



# Contract Brewing & Alternating Proprietorships

## Part II: Contracts & Requirements

By Candace L Moon, The Craft Beer Attorney

### ***Legal Disclaimer***

*Nothing in this article should be considered legal advice. If you have a specific legal situation, please consult a licensed attorney with the specific facts of your situation. Thank you!*

In *Part I: Definition and Differentiation*, we established what Contract Brewing and Alternating Proprietorships are and how they differ from each other. From there we dive in deeper to look at what contracts, agreements, and parameters need to be in place for each to be effective and structured properly.

### **Contract Brewing Contracts**

Typical terms of a contract brewing contract include the following:

- Term – how long
- Price – how much, generally based on beer and quantity
- Production direction
- Confidentiality – key element of contract
- Intellectual Property – recipes, trademarks, etc. & another key element of your contract
- Compliance with law
- Termination
- Disputes
- Standard contract clauses – insurance, indemnification, etc.

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### **Alternating Proprietorship Agreement**

Typical terms of an Alternating Proprietorship Agreement include the following, similar to a lease in a lot of ways:

- Term – how long
- Price – this will be framed as rental price, generally
- Production direction – if the host brewery will provide some brewing
- Compliance with law
- Access to premises
- Segregation of ingredients and final product
- Termination
- Disputes
- Standard contract clauses – insurance, indemnification, etc.

In an Alternating Proprietorship Agreement a Tenant Brewer must qualify as a brewer, and the TTB expects the Tenant Brewer to actually produce beer. However, a Tenant Brewer can have the Host Brewer provide certain services related to Tenant Brewer's production of the beer.

- Tenant Brewer can pay for Host Brewer's employees' services, but be careful that you don't find yourself in a joint employer situation
- Tenant Brewer can purchase raw ingredients from Host Brewer

However, there should NOT be any pass-through payment for excise taxes.

In an Alternating Proprietorship Agreement the Tenant Brewer needs to be operating as a brewery, not as a party to a contract brewing arrangement. Ask yourself the following to ensure that the differentiation is clear:

- Who holds the title to the raw materials and ingredients?
- Does the Tenant Brewer have access to the premises?
- What is the Tenant Brewer's business plan? Do they plan to produce in the future or are they just looking to market the product?

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In an Alternating Proprietorship Agreement there must be:

- Separation and identification of beer
  - All Tenant Brewer beer must be separate and identifiable from all other Tenant Brewer and Host Brewer product at ALL stages of production. If the TTB comes to inspect and cannot segregate the beer, they will consider it contract beer production by the Host Brewer. Note that blending is ok if the taxes are already paid.
  
- Records and Reports
  - The Tenant Brewer must keep its own records and submit operational reports, claims, notices, etc. However, Tenant Brewer can contract with Host Brewer to prepare those records and reports via power of attorney. In this case the Tenant Brewer still needs to be knowledgeable and familiar with the information in those reports, as the Tenant Brewer still bears responsibility even if having someone else prepare them.
  
- Taxpayment of beer
  - Tenant Brewer is responsible for taxpayment at the applicable rate. Liability for taxpayment CANNOT be delegated, although you can delegate the preparation of the reports.
  - Any passthrough of money for payment of excise taxes will be seen as **contract brewing** by the TTB.

In an Alternating Proprietorship Agreement the Tenant Brewer must have involvement and oversight of brewery operations. The Tenant Brewer must be materially involved and exercise oversight over the brewery operations, such as:

- Product development,
- Records,
- Quality Control, and
- Product liability.

Further, the Tenant Brewer needs to be involved with purchase of ingredients and materials, movement of beer through the process, beer removed, payment of taxes, inventory, and with any other required records such as establishment of standard procedures. These procedures

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could include overseeing the testing of the Tenant Brewer's beer by the Host Brewer, receiving samples regularly, and/or making regular visits to the premises (not necessarily during production).

It is also essential that the Tenant Brewer Operation be independent. The Tenant Brewer needs to operate independently from the Host Brewer, including brands, formulas, trademarks, marketing, and sales

- Production,
- Marketing,
- Restricting product relocation,
- Assignments or sales, and
- Identical formulas.

Further, the Tenant Brewer should be directing production of beer at the brewery, should have potential customers, and should be receiving orders to help determine scheduling and amount of beer production. The Tenant Brewer and the Host Brewer must be separately and independently marketing their own products, and have different brands and different trademarks.

### **Licensing and Applications responsibilities of the Host Brewer**

The Host Brewer needs to file:

- Amended Brewers Notice
  - Portion of premises and equipment to be alternated,
  - The Tenant Brewer with whom the Host Brewer will alternate, and
  - The Diagram identifying areas the Tenant Brewer will use.
- Update of security of brewery, unless unchanged
- Consent of surety, if you have a bond
- Letters of request for an alternative method of operations

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### Licensing and Applications responsibilities of the Tenant Brewer

The Tenant Brewer needs to file:

- Brewers Notice application
- Letters of request for alternate method of operations
- Power of Attorney if Host Brewer employees will prepare or store records of Tenant Brewer
- Copy of the Alternating Proprietor Agreement

If you have questions or concerns, please reach out to your local attorney specializing in craft beer, a Start A Brewery Legal Contributor in your area, or contact Candace at [Candace@CraftBeerAttorney.com](mailto:Candace@CraftBeerAttorney.com).



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