

Promotional Items in the Alcohol Beverage Industry

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I like free stuff. Who doesn't? (Just think of all of those reusable shopping bags and stress balls you continue to stash away in your cupboards.) And, I will admit the promotional items I have received gratis may lead me to think kindly of the company willing to gift me a "highly-prized" widget. This favorable impression is exactly the aim of companies providing these nominal valued promotional items.

In most industries, the promotional t-shirt, ball cap, or shopping bag may be handed out by companies to consumers, like me, and potential business customers without a second thought. This, however, is not the case in the alcohol beverage industry. Members of the alcohol beverage industry, including retailers, wholesalers, manufacturers, and their promotional personnel, are governed by a detailed framework of state and federal laws and regulations that specify, sometimes down to the particular item, what "free stuff" may be given away to consumers and other members of the industry. What follows is a brief introduction to the arguably highly-regulated issue of the provision of promotional items in the alcohol beverage industry.

Tied-House & Trade Practice Regulations

To understand the specific regulations surrounding promotional items in the alcohol beverage industry it is important to understand the history of this industry. Prior to Prohibition, alcohol beverage manufacturers exerted immense control over retailers. This arrangement is often referred to as "Tied-House", referencing a historical practice in England where a retailer of alcohol beverages may have been tied, by ownership links or contractual obligations, to a specific manufacturer. Following Prohibition, the federal government returned much of the responsibility for regulating alcohol back to the states. Although each state adopted its own regulatory system, two elements are common to all of their regulatory frameworks: (1) implementation of a "three-tier system" that segregated manufacturers, wholesalers, and retailers; and (2) creation of "tied-house evil" laws that prohibited manufacturers or wholesalers from owning or controlling retailers.

Today, specific trade practice laws and regulations exist to ensure that promotional activities do not result in tied-houses. The laws governing promotional items are an example of these trade practice regulations governing the alcohol beverage industry. The general premise is that, absent an exception, manufacturers and wholesalers ("suppliers") may not provide things of value to retailers to induce a retailer to buy a particular product.¹

Consumer Advertising Specialties

"Consumer Advertising Specialties" are the promotional items provided by industry members to consumers and are generally designed to be carried away by the consumer. As mentioned above, suppliers are limited in what they can provide to retailers. However, most state and federal laws make an exception for consumer advertising specialties, specifically outlining what promotional items may be given to a retailer to provide to a consumer, and how these items can be provided.

Under federal law, suppliers may sell or give consumer specialty items to retailers as long as:

- The items bear conspicuous and substantial advertising matter about the product or the supplier which is permanently inscribed or securely affixed; and

¹ See generally, 27 U.S.C. §205(b).

- The supplier does not pay or credit the retailer for using or distributing these materials or for any expense incidental to their use.²

As expected, state laws and regulations typically are more specific. The permissibility of consumer advertising specialties may depend on (i) the type of retailer the item is given to (an on-premises or off-premises retailer) and (ii) the type of product that is being promoted – beer, wine or spirits. For example, in Florida, wine or spirits suppliers may give or sell consumer advertising specialties to a retailer as long as (1) the item is of nominal value bearing substantial brand or industry member advertising and (2) is designed to be carried away by the consumer.³ Beer suppliers, conversely, may not give, but can sell consumer advertising specialties to retailers. Similar to items from wines and spirits suppliers, these consumer advertising specialties must be of nominal value bearing substantial brand advertising and designed to be carried away by the consumer. The beer supplier must sell these items to the retailer at no less than the actual cost to the industry member who initially purchased them, but there is no limit on the total value of items. The beer supplier is permitted, however, to give items directly to consumers on the vendor's licensed premises without charge to the retailer.⁴

Retailer Advertising Specialties

“Retailer Advertising Specialties” are items the retailer may be able to use in their establishment to attract consumer attention to the supplier’s products. These items may include lights, umbrellas, menu cards, coasters, and signs. The federal restrictions for these items are similar to those for consumer advertising specialties – they must bear conspicuous and substantial advertising matter about the product or the supplier which is permanently inscribed or securely affixed, the supplier cannot pay the retailer for using the item, and the name and address of the retailer may appear on materials.⁵

In Florida, there is a distinction between durable and expendable retailer advertising specialties. Durable retailer advertising specialties bear permanently inscribed, substantial advertising intended to promote the brand or supplier being advertised, and include a function such as providing illumination, reflection, the time, the date, or similar limited functions.⁶ These items may include pool table lights, picnic-table umbrellas, mirrors, clocks, calendars, and similar specialties. Similar to consumer advertising specialties in Florida, wine and spirits suppliers may give or sell these items to retailers while beer suppliers are limited to renting, loaning, or selling durable retailer advertising specialties.

Expendable retailer advertising specialties include items of nominal value that the retailer can use on their licensed premises.⁷ For example, coasters, napkins, beverage lists, and menu cards. When the specialties advertise wine or spirits, the supplier may give or sell these items, but when the specialties advertise beer, beer suppliers are limited to selling these items at a cost not less than the actual cost of the industry member who purchased them. The specialties may advertise a brand or industry member. The vendor's name, business name, website address, logo, and business address may be printed on these specialties, which shall be intended for use by the vendor or consumers on the vendor's licensed premises.

The law in Florida is even more specific when it comes to branded glassware. Until recently, this glassware had to be sold to retailers at a cost not less than the actual cost to the supplier who purchased them. However, effective October 1, 2018, a beer distributor that receives glassware at no charge from a beer manufacturer or importer may give such glassware to an on-premises retailer.⁸ The glassware given to a retailer by a distributor must bear a permanent brand name intended to prominently advertise the

² 27 C.F.R. § 6.84.

³ Fla. Admin. Code. Ann. r. 61A-1.01012(1).

⁴ Fla. Stat. § 561.42(14)(c); Fla. Admin. Code. Ann. r. 61A-1.01012(2).

⁵ 27 C.F.R. § 6.84

⁶ Fla. Admin. Code. Ann. r. 61A-1.01011.

⁷ Fla. Admin. Code. Ann. r. 61A-1.01010.

⁸ See House Bill 961 amending Fla. Stat. Ann. § 561.42(14)(a) effective October 1, 2018, <http://laws.flrules.org/2018/135>.

brand. The beer distributor may not give a retailer more than 10 cases of glassware per calendar year per licensed premises and the beer distributor and manufacturer must keep records of any glassware given or sold to retailer.

What appears above is just a limited overview of the complicated laws governing the provision of promotional items in the alcohol beverage industry. Next time you are given a free shirt or snazzy koozie or enjoy a meal at a local restaurant under the shade provided by a branded umbrella, you make think twice about how this “free stuff” came to be.

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