



A Legal Checklist for the Startup Brewery

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For those hoping to realize their dream of starting a craft brewery, the number of tasks can be overwhelming and it may be difficult to know where to begin. Building the right team to help achieve each objective can smooth the path considerably. One of the first members of that team should be an attorney knowledgeable in the industry. The information below is not a comprehensive list of everything a brewery needs to do, but is intended to provide a rough estimation of the time and expense required for the major events that may require an attorney, as well as identifying opportunities to save expense by doing some tasks in-house. These items are list-

ed in a sequential order that may be useful, but is certainly not a requirement.

Form Corporate Entity

In most cases, a limited liability company (LLC) is the best structure for a startup brewery, though it is wise to first consult a CPA or tax professional familiar with breweries. Secretary of State offices often have simple online forms for the Articles of Organization of an LLC that do not require the services of an attorney. However, some States, such as California, New York, and Delaware, require an LLC to have a signed operating agreement. As

explained below, the operating agreement should be drafted by an attorney and in some cases the attorney may offer a package that includes creation of the operating agreement along with creating and filing the articles of organization. Though it varies state-to-state, the filing fees for Articles of Organization are typically \$100-200 and it generally takes 2-3 weeks for the application to be accepted by the state, though it can sometimes be expedited for an additional fee.

Once the corporate entity is formed, the business can apply for an Employer Identification Number (EIN) using the free online form on the IRS website. The EIN is needed to then open a bank account in the name of the business.

Trademarks

There are two reasons why filing for federal trademark registration should be the next step. First, prior to the COVID pandemic, it generally took at least eight months to secure trademark registration. Post-COVID, it is now taking closer to one year, at a minimum. Second, if there is going to be a problem getting the mark registered or a competitor in the

market is going to oppose the application or use of the mark, it is better to find out as soon as possible and preferably before spending money on developing a brand image, signage, and customer recognition of the name.

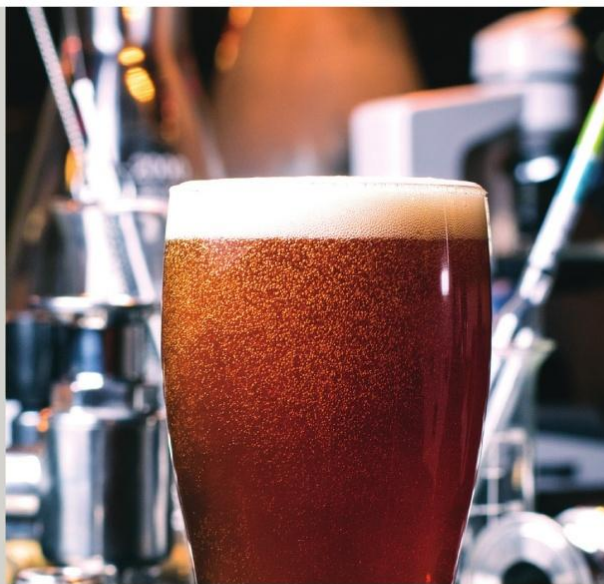
Many breweries attempt to register their trademarks themselves and sometimes they are successful. But, even registration of the mark does not ensure freedom-to-operate using the name. Competitors may attempt to cancel the mark post-registration or may have developed common law trademark rights based on prior usage of the name even though it was never federally registered. A skilled trademark attorney will conduct a thorough "clearance search" before filing an application to uncover potential obstacles to registration or problematic common law usage.

In addition, there are many technical requirements governing how applications for trademark registration must be filed. It is common for trademark applications filed without an attorney to be rejected based on a technical flaw and then abandoned because the applicant did not know how to fix the problem.

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The costs to obtain federal trademark registration can vary significantly. In most cases, the application can be filed online using pre-existing descriptions of the associated goods and services. The filing fees for such applications are \$250 per class of goods and services (i.e., international class 032 for beer, class 043 for taproom services, etc.). Additional government fees will depend on whether the application is filed as “actual use” versus “intent-to-use,” whether extensions of time are requested before filing a Statement of Use, etc. Also, attorneys’ fees for conducting a clearance search, filing and prosecuting the application can vary dramatically. As a very general guide, one should anticipate about \$2,000 total cost per trademark, but discuss each mark with an attorney for a specific estimate.

Operating Agreement

All LLC’s should have a written operating agreement. For single-member LLCs, they help to distinguish the business financial interests from the owner’s personal financial interests. For multi-member LLC’s they are critical; they are essentially a “prenup” for the business owners.

There are three reasons why breweries should hire an attorney to draft an operating agreement from scratch. First, online or “standard” operating agreements are generally drafted very poorly. Second, states vary in terms of what is required to be included in an operating agreement, so using one from the internet may not satisfy the law in a particular state. Third, and most important, drafting and negotiating an operating agreement forces the owners to discuss issues that might otherwise be left unaddressed. The resulting document is tailored to the owners’ specific needs and can prevent unnecessary expense, disagreement, and hardship if problems develop in the business relationship down the line.

The legal fees for drafting the operating agreement will depend on the number of members and the level of agreement between the members on important issues. Five to ten hours of attorney time is a good starting estimate.

Financing

Given the expense, very few breweries are built purely from the owners’ savings. Whether the project will be funded by friends and family, through

loans, through investors, or some combination thereof, having a knowledgeable CPA involved is essential. In addition, if funds will be raised from investors, an attorney should be part of the team, to ensure that the owners do not run afoul of securities laws.

Lease

Most breweries are built on leased property. Often a commercial landlord will have a “standard” lease that they want the brewery to sign. But, unless a landlord has already had a brewery tenant, they are likely unfamiliar with the particular needs of a brewery and their standard lease will reflect this lack of understanding. Having an attorney that not only understands commercial leases, but is familiar with brewing equipment and operations, can prevent the costly mistake of signing a long-term lease for a property that will not meet the brewery’s needs. Some of the issues that should be addressed include water and electrical supply, puncturing walls and ceilings for ventilation, sloped floors and trench drains, noise levels, odors, use of outdoor space, etc. It is impossible to estimate the cost of an attorney’s involvement in this process as every lease and situation is different. But, getting the attorney involved in the beginning is the most cost effective option as it is easier to prevent a disagreement than to resolve one.

Equipment Purchasing

Breweries have a lot to buy: a brew house and fermenters, furniture, glassware, grain and hops, and much more. Generally, owners make these purchases on their own, but for large expenses or long-term supply agreements, it’s never a bad idea to have an attorney review the terms.

File Brewer’s Notice with TTB

Some breweries have their attorney prepare and file the Brewers Notice and accompanying documentation with the TTB and certainly that can take some weight off the owners’ to-do list and ensure things get filed correctly the first time. But, for those looking to save on legal fees, this is one area that it makes sense to DIY. The forms are long and detailed, but they are not especially difficult. The TTB has excellent online resources and guidance and the personnel at the TTB are quite friendly and helpful on the phone.

As a rough guide, it will take about 1-2 weeks to learn what information the TTB needs, gather the materials, and fill out the forms. As of January 2022, the average processing time for a new application at the TTB was 34 days.

For those that do have their attorneys prepare the application, a rough estimation would be two to five hours of attorney time. The more complete the information provided to the attorney the first time, the lower the cost.

File for State Manufacturing License


As with the TTB application, the application for a manufacturing license from the state, and any necessary local licenses or permits, are something that can be done by the brewery owners to save legal fees. Though it varies state-to-state, the online resources tend not to be as complete or user friendly as those of the TTB and the response to telephone inquiries can be... inconsistent. However, with a bit of patience the forms are not terribly onerous. Being on good terms with other breweries in the area can be valuable, too, as they may be willing to help with any questions about the local forms.

Distributor Agreement

Most breweries start with taproom sales and some keg sales to nearby bars and restaurants, especially if they can self-distribute, but growth eventually leads to the need for a distributor. Breweries should never sign a distribution agreement without it being reviewed by an attorney. State laws on the subject are heavily slanted in favor of distributors and the contracts can be nearly impossible to terminate even if the distributor is failing to meet its obligations. A knowledgeable attorney can help to level the playing field as much as possible, particularly though negotiation of what constitutes "good cause" for termination and how to calculate the fair market value of the distribution rights. The legal fees will depend on the circumstances, but this is one area where breweries should not try to cut costs.

Conclusion


Successful entrepreneurs do not try to do everything alone. They surround themselves with experts to help navigate difficult issues. Bringing an experi



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enced attorney onto the team at the beginning of the process of starting a brewery can save time and money by preventing costly mistakes.

Brian Kaider is a principal of KaiderLaw, a law firm with extensive experience in the craft beverage industry. He has represented clients from the smallest of start-up breweries to Fortune 500 corporations in the navigation of regulatory requirements, drafting and negotiating contracts, prosecuting trademark and patent applications, and complex commercial litigation.