

2013 Kentucky Law Changes Affecting Retail Licensees

by Stacy C. Kula

If you've ever watched a cocktail artist at work, it's rather remarkable. The detailed steps. The careful calculation. The precise presentation --- all to give you one tasty experience. In Kentucky, the steps to preparing a delectable drink are outdone only by the even more complicated regulations surrounding alcohol. Historically, Kentucky's alcohol-related laws were made on a case-by-case basis, leaving "a patchwork of laws and regulations that are duplicative, outdated and cumbersome to administer."¹ In fact, until earlier this year, Kentucky had 88 Alcoholic Beverage Control license types – more than almost any other state in the nation.

However, on June 25, 2013, Senate Bill 13 (SB 13)² was enacted as law in Kentucky, representing the Commonwealth's first organized revision of its alcohol laws. With these changes, Kentucky reduced its license types to 44 – 50% less than what it had – without eliminating any licensee privileges. SB 13 consolidated similar license types and licensing fees, simplified the licensing process and modernized laws regarding sales on election days.³ SB 13 also reinforced public protection powers and made license fees uniform for the same license types while maintaining revenue neutrality.⁴ Although not all of the problems in the alcohol statutory scheme have been eliminated, this new legislation transported Kentucky into the 21st Century. This article focuses on the basic changes impacting retail licensees:

Retail License Types

The following retail license types were changed to consolidate similar licenses and/or simplify the licensing process:

- **Quota Retail Drink License** – Only the name of this license has changed from "Retail

Liquor Drink License” to “Quota Retail Drink License” to more easily distinguish between quota and non-quota licenses types.⁵ Quota licenses are limited in number and set by quota regulations. Non-quota licenses are infinite in number⁶ but usually restrict a licensee’s ability to sell alcohol or otherwise operate their businesses in some manner. Quota Retail Drink Licenses have no required food sales or number of seats.

Quick Practice Tip – Licenses for Use by Bars and Restaurants

There are several types of Kentucky retail by-the-drink licenses that can be used by a bar or restaurant depending upon what Kentucky territory (wet or moist) the licensed premises is located, and those licenses and their particular requirements are:

1. **Quota Retail Drink License** – This license is a quota license so it is limited in number; however, many cities and counties have them available for issuance. If all of the Quota Retail Drink Licenses have been issued for a specific city or county, then a prospective licensee must either negotiate to purchase a license from a third party, apply for a different type of retail by the drink license or forego alcohol sales. There are no food sale or number of seat requirements. This license authorizes the sale of distilled spirits and wine (but not malt beverages) by the drink for on premises consumption only. KRS 243.250 and 804 KAR 4:270.
2. **NQ-2 Retail Drink License** - An NQ-2 license is a non-quota license, so there is no restriction on the number of these types of licenses that can be issued.
 - *for a Restaurant with 100 table seats* –To qualify for this type of license, the restaurant must have at least 100 seats for patrons at tables and demonstrate that its gross receipts from the sale of food for consumption on the premises is reasonably estimated to be not less than 50% of the total food and alcoholic beverage receipts of the restaurant for the license period. This license authorizes the sale of distilled spirits, wine and malt beverages by the drink for on premises consumption only. KRS 243.083 and KRS 243.084.
 - *for Restaurant with 50 table seats or more* – To qualify for this type of license, a restaurant must have a minimum table seating for 50 patrons. This non-quota license authorizes the sale of wine and malt beverage (but not distilled spirits) by the drink for on premises consumption only. KRS 243.083 and KRS 243.084.
3. **LR (Limited Restaurant) 50 License** – This non-quota license is available

to restaurants and dining facilities but has the following restrictions: (1) a minimum of 50 seats; (2) at least 70% of gross income comes from the sale of food; (3) no open bar; and (4) no sales of distilled spirits, wine or malt beverages to any person who has not purchased or does not purchase a meal. Distilled spirits, wine and malt beverages are deemed to be purchased in conjunction with a meal if the alcoholic beverage is served after the meal is ordered and no more than one-half hour after the meal is complete. This license authorizes the sale of distilled spirits, wine and malt beverages by the drink for on premises consumption only. KRS 242.1244 and KRS 243.034.

4. **LR (Limited Restaurant) 100 License** – This non-quota license is available to restaurants and dining facilities but has the following restrictions: (1) a minimum of 100 seats; (2) at least 70% of the establishment’s gross income comes from the sale of food; (3) no open bar; and (4) the establishment may not sell distilled spirits, wine or malt beverages to any person who has not or does not purchase a meal. Distilled spirits, wine and malt beverages are deemed to be purchased in conjunction with a meal if the alcoholic beverage is served after the meal is ordered and no more than one-half hour after the meal is complete. This license authorizes the sale of distilled spirits, wine and malt beverages by the drink for on premises consumption. KRS 242.1244 and KRS 243.034.
5. **NQ4 Retail Malt Beverage Drink License** – This nonquota license cannot be issued to any premises from which gasoline and lubricating oil are sold or from which the servicing and repair of motor vehicles is conducted unless at least \$5,000 of food, groceries and related products (valued at cost) are maintained as inventory for sale at retail. The phrase “food and groceries” is defined as any food or food product intended for human consumption except alcoholic beverages, tobacco, hot foods, hot food products prepared for immediate consumption, and seeds and plants to grow food for personal consumption. This license authorizes the sale of malt beverages (but not distilled spirits or wine) by the drink for consumption on the premises only. KRS 243.088 and KRS 243.280.

All of the above licenses are available in wet territory. More than one of the aforementioned licenses can be issued to the same licensee. For example, if a restaurant has a Retail Liquor Drink License but also wants to sell malt beverage, it may also hold an NQ4 Retail Malt Beverage Drink License. The LR (limited restaurant) 50 and 100 Licenses are available in wet and approved moist territories. None of the aforementioned licenses may be issued in dry territory.

• **Bundled Non-Quota Retail Drink Licenses** – Several existing non-quota (NQ) licenses were bundled together and new types created to simplify and reduce the number of license types. Former license types were grouped together based upon similar costs, qualifications and privileges,

but the qualifications and privileges themselves did not change. The NQ1, NQ2 and NQ3 Retail Drink Licenses are combo licenses, which means that, with one exception, the holder need only hold one license in order to sell all three types of alcoholic beverages - distilled spirits, wine and malt beverages.⁷

NQ1 Retail Drink License – An NQ1 Retail Drink License combines the former Convention Center, Horse Track, Automobile Racetrack and Air/Rail System Licenses.⁸

NQ2 Retail Drink License – An NQ2 Retail Drink License includes the former Restaurant Drink, Motel Drink, Restaurant Wine, Airport Drink and Riverboat Licenses.⁹ Although the NQ2 Retail Drink License is also a combo license, the “combo” designation only adds the privilege to sell malt beverages. Accordingly, a licensee that previously qualified for a Restaurant Wine License (restricted to wine sales only) will now be allowed to sell only wine and malt beverages, but not distilled spirits. All other holders of an NQ2 License that previously qualified to hold a Restaurant Drink, Motel Drink, Airport Drink or a Riverboat Licenses have the right to sell distilled spirits, wine and malt beverages.

NQ3 Retail Drink License – An NQ3 Drink License now contains what was previously known as the Special Private Club, Dining Car Liquor and Dining Car Malt Beverage Licenses.¹⁰

• **NQ4 Retail Malt Beverage Drink License/NQ Retail Malt Beverage Package License** – SB 13 divided the privileges of the former Retail Malt Beverage License into two new licenses: the NQ4 Retail Malt Beverage Drink and the NQ Retail Malt Beverage Package Licenses. The former Retail Malt Beverage License allowed a licensee to sell malt beverages both by the drink and by the package. The NQ4 Retail Malt Beverage Drink License permits malt beverage drink sales only for consumption on a licensed premises.¹¹ The NQ Retail Malt Beverage Package License permits malt beverage package sales only for consumption off the licensed premises.¹² Despite the division, it is possible to simultaneously hold both licenses.¹³ The two separate retail malt beverage

licenses were created by SB 13 to eliminate the licensing scheme conflict with retail distilled spirits and wine license types, which separated its retail license types by either by the drink allowing consumption only on premise or by the package allowing consumption only off premise.¹⁴

Quick Practice Tip – Definitions of Wet, Dry and Moist

A business will be located in one of the three following types of territories:

Wet – KRS 241.010(59) defines this term as “a territory in which a majority of the electorate voted to permit all forms of retail alcohol sales by a local option election under KRS 242.050, 242.125 or 242.1292 on the following question: ‘Are you in favor of the sale of alcoholic beverages in (name of territory)?’” Any type of retail alcohol beverage license allowed by the Kentucky ABC may be had, assuming such license is available and all other qualifications of licensing are met.

Dry – KRS 241.010(24) defines this term as “a territory in which a majority of the electorate voted to prohibit all forms of retail alcohol sales by KRS 242.050, KRS 242.125, or other local option election.” In dry territory, no alcohol may be sold at retail.

Moist – SB 13 added the definition of moist under KRS 241.010(36), and it defines this term as “a territory in which a majority of the electorate voted to permit limited alcohol sales by any one (1) or a combination of special limited local option elections authorized by KRS 242.123, 242.1238, 242.124, 242.1242, 242.1244 or 242.1292.” This means that, among other things, golf course, horse racetrack, fourth class city liquor wine/drink sales, small farm winery, qualified historic site, limited restaurant (LR 50 and LR 100) licenses could be allowed in certain areas where specifically approved.

New Master Filing System Allowed

SB 13 amended KRS 243.380 to allow a business with more than two licensed premises in Kentucky to submit information about ownership, management and criminal background checks (if current) only once for all separately licensed premises in one master file. The idea behind this change was that a master file would reduce the paperwork since the master file information only needed to be amended for material changes required by KRS 243.390(2) or ownership changes described in KRS 243.360. That said, if a criminal background check currently existing in the file is more than six months old, a new background check will be required. Also, if a licensee operates multiple

restaurants using the same name but forms separate entities to operate each premises, none of the premises would be allowed to use a master file system because they are not the same licensee. All licenses in the master file will be renewed at the same time as a batch – August 31st – regardless of location.¹⁵ It remains to be seen whether this master filing system provides any material benefit to licensees.

Changes to State Licensing Fees and the Annual Renewal Schedule

SB 13 attempted to correct certain inconsistencies and inequalities in license fees. Prior to the passage of SB 13, licensees had as many as four different state licensing fees depending upon the type of license and the class of city or county in which a licensee was located. For example, under the former KRS 243.030, the license fee for the Restaurant Drink License was \$1,000 for a county containing a city of the first class or consolidated government (e.g., Louisville), \$700 for a county containing a city of the second class (e.g., Newport), \$600 for a county containing a city of the third class (e.g., Florence) and \$500 for a county containing a city of the fourth class (e.g., Union).¹⁶ There is now only one fee for the same license type, regardless of location. Accordingly, a licensee in the aforementioned example would now pay \$830 to the state for what was formerly known as a Restaurant Drink License, now called an NQ2 Retail Drink License, regardless of where the licensee is located.¹⁷

SB 13 also adjusted the licensing fee amounts in a manner that allows the new licensing scheme to remain revenue neutral. Based on the Task Force's recommendations, a concerted effort was made to calculate fees equitably across all state license types, and changes were not made for the purpose of collecting increased fees. Surprisingly, some license fees actually decreased.

The state licensing renewal schedule was simplified, and state renewals are now scheduled by month for specific counties instead of by zip code. Previously, retailers in the same city with different zip codes, but located directly across the street from one another, had different license renewal dates. These changes will mainly affect licensees in first and second class cities.¹⁸

To incorporate the statutory modifications into licensing, the Kentucky ABC issued replacement state licenses to all existing license holders around the middle of 2013. The replacement licenses set forth the new license types in place of the eliminated ones, but the expiration dates of these licenses remained the same. Licensees were required to replace their old state licenses with the new ones and correct the 3 inch licensing numbers on the exterior windows or doors of their licensed premises by September 1, 2013. Failure to make this change could result in violations issued by the Kentucky and/or local ABCs. For those of you in corporate headquarters located outside of Kentucky, an easy way to determine if your individual locations have made the appropriate changes is to ask the manager to take a photo of the license numbers by way of his or her cell phone and e-mail it to you.

If a licensee's renewal schedule does change, the Kentucky ABC will phase in the new renewal schedule by requiring the licensee to renew twice in the current year; most of these double renewals have already been accomplished. The first renewal form permitted a licensee to renew the licensee's existing licenses and pay a pro-rated fee to keep the licenses active during this year's transition period. The second renewal form allowed the licensee to renew on the full year schedule as anticipated by the new laws. Since local governments are not required to renew local licenses based on the state's licensing renewal schedule, the local renewal date may be different than the state's renewal schedule.

Although holders of producer, wholesaler and distributor licenses now have the option to renew their respective licenses for a one-year or two-year licensing period, the two-year licensing period and renewal option is not currently available to retail licensees.

Changes to Local Licenses and Fees

The legislative body of any wet or moist county or city may impose local license fees for the privilege of manufacturing and trafficking in alcoholic beverages,¹⁹ but only those license types listed in KRS 243.060 and KRS 243.070 may be issued by the local ABC. Accordingly, SB13 revised local license types to be consistent with the new state license types.²⁰ Cities and counties were advised to amend their local ordinances to reflect the new license types to avoid court challenges that local ABC approval was no longer required because a license type was not within their purview and that the applicable cities and counties could no longer charge an applicant a fee for a license type that no longer exists.²¹

Unlike state license fees, local license fees were not standardized to allow only one fee for the same license type. However, SB 13 did reduce the number of different fees the Commonwealth authorizes a county, city or consolidated local government to charge at the local level for the same license type from four to two fees²² for those local licenses that do different fees. For those license types that now have two different fee amounts, the different fees are based upon whether or not the licensed premises is located in a county containing a consolidated local government.²³

In consolidating the four fees, the maximum license fee amounts permitted will increase for some counties and cities. To protect licensees from drastic increases in county and city fees, current fees cannot be increased by more than five percent during any five-year period.²⁴

New Default Rule Allowing Retail Alcohol Sales on Election Days

Prior to the passage of SB 13, Kentucky was one of only four states to prohibit the sale of alcohol on primary and general election days while the polls were open.²⁵ KRS 244.290 and KRS 244.480 were amended by SB13 to permit licensees to sell alcoholic beverages on any primary, regular, local option or special election days as the new default state law. However, SB 13 authorized cities of the first four classes, and counties containing cities of the first four classes, to adopt local ordinances to prohibit alcoholic beverages sales, or limit the hours of sales, on any election day.²⁶ Although counties and cities are not required to enact such ordinances, if prohibition is desired on election days by an authorized local government that did not previously have an ordinance to that effect in place, an ordinance must be passed to prohibit such sales. Despite the new state default rule, licensees still need to review local ordinances to ensure election day sales are not prohibited. If no local ordinance exists, whether currently in effect or enacted with the passage of SB 13, retail alcohol sales will be permitted, by default, under state law.²⁷

Public Safety and Protection

Finally, SB 13 expanded the scope of KRS 244.120, the disorderly premises statute, to provide the administrators at the Kentucky and local ABC with additional public protection. In *Hofbrauhaus Newport, LLC v. Department of Alcoholic Beverage Control*, Civil Action No. 11-CI-1345, the Franklin Circuit Court held that the language contained in KRS 244.120 prior to the passage of SB 13 only applied to patrons' conduct, and not the conduct of the licensee's employees, and therefore, the Kentucky ABC could not reprimand a licensee whose premises became disorderly because of the licensee's own employees' conduct. Accordingly, SB 13 amended KRS 244.120 to prohibit disorderly conduct by a licensee's employees as well. In addition to existing prohibitions, SB 13 expanded the acts constituting disorderly conduct to include: creating a public nuisance; engaging in criminal

activity that would constitute a capital offense, felony, or misdemeanor; and failing to maintain the minimum health, fire, safety, or sanitary standards established by the state or a local government, or by state administrative regulations, for the licensed premises.

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¹ Governor’s Task Force on the Study of Kentucky Alcoholic Beverage Control Laws, Executive Summary at i (January 2013). The author was an active participant in the Task Force.

² House Bill 315 was also enacted into law at the same time as SB 13, and introduced new legislation which allows brewers located in wet territory to serve on their brewery premises complimentary samples of up to 16 ounces per day per patron of malt beverages produced at their breweries.

³ 2013 Ky. Acts 518.

⁴ Id.

⁵ KRS 243.250.

⁶ KRS 241.065 and 804 KAR 9:010, Section 1 and Section 2.

⁷ Stacy C. Kula And Stephen Humphress Lifting the Spirits of Kentucky: How the 2013 Legislative Changes Impact the Alcohol Industry (Forthcoming November, 2013).

⁸ KRS 243.082.

⁹ KRS 243.084.

¹⁰ KRS 243.086.

¹¹ KRS 243.088.

¹² KRS 243.280(1)(a).

¹³ KRS 243.280(3).

¹⁴ Kula, supra at note 7.

¹⁵ 804 KAR 4:390E, Section 7.

¹⁶ KRS 243.03027).

¹⁷ KRS 243.030.

¹⁸ Kula, supra at note 7.

¹⁹ KRS 243.060 and KRS 243.070.

²⁰ Id.

²¹ Kula, supra at note 7.

²² KRS 243.060 and 243.070.

²³ Id.

²⁴ KRS 243.060(2) and 243.070(16).

²⁵ The other states that still prohibit alcohol sales to some degree while the polls are open on election days are Alaska, Massachusetts and South Carolina.

²⁶ KRS 244.290 and KRS 244.480.

²⁷ Id.