

HOUSE No. 4860

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, July 31, 2018.

The committee on Ways and Means, to whom was referred the petition (accompanied by bill, House, No. 2823) of John J. Mahoney and others relative to promoting emerging breweries, reports recommending that the accompanying bill (House, No. 4860) ought to pass.

For the committee,

JEFFREY SÁNCHEZ.

HOUSE No. 4860

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

An Act to promote economic development and market access for emerging businesses.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 10A of chapter 23A of the General Laws, as appearing in the 2016
2 Official Edition, is hereby amended by inserting after the word “companies”, in line 7, the
3 following words:- ; provided that such agricultural items shall include cereal grains, malted
4 grains, hops, fruits, flowers, plants, vegetables, or pure juices from fruits, vegetables or plants,
5 herbs, other natural flavoring materials or extracts derived from infusions, percolations, or
6 maceration of such materials.

7 SECTION 2. Chapter 138 of the General Laws is hereby amended by inserting after
8 section 25E the following section:-

9 Section 25E½. (a) Notwithstanding the provisions of section 25E, an emerging brewery
10 may, without good cause shown, terminate the right to distribute any brands of malt beverages
11 for any licensed wholesaler to whom such emerging brewery has made regular sales of such
12 brands of malt beverages, subject to the provisions of this section.

13 For purposes of this section, an emerging brewery shall mean any entity that (1) is
14 authorized to sell malt beverages to wholesalers in the commonwealth, hereinafter referred to in
15 this section as a “brewery”, (2) is privately owned and operated, (3) is managed only by the
16 owners of the Brewery, and (4) directly or indirectly, produced less than 100,000 barrels, or its
17 case equivalents, of malt beverages in the 12-month period immediately preceding the date of the
18 written notice of termination of the right to distribute any brands of malt beverages required by
19 this section; provided however, that an emerging brewery shall include: (1) an officer or director
20 of an emerging brewery, and (2) an affiliate of such emerging brewery, regardless of whether the
21 affiliation is corporate or by management, direction, or control.

22 For purposes of calculating the volume of production for the purposes of this section, an
23 emerging brewery shall include the volume of products that are malt beverages as defined in
24 section 1 or are determined to be malt beverages for the purpose of federal or state law and are
25 produced by (1) the emerging brewery, (2) an officer or director of such emerging brewery, and
26 (3) an affiliate of such emerging brewery, regardless of whether the affiliation is corporate or by
27 management, direction, or control.

28 For the purposes of this section, a barrel shall be 31 U.S. gallons and a case equivalent
29 shall be 2.25 U.S. gallons. For the purposes of this section, the volume produced under contract
30 by a brewery shall be calculated in the volume of the agent brewery for whom the volume of
31 brands is produced, and not in the volume of brands produced by the contracted brewery.

32 (b) (1) No termination of the right to distribute shall be effective until the wholesaler
33 being terminated has received both written notice and full compensation as specified in this
34 section. An emerging brewery shall provide the wholesaler with not less than 90 days written

35 notice of the termination of the right to distribute, which written notice shall identify the
36 successor wholesaler who will begin servicing the affected territory.

37 (2) Upon any termination of the right to distribute pursuant to this section, the wholesaler
38 shall sell and the emerging brewery or the wholesaler newly assigned to distribute the brands
39 being terminated shall repurchase the wholesaler's inventory and sales and marketing materials.

40 (c) (1) The emerging brewery shall cause to be paid to the affected wholesaler, as full
41 compensation for termination of the right to distribute the brands of an emerging brewery, an
42 amount not less than the laid-in cost of the inventory plus the laid-in cost of the sales and
43 marketing material plus the fair market value of the distribution rights for the brands which are
44 being terminated by the emerging brewery.

45 (2) For the purposes of this section, "fair market value" shall mean the price that the
46 wholesaler's business that is related to the terminated brands of the emerging brewery would sell
47 for in an arms length transaction between a willing buyer and a willing seller as of the date the
48 notice was received by the wholesaler being terminated under paragraph (1) of subsection (b),
49 with neither being required to act, and both having reasonable knowledge of the relevant facts.

50 (d) (1) Any dispute whether a brewery is an emerging brewery within the meaning of this
51 section shall be determined by the alcoholic beverages control commission, which either the
52 emerging brewery or the wholesaler may request within 90 days of either party claiming rights
53 under this section. The commission shall issue a decision within 90 days of receipt of any request
54 to determine this issue. The commission may award the prevailing party its attorney's fees
55 regarding the issue of whether a brewery is an emerging brewery.

56 (2) If the emerging brewery and the affected wholesaler cannot agree on the
57 compensation due to the affected wholesaler under subsection (c) within the 90 days following
58 the emerging brewery notice of its termination of the right to distribute any brands of malt
59 beverages, either the affected wholesaler or the emerging brewery may request that the amount
60 of compensation be determined by final binding arbitration conducted in the commonwealth,
61 applying the laws of the commonwealth according to the arbitration process below.

62 (e) (1) Arbitrations under this section shall be administered by the American Arbitration
63 Association or its successor organization. The commercial arbitration rules of the American
64 Arbitration Association or its successor organization shall govern the arbitration. Arbitrations
65 shall be conducted before a panel of 3 arbitrators. Within 15 days after the commencement of
66 arbitration, each party shall select one person to act as arbitrator, and the two so selected shall
67 select a third arbitrator within 30 days of the commencement of the arbitration. If any arbitrator
68 is not selected within 45 days after notice of the arbitration being filed, such arbitrators shall be
69 selected by the nearest office of the American Arbitration Association or its successor
70 organization. All arbitrators shall serve as neutral, independent and impartial arbitrators.

71 (2) The arbitration proceeding shall conclude not later than 90 days after the date of the
72 notice of intent to arbitrate is transmitted to the other party, unless the parties agree to extend the
73 time by agreement or the arbitrator extends the time for good cause shown. Any arbitration held
74 pursuant to this section shall be in lieu of all other remedies and procedures. The costs of the
75 arbitrators and any other costs of the arbitration shall be equally divided by the parties engaged
76 in the arbitration. Each party shall bear all other expenses related to the arbitration. The panel of
77 arbitrators shall render a written, reasoned decision not later than 30 days after the conclusion of

78 the arbitration proceeding, unless the parties agree to extend the time by agreement or the
79 arbitrators extend the time for good cause shown.

80 (3) The arbitration decision shall be subject to judicial review pursuant to chapter 30A.
81 Any arbitration decision issued under this section may be enforced by commencing a civil action
82 in any court of competent jurisdiction in the commonwealth.

83 (4) Any party duly notified of an arbitration involving its rights that fails to participate in
84 an arbitration proceeding held pursuant to this section waives all rights it would have had in the
85 arbitration and is considered to have consented to the determination of the panel of arbitrators.

86 SECTION 3. Said chapter 138 of the General Laws is hereby further amended by adding
87 the following section:-

88 Section 79. If any provision of this chapter 138, or its application to any person or
89 circumstance, is determined by a court to be invalid or unconstitutional, the remaining provisions
90 shall be construed in accordance with the intent of the general court to further limit rather than to
91 expand commerce in alcoholic beverages, to enhance strict regulatory control over taxation,
92 distribution and sale of alcoholic beverages through the three-tier regulatory system imposed by
93 this chapter upon all alcoholic beverages including malt beverages.