

Duff on Hospitality Law

## Swag: What Can Your Hotel Restaurant Accept for Free?

By Emily Gant on 9.17.15 | Posted in Hotel Restaurant, Hotels

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A distributor is knocking on your hotel restaurant's door, offering key chains from a hot new distillery for your customers. A brewery just dropped off coasters for use in the restaurant's bar. And a winery offered cork screws for your sommeliers.

As a responsible retail licensee, you know that most states tightly govern the relationships among liquor retailers, manufacturers, and distributors.

But where's the line? What kind of "swag" and other valuable items can your hotel restaurant accept for free without running afoul of the law? To find out, read on.

### Big Picture Overview

Blame it on the mob. Before (and during) Prohibition, the mafia had a stranglehold on all three tiers of the alcoholic beverage system: it made the booze, ran the booze, and sold the booze in bars under its (ahem) control.

This vertical integration is commonly known as the "Tied House," meaning that the retailer is "tied" to a particular manufacturer or distributor, whether by ownership links, contractual obligations, or undue influence.

Virtually all states and the federal government have Tied House laws, which create a three-tier system: (1) manufacturers (breweries, wineries, and distilleries); (2) distributors (the wholesalers); and (3) retailers (bars, restaurants, hotels, etc.).

Tied House laws generally prohibit the transfer of money or other things of value between the tiers, unless specifically authorized by statute or regulation. These items of value may include volume discounts, branded signs, and accepting payment on credit.

## So, Back to Our Restaurant....

We arrive back at our hotel restaurant. Recall that the restaurant holds a retail license, and it is being plied with items of value by manufacturers and distributors. Is the restaurant in hot water? How about the manufacturers and distributors (collectively the “industry members”)?

*Here’s the short answer:* If there is not a statute or regulation specifically allowing the action, the retailer, manufacturer and distributor could face sanctions from the state alcoholic beverage agency. So, you need to dig into the laws to determine whether the state allows industry members to give, and retailers to accept, certain things of value.

The following is a brief overview of the Washington rules on branded promotional items. (Other things of value, like volume discounts, tastings, and advertisements, are subjects for another post.)

## Washington

### 1. Know the Lingo

First, let’s ensure that we’re all speaking the same language.

Many jurisdictions utilize the term “advertising specialties.” This post focuses on Washington, which uses the term “branded promotional items.”

There are two types of branded promotional items. **Consumer branded promotional items** are items designed to be carried away by the consumer. Common examples are bottle openers, cork screws, shopping bags, match books, t-shirts, and hats.

**Retail branded promotional items** are items designed to be used within a retail establishment to attract consumer attention to a product. Common examples are lighters, coasters, napkins, and cork screws.

Ultimately, whether the “swag” is a consumer or a retail branded promotional item depends on the intended recipient. If meant for the consumer to take home, it is a consumer branded promotional item. If meant for use in the retail establishment, it is a retail branded promotional item.

### 2. Branded Promotional Items

#### a. Consumer Branded Promotional Items

Washington does not allow industry members to give, or retailers to accept, consumer branded promotional items for free. However, retailers may purchase these items. The price must meet or exceed the industry member’s cost of acquisition.

If industry members give, and retailers accept, consumer branded promotional items for free, both businesses are subject to administrative violations.

### **b. Retail Branded Promotional Items**

Washington allows industry members to give, and retailers to accept, retail branded promotional items for free.

Examples of permissible retail branded promotional items include though are not limited to: Trays, lighters, blotters, post cards, pencils, coasters, menu cards, meal checks, napkins, clocks, mugs, glasses, bottle or can openers, cork screws, matches, printed recipes, hats, shirts, visors, and other similar items.

There are a few conditions, however. Specifically, the retail branded promotional items:

- Must be used exclusively by the retailer or its employees in a manner consistent with its license.
- Must be of nominal value, whether singly or in the aggregate, per licensed location.
- Must only be provided to retailers and their employees. Items cannot be “passed through” by the retailer to consumers.
- May not be targeted or appeal principally to youth.
- May not include the retailer’s name or address.

“Quid pro quos” are generally prohibited under Washington law. In this vein, then, retailers cannot require the industry member to provide branded promotional items as a condition for buying the industry member’s product. Similarly, an industry member cannot require the retailer to purchase its product before providing branded promotional items.

Like consumer branded promotional items, retailers may purchase retail branded promotional items at or above cost.

### **3. Anyone in Hot Water?**

So, how would this apply to our hotel restaurant? Again, it boils down to the intended recipient.

**Key chains:** The distributor provided the key chains, such that the restaurant could pass them out to customers. This is impermissible, unless the restaurant pays for the items at cost or higher.

**Coasters:** Since they were intended for use in the restaurant, these coasters are permissible retail branded promotional items. Provided that they meet the basic criteria above, the restaurant may accept them for free.

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**Cork screws:** Finally, the winery provided cork screws for use by your sommeliers. The restaurant may accept them for free.

Finally, a practice pointer. As a retailer, you have an obligation to maintain accurate records for three (3) years. (It's one of the first things reviewed by the LCB....) If the industry member is unable or unwilling to provide an invoice, you would be wise to return the branded promotional items.

**Tags:** consumer branded promotional items, distillery, hotel, hotel restaurant, liquor, liquor distributors, liquor manufacturers, liquor retailers, retail branded consumer promotional items, tied house, Washington state