

## Hotel Sales and Interim Management Agreements: Key Considerations, Including Alcohol Beverage Licensing

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Due to timing issues in a hotel deal, the parties involved in a hotel deal may find that they do not have the luxury of time to complete all necessary tasks. In the face of timing constraints, interim management agreements may be a possible solution for the parties.

Who are the parties to an interim management agreement? The parties could include a hotel seller and a hotel buyer. However, parties may also include a hotel lessee or a hotel management company as the ultimate operator. If a hotel property is changing brands, there may be an outgoing management company and an incoming management company.

The parties should review all current agreements, including current hotel management agreements and franchise agreements, to determine if any terms will restrict parameters towards the negotiation of a new interim management agreement for the hotel property. The scope of an interim agreement may include the lodging operations, housekeeping, maintenance of hotel facilities, and food and beverage services.

Some key considerations for those drafting interim agreements are:

1. Term of the agreement— how much time are the parties agreeing to operate under the agreement? Clearly define the interim period. Often, an agreement will state that the period terminates when the defined tasks are completed or by X days, whichever occurs first.
2. Financial arrangements— how will the parties be compensated in the interim period, who will handle the accounting, who has access to books, records, and reports? Parties need to agree on operating expenses. Will ongoing expenses incurred in the ordinary course of business be paid on behalf of the current licensee from a business operating account during the interim period?

3. Labor and employment – managers and employees operating in the interim period will be paid by whom? Do the managers and employees comply with local requirements, if any, for certification in proper food handling techniques and hotel managers?
4. Indemnification—address the risks for the parties involved. Who needs to be an additional insured on insurance policies?

The goal is to have interim agreements in place so that there is no interruption in business and the changes are seamless to hotel guests.

For hoteliers, food and beverage service continuity, including alcohol beverage service, is often critical. However, because liquor licenses are not approved overnight, the parties sometimes need interim alcohol beverage agreements.

**First, determine which agency regulates retailers engaged in the sale of alcohol beverages.** In some states, this means checking with the state licensing agency. In other states, this may mean checking with state and local licensing agencies as some jurisdictions require state and local liquor licenses. Georgia, Illinois, Louisiana, and Nevada are four examples. In other states, a hotel property may get its liquor license from a local licensing agency only. Hawaii and Maryland are two examples.

**Second, determine with your licensing counsel or the proper licensing agency if interim alcohol beverage agreements are allowed.** The permissibility of interim agreements will vary by jurisdiction. Interim agreements may not be a possible solution in all hotel deals.

Florida had a period of time in which interim alcohol agreements were accepted. However, the Florida Division of Alcoholic Beverages and Tobacco currently does not allow interim alcohol agreements. Any hotel buyer, new lessee, or new hotel operator must have a liquor license in its name before taking over the hotel and selling any alcohol or risk legal penalties.

The Louisiana Office of Alcohol and Tobacco Control (“ATC”) currently allows an interim alcohol arrangement under these conditions:

When the business assets are sold to a new owner, the new owner may continue operating under the previous owner’s alcohol permit until a new permit is issued or denied IF:

The new owner notifies the Louisiana Office of Alcohol and Tobacco Control (“ATC”) of the purchase within 5 days of the closing; AND

The new owner submits a completed new business application to ATC within 15 days of the purchase; AND

The new owner will operate the same type of business as the previous owner.

ATC shall be notified of any changes to any licensed business premises which increases or decreases the previously approved licensed business premises prior to any such changes.

**Third, as with interim agreements for hotel lodging operations, the key considerations include the term of the agreement, the financial arrangements, labor and employment issues, and indemnification provisions.**

Additional considerations for alcohol agreements are:

1. Responsible alcohol vendor requirements. Some jurisdictions have mandatory responsible alcohol vendor requirements. In other jurisdictions, responsible alcohol vendor training is voluntary. Verify and ensure compliance with proper local requirements.
2. Alcohol beverages are sold from licensed wholesalers to licensed retailers. So, during the interim period, Party A may still be holding the liquor license while Party B's liquor license application is pending. All alcohol would need to be purchased in Party A's name and invoiced and delivered accordingly to Party A.

In special situations, interim agreements may be useful to help bridge time needed to complete certain tasks. Special situations may include when a hotel owner, lessee, or franchisee declares bankruptcy. Another situation is when a bank or other lender forecloses on a hotel property. We advise that it is best to consult legal counsel and work cooperatively with the parties involved and the licensing agency on the best course of action for continuity of service in your particular situation.

In certain situations, and where permitted by law, interim management agreements may be useful, temporary agreements in your hotel projects to avoid interruption in hotel operations, including alcohol beverage service.

## SAMPLE LANGUAGE FOR INDEMNIFICATION IN AN INTERIM ALCOHOL AGREEMENT

F&B Manager shall indemnify and hold harmless Hotel Owner, its officers, directors, shareholders, employees, subsidiaries, agents, and affiliates (collectively, "Indemnitees") from and against any and all damages, costs, losses, expenses, unpaid operating expenses, obligations, suits, claims or liabilities of every kind and description including allegations of negligence by Indemnitees and including reasonable attorneys' fees ("Damages") sustained by any of the Indemnitees to the extent that such Damages arise from or are related to: (i) the sale or provision of alcoholic beverages, other beverages, or food at the Hotel to any person; (iii) the employment or use of any employee, agent, or independent contractor by the F&B Manager; and (iv) any action or inaction by any entity or person on or in the Hotel during the Term.

b) Upon discovery by the Indemnitees of facts giving rise to a claim for indemnity under the provisions of this Agreement ("Claim"), including receipt of notice of any demand, assertion, claim, action or proceeding, judicial or otherwise by any person or entity, the Indemnitees will give prompt notice thereof in writing to the F&B Manager.

c) Indemnitees shall have the right, through counsel of its choice, to control the defense or response to any such action if it could affect the interests of any Indemnitee, and such undertaking by an Indemnitee shall not diminish the F&B Manager's obligations to Indemnitees hereunder, in any manner or form. Under no circumstances shall any Indemnitee be required or obligated to seek recovery from third parties or otherwise mitigate its losses in order to maintain a claim under this indemnification and against the F&B Manager, and the failure of any Indemnitee to pursue such recovery or mitigate loss will in no way reduce the amounts recoverable by any Indemnitee from F&B Manager. F&B Manager shall have the right to approve any settlement in excess of fifty thousand dollars (\$50,000.00) reached during the course of any such action, and F&B Manager's approval of such settlement shall not be unreasonably withheld, conditioned or delayed.

d) The F&B Manager acknowledges that Indemnitees and its officers are principals in several entities holding permits and licenses for the sale of alcoholic beverages ("Permitted Operations"), and that any violation of any rule, regulation governing the Liquor License may have an adverse effect on such other permits and licenses and the holding of same. The F&B Manager further acknowledges its full responsibility for conducting the business pursuant to Hotel Owner's direction and in accordance with this Agreement and agrees that the F&B Manager shall pay to Indemnitees the amount of any Damages to which Indemnitees may become entitled by reason of the provisions of this Agreement, such payment to be made within thirty (30) calendar days after any such amount of Damages is finally determined either by mutual agreement of the parties hereto or otherwise pursuant to this Agreement. Said

Damages shall include any and all loss that Indemnitees shall suffer to any Permitted Operations and the results thereof.

e) F&B Manager specifically acknowledges and agrees that (i) Hotel Owner enjoys significant goodwill with both the public as well as governmental agencies exercising jurisdiction over the Property; and (ii) any enforcement action or administrative sanction imposed or threatened to be imposed will cause substantial and incalculable harm to goodwill and reputation generally, resulting in undeterminable economic damage to the Hotel. F&B Manager agrees, therefore, that F&B Manager will pay to Hotel Owner an amount equal to \$\_\_\_\_\_ if Hotel Owner receives notice from any governmental agency that such agency has imposed or may impose against the Liquor License any administrative sanction or other penalty.

f) The obligations of the F&B Manager under this Section 5 shall survive the termination or expiration of this Agreement.