BERN
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The Brew Kit

New Hampshire Edition

A Guide to Starting, Owning & Operating a
Craft Brewery + State Licensing Requirements

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Contents

Introduction 1

Timeline 2

Checklist 3

PRIMARY FERMENTATION

Entity Formation 5

Brand Identity and Trademark Protection 6

Financing and Real Estate 8

Federal Licensing and Compliance 10

State Licensing and Compliance 13

SECONDARY AGING, BLENDING, AND BOTTLING

Additional Considerations 15

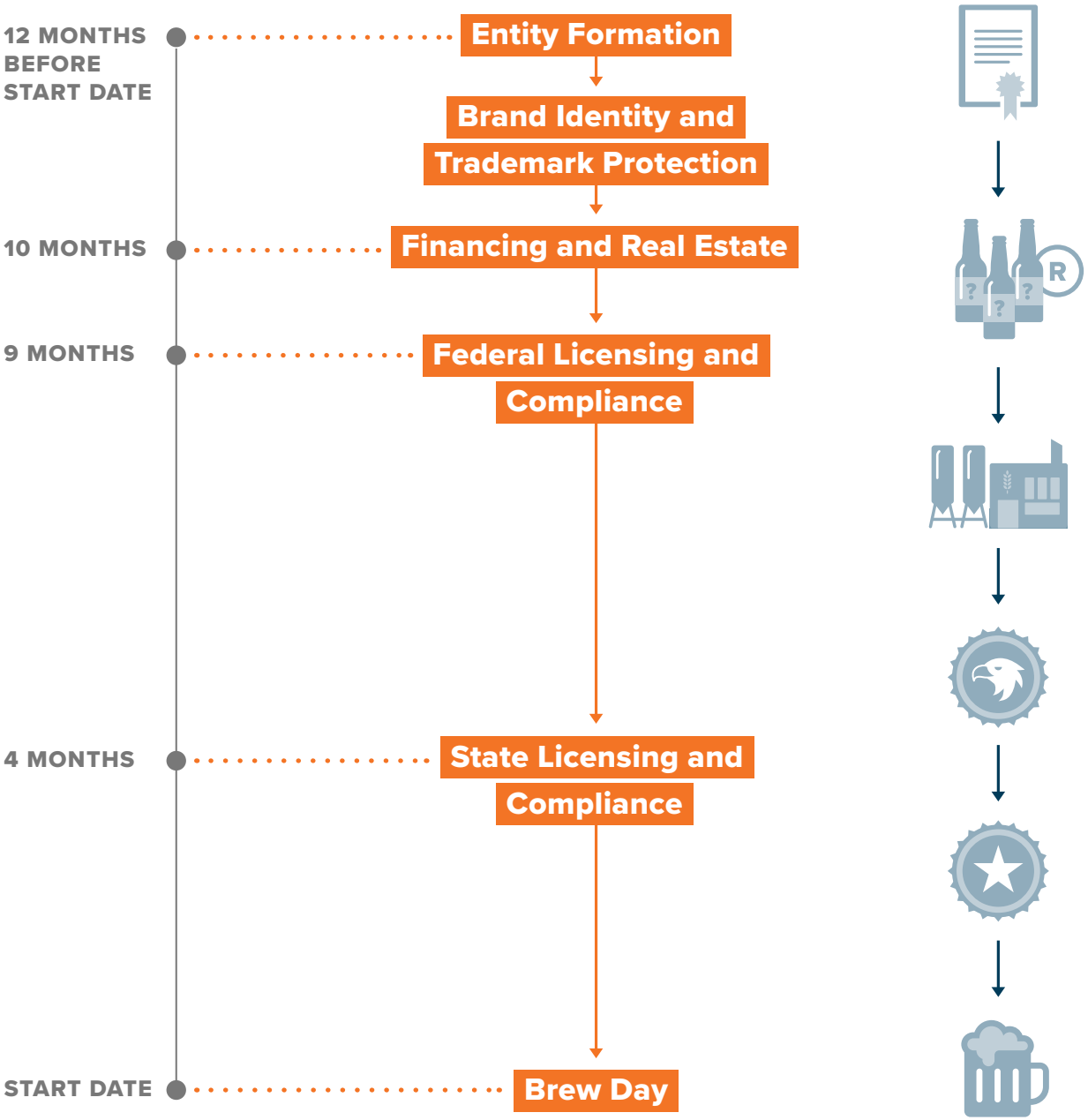
Introduction

If you are an avid homebrewer, a veteran commercial brewer, or someone who falls somewhere in between, you might have considered starting your own brewery at one time or another but might not have known where or how to begin—enter, The Brew Kit. The Brew Kit is a guide designed to help simplify an otherwise complex start-up process for breweries-in-planning and also to raise important issues for existing breweries to consider or revisit. It starts with an overall timeline, proceeds with a handy checklist, and follows with an explanation of each individual step in the process.

Of course, **The Brew Kit is a non-comprehensive overview that does not offer, and should not be interpreted to offer, legal advice. In addition, you should not rely solely upon the information contained in The Brew Kit when starting or operating your craft brewery. Instead, you will be served best by engaging legal counsel early in the process with significant experience in the food and beverage industry—like Bernstein Shur.** This is not, by any means, our "first brew day." We currently represent a significant number of craft breweries throughout New England with production capacities ranging from two-barrel to sixty-barrel brewhouses. Our practical approach and industry knowledge will help ensure that you will be able to more fully enjoy the business of brewing. So, relax, don't worry, and read The Brew Kit.

Timeline

PRIMARY FERMENTATION



Checklist

PRIMARY FERMENTATION

ENTITY FORMATION

- ☐ Select and form the proper legal business entity
- ☐ Consult with an attorney and a certified public accountant
- ☐ Consider key questions

BRAND IDENTITY AND TRADEMARK PROTECTION

- ☐ Choose your brand identity
- ☐ Obtain trademark protection

FINANCING AND REAL ESTATE

- ☐ Determine the right kind of financing
- ☐ Secure a location for your brewery

FEDERAL LICENSING AND COMPLIANCE

- ☐ Apply for a federal brewery license
- ☐ Complete all federal registrations and approvals
- ☐ File federal excise taxes

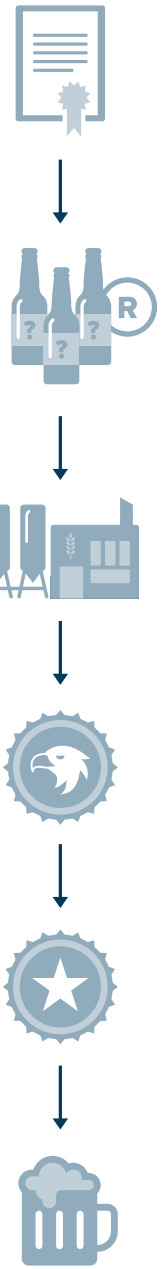
STATE LICENSING AND COMPLIANCE

- ☐ Apply for a state brewery license
- ☐ Complete all state registrations and approvals
- ☐ File state excise taxes

SECONDARY AGING, BLENDING, AND BOTTLING

ADDITIONAL CONSIDERATIONS

- ☐ Lay out plan with legal counsel for ongoing maintenance of trademarks, employment policies, distribution strategies, and management issues



Primary Fermentation

Entity Formation



12 MONTHS BEFORE START DATE

In most cases, the first step for a brewery-in-planning is to select and form the proper legal business entity

What: A legal business entity (e.g., corporation, limited liability company, limited partnership, etc.) is a business structure created by state law that is separate and distinct from the owners and under which the owners will own and operate the brewery.

Why: The proper selection and formation of a legal business entity, among other things, formalizes the organization and management of your brewery, limits the personal liability of the brewery's owners, and offers several tax planning advantages. (It's usually less intimidating than it sounds.)

How: Consult with an attorney and a certified public accountant who both specialize in business and taxation matters. They will help structure your business in the most stable and efficient way possible to guarantee its long-term health and continued success.

In order to determine the most appropriate business structure for the brewery, your professional advisors will ask you to consider a few key questions and you can save time (and money) by preparing possible answers in advance of your meeting. For example:

- How will you fund the brewery's present and future financial needs?
- Do you hope to limit your personal liability for the brewery's debts and obligations?
- How will the brewery's profits be taxed?
- How will you be compensated for your time and effort in owning and operating the brewery?
- Who will own and/or control the business, who will manage the brewery's day-to-day operations, and what will that management structure look like?

Brand Identity and Trademark Protection



10–12 MONTHS BEFORE START DATE

The next step for a brewery-in-planning is to choose a brand identity, which helps your customers identify, locate, and connect with your brewery's goods, and to protect that brand identity through trademark registration.

STEP 1: CHOOSE YOUR BRAND IDENTITY

Why: The name of your brewery is the most natural extension of yourself: it defines the brewery's ethos, reinforces the brewery's independent culture, and sets the brewery apart from other breweries in the marketplace. Like a simple misstep on brew day that might lead to unwanted oxidation or unpleasant off flavors, a brewery name that misses the mark might similarly obstruct your brewery's initial success.

How: Discuss your ideas with an attorney and a marketing professional who understand the craft beer industry and the local marketplace. It is worth the extra time and effort to find the right name—one that strikes the right balance between who you are and the availability for trademark registration. An experienced attorney can help you find a name that meets both criteria.

STEP 2: REGISTER A TRADEMARK

What: A trademark is a word, phrase, name, symbol, or design—or some combination of those pieces—that identifies the source of your brewery's goods and distinguishes them from those manufactured and sold by other breweries in the marketplace. Although the simple use of a name may grant some initial trademark rights to the brewery, federal trademark registration of that name through the United States Patent and Trademark Office (**USPTO**) offers much more protection for the brewery and the brewery's brand identity.

Why: The rapid growth and expansion of the craft beer industry throughout the country has inevitably led to more trademark disputes amongst breweries (and distilleries and wineries). Therefore, it is increasingly important to protect the brewery's brand identity during the initial stages

of development, the identity of which includes not only the brewery's name but also any logos or beer names that you believe are critical to establishing the brewery's culture.

How: Consult with experienced trademark legal counsel—like Bernstein Shur—who can conduct a full trademark clearance search to ensure that your proposed brewery name is not currently used or registered by another brewery or similar business. We can also provide guidance on how to enforce your trademarks in the marketplace, which is an ongoing responsibility for any small business owner (see "Maintaining and Enforcing Your Trademarks" below).

Financing and Real Estate

10 MONTHS BEFORE START DATE



Once the brewery-in-planning drafts an executive summary or a full-fledged business plan and prepares detailed financial projections—which should, among other things, account for the purchase of big-ticket items (e.g., brewing equipment) and payment of ongoing business obligations (e.g., lease or mortgage payments)—you should consider how the brewery will finance costs and secure affordable real estate space.

Pro tip:
Once the brewery calculates the cost of start-up brewing equipment, it is wise to consider placing an order for the brewing equipment because the construction, fabrication, and shipping times are sometimes substantial.

STEP 1: DETERMINE THE RIGHT KIND OF FINANCING

Why: In the early stages of the business, the brewery's founder will often contribute his or her personal savings into the brewery to help cover start-up costs (i.e., "bootstrapping"), but the brewery will generally use debt financing, equity financing, or a combination of both to finance the purchase of big-ticket items and payment of its ongoing business obligations.

How: There are two basic options to finance the brewery-in-planning: debt financing, and equity financing. The first option, debt financing, is the process of raising money by borrowing funds from a traditional lender (such as a savings bank or a credit union) or from non-traditional lender (e.g., a high net-worth individual) and promising to repay those funds with interest over a certain period of time.

The second option, equity financing, is the process of raising money by selling o portions of ownership in the brewery to third parties (i.e., investors). Any equity financing and most non-traditional debt offerings (e.g., convertible debt) are regulated by federal and state securities laws. This process is often called a "securities offering" or "offering of securities" because the brewery, by offering equity and certain types of debt, is "offering securities" (a term of art) in the company. It is very important for the brewery to contact legal counsel experienced in both debt and equity financing—like **Bernstein Shur's Private Capital Team**—to make sure that the brewery complies with federal and state securities laws and regulations and fully understands its debt obligations.

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STEP 2: SECURE A LOCATION FOR YOUR BREWERY

Why: As part of the federal licensing process (see "Federal Licensing and Compliance"), the brewery must submit proof that it has secured the soon-to-be brewery premises. If the brewery is leasing physical space, the brewery may submit a signed commercial lease agreement; if, on the other hand, the brewery owns or is planning to purchase the brewery premises, the brewery may submit a properly recorded deed.

How: Consult with legal counsel who is well versed in real estate and municipal law to ensure that your hoped-for space is properly zoned for brewery operations.

From a technical standpoint, you should also consider whether your new premises (1) contains the proper piping for **water consumption and wastewater disposal**, (2) includes cold and dry storage areas, and (3) offers room for expansion.

Federal Licensing and Compliance

9 MONTHS BEFORE START DATE

The next step for a brewery-in-planning is to comply with several federal licensing requirements, the most notable of which requires the brewery to apply for and obtain its Brewer's Notice from the Alcohol and Tobacco Tax and Trade Bureau (**TTB**). The following list of federal licensing and registration requirements is not, by any means, a comprehensive list, and a start-up brewery should not rely solely upon this list to comply with such requirements without first consulting with an attorney who is experienced in this area of the law—like us. We prepare, submit, and help streamline the federal licensing and registration processes by working directly with TTB.

Pro tip:
To learn if a Brewer's Bond must be submitted, see our Craft Food and Beverage Client Alert: **New Federal Bond Exemption for Breweries Distilleries, and Wineries**

STEP 1: APPLY FOR A FEDERAL BREWERY LICENSE

Why: In order for your brewery to begin brewery operations, it must "give notice as a brewer" to TTB, and the brewery cannot begin operations until the appropriate TTB examiner approves the Brewer's Notice and all associated documents.

How: You can apply for your Brewer's Notice through TTB's **Permits Online**, but we recommend consulting with experienced legal counsel before submitting the Brewer's Notice because there are many opportunities for errors. The Brewer's Notice can be complicated, with many associated forms including, but not limited to:

- Application for Owner and Officer Information—formerly called a Personnel Questionnaire—for each member, partner, officer, director, and stockholder with an ownership interest of ten percent (10.00%) or more in the brewery; and
- Brewer's Bond or Brewer's Collateral Bond, whichever is applicable.

In addition to further informational requirements under the Application for Brewer's Notice, the brewery-in-planning also must submit the following documents:

- Diagram of the brewery premises;
- Description of the brewery premises;
- Description of the security at the brewery premises;
- Copy of ownership documents for the brewery premises or a copy of a valid lease agreement;
- Registration of trade name (if required by state or local government); and
- Legible photocopy of the driver's license or official state identification card of the primary contact for the brewery-in-planning.

If the brewery-in-planning is applying as a legal business entity (see "Entity Formation"), it must submit additional documentation.

STEP 2: COMPLETE ALL FEDERAL REGISTRATIONS AND APPROVALS

Why: Once the brewery obtains its Brewer's Notice, the brewery must secure additional federal registrations and approvals, including registrations and approvals from the Food and Drug Administration and TTB.

How: Consult with TTB and experienced legal counsel to navigate through these additional federal registrations and approvals.

STEP 3: FILE FEDERAL EXCISE TAXES

Why: As recording and payment of federal excise taxes and state excise taxes (see "State Licensing and Compliance") are some of the most complicated responsibilities for a brewery, the brewery must perform these obligations carefully and pay the requisite taxes on any beer that is removed from the brewery for consumption or sale—preferably by electronic payment through **pay.gov**.

How: Discuss the recording, payment, and other compliance issues relating to federal excise taxes with experienced legal counsel and a certified public accountant or other professional tax advisor.

State Licensing and Compliance

4 MONTHS BEFORE START DATE

Once your brewery successfully secures the appropriate federal licensing, the next step is to secure state and local licensing, registration, and approvals. Those listed below are specific to the State of New Hampshire, but we at Bernstein Shur are more than happy to help you navigate your state's licensing requirements if we happen to practice law in your state. Please contact us to find out.

STEP 1: APPLY FOR A STATE BREWERY-RELATED LIQUOR LICENSE

Why: In order to produce and sell beer in New Hampshire, the brewery-in-planning must secure a state liquor license. There are actually three (3) types of brewery-related liquor licenses: (1) nano brewery license under which a brewery can brew up to 2,000 barrels (i.e., around 63,000 gallons) of beer annually, (2) brew pub license under which a brewery can brew up to 2,500 barrels (i.e., around 75,000 gallons) of beer annually, and (3) beverage manufacturer license under which a brewery can brew more than 2,500 barrels of beer annually. Each license offers certain benefits and your legal counsel or the New Hampshire Liquor Commission (**NHLC**) can further explain them to you.

How: Consult with experienced legal counsel to select the proper liquor license and submit the necessary paperwork. To learn more about the liquor license applications, take a look at them here:

- **Request for Nano Brewery License Application** ($240.00 Annual Fee)
- **Request for Brew Pub License Application** ($1,200.00 Annual Fee)
- **Request for Beverage Manufacturer License Application**

  The annual fee is based upon annual domestic barrel sales as follows:

Annual Fee	Domestic Barrels Sold
1,200	≤ 15,000
1,682	> 15,000

To obtain your desired liquor license application, you must complete and submit a Request for Application along with the non-refundable $100.00

processing fee to NHLC, Division of Enforcement, at PO Box 1795, Concord, NH 03302-1795. NHLC's **Licensing Steps** is a good place to start.

STEP 2: COMPLETE ALL STATE REGISTRATIONS AND APPROVALS

Why: The brewery may need to secure additional state and local registrations and approvals, which may include, but are not limited to, registrations and approvals from the city or town where the brewery will be located.

How: Consult with experienced legal counsel and NHLC to navigate through these additional state and local registrations and approvals. through these additional state registrations and approvals.

STEP 3: FILE STATE EXCISE TAXES

Why: It is important for the brewery to begin reporting its federal and state excise taxes, even if the brewery is not yet producing beer.

How: The best way to submit your state excise taxes is through the **Brewer of Malt Liquor Excise Tax Report**.

Secondary Aging, Blending, and Bottling

Additional Considerations

AFTER START DATE



Once the start-up phase of the brewery is complete (i.e., "Primary Fermentation"), the brewery should begin to consider how it will address and manage the following issues in the post start-up phase of the brewery (i.e., "Secondary Aging, Blending, and Bottling").

FEDERAL, STATE, AND LOCAL COMPLIANCE

The brewery will need to submit the appropriate paperwork with TTB if one or more of the following changes occurs after the brewery receives its Brewer's Notice (i.e., "Change After Original Qualification"): location, name, ownership or management structure, Brewer's Bond, or other certain information in the Brewer's Notice. Similarly, the brewery will need to remain compliant with existing state and local statutes, regulations, and ordinances.

PLANNING FOR EXPANSION

If the brewery plans to expand, whether by increasing production capacity, constructing a quality control and assurance laboratory, moving to a larger location, or opening a new location altogether, the brewery will likely need additional ("follow-on") financing to realize that expansion. If you are considering whether the brewery will need additional financing, you should start planning your next round of follow-on financing at least six months before the brewery will actually need the extra funds. Consult with experienced legal counsel to discuss potential options for follow-on financing—whether debt or equity, traditional or non-traditional.

DISTRIBUTION

If allowed by the state's "three-tier" system or some variation of that system, the brewery will oftentimes deliver its beer directly (i.e., "self-distribute") to on-premise and off-premise retail accounts (e.g., restaurants, bars, bottle shops, etc.), until it is no longer allowed under state law or it no longer makes business or financial sense to do so. In either case, the brewery will likely enter into a distribution contract with a distributor whereby the brewery agrees to pay the distributor for delivering the brewery's beer to those same

retail accounts and also, among other things, for warehousing, storing, and promoting the brewery's beers.

MANAGING YOUR STAFF, WORKPLACE SAFETY, AND QUALITY ASSURANCE

In the event that the brewery's current employees are overwhelmed with existing and incoming tasks, the brewery is continuously outpaced by demand, or the brewery expands its production capacity, it might be time for the brewery to consider hiring one or more new full-time or part-time employees to bolster the brewery's growth trajectory. If possible, the brewery should work proactively with legal counsel to prevent future employment issues and also to create a plan ensuring both workplace safety and quality assurance. If the brewery plans to offer equity as incentive or partial compensation to its employees, consult with legal counsel experienced in securities law to help create an equity incentive plan.

MAINTAINING AND ENFORCING YOUR TRADEMARKS

It is important to note that federal registration of a trademark is not permanent, and it does not offer trademark enforcement or guarantee trademark protection. In other words, the brewery cannot "set it and forget it" with respect to ongoing trademark lings, enforcement, and protection. Instead, the brewery should work closely with legal counsel to make the requisite ongoing lings with the USPTO and to protect the brewery's existing trademarks by using them properly in the marketplace and preventing others from using them.