

From Government Ethics Lawyers: Gifts That Are Better Not to Give or Receive This Holiday Season

December 4, 2023

We are now in December and the end-of-the-year holiday gift-giving season is upon us. Gifts for family; gifts for assistants; gifts for clients; gifts for friends. Holiday parties, Secret Santa exchanges, and the like. It's festive, it's fun, and only ethics-law attorneys could find reasons for risk!

But the holiday celebrations are also a time to remember that government officials and employees are not like the rest of us in one significant way – at the federal, state, and local level, they are all subject to gift rules of one type or another. And it is not just gold bars that are a problem, but other, lesser presents as well. So, heed our well-intentioned advisory on the following five types of gifts, among others, that may trigger something worse than coal in your stocking and a spot on the naughty list.

1. Gifts Tied to Official Action

Trust us: do not provide gifts tied in any way to official government action. Gifts tied to, for example, votes on legislation, mark-ups at subcommittee hearings, consideration during a rulemaking, a letter to an agency, extra consideration during a procurement. . .the list goes on and on. What is "tied to an official action," you ask? Well, if it happens ahead of time, it is bribery. If the gift happens after the official action, then it is a gratuity. Find the full explanation in the criminal law provisions of 18 U.S.C. 201 and cases interpreting those provisions. Bribery of a public official is also a potential state law offense. Note also that political contributions tied to official action can be the basis for a bribery prosecution.

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2. Gifts Solicited by a Government Official

It is almost always a bad idea to give a gift to a government official if that gift has been solicited by that official or by one of the official's staff members. Charitable and political donations notwithstanding, such solicitations are often, such as in the case of Members of Congress and Congressional staff, against the government official's own ethics rules. This is true even when the solicited item would otherwise fall within an exception to the applicable gift rules. Even if your ultimate gift is permissible under the gift rules, you don't want to be caught up or connected with a public servant who doesn't take his or her own ethics rules seriously. This official may be reckless in many other ways as well, and you and your company do not need to deal with the investigations and bad publicity that follow.

3. Gifts Where Everyone in the Government is Your Personal Friend

The federal gift rules contain specific exceptions for family members and "personal friends" who are also government officials or employees. This does not mean that anything goes with respect to such government officials, but the rules are definitely looser (for example, gifts based on personal friendship – including from lobbyists – are permitted even under the "lobbyist gift bans" applicable to Members of Congress, Congressional staff, and political appointees in the Biden Administration). Nonetheless, these exceptions have many requirements, all of which must be followed to avoid an impermissible gift. These requirements include who qualifies as a personal friend. Mere Facebook friends don't count! The legislative director you just met and lobbied last week doesn't count! Also potentially problematic – that person in the Leadership office whom you ran into occasionally when you both worked on the Hill but now for whom you want to buy lunch in your private-sector position. Gifts to persons who don't qualify as family or personal friends are impermissible if they don't fall within any other exceptions.

4. Almost Any Gift in Florida and Iowa, Among Other Places, if You Are a Lobbyist or Lobbyist Employer

There are gift rules and then there are gift RULES. In the House and the Senate, there are bans on gifts from lobbyists and lobbyist employers (and also foreign agents, not to forget about them), but there are 24 or 25 exceptions depending on how you count them. Not exactly Swiss cheese, but there is definitely room to have certain events, holiday parties, and the like. Some of the states, however, are different. Florida, for example, bans gifts from state lobbyists and lobbyist employers to legislators, legislative staff, and most state officials. There are a few narrow exceptions to this Florida gift ban, but not the kind of catch-all "reception exception" (under the congressional gift rules) that energizes holiday activities in Washington, DC. One of the more useful exceptions in Florida kills the festive season with its specificity, as it applies to "events that are held within the Capitol complex, out-of-doors or under temporary shelter, open to the general public, widely and publicly noticed, free to all, not ticketed, and for which equal and totally unobstructed access to the general public is provided" Iowa similarly prohibits gifts from "restricted donors," with mostly work-a-day exceptions outside the time of the regular session of the legislature. There is a catch-all available for the holiday season, however: non-monetary gifts with a value of \$3 or less that are received from any one donor during one calendar day. Good times!

5. A Cup of Coffee or a Beer for a House or Senate Staffer

There are exceptions in the U.S. House and Senate gift rules for items of de minimis value, by which is meant items with a retail value of less than \$10. Both the House Ethics Committee and the Senate Select Committee on Ethics have stated, however, that this exception does not apply to food and drink in a one-on-one setting. So, if you are a lobbyist or lobbyist employer, or are working for one, and the personal friendship exception does not apply (see above), don't try to spread holiday good cheer by buying a beer for a House or Senate staffer – or Member, for that matter. Such a purchase would be a problem under the House and Senate gift rules, which, as a result, would also cause a problem under the Lobbying Disclosure Act (LDA) with the semiannual certification that you and/or your lobbyist employer did not violate the Congressional gift rules. And a bah humbug as well.

Please let us know if you need assistance in avoiding these holiday-season gift-rule traps or have gift-rule or other political law issues during the rest of the year. We'd love to discuss how edible spoons fit in the "toothpick rule" for Congressional receptions or how the Presidential primaries could affect your grassroots lobbying for the "Christmas tree" year-end, must-pass legislation.