

The Employment Kit

Maine Edition

A Guide for Managing a Brewery's Employees in the State of Maine



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INTRODUCTION

Many breweries are surprised to know that even with a handful of employees—and even if those employees are friends or family— they are still subject to various state and federal employment laws. All breweries, irrespective of the number of staff, should consult with legal counsel prior to commencement of operations to ensure compliance with federal and state anti-discrimination and wage and hour laws, protection of confidential trade secrets, and understand how to manage staff in a way that minimizes future legal exposure. Your employees are your most important assets in your operation, after all without them who would brew, deliver, sell, or serve the beer? But having employees also exposes the brewery to potential liability. This guide does not constitute legal advice, but is designed to encourage you to get your employment house in order to ensure you can continue to do what you do best—brew great beer.

BOTH PRIOR TO HIRING EMPLOYEES AND THROUGHOUT THE COURSE OF EMPLOYMENT, ALL BREWERIES SHOULD BE SURE TO:

- Determine policies and procedures governing employees and adhere to those policies consistently
- Establish protocols for creating and maintaining personnel records
- Determine the proper classification of each employee
- Create job descriptions for each position
- Create a handbook and update it annually
- Obtain proper insurance
- Understand best practices for managing ongoing relationships with employees

DETERMINE POLICIES AND PROCEDURES GOVERNING EMPLOYEES AND ADHERE TO THOSE POLICIES CONSISTANTLY

Policies include, but are not limited to:

- **Confidentiality policies**—*how can I protect my brew recipes?*
Breweries in particular have a special interest in protecting, among other things, their recipes, beer preparation techniques or processes, vendor information, marketing strategies and customer lists. To avoid the unintended sharing of confidential business and proprietary information, breweries should consider both maintaining a confidentiality policy in their handbooks as well as having certain employees, such as brewers, sign confidentiality, non-compete and/or nondisclosure agreements to ensure you have recourse should your most popular recipe get in the hands of your competitor.
- **Cell Phone Policies**—*can I restrict my employees' cell phone use?* YES, you can! For many breweries, employee cell phone use can be disruptive and interfere with customer service. Not only can you adopt a policy restricting or prohibiting cell phone use, but you can tailor that policy to your brewery's needs. For example, you may want to prohibit cell phone use for those employees working in the tap room, but allow it for brewers, who rely on cell phones to time stages of production.
- **Tip Policies**—*can I share taproom tips with other employees?*
Navigating the federal and state wage laws applicable to the receipt of tips by service staff can be complicated. With taprooms becoming a more and more popular way of showcasing and selling beer, breweries need to be aware of the rules regarding tips and tip-pooling that apply to their servers, bartenders and wait staff. The basic rule is that tips belong to the employees who provided the service to the patron. The only exception is when the employer has instituted a valid tip pool. While there are many considerations and nuances a brewery must take into account, in general, no portion of a tip pool may go to the brewery itself, to staff with any managerial responsibility, to kitchen staff or any other "back of the house" staff, or to any other employee who does not serve patrons directly. Breweries should consult with legal counsel to be sure they are in compliance with state and federal wage laws.

- **Drug and Alcohol Policies**—*where do I draw the line between quality control and out of control?* Breweries have unique concerns when it comes to alcohol consumption in the workplace, so having a policy outlining expectations is essential. Additionally, with medical and recreational marijuana both legal in Maine and many other states, having a policy addressing expectations related to marijuana and the workplace will go a long way to ensure a safe and productive work environment.
- **Anti-discrimination and Harassment Policies**—*how do I create a workplace free of harassment and discrimination?* All breweries must be aware of their obligations under state and federal law with respect to ensuring a workplace free from harassment and discrimination. While the majority of federal anti-discrimination laws only apply to employers with 15 or more employees, Maine has its own set of laws which often mirror federal law and apply to all employers, irrespective of size. Maine law imposes greater restrictions on employers as it relates to sexual harassment and discrimination. Having a policy that outlines the brewery's adherence to anti-discrimination and harassment laws, the process for handling employee complaints and the potential consequences of discriminatory or harassing behavior, is essential to ensuring a productive work environment that is free from harassment and discrimination.
- **Leave Policies**—*how much vacation time should I provide to my employees? Sick leave? What about when an employee requests an unpaid leave of absence?* As an employer, you have some flexibility in determining whether and to what extent you provide paid or unpaid leave, (be aware that employees from Massachusetts have mandatory sick leave under certain circumstances). However, you may have an obligation to provide leave for employees under the Family and Medical Leave Act ("FMLA") and the Americans with Disabilities Act ("ADA"). While the federal FMLA only applies to employers with 50 or more employees, Maine's version of the FMLA applies to private employers with 15 or more employees, entitling employees to unpaid leave for an employee's serious health condition, the birth or adoption of a child, and to care for an employee's parent, child or spouse. Similarly, while the ADA applies to employers with 15 or more employees, the Maine Human Rights Act ("MHRA"), which

affords nearly identical protection, applies to all employers in Maine, irrespective of the number of employees. Under the ADA and MHRA, employers may be required to provide a leave of absence as a reasonable accommodation for an employee's disability. Application and intersection of the ADA, FMLA and MHRA is complex and fact-specific, and breweries are well advised to consult with legal counsel should leave related to a potential serious health condition or disability arise.

ESTABLISH PROTOCOLS FOR CREATING AND MAINTAINING PERSONNEL RECORDS

Every brewery should have clear protocols for creating and maintaining personnel files because:

- They are required by various federal and state laws;
- An employee's personnel file is often among the first items requested by an employee in an employment-related lawsuit; and
- Information contained in a personnel file may help establish an employer's claim or defense in employment litigation, such as records of an employee's disciplinary problems, documentation of an accommodation offered for an employee's disability, or acknowledgement of an employee's at-will employment status.

Under Maine law, a personnel file includes, but is not limited to, any formal or informal employee evaluations and reports relating to the employee's character, credit, work habits, compensation and benefits and medical records relating to the employee that the employer has in its possession.

Although no single federal law requires employers to maintain a personnel file as such, employers must keep certain employee records under various laws, including but not limited to:

- Records of hours worked and wages paid under the Fair Labor Standards Act (FLSA);
- Records of workplace injuries under the Occupational Safety and Health Act (OSHA);
- Form I-9s demonstrating employees' right to work in the United States

Employers generally should keep personnel files in locked files or password-protected electronic equivalents, in a way that limits access to HR, to the extent feasible, or others with a need to know, and segregated from the brewery's general business records.

DETERMINE THE PROPER CLASSIFICATION OF EACH EMPLOYEE

Employee or Independent Contractor?

While many breweries are tempted to classify staff as independent contractors, simply referring to a worker as an independent contractor, even in a written agreement, does not make it so. Maine law, the IRS and other state and federal agencies have specific legal definitions of “independent contractor” and getting it wrong can result in significant legal and financial consequences. Breweries should work with legal counsel to determine whether an employee truly can be classified as an independent contractor based on the specific facts at hand.

Exempt or Non-Exempt?

From the get-go, breweries must determine whether an employee is classified as exempt or non-exempt under the Fair Labor Standards Act (FLSA) and applicable state law. Merely classifying employees as “salaried” does not mean they are not entitled to be paid overtime wages for work in excess of 40 hours a week. Breweries should make a conscious and informed decision with the assistance of legal counsel to classify each employee correctly, and properly adhere to minimum wage and overtime pay requirements.

CREATE PROPER JOB DESCRIPTIONS FOR EACH POSITION

Job descriptions are useful in many aspects of a brewery’s business, from hiring to compensation to managing employee performance. A job description is a document that describes certain details about a particular position and typically contains the following elements:

- Job title—the document may also specify pay grade and to whom the position reports
- Job classification—including whether the position is exempt or non-exempt from overtime requirements and whether it is a full, part-time, or temporary or contract position
- Duties—the document should specify the responsibilities, duties, tasks and requirements of the job
- Qualifications—the document should list the qualifications and indicate whether the qualifications are required or preferred

- Physical requirements—the document should specify the particular physical requirements of the job, such as standing, sitting, and lifting requirements and the physical work environment
- Additional information—the job description can include other information, such as location, travel requirements, working hours, ability to work remotely, etc.

Job descriptions should be updated as an employee's duties and responsibilities evolve and may be critical to claims or agency audits such as:

- Misclassification of employees as exempt or non-exempt;
- Requests for accommodation under the Americans with Disabilities Act (ADA), including the determination of the essential functions of the job; and
- Requests for religious accommodations.

CREATE A HANDBOOK AND UPDATE IT ANNUALLY

Having an employee handbook outlining the brewery's policies and procedures is a must. Your handbook serves two important purposes: letting your employees know what you expect of them, and protecting your business in case there is a dispute. While many businesses are tempted to use "stock" handbook templates they find online, these templates often do not comply with applicable law or accurately reflect an employer's actual practices. Employers should be aware that company handbooks are regularly used as exhibits in employment-related litigation and administrative proceedings. For this reason, handbooks must:

- Be drafted in a manner that does not create legal obligations the employer did not intend;
- Contain provisions reserving certain employer rights;
- Comply with applicable local, state and federal law;
- Demonstrate an employer's commitment to comply with the law;
- Accurately reflect the employer's actual practices; and
- Be enforced fairly and consistently.

OBTAIN PROPER INSURANCE

All breweries operating in the state of Maine must provide workers' compensation insurance coverage for their employees.

Also, while not required by law, breweries should consider obtaining employment practices liability (EPLI) insurance to cover the costs associated with defending employment claims. EPLI policies have become increasingly popular due to the rising volume and costs of employment practices litigation and the employment practices exclusions added to many other insurance policies.

UNDERSTAND BEST PRACTICES FOR MANAGING ONGOING RELATIONSHIPS WITH EMPLOYEES

1. Lay the proper groundwork by establishing clear expectations from the beginning, including the presentation of carefully crafted job descriptions and policies that the brewery maintains the right and discretion to change.
2. Track and document employee performance through verbal counseling, written warnings, suspensions, etc. Most importantly, BE HONEST in annual reviews, especially about employee shortcomings.
3. Make good faith efforts to coach employees to success and DOCUMENT, DOCUMENT, DOCUMENT both your efforts and the employee's continued shortcomings.
4. Think again before you act! Take the time to make careful, informed decisions.

Anytime you are implementing policies and procedures related to managing your workplace and your employees, it is recommended that you consult with your legal counsel to ensure compliance with federal, state and local laws. We have found new businesses often think doing the right thing by its employees must be legal. Unfortunately, the law does not always follow common or practical sense and making this assumption, although well-intentioned, may get you into trouble down the road.