



# UNDERSTANDING HB 415

## The Producer-only Shipping Legislation

### OVERVIEW

The Kentucky General Assembly passed House Bill 415 on March 26 and it became law on April 8. HB 415 streamlines direct-to-consumer (DTC) shipping by alcohol producers, significantly improving and largely supplanting Kentucky's original DTC shipping laws created by HB 400 in 2018 that required an "in-person" transaction at a distillery. That requirement is no longer necessary.

#### WHO CAN SHIP?

*Only alcohol producers can ship:*

- *Distilleries*
- *Wineries*
- *Breweries*

- ▶ Kentucky-based producers can ship products to other states if those states have **reciprocal laws** that allow products from out-of-state manufacturers to be shipped to its citizens.
- ▶ Out-of-state producers can ship to Kentucky consumers if their respective state laws permit them to ship.
- ▶ Kentucky **retailers** can no longer ship products, which is a change from HB 400 in 2018. The retailers asked for their shipping privileges to be removed because they are concerned about corporate giants like large, big-box retailers taking over the retail market. However, Kentucky retailers may take orders online or by phone and deliver to Kentucky consumers or contract with third-party companies to deliver for them.
- ▶ The original bill allowed **wholesalers** to ship. That was taken out of the final version at the wholesaler's request.

### WHAT CAN BE SHIPPED?

Producers may ship alcoholic beverages that are sold under a brand name owned or exclusively licensed to the manufacturer as long as the alcoholic beverages were:

- ▶ Produced by the manufacturer;
- ▶ Produced for or by the manufacturer under a written contract with another manufacturer; or
- ▶ Produced and bottled for the manufacturer.

The product must be shipped from a producer's **licensed premises**. What determines a producer's licensed premises will be described in the direct shipper license application, which will be created by ABC in the regulation process. It is unclear, and probably unlikely, that third party fulfillment centers could be utilized at this time.

## WHEN CAN I SHIP?

The legislation will take effect 90 days upon the conclusion of the General Assembly, which is roughly July 15, 2020. The state Attorney General will set the exact date upon conclusion of the session.

*\*However, it may take longer to allow shipping.\**

Over the next few months, the Kentucky Department of Alcohol Beverage Control will have to promulgate regulations to create the licenses, forms and guidance details before spirits, beer and wine producers may begin to ship.

In addition, the Kentucky Department of Revenue also will have to issue regulations to create tax remittance forms.

The KDA will be asking these government agencies to issue “emergency regulations” that take effect while the normal process to promulgate regulations runs its course, which usually takes about six months.

## HOW MUCH CAN BE SHIPPED?

HB 415 creates new quantity limits for what can be shipped out-of-state and what can be shipped into Kentucky. Each **producer** is allowed to ship:

- ▶ 10 liters of distilled spirits, per consumer, per month
- ▶ 10 cases of wine, per consumer, per month
- ▶ 10 cases of beer, per consumer, per month
- \* NOTE: There is no change for Kentucky distillery gift shops sales. That limit remains at 4.5 liters per person, per day, until January 1, 2021, when the limit increases to 9 liters per person, per day.
- \* NOTE #2: HB 415 removes the “club” privilege, since manufacturers can now ship 10 liters per customer, per month. The old “club” privilege restricted clubs to one standard 9L case per customer, per year.

## REQUIRED RECORD KEEPING!

Direct shipper license holders (both in-state and out-of-state) must maintain detailed records of:

- ▶ Quantities shipped
- ▶ Name and address of the consumer
- ▶ Purchase price of the product
- ▶ Amount of taxes charged

These records shall be submitted quarterly to the Kentucky ABC and the Department of Revenue. These records may also be audited and inspected by both agencies.

## LICENSE, LAWS, AND LOGISTICS OF SHIPPING

In-state and out-of-state producers are eligible to apply for a “direct shipper license” from the Kentucky ABC at a cost of \$100 annually, which supersedes existing direct shipping law.

### **A direct shipper license holder shall:**

- ▶ Appoint and maintain an agent of service with the Kentucky Secretary of State’s office.
- ▶ Maintain all records of shipments.
- ▶ Allow the Kentucky ABC and Department of Revenue to perform audits of records and inspections of a licensee’s licensed premises (upon request).
- ▶ Submit to the jurisdiction of the Kentucky ABC and Department of Revenue, the courts, and all other enforcement authorities in Kentucky.
- ▶ Hold a shipper license contingent on obeying all the laws and regulations of both the origin state and the shipping destination state, including those related to times, days and circumstances of when alcoholic beverages may be sold or shipped.
- ▶ Be subject to fines and penalties, or license suspension/revocation, for violating duties or obligations of a licensee.

Producers who hold a direct shipper license may ship products through transactions that take place electronically, online, by mail, or in-person at the producer’s location.

- ▶ A producer must verify that a consumer purchasing alcoholic beverages for shipping is of lawful drinking age. A valid identification document must be an unexpired, government-issued form of identification that contains the photograph and date of birth.
- ▶ A producer may not sell or ship alcoholic beverages to a consumer in a dry territory. However, it is a violation *by the consumer* who purchases the alcoholic beverages and intentionally ships the product to an unlawful address. That consumer is subject to a \$250 fine for the first offense and \$500 fine for subsequent offenses.

## WHAT IS RECIPROCIITY?

In order for a Kentucky producer to ship to another state, the other state must have “reciprocal” laws on the books that allow for shipments of spirits (or wine or malt beverages) into its state.

- ▶ With the passage of HB 415, Kentucky has declared itself a state that will allow in-bound shipments of spirits, wine or malt beverages into Kentucky from an alcohol producer in another state that has first obtained a direct shipper license from the Kentucky ABC.
- ▶ Unlike wine, there are currently very few states that allow spirits to be shipped into their states. Kentucky’s signature Bourbon and distilling industry has led the way in becoming one of the first states in the country to allow spirits to be shipped in and out of its state. Other state legislatures around the country will need to adopt reciprocal laws that would allow distilled spirits from out-of-state producers to be shipped to its citizens.
- ▶ Reciprocal states as of March 2020 are Alaska, Arizona, Connecticut, Hawaii, Kentucky, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island and Washington, D.C. Please note most of these states have specific, different guidelines on what can be shipped.

### **Other items of note:**

KRS 243.240 is amended to allow quota retail package licensees to purchase distilled spirits and wine by the package from other licensees who can sell distilled spirits and wine by the package at retail. This includes liquor retailers being able to purchase product from distilleries both online and from distillery visitor centers, and placing it on the retailers’ shelves for sale.

## USE OF COMMON CARRIERS

Direct shipper license holders must use licensed common carriers (UPS, FedEx) to ship the product. The product must be shipped from licensed premises (as described in the direct shipper license application that will be created by the ABC).

All shipments must be labeled : **“CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY.”**

A common carrier may not leave a package at a consumer’s location without first inspecting a valid identification document verifying the recipient of the delivery is at least 21 years old, and requiring a signature of the recipient.

The individual who receives the package does not have to be the consumer who purchased the product.

## TAXES + THE WHOLESALE TIER

### Shipments from Kentucky to other states:

Kentucky producers can ship their product directly from their finished product location to a consumer without sending the product to the wholesaler.

- ▶ No Kentucky taxes are paid on product that is shipped out of Kentucky to a reciprocal state.
- ▶ However, the Kentucky producer must collect all sales, excise and license taxes that are levied by the destination state, and remit those taxes to the destination state.
- \* NOTE: For all tax collection purposes on alcohol shipments, the retail sale is deemed to be a sale that occurs at the location of the consumer, which is a commonly held tax practice for the interstate shipping of consumer goods.

### Shipments from other states into Kentucky:

Out-of-state producers must pay Kentucky excise, sales and any municipal taxes on shipments they make to consumers in Kentucky. Since Kentucky is currently only one of two states with a wholesale tax, out-of-state producers will be required to pay the 11% equivalent wholesale tax (a calculation that will be based on 70% of the retail price).

### Shipments from Kentucky producers to Kentucky customers:

Kentucky producers with a direct shipper license may ship product to consumers within Kentucky under the following process:

- ▶ This product does not go through the wholesale tier.
- ▶ The producer is required to collect and remit all required Kentucky taxes, including sales taxes, excise taxes, wholesale taxes and local regulatory license fees at the destination location (if applicable). \* NOTE: Distilleries will be paying all of these taxes, which is new.
- ▶ However, the wholesale tax rate of 11% is now applied to the wholesale cost of the bottle, not to the retail price. All other taxes are applied to the retail sales price.

### Other items of note:

All applicable taxes shall be separately identified on the consumer’s invoice.

For the purposes of identifying local regulatory license fees imposed by select Kentucky cities, the Kentucky ABC is required to maintain a list of those cities and licensed fee rates and make the list publicly available.

# HB 415 FAQ



## **What does this do to the 3-tier system?**

The three-tier system remains intact for the vast majority of alcohol sales, including all gift shop sales at Kentucky distilleries. Only alcohol producers (distilleries, wineries and breweries) may sell and ship their own products directly to consumers using a licensed common carrier such as UPS or FedEx. Keep in mind that wineries have been shipping since the 1970s and the 3-tier system remains alive and well.

## **When can I order bottles?**

Kentucky's model new law should take effect in mid-July, but it could be later because some state agencies need to create forms and processes to regulate shipment. But more importantly, consumers will need to first determine if they live in a "reciprocal state" that allows shipments in and out of that state. Unlike wine, which can be shipped to more than 45 states, there are less than a dozen states that currently allow the reciprocal shipment of spirits.

## **Do I live in a reciprocal state and if not, what can I do to change that?**

Reciprocal states as of March 2020 are Alaska, Arizona, Connecticut, Hawaii, Kentucky, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island and Washington, D.C. Please note most of these states have specific, different guidelines on what can be shipped. If you don't live in one of these states, contact your state's Governor or state lawmakers and ask them to pass spirits shipping legislation. Tell them Kentucky has a new spirits shipping model that can be adopted in your state.

## **When I order a bottle online or by telephone, does it go through the 3-tier system? Is it different than when I buy a bottle at the distillery when visiting the Kentucky Bourbon Trail® tour or Kentucky Bourbon Trail Craft Tour®?**

Online or telephone purchases go straight from the distillery to the consumer, like most electronic retail transactions in today's modern economy. All bottles purchased in person at a distillery gift shop in Kentucky are retail sales that have gone through the 3-tier system.

## **How much can I get shipped to me?**

The new law allows each consumer in a reciprocal state to receive up to 10 liters of spirits per month, 10 cases of wine per month, and 10 cases of malt beverages per month.

## **How are teenagers prevented from shipping alcohol?**

This new law requires ID checks at the point of sale and at the point of delivery. All shipments also must be clearly marked as alcohol, and require an adult signature and valid identification upon delivery. Alcohol producers and common carriers could lose their license if they are caught shipping illegally to minors.

## **How are taxes paid on shipments?**

Under current Kentucky law, alcohol shipped out-of-state pays no Kentucky taxes. This new law doesn't change that long-standing process. Taxes are based on the point of sale, meaning the taxes are paid to the state where the alcohol is shipped.

Alcohol producers will have to charge and collect those taxes when a sale is made and remit them to the receiving state based on that state's laws. This can include state excise, sales and any local taxes.

## **Won't Kentucky lose out on a lot of tax revenue this way?**

No. Kentucky will benefit from new tax revenue when products like wine from California are legally shipped into Kentucky. These in-bound shipments of alcohol have to pay the Kentucky sales tax, excise tax, wholesale tax equivalent, and any applicable local alcohol licensing taxes or fees.

All producers also must obtain a \$100 Kentucky license to ship. And, Kentucky producers - especially our legendary Bourbon distilleries - will expand to meet this new market opportunity, creating more jobs and investment for the Commonwealth.

## **Can distilleries currently ship internationally?**

Yes, Kentucky distilleries can ship their products internationally, primarily through their contracts with UPS.

## **Are in-state shipments legal with this bill?**

Kentucky distilleries can ship their product to Kentucky consumers, and all state taxes must be collected on these sales. However, shipping costs and the time it takes to ship makes it more economical to shop local or visit one of our Kentucky Bourbon Trail® or Kentucky Bourbon Trail Craft Tour® distilleries.

## **What is the effect on liquor stores?**

The state association that represents retail liquor stores in Kentucky specifically asked not to be granted direct-to-consumer shipping privileges in this legislation because they are worried that large, big-box retailers could corner the alcohol shipping market.

The new legislation makes sure there is a level playing field in regards to taxes on all alcoholic beverages that are shipped into this state. This helps ensure our local retailers won't be undercut on price, especially when one has to factor in the extra cost of shipping and time it takes to arrive.

## **Why did distillers support this bill?**

Parity and increasing consumer demand. Consumers today are demanding easier ways to access products by shipping or delivery. Distillers are rising to meet these needs and further develop brand loyalty, assuring the continued growth of our \$8.6 billion dollar signature industry that employs more than 20,100 people in Kentucky.

In addition, wine has been shipping throughout the country for nearly 50 years. Now that spirits - especially Kentucky Bourbon - are in vogue and high demand, it's only fair to allow the same shipping privileges to spirits. There are more than 2,000 distilleries in all 50 states now, so shipping also will help this next generation of distillers grow and market their new brands.