

FOOD & BEVERAGE OUTLOOK

A L E G A L P E R S P E C T I V E



THE FOOD AND BEVERAGE INDUSTRY AS A WHOLE IS UNIQUE IN MANY WAYS – AND HERE IN LOS ANGELES, WHERE WE have some of the best dining and food-for-purchase options in the nation, there’s perhaps an even more finely tuned set of rules for success.

Stir in the last year’s uncharted obstacles (primarily the COVID-19 pandemic), an unpredictable economy and unique regulatory conditions and you’ve got a sector of Southern California business that continues to change and evolve as swiftly as any other, despite facing an increasing number of complexities.

In this section we take a look at the key ingredients to success in this uniquely tested sector and share insights from legal minds who specialize in this area.

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Serving Up Legal Insights for Los Angeles' Food and Beverage Industry

To make some sense of this unpredictable realm from a legal perspective, the Los Angeles Business Journal has turned to attorney and trusted advisor, Benjamin E. Helfman of Greenberg Glusker LLP to share his insights and assessments regarding the current state of the industry that Angelenos most certainly couldn't live without.

While on the road to recovery from the COVID-19 pandemic, how would you describe the outlook as we reopen for the food & beverage industry?

HELFMAN: The industry has already withstood the worst of COVID and is emerging stronger than many had feared. Food and beverage companies demonstrated incredible resilience during the pandemic, whether it was restaurants opening marketplaces and/or converting to outdoor dining, grocery stores embracing delivery, or CPG companies navigating supply chain issues. 2020 was certainly a difficult year for the foodservice industry, with revenue dropping year-over-year by roughly \$250 billion. With restaurants operating at or near full capacity throughout the country, that money should now be flowing back into the space. After all, food brings people together—and after being isolated for much of the past year and a half, people are eager to socialize and return to a new normal. Two things to look out for moving forward are the impacts the labor market and rising inflation could have on the industry.

What lessons/learnings from the past 15 months can the food & beverage industry take away from the experience?

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HELFMAN: There are several takeaways, but I'll focus on a few. First, stay true to your brand and build genuine relationships with your customers, while at the same embracing change and innovation. Customers will continue to trust and support mission-driven brands that are authentic, deliver quality products, and can adapt to customer demands. Second, it's important to secure relationships with your supply chain and to have contingency plans. While supply chain management may not be sexy, it pays dividends. It's also a way for companies to align with partners (for example: farmers, processors, manufacturers, co-packers, distributors, or suppliers) that share their values. Third, the functional and plant-based “trends” are here to stay. Now more than ever, people are concerned with what they're consuming—conscious of the impact on both their health and the environment.

What new business opportunities have presented themselves for food and beverage companies in recent months?

HELFMAN: While COVID disrupted businesses and forced many to permanently close, it also presented an opportunity for people with hobbies to organically turn their passion projects into successful businesses. We represent several clients in the industry that launched businesses during the pandemic, including CPG companies that sell functional and plant-based products, bakeries, and a DTC coffee business. Social media certainly helped these founders with customer acquisition, as people were especially eager for human connection while on lockdown and resonated with the founders' personal stories. Ultimately, however, it's the quality of the products that drives customer retention and loyalty.

What would you say are current trends in the food and beverage industry?

HELFMAN: Four trends come to mind, though I believe these trends are here to stay: (1) Foods with functional ingredients, like ashwaganda and mushrooms (e.g., chaga, cordyceps, lion's mane, and reishi); (2) The ongoing shift away from animal-based to plant-based foods, both for health and environmental reasons; (3) Along those lines, the growing expectation that food will be produced in an environmentally sustainable and socially responsible way; and (4) Consumers' expectation for convenience, including the growth of ghost kitchens and grocery delivery.

What advice would you offer to an early-stage restaurant company seeking growth capital in 2021?

HELFMAN: Several questions need to be answered: (1) Do you have a comprehensive and realistic business plan? (2) How much money does your business need? (3) Are you looking to raise debt and/or equity? (4) What ownership and control rights are you willing to surrender? For debt financing, traditional banks are likely out of the picture given the risk profile. You may want to explore SBA loans, as well as equipment financing. For equity financing, founders often turn to family and friends, as well as angel investors, as an initial source of capital—whether through a SAFE, convertible note, or series seed round. Finally, as eager as you may be to receive funding, be sure to also do your diligence on any potential investors. Ideally, you're looking to establish a long-term strategic partnership, so you should ensure that you want these investors along for the ride.

What are the most critical legal issues that a new start-up food/beverage company should allocate its limited resources to addressing at the very beginning, and what items can wait a while until additional funds have been secured?

HELFMAN: While the pandemic rattled the industry, the legal fundamentals haven't changed. A start-up should ensure that it's properly licensed to do business and that its legal structure addresses its founders' concerns. Protecting intellectual property is also essential. IP counsel should file trademark registrations (after conducting searches) to protect the

company's name and logo; additional filings can wait until the company has more funding. The company should also enter into confidentiality and invention assignment agreements with its employees and consultants. The company should ensure new employees aren't misclassified as exempt. More formal HR policies and training, while important, can also wait until the company has more cash on hand. On the regulatory front, the company should make sure that its products and suppliers comply with the Food Safety Modernization Act and other applicable laws. Finally, the start-up should post its privacy policy and terms of use on its ADA-compliant website.

What is a good piece of advice you would share with your clients?

HELFMAN: It's often cheaper to get your lawyers involved sooner rather than later. On several occasions, clients have brought us in once a term sheet has already been signed to help them paper and close an equity financing round or sale of their business. More often than not, several of the terms our clients have agreed to have been incredibly unfavorable to them. It's a lot harder to re-trade on positions once a term sheet is signed and this often leads to deal fatigue. Although we welcome the additional attorneys' fees, we'd prefer to save our clients the headache and make the transaction process smoother.

Ben Helfman is a member of Greenberg Glusker's Corporate, Finance and Securities group and represents clients in an array of corporate and transactional matters, including entity formation and structuring, equity financings and mergers and acquisitions. He can be reached at bhelfman@ggfirm.com. Learn more about Greenberg Glusker LLP at GreenbergGlusker.com.





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From Soup to Nuts: A Round-Up of Legal Guidance for Food & Beverage Companies

The Los Angeles area is home to iconic food innovators, family-run restaurants of every ethnic stripe, and competition-winning restaurateurs. A successful restaurant or food and beverage company is also a business enterprise associated with high risks, hard-earned rewards, and the need to comply with numerous federal and state regulations. Our Restaurant, Food & Beverage Law Group provides trends to assist you with your growing business.

A SURGE IN TRADEMARK APPLICATIONS – PLAN AHEAD

The USPTO recently announced that trademark applications have surged to unprecedented levels in recent months. As of June 2021, the increase is roughly 63% over last year. One of the consequences of this drastic increase is that, whereas historically, a newly-filed trademark application was examined by a PTO attorney 3-4 months after the application was filed, it is now taking about 6 months (or more!) for that initial examination to take place. This means that if you are planning to open a new restaurant or food business, and have filed a trademark application for the name and/or logo of your new venture, you will need to take into consideration that you may not know whether your trademark application will be approved or not by the time you are ready to launch.

- *Natasha Shabani, intellectual property attorney*

THE PANDEMIC HAS CHANGED REAL ESTATE CONTRACTS

As a result of lessons learned from the stay-at-home orders, retail tenants have become emboldened in negotiations, requiring rental abatement in leases should governmental orders result in their inability to operate entirely or at full capacity. This trend started with large, multi-location restaurants

and quick-service tenants, and is now a frequent ask even with smaller retail tenants. Going forward, tenant abatement rights that were written specifically with COVID-19 in mind may apply to use and occupancy limitations from any governmental order in order to hedge against future shutdowns.

- *Sarkis Haroutunian, real estate attorney*

ACRYLAMIDE & PROP 65 WARNINGS

It has thus far been a noteworthy year for acrylamide, a Proposition 65-listed substance that naturally forms in the cooking and heating of many plant-based foods. Both the courts and the California Office of Environmental Health Hazard Assessment (OEHHA) appear to be responding to a proliferation of Prop 65 acrylamide lawsuits. In the first quarter of 2021, there were 109 60-day notices issued to companies based on failure to warn for acrylamide. In March, a federal district court judge issued a preliminary injunction temporarily barring Prop 65 acrylamide lawsuits based on the failure to warn for cancer risk. However, the Ninth Circuit recently stayed the preliminary injunction pending an appeal of the injunction, meaning these suits can be filed again. In addition, OEHHA is in the process of a regulatory rulemaking potentially amending the Prop 65 regulations to specify new safe harbor levels for certain classes of heat-processed foods, which would potentially eliminate Prop 65 warning requirements for foods created by cooking or heat processing if the producer, manufacturers, distributor or holder of the food has “utilized quality control measures that reduce the chemical to the lowest level currently feasible.” The new regulation would also specify acrylamide safe harbor levels for a variety of food categories, such as almonds, bread, crackers, and potato products. While relief may be near, be aware of

this rapidly evolving landscape.

- *Sherry Jackman & Sedina Banks, environmental attorneys*

LABELING OF PLANT-BASED MEAT PRODUCTS

Of the recent trends that have emerged in the false advertising space involves the labeling of plant-based meat products. Several states have passed laws dealing with these products, with proponents saying consumers may be misled into believing they contain actual meat. At least one federal court has held even where the term ‘vegan’ appears on the label, a false advertising claim may still lie because hurried shoppers may not scrutinize the packaging before purchasing, especially where the label otherwise contains traditional meat terminology (e.g., “Classic Burger,” “meatballs,” and “chorizo”). Companies offering products in this space should therefore avoid relying on fine-print disclaimers and ensure that the plant-based nature of their products is conspicuously disclosed. In addition, traditional meat terminology should be avoided in favor of more transparent choices, such as “chik’n,” “veggie bacon strips” or “beefless crumbles.”

- *James Molen, business litigation attorney*

CONDUCT PERIODIC EMPLOYMENT PRACTICES AUDITS

The health of a company’s personnel practices and policies is often an unsung anchor to an M&A deal. Conducting due diligence on employment practices and documentation before a potential sale, especially with the benefit of confidential legal review, is important in aiding the founders to get the most value from their life’s work and increase attractiveness to a buyer. It is strongly recommended to conduct a periodic employment practices audit to assess legal liability exposure, especially once the company is established enough to consider

investment or sale. This audit includes, but is not limited to: ensuring all of your employment relationships are properly classified; confirming whether all employees have current written terms of employment; identifying any key employees who were part of the founding or major growth; determining if arbitration agreements exist for all employees; and checking for a compliant employee handbook. In today’s market, where competition is swift and deals move quickly, it is essential to audit and update your employment practices to facilitate a smooth and profitable sale.

- *Karina Sterman, employment attorney*

VIRTUAL DINING EXPERIENCES

With the struggles endured by restaurants during the pandemic corresponding with the proliferation of food delivery services, we saw the birth of the “virtual dining” experience. Celebrities and well-known brands license their IP to create a branded, online-only restaurant that delivers through food delivery apps. The food is prepared by a variety of local restaurants, sourced by the “virtual dining” provider, that are supplied with the recipes, ingredients, and branded packaging. Users can buy a hamburger from their favorite celebrity without realizing that it was actually cooked by the Indian restaurant down the street. Brands have gotten involved not only to expand their reach but also to help support local restaurants by providing them with an additional income stream. However, celebrities and brands need to ensure they have sufficient approvals/controls so that if any of the local restaurants aren’t meeting quality control standards, they have the ability to remove them from the pool of participating restaurants. In addition, assuming all goes well, they need to reserve rights that would allow for the launch of a branded brick-and-mortar restaurant.

- *Jesse Saivar, intellectual property attorney*



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