any provision of this chapter. Nothing in this chapter may be construed to limit or prohibit good-faith dispute settlements voluntarily entered into by the parties. However, no provision of any written agreement may require the law of any state other than North Dakota to govern the relationship of the parties.

5-04-14. Sale of brewer. Except for good cause, as defined by section 5-04-04, the purchase of a brewer as defined in section 5-04-01, when the purchaser continues in business as a brewer, shall obligate the new brewer to all terms and conditions of the agreement in effect on the date of purchase. "Purchase", for the purposes of this chapter, includes the sale of stock, sale of assets, merger, lease, transfer, or consolidation.

5-04-15. Application to agreements. The provisions of this chapter cover agreements in existence on July 1, 1981, as well as agreements entered into after July 1, 1981.

5-04-16. Right of free association. No brewer or wholesaler may restrict or inhibit, directly or indirectly, the right of free association among brewers or wholesalers for any lawful purpose.

5-04-17. Chapter to apply when in conflict with title 51. The provisions of this chapter apply in any instances when the provisions of this chapter conflict with the unfair practice provisions of title 51.

5-04-18. Same brands - Assignment of brand extensions. Different categories of products manufactured and marketed under a common identifying trade name are the same brand. For example, "old faithful" includes "old faithful", "old faithful light", "old faithful draft", "old faithful dry", and other products identified principally by the old faithful name. Differences in packaging do not establish different brands. A brewer or importer may assign a brand extension only to the wholesaler with an exclusive sales territory to the brand that is the basis for the brand extension. This limitation does not apply to assignments of brand extensions to wholesalers which were made by a brewer or importer before August 1, 1995. If, before August 1, 1995, a brewer or importer assigned a brand extension to a wholesaler that is without exclusive sales territory to the brand that is the basis of the brand extension, any additional brand extension must be assigned to the wholesaler who first had the brand.