

2017 Supplement to  
The Essential Guide to California Restaurant Law

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# **2017 SUPPLEMENT TO THE ESSENTIAL GUIDE TO CALIFORNIA RESTAURANT LAW (“EGCRL”)**

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## **Preface and Acknowledgments**

The Essential Guide to California Restaurant Law (Carolina Academic Press 2010) surveyed important legal issues pertaining to the daily operation of a California restaurant. This supplement updates that volume. Together, they can provide an efficient starting point for an attorney's client-specific analysis of legal issues and review of applicable law.

Research for this supplement was conducted by reviewing seminal state, federal, and administrative cases, state and federal laws and regulations, local ordinances, legislative history, news articles, and websites of associations and organizations in the restaurant industry. We have mentioned various vendors and organizations and their websites for the convenience of readers, but with no intention of making endorsements or advertisements.

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## Chapter 1

### Can I Have That Medium Rare? Regulating Restaurant Kitchens and Employees

Page 3

*The 1st full paragraph is replaced with the following text:*

Cleanliness and food quality are among the most important factors considered by customers when choosing a restaurant. Not only should food appeal to the taste buds, but it cannot and must not make a restaurant customer sick. Every year, 1 in 6 Americans gets sick, 128,000 are hospitalized, and 3,000 die of foodborne diseases. Among foodborne agents, 31 pathogens (bacteria, viruses, and microbes) are known, but most illnesses, hospitalizations, and deaths are caused by unspecified agents.<sup>1</sup> Almost half of reported foodborne illness outbreaks in the United States (hereinafter “U.S.”) occur in restaurant settings.<sup>2</sup>

<sup>1</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION (hereinafter “CDC”), *CDC Estimates of Foodborne Illness in the United States*, available at <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html>.

<sup>2</sup> Craig W. Hedberg, *Explaining the Risk of Foodborne Illness Associated with Restaurants: The Environmental Health Specialists Network (EHS-Net)*, *Journal of Food Protection* 76: 12, 2124-2125 (2013).

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<sup>3</sup> FOOD SAFETY.GOV, FOOD POISONING, available at <http://www.foodsafety.gov/poisoning/index.html>; FOOD AND DRUG ADMINISTRATION (hereinafter "FDA"), FOOD FACTS (June 2011), available at [www.fda.gov/downloads/Food/FoodborneIllnessContaminants/UCM257049.pdf](http://www.fda.gov/downloads/Food/FoodborneIllnessContaminants/UCM257049.pdf).

#### Chapter 1A.

<sup>5</sup> The CRFSC’s California Retail Food Code-Summary of Major Changes, detailing differences between the CURFFL and the Food Code, is available at [http://www.acgov.org/aceh/food/calCode\\_major\\_changes.pdf](http://www.acgov.org/aceh/food/calCode_major_changes.pdf).

*Pages 4-5*

<sup>6</sup> CAL. HEALTH & SAFETY CODE §§ 113705, 113709 (authorization of local grading systems, of local prohibitions of any type of food facility, of local employee health certification programs, of local toilet and handwashing facility requirements, of local street vending vehicle requirements, and of local prohibitions of pet dogs in outdoor dining areas of food facilities); CAL. HEALTH & SAFETY CODE § 113789 (“food facility” is operation that stores, prepares, packages, serves, vends or otherwise provides food for human consumption at the retail level, whether or not the food is consumed on the premises or sold, and any place used in conjunction with these activities, such as storage facilities for food-related utensils, equipment, and materials). “Food facilities” include permanent and nonpermanent food facilities including school cafeterias, restricted food service facilities, licensed health care facilities, commissaries, mobile food facilities and support units, temporary food facilities, vending machines, and certified farmers’ markets and farm stands (for enforcement purposes). *Id.*

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<sup>7</sup> Information about the various versions of the Model Food Code authored by the FDA is *available at* <http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/>. The FDA also inspects foodservice operations that cross state borders and, along with the U.S. Department of Agriculture (hereinafter “USDA”), inspects food processing plants to ensure compliance with federal health, safety, and labeling requirements. The USDA inspects and provides standards for meat, meat products, poultry, dairy products, eggs and egg products, and fruits and vegetables shipped across state lines. Each state determines whether to adopt the Model Food Code or an adaptation of it. *See also* CRFSC, California Retail Food Code-Summary of Major Changes, *supra* Chapter 1, footnote 5 in this supplement.

Recently-enacted S.B. No. 1067 (signed by Gov. Jerry Brown on Aug. 25, 2016), *available at* [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB1067](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1067), made a number of changes to the Food Code, effective Jan. 1, 2017, which are discussed herein. The stated purpose of this legislation was to update the Food Code with post-2006 changes made in the FDA’s Model Food Code. *See* California Senate Rules Committee, Office of Senate Floor Analyses, S.B. No. 1067 (May 4, 2016), *available at* [file:///C:/Users/TA24F~1.TOU/AppData/Local/Temp/201520160SB1067\\_Senate%20Floor%20Analyses.pdf](file:///C:/Users/TA24F~1.TOU/AppData/Local/Temp/201520160SB1067_Senate%20Floor%20Analyses.pdf).

**Chapter 1B.***Page 7*

<sup>15</sup> A “potentially hazardous food” means a food that requires time or preparation control to limit pathogenic micro-organism growth or toxin formation. CAL. HEALTH & SAFETY CODE § 113871(a). It includes a food of animal origin that is raw or heat-treated, a food of plant origin that is heat-treated or consists of raw seed sprouts, cut melons, cut tomatoes or mixtures of cut tomatoes that are not modified to render them unable to support pathogenic micro-organism growth or toxin formation, and garlic-in-oil mixtures that are not acidified or otherwise modified at a food processing plant in a way that results in mixtures that do not support growth or toxin formation as specified under subdivision (a). CAL. HEALTH & SAFETY CODE 113871(b).

Under CAL. HEALTH & SAFETY CODE 113871(c), “potentially hazardous food” does not include any of the following:

- (1) A food with an a(w) value of 0.85 or less.
- (2) A food with a pH level of 4.6 or below when measured at 75°F.
- (3) An air-cooled, hard-boiled egg with shell intact, or an egg with shell intact that is not hard boiled, but has been pasteurized to destroy all viable salmonellae.
- (4) A food in an unopened, hermetically sealed container that is commercially processed to achieve and maintain commercial sterility under conditions of nonrefrigerated storage and distribution.
- (5) A food that has been shown by appropriate microbial challenge studies approved by the enforcement agency not to support the rapid and progressive growth of infectious or toxigenic micro-organisms that may cause food infections or food intoxications, or the growth and toxin production of *Clostridium botulinum*, such as a food that has an a(w) and a pH that are above the levels specified under paragraphs (1) and (2) and that may contain a preservative, other barrier to the growth of micro-organisms, or a combination of barriers that inhibit the growth of micro-organisms.
- (6) A food that does not support the rapid and progressive growth of infectious or toxigenic micro-organisms, even though the food may contain an infectious or toxigenic micro-organism or chemical or physical contaminant at a level sufficient to cause illness.

<sup>16</sup> FDA, EVALUATION AND DEFINITION OF POTENTIALLY HAZARDOUS FOODS CHAPTER 2. CURRENT AND PROPOSED DEFINITIONS OF “POTENTIALLY HAZARDOUS FOODS,” available at <http://www.fda.gov/Food/FoodScienceResearch/SafePracticesforFoodProcesses/ucm094143.htm>; D. McSwane, N. Rue, and R. Linton, ESSENTIALS OF FOOD SAFETY AND SANITATION (Prentice Hall 4th ed. 2005), at 7, 39-41. Tomatoes and mixtures of cut tomatoes that are not modified to render them unable to support pathogenic micro-organism growth or toxin formation have been added to the definition of potentially hazardous food. CAL. HEALTH & SAFETY CODE § 113871(b), *supra* Chapter 1, footnote 15 in this supplement.

## Chapter 1.B.1

<sup>19</sup> CAL. HEALTH & SAFETY CODE § 113947.2. As amended by S.B. No. 1067, *see supra* footnote 7 in this supplement, the topics covered on the food safety certification exam must include the understanding of “foods identified as major food allergens and the symptoms that a major food allergen could cause in a sensitive individual who has an allergic reaction.” CAL. HEALTH & SAFETY CODE § 113947.2(h) (effective Jan. 1, 2017).

New CAL. HEALTH & SAFETY CODE § 113820.5(a) (effective Jan. 1, 2017), added to the Food Code by S.B. No. 1067, defines a “major food allergen” as the following:

- (1) Milk.
- (2) Eggs.
- (3) Fish, including, but not limited to, bass, flounder, and cod.
- (4) Crustacean shellfish, including, but not limited to, crab, lobster, and shrimp.
- (5) Tree nuts, including, but not limited to, almonds, pecans, and walnuts.
- (6) Wheat.
- (7) Peanuts.
- (8) Soybeans.
- (9) A food ingredient that contains protein derived from a food listed in paragraphs (1) to (8), inclusive.

New CAL. HEALTH & SAFETY CODE § 113820.5(b) (effective Jan. 1, 2017), provides that the following items are not “major food allergens”:

- (1) A highly refined oil derived from a food specified in CAL. HEALTH & SAFETY CODE § 113820.5(a)(1) to (8) and any ingredient derived from that highly refined oil.
- (2) An ingredient that is exempt under the petition or notification process specified in the federal Food Allergen Labeling and Consumer Protection Act of 2004 (Public Law 108-282).

*See infra* Chapter 4(C) in the EGCRL and in this supplement for further discussion of food allergies.

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<sup>20</sup> CAL. HEALTH & SAFETY CODE §§ 113947.3, 113947.5 (accredited food safety certification exams are offered online and must be proctored under secure conditions).

<sup>24</sup> CAL. HEALTH & SAFETY CODE §§ 113947(a), 113947.1(f). In September, 2011, the Food Code was amended to include a definition of a “food handler” as an individual (other than a certified owner or employee) involved in the preparation, storage, or service of food in a food facility that sells food for human consumption to the general public. CAL. HEALTH & SAFETY CODE §

113790. Subject to exceptions for food handlers employed by commissaries, mobile support units, and other specified entities, a food handler must obtain a food handler card within 30 days after the date of hire, and must maintain a valid food handler card as long as he or she is employed as a food handler. The cards are valid for 3 years, and must be obtained after successful completion of a training course and examination from an American National Standards Institute (ANSI) accredited training provider that meets ASTM International E26529-09 Standard Practice for Certificate Programs. CAL. HEALTH & SAFETY CODE §§ 113790, 113948.

CAL. HEALTH & SAFETY CODE § 113947(b)(effective Jan. 1, 2017), added to the Food Code by S.B. No. 1067, provides that the person in charge must both:

- (1) Have adequate knowledge of major food allergens, foods identified as major food allergens, and the symptoms that a major food allergen could cause in a sensitive individual who has an allergic reaction; and
- (2) Educate the employees at the food facility regarding the information described in paragraph (1), which the person in charge may elect to accomplish by, among other methods, using a poster or job aid to which the employee can refer.

*See supra* Chapter 1, footnotes 7 and 19 in this supplement.

## **Chapter 1.B.2**

*Page 8*

*The 2nd full paragraph is replaced with the following text:*

Food destined for restaurant kitchens, and ultimately to consumers, must be obtained from approved sources that comply with all applicable laws.<sup>26</sup> No recreationally-caught shellfish or fish are acceptable, and game animals must be from an approved source.<sup>27</sup> Egg and dairy products must be pasteurized and ice must be made from potable water.<sup>28</sup>

When the Food Code was adopted in 2007, it prohibited restaurants from using or selling food prepared in a private home.<sup>29</sup> The California legislature then passed the California Homemade Food Act (hereinafter “CHFA”), which is the subject of new Chapter 27 in this supplement. Due to the enactment of the CHFA, as of January 1, 2013, some non-refrigerated homemade food items that are not “potentially hazardous food” can be produced for sale in home kitchens and sold to restaurants under specified conditions; food in hermetically sealed

containers can only be obtained from regulated food processing plants or from a registered and permitted cottage food operation that produces jams, jellies, and preserves.<sup>30</sup>

Restaurants may obtain whole uncut fruits or vegetables as well as unrefrigerated shell eggs from a community food producer whose products are grown in accordance with applicable laws and guidelines and who meets certain requirements. A product label or conspicuous signage with the name and address of the community food producer (if sold on its site) must be provided with the agricultural product(s), and egg production must be limited to 15 dozen eggs per month. Best management practices as described by the California Department of Food and Agriculture must be observed concerning production and handling of food, whether or not it is a PHF. A local ordinance may add certain additional requirements.<sup>30A</sup>

Effective January 1, 2017, in a change made by S.B. No. 1067, if a whole-muscle, intact beef steak is intended to be eaten raw or undercooked and the restaurant does *not* intend to provide a written disclosure and reminder under new California Health and Safety Code Section 114093, the following must occur:

(i) either the food has been obtained from a food processing plant that, upon request by the purchaser, packages the steaks and labels them to indicate that the steak meets the definition of whole-muscle, intact beef, or it is deemed acceptable by the local enforcement agency based on other evidence, such as written buyer specifications or invoices, that indicate that the steaks meet the definition of whole-muscle intact beef.

(ii) if the food is individually cut in the restaurant, all of the following conditions are satisfied:

(A) the food is cut from whole-muscle intact beef that is labeled by a food processing plant as specified in paragraph (i) above;



(B) the food is prepared so it remains intact; and

(C) if the food is packaged for undercooking in a food facility, the food is labeled as specified in paragraph (i) above.<sup>30B</sup>

<sup>26</sup> CAL. HEALTH & SAFETY CODE §§ 113735, 113980, 114021(a).

<sup>27</sup> CAL. HEALTH & SAFETY CODE §§ 114027, 114029, 114031.

<sup>28</sup> CAL. HEALTH & SAFETY CODE §§ 114024, 114025. If foods prepared with raw shell eggs such as Caesar salads, hollandaise or béarnaise sauce, mayonnaise, eggnog, ice cream, and egg-fortified beverages are neither cooked as specified in CAL. HEALTH & SAFETY CODE §114004 nor accompanied by a written disclosure and reminder as specified in CAL. HEALTH & SAFETY CODE §114093, those dishes must be prepared with pasteurized eggs or pasteurized egg products. CAL. HEALTH & SAFETY CODE § 114012. *See infra* Chapter 1, footnotes 97 and 98B in this supplement.

<sup>29</sup> CAL. HEALTH & SAFETY CODE § 114021(b) (effective through Dec. 31, 2012).

<sup>30</sup> CAL. HEALTH & SAFETY CODE §§ 113805, 114021(b), 114023. *See* Chapter 27 in this supplement for discussion of permitted cottage food operations.

<sup>30A</sup> CAL. HEALTH & SAFETY CODE §§ 113735(b), 114376. A “community food producer” is a producer of agricultural products on land that is not zoned for agricultural use but is otherwise in compliance with applicable local land use and zoning restrictions. CAL. HEALTH & SAFETY CODE § 113752; CAL. HEALTH & SAFETY CODE § 113796. Local enforcement officers have the authority to inspect and regulate operations of community food producers. CAL. HEALTH & SAFETY CODE § 114376.5. For the authority of restaurants to donate food to food banks or other nonprofit charitable organizations for distribution free of charge, see CAL. HEALTH & SAFETY CODE §§ 114432-114434.

<sup>30B</sup> CAL. HEALTH & SAFETY CODE §114021(c) (effective Jan. 1, 2017). *See infra* Chapter 1, footnotes 98B-98D in this supplement for discussion of new CAL. HEALTH & SAFETY CODE § 114093.

### **Chapter 1.B.2.b**

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<sup>37</sup> CAL. HEALTH & SAFETY CODE § 114041. Shell eggs must not exceed the restricted egg tolerances for United States Consumer Grade B Standards. CAL. HEALTH & SAFETY CODE § 114041(b).

*Page 10*

*The 1st full paragraph is replaced with the following text:*

Receiving and storing food at proper temperatures prevents, or at least reduces, the growth of harmful bacteria and helps maintain food quality, free from spoilage; thus, on receipt of PHF, there should be no evidence of temperature abuse.<sup>38</sup> Refrigerated PHF may be received at a temperature of 45°F or less if it is cooled to 41°F or below within 4 hours.<sup>39</sup> If a temperature other than 41°F is designated by law governing the distribution for a PHF, PHF may be received at that temperature and then cooled within 4 hours to 41°F or less;<sup>40</sup> this rule does not apply to pasteurized milk or pasteurized milk products in original, sealed containers, raw shell eggs, and unshucked live molluscan shellfish if these foods are placed immediately upon receipt in a refrigerator at 45°F or less.<sup>41</sup> Hot PHF must be received at 135°F or above.<sup>42</sup> No temperatures need be taken of foods that are labeled frozen, hard-frozen, or visibly well-packed in ice by a food processing plant, but frozen foods must be received frozen and accepted only if there are no visible signs of thawing and refreezing (for example, large ice crystals on package surfaces or frozen liquids or juices inside packages).<sup>43</sup>

<sup>38</sup> CAL. HEALTH & SAFETY CODE § 114037(f).

<sup>39</sup> CAL. HEALTH & SAFETY CODE § 114037(a).

<sup>40</sup> CAL. HEALTH & SAFETY CODE §§ 114037(b), 114002(d).

<sup>41</sup> CAL. HEALTH & SAFETY CODE §§ 114037(b), 114002(d), (e).

<sup>42</sup> CAL. HEALTH & SAFETY CODE § 114037(d).

<sup>43</sup> CAL. HEALTH & SAFETY CODE § 114037(e).

<sup>45</sup> CAL. HEALTH & SAFETY CODE §§ 110620, 110760; *Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1086-1087 (Cal. 2008) (discussing California's Sherman Food, Drug, and Cosmetic Law (hereinafter "SFDC Act"). Under the SFDC Act, regulations may be adopted that conform insofar as practicable to the Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C § 301 *et*

*seq.*, which also bans adulterated and misbranded food. CAL. HEALTH & SAFETY CODE § 110065. See *infra* Section 3(C) in this supplement for further discussion of the FDCA and the SFDC Act.

#### **Chapter 1.B.2.d**

*Page 12*

<sup>57</sup> CAL. HEALTH & SAFETY CODE § 114047(c)-(d). Temporary alternate food storage methods and locations may be approved by the local enforcement agency. CAL. HEALTH & SAFETY CODE § 114047(e).

#### **Chapter 1.B.2.e**

*Page 13*

<sup>66</sup> CAL. HEALTH & SAFETY CODE § 113986(a)(1). Food must be protected from cross-contamination by separating raw food of animal origin from raw ready-to-eat food and cooked ready-to-eat food in any of the following ways: using separate equipment of each type, arranging each type of food in equipment so that cross-contamination is prevented, preparing each type of food at different times or in separate areas, storing food in packages, covered containers, or wrappings, cleaning containers of visible soil before opening, protecting containers that are received packaged together in a case or overwrap from cuts when the case or overwrap is opened, storing damaged, spoiled or recalled food in a manner that prevents adulteration of other foods and vermin infestation, and separating fruits and vegetables before they are washed from ready-to-eat food. CAL. HEALTH & SAFETY CODE § 113986(a)(1)(A)-(H).

*Page 14*

*The 1st full paragraph is replaced with the following text:*

The temperature at which PHF is held prior to preparation is critical to its wholesomeness and freedom from contamination. As a general rule, all PHF must be maintained at or below 41°F or at or above 135°F at all times.<sup>71</sup> However, special rules apply when preparing, cooking, cooling, or transporting PHF to or from a restaurant for a period of less than 30 minutes (or when time is used as the public health control, as discussed in *Time Only as Control for Potentially Hazardous Food* below). Certain roasts may be held at a temperature of 130°F, and raw shelled eggs, unshucked live molluscan shellfish, pasteurized milk, pasteurized milk products in original, sealed containers, PHF in vending machines, PHF held for sampling at certified farmer's

markets, PHF in transportation, and PHF in serving lines and salad bars during periods not to exceed 12 hours in any 24 hour period (only if the unused portions are disposed of within the 24 hour period) may be held at or below 45°F.<sup>72</sup> If the PHF must be removed from its holding temperature for its preparation, the time cannot exceed 2 cumulative hours before returning it to the required temperature.<sup>73</sup>

<sup>71</sup> CAL. HEALTH & SAFETY CODE § 114037(a), (d).

<sup>72</sup> CAL. HEALTH & SAFETY CODE §§ 113996(b)-(d), 110960. For purposes of this exception, a display case is not deemed to be a serving line. CAL. HEALTH & SAFETY CODE § 113996(d).

<sup>73</sup> CAL. HEALTH & SAFETY CODE § 113998.

### **Chapter 1.B.3**

*Pages 15-16*

*The 3rd full paragraph on page 15 and the run-on paragraph on page 16 are replaced with the following text:*

To speed up the thawing process, PHF may also be thawed for a period of not more than 2 hours by completely submerging it under potable running water heated to not more than 70°F and running at sufficient speed to flush loose food particles down the drain.<sup>81</sup> PHF can also be thawed as part of the cooking process, or in the microwave if immediately followed by preparation.<sup>82</sup> Food thawed in cold water or in the microwave should be cooked immediately.<sup>83</sup>

<sup>81</sup> CAL. HEALTH & SAFETY CODE § 114020(b).

<sup>82</sup> CAL. HEALTH & SAFETY CODE § 114020(c)-(d).

<sup>83</sup> FDA, SAFE FOOD HANDLING: WHAT YOU NEED TO KNOW, *available at* <http://www.fda.gov/Food/FoodborneIllnessContaminants/BuyStoreServeSafeFood/ucm255180.htm>.

<sup>84</sup> Reserved.

### **Chapter 1.B.3.a**

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<sup>91</sup> CAL. HEALTH & SAFETY CODE §§ 113711, 113784, 113818, 113984(b)-(c). *See Outdoor Food Preparation and Display* discussed *infra* Chapter 24(A) in the EGCR and in this supplement. A “food compartment” is an enclosed space, including, but not limited to, an air pot, blender, bulk dispensing system, covered chafing dish, and covered ice bin, with all of the following characteristics. The space is defined by a physical barrier from the outside environment that completely encloses all food, food-contact surfaces, and the handling of nonprepackaged food. All access openings are equipped with tight-fitting closures, or one or more alternative barriers that effectively protect the food from contamination and facilitate safe food handling, while minimizing exposure to the environment. It is constructed from materials that are nontoxic, smooth, easily cleanable, and durable and is constructed to facilitate the cleaning of the interior and exterior of the compartment. CAL. HEALTH & SAFETY CODE § 113784. For CAL. HEALTH & SAFETY CODE § 113818’s definition of limited food preparation, as amended by S.B. No. 1067, *see infra* Chapter 26, footnote 16 in this supplement.

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<sup>92</sup> CAL. HEALTH & SAFETY CODE § 113984.1. A “consumer” is a person who is a member of the public, takes possession of food, is not functioning in the capacity of an operator of a food facility, and does not offer the food for resale. CAL. HEALTH & SAFETY CODE § 113757.

### **Chapter 1.B.3.b**

*Pages 17-18*

*The 2nd full paragraph on page 17 and the run-on paragraph and succeeding paragraph on page 18 are replaced with the following text:*

The Food Code, as amended by S.B. No. 1067, sets out minimum temperature/time for cooking raw animal foods and foods containing them. With the exceptions described in the rest of this paragraph and in the next two paragraphs, fish, meat, game animals commercially raised for food, and raw shell eggs that are cooked to order must be heated to a minimum internal temperature of 145°F or above for 15 seconds.<sup>95</sup> Raw eggs not cooked to order, ratites (flightless birds), mechanically tenderized and injected meats, and comminuted (pulverized or ground) fish, meat, and game animals commercially raised for food must be brought to an internal temperature of 155°F for 15 seconds, or alternatively to 145°F for 3 minutes, 150°F for 1 minute, or 158°F for 1 second.<sup>96</sup> Poultry, baluts (developing bird embryos), wild game animals, stuffed fish,

stuffed meat, stuffed poultry, and stuffed ratites, as well as pasta and any other food stuffed with or stuffing containing fish, meat, ratites, or poultry must be heated to a minimum internal temperature of 165°F for 15 seconds, since foods containing a mixture of raw ingredients must be cooked to a final temperature that coincides with the food requiring the highest cooking temperature.<sup>97</sup>

Whole roasts, including beef, corned beef, pork, lamb, and cured pork such as ham must be heated to a Food Code-specified temperature for a certain amount of time depending on the type of oven used, humidity, and the weight of the roast.<sup>98</sup> A raw or undercooked whole-muscle, intact beef steak may be served or offered for sale in a ready-to-eat form if the restaurant serves a population that is not a highly susceptible population, the steak is labeled to show that it meets applicable Food Code criteria, and it is cooked on both the top and bottom to a surface temperature of 145°F or above and a cooked color change is achieved on all external surfaces.<sup>98A</sup>

S.B. No. 1067 significantly changes the precautions which must be taken before raw or undercooked food is served to a consumer. A raw animal food such as raw egg, raw fish, raw marinated fish, raw molluscan shellfish, or steak tartare, or a partially cooked food such as lightly cooked fish, soft cooked eggs, or rare meat (other than whole-muscle, intact beef steaks as described in the preceding paragraph) may be served or offered for sale upon consumer request or selection in a ready-to-eat form if the restaurant serves a population that is not a highly susceptible population, the food (if served or offered for service by consumer selection from a children's menu) does not contain comminuted meat, and the consumer receives a written disclosure and written reminder under new California Health and Safety Code Section 114093<sup>98B</sup> about the safe cooking of food.<sup>98C</sup> Alternatively, the California Department of Public Health may grant a variance if certain specified conditions are met.<sup>98D</sup>

Fruits and vegetables cooked and meant to remain hot must be cooked to a minimum temperature of at least 135°F.<sup>99</sup>

Unlabeled or nonprepackaged confectioneries sold over the counter directly to consumers containing more than 0.5% alcohol by weight may only be served or sold if the restaurant notifies the consumer in writing of that fact.<sup>100</sup>

<sup>95</sup> CAL. HEALTH & SAFETY CODE §§ 113795 (effective Jan. 1, 2017), 113779, 113823 (effective Jan. 1, 2017), 114004(a)(1) (effective Jan. 1, 2017). *See supra* Chapter 1, footnote 7 in this supplement.

<sup>96</sup> CAL. HEALTH & SAFETY CODE §§ 113750, 113795 (effective Jan. 1, 2017), 113779, 113814 (effective Jan. 1, 2107), 113823 (effective Jan. 1, 2017), 114004(a)(2) (effective Jan. 1, 2017). With respect to comminuted meat, the ingredients of “imitation hamburger,” as defined in the SFDC Act, must be disclosed on a restaurant menu. CAL. HEALTH & SAFETY CODE § 111205(a).

<sup>97</sup> CAL. HEALTH & SAFETY CODE §§ 113795 (effective Jan. 1, 2017), 113779, 113823 (effective Jan. 1, 2017), 113873 (effective Jan. 1, 2017), 114004(a)(3) (effective Jan. 1, 2017).

<sup>98</sup> CAL. HEALTH & SAFETY CODE § 114004(b) (effective Jan. 1, 2017).

<sup>98A</sup> CAL. HEALTH & SAFETY CODE §§ 114004(c), 114021(c) (effective Jan. 1, 2017). *See supra* Chapter 1, footnote 30B in this supplement for the requirements for whole-muscle, intact beef steaks.

<sup>98B</sup> S.B. No. 1067 repealed former CAL. HEALTH & SAFETY CODE § 114093, effective Dec. 31, 2016, which had set forth requirements for serving certain foods raw or less than thoroughly cooked. It enacted in its place a more stringent new CAL. HEALTH & SAFETY CODE § 114093, discussed below. *See supra* Chapter 1, footnote 7 in this supplement.

Under new CAL. HEALTH & SAFETY CODE § 114093(a), effective Jan. 1, 2017, if an animal food, including beef, eggs, fish, lamb, milk, pork, poultry, or shellfish, is served or sold raw, undercooked, or without otherwise being processed to eliminate pathogens, either in ready-to-eat form or as an ingredient in another ready-to-eat food, the restaurant must inform consumers of the significantly increased risk of consuming those foods by providing them with both a disclosure and a reminder, as described below, using brochures, deli case or menu advisories, label statements, table tents, placards, or other effective written means.

The disclosure required under CAL. HEALTH & SAFETY CODE § 114093(b) is a written statement that clearly includes either of the following:

(1) a description of the animal-derived foods, such as “oysters on the half shell (raw oysters),” “raw-egg Caesar salad,” and “hamburgers (can be cooked to order),” or

(2) identification of the animal-derived foods marked by an asterisk denoting a footnote that states that the items are served raw or undercooked, or contain or may contain raw or undercooked ingredients.

The reminder required under CAL. HEALTH & SAFETY CODE § 114093(c) means a written statement that identifies the animal-derived foods by an asterisk that denotes a footnote that includes either of the following disclosure statements:

(1) “Written information regarding the safety of these food items is available upon request.”

(2) “Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness, especially if you have certain medical conditions.”

<sup>98C</sup> CAL. HEALTH & SAFETY CODE § 114004(d)(1) (effective Jan. 1, 2017).

<sup>98D</sup> CAL. HEALTH & SAFETY CODE § 114004(d)(2) (effective Jan. 1, 2017).

<sup>99</sup> CAL. HEALTH & SAFETY CODE § 114010.

<sup>100</sup> CAL. HEALTH & SAFETY CODE § 114093.1. Under S.B. No. 819/A.B. 1554, *available at* [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB819](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB819) and [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB1554](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1554), the manufacture, sale, and use of powdered alcohol is banned in California. CAL. BUS. & PROF. CODE § 24200.7 (effective Jan. 1, 2017).

### **Chapter 1.B.3.c**

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<sup>102</sup> USDA FOOD SAFETY AND INSPECTION SERVICES, HOW TEMPERATURES AFFECT FOOD, *available at* [http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/safe-food-handling/how-temperatures-affect-food/ct\\_index](http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/safe-food-handling/how-temperatures-affect-food/ct_index). A related concern is the improper cooling and the customer’s re-heating of leftovers or “doggie bag” items removed from the restaurant. Restaurant customers should know that they should discard all perishable items such as meat, poultry, eggs, and casseroles that have been left at room temperature longer than 2 hours, or left at an air temperature above 90°F for longer than 1 hour. Furthermore, it is recommended that leftovers such as cooked meats or poultry be refrigerated and kept at 40°F for no longer than 4 days; pizza no longer than 4 days; luncheon meats no longer than 5 days; and egg, tuna, and macaroni salads no longer than 5 days. USDA, SAFE HANDLING OF TAKE-OUT FOODS, *available at* <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/safe-food-handling/safe-handling-of-take-out-foods/>.



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<sup>105</sup> CAL. HEALTH & SAFETY CODE § 114002(c). Pasteurized milk and pasteurized milk products in original, sealed containers, raw shell eggs, and unshucked live molluscan shellfish can be refrigerated at 45°F or less. CAL. HEALTH & SAFETY CODE § 114002(e).

**Chapter 1.B.3.d**

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<sup>112</sup> CAL. HEALTH & SAFETY CODE §§ 113757, 114060(a); *see supra* Chapter 1, footnote 92 in this supplement.

<sup>115</sup> CAL. HEALTH & SAFETY CODE §§ 114063(b), 114089(c). The label must comply with any federal labeling requirements applicable to restaurants. *See* Chapter 20 *infra* in the EGCRL and in this supplement. Any food prepackaged in a restaurant or other food facility must also comply with the SFDC Act, which was amended to provide that any food is misbranded if its labeling does not conform to the Food Allergen Labeling and Consumer Protection Act. This law requires any food containing one of the 8 major food allergens to be identified in the label of a food product. CAL. HEALTH & SAFETY CODE §§ 110673, 114089. *See supra* Chapter 1, footnote 19 in this supplement and Chapter 4(C) in the EGCRL and in this supplement. Bulk food available for consumer self-service must be prominently labeled in plain view of the consumer with either: (1) the manufacturer's or processor's label that was provided with the food, or (2) a card, sign, or other method of notification that includes the common name of the food, list of ingredients, and any required nutrition labeling. CAL. HEALTH & SAFETY CODE § 114089(c).

**Chapter 1.B.4**

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<sup>120</sup> CAL. HEALTH & SAFETY CODE § 113801. *See* FDA, HACCP PRINCIPLES & APPLICATION GUIDELINES, *available at* <http://www.fda.gov/Food/GuidanceRegulation/HACCP/ucm2006801.htm>. CAL. HEALTH & SAFETY CODE § 113801 lists the basic principles to be included in an HACCP Plan. These include: identifying likely hazards to consumers by a specific food, determining critical control points in receiving, storage, preparation, displaying, and dispensing of a food, setting measurable critical limits for each critical control point, developing and maintaining monitoring practices, developing and using corrective action plans when critical limits are not met, establishing and maintaining a recordkeeping system, and establishing a system of audits to both (i) verify the effectiveness of critical limits and appropriateness of critical control points determined and (ii) periodically verify the effectiveness of the HACCP plan.

<sup>121</sup> FDA BACKGROUNDER, HACCP: A STATE OF THE ART APPROACH TO FOOD SAFETY (Oct. 2001), *available at* <http://www.lucidfusion.com/wp->

content/clients/sage/PartnerTools/trunk/ASSETS/files/HACCP\_1222847322.pdf; *see also* FDA, MANAGING FOOD SAFETY: A REGULATOR'S MANUAL FOR APPLYING HACCP PRINCIPLES TO RISK-BASED RETAIL AND FOOD SERVICE INSPECTIONS AND EVALUATING VOLUNTARY FOOD SAFETY MANAGEMENT SYSTEMS (April 2006), *available at* <http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM078159.pdf>.

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<sup>123</sup> CAL. HEALTH & SAFETY CODE §§ 114419(b), 114057.1 (additional requirements for reduced-oxygen packaging methods). Under S.B. No. 1067, effective Jan. 1, 2017, no HACCP plan is required for a reduced-oxygen packaging method if certain criteria are met. CAL. HEALTH & SAFETY CODE § 114419(b)(2), 114057.1(d) (effective Jan. 1, 2017).

### **Chapter 1.C.1**

*Page 24*

*The 1st full paragraph is replaced with the following text:*

Food contact surfaces of equipment and utensils used with PHF must be cleaned and sanitized throughout the day, at least every 4 hours. However, cleaning and sanitization are required less frequently if:

- in storage, PHF-filled containers and their contents are maintained at required temperatures, and the containers thereafter are cleaned and sanitized when empty;
- the utensils and equipment are used to prepare food in a refrigerated room at or below 55°F and are cleaned and sanitized at the frequency specified for the ambient temperature of the room in which kept;
- ready-to-eat PHF that is maintained at required temperatures is intermittently combined with additional supplies of the same food at required temperatures and the containers are cleaned and sanitized at least every 24 hours;
- utensils and containers holding PHF at required temperatures are cleaned when empty or when the remaining contents are disposed of;

- temperature measuring devices are maintained in contact with food held at required temperatures;
- equipment is used for storage of packaged or unpackaged food, such as a reach-in refrigerator, and it is cleaned and sanitized at a frequency necessary to preclude the accumulation of soil residue;
- a different cleaning schedule is approved by the local enforcement agency; or
- in-use utensils are intermittently stored in a container of water in which the water is maintained at 135°F or higher and the utensils and container are cleaned and sanitized at least every 24 hours or as necessary to preclude accumulation of soil residue.<sup>136</sup>

<sup>136</sup> CAL. HEALTH & SAFETY CODE § 114117(c)-(d). The frequency of cleanings and sanitization varies and depends on the ambient temperature of the room in which the surface is kept, and the cleaning and sanitization frequency based on such temperature must be documented. *Id.*

*Pages 24-25*

*The 2nd full paragraph on page 24 and the run-on paragraph on page 25 are replaced with the following text:*

Cleaned and soiled utensils, equipment, and kitchenware must be handled in a way that precludes contamination of cleaned items with dirty items.<sup>137</sup> Except when dry cleaning methods are used with dry non-PHF food residues, food contact surfaces that come in contact with non-PHF must be cleaned and sanitized whenever contamination has occurred, at least every 24 hours for customer self-service equipment and utensils, before restocking self-service equipment and utensils, and in equipment such as ice bins, beverage dispensing nozzles, and enclosed components of equipment as specified by the manufacturer or otherwise as necessary to preclude the accumulation of soil or mold.<sup>138</sup> Non-food contact surfaces of equipment must be cleaned as frequently as necessary to keep them free of residue, dust, dirt, and other contamination.<sup>139</sup>

<sup>137</sup> CAL. HEALTH & SAFETY CODE § 114083.

<sup>138</sup> CAL. HEALTH & SAFETY CODE §§ 114111, 114117(e).

<sup>139</sup> CAL. HEALTH & SAFETY CODE § 114115(c).

*Page 25*

*The 1st full paragraph is replaced with the following text:*

The proper cleaning of food contact surfaces and utensils requires the manual or mechanical removal and loosening of the contamination with various detergents and wetting agents, emulsifiers, abrasive cleaners, hot water, brushes, etc.<sup>140</sup> Before washing the equipment, any food debris should be scraped into a receptacle.<sup>141</sup> If a manual method is used for warewashing, it must be done in a three-compartment sink where the utensils are precleaned, washed in not less than 100°F water (or as specified by the manufacturer in writing including the label instructions), and then rinsed and sanitized.<sup>142</sup> A thermometer must be readily accessible to ascertain water temperature.<sup>143</sup> A sink used for warewashing may not be used for handwashing except if there is no other proper sink and the facility was not built or extensively remodeled after January 1, 1996.<sup>144</sup>

<sup>140</sup> CAL. HEALTH & SAFETY CODE §§ 114095, 114097.

<sup>141</sup> CAL. HEALTH & SAFETY CODE § 114099.1.

<sup>142</sup> CAL. HEALTH & SAFETY CODE §§ 114099.1(b), 114099.2.

<sup>143</sup> CAL. HEALTH & SAFETY CODE § 114099.5.

<sup>144</sup> CAL. HEALTH & SAFETY CODE § 114125(a).

## **Chapter 1.C.2**

*Page 26*

<sup>152</sup> Under CAL. HEALTH & SAFETY CODE § 113976, if a utensil is used to taste food, it must be washed, rinsed, and sanitized, unless it is discarded, before it is used again for tasting food or for any other purpose.

*Page 27*

*The 1st full paragraph is replaced with the following text:*

Single-use gloves must be worn when handling food and food-contact surfaces if the employee has any cuts, sores, rashes, artificial nails, nail polish, rings other than a plain ring (such as a wedding band), uncleanable orthopedic supports, or fingernails that are not clean, smooth, or neatly trimmed.<sup>159</sup> Single-use gloves must be used only for one task and not if damaged or if there is an interruption in food handling; otherwise, gloves must be washed or changed as often as handwashing is mandated.<sup>160</sup> Cloth gloves must never be used to handle food unless the food will be cooked afterwards.<sup>161</sup> Slash resistant gloves used to protect hands during cutting must be used only with food that is subsequently cooked at required specified temperatures and may be used with ready-to-eat food that will not be subsequently cooked if the gloves are single-use or if the gloves or an outer glove have a smooth, durable, and nonabsorbent surface.<sup>162</sup>

<sup>159</sup> CAL. HEALTH & SAFETY CODE § 113973(a).

<sup>160</sup> CAL. HEALTH & SAFETY CODE § 113973(b)-(c). Single-use gloves must not be washed. CAL. HEALTH & SAFETY CODE § 113973(b).

<sup>161</sup> CAL. HEALTH & SAFETY CODE § 113973(f).

<sup>162</sup> CAL. HEALTH & SAFETY CODE § 113973(d)-(e).

### **Chapter 1.C.2.a**

*Pages 27-28*

*The 2nd full paragraph on page 27 and the run-on paragraph on page 28 are replaced with the following text:*

Paramount among the necessary precautions for restaurant employees is handwashing. Employees must keep their hands and arms clean, and they must thoroughly wash hands and the portions of their arms exposed to direct food contact by vigorously rubbing them with cleanser and warm water of 100°F or more for at least 10 to 15 seconds. Employees must pay particular attention to the areas between their fingers and under their fingernails and thoroughly rinse their hands with clean water followed by drying of clean hands and any portion of their exposed arms.<sup>163</sup> A sign must be posted near the handwashing sink that instructs all employees to wash their hands.<sup>164</sup> Employees must wash their hands at the following times:

- before engaging in food preparation, dispensing food, or handling clean utensils or tableware;
- as often as necessary during food preparation to remove soil and contamination and to prevent cross-contamination when changing tasks;
- when switching between working with raw food and working with ready-to-eat food;
- after touching bare human body parts other than clean hands and clean, exposed portions of arms;
- after using the toilet room;
- after coughing, sneezing, blowing, or wiping their noses;
- after smoking, eating, or drinking;
- after handling soiled equipment or utensils;
- before initially donning gloves for working with food;
- after caring for or handling any animal allowed in a food facility; and
- after any other activity that contaminates hands.<sup>165</sup>

<sup>163</sup> CAL. HEALTH & SAFETY CODE §§ 113941, 113952, 113953.3. Hand antiseptics must comply with CAL. HEALTH & SAFETY CODE § 113953.4.

<sup>164</sup> CAL. HEALTH & SAFETY CODE § 113953.5(a).

<sup>165</sup> CAL. HEALTH & SAFETY CODE § 113953.3(a).

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<sup>166</sup> CAL. HEALTH & SAFETY CODE § 113961(a). Section 113961 has been repealed and revised, its revision has been repealed, and the original statute has been reenacted. The interim version allowed food employees to contact exposed, ready-to-eat food with their bare hands under certain conditions, including when washing fruits and vegetables and when not serving a highly susceptible population. For more information on the controversy, *see, e.g.*, Betty Hallock, *California Legislature Repeals Glove Law for Food Handlers*, Los Angeles Times (June 26, 2014), available at <http://www.latimes.com/local/politics/la-me-glove-law-20140627-story.html>.

*Page 28*

*The 2nd full paragraph is replaced with the following text:*

A dedicated facility only for washing hands must be provided and must be clean and accessible at all times for use by employees.<sup>168</sup> Employees must not clean their hands in sinks used for food preparation, warewashing, or in a utility sink.<sup>169</sup> Handwashing basins must be provided within or adjacent to toilet rooms and equipped with a combination faucet or premixing valve that supplies warm water of at least 100°F for a minimum of 15 seconds; if the temperature of the water provided to a handwashing sink is not readily adjustable at the faucet, the water must be at least 100°F, but not greater than 108°F.<sup>170</sup> A 6-inch splashguard must separate handwashing sinks from warewashing sinks unless they are at least 2 feet apart.<sup>171</sup> Local building and plumbing codes determine the number of handwashing facilities.

<sup>168</sup> CAL. HEALTH & SAFETY CODE § 113953.1(a)-(b).

<sup>169</sup> CAL. HEALTH & SAFETY CODE § 113953.1(c).

<sup>170</sup> CAL. HEALTH & SAFETY CODE §§ 113953(a),(c), 113941.

<sup>171</sup> CAL. HEALTH & SAFETY CODE § 113953(b)(2). Automatic handwashing facilities may be installed and used in accordance with manufacturer's instructions. CAL. HEALTH & SAFETY CODE § 113953(e).

### **Chapter 1.C.2.b**

*Pages 29-31*

*Chapter 1(C)(2)(b) is replaced in its entirety with the following text:*

A food employee who has an "acute gastrointestinal illness"<sup>175</sup> or is infected with a communicable disease transmissible through food may transmit a disease to a restaurant customer through food. The Food Code attempts to reduce the instances of transmission of foodborne diseases from employees to customers by preventing food handling and preparation until after the food employee is either free of the illness or unable to transmit it through food, and through new reporting requirements.<sup>176</sup>

The restaurant owner or food employee with a food safety certificate (see *Food Safety Certification and Employee Training* above) must instruct all food employees regarding the relationship between personal hygiene and food safety, including the association of hand contact, personal habits and behaviors, and food employee health to foodborne diseases. The restaurant owner or such certified employee must require food employees to report to the person in charge that he or she (1) has been diagnosed with salmonella typhi, salmonella spp., shigella spp., Entamoeba histolytica, enterohemorrhagic or shiga toxin producing Escherichia coli (E. coli), Hepatitis A virus, or Norovirus (hereinafter an "Infectious Illness"), or (2) has a wound that is (i) on the hands or wrists and not covered by a single-use glove worn on top of an impermeable cover like a finger cot or stall, (ii) on an exposed portion of an arm and not protected by an



impermeable cover, or (iii) on another part of the body and not covered by a dry, durable, and tight-fitting bandage (any of these wounds, a “Specified Wound”).<sup>177</sup>

A food employee with an Infectious Illness or a Specified Wound must report this fact to the person in charge and comply with all required restrictions and exclusions, discussed below.<sup>178</sup> Once the person in charge has been notified that a food employee has been diagnosed with an Infectious Illness or other communicable disease transmissible through food, or becomes aware that two or more food employees concurrently show symptoms of an acute gastrointestinal illness, he or she must notify the local enforcement agency.<sup>179</sup> The person in charge must either "exclude"<sup>180</sup> the food employee from the restaurant if diagnosed with an Infectious Illness or other communicable disease transmissible through food, or if the food employee is suffering from symptoms of an acute gastrointestinal illness, "restrict"<sup>181</sup> the food employee from working with exposed food, clean equipment, utensils, linens and unwrapped single-service and single-use articles.<sup>182</sup> The local health officer or local enforcement agency must take steps in accordance with specified criteria.<sup>183</sup>

If circumstances are such that a local health officer becomes aware of an Infectious Illness of a restaurant employee or other communicable disease transmissible through food at a restaurant, the local health officer must inform the local enforcement agency.<sup>184</sup> Either or both will notify the person in charge and investigate the conditions, and may take appropriate and reasonable actions to require that the restaurant immediately exclude or restrict the affected food employee, close the restaurant until the danger of an outbreak has been eliminated, or require any employee to undergo a medical evaluation.<sup>185</sup>

If the food employee claims that he or she no longer has any symptoms of an acute gastrointestinal illness, the person in charge may remove any restrictions.<sup>186</sup> However, only the

local health officer or local enforcement agency, or both, can remove the exclusions and restrictions that were placed on a food employee diagnosed with an Infectious Illness or other communicable disease transmissible through food after the local health officer has stated, in writing, that the excluded or restricted employee is no longer considered infectious.<sup>187</sup>

If a food employee is not ill but suffers from persistent sneezing, coughing, or runny nose, such as symptoms associated with hay-fever, the employee must not work with exposed food or clean equipment, utensils, linens, or unwrapped single-used articles.<sup>188</sup> This does not apply if the employee can control the symptoms with medication.<sup>189</sup>

<sup>175</sup> CAL. HEALTH & SAFETY CODE § 113733 (symptoms include specified combinations of diarrhea, vomiting, fever and/or abdominal cramps).

<sup>176</sup> CAL. HEALTH & SAFETY CODE § 113788 (a “food employee” is an employee working with food, food equipment or utensils, or food-contact surfaces); CAL. HEALTH & SAFETY CODE § 113949.

<sup>177</sup> CAL. HEALTH & SAFETY CODE § 113949.2. For more discussion of these Infectious Illnesses, see *supra* Chapter 1, footnotes 1 and 3 and accompanying text in this supplement.

<sup>178</sup> CAL. HEALTH & SAFETY CODE § 113949.4. See also *Foodborne Diseases Litigation* discussed *infra* Chapter 4(B)(5) in the EGCR and in this supplement.

<sup>179</sup> CAL. HEALTH & SAFETY CODE §§ 113949.1(b), 113949.5.

<sup>180</sup> CAL. HEALTH & SAFETY CODE § 113778 (“exclude” means to prevent a person from working as a food employee or entering non-public areas of a food facility).

<sup>181</sup> CAL. HEALTH & SAFETY CODE § 113894 (“restrict” means to limit the activities of a food employee so that there is no risk of transmitting a disease that is transmissible through food and the food employee does not work with exposed food, clean equipment, utensils, linens, and unwrapped single-use articles).

<sup>182</sup> CAL. HEALTH & SAFETY CODE § 113950(b).

<sup>183</sup> CAL. HEALTH & SAFETY CODE § 113950(a).

<sup>184</sup> CAL. HEALTH & SAFETY CODE § 113949.1(a).

<sup>185</sup> CAL. HEALTH & SAFETY CODE § 113949.1, 113950(a). Appeals to closures must be made in writing within 5 days to the enforcement agency. CAL. HEALTH & SAFETY CODE § 113949.1(a).

<sup>186</sup> CAL. HEALTH & SAFETY CODE § 113950.5(a).

<sup>187</sup> CAL. HEALTH & SAFETY CODE § 113950.5(b).

<sup>188</sup> CAL. HEALTH & SAFETY CODE § 113974.

<sup>189</sup> *Id.*

### **Chapter 1.C.2.c**

*Page 31*

*The 2nd full paragraph is replaced with the following text:*

Clean, working toilet facilities for employees are required in all restaurants but need not be separate from customer restrooms.<sup>190</sup> Local building and plumbing codes determine the number of toilet facilities required and may have more restrictive requirements for toilet facilities. If also used by patrons, toilet rooms must be situated so that restaurant customers do not pass through food preparation, food storage, or utensil washing areas.<sup>191</sup> Toilet rooms must be separated from other portions of the restaurant by well-fitting, self-closing doors.<sup>192</sup> They may not be used for the storage of food, clean and sanitized equipment, utensils, laundered linens, and single-use articles.<sup>192A</sup> Handwashing facilities must be provided within or adjacent to toilet rooms, and toilet tissue must be provided in a permanently installed dispenser at each toilet.<sup>193</sup> Toilet rooms must be vented to the outside by means of a screened window that can be opened, an air shaft, or an exhaust fan activated by a light switch, consistent with the requirements of local building codes.<sup>194</sup>

<sup>190</sup> CAL. HEALTH & SAFETY CODE §§ 114250, 114276(a), (f). *See Restrooms and Sanitation under the California Retail Food Code* discussed *infra* Chapter 2(E) in the EGCR and in this supplement.

<sup>191</sup> CAL. HEALTH & SAFETY CODE § 114276(b)(2). Under new CAL. HEALTH & SAFETY CODE § 118600, effective Mar. 1, 2017, all single-user toilet facilities in any business establishment or place of accommodation must be identified as all-gender toilet facilities in compliance with Chapter 24 of the California Code of Regulations, and designated for use by no more than one

occupant at a time or for family or assisted use. Any inspector, building official, or other local official responsible for code enforcement may inspect for compliance with this requirement. *Id.*

<sup>192</sup> CAL. HEALTH & SAFETY CODE § 114276(c).

<sup>192A</sup> CAL. HEALTH & SAFETY CODE §§ 114049(b), 114179(a)(2).

<sup>193</sup> CAL. HEALTH & SAFETY CODE §§ 113953(a), 114250. Handwashing cleanser and single-use sanitary towels or hot-air blowers must be provided in dispensers at or adjacent to handwashing facilities. CAL. HEALTH & SAFETY CODE § 113953.2.

<sup>194</sup> CAL. HEALTH & SAFETY CODE § 114149(b).

*Page 31*

*The 3rd full paragraph is replaced with the following text:*

A room, enclosure, or designated area, where contamination of food, equipment, utensils, linens, and single-use articles cannot occur, must be provided as the sole place for employees to change and store clothes.<sup>195</sup> No sleeping accommodations may be maintained in any room where food is prepared, stored, or sold, and any sleeping room must be separated from restaurant operations by complete partitioning. The partition separating the food facility from the living or sleeping quarters cannot have a door or other opening.<sup>196</sup>

<sup>195</sup> CAL. HEALTH & SAFETY CODE §§ 114256, 114256.1. For employees' reasonable expectation of privacy in these areas, *see Obligation to Inform Employees They Are Being Videotaped* discussed *infra* Chapter 10(E) in the EGCR and in this supplement.

<sup>196</sup> CAL. HEALTH & SAFETY CODE § 114286. The statute makes an exception for restricted food service facilities. *Id.*

## **Chapter 1.C.2.d**

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<sup>201</sup> CAL. CODE REGS. tit. 27, § 25603.3(a). For fresh fruits, nuts, and vegetables, the Proposition 65 warning is as follows: "WARNING: This product may contain a chemical known to the State of California to cause cancer, or birth defects or other reproductive harm." CAL. CODE REGS. tit. 27, § 25603.3(b).

Bisphenol A, or BPA, is a chemical frequently found in plastics and in the protective lining of cans, bottles, and jar lids. It was listed under Proposition 65 as of May 11, 2015, as a chemical known to cause female reproductive harm. CAL. OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, BISPHENOL A (BPA) IN CANNED AND BOTTLED FOODS AND BEVERAGES, *available at* <https://www.p65warnings.ca.gov/fact-sheets/bisphenol-bpa-canned-and-bottled-foods-and-beverages>. Pursuant to emergency regulations, beginning May 11, 2016, retail sellers of canned and bottled foods and beverages containing BPA must include a warning sign about BPA exposure at each point of sale so that consumers see the warning before they make a purchase. CAL. CODE REGS. tit. 27, § 25603.3(f).

Since restaurants may serve drinks in bottles or cans, and restaurant kitchens may use canned, bottled, or jarred ingredients, restaurant owners and managers should discuss the BPA content of products with vendors and suppliers, consider the applicability of the emergency regulations, and decide whether to post the specific warning language contained in the regulations. The OEHHA's emergency regulations provide this language: "WARNING: Many food and beverage cans have linings containing bisphenol A (BPA), a chemical known to the State of California to cause harm to the female reproductive system. Jar lids and bottle caps may also contain BPA. You can be exposed to BPA when you consume foods or beverages packed in these containers. For more information, go to: [www.P65Warnings.ca.gov/BPA](http://www.P65Warnings.ca.gov/BPA)." CAL. CODE REGS. tit. 27, § 25603.3(g).

## Chapter 2

### View from the Top: Requirements for Restaurant Set-Up, Design, Equipment, and Insurance

*Pages 35-36*

<sup>2</sup> CAL. HEALTH & SAFETY CODE §§ 113849, 114265. In addition to regulating permanent food facilities, the Food Code includes specific regulations for mobile food facilities (Chapter 10)(*see infra* chapter 26 in this supplement), nonprofit charitable temporary food facilities (Chapter 10.5), temporary food facilities (Chapter 11), cottage food operations (Chapter 11.5)(*see infra* chapter 27 in this supplement), certified farmers' markets (Chapter 12), farm stands and community food production (Chapter 12.5), trans fat (Chapter 12.6)(*see infra* chapter 20 in the EGCRl and in this supplement), and fishermen's markets (Chapter 12.7).

<sup>3</sup> CAL. CODE REGS. tit. 24 (2016) (California Building Standards Code, effective Jan. 1, 2017). While analysis of the requirements of the California Building Standards Code is beyond the scope of this book, certain provisions applicable to restaurants are periodically discussed herein. *See* Chapter 12 *infra* in the EGCRl and in this supplement.

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<sup>4</sup> CAL. HEALTH & SAFETY CODE § 114380(e). *See* City of Petaluma, Commercial Tenant Improvement Information (rev. Jan. 1, 2008), *available at* <http://cityofpetaluma.net/cdd/pdf/comm-tenant-improve.pdf> at #65 and #66 (if the county health department is involved for items such as kitchen work or a new or remodeled restaurant, a copy of health department approvals, together with a copy of the approved plans, must be submitted to the city building department before issuance of a building permit).

### **Chapter 2A.**

<sup>5</sup> *See supra* Chapter 1, footnote 3 and accompanying text in this supplement.

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<sup>7</sup> CAL. HEALTH & SAFETY CODE § 114380(d).

<sup>12</sup> CAL. HEALTH AND HUMAN SERVICES AGENCY, DEPARTMENT OF PUBLIC HEALTH FOOD AND DRUG BRANCH, CALIFORNIA RETAIL FOOD CODE SECTION 114380(C)(2) GRANDFATHER CLAUSE FOR PRE-EXISTING NON-CONFORMING STRUCTURES AND EQUIPMENT (Aug. 18, 2008), *available at* <http://www.cdph.ca.gov/pubsforms/Documents/fdbRFCrRa08001.pdf>.

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<sup>16</sup> CAL. HEALTH & SAFETY CODE § 114380(e).

## **Chapter 2B.**

*Page 39*

<sup>23</sup> FEDERAL EMERGENCY MANAGEMENT AGENCY, U.S. FIRE ADMINISTRATION, RESTAURANT BUILDING FIRES (Apr. 2011), *available at* <http://www.usfa.fema.gov/data/statistics/reports.html> (stating that an estimated 5,900 restaurant fires are reported in the U.S. every year).

<sup>24</sup> CAL. FIRE CODE §§ 105.1.2, 105.6.34. The applicable fire code is the 2016 California Fire Code, which became effective on January 1, 2017. Comprising Part 9 of 12 parts of the California Building Standards Code, the 2016 California Fire Code is based on the 2015 International Fire Code. Local jurisdictions may make local amendments based on local needs and conditions. The California Fire Code is found at CAL. CODE REGS. tit. 24, Part 9. For convenience, citations in this book are to individual sections of the California Fire Code.

<sup>25</sup> CAL. FIRE CODE § 202, OCCUPANCY CLASSIFICATIONS, ASSEMBLY GROUP A. Similarly, under CAL. CODE REGS. tit. 24, Part 2, Vol. 1, § 303.1, Assembly Group A occupancy includes the use of a building or structure, or portion thereof, for food or drink consumption, with occupant loads of less than 50 persons classified as Group B occupancies. All occupancies in Group A, including those which contain seats, tables, displays, equipment or other material, must comply, along with other provisions, with CAL. BLDG. CODE § 1029's provisions on Assembly (which are the same as CAL. FIRE CODE § 1029 *et seq.*). CAL. CODE REGS. tit. 24, Part 2, Vol. 1, § 1029.1.

<sup>26</sup> CAL. FIRE CODE § 202, OCCUPANCY CLASSIFICATIONS, ASSEMBLY GROUP A-2. A building used for assembly purposes with an occupant load of less than 50 persons is a Group B occupancy under the California Fire Code.

<sup>27</sup> CAL. FIRE CODE § 105.3.3. Fire departments often provide helpful summaries of local fire code requirements pertinent to public assembly occupancies such as restaurants. *See, e.g.*, CORONA FIRE DEPARTMENT, PLACES OF ASSEMBLY: GUIDELINE PER 2013 CALIFORNIA FIRE CODE, *available at* [www.discovercorona.com/CityofCorona/media/Media/Fire/pdf/Prevention/2013-Place-of-Assembly-Guideline.pdf](http://www.discovercorona.com/CityofCorona/media/Media/Fire/pdf/Prevention/2013-Place-of-Assembly-Guideline.pdf).

*Page 40*

*The 1st full paragraph is replaced with the following text:*

Fire department officials will calculate the maximum occupant load of a restaurant for fire safety purposes. Assembly areas with a concentrated use and without fixed seats are calculated at 7 square feet per person, while assembly areas with less concentrated use are calculated at 15 square feet per person.<sup>28</sup> Under the California Fire Code and the regulations of the State Fire Marshal, any assembly room or area which is used for assembly, classroom, dining, drinking, or similar purposes, without fixed seats and with an occupant load of 50 or more persons must have posted a room capacity sign in a conspicuous place near the main exit using a durable sign with the lettering in a contrasting color from the background and stating the number of occupants permitted for each room use.<sup>29</sup>

<sup>28</sup> CAL. FIRE CODE § 1004.1.2 Table. “The occupant load permitted in any building, or portion thereof, is permitted to be increased from that number established for the occupancies in Table 1004.1.2, provided that all other requirements of the code are also met based on such modified number and the occupant load does not exceed one occupant per 7 square feet (0.65 m<sup>2</sup>) of occupiable floor space. Where required by the fire code official, an approved aisle, seating or fixed equipment diagram substantiating any increase in occupant load shall be submitted. Where required by the fire code official, such diagram shall be posted.” CAL. FIRE CODE § 1004.2.

<sup>29</sup> CAL. FIRE CODE §1004.3; CAL. CODE REGS. tit. 19, § 3.30.

*Page 40*

*The 2nd full paragraph is replaced with the following text:*

In some cases, a restaurant may need to incorporate an automatic sprinkler system for fire protection. When required, the sprinkler system must be provided throughout the floor area used for restaurant purposes and on all floors between the restaurant area and the level of exit discharge location.<sup>30</sup> As Group A-2 assembly uses, restaurants are required to have an automatic sprinkler system when any of the following exists: (i) the fire area exceeds 5,000 square feet; (ii) the fire area has an occupant load of 100 or more; (iii) the fire area is located on a floor other than the level of exit discharge serving such occupancies; or (iv) the structure exceeds 5,000 square feet, contains more than one fire area containing a Group A-2 occupancy, and is separated



into two or more buildings by fire walls of less than 4-hour fire-resistance rating without openings.<sup>31</sup>

<sup>30</sup> CAL. FIRE CODE § 903.2.1.

<sup>31</sup> CAL. FIRE CODE § 903.2.1.2.

*Page 40*

*The 3rd full paragraph is replaced with the following text:*

Fire alarm and detection systems may also be required. In new restaurant buildings, a manual fire alarm system must be installed with occupant loads of 300 or more.<sup>32</sup> A construction permit from a fire code official is required to install or modify a fire alarm and detection system as well as related equipment; however, maintenance is not considered a modification and does not require a permit.<sup>33</sup>

<sup>32</sup> CAL. FIRE CODE §§ 907.1, 907.2, 907.2.1.

<sup>33</sup> CAL. FIRE CODE § 105.7.6.

*Page 40*

*The 4th full paragraph is replaced with the following text:*

Each commercial kitchen exhaust hood and duct system required to have a Type I hood must be protected with an approved automatic fire-extinguishing system installed in accordance with the California Fire Code (see *Environmental Controls* below and *Wet-Chemical Fire Suppression System Requirement* discussed *infra* Chapter 12(B)(1) of the EGCR).<sup>34</sup> Portable fire extinguishers are required within 30 feet of commercial cooking equipment and in areas where flammable or combustible liquids are stored, used, or dispensed. They also must be placed in a conspicuous location (see *Portable Fire Extinguishers* discussed *infra* Chapter 12(B)(2) of the EGCR).<sup>35</sup>

<sup>34</sup> CAL. FIRE CODE § 904.2.2.

<sup>35</sup> CAL. FIRE CODE §§ 906.1, 906.5.

## **Chapter 2C.**

*Page 41*

<sup>38</sup> CAL. HEALTH & SAFETY CODE §§ 113824 (menu change), 114266(a)-(b).

### **Chapter 2.C.1**

*Page 41*

*The 2nd full paragraph is replaced with the following text:*

Floor surfaces in all areas, except those dedicated to sales, must be smooth, durable, nonabsorbent, and easily cleanable.<sup>39</sup> These areas include those where food is prepared and stored, where utensils<sup>40</sup> are washed, where garbage is stored, as well as janitorial and non-guest restroom areas. Flooring must continue up the wall in a seamless manner, forming a 3/8-inch minimum radius cove as an integral unit and should extend up the wall at least 4 inches.<sup>41</sup> These requirements, however, do not apply in storage areas where food is stored in original, unopened shipping containers such as cans, cartons, or sacks.<sup>42</sup>

<sup>39</sup> CAL. HEALTH & SAFETY CODE § 114268(a).

<sup>40</sup> CAL. HEALTH & SAFETY CODE § 113934.

<sup>41</sup> CAL. HEALTH & SAFETY CODE § 114268(b).

<sup>42</sup> *Id.*

### **Chapter 2.C.2**

*Page 42*

*The 2nd full paragraph is replaced with the following text:*

The walls and ceilings of all rooms in a restaurant are not restricted as to color, but generally must be durable, smooth, nonabsorbent, and washable.<sup>50</sup> These requirements do not

apply to areas where food is stored in unopened, original shipping containers, dining and sales areas, offices, bar areas in which alcohol is sold or served other than wall areas adjacent to bar sinks and areas where food is prepared, dressing rooms, dressing areas, locker areas, and restrooms used exclusively by patrons.<sup>51</sup> The walls and ceilings of customer restrooms need only be nonabsorbent and washable. Acoustical paneling may be utilized if it is installed not less than 6 feet above the floor and is otherwise in compliance with the Food Code.<sup>52</sup>

<sup>50</sup> CAL. HEALTH & SAFETY CODE § 114271(a).

<sup>51</sup> CAL. HEALTH & SAFETY CODE § 114271(b).

<sup>52</sup> CAL. HEALTH & SAFETY CODE § 114271(c).

<sup>55</sup> CAL. FIRE CODE §§ 807.1, 807.2.

*Page 43*

*The 1st full paragraph is replaced with the following text:*

Group A occupancies such as restaurants containing seats, tables, furnishings, displays, and similar fixtures or equipment must be provided with aisles leading to exits or exit doorways. Where seating is located at a table or counter and is adjacent to an aisle or aisle accessway, the aisle or aisle accessway must have a required clear width of 19 inches from the edge of the table or counter.<sup>55A</sup> The length of travel along the aisle accessway must not exceed 30 feet from any seat to the point where a person has a choice of two or more paths of egress travel to separate exits.<sup>56</sup>

<sup>55A</sup> CAL. FIRE CODE §§ 1029.12, 1029.12.1.

<sup>56</sup> CAL. FIRE CODE § 1029.12.1.2.

### **Chapter 2.C.3**

*Page 43*

*The 2nd full paragraph is replaced with the following text:*

Exits and exit access doors must be marked by an approved exit sign that is readily visible from any direction that a customer might approach seeking an exit.<sup>57</sup> Exits in a restaurant must be illuminated at all times.<sup>58</sup> Exit signs are required at all exit doors and whenever otherwise required to clearly indicate the direction of egress, except the main exit door which is obviously and clearly identifiable as an exit where approved by a fire code official.<sup>59</sup> Exit signs must have plainly legible letters at least 6 inches high in high contrast to the background.<sup>60</sup> Exit signs illuminated from an external source must have an intensity of 5 foot candles.<sup>61</sup>

<sup>57</sup> CAL. FIRE CODE § 1013.1.

<sup>58</sup> CAL. FIRE CODE § 1013.6.3.

<sup>59</sup> CAL. FIRE CODE § 1013.1.

<sup>60</sup> CAL. FIRE CODE § 1013.6.1.

<sup>61</sup> CAL. FIRE CODE § 1013.6.2. A “foot candle” is a non-metric unit of measure of the intensity of light falling on a surface; it was originally defined with reference to a standardized candle burning at 1 foot from a given surface.

#### **Chapter 2.C.4.c**

*Page 45*

*The 2nd full paragraph is replaced with the following text:*

Sufficient natural or artificial lighting must be supplied in all areas where food is prepared, processed, or served, or where utensils are being cleaned.<sup>80</sup> The required intensity of the light is determined by the particular activity for which the space is being utilized. At least 10 foot candles<sup>81</sup> of light are required (i) in dry food storage areas and walk-in refrigeration units at a distance of 30 inches above the floor, (ii) at a working surface on which alcoholic beverages are prepared or where utensils in the preparation or service of alcoholic beverages are cleaned, and (iii) inside equipment such as reach-in and under-the-counter refrigerators.<sup>82</sup>

A light intensity of at least 20 foot candles is required (i) at a surface where food is offered for consumer self-service, (ii) at a surface where fresh produce or prepackaged foods are offered or sold for consumption, (iii) in server stations where food is prepared, (iv) at a distance of 30 inches above the floor in areas used for handwashing, warewashing, equipment and utensil storage, and in restrooms, and (v) in all areas and rooms when they are being cleaned.<sup>83</sup> Except in server stations where food is prepared, an intensity of at least 50 foot candles is required at a surface where a food employee<sup>84</sup> works with food or works with utensils or equipment such as knives, slicers, grinders, or saws where employee safety is a factor.<sup>85</sup> The means of egress (exit from the building) must be illuminated at all times the building is in use by at least 1 foot candle at the walking surface level.<sup>86</sup>

<sup>80</sup> CAL. HEALTH & SAFETY CODE § 114252. Candles on tables are permitted if they are securely supported on substantial noncombustible bases and the candle flames are protected. CAL. FIRE CODE § 308.3. (Exception 1.3).

<sup>81</sup> See *supra* Chapter 2, footnote 61 in this supplement.

<sup>82</sup> CAL. HEALTH & SAFETY CODE § 114252(a)(1)-(3).

<sup>83</sup> CAL. HEALTH & SAFETY CODE § 114252(b)(1)-(4).

<sup>84</sup> CAL. HEALTH & SAFETY CODE § 113788.

<sup>85</sup> CAL. HEALTH & SAFETY CODE § 114252(c).

<sup>86</sup> CAL. FIRE CODE § 1008.2.1.

### **Chapter 2.D.3**

*Page 50*

<sup>134</sup> CAL. HEALTH & SAFETY CODE § 114103(b). As amended by S.B. No. 1067, effective Jan. 1, 2017, when a mechanical warewashing machine is used, there must be two metal drainboards, one for soiled equipment and utensils, and one for clean equipment and utensils, located adjacent to the machine. The requirement for a drainboard for soiled equipment and utensils or the requirement for a drainboard for clean equipment and utensils, or both requirements, may be satisfied by using the drainboards that are part of the manual warewashing sinks if the sink is

located adjacent to the machine. CAL. HEALTH & SAFETY CODE § 114103(b) (effective Jan. 1, 2017). *See supra* Chapter 1, footnote 7 in this supplement.

### **Chapter 2.E.1**

*Page 51*

<sup>140</sup> Effective Jan. 1, 2016, except where the foregoing provision applies (*see* text at Chapter 1, footnote 139 in the EGCR), a food facility that was constructed before Jan. 1, 2004, that has been in continuous operation since Jan. 1, 2004, and that provides space for the consumption of food on the premises must either (i) provide clean, operable toilet facilities for consumers, guests, or invitees on property used in connection with, or in, the food facility, or (ii) prominently post a sign within the food facility in a public area that there are no toilet facilities on the premises. CAL. HEALTH & SAFETY CODE § 114276(f)(1).

<sup>142</sup> CAL. HEALTH & SAFETY CODE § 114276(b)(2), (f). Effective Mar. 1, 2017, all single-user toilet facilities in any business establishment or place of accommodation must be identified as all-gender toilet facilities in compliance with Chapter 24 of the California Code of Regulations, and designated for use by no more than one occupant at a time or for family or assisted use. Any inspector, building official, or other local official responsible for code enforcement may inspect for compliance with this requirement. CAL. HEALTH & SAFETY CODE § 118600 (effective Mar. 1, 2017).

### **Chapter 2.E.2**

*Page 52*

*The 2nd full paragraph is replaced with the following text:*

Except for linen used in fabric implements, linens must not be used in contact with food unless they are used to line a container for the service of food, replaced each time the container is refilled for a new customer, and then laundered.<sup>147</sup> Appropriate space must be provided for the storage of clean linens, which include fabric items such as cloth hampers, cloth napkins, tablecloths, wiping cloths, and work garments including cloth gloves.<sup>148</sup> Soiled linens must be kept in clean, nonabsorbent receptacles or clean washable laundry bags in an area that will not result in contamination of food, clean equipment, clean utensils, and single-use articles.<sup>149</sup>

<sup>147</sup> CAL. HEALTH & SAFETY CODE §§ 114185, 113778.4 (“fabric implement” means a cloth or fabric, including, but not limited to, burlap and cheesecloth, that is used as part of the food process and comes in direct contact with food that is subsequently cooked).

<sup>148</sup> CAL. HEALTH & SAFETY CODE §§ 113820, 114185.2, 114185.4(a).

<sup>149</sup> CAL. HEALTH & SAFETY CODE § 114185.4(b).

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<sup>158</sup> CAL. HEALTH & SAFETY CODE § 114185.5(b), (c) (if wiping cloths are laundered on the premises, they must be laundered in a mechanical clothes washer and dryer or in a warewashing sink that is cleaned and sanitized before and after each time it is used to wash wiping cloths or wash produce or thaw food).

### **Chapter 2.E.3**

*Page 54*

<sup>165</sup> CAL. HEALTH & SAFETY CODE § 114254.2(b).

### **Chapter 2.E.4**

*Page 55*

*The 3rd full paragraph is replaced with the following text:*

All animal byproducts and inedible kitchen grease (other than grease recovered from a grease interceptor) must be picked up either by a state-licensed renderer or a state-registered transporter of inedible kitchen grease.<sup>183</sup> See *Oil and Grease* discussed *infra* Chapter 12(C) in the EGCR and in this supplement.

<sup>183</sup> CAL. HEALTH & SAFETY CODE § 114245.8 was repealed by Stats. 2009 c. 572 (S.B. 241).

### **Chapter 2.E.5**

*Page 56*

*The 1st full paragraph is replaced with the following text:*

So long as contamination of food, clean equipment, utensils, linens, and unwrapped single-use articles cannot result, the following live animals may be allowed in a restaurant or other food facility as specified below.<sup>188</sup>

- edible fish or decorative fish in aquariums, shellfish or crustacea on ice, under refrigeration or in display tanks;
- live animals intended for consumption if kept in sanitary conditions separate from all food and utensil handling areas, slaughtered in a separate room designed solely for that purpose and separated from other food and utensil handling areas, and maintained in an area that has ventilation separate from food and utensil handling areas;
- dogs used by police or security personnel;
- in areas not used for food preparation and typically open to restaurant customers, service animals<sup>188A</sup> controlled by a disabled employee or person, if a health or safety hazard will not result from the presence or activities of the service animal; or
- subject to local regulations, pet dogs<sup>188B</sup> under the control of a person in an outdoor dining area.

<sup>188</sup> CAL. HEALTH & SAFETY CODE § 114295.5(a)-(d).

<sup>188A</sup> CAL. HEALTH & SAFETY CODE § 113903. Under the Food Code, a service animal is any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability, or that is in training to do that work or perform those tasks. Other species of animals, whether wild or domestic, trained or untrained, are not service animals under this definition. A dog that deters crime or provides emotional support is not a service animal under this definition. *Id.* See *infra* Chapter 15(A)(3)(a) of this supplement for further discussion of service animals under the Americans with Disabilities Act (ADA).

<sup>188B</sup> CAL. HEALTH & SAFETY CODE §§ 113709 (local jurisdictions are permitted to prohibit the presence of pet dogs in outdoor dining areas of food facilities), 114259.5(d). See *infra* Chapter 24(B) in this supplement for discussion of pet dogs in outdoor dining areas.



*Page 56*

*The 2nd full paragraph is replaced with the following text:*

Service animals, patrol dogs, and pets must not be handled by food employees, but food employees with service animals may handle or care for their service animals if they wash their hands as required by the Food Code. Food employees may also care for fish in aquariums or shellfish or crustacea in tanks if they comply with the Food Code's handwashing requirements.<sup>189</sup> See Handwashing discussed supra Chapter 1(C)(2)(a) in the EGCRL and in this supplement.

<sup>189</sup> CAL. HEALTH & SAFETY CODE § 114259.4. For discussion of the rights of food service employees with disabilities under the ADA, including their ability to use service animals on the job, see EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HOW TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR RESTAURANTS AND OTHER FOOD SERVICE EMPLOYERS (last modified September 24, 2014), *available at* [http://www.eeoc.gov/facts/restaurant\\_guide.html](http://www.eeoc.gov/facts/restaurant_guide.html). A food service employee with a disability is permitted to handle his or her service animal at work unless the restaurant owner or manager demonstrates that it would cause an undue hardship or pose a direct threat. *Id.* at Q&As, ## 4, 5, 25 and generally ##20-27.

*Page 59*

*The following new Chapter 2(G) is added at the end of Chapter 2(F):*

### **G. Point of Sale Systems**

Restaurants must comply with requirements regarding point-of-sale systems.<sup>200</sup> For example, the price of each good or service must be conspicuously displayed to the consumer at the time the price is interpreted by the system.<sup>201</sup> If the restaurant advertises a price reduction or discount regarding an item offered for sale, the checkout system customer indicator must display either (1) the discounted price for that item, or (2) the regular price and a credit or reduction of the advertised savings.<sup>202</sup> Any surcharges and the total value to be charged for the overall transaction also must be displayed for the consumer at least once before the consumer is required

to pay.<sup>203</sup> In addition, the amounts displayed on the checkout system customer indicator must be easily viewable from a typical customer position at each checkout location.<sup>204</sup>

Restaurants with point-of-sale systems must also register and pay registration fees. For example, in the city and county of San Francisco, all regulated point of sale stations are required to register annually with the County Sealer.<sup>205</sup> Each business location must have a separate registration for each separate POS station.<sup>206</sup> Registrations are valid for up to one year and are not transferrable between persons or locations.<sup>207</sup> The annual registration fee is \$75 per business location, plus \$14 fee for each POS station.<sup>208</sup> The maximum fee per location is \$773.<sup>209</sup> There are fees and penalties for late payments and non-registration, and failed inspections may result in a re-inspection fee.<sup>210</sup>

<sup>200</sup> A “point-of-sale system” means any computer or electronic system used by a retail establishment such as, but not limited to, Universal Product Code scanners, price lookup codes, or an electronic price lookup system as a means for determining the price of the item being purchased by a consumer. CAL. BUS. & PROF. CODE § 13300(b).

<sup>201</sup> CAL. BUS. & PROF. CODE § 13300(a).

<sup>202</sup> *Id.* Restaurants must ensure that the prices posted or advertised match what is being charged. It is against the law to charge or compute a price greater than what is advertised, posted, marked, displayed, or quoted for a commodity or service, or to charge an amount greater than the lowest price posted, notwithstanding any time limitations. CAL. BUS. & PROF. CODE § 12024.2.

<sup>203</sup> CAL. BUS. & PROF. CODE § 13300(a).

<sup>204</sup> *Id.*

<sup>205</sup> SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH, INFORMATION ON AUTOMATED POINT OF SALE (POS) STATIONS, *available at* <https://www.sfdph.org/dph/files/EHSdocs/WeightsMeasures/InfoAutoPointofSaleStation.pdf>.

<sup>206</sup> S. F. ADMIN. CODE, CHAPTER 115, § 115.2. POS stations are individual and separate equipment capable of recovering electronically stored price information that is used to charge consumers for the purchase of commodities. This includes Universal Price Code scanners and price look up codes. SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH, *supra* Chapter 2, footnote 205 in this supplement.

<sup>207</sup> S. F. ADMIN. CODE, CHAPTER 115, § 115.3

<sup>208</sup> S. F. ADMIN. CODE, CHAPTER 115, § 115.4.

<sup>209</sup> *Id.*

<sup>210</sup> S. F. ADMIN. CODE, CHAPTER 115, §§ 115.5, 115.8; SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH, *supra* Chapter 2, footnote 205 in this supplement.

## Chapter 3

### The Inspector Is Here: Inspections, Grading Systems, Enforcement, and Recalls

Page 61

<sup>1</sup> CAL. HEALTH & SAFETY CODE § 113700 *et seq.*

#### Chapter 3A.

Page 62

*The 2nd full paragraph is replaced with the following text:*

Each violation of these specified inspection criteria must be categorized by the local enforcement agency as a major violation or a minor violation.<sup>7</sup> In keeping with the focus of the Food Code on foodborne disease risk factors and necessary public health interventions to combat them, a “major violation” of the Food Code is one that “may pose an imminent health hazard and warrants immediate closure or other corrective action.”<sup>8</sup> In turn, “minor violations” are those that do “not pose an imminent health hazard, but [do] warrant correction.”<sup>9</sup>

<sup>7</sup> CAL. HEALTH & SAFETY CODE § 113725(a).

<sup>8</sup> CAL. HEALTH & SAFETY CODE § 113821. One of the major forces behind the Food Code, the California Retail Food Safety Coalition (hereinafter “CRFSC”), in its California Retail Food Code-Summary of Major Changes, details the provisions of the Food Code that should give rise to major violations if breached. *See* [http://publichealth.lacounty.gov/eh/docs/Specialized/Summary\\_CalCodeChanges.pdf](http://publichealth.lacounty.gov/eh/docs/Specialized/Summary_CalCodeChanges.pdf).

<sup>9</sup> CAL. HEALTH & SAFETY CODE § 113827. The guidelines prepared by some local enforcement agencies set forth major and minor violations of the Food Code. *See, e.g.*, County of Sacramento Environmental Management Department, California Retail Food Code Field Inspection Guide, *available at* [http://www.emd.saccounty.net/EH/FoodProtect-RetailFood/Documents/CalCode\\_FieldGuide.pdf](http://www.emd.saccounty.net/EH/FoodProtect-RetailFood/Documents/CalCode_FieldGuide.pdf).

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<sup>11</sup> *See, e.g.*, County of Los Angeles Department of Public Health, Environmental Health, Reference Guide for the Food Official Inspection Report (Aug. 19, 2016) *available at*

<http://publichealth.lacounty.gov/eh/docs/RefGuideFoodInspectionReport.pdf>, where the sample food inspection report covers physical facilities such as floors, walls and ceilings, refuse, and toilet facilities.

<sup>15</sup> See, e.g., Alameda County Environmental Health, Food Safety, *available at* [http://www.acgov.org/aceh/food/restaurant\\_inspection.htm](http://www.acgov.org/aceh/food/restaurant_inspection.htm), and Los Angeles County Public Health Food Facility Rating, *available at* <https://ehservices.publichealth.lacounty.gov>. Consumer review website Yelp now posts restaurant inspection scores online in cities such as San Francisco and Los Angeles. In addition to a numerical score, the date of inspection and specific violations also appear. While Yelp collects public inspection data from local health departments, it believes that consumer reviews can help inspectors narrow the search for violators, rather than wasting time on spot checks at rule-abiding restaurants. See Luther Lowe, *Yelp + Open Data = The End of Food Poisoning?*, Yelp Official Blog (Feb. 16, 2015), *available at* <http://officialblog.yelp.com/2015/02/yelp-open-data-the-end-of-food-poisoning.html>; Michael Luca and Luther Lowe, *City Governments Are Using Yelp to Tell You Where Not to Eat*, Harvard Business Review (February 12, 2015), *available at* <https://hbr.org/2015/02/city-governments-are-using-yelp-to-tell-you-where-not-to-eat>.

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<sup>19</sup> For an example of the debate around such systems, review the 2013-2014 Grand Jury Report entitled “Revisiting Orange County Restaurant Food Safety: Improving Placard Visibility for the Public’s Best Interest”, *available at* [http://www.ocgrandjury.org/pdfs/2013\\_2014\\_GJreport/Restaurant\\_Report.pdf](http://www.ocgrandjury.org/pdfs/2013_2014_GJreport/Restaurant_Report.pdf). The report recommended a color enhanced placard system, which has not been adopted. See Orange County Health Care Agency, Food Safety Public Notification System, *available at* <http://ocfoodinfo.com/retail/pass>.

<sup>20</sup> The county’s Grading and Posting Requirements for Retail Food Facilities, *available at* <http://publichealth.lacounty.gov/eh/misc/ehpost.htm>, describes the ABC grading system and states that grade/score cards must remain posted until the time of the next routine inspection. After media reports and investigations showing that the grading system had not prevented the continued operation of restaurants with major Food Code violations, Los Angeles undertook a review of its restaurant grading system. See Stephanie Baer, *Changes are Coming to Los Angeles County’s Restaurant Public Health Grades*, The San Gabriel Valley Tribune (Mar. 3, 2016), *available at* <http://www.sgvtribune.com/health/20160303/changes-are-coming-to-los-angeles-countys-restaurant-public-health-grades>. Changes have now been made to the grading system. County of Los Angeles Department of Public Health, Environmental Health, Changes to the Retail Food Facility Grading System, *available at* <http://publichealth.lacounty.gov/eh/misc/changeGradingSys.htm>. See also National Restaurant

Association, *Why Health Inspection Scores May Fail Restaurants* (Sept. 1, 2015), available at <http://www.restaurant.org/News-Research/News/Why-health-inspection-scores-may-fail-restaurants>.

<sup>21</sup> San Bernardino County's ABC grading system is based on a 100 point scale. A grade of "A" indicates a score of 90 or higher, a grade of "B" indicates a score of 80-89, and a grade of "C" indicates a score of 70-79. An establishment that receives a "C" is required to correct all deficiencies and must request a reinspection within 30 days to avoid closure. An establishment that fails to receive a "B" grade on the reinspection may be closed immediately and may not reopen until a reinspection achieves a "B" grade. A food facility that receives a score of less than 70 will be closed for not less than 24 hours to allow corrections and reinspection. County of San Bernardino Environmental Health Services, ABC Retail Food Inspection Guide (Mar. 2012), available at [http://www.sbcounty.gov/uploads/dph/dehs/Depts/EnvironmentalHealth/EHSDocuments/abc\\_retail\\_food\\_inspection\\_guide.pdf](http://www.sbcounty.gov/uploads/dph/dehs/Depts/EnvironmentalHealth/EHSDocuments/abc_retail_food_inspection_guide.pdf), at 9-10.

<sup>22</sup> See San Francisco Department of Public Health, Environmental Health, available at <https://www.sfdph.org/dph/EH/Food/Score/default.asp>.

<sup>23</sup> Under the Sacramento County system, a Green placard indicates a "Pass" – an acceptable level of compliance achieved; a Yellow placard indicates a "Conditional Pass" – violations observed that required immediate correction and a follow-up inspection within 24-72 hours; a Red placard indicates "Closed" – closure is required when an imminent danger to public health or safety is observed. County of Sacramento, Environmental Management, Green Yellow Red (GYR) Placard Program, available at [http://www.emd.saccounty.net/EH/FoodProtect-RetailFood/Pages/GYR\\_Placards.aspx](http://www.emd.saccounty.net/EH/FoodProtect-RetailFood/Pages/GYR_Placards.aspx).

<sup>24</sup> This system can lead to increased demand on local enforcement agencies for reinspections and re-grading. See, e.g., County of San Bernardino Environmental Health Services, ABC Retail Food Inspection Guide, *supra* Chapter 3, footnote 21 in this supplement, at 9 (a restaurant receiving a "B" grade can request a re-score before the time of the next evaluation and will be charged for time required to perform evaluation).

### **Chapter 3B.**

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<sup>28</sup> CAL. HEALTH & SAFETY CODE § 114390(b). For local enforcement agency authority concerning community food producers and gleaners, see *supra* Chapter 1, footnote 30A in this supplement. For local enforcement agency authority concerning cottage food operations, see *infra* Chapter 27, footnote 41 in this supplement.

**Chapter 3C.**

*Pages 67-69*

*Chapter 3(C) is replaced in its entirety with the following text:*

**C. The Food Safety Modernization Act: New Enforcement and Regulatory Tools**

The primary purpose of the 1938 Federal Food, Drug, and Cosmetic Act (hereinafter "FDCA")<sup>45</sup> as it pertains to food<sup>46</sup> is to protect public health and safety by preventing adulterated<sup>47</sup> or misbranded<sup>48</sup> food from entering interstate commerce. The FDCA is administered by the Food and Drug Administration (hereinafter "FDA"), an agency within the U.S. Department of Health and Human Services, which also establishes regulations governing food manufacture, processing, and labeling.

The FDCA is enforced by the federal government;<sup>49</sup> injured consumers do not have the right to a private civil right of action for violations of the FDCA.<sup>50</sup> Remedies for violation of the FDCA include injunctive relief, seizure, or forfeiture of food items, equitable remedies such as restitution and disgorgement of profit,<sup>51</sup> and criminal prosecution resulting in financial penalties and even imprisonment.<sup>52</sup>

A flurry of interest in enhanced federal food safety legislation was generated during the 2008 Presidential campaign<sup>53</sup> and during the salmonella-driven peanut product scandal stretching into early 2009.<sup>54</sup> The result of this renewed interest in food safety was the enactment in 2011 of the FDA Food Safety Modernization Act (hereinafter, "FSMA"),<sup>55</sup> which made sweeping changes to the FDCA. Although much of the FSMA concentrates on manufacturers, distributors and farms, the FSMA's food safety infrastructure affects restaurants due to their significant place in the food supply chain.<sup>56</sup> The FSMA has implications for California restaurants, particularly as

the FDA implements the numerous regulations required by the FSMA. Some significant implications are discussed below.

### ***1. Recalls***

Prior to 2011, the FDA lacked the authority under the FDCA to order a manufacturer or distributor to recall a defective food item.<sup>57</sup> Amid the calls for requiring detailed food safety plans from all food manufacturers, safety standards for fruits and vegetables, and improved scrutiny of foreign food supplies, there were numerous proposals to give the FDA the power to authorize mandatory food recalls.<sup>58</sup>

With the enactment of the FSMA, the FDCA was amended to give the FDA mandatory recall authority.<sup>59</sup> The FDA must first provide a responsible party<sup>60</sup> with an opportunity for a voluntary recall.<sup>61</sup> If the responsible party refuses or fails to voluntarily cease distribution or recall the food in compliance with the FDA's requirements, the FDA now has the authority to require a food facility<sup>62</sup> to recall an article of food other than infant formula based on information gathered by the FDA (through the reportable food registry<sup>63</sup> or by any other means) that there is a reasonable probability the food is adulterated under 21 U.S.C. § 342 or misbranded under 21 U.S.C. § 343(w) and the use of or exposure to the food will cause serious adverse health consequences or death to humans or animals.<sup>64</sup>

As part of the mandatory recall procedures, the FDA must publish press releases and other public notices to publicize the recall to consumers and retailers such as restaurants to whom or which the recalled article of food was or may have been distributed.<sup>65</sup> The FDA must also coordinate with state and local officials with responsibilities related to food recalls or to foodborne illness outbreaks associated with recalled foods.<sup>66</sup>



The FDA used its new mandatory recall authority very sparingly from 2011 through 2015,<sup>67</sup> prompting criticism and concern about delays in protecting the public.<sup>68</sup> The numerous recalls that occurred during that period were generally undertaken voluntarily by a manufacturer or a distributor, often at the request of the FDA.<sup>69</sup>

A firm may decide of its own volition to remove or correct a distributed product;<sup>70</sup> the removal or correction is considered a recall if the FDA regards the product as involving a violation that is subject to legal action such as a seizure.<sup>71</sup> An evaluation of the health hazard presented by a food item being recalled is undertaken by FDA scientists, and the recall is assigned a Class I, Class II, or Class III classification to indicate the relative degree of health hazard involved.<sup>72</sup>

A recall strategy is developed by the FDA for an FDA-requested recall or by the recalling firm for a firm-initiated recall.<sup>73</sup> Recall communications, public notification of recalls, recall status reports, and general industry guidance must conform to regulatory requirements.<sup>74</sup> Depending on the food item's degree of hazard and extent of distribution, the recall strategy will include notifying retailers such as restaurants to recall the food item, including "subrecalls" to make sure that wholesalers and distributors reach out to customers to whom or which food items were distributed.<sup>75</sup>

A recall is terminated when the FDA determines that all reasonable efforts have been made to remove or correct the food item and when it is reasonable to assume that the item has been removed and proper disposition or correction has been made.<sup>76</sup> Due to changes enacted by the FSMA, the FDA has the power to assess fees against a food facility that fails to comply with a recall order.<sup>77</sup>

As part of recall response planning, restaurant owners and managers should consider:

- maintaining day-to-day awareness of new food product recalls through the websites of the FDA (which often provides information from the Centers for Disease Control),<sup>78</sup> the Food Safety Inspection Service (“FSIS”) of the United States Department of Agriculture (“USDA”),<sup>79</sup> the California Department of Public Health (“CDPH”),<sup>80</sup> and local environmental health departments;<sup>81</sup>
- monitoring the recall information provided by relevant food manufacturing and distribution companies;
- specifying a person or persons responsible for receiving information about food product recalls and detailing internal restaurant communications and procedures in the event of a food recall;
- using product names, product code numbers, and product descriptions to immediately remove all recalled food products and menu items containing recalled food products;
- segregating recalled products, returning them to the vendor, or destroying them in accordance with the manufacturer’s or regulator’s instructions, and cleaning and sanitizing food contact surfaces in accordance with regulatory and manufacturer/distributor instructions;<sup>82</sup>
- learning the recall plans of the restaurant’s suppliers to make sure that the restaurant will be quickly notified of any recall of potentially dangerous food items; and
- in the event of a notice from a supplier or the CDPH<sup>83</sup> about a recalled meat- or poultry-related product,<sup>84</sup> working with local enforcement officials and the CDPH to determine whether the contaminated product has been served, sold, or offered to the public,<sup>85</sup> and removing the contaminated product from the restaurant's food supply.<sup>86</sup>

By building a recall response plan before problems arise, restaurant owners and managers can take steps to minimize their risk of serving potentially contaminated food to customers and their own liability as part of the food supply chain. The Reportable Food Registry and emerging product tracing systems, discussed *infra* in Sections 3(C)(3) and 3(C)(6) in this supplement, are likely tools in recall response and management.

## **2. *Administrative Detention***

The FDA's power to administratively detain contaminated food was enhanced by the FSMA. Prior to its amendment by the FSMA, Section 304 of the FDCA required the FDA to show that it had "credible evidence or information" that the detained article of food presented a threat of "serious adverse health consequences or death to humans or animals," a standard so rigorous that the FDA was unable to make use of its detention authority.<sup>87</sup> As amended by Section 207 of the FSMA, Section 304(h)(1)(A) of the FDCA now permits the FDA to order the detention of any article of food that it finds during an inspection, examination, or investigation if it has "reason to believe" that the food "is adulterated or misbranded."<sup>88</sup>

California's Sherman Food, Drug, and Cosmetic Law (hereinafter "SFDC Act") also prohibits the adulteration or misbranding of food, the sale or manufacture of adulterated or misbranded food, or the commercial receipt or delivery of such food.<sup>89</sup> The CDPH has the authority to seize and embargo adulterated or misbranded food that violates the protections of the SFDC Act, and can impose penalties or seek an injunction.<sup>90</sup>

### 3. ***Reportable Food Registry***

A restaurant may learn directly about potentially adulterated food in its possession through the operation of the FDA's Reportable Food Registry. A "reportable food" is an article of food (other than infant formula) subject to the FDA's jurisdiction for which there is a reasonable probability that the use of, or exposure to, such article of food will cause serious adverse health consequences or death to humans or animals.<sup>91</sup> A food that fails to disclose a major food allergen defined in the Food Allergen Labeling and Consumer Protection Act may be a "reportable food" if it meets the foregoing test due to the failure to disclose the allergen.<sup>92</sup> The "responsible party" for a "reportable food" is the person that submitted the registration under 21 U.S.C. § 350d(a) for the food facility at which the food was manufactured, processed, packed, or held.<sup>93</sup>

A responsible party generally must file an online report with the FDA within 24 hours of determining that an article of food is reportable.<sup>94</sup> After receipt of a report, among other things, the FDA may require the responsible party to provide to restaurants and all other "immediate subsequent recipients" a notification setting forth specified pieces of information about the adulterated food product.<sup>95</sup>

A restaurant owner or manager who believes that his or her restaurant has acquired an adulterated food product should contact the vendor of the item, and that vendor must make a report to the Reportable Food electronic portal if it is a responsible party that manufactured, processed, packed, or held the food item in question.<sup>96</sup> Restaurant owners and managers should also consult the vendor's food recall plan and their own food recall plan to ensure that the reportable food is identified, removed, segregated, returned, or destroyed, as appropriate. *See*

Section 3(C)(1) *supra* in this supplement.

#### **4. Produce Safety**

Contaminated produce was linked to 131 outbreaks of foodborne illness between 1996 and 2010, causing more than 14,000 illnesses, almost 1400 hospitalizations, and 34 deaths.<sup>97</sup> Section 105 of the FSMA, codified as 21 U.S.C. Section 350h, directs the FDA to set science-based minimum standards for the safe production and harvesting of fruits and vegetables that the FDA determines will minimize the risk of serious adverse health consequences or death.<sup>98</sup> The FDA's final rule on produce safety<sup>99</sup> (“hereinafter, “Final Produce Safety Rule”) sets standards for farms for the safe growing, harvesting, packing, and holding of fruits and vegetables grown for human consumption.<sup>100</sup> The Final Produce Safety Rule regulates agricultural water, biological soil amendments of animal origin, health and hygiene of farm personnel, domesticated and wild animals in the growing area, and equipment, tools, and buildings.<sup>101</sup> It contains particular regulations for sprouts, due to the unique risks for pathogen and listeria growth associated with sprouts production.<sup>102</sup>

As directed by the FSMA and duly reflected in the final rule, there is a qualified exemption from the Final Produce Safety Rule for some smaller-scale farms<sup>103</sup> servicing primarily their local communities.<sup>104</sup> The Final Produce Safety Rule does not apply to farms that had (i) annual food sales averaging less than \$500,000 a year during the previous 3 years, and (ii) average annual direct food sales to “qualified end-users” during the previous 3 years that exceeded average annual sales to all other buyers during that period.<sup>105</sup> “Qualified end-users” of a food are defined as either consumers (not including a business) or restaurants or other retail food establishments located in the same state or the same Indian reservation as the farm that

produced the food or not more than 275 miles away from it.<sup>106</sup> Special labeling requirements apply to produce that is exempted on this basis.<sup>107</sup>

Farms with a qualified exemption must comply with the recordkeeping provisions of the Final Produce Safety Rule, must keep records supporting their qualified exemption for at least 2 years and as long as necessary to support the farm's exempted status, and must include in those records a written record reflecting an annual review and verification of continued eligibility for the exemption.<sup>108</sup> Farms with a qualified exemption remain subject to the compliance and enforcement provisions of the Final Produce Safety Rule, and the FDA retains the authority to withdraw the exemption if an otherwise-exempted farm is directly linked to an outbreak of foodborne illness, or if the FDA determines that withdrawal of the exemption is necessary to protect the public health or to prevent or mitigate such an illness.<sup>109</sup>

The Final Produce Safety Rule will require restaurant owners and managers to determine whether a local farm supplier is entitled to a qualified exemption. If the farm claims the qualified exemption for fresh fruits and vegetables that would otherwise be subject to the Final Produce Safety Rule, restaurant owners and managers should inform themselves of the basis upon which the farm claims the exemption and the farm's compliance with the terms thereof. After all, a restaurant that is a "qualified end user" will likely be generating some of the records that will provide the documentary support for the farm's qualified exemption under the Final Produce Safety Rule.

## **5. *Recordkeeping***

Under Section 414(b) of the FDCA, 21 U.S.C. Section 350c(b), all persons who manufacture, process, pack, transport, distribute, receive, hold, or import food are required to

establish and maintain certain records for inspection by the FDA.<sup>110</sup> Restaurants and farms, however, are specifically excluded from this requirement.<sup>111</sup>

Under Section 414(a) of the FDCA, 21 U.S.C. Section 350c(a), as amended by the FSMA,<sup>112</sup> all persons who manufacture, process, pack, transport, distribute, receive, hold, or import food must allow the FDA to access and copy their records concerning (i) food or food reasonably believed to be similarly affected that is adulterated and presents a threat of serious adverse health consequences or death to humans or animals,<sup>113</sup> or (ii) the use or exposure to food or food reasonably believed to be similarly affected when the FDA believes it reasonably probable that such food will cause serious adverse health consequences or death to human or animals.<sup>114</sup> The FDA's records access authority under Section 414(a) of the FDCA, however, does not apply to records from restaurants and farms.<sup>115</sup>

These recordkeeping and record access exclusions for restaurants have implications for the product tracing system contemplated by the FSMA, discussed below in Chapter 3(C)(6).

## **6. *Product Tracing***

A product tracing system involves documenting the production and distribution chain of products so that, in the event of an outbreak of foodborne illness or evidence of a contaminated article of food, a food item can be traced back to a common source or traced forward through distribution channels.<sup>116</sup> Product tracing allows a recipient to ensure that it is receiving a safe article of food, and in the event of a product recall or other safety incident, it allows government agencies and those who produce and sell food to trace a contaminated food product, to remove it from the food supply chain, and to alert the public to ensure consumer safety.<sup>117</sup>

Section 204 of the FSMA, entitled “Enhancing Tracking and Tracing of Food and Recordkeeping,” requires the FDA in tandem with other agencies to establish pilot projects,

discussed below, to evaluate methods and technologies for rapid and effective tracking and tracing of foods.<sup>118</sup> Section 204 requires the FDA to publish a notice of proposed rulemaking to establish recordkeeping requirements for foods designated by the FDA as “high-risk foods” in addition to the recordkeeping requirements described above in Section 414(a) of the FDCA.<sup>119</sup> The FDA has not yet issued a list of “high risk foods” or a proposed rule.<sup>120</sup>

Within 1 year of the date of the final rule, Section 204 of the FSMA requires the Comptroller General under specified conditions to evaluate the public health benefits and risks if any of limiting (i) product tracing requirements solely to “high-risk foods,” and (ii) the participation of restaurants in the recordkeeping requirements for product tracing.<sup>121</sup> If the Comptroller General determines that these limitations do not adequately protect public health, he or she is required to submit to Congress recommendations, if appropriate, regarding recordkeeping requirements for restaurants and additional foods to be included in product tracing requirements.<sup>122</sup>

The FDA has released a report on two pilot projects which studied product tracing through the food supply chain of whole and sliced tomatoes, frozen kung pao-style dishes containing peanut products, red pepper spice, and chicken, and jarred peanut butter and dry and packaged peanut/spices.<sup>123</sup> Among the recommendations of the report are that the FDA (i) establish a uniform set of recordkeeping requirements for all foods it regulates, (ii) require all firms that manufacture, process, pack, transport, distribute, receive, hold, or import food to identify and maintain records of critical tracking events and key data elements, and (iii) require each member of the food supply chain to develop, document, and exercise a product tracing plan.<sup>124</sup> As the food industry awaits the input of the FDA, many food industry segments have



already developed product tracing systems, which vary in their use of technology and in their scope and precision.<sup>125</sup>

<sup>45</sup> 21 U.S.C. § 301 *et seq.*

<sup>46</sup> Under Section 201(f) of the FDCA, “food” means (i) articles used for food or drink for man or other animals, (ii) chewing gum, and (iii) articles used for components of any such article. 21 U.S.C. § 321(f).

<sup>47</sup> 21 U.S.C. § 342 (defining when a food is deemed to be adulterated).

<sup>48</sup> 21 U.S.C. § 343 (defining when a food is deemed to be misbranded).

<sup>49</sup> 21 U.S.C. § 337(a) (stating that proceedings for the enforcement or to restrain violations of the FDCA shall be by and in the name of the United States).

<sup>50</sup> *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (U.S. 1986).

<sup>51</sup> See generally Annotation, *Remedies Available for Violations of Federal Food, Drug, and Cosmetic Act (FDCA)*, 25 A.L.R. Fed. 2d 431 (2008). Chapter III of the FDCA addresses prohibited acts. Section 301 of the FDCA, in 21 U.S.C. § 331(a)-(d), prohibits the adulteration or misbranding of any food in interstate commerce or the introduction or delivery for introduction, or receipt and delivery, of such items into interstate commerce. Under 21 U.S.C. § 333(a)(1), Section 303 of the FDCA, any person who violates a provision of 21 U.S.C. § 331 faces imprisonment for not more than 1 year and a fine of \$1,000, or both, and if that violation was undertaken with intent to defraud or mislead, the perpetrator faces imprisonment for not more than 3 years and a fine of not more than \$10,000, or both.

<sup>52</sup> In 2013, 2 cantaloupe farmers in Colorado were charged with 6 counts of introducing cantaloupes adulterated with *listeria monocytogenes* into interstate commerce. Thirty-three people died and 147 people were hospitalized after eating the tainted cantaloupes. The indicted farmers faced a year in prison and fines of up to \$250,000 per count. The FDA stated that the filing of criminal charges was designed to send a message that absolute care must be taken to protect the food supply chain from deadly pathogens. U.S. DEPARTMENT OF JUSTICE PRESS RELEASE (Sept. 26, 2013), available at <https://www.justice.gov/usao-co/pr/eric-and-ryan-jensen-charged-introducing-tainted-cantaloupe-interstate-commerce>. Each farmer pleaded guilty and received 5 years of probation and 6 months of home detention, and was ordered to pay \$150,000 in restitution and to perform 100 hours of community service. Mary Beth Marklein, *Cantaloupe Farmers Get No Prison Time in Disease Outbreak*, USA Today (Jan. 28, 2014), available at

<http://www.usatoday.com/story/news/nation/2014/01/28/sentencing-of-colorado-cantaloupe-farmers/4958671/>. See also Chapter 3, footnote 54 *infra* in this supplement.

<sup>53</sup> Paul Frumkin, *Food Safety Looms Large on Capitol Hill, Campaign Trail*, Restaurant News (May 5, 2008), available at <http://nrn.com/product-watch/food-safety-looms-large-capitol-hill-campaign-trail>.

<sup>54</sup> Caroline Scott-Thomas, *Food Industry Urges Congress to Reform Food Safety Rules*, Foodnavigator-USA (Jan. 26, 2009), available at <http://www.foodnavigator-usa.com/Regulation/Food-industry-urges-Congress-to-reform-food-safety-rules>. Executives of Peanut Corporation of America were indicted, among other things, for intentionally adulterating and misbranding peanut products with intent to defraud under 21 U.S.C. §§ 331(a) and 333(a)(2). See *United States of America v. Stewart Parnell et al.*, Case No. 1:13-CR-12-WLS (U.S. District Court for the Middle District of Georgia, Albany Division), available at <http://www.justice.gov/iso/opa/resources/61201322111426350488.pdf>. The chief executive officer was convicted and sentenced to 28 years in prison for knowingly shipping salmonella-tainted peanut butter linked to 9 deaths and 714 illnesses. In the view of the U.S. Department of Justice, this sentence was the harshest punishment then-to-date in a food safety case. Two other executives of the Peanut Corporation of America were also convicted and sentenced to prison terms. *Former Peanut Corporation Exec Gets 28 Years for Role in Deadly Salmonella Outbreak* (Sept. 21, 2015), available at <http://www.npr.org/sections/thetwo-way/2015/09/21/442273854/former-peanut-company-exec-could-get-life-sentence-in-deadly-salmonella-outbreak>.

<sup>55</sup> Pub. L. No. 111-353, 124 Stat. 3885 (2011), amending various sections of the FDCA, 21 U.S.C. § 301 *et seq.* The FSMA was signed into law by President Obama on Jan. 4, 2011. In an effort to protect consumers and modernize the food safety system, under the FSMA the burden is on food companies and growers to ensure that their products are safe. In the continuing struggle to fully fund the FSMA, supporters in the U.S. Senate have noted that adequate funding would “enable the FDA to retrain inspectors in the new prevention-based oversight system; hire technical experts to assist growers and food manufacturers to understand and comply with the new requirements; and build the new comprehensive food import oversight system provided for in the law.” James Andrews, *Senators, Food Industry Groups Call for More FSMA Funding*, Food Safety News (May 1, 2015), available at <http://www.foodsafetynews.com/2015/05/seven-u-s-senators-major-food-industry-groups-call-for-more-fsma-funding/#.Vfx3OP-FPIU>.

<sup>56</sup> Steven Sklare, *Understanding the New Food Safety Rules*, Restaurant Hospitality (Jan. 1, 2012), available at [http://restaurant-hospitality.com/food\\_safety/understanding-the-new-food-safety-rules0112](http://restaurant-hospitality.com/food_safety/understanding-the-new-food-safety-rules0112).

<sup>57</sup> FDA, ANNUAL REPORT TO CONGRESS ON THE USE OF MANDATORY RECALL AUTHORITY- 2013 (Dec. 2013), *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm382490.htm>.

<sup>58</sup> Ricardo Alonso-Zaldivar, U.S. *Lawmakers Vow More Food Safety Funds as Peanut Recalls Set Record*, Insurance Journal (Feb. 6, 2009), *available at* <http://www.insurancejournal.com/news/national/2009/02/06/97668.htm>.

<sup>59</sup> Pub. L. No. 111-353, Title II, § 206, 124 Stat. 3940 (2011), making amendments to 21 U.S.C. § 350*l*. The FDA has published a draft guidance for public comment on the subject of its recall authority. FDA, DRAFT GUIDANCE FOR INDUSTRY: QUESTIONS AND ANSWERS REGARDING MANDATORY FOOD RECALLS (hereinafter "DRAFT RECALL GUIDANCE") (May 2015), *available at* <http://www.fda.gov/RegulatoryInformation/Guidances/ucm445428.htm>.

<sup>60</sup> A “responsible party” with respect to an article of food means a person that submits the registration under 21 U.S.C. § 350d(a) for a food facility (required to so register) at which the article of food is manufactured, processed, packed, or held. 21 U.S.C. § 350f(a)(1). A “person” includes individuals, partnerships, corporations, and associations. 21 U.S.C. § 321(e).

<sup>61</sup> 21 U.S.C. § 350*l*(a). *See* FDA, DRAFT RECALL GUIDANCE, *supra* Chapter 3, footnote 59 in this supplement, at #6 (“If the responsible party refuses or does not voluntarily cease distribution and recall the article of food within the time and manner prescribed by FDA, if so prescribed, FDA may order the responsible party to cease distributing the article of food, order the responsible party to give notice to certain other persons to cease distributing the article of food, and give the responsible party an opportunity for an informal hearing. After these steps are completed, FDA may order a recall under section 423(d) of the FD&C Act if it is determined that the removal of the article from commerce is necessary. Only the FDA Commissioner has the authority to order a recall under section 423(d). Recall orders under Section 423(d) may, if necessary, be vacated by the Commissioner.”)

<sup>62</sup> 21 U.S.C. § 350d(a)(facilities engaged in manufacturing, processing, packing or holding food for consumption within the U.S. must be registered with the FDA under the auspices of the Secretary of Health and Human Services). Under 21 U.S.C. § 350d(c)(1), restaurants and other retail food establishments are specifically exempted from the definition of a food “facility” and thus not required to register with the FDA.

A "restaurant" is defined in 21 C.F.R. § 1.227 as follows:

"[A] facility that prepares and sells food directly to consumers for immediate consumption. 'Restaurant' does not include facilities that provide food to interstate conveyances, central kitchens, and other similar facilities that do not prepare and serve food directly to consumers.

(1) Entities in which food is provided to humans, such as cafeterias, lunchrooms, cafes, bistros, fast food establishments, food stands, saloons, taverns, bars, lounges, catering facilities, hospital kitchens, day care kitchens, and nursing home kitchens are restaurants; and (2) Pet shelters, kennels, and veterinary facilities in which food is provided to animals are restaurants."

<sup>63</sup> 21 U.S.C. § 350f. The Food and Drug Administration Amendments Act of 2007 required the Secretary of Health and Human Services to establish within the FDA a Reportable Food Registry to provide a mechanism to track patterns of food which could carry the risk of serious adverse health consequences or death. The Reportable Food Registry was implemented on September 8, 2009. *See* FDA, DRAFT GUIDANCE FOR INDUSTRY: QUESTIONS AND ANSWERS REGARDING THE REPORTABLE FOOD REGISTRY AS ESTABLISHED BY THE FOOD AND DRUG ADMINISTRATION AMENDMENTS ACT OF 2007 (EDITION 2) (May 2010) (hereinafter "DRAFT REPORTABLE FOOD GUIDANCE"), *available at* <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/RFR/ucm212793.htm>. To further the development of the Reportable Food Registry, the FDA was required to establish an electronic portal by which instances of such reportable food would be submitted to the FDA. Section 211 of the FSMA, entitled "Improving the Reportable Food Registry," made additional changes. Pub. L. No. 111-353, Title II, § 211, 124 Stat. 3951-3953 (2011). *See* Section 3(C)(3) *infra* in this supplement for further discussion of the Reportable Food Registry.

<sup>64</sup> 21 U.S.C. § 350l(b) – (d). A food is misbranded under Section 403(w) of the FDCA, 21 U.S.C. § 343(w), if its list of ingredients fails to properly disclose a major food allergen. The FDA has set out some criteria for when it might decide to move forward with a mandatory recall. *See* FDA, DRAFT RECALL GUIDANCE, *supra* Chapter 3, footnote 59 in this supplement, at #9 ("FDA will evaluate all applicable evidence, when determining whether there is a reasonable probability the article of food (other than infant formula) is adulterated under section 402 of the FD&C Act or misbranded under section 403(w) of the FD&C Act and that the use of or exposure to such article will cause [serious adverse health consequences or death to humans or animals]"). Evidence may include (i) observations made during inspections of the responsible party or other parties, (ii) results from sample analyses, (iii) epidemiological data, (iv) Reportable Food Registry data, and (v) consumer and trade complaints. *Id.*

<sup>65</sup> 21 U.S.C. § 350l(g).

<sup>66</sup> 21 U.S.C. § 350l(j)(2)(D).

<sup>67</sup> The FDA used its mandatory recall authority once in 2013 and once in 2014. FDA, ANNUAL REPORT TO CONGRESS ON THE USE OF MANDATORY RECALL AUTHORITY - 2014 (Feb. 2015), *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm442802>.

It did not use its mandatory recall authority in 2015. FDA, ANNUAL REPORT TO CONGRESS ON THE USE OF MANDATORY RECALL AUTHORITY - 2015 (Feb. 2016), *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm489142.htm>.

<sup>68</sup> The FDA has come under fire for ineffective food recall procedures from the Department of Health and Human Services inspector general. *See* Daniel R. Levinson, Office of Inspector General of Department of Health and Human Services, *Early Alert: The Food and Drug Administration Does Not Have an Efficient and Effective Food Recall Initiation Process* (June 8, 2016), *available at* <https://oig.hhs.gov/oas/reports/region1/11501500.pdf>.

<sup>69</sup> *Id.* *See* 21 C.F.R. § 7.40(b). *See also* FDA, 2013 RECALLS, MARKET WITHDRAWALS AND SAFETY ALERTS, *available at* <http://www.fda.gov/safety/recalls/archiverecalls/2013/default.htm>.

<sup>70</sup> 21 C.F.R. § 7.46(a).

<sup>71</sup> *Id.*

<sup>72</sup> 21 C.F.R. § 7.41.

<sup>73</sup> 21 C.F.R. §§ 7.42, 7.45, 7.46.

<sup>74</sup> 21 C.F.R. §§ 7.49, 7.50, 7.53, 7.59.

<sup>75</sup> 21 C.F.R. § 7.42. *See* FDA, GUIDANCE FOR INDUSTRY: PRODUCT RECALLS, INCLUDING REMOVALS AND CORRECTIONS (Nov. 3, 2003), *available at* <http://www.fda.gov/Safety/Recalls/IndustryGuidance/ucm129259.htm>.

<sup>76</sup> 21 C.F.R. § 7.55.

<sup>77</sup> Section 107 of the FSMA, entitled “Authority to Collect and Use Fees”, added Section 743(a)(1)(B) to the FDCA (codified as 21 U.S.C. § 379j-31(a)(1)(B)). Pub. L. No. 111-353, Title I, § 107, 124 Stat. 3906-3910 (2011). *See* FDA DRAFT RECALL GUIDANCE, *supra* Chapter 3, footnote 59 in this supplement, at #11.

<sup>78</sup> *See* FDA, RECALLS, MARKET WITHDRAWALS, & SAFETY ALERTS, *available at* <http://www.fda.gov/safety/recalls>. For example, in the FDA’s communications regarding salmonella-infected cucumbers in September of 2015, its email update included instructions to restaurants as to how to deal with the contaminated produce and how to avoid cross-contamination. *See* FDA, FDA INVESTIGATED MULTISTATE OUTBREAK OF

SALMONELLA POONA LINKED TO CUCUMBERS (Mar. 24, 2016), *available at* <http://www.fda.gov/Food/RecallsOutbreaksEmergencies/Outbreaks/ucm461317.htm?mode=jqm>.

<sup>79</sup> See USDA, FSIS, CURRENT RECALLS AND ALERTS, *available at* <http://www.fsis.usda.gov/wps/portal/fsis/topics/recalls-and-public-health-alerts/current-recalls-and-alerts>. The USDA inspects and regulates meat, poultry, and processed egg products produced in federally inspected plants (all other food products are regulated by the FDA). Recalls are initiated by the manufacturer or distributor of meat or poultry products, sometimes at the request of FSIS. All recalls are voluntary. However, if a company refuses to recall its products, then FSIS has the legal authority to detain and seize those products in commerce. USDA, FSIS FOOD RECALLS, *available at* <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/fsis-food-recalls/fsis-food-recalls>.

<sup>80</sup> See CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, FOOD RECALLS, *available at* <http://www.cdph.ca.gov/HEALTHINFO/Pages/fdbFr.aspx>.

<sup>81</sup> See, e.g., Los Angeles County Department of Public Health, Environmental Health, Recent Food Recalls, *available at* <http://publichealth.lacounty.gov/eh/recall/currentRecall.htm>.

<sup>82</sup> The CDPH sets forth recall plan information for both recalling firms and firms holding recalled food products in WHAT ARE MY RESPONSIBILITIES DURING A FOOD RECALL, *available at* <http://www.cdph.ca.gov/pubsforms/Documents/fdbFrFrm01A.pdf>.

<sup>83</sup> Under Article 6.5 of California's Sherman Food, Drug, and Cosmetic Law, a meat or poultry supplier, distributor, broker, or processor that meets the criteria for a USDA Class I or Class II recall of meat- or poultry-related products must notify and provide certain information to the CDPH and to its own customers. CAL. HEALTH & SAFETY CODE § 110806(a). The CDPH may notify local health officers and environmental health directors that a business in the local jurisdiction has handled or received or anticipates handling or receiving a recalled meat- or poultry-related product. CAL. HEALTH & SAFETY CODE § 110806(b).

<sup>84</sup> See *supra* Chapter 3, footnote 79 in this supplement.

<sup>85</sup> The CDPH, local health officers, and environmental health directors may notify the public about the recalled product in the manner the local health officers deem appropriate based on their determination that the retailer within the local jurisdiction has received or made the product available to the public. CAL. HEALTH & SAFETY CODE § 110806(c)(1).

<sup>86</sup> If the retailer in question is a restaurant, and a determination has been made by a local health officer or environmental health officer that the contaminated product has not been served, sold, or otherwise offered to the public for consumption, and the contaminated product has been permanently removed from the restaurant's food supply, then the public notification must exclude the name or any other identifying feature of the restaurant. CAL. HEALTH & SAFETY CODE § 110806(c)(2).

<sup>87</sup> 21 U.S.C. § 334(h)(1)(A) (as in effect prior to Jan. 4, 2011). *See* Caroline Smith DeWaal, *Enforcement Provisions under the Food Safety Modernization Act*, Center for Science in the Public Interest (Feb. 13, 2014), *available at* [http://www.fdpi.org/fdocs/fweek2014/fsma-enforcement-provisions-fdpi-feb-dc\\_cdewaal.pdf?sfvrsn=0](http://www.fdpi.org/fdocs/fweek2014/fsma-enforcement-provisions-fdpi-feb-dc_cdewaal.pdf?sfvrsn=0). The FDA asserts jurisdiction over finished food products that are made from components that were shipped in interstate commerce. FDA, CPG SEC. 100.200, JURISDICTION OVER PRODUCTS COMPOSED OF INTERSTATE INGREDIENTS, *available at* <http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm073820.htm>.

<sup>88</sup> Section 207(a) of the FSMA, entitled "Administrative Detention of Food," amending 21 U.S.C. § 334(h)(1)(A). Pub. L. No. 111-353, Title II, § 207, 124 Stat. 3944 (2011). This authority has been used by the FDA to seize food contaminated by rodents and insects, and food contaminated with listeria. *See* Caroline Smith DeWaal, *Enforcement Provisions under the Food Safety Modernization Act*, *supra* Chapter 3, footnote 87 in this supplement.

<sup>89</sup> CAL. HEALTH & SAFETY CODE §§ 110445, 110545 – 110630 (adulterated food); CAL. HEALTH & SAFETY CODE §§ 110660 – 110805 (misbranded food).

<sup>90</sup> CAL. HEALTH & SAFETY CODE §§ 111825- 111915; CAL. PEN. CODE §§ 382, 383. Adulteration of certain specific food items may also be regulated under the California Food and Agriculture Code and under the California Fish and Game Code.

<sup>91</sup> 21 U.S.C. § 350f(a)(2).

<sup>92</sup> *See* FDA, DRAFT REPORTABLE FOOD GUIDANCE, *supra* Chapter 3, footnote 63 in this supplement, at Question D.7. For more discussion of the Food Allergen Labeling and Consumer Protection Act, *see* Chapter 4(C) in the EGCR and in this supplement.

<sup>93</sup> *See supra* Chapter 3, footnotes 60 and 62 and accompanying text in this supplement.

<sup>94</sup> 21 U.S.C. § 350f(d)(1). The criteria for an exception to this reporting requirement are contained in 21 U.S.C. § 350f(d)(2).

<sup>95</sup> 21 U.S.C. § 350f(d)(6)-(7), (e). *See* FDA, DRAFT REPORTABLE FOOD GUIDANCE, *supra* Chapter 3, footnote 63 in this supplement, at Questions G.1, H.2, and I.4; *See* FDA CENTER FOR FOOD SAFETY AND APPLIED NUTRITION, FDA IMPROVES THE REPORTABLE FOOD REGISTRY BY ADDING NEW DATA ELEMENTS (June 4, 2012), *available at* <http://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm306738.htm>.

<sup>96</sup> *See* FDA, DRAFT REPORTABLE FOOD GUIDANCE, *supra* Chapter 3, footnote 63 in this supplement, at Question I.3.

<sup>97</sup> FDA, PRODUCE SAFETY STANDARDS, PREVENTION IS KEY FOR PRODUCE STANDARDS, *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm304045.htm>.

<sup>98</sup> Section 105 of the FSMA, Pub. L. 111-353, Title I, § 105, 124 Stat. 3899-3905, adding new Section 419 of the FDCA, codified as 21 U.S.C. § 350h; *see* 21 U.S.C. 350h(a)(1)(A).

<sup>99</sup> FDA, STANDARDS FOR THE GROWING, HARVESTING, PACKING, AND HOLDING OF PRODUCE FOR HUMAN CONSUMPTION, FINAL RULE, 80 FED. REG. 74353 (Nov. 27, 2015) (hereinafter “Final Produce Safety Rule”), *available at* <https://www.federalregister.gov/articles/2015/11/27/2015-28159/standards-for-the-growing-harvesting-packing-and-holding-of-produce-for-human-consumption>.

<sup>100</sup> 21 C.F.R. §§ 112.111-112.116. The produce covered in the Final Produce Safety Rule is set forth in 21 C.F.R. § 112.1. The Final Produce Safety Rule does not apply to raw agricultural commodities that are rarely consumed raw, food grains, produce produced for personal or on-farm consumption, and (with certain documentation) produce destined for commercial processing, such as canning, that will adequately reduce microorganisms of public health concern. FDA, FSMA FINAL RULE FOR PRODUCE SAFETY, EXEMPTIONS, *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334114.htm#exemptions>; 21 C.F.R. § 112.2. A “farm” is defined for purposes of the Final Produce Safety Rule in 21 C.F.R. § 112.3. A farm with less than \$25,000 in average annual monetary value of produce sold during the preceding 3 years is not subject to the Final Produce Safety Rule. 21 C.F.R. §§ 112.4(a), 112.3 (definition of “produce”).

<sup>101</sup> Final Produce Safety Rule, *supra* Chapter 3, footnote 99 in this supplement, 21 C.F.R. §§ 112.21-112.30 (personnel), 112.31-112.33 (health and hygiene), 112.41-112.50 (agricultural water), 112.51-112.60 (biological soil amendments of animal origin and human waste), 112.81-112.83 (domesticated and wild animals), and 112.121-112.140 (equipment, tools, buildings, and sanitation).



The effective date of the Final Produce Safety Rule was Jan. 26, 2016. Subject to the qualified exemption described *infra* at Chapter 3, footnotes 105-109 and accompanying text in this supplement, these rules generally become effective on Jan. 26, 2020, for covered farms that are very small businesses (as defined in 21 C.F.R. § 112.3), on Jan. 26, 2019, for covered farms that are small businesses (as defined in 21 C.F.R. § 112.3), and on Jan. 26, 2018, for all other covered farms. Final Produce Safety Rule, *supra* Chapter 3, footnote 99 in this supplement, 80 Fed. Reg. at 74357, 74527 – 74528 (setting forth exceptions for some water-related requirements). See FDA, FINAL RULE ON PRODUCE SAFETY, KEY REQUIREMENTS, COMPLIANCE DATES, *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334114.htm#key>.

<sup>102</sup> Final Produce Safety Rule, *supra* Chapter 3, footnote 99 in this supplement, 21 C.F.R. §§ 112.141-112.150; FDA, FINAL RULE ON PRODUCE SAFETY, KEY REQUIREMENTS, SPROUTS, *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334114.htm#key>. Subject to the qualified exemption described *infra* at Chapter 3, footnotes 105-109 and accompanying text in this supplement, these rules generally become effective on Jan. 26, 2019, for covered farms that are very small businesses (as defined in 21 C.F.R. § 112.3), on Jan. 26, 2018, for covered farms that are small businesses (as defined in 21 C.F.R. § 112.3), and on Jan. 26, 2017, for all other covered farms. Final Produce Safety Rule, *supra* Chapter 3, footnote 99 in this supplement, 80 Fed. Reg. at 74357, 74527 – 74528.

<sup>103</sup> For an overview of California's 77,857 farms (2012 census numbers), see USDA, 2012 CENSUS OF AGRICULTURE, TABLE 1, *available at* [https://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_2\\_US\\_State\\_Level/st99\\_2\\_001\\_001.pdf](https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_001_001.pdf).

<sup>104</sup> Section 105(f) of the FMSA, *supra* Chapter 3, footnote 98 in this supplement, codified as 21 U.S.C. § 350h(f).

<sup>105</sup> 21 C.F.R. § 112.5. The definition of "food" in 21 C.F.R. § 112.3 incorporates the definition of "food" in Section 201(f) of the FDCA and includes seeds and beans used to grow sprouts. See *supra* Chapter 3, footnote 46 in this supplement for the text of Section 201(f) of the FDCA, as codified in 21 U.S.C. § 321(f).

<sup>106</sup> 21 U.S.C. § 350h(f)(4); 21 C.F.R. § 112.3(definition of "Qualified End-User"). The compliance date for this qualified exemption is Jan. 26, 2020, for farms that are very small businesses (as defined in 21 C.F.R. § 112.3), and Jan. 26, 2019, for farms that are small businesses (as defined in 21 C.F.R. § 112.3). Final Produce Safety Rule, *supra* Chapter 3, footnote 99 in this supplement, 80 Fed. Reg. at 74357, 74527 – 74529.

<sup>107</sup> 21 C.F.R. § 112.6(b). The labeling requirement in 21 C.F.R. § 112.6(b)(1), for labels on food that would otherwise be covered produce under the Final Produce Safety Rule, becomes effective

Jan. 1, 2020. Final Produce Safety Rule, *supra* Chapter 3, footnote 99 in this supplement, 80 Fed. Reg. at 74357, 74527 – 74529.

<sup>108</sup> 21 C.F.R. §§ 112.6, 112.7, 112.164. The requirement in 21 C.F.R. § 112.7(b) that firms retain records to support their eligibility for the qualified exemption took effect on Jan. 26, 2016. The remaining records requirements take effect on Jan. 26, 2020, for farms that are very small businesses (as defined in 21 C.F.R. § 112.3), and Jan. 26, 2019, for farms that are small businesses (as defined in 21 C.F.R. § 112.3). FDA, FINAL RULE ON PRODUCE SAFETY, KEY REQUIREMENTS, COMPLIANCE DATES, *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm334114.htm#key>.

<sup>109</sup> 21 C.F.R. §§ 112.6, 112.192 *et seq.*

<sup>110</sup> 21 U.S.C. § 350c(b); 21 C.F.R. §§ 1.326 – 1.368.

<sup>111</sup> 21 U.S.C. § 350c(b) excludes restaurants and farms from the requirement to establish and maintain records. Under 21 C.F.R. § 1.327(b), a restaurant is entitled to this exclusion if sales of food the restaurant prepares and sells to consumers for immediate consumption are more than 90% of its total food sales. In 21 C.F.R. § 1.328, a “restaurant” is defined generally for purpose of the recordkeeping rules as a facility that prepares and sells food directly to consumers for immediate consumption (such as cafeterias, lunchrooms, cafes, bistros, fast food establishments, food stands, saloons, taverns, bars, lounges, catering facilities, hospital kitchens, day care kitchens, and nursing home kitchens), but excluding facilities providing food to interstate conveyances, central kitchens, and other similar facilities that do not prepare and serve food directly to consumers. For entities not so excluded, the regulations set forth the types of records that firms that do not transport food must maintain for all foods they receive and for all foods they release. See 21 C.F.R. §§ 1.328, 1.337, 1.345. Under 21 C.F.R. § 1.363, violations of recordkeeping requirements or denial of access to the FDA is a prohibited act under Section 301 of the FDCA. *See supra* Chapter 3, footnote 51 in this supplement.

<sup>112</sup> Section 101(a) of the FSMA, Pub. L. 111-353, 124 Stat. 3886-3887 (2011), amending Section 414 of the FDCA, codified as 21 U.S.C. § 350c(a). *See* FDA, GUIDANCE FOR INDUSTRY, FDA RECORDS ACCESS AUTHORITY UNDER SECTIONS 414 AND 704 OF THE FEDERAL FOOD, DRUG, AND COSMETIC ACT (April 2014) (hereinafter “FDA Records Guidance”), *available at* <http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/ucm292745.htm>, at Section II. Section 101 of the FSMA made no change to Section 414(d)(1) of the FDCA, 21 U.S.C. § 350c(d)(1), which states that Section 414 should not be construed as limiting the authority of the FDA to inspect records or to require the establishment or maintenance of records under any other provision of the FDCA.

<sup>113</sup> 21 U.S.C. § 350c(a)(1). *See* FDA Records Guidance, *supra* Chapter 3, footnote 112 in this supplement, at Section III, Questions and Answers ## 3, 5.

<sup>114</sup> 21 U.S.C. § 350c(a)(2). *See* FDA Records Guidance, *supra* Chapter 3, footnote 112 in this supplement, at Section III, Questions and Answers ## 3, 5.

<sup>115</sup> 21 U.S.C. § 350c(a)(1), (a)(2). *See* FDA Records Guidance, *supra* Chapter 3, footnote 112 in this supplement, at Section III, Question and Answer #7. Restaurants and farms are similarly excluded from the inspection and records access of the FDA provided under Section 374 of the FDCA, 21 U.S.C. § 374.

<sup>116</sup> FDA, FREQUENTLY ASKED QUESTIONS ON FSMA, PRODUCT TRACING, Pt. 1.1, *available at* <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm247559.htm#ProductTracing>.

<sup>117</sup> Tricia Contreras, *Q-and-A: GSIUS' Angela Fernandez on the Importance of Supply Chain Traceability*, SmartBrief (Feb. 12, 2014), *available at* <http://www.smartbrief.com/original/2014/02/q-and-gs1us-angela-fernandez-importance-supply-chain-traceability>.

<sup>118</sup> Section 204 of the FSMA, Pub. L. 111-353, 124 Stat. 3930-3937 (2011), codified as 21 U.S.C. § 2223.

<sup>119</sup> Section 204(d) of the FSMA, *supra* Chapter 3, footnote 118 in this supplement, codified as 21 U.S.C. § 2223(d).

<sup>120</sup> FDA, FREQUENTLY ASKED QUESTIONS ON FSMA, PRODUCT TRACING, *supra* Chapter 3, footnote 116 in this supplement, at Pts. 3.1-3.7.

<sup>121</sup> Section 204(e)(1)(A) and (B) of the FSMA, *supra* Chapter 3, footnote 118 in this supplement, codified as 21 U.S.C. § 2223(e)(1)(A) and (B).

<sup>122</sup> Section 204(e)(2) of the FSMA, *supra* Chapter 3, footnote 118 in this supplement, codified as 21 U.S.C. § 2223(e)(2).

<sup>123</sup> Institute of Food Technologists, Pilot Projects for Improving Product Tracing along the Food Supply System-Final Report (Aug. 2012), *available at* [www.fda.gov/downloads/Food/GuidanceRegulation/UCM341810.pdf](http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM341810.pdf); *see generally* FDA, FREQUENTLY ASKED QUESTIONS ON FSMA, PRODUCT TRACING, *supra* Chapter 3, footnote 116 in this supplement, at Pts. 2.1 – 2.12.

<sup>124</sup> Institute of Food Technologists, Pilot Projects for Improving Product Tracing along the Food Supply System-Final Report, *supra* Chapter 3, footnote 123 in this supplement, at 203-213. The

report notes that product tracing is primarily dependent on recordkeeping, and that current recordkeeping requirements under Section 414 of the FDCA, discussed *supra* at Chapter 3(C)(5), exempt restaurants and farms from those requirements. *Id.* at 17. The report concludes that these statutorily exempted parts of the supply chain include critical information about food items that should be included in an effective product tracing system. *Id.* at 26-28 and 204-207. The FDA reflects these findings in its summary of the pilot project. FDA, FREQUENTLY ASKED QUESTIONS ON FSMA, PRODUCT TRACING, *supra* Chapter 3, footnote 116 in this supplement, at 2.12.

<sup>125</sup> Institute of Food Technologists, Pilot Projects for Improving Product Tracing along the Food Supply System-Final Report, *supra* Chapter 3, footnote 123 in this supplement, at 185-202. For example, the Foodservice GS1 US Standards Initiative launched in 2009 by the National Restaurant Association and 55 foodservice companies is a supply chain traceability system designed to isolate products in the event of a foodborne illness outbreak, reduce waste and inefficiency, and provide (through the Global Data Synchronization Network) nutrition, allergen, and ingredient information. See Tricia Contreras, *Q-and-A: GSIUS' Angela Fernandez on the Importance of Supply Chain Traceability*, *supra* Chapter 3, footnote 117 in this supplement.

## Chapter 4

### Proceeding With Caution: Liability for Food-Related Injuries

#### Chapter 4.A.2

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<sup>6</sup> *Holt v. Globalinx Pet LLC*, 2013 Westlaw 3947169, 2013 U.S. Dist. LEXIS 108009 (C.D. Cal. 2013) (plaintiff's dog alleged to have died after ingesting dog food produced and sold by defendants) (“in California, a product may be found defective in design if [either] the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or foreseeable manner...[or] the plaintiff demonstrates that the product’s design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design...[omitting citations]...In addition, the Supreme Court of California explicitly ‘abolish[ed] the Restatement’s requirement that the product prove not only defective but also ‘unreasonably dangerous’ as a result thereof); *Cavers v. Cushman Motor Sales, Inc.*, 95 Cal.App.3d 338, 344, 157 Cal. Rptr. 142 (1979)”).

#### Chapter 4.B.3

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<sup>26</sup> The Court in *Mexicali Rose* noted that the test set out in its decision would not be applicable to an express warranty cause of action. 1 Cal. 4th at 631, n. 6. *See* CAL. COMM. CODE § 2313; *Allen v. ConAgra Food, Inc.*, 2013 Westlaw 4737421 at 11, 81 UCC Rep.Serv.2d 624, 2013 U.S. Dist. LEXIS 125607 (N.D. Cal. 2013) (setting forth necessary elements for express warranty claim under CAL. COMM. CODE § 2313 in challenge to a food label); *Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d 889, 904 (N.D. Cal. 2012), *appeal on other grounds pending* (No. 14-16327, July 15, 2014) (express warranty claim not permitted for food products under Song-Beverly Act, Cal. Civ. Code §1791(d), 1791.2); *In Re McDonald's French Fries Litigation*, 503 F. Supp. 2d 953, 958 (N.D. Ill. 2007) (express warranty cause of action was permitted under Florida law and the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, §101 *et seq.*, 15 U.S.C.A. § 2301 *et seq.*, in a case in which a fast food restaurant made an alleged written misrepresentation on its website to consumers with food allergies that its potato products were free of milk, wheat, and gluten and were safe for consumption).

<sup>28</sup> *Foor v. Amici's East Coast Pizzeria*, 2011 Westlaw 3854818, 2011 Cal. App. Unpub. LEXIS 6672 (Cal. Ct. App. 2011)(denying plaintiff's negligence claim under *Mexicali Rose*, the court held that an olive pit is a naturally occurring substance in olives, and a restaurant patron should reasonably expect olives in an antipasto salad to contain pits); *Ford v. Miller Meat Company*, 28 Cal. App. 4th 1196, 1202 (Cal. Ct. App. 1994) (under *Mexicali Rose*, a bone fragment is a

natural substance and plaintiff was therefore precluded from recovering on strict liability or breach of implied warranty theories).

<sup>30</sup>*Mexicali Rose*, 1 Cal. 4th at 633; see *Oakes v. Carrabba's Italian Grill, LLC*, UCC Rep.Serv.2d 642, 2010 Westlaw 2696631, 2010 U.S. Dist. LEXIS 67160 (D. Nev. 2010) (discussing whether, under Nevada law, to adopt *Mexicali Rose* test in case involving shell fragment in pasta dish that included mussels).

#### Chapter 4.B.4

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*Insert the following text at the end of the first full paragraph:*

In *Verdugo v. Target Corporation*,<sup>40A</sup> in response to a certified question posed by the Ninth Circuit Court of Appeals, the California Supreme Court concluded that the *Breaux* court had not fully explored a restaurant's common law duty to aid a choking patron:

In reaching [its] conclusion, the court in *Breaux, supra*, 153 Cal.App.3d 379, 200 Cal.Rptr. 260, failed to consider explicitly the fact that the statutory language on which it relied stated simply that nothing “*in this section*” shall impose such an obligation (Health & Saf. Code, former § 28689, italics added). The court did not address whether such language purported to preclude a court from determining whether a restaurant's *common law* duty of reasonable care might include, either in general or in light of a special risk of choking that might be posed by particular foods or the frequency at which such choking may have occurred at the establishment, an obligation to take reasonable steps to attempt to dislodge an obstructing particle of food from a choking customer. As in *Rotolo [v. San Jose Sports & Entertainment, LLC]*, 151 Cal. App. 4th 307 (Cal. Ct. App. 2007)], the *result* reached by the court in *Breaux*—affirming summary judgment in favor of the defendant restaurant—may well have been defensible in light of other aspects of former section 28689 that could reasonably have been interpreted as intended to grant immunity from potential civil liability to any restaurant, like the defendant in *Breaux*, that properly posted the state-supplied instructions in conformance with the statutory requirements. [footnote omitted] But the fact that the statutory provision at issue in *Breaux* specified simply that nothing *in the statute* imposed an obligation to remove or attempt to remove food which has become lodged in a customer's throat was not itself sufficient, in our view, to preclude a court from determining whether, under generally applicable

common law principles, such a duty should properly be recognized under the common law. The court in *Breaux* failed adequately to consider the common law as an alternative source of potential tort duty or liability, distinct and independent of any statutorily imposed requirement. We note that the statutory provision relied upon in *Breaux*, after being renumbered on several occasions (Stats.1984, ch. 256, § 1, pp. 790–791; Stats.1995, ch. 415, § 6, p. 2813), was repealed in 2006. (Stats.2006, ch. 23, § 1, p. 86.)<sup>40B</sup>

The court drew a distinction between (i) as in *Verdugo*, a business’s common law duty to take precautionary steps prior to the occurrence of an injury or illness in light of the foreseeability of such an occurrence, and (ii) as in *Breaux*, a business’s common law duty to act to assist a patron from an ongoing threat to the patron’s health and safety after the patron has experienced an injury or illness on the business’s premises.<sup>40C</sup> It reserved the issue posed in *Breaux*.<sup>40D</sup> The *Verdugo* court found that Target’s common law duty of reasonable care to its patrons did not include an obligation to acquire and make available an automatic external defibrillator for the use of its patrons in a medical emergency.<sup>40E</sup>

<sup>40A</sup> 59 Cal. 4th 312, 330-331 (Cal. 2014).

<sup>40B</sup> *Id.* at 330-331.

<sup>40C</sup> *Id.* at 338. In *Ghaffarpour v. Plaza Commerce Hotel*, 2016 Westlaw 1057050, 2016 Cal. App. Unpub. LEXIS 1939 (Cal. Ct. App. 2016), citing *Verdugo*, the court held that a hotel had a duty to summon medical aid for protesters at the hotel who were injured in a physical altercation with security guards. *See also infra* Chapter 7(F) in the EGCR and in this supplement.

<sup>40D</sup> *Id.* at 336 (“[w]e have no occasion in this case to determine whether a business entity’s common law duty to provide assistance to an injured or ill patron never requires a business to do anything more than to promptly summon emergency medical assistance, as Target suggests, or whether a business’s common law duty of reasonable care, in some circumstances, may require it to take some additional measures beyond summoning emergency medical assistance.”).

<sup>40E</sup> *Id.* at 316. The Ninth Circuit affirmed the dismissal of the plaintiff’s claims against Target, based on the California Supreme Court’s opinion. *Verdugo v. Target Corporation*, 770 F.3d 1203 (9th Cir. 2014).

### Chapter 4.B.5

<sup>41</sup> Lisa Jennings, *Legal Experts Forecast Wave of Salmonella-Driven Suits vs. Restaurants*, Restaurant News (Aug. 4, 2008), available at <http://nrm.com/archive/legal-experts-forecast-wave-salmonella-driven-suits-vs-restaurants>.

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<sup>42</sup> See, e.g., *Byerly v. Cargill Meat Solutions Corp.*, Civil Case No. 2:11-cv-04227, Complaint, at 7-8 (W.D. Mo., Central Division, Aug. 2011) (ground turkey salmonella outbreak), available at <http://www.foodpoisonjournal.com/uploads/image/Byerly%20v.%20Cargill%20-%20NEF,%20Civil%20Cover,%20Complaint.pdf>.

<sup>43</sup> 21 U.S.C. § 301 *et seq.*

<sup>45</sup> See *supra* Section 3(C) in this supplement for further discussion of the FDCA and the Sherman Food, Drug, and Cosmetic Law (hereinafter “SFDC Act”).<sup>50</sup>

### Chapter 4C.

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*The 1st full paragraph is replaced with the following text:*

It is estimated that approximately 15 million people in the U.S. – about 2% of adults and between 4% and 8% of children -- suffer from food allergies.<sup>50</sup> Between 30,000 and 50,000 Americans go to the emergency room each year to be treated for severe food allergies, and it is estimated that 150 to 200 Americans die each year because of allergic reactions to food.<sup>51</sup>

<sup>50</sup> FDA, FOOD ALLERGIES: REDUCING THE RISK (Jan. 2009), available at <http://www.fda.gov/forconsumers/consumerupdates/ucm089307.htm#AdviceforConsumers>; Emily Dwass, *Food Allergic Diners Balance On A Knife Edge*, Chicago Tribune (Aug. 9, 2013), available at <http://www.chicagotribune.com/lifestyles/health/la-he-dining-allergies-20130810-story.html>.

<sup>51</sup> FDA, FOOD ALLERGIES: REDUCING THE RISK, *supra* Chapter 4, footnote 50 in this supplement; see Jonathan B. Roses, *Food Allergen Law and the Food Allergen Labeling and Consumer Protection Act of 2004: Falling Short of True Protection for Allergy Sufferers*, 66 FOOD AND DRUG LAW JOURNAL 225 (2011). Some severe food allergies may be considered a disability as defined by the Americans With Disabilities Act (ADA), 42 U.S.C. § 12102 *et seq.* UNITED STATES DEPARTMENT OF JUSTICE, QUESTIONS AND ANSWERS ABOUT THE LESLEY UNIVERSITY AGREEMENT AND POTENTIAL IMPLICATIONS FOR INDIVIDUALS WITH FOOD ALLERGIES (Jan.



2013), available at [http://www.ada.gov/q&a\\_lesley\\_university.htm](http://www.ada.gov/q&a_lesley_university.htm). See also *Knudsen v. Tiger Tots Community Child Care Center*, No. 2-1011/12-0700, 2013 Iowa App. LEXIS 6 (Iowa Ct. App. Jan. 9, 2013), in which a divided Iowa Court of Appeal reversed a lower court ruling that a child's tree nut allergy did not constitute a disability under the Iowa Civil Rights Act (which defines disability more narrowly than the ADA). The *Knudsen* court concluded that "federal law establishes the framework for an analysis of 'disability' under state law." For more discussion of the ADA, see *infra* Chapter 15(A) in the EGCRL and in this supplement.

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<sup>53</sup> 21 U.S.C. §§ 301, 321, 343 (notes), 343(w). See also Food Allergy Research and Education (FARE), Answers to Frequently Asked Questions About FALCPA, available at <http://www.foodallergy.org/falcpa-faq>. Under the SFDC Act, any food is misbranded if its labeling does not conform to the requirements for food allergen labeling under 21 U.S.C. § 343(w). CAL. HEALTH & SAFETY CODE § 110673.

<sup>55</sup> 21 U.S.C. § 321(qq). See *Cline v. Publix Super Markets, Inc.*, Case No. 3:15-0275, 2015 U.S. Dist. LEXIS 75716 (D. Tenn. June 11, 2015) (in a lawsuit brought after death of a child with a tree nut allergy who had eaten a cookie that allegedly contained tree nuts but contained no food allergen label, the district court denied defendants' motion to dismiss products liability claimed based upon the FALCPA).

<sup>57</sup> Subsequent Model Food Code revisions have added "food allergy awareness" as a part of the food safety training of restaurant employees and added the requirement that the person in charge of a restaurant be knowledgeable about major food allergens, the symptoms of an allergic reaction, and proper cleaning procedures to prevent cross-contact. See FDA, FDA FOOD CODE 2009: SUMMARY OF CHANGES IN THE FDA FOOD CODE, available at <http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/ucm188119.htm>.

S.B. No. 1067 (signed by Gov. Jerry Brown on Aug. 25, 2016), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB1067](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1067), made changes to the Food Code relating to food allergies, effective Jan. 1, 2017. See Chapter 1, footnotes 7, 19, and 24 in this supplement.

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<sup>64</sup> *Id.* See *Cline v. Publix Super Markets, Inc.*, *supra* Chapter 4, footnote 55 in this supplement (relying on *Livingston* in a case brought under Tennessee law, court denied defendants' motion to dismiss plaintiffs' failure to warn cause of action).

<sup>66</sup> See, e.g., FARE, Laws & Regulations: Food Code Revisions, available at <http://www.foodallergy.org/laws-and-regulations/food-code-revisions>. FARE, the National Restaurant Association, and partners offer food allergies resources for restaurants. FARE,

Resources for Restaurants, *available at*

<http://www.foodallergy.org/resources/restaurants>; National Restaurant Association, *ServSafe Allergens Online Course*, *available at* <http://www.servsafe.com/allergens/the-course>.

Under A.B. No. 1386, signed by Gov. Jerry Brown on Sept. 16, 2016, businesses such as restaurants, organizations, and other “authorized entities” are permitted (but not mandated) to obtain a prescription to stock epinephrine auto-injectors (hereinafter “EAI”) for use in an emergency if the business, organization, or entity has employees, agents, or others who are trained in the recognition of anaphylaxis (which is defined to include allergic reactions from foods and drugs) and the administration of EAIs. CAL. HEALTH & SAFETY CODE § 1797.197a (effective Jan. 1, 2017). The law permits doctors to prescribe EAIs to these entities and permits pharmacies to fill those prescriptions. CAL. BUS. & PROF. CODE § 4119.4 (effective Jan. 1, 2017).

Under CAL. CIV. CODE § 1714.23(b)(effective Jan. 1, 2017), an authorized entity is protected from liability for any civil damages resulting from any act or omission, other than an act or omission constituting gross negligence or willful or wanton misconduct, connected to the administration of an EAI by any one of its employees, volunteers, or agents who is a lay rescuer, as specified, if the entity has complied with all applicable requirements of CAL. HEALTH & SAFETY CODE § 1797.197a. In Gov. Jerry Brown’s signing message, *available at* [https://www.gov.ca.gov/docs/AB\\_1386\\_Signing\\_Message.pdf](https://www.gov.ca.gov/docs/AB_1386_Signing_Message.pdf), he acknowledged the life-saving impact of EAIs in the face of severe allergic reactions, but he also blasted Mylan, the bill’s sponsor and manufacturer of an EAI called the EpiPen®, for its pricing policies.

**Chapter 5**  
**On-the-Rocks?**  
**Requirements to Serve Alcohol in California**

**Chapter 5.A.2**

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<sup>16</sup> CAL. BUS. & PROF. CODE § 23816. Effective Jan. 1, 2017, a handful of new on-sale general licenses will be made available under two recently-enacted pieces of legislation. Under A.B. No. 1670, *available at* [http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab\\_1651-1700/ab\\_1670\\_bill\\_20160914\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1651-1700/ab_1670_bill_20160914_chaptered.pdf), the ABC is authorized to issue a maximum of 5 new original on-sale general licenses, over a 1-year period, for bona fide public eating places with seating for 25 or more diners in the County of Napa. Under S.B. No. 1285, *available at* [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_1251-1300/sb\\_1285\\_bill\\_20160928\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1251-1300/sb_1285_bill_20160928_chaptered.pdf), the ABC is authorized to issue 5 new original special on-sale general licenses for premises located within specified census tracts in San Francisco. *See* Emily Green, *1st Liquor Licenses in 77 Years for Outer S.F. Neighborhoods*, San Francisco Chronicle (Oct. 13, 2016), *available at* <http://www.sfgate.com/bayarea/article/SF-restaurants-to-get-1st-new-liquor-licenses-in-9968079.php>.

<sup>19</sup> *See* DEP'T OF ABC, LICENSING, *available at* <https://www.abc.ca.gov/Forms/PDFPackages.html>. Detailed instructions on “priority” licenses may be found in the guide prepared by the ABC. DEP'T OF ABC, ISSUANCE OF ORIGINAL AND INTERCOUNTY TRANSFER OF ON-SALE GENERAL AND OFF-SALE GENERAL LICENSES (July 2015), *available at* <https://www.abc.ca.gov/forms/ABC-521%202015.pdf>.

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<sup>20</sup> *Id.* The Form ABC-521-1 (Priority License Application), *available at* <https://www.abc.ca.gov/forms/ABC-521-1%202015.pdf>, requires that a Form ABC-211 (Application for Alcoholic Beverage License) be submitted within 90 days of notification of eligibility to file the formal application.

<sup>22</sup> DEP'T OF ABC, ISSUANCE OF ORIGINAL AND INTERCOUNTY TRANSFER OF ON-SALE GENERAL AND OFF-SALE GENERAL LICENSES, *supra* Chapter 5, footnote 19 in this supplement, at 4.

<sup>24</sup> CAL. BUS. & PROF. CODE §§ 23950-23953. The application must be signed by the applicant, namely by (i) all the partners in a general partnership; (ii) all the general partners in a limited partnership; (iii) all members or managers in a limited liability company, depending on its organizational structure; or (iv) two officers in a corporation (one from each of the following categories: (x) the chairperson of the board of directors, the president or a vice president; and (y) the secretary, assistant secretary, chief financial officer, or assistant treasurer). CAL. BUS. &

PROF. CODE § 23953. Note that a married couple applying for a license may only file one priority application. See DEP'T OF ABC, ISSUANCE OF ORIGINAL AND INTERCOUNTY TRANSFER OF ON-SALE GENERAL AND OFF-SALE GENERAL LICENSES, *supra* Chapter 5, footnote 19 in this supplement, at 3.

*Pages 89-90*

*The 3rd full paragraph on page 89 and run-on paragraph on page 90 are replaced with the following text:*

Additionally, the application must be accompanied by the appropriate fee. The initial fee for an on-sale beer and wine license is far less expensive than one that allows for the sale of other liquors.<sup>25</sup> Subject to permitted fee adjustments by the ABC, the base fee for an original on-sale license Type #47 (general) is \$13,800 whereas the fee for an original on-sale license Type #41 (beer and wine) is only \$300.<sup>26</sup>

<sup>25</sup> CAL. BUS. & PROF. CODE § 23954.5.

<sup>26</sup> *Id.*

*Page 90*

*The 2nd full paragraph is replaced with the following text:*

A priority license is generally not transferable for 2 years, and an inter-county priority license generally cannot be sold for more than \$13,800 for 5 years following the date of issuance.<sup>28</sup> Inter-county transfers of a license originally issued within the past 5 years cannot be sold for more than \$6,000 for a period of 5 years following the transferring license's original issuance date.<sup>29</sup>

<sup>28</sup> DEP'T OF ABC, ISSUANCE OF ORIGINAL AND INTERCOUNTY TRANSFER OF ON-SALE GENERAL AND OFF-SALE GENERAL LICENSES, *supra* Chapter 5, footnote 19 in this supplement, at 5-6.

<sup>29</sup> *Id.*, see CAL. BUS. & PROF. CODE § 24079.

### **Chapter 5.A.3.b.iii**

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<sup>42</sup> For purposes of Cal. Bus. & Prof. Code § 23958, "undue concentration" includes the following

conditions: (1) the applicant premises for an original or premises-to-premises transfer of any retail license are located in a crime reporting district which has a 20% greater number of reported crimes, as defined below, than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency; (2) as to on-sale retail license applications, the ratio of on-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of on-sale retail licenses to population in the county in which the applicant premises are located; and (3) as to off-sale retail license applications, the ratio of off-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of off-sale retail licenses to population in the county in which the applicant premises are located. “Reported crimes” means the most recent yearly compilation by the local law enforcement agency of reported offenses of criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny, theft, and motor vehicle theft, combined with all arrests for other crimes, both felonies and misdemeanors, except traffic citations. CAL. BUS. & PROF. CODE § 23958.4(a), (c). At present, the ratio is 1 on-sale general license for each 2,000 persons in the county in which the premises are situated and 1 off-sale general license for each 2,500 persons. For on-sale beer and wine, there are no state limits. *See* DEP’T OF ABC, FREQUENTLY ASKED QUESTIONS, Question 20, available at [http://www.abc.ca.gov/questions/licenses\\_faq.html](http://www.abc.ca.gov/questions/licenses_faq.html).

#### **Chapter 5.A.3.d**

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<sup>52</sup> DEP’T OF ABC, PRIORITY APPLICATION SIGNATURE SHEET, ABC-213-SIG (May 2006), available at <http://www.abc.ca.gov/FORMS/ABC213sig.PDF>; *see also* CAL. BUS. & PROF. CODE § 24044.

#### **Chapter 5.A.6**

*Page 101*

*Chapter 5(A)(6) is replaced in its entirety with the following text:*

The licensee must renew the license whether or not the licensee has received a renewal notice from the ABC. All licenses may be renewed by paying the required annual renewal fee before the license expires.<sup>99</sup> As of January 1, 2013, the ABC is permitted to adjust the base annual fees for licenses;<sup>100</sup> annual fees can be found on its website.<sup>101</sup>

<sup>99</sup> After the expiration of a license, the licensee may continue operating and renew the license within 60 days after expiration by paying the renewal fee in addition to a penalty fee that is equal to 50 % of the annual fee. The license is cancelled if said fee and applicable penalty are not paid. The licensee may reactivate the license by paying the renewal fee in addition to a penalty fee that

is equal to 100% of the annual fee within 30 days of cancellation. If the penalty and renewal fee are not paid by the end of the 30th day following cancellation, the license is automatically revoked. CAL. BUS. & PROF. CODE § 24048.

<sup>100</sup> CAL. BUS. & PROF. CODE § 23320(b), (c).

<sup>101</sup> See DEP'T OF ABC, LICENSING, LICENSING TYPES/FEEES, *available at* <http://www.abc.ca.gov/permits/permits.html>.

## Chapter 5.B.2

*Page 104*

*The 2nd full paragraph is replaced with the following text:*

Alcohol use remains extremely widespread among today's teenagers. In 2013, about 8.7 million persons aged 12 to 20 (22.7% of this age group) reported drinking alcohol in the past month.<sup>120</sup>

<sup>120</sup> DEP'T OF HEALTH AND HUMAN SERVICES, RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS (Substance Abuse and Mental Health Services Administration 2014), *available at* <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>.

*Pages 104-105*

*The 3rd full paragraph on paragraph 104 and the run-on paragraph on page 105 are replaced with the following text:*

To be considered bona fide evidence of the age of majority and the identity of the person, the document produced must be issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a valid motor vehicle operator's license that contains the name, date of birth, description, and picture of the person, a valid passport, or a valid identification card issued to a member of the Armed Forces that includes a date of birth and picture.<sup>123</sup> Proof that a licensee, or the licensee's employee or agent, demanded, was shown and acted in reliance upon bona fide evidence in any transaction, employment, use or

permission forbidden by California Business and Professions Code Sections 25658, 25663, or 25665 is a defense to any criminal prosecution or proceeding for the suspension or revocation of any license based thereon.<sup>124</sup>

<sup>123</sup> CAL. BUS. & PROF. CODE § 25660(a).

<sup>124</sup> CAL. BUS. & PROF. CODE § 25660(b).

### **Chapter 5.B.5**

*Pages 106-107*

*Chapter 5(B)(5) is replaced in its entirety with the following text:*

Subject to the exceptions listed in this paragraph, no person under the age of 21 can be employed to prepare or serve alcohol in or on premises or any portion thereof which are primarily designed and used for the sale and service of alcohol for consumption; violation of this prohibition is a misdemeanor.<sup>133</sup> A person under the age of 21 is not authorized to act in the capacity of a bartender and may not work at a fixed counter where only alcohol and other beverages are served or dispensed (the food items being served at another counter or area within the premises).<sup>134</sup>

Any person between 18 and 21 years of age employed in a bona fide eating place such as a restaurant which is licensed for the on-sale of alcoholic beverages may serve, deliver, present, open or pour alcohol to or for consumers if the service occurs in an area primarily designed and used for the sale and service of food for consumption on the restaurant premises, his or her primary duties are the service of meals to guests, and the service of alcohol is incidental to such duties.<sup>135</sup>

<sup>133</sup> CAL. BUS. & PROF. CODE § 25663(a); *see* DEP'T OF ABC, IMPACT, EMPLOYMENT OF MINORS, ABC-533 (January 2011), *available at* <http://www.abc.ca.gov/FORMS/ABC533.pdf> (note that former CAL. BUS. & PROF. CODE § 25667 was repealed and is now CAL. BUS. & PROF. CODE § 25663(c)).

<sup>134</sup> DEP’T OF ABC, IMPACT, EMPLOYMENT OF MINORS, ABC-533 (January 2011), *available at* <http://www.abc.ca.gov/FORMS/ABC533.pdf> (interpreting CAL. BUS. & PROF. CODE § 25663(a)).

<sup>135</sup> CAL. BUS. & PROF. CODE §§ 23038 (defining a bona fide eating place), 25663(c).

### **Chapter 5.B.9**

*Page 110*

<sup>158</sup> DEP’T OF ABC, SIGNAGE REQUIREMENTS AND IDEAS FOR RETAIL LICENSEES, ABC-617 (April 2005), *available at* <https://www.abc.ca.gov/FORMS/ABC617.pdf>.

### **Chapter 5.B.12**

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<sup>169</sup> CAL. CODE REGS. tit. 4, § 106(e)(2) refers to “consumer advertising specialties” as “ash trays, bottle or can openers, litter or shopping bags, matches, recipe cards, pamphlets, pencils, post cards, hats, posters, bottle or can stoppers, and other items approved by the Department, and which bear conspicuous advertising required of a sign.” However, “[c]oin banks, toys, balloons, magic tricks, miniature bottles or cans, confections, dolls, or other items which appeal to minors or immature persons may not be used in connection with the merchandising of alcoholic beverages.” CAL. CODE REGS. tit. 4, § 106(e)(2)(E).

### **Chapter 5.G.2**

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<sup>212</sup> *See* DEP’T OF ABC, COMPLAINT AND PROTEST FORMS, *available at* <http://www.abc.ca.gov/forms/PDFCompl.html>.

<sup>213</sup> *See* DEP’T OF ABC, FREQUENTLY ASKED QUESTIONS, COMPLAINTS OR ACCUSATIONS, *available at* [https://www.abc.ca.gov/questions/complaints\\_faq.html](https://www.abc.ca.gov/questions/complaints_faq.html).

<sup>214</sup> *Id.*

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<sup>217</sup> *See* DEP’T OF ABC, ALCOHOLIC BEVERAGE LICENSE – DISCIPLINARY PROCESS, at Paragraph 6, *available at* [https://www.abc.ca.gov/legal/Disciplinary\\_Process/Disciplinary%20Process001.pdf](https://www.abc.ca.gov/legal/Disciplinary_Process/Disciplinary%20Process001.pdf).

### **Chapter 5.G.4**

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<sup>231</sup> CAL. BUS. & PROF. CODE §§ 23080-23083; *see also* ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, FILING AN APPEAL, *available at* [http://www.abcappealsbd.ca.gov/file\\_appeal.htm](http://www.abcappealsbd.ca.gov/file_appeal.htm).

## Chapter 6

### I Need to See Some Identification: Serving Alcohol Safely and Legally

#### Chapter 6A.

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<sup>1</sup> “No social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages.” CAL. CIV. CODE § 1714(c). *Allen v Liberman*, 227 Cal. App. 4th 46, 56 (Cal. Ct. App. 2014), involved a minor, Shelby Allen, who died from alcohol poisoning at the home of another minor after she consumed alcohol from an unlocked liquor cabinet. The *Allen* court found that social host immunity under CAL. CIV. CODE § 1714(c) protected the host parents and minor from liability to Shelby Allen’s parents, and that social host immunity applied whether the host parents had furnished the alcohol to the deceased minor or if they simply had failed to prevent her from drinking the alcohol available at their home.

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<sup>3</sup> CAL. CIV. CODE § 1714(b); CAL. BUS. & PROF. CODE § 25602(c). Due to the death of Shelby Allen, CAL. CIV. CODE § 1714 was amended in 2011 to create an exception to CAL. CIV. CODE § 1714(c). *Allen v. Liberman*, *supra* Chapter 6, footnote 1 in this supplement, at 473 n.3. CAL. CIV. CODE § 1714(d) permits claims against a “parent, guardian, or another adult” who “knowingly furnishes alcoholic beverages at his or her residence” to a person whom he or she knows, or should have known, is under 21 years of age and when the furnishing of the alcohol is the proximate cause of subsequent injury or death.

<sup>4</sup> *Id.*, see *Williams v. Saga Enterprises, Inc.*, 225 Cal. App. 3d 142, 151-152 (Cal. Ct. App. 1990), where an individual was struck by a vehicle driven by a patron who had been drinking at a restaurant. The court found that under CAL. CIV. CODE § 1714(c) the restaurant could not be held liable in a civil action for merely furnishing alcohol to an intoxicated person who later injured someone else. However, the court also found that the restaurant could be found liable under other tort theories such as the “Good Samaritan” duties of 324A of the Restatement (Second) of Torts. See also *Allen v. Liberman*, *supra* Chapter 6, footnote 1 in this supplement (*Williams v. Saga Enterprises* not applicable because there was no evidence that defendants acted as good Samaritans at any time before intoxicated minor died of alcohol poisoning).

## **Chapter 6B.**

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<sup>11</sup> “. . . a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed [to sell alcoholic beverages] who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage . . . to any obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person." CAL. BUS. & PROF. CODE § 25602.1. *See Ennabe v. Manosa*, 58 Cal. 4th 697, 722 (Cal. 2014) (civil liability under CAL. BUS. & PROF. CODE § 25602.1 extends to social hosts who provide alcohol to obviously intoxicated minors where there is an affirmative sale of some sort).

## **Chapter 6C.**

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<sup>16</sup> In *Jones v. Toyota Motor Co., Ltd.*, 198 Cal. App. 3d 364 (Cal. Ct. App. 1988), the court sets forth the basis under which a minor can be found to be “obviously intoxicated.” *See also Ruiz v. Safeway, Inc.*, 209 Cal. App. 4th 455, 1462 (Cal. Ct. App. 2012) (Safeway not liable under CAL. BUS. & PROF. CODE § 25602.1 because the person to whom it sold alcohol was not the minor whose negligence while driving allegedly resulted in the death of the Ruiz’s son).

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<sup>21</sup> *See* CAL. BUS. & PROF. CODE § 25602; DEP’T OF ABC, FREQUENTLY ASKED QUESTIONS, QUESTION 82, *available at* [http://www.abc.ca.gov/questions./enforcement\\_fa.html](http://www.abc.ca.gov/questions./enforcement_fa.html).

## Chapter 7

### Maintaining A Safe Environment: Restaurant Premises Liability

#### Chapter 7B.

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<sup>15</sup> *Verdugo v. Target Corporation*, 59 Cal. 4th 312, 335 (Cal. 2014); *Romero v. Superior Court*, 89 Cal. App. 4th 1068, 1078-1079 (Cal. Ct. App. 2001). See *Contemplating a Duty to Assist Ailing Customers* discussed *supra* Chapter 4(B)(4) in the EGCR and in this supplement.

<sup>17</sup> *Allen v. Liberman*, 227 Cal. App. 4th 46, 57 (Cal. Ct. App. 2014) (“[B]usiness proprietors such as shopping centers, restaurants, and bars have a special relationship with their patrons giving rise to a duty to maintain their premises in a relatively safe condition”); *Chance v. Lawry’s, Inc.*, 58 Cal. 2d 368, 373 (Cal. 1962).

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<sup>19</sup> *Chance*, 58 Cal. 2d at 373. See *Verdugo*, *supra* Chapter 7, footnote 15 in this supplement, 59 Cal. 4th at 335 (“Because of the so-called ‘special relationship’ between a business entity and its patrons, past California cases have recognized that a business may have a duty, under the common law, to take reasonable action to protect or aid patrons who sustain an injury or suffer an illness while on the business’s premises, including ‘undertak[ing] relatively simple measures such as providing ‘assistance [to] their customers who become ill or need medical attention....’ [citations omitted].”). The *Verdugo* court observed that when safety measures are costly or burdensome rather than minimal, California common law does not impose a duty to provide such safety measures in the absence of a heightened or high degree of foreseeability of the medical risk. *Id.*

<sup>20</sup> *Ortega*, 26 Cal. 4th at 1207. In *Verdugo*, *supra* Chapter 7, footnote 15 in this supplement, the California Supreme Court found Target’s common law duty of reasonable care to its patrons did not include an obligation to acquire and make available an automatic external defibrillator (AED) for the use of its patrons in a medical emergency. The court found the obligation of making AEDs available to be more than a minor or minimal burden upon Target, and found no evidence that Target’s operations posed a high degree or heightened foreseeability that its patrons would suffer sudden cardiac arrest on its premises. On that basis, the court concluded that providing AEDs was not a common law obligation of Target’s, and that such a measure was instead a policy decision best left to the legislature. 59 Cal. 4th at 339-344.

#### Chapter 7.B.2

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<sup>41</sup> *Chance*, 58 Cal. 2d at 374. See *Iden v. Mondrian Hotel-Los Angeles*, 2009 Westlaw 33300 at 5, 2009 Cal. App. Unpub. LEXIS 60 (Cal. Ct. App. 2009)(grant of summary judgment overturned in case where hotel patron was injured after tripping on luggage left by a bellman in the doorway of her hotel suite; the court observed that “[a] question remains whether the risk was so obvious as to relieve the hotel of its duty to take reasonable precautions for the safety of its patrons and relocate the baggage or at least warn Iden of its existence to guard against foreseeable injury [citing *Chance*]”).

### **Chapter 7C.**

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<sup>45</sup> *Frontanez v. Chan*, 2013 Westlaw 178147, 2013 Cal. App. Unpub. LEXIS 415 (Cal. Ct. App. 2013)(after plaintiff fell on an uncovered water meter on a city sidewalk adjacent to private property, no liability on part of owner of adjacent private property or others working on construction project at that property because they did not own, possess, or control the city sidewalk and had no duty to inspect or cover it or warn of its hazards); *Seaber v. Hotel Del Coronado*, 1 Cal. App. 4th 481, 487-488 (Cal. Ct. App. 1991)

### **Chapter 7F.**

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<sup>69</sup> *Delgado*, 36 Cal. 4th at 237-238. In *Verdugo*, *supra* Chapter 7, footnote 15 in this supplement, the California Supreme Court interpreted *Delgado* and other cases involving third-party criminal activity as follows: “These decisions implicitly recognize that, in the absence of such heightened foreseeability [of third-party criminal activity], the determination whether a business (or businesses in general) should be required to provide a costly or burdensome precautionary safety measure to protect against potential future third-party criminal conduct should more appropriately be made by the Legislature rather than by a jury applying a general reasonableness standard in a particular case.” 59 Cal. 4th at 338-339.

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<sup>73</sup> *Delgado*, 36 Cal. 4th at 240 (“[O]nly when 'heightened' foreseeability of third party criminal activity on the premises exists—shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location—does the scope of a business proprietor’s special-relationship-based duty include an obligation to provide guards to protect the safety of patrons.”) (citing *Ann M.*, 6 Cal. 4th 666). See *Crocker v. The Dresden Restaurant*, 2014 Westlaw 3387948 at 6, 2014 Cal. App. Unpub. LEXIS 4877 (Cal. Ct. App. 2014) (restaurant/bar owner did not have a duty to prevent attack on a patron because the violence was unforeseeable).

## Chapter 7.F.2

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<sup>92</sup> See, e.g., *Onciano*, 219 Cal. App. 3d at 385, where the court reversed summary judgment in favor of defendant-restaurant and held that there were triable issues of fact as to whether the restaurant was liable for injuries suffered by a patron attacked in the restaurant's parking lot, even though evidence showed that it was in a low-crime area. The court found that any parking lot, dimly lit, unguarded, and inadequately fenced poses a foreseeable risk to patrons, particularly at night. *But see Hernandez v. Fusion Food & Boba Café*, 2013 Westlaw 5304181, 2013 Cal. App. Unpub. LEXIS 6746 (Cal. Ct. App. 2013), where the court affirmed summary judgment in favor of defendant-property manager, concluding that, because no prior acts of criminal violence had occurred in the shopping center parking lot where plaintiff was assaulted, the assault was not foreseeable and thus no triable issue of fact existed as to the defendant's liability.

## Chapter 7.F.3

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<sup>102</sup> *Marois v. Royal Investigation & Patrol, Inc.*, 162 Cal. App. 3d 193, 199 (Cal. Ct. App. 1984). In *Cisneros v. Lost Isle Partners*, 2015 Westlaw 6379934 at 8-9, 2015 Cal. App. Unpub. LEXIS 7548 (Cal. Ct. App. 2015), the court reversed a grant of summary judgment and observed that from a foreseeability perspective, it was a question of fact whether, had a resort's security guards been armed with and trained to use metal-detecting wands, two-way radios, and pepper spray, they could have prevented the stabbing death of a patron at a resort where prior altercations and excessive alcohol use were known to have occurred.

## Chapter 7G.

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<sup>119</sup> *Id.* See also *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474 (Cal. 2014), in which an employee of a Domino's Pizza franchise sued both the owner of the Domino's franchise where she worked and the franchisor, Domino's Pizza, LLC and related entities, alleging that she was sexually harassed and assaulted on the job by the franchisee's store manager.

## Chapter 7.G.1

Page 156

*The 2nd full paragraph is replaced with the following text:*

Ordinarily, the franchise agreement confers on a franchisee what is called either licensee or independent contractor status.<sup>122</sup> As merely a licensor, the franchisor is not generally liable for

the negligence of its licensees or independent contractors.<sup>122A</sup> It is when the franchisor exercises a general right of control over factors such as hiring, direction, supervision, discharge, and relevant day-to-day operations of a franchisee’s business that this relationship may be elevated to agency status and that a franchisor may be potentially liable.<sup>123</sup>

<sup>122</sup> Early California cases on franchisor vicarious liability used the terms license, licensor, and licensee in place of franchise, franchisor, and franchisee. The status is the same, though for convenience, the court in *Cislaw* does not use the language of license. *See Cislaw*, 4 Cal. App. 4th at 1288, fn. 2.

<sup>122A</sup> In 2015, the federal National Labor Relations Board (hereinafter “NLRB”) concluded that Browning-Ferris Industries (hereinafter “BFI”) was a joint employer with a staffing company, Leadpoint, that supplied it with employees. The NLRB found that, in addition to a joint employer having direct and immediate control of workers’ terms of employment, a joint employer relationship can be based on indirect control through an intermediary employer and even reserved contractual rights that may affect workers’ terms and conditions of employment. Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, *and* FPR-II, LLCd/b/a Leadpoint Business Services, *and* Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner. Case 32–RC–109684 (Aug. 27, 2015), *available at* <https://www.nlr.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries>.

The NLRB’s BFI decision was consistent with the broader joint employer standard that it had also applied against McDonald’s Corporation. There is considerable concern about the impact of the NLRB’s emerging joint employer analysis upon restaurant franchisors and franchisees, with the concern being that the former could become responsible for the decisions made by the latter. Lisa Jennings, *Broader ‘Joint Employer’ Standard Upheld by NLRB*, Nation’s Restaurant News (Aug. 27, 2015), *available at* <http://nrr.com/government/broader-joint-employer-standard-upheld-nlr>.

As this area continues to evolve, it is worth noting that in an Advice Memorandum issued to the fast-casual restaurant franchisor Freshii by the NLRB’s office of general counsel, Freshii was not found to be a joint employer responsible for the unfair labor practices of its franchisee under either the NLRB’s traditional standard or its expanded joint employer standard. No evidence was found that the franchisee shared or codetermined with the franchisor the essential working terms and conditions of the franchisee’s employees. NLRB Office of the General Counsel, Advice Memorandum re: Nutritionality, Inc. d/b/a Freshii (Apr. 28, 2015), *available at* <https://www.nlr.gov/cases-decisions/advice-memos> (Case No. 13-CA-134294).

<sup>123</sup> In *Patterson*, *supra* Chapter 7, footnote 119 in this supplement, the California Supreme court

reviewed the analysis in *Cislaw* and other prior franchise decisions, and restated the appropriate analysis as follows: “The ‘means and manner’ test generally used by the Courts of Appeal cannot stand for the proposition that a comprehensive operating system alone constitutes the “control” needed to support vicarious liability claims like those raised here. As noted, a franchise contract consists of standards, procedures, and requirements that regulate each store for the benefit of both parties...A franchisor enters this arena, and becomes potentially liable for actions of the franchisee’s employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee’s employees. Any other guiding principle would disrupt the franchise relationship [footnotes omitted].” 60 Cal. 4th at 497-498.

### **Chapter 7.G.2.a**

*Page 159*

<sup>147</sup> *Id.* at 1295. See *Patterson*, *supra* Chapter 7, footnote 119 in this supplement, where the franchisor of a Domino’s Pizza store was found not liable as a principal for the sexual harassment of an employee by the franchisee’s store manager. Domino’s exercised some degree of control over aspects of the business aimed at preventing harm to its brand, customers, and employees, and required franchisees to comply with Domino’s operational and marketing standards (including rules and guidelines set forth in a Managers’ Reference Guide). However, the court found no principal-agent relationship because, under the terms of the franchise contract and in daily business operations, the franchisee maintained control over hiring, training, and management of employees, creating and implementing personnel policies, pricing, staffing levels, and all other “relevant day-to-day aspects of employment and employee conduct.” 60 Cal. 4th at 503. See also *Vann v. Massage Envy Franchising LLC*, 2015 Westlaw 74139, 2015 U.S. Dist. LEXIS 1002 (S. D. Cal. 2015)(applying *Patterson* and finding no control by franchisor over hiring, firing and other relevant day-to-day operations of its franchisee, the court found franchisor not to be a joint employer with its franchisee for purposes of a franchise employee’s wage claims).

### **Chapter 7.G.2.b**

*Page 161*

<sup>156</sup> *Id.* See *Ochoa v. McDonald’s Corp.*, 133 F. Supp. 3d 1228, 1240 (N.D. Cal. 2015)(denial of summary judgment because a jury could reasonably conclude that franchisor McDonald’s Corporation was ostensible agent of McDonald’s franchisee, making franchisor potentially liable for wage claims of franchisee’s employees as a joint employer).



## Chapter 8

### Coat Checks and Valets: Liability for Failing to Safeguard Customers' Property

#### Chapter 8.A.1

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<sup>4</sup> CAL. CIV. CODE § 1852. In *Starbucks Corporation v. Amcor Packaging Distribution*, 2015 Westlaw 237141 at 2, 2015 U.S. Dist. LEXIS 5746 (E.D. Cal. 2015), the court equated the duty of a bailee under CAL. CIV. CODE § 1852 to the tort duty of ordinary care imposed by California's general negligence statute, CAL. CIV. CODE § 1714(a).

<sup>8</sup> *Dzharadzhyan v. Exclusive Motorcars, Inc.*, 2015 Westlaw 1004996, 2015 Cal. App. Unpub. LEXIS 1565 (Cal. Ct. App. 2015) (no liability for stolen car when automobile repair garage used ordinary care to protect against theft); *Gardner v. Downtown Porsche Audi*, 180 Cal. App. 3d 713, 715 (Cal. Ct. App. 1986) (liability of automobile repair garage for negligent safekeeping of customer's car, which was stolen); *Clark v. Burns Hammam Baths*, 71 Cal. App. 571, 573-574 (Cal. Ct. App. 1925) (depository for hire of customer's money and jewelry failed to use ordinary care to prevent theft; bathhouse attendant should have inquired as to identity of person presenting the key to the lock-box containing the customer's property).

#### Chapter 8.B.1

*Page 167*

<sup>21</sup> Abandoned property, on the other hand, is property intentionally discarded by its owner. See *United States v. \$1,181,895 in U.S. Currency*, 2015 Westlaw 631394 at 3, 2015 U.S. Dist. LEXIS 17448 (C.D. Cal. 2015) (evidence of an affirmative act indicating an intent to relinquish ownership must be produced to establish that property is abandoned).

#### Chapter 8.B.2

*Page 168*

<sup>23</sup> CAL. CIV. CODE §§ 2080 - 2080.10 ("Lost Money and Goods"). These provisions do not apply to property intentionally abandoned by its owner. CAL. CIV. CODE § 2080.7 ("Abandoned Property"). See *United States v. \$1,181,895 in U.S. Currency*, *supra* Chapter 8, footnote 21 in this supplement (compliance with CAL. CIV. CODE §§ 2080 - 2080.10 required in order to claim ownership of lost property).

## Chapter 9

### Will You Be Paying with a Credit Card? Credit Card Fraud and Identity Theft Awareness and Avoidance

Page 173

*The 1st full paragraph is replaced with the following text:*

The restaurant industry is one of the few industries where a consumer lets another person, typically a restaurant server, disappear out of sight with his or her credit card. A server or other person in possession of a magnetic strip reader, or skimmer, can run the card through the payment system and through a skimmer – and leave the restaurant with both the server’s tip and the customer’s credit card information.<sup>1</sup> Credit card and ATM skimming combined accounted for over \$5 billion in losses in 2012;<sup>2</sup> according to payment industry sources, 70% of credit card skimming has occurred in restaurants.<sup>3</sup>

<sup>1</sup> Michael Cohn, *Skimmer Fraud on the Rise*, Accounting Today-Debits and Credits (Mar. 7, 2014), available at <http://www.accountingtoday.com/blogs/debits-credits/skimmer-fraud-on-the-rise-69900-1.html>. Among other things, skimming will be impeded by the new EMV chip technology implemented by the credit card industry as of October 1, 2015. The chip creates a unique signature for each transaction, so the only data processed through the point of sale (hereinafter “POS”) terminal is a random numerical sequence, as opposed to the unchanging magnetic strip of pre-EMV credit cards.

After October 1, 2015, liability for specified counterfeit transactions and/or lost or stolen fraudulent credit card transactions in certain payment transactions will shift to those merchants who do not use EMV chip enabled devices and applications for POS payment devices. EMV Migration Forum, *Understanding the 2015 U.S. Fraud Liability Shifts*, Version 1.0 (May 2015), available at <http://www.emv-connection.com/downloads/2015/05/EMF-Liability-Shift-Document-FINAL5-052715.pdf>. For a guide to EMV chip technology, see EMV Connection, *EMV-FAQ*, available at <http://www.emv-connection.com/emv-faq/>. See also Natalie Gagliardi, *EMV Apathy? Why Small Businesses Are Avoiding the POS Upgrade* (Sept. 25, 2015), available at <http://www.zdnet.com/article/emv-apaty-why-small-businesses-are-avoiding-the-pos-upgrade/>; Taylor Tepper, *Here’s Why Your Credit Card Now Has a Chip and Why You Should Care*, Time (Sept. 28, 2015), available at <http://time.com/money/4040808/credit-card-chip-fraud-emv/>.

<sup>2</sup> *Skimming Off the Top: Why America Has Such a High Rate of Credit Card Fraud*, The Economist (Feb. 15, 2014), available at <http://www.economist.com/news/finance-and-economics/21596547-why-america-has-such-high-rate-payment-card-fraud-skimming-top> (stating that the U.S. is the *only country* in which counterfeit-card fraud has been consistently growing and that card issuers lost \$3.4 billion and merchants another \$1.9 billion in 2012).

<sup>3</sup> Susan Weber, *Expert Tips to Prevent Credit Card Skimming* (citing proprietary statistics generated by Mercator Advisory Group), available at [http://creditcards.lovetoknow.com/Credit\\_Card\\_Skimming](http://creditcards.lovetoknow.com/Credit_Card_Skimming).

## Chapter 9A.

Page 174

*The 1st full paragraph is replaced with the following text:*

In the U.S., based on 2014 census data, there are approximately 167 million American adults with at least one credit card.<sup>5</sup> With approximately 1 million restaurants in the U.S. – where consumers are projected to spend \$709.2 billion in 2015 – the use of credit cards in restaurants is growing.<sup>6</sup> But this rise of credit card use has been followed by an increase in credit card fraud.

<sup>5</sup> See CreditCards.com for summaries of study data and voluntary disclosures by credit card users at <http://www.creditcards.com/credit-card-news/ownership-statistics-charts-1276.php>; see also Niall McKay, *Paying with Plastic: How It Works in the Rest of the World* (Nov. 23, 2004), available at <http://www.pbs.org/wgbh/pages/frontline/shows/credit/more/world.html>. As the names imply, credit cards allow the extension of credit and the delay of payment while debit cards charge or debit a customer's account at the moment of the transaction and typically require a personal identification number to be entered. There are numerous fraudulent practices affecting both types of cards. FEDERAL RESERVE BANK OF SAN FRANCISCO, PLASTIC FRAUD: GETTING A HANDLE ON CREDIT AND DEBIT CARDS, available at [www.popcenter.org/problems/credit\\_card\\_fraud/PDFs/FRB.pdf](http://www.popcenter.org/problems/credit_card_fraud/PDFs/FRB.pdf); see also FEDERAL TRADE COMMISSION, PROTECTING AGAINST CREDIT CARD FRAUD – CONSUMER INFORMATION, available at <http://www.consumer.ftc.gov/articles/0216-protecting-against-credit-card-fraud>.

This Chapter 9 focuses on the fraudulent practices generally posing a problem in restaurants, which are most closely associated with the features of credit cards but could, depending on the attributes of a particular debit card, also occur with a debit card. The legislation discussed in Chapter 9 applies to both types of cards.

<sup>6</sup> See National Restaurant Association, Facts at a Glance, available at <http://www.restaurant.org/News-Research/Research/Facts-at-a-Glance>.

*Pages 174 - 175*

*The 2nd full paragraph on page 174 and the run-on paragraph on page 175 are replaced with the following text:*

A Federal Trade Commission (hereinafter “FTC”) report on identity theft consistently ranked credit card fraud as the most prevalent form of identity theft,<sup>7</sup> which cost businesses and consumers more than \$16 billion in 2014.<sup>8</sup> In California, the FTC ranked the top identity theft victim locations (according to complaint per 100,000 population) as Stockton, Vallejo-Fairfield, Fresno, San Francisco, Los Angeles, and Modesto, respectively.<sup>9</sup> Identity theft is the fastest growing crime in the U.S., according to the Secret Service and the Federal Trade Commission.<sup>10</sup>

<sup>7</sup> FEDERAL TRADE COMMISSION, CONSUMER SENTINEL NETWORK DATABOOK JANUARY-DECEMBER 2014 (Feb. 2015), at 4, *available at* <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2014/sentinel-cy2014-1.pdf>. The most commonly reported form of identity theft in 2014 was government benefits fraud, then credit card fraud, then phone/utilities fraud, and then bank fraud. *Id.*

<sup>8</sup> Javelin Strategy & Research, *\$16 Billion Stolen from 12.7 Million Identity Fraud Victims in 2014, According to Javelin Strategy & Research*, *available at* <https://www.javelinstrategy.com/news/1556/92/16-Billion-Stolen-from-12-7-Million-Identity-Fraud-Victims-in-2014-According-to-Javelin-Strategy-Research/>.

<sup>9</sup> FEDERAL TRADE COMMISSION, CONSUMER SENTINEL NETWORK DATABOOK JANUARY-DECEMBER 2014, *supra* Chapter 9, footnote 7 in this supplement, at 17.

<sup>10</sup> For current statistics on identity theft from the U.S. Department of Justice, *see* Identity Theft, Offices of the United States Attorneys (July 8, 2015), *available at* <http://www.justice.gov/usao/priority-areas/financial-fraud/identity-theft>.

*Page 175*

*The 1st full paragraph is replaced with the following text:*

A 2011 study by the Ponemon Institute found that the costs to a business averaged \$5.5 million per security breach, with an average per victim cost of \$194.<sup>11</sup> As mentioned previously, the implementation of the EMV chip technology standards should reduce credit card fraud in

restaurants.<sup>12</sup> That is important for many reasons, including the fact that credit card fraud, such as a server's inflation of a credit card tip, can result in the loss of patronage by a customer as well as the restaurant's liability under California law. See *Unauthorized Use of Customers' Credit Cards* below and *An Employer's Liability for the Acts of its Employees* discussed *infra* Chapter 16(A) in the EGCR and in this supplement.

<sup>11</sup> Ponemon Institute, *2011 Cost of Data Breach Study: United States* (Mar. 2012), available at [www.ponemon.org/local/upload/file/2011\\_US\\_COODB\\_FINAL\\_5.pdf](http://www.ponemon.org/local/upload/file/2011_US_COODB_FINAL_5.pdf).

<sup>12</sup> Andy Sirmon, *The Real Scoop: Impact of EMV on Restaurant Operations* (Sept. 8, 2015), available at <http://www.ncr.com/company/blogs/hospitality/the-real-scoop-impact-of-emv-on-restaurant-operations>.

## **Chapter 9B.**

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<sup>13</sup> 15 U.S.C. § 1681 *et seq.* (for further discussion of the FCRA, see *infra* Chapter 16(C) – (E) in the EGCR and in this supplement); FACTA, 15 U.S.C. § 1681c. Victims of identity theft have a right to free credit reports through a dedicated website, [www.annualcreditreport.com](http://www.annualcreditreport.com). Victims can also order free reports by telephone at (877) 322-8228 or by mail. For a copy of the mail-in form, see [www.consumer.ftc.gov/articles/pdf-0093-annual-report-request-form.pdf](http://www.consumer.ftc.gov/articles/pdf-0093-annual-report-request-form.pdf).

<sup>14</sup> More information on a consumer's right to privacy is available at [www.privacyrights.org](http://www.privacyrights.org). For a thorough overview of FACTA, see <https://www.privacyrights.org/facts-facta-fair-and-accurate-credit-transactions-act#Notes>.

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<sup>21</sup> *Id. Grimes v. Rave Motion Pictures Birmingham, L.L.C.*, 552 F. Supp. 2d 1302 (N.D. Ala. 2008), which held that the damages provision of FACTA violates the due process clause of the U.S. Constitution, was vacated and remanded by *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009).

<sup>22</sup> See, e.g., Complaint, *McGee v. Ross Stores, Inc.*, No. 3:06-cv-07496-CRB (N.D. Cal. 2006) (alleging that Ross Stores had knowingly or with reckless disregard printed more than the last 5 digits of the credit or debit card number or printed the expiration date on receipts after FACTA's effective date). See also Milford Prewitt, *Restaurants Targeted by ID Theft Lawsuits*, Nation's

Restaurant News (Feb. 12, 2007), *available at* <http://nrn.com/corporate/restaurants-targeted-id-theft-lawsuits>.

*Pages 177 - 178*

*The 3rd full paragraph on page 177 and the run-on paragraph on page 178 are replaced with the following text:*

As the Clarification Act did not eliminate the statutory requirement to not print expiration dates on cardholder receipts, restaurants or other businesses that print more than the last 5 digits of a credit or debit card number or, on receipts issued after June 3, 2008, the expiration date may still incur liability under FACTA.<sup>28</sup> Also, the Clarification Act does not extinguish all past liability. Consumers still have the right to sue to recover actual damages, if any, suffered as the result of a negligent violation of FACTA. Moreover, merchants who printed more than the last 5 digits of the credit or debit card number remain potentially liable for willful violations for receipts issued both before and after the passage of the Clarification Act. Thus, notwithstanding the Clarification Act, FACTA remains a potent source of litigation against restaurants and other businesses not mindful of its requirements.<sup>28A</sup>

<sup>28</sup> See *Smith v. Zazzle.com, Inc.*, 589 F. Supp. 2d 1345 (S.D. Fla. 2008) (Clarification Act does not apply to transactions that occur after June 3, 2008).

<sup>28A</sup> Hundreds of cases alleging FACTA violations have been filed against restaurants and other businesses in the past several years. See, e.g., *New York Federal Judge Denies Motion to Reconsider Fair and Accurate Credit Transactions Act (FACTA) Lawsuit Dismissal*, National Law Review (Nov. 4, 2015), *available at* <http://www.natlawreview.com/article/new-york-federal-judge-denies-motion-to-reconsider-fair-and-accurate-credit-transact>.

### **Chapter 9.C.1**

*Page 179*

*The 1st full paragraph is replaced with the following text:*

In addition, California Civil Code Section 1798.81.5 mandates that all such businesses collecting consumers' names and credit card numbers implement and maintain reasonable

security procedures and practices to protect the consumers' personal information from unauthorized access, destruction, use, modification, or disclosure.<sup>37</sup> This law applies in particular to businesses that collect both a name and credit card number, or both a name and driver's license or state identification number, or both a name and social security number. A restaurant thus comes under California Civil Code Section 1798.81.5 when it engages in a credit card transaction in which the restaurant collects a customer's name and account number.<sup>37A</sup>

<sup>37</sup> CAL. CIV. CODE § 1798.81.5.

<sup>37A</sup> As of Jan. 1, 2016, under CAL. CIV. CODE § 1798.81.5(d)(1)(B), a customer's personal information also includes a username or email address in combination with a password or security question and answer that would permit access to an online account.

*Page 179*

*The 3rd full paragraph is replaced with the following text:*

Under California's amended Security Breach Notification Law, as of January 1, 2017, a restaurant or other business in California owning or licensing computerized data that includes "personal information"<sup>39</sup> must disclose a data breach to a California resident:

- whose unencrypted personal information was (or is reasonably believed to have been) acquired by an unauthorized person, or
- whose encrypted personal information was (or is reasonably believed to have been) acquired by an unauthorized person, and the encryption key or security credential was (or is reasonably believed to have been) acquired by an unauthorized person and the restaurant or other business that owns or licenses the encrypted information has a reasonable belief that the encryption key or security credential could render that personal information readable or usable.<sup>40</sup>

<sup>39</sup> CAL. CIV. CODE §§ 1798.82-1798.84. “Personal information” under CAL. CIV. CODE § 1798.82(h) includes either an individual’s first name or first initial and last name in combination with any one or more specified data elements, when either the name or the data element are not encrypted, or a user name or email address, in combination with a password or security question and answer that would permit access to an online account. It does not include publicly available information. CAL. CIV. CODE § 1798.82 includes guidelines for the content of security breach notifications, and includes a model security breach notification.

<sup>40</sup> CAL. CIV. CODE § 1798.82(a)(effective Jan. 1, 2017). Under CAL. CIV. CODE § 1798.82(k)(effective Jan. 1, 2017), “encryption key” and “security credential” mean the confidential key or process designed to render data useable, readable, and decipherable.

<sup>41</sup> CAL. OFFICE OF PRIVACY PROTECTION, A CALIFORNIA BUSINESS PRIVACY HANDBOOK (April 2008), *available at* [http://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/business\\_privacy\\_handbook.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/business_privacy_handbook.pdf). *See infra* Chapter 9, footnote 44.

*Page 180*

*The 1st full paragraph is replaced with the following text:*

California law mandates that a business make a disclosure of the loss of personal information “in the most expedient time possible and without unreasonable delay.”<sup>43</sup> There are specific rules on how to make these disclosures and to whom to make the disclosures.<sup>44</sup>

<sup>43</sup> CAL. CIV. CODE § 1798.82(a).

<sup>44</sup> For more information, *see* State of California, Office of Attorney General, Business Privacy Resources, *available at* <https://oag.ca.gov/privacy/business-privacy>. Created by a state law enacted in 2000, California’s Office of Privacy Protection was defunded in 2012.

### **Chapter 9.D.1**

*Page 181*

*The 3rd full paragraph is replaced with the following text:*

Not only must restaurants avoid losses of customers’ personal information, but under the terms of their agreements with credit card companies such as Visa and Master Card, they must protect that information from potential computer hacking.<sup>52A</sup> POS systems can be particularly vulnerable to hacking due to the length of the credit card transaction itself. A credit card is



“opened” while the POS terminal acquires authorization for the transaction and remains open until the server enters the tip. Servers may not enter tips until hours after the credit card transaction, at the end of a shift. Some systems allow a user, frequently the restaurant manager, to yet again re-open and adjust charges or the tip long after the customer has left the premises.<sup>52B</sup>

<sup>52A</sup> Brian Krebs, *Point of Sale Vendor NEXTEP Probes Breach* (Mar. 9, 2015), available at <http://krebsonsecurity.com/2015/03/point-of-sale-vendor-nextep-probes-breach/> (detailing breaches of POS systems at various restaurants and stating that “historically the chief victims of POS vendor breaches have been food service establishments”); Khushbu Shah, *Meet the Man Crusading Against Restaurant Credit Card Hackers* (Apr. 9, 2015), available at <http://www.eater.com/2015/4/9/8373151/brian-krebs-credit-card-hackers-chain-restaurants> (quoting cybersecurity expert Brian Krebs, who states that POS systems are the weakest spots in a restaurant’s operations, as passwords are often not secure, outdated operating systems provide little security protection against cybercriminals, and many chain restaurants can be simultaneously hacked since they are linked to the same internal systems). See also *supra* Chapter 2(G) in this supplement.

<sup>52B</sup> See David Gilbert, *Best Practices to Avoid Credit Card Fraud* (Aug. 19, 2015), available at <http://restaurant-hospitality.com/how/best-practices-avoid-credit-card-fraud>; Matthew Goldstein, *Hackers Go After Little Fish, Too, While Trawling for Credit Cards*, *The New York Times* (June 11, 2015), available at [http://www.nytimes.com/2015/06/11/business/dealbook/when-it-comes-to-hackers-big-and-small-will-do.html?\\_r=0](http://www.nytimes.com/2015/06/11/business/dealbook/when-it-comes-to-hackers-big-and-small-will-do.html?_r=0) (hackers are attacking smaller retailers such as restaurants because they tend to have less sophisticated security systems, with POS systems that are vulnerable to hackers).

<sup>53</sup> PCI FAQs, *To Whom DOES PCI Apply*, available at <https://www.pcicomplianceguide.org/pci-faqs-2/#2> (PCI applies to all restaurants and other businesses that accept payment by credit or debit card, transmit cardholder data, or store credit cardholder data).

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<sup>54</sup> PCI DSS 3.0 went into effect on Jan. 1, 2015. Sean Michael Kerner, *EMV Among the Missing Pieces of PCI DSS 3.0*, *Eweek* (Dec. 16, 2014), available at <http://www.eweeek.com/security/emv-among-the-missing-pieces-of-pci-dss-3.0.html> (explaining that PCI DSS 3.0 does not address EMV, because the EMV specification does not deal with card data security after the card data has been captured by a POS, and that PCI DSS is what provides guidance and best practices for securing credit card data in the POS). See PCI Security Standards Council, *Increasing Security with EMV Chip and PCI Standards*, available at <https://www.pcisecuritystandards.org/pdfs/PCI-EMV-Final1.pdf> (EMV protects against fraud in credit card payment, PCI protects credit card information in a POS and provides security controls

for businesses to use throughout the transaction process and across payment channels to keep card data safe).

<sup>55</sup> PCI FAQs, *How Do I Report An Organization for Violating PCI*, available at <https://www.pcicomplianceguide.org/pci-faqs-2/#5> (“Businesses that are found to be out of compliance with PCI may be subject to fines by the entity they use to process their credit card transactions. Businesses that have a data breach where credit card data is actually stolen will be subject to much larger fines and fees from the banks, card brands, etc., and are required to report the breach, which quickly makes the news and causes further reputational damage.”)

<sup>56</sup> For more information on PCI compliance, see PCI Security Standards Council, available at <http://www.pcisecuritystandards.org>. See Smart Card Alliance Payments Council, *White Paper, Technologies for Payment Fraud Prevention: EMV, Encryption and Tokenization* (Oct. 2014) at 11, available at <http://www.smartcardalliance.org/wp-content/uploads/EMV-Tokenization-Encryption-WP-FINAL.pdf> (advantages to businesses which update their POS systems to utilize EMV technology include PCI and Mastercard audit relief/waiver of PCI validation assessments, leading to cost savings that offset investment in EMV technology).

## Chapter 9.D.2

*Page 182*

<sup>57</sup> Noah Glass, *Digital Or Die: the \$100B Shift Towards Digital Ordering*, Smart Blog on Food and Beverage (Nov. 11, 2015), available at <http://smartblogs.com/food-and-beverage/2015/11/11/digital-or-die-the-100-billion-shift/> (calculating that Pizza Hut, Domino’s and Papa John’s collectively processed more than \$6 billion in digital ordering sales in 2013, and predicting that roughly \$100 billion of non-pizza, limited-service restaurant industry sales will shift to digital ordering by 2022).

<sup>58</sup> See Noah Glass, *Digital Or Die: the \$100B Shift Towards Digital Ordering*, *supra* Chapter 9, footnote 57 in this supplement, for updated statistics.

<sup>59</sup> *Id.*

<sup>60</sup> Smart Card Alliance Payments Council, *White Paper, Technologies for Payment Fraud Prevention: EMV, Encryption and Tokenization*, *supra* Chapter 9, footnote 56 in this supplement, at 25-26 (cardholder authentication, encryption, and tokenization are security approaches to be considered in the card-not-present transaction environment -- which includes a customer using a credit card and ordering from a computer, tablet, or mobile phone).

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<sup>62</sup> For examples of current PATT systems, see Lindsay Konsko, “*Pay at the Table*” *Helps Take Credit Card Fraud Off the Menu*, Nerdwallet (May 23, 2014), available at <http://www.nerdwallet.com/blog/credit-cards/credit-card-fraud-skimmingrestaurants-pay-at-the-table-menu/> (discussing how credit card transactions are encrypted using PATT and the additional benefits of EMV technology alongside PATT); See also *Ingenico Group’s Wi-Fi Pay-at-the-Table Technology Brings EMV and NFC Tableside, Prepares Merchants for the Coming Liability Shift* (Mar. 31, 2015), available at <http://www.businesswire.com/news/home/20150331005633/en/Ingenico-Group%E2%80%99s-Wi-Fi-Pay-at-the-Table-Technology-Brings-EMV> (example of PATT using both Wifi and Bluetooth, coupled with EMV technology).

<sup>63</sup> *Id.*

<sup>64</sup> For discussion of the rapidly evolving field of electronic payment technology, including mobile wallets, tabletop boxes, and remote payment mechanisms, see Sheryl E. Kimes and Joel Collier, *Customer-Facing Payment Technology in the U.S. Restaurant Industry* (June 2014), available at <http://scholarship.sha.cornell.edu/chrpubs/76/>.

*Pages 183 - 184*

*The 3rd full paragraph on page 183 and the run-on paragraph on page 184 are replaced with the following text:*

Other than a PATT system, a restaurant owner or operator could employ contactless-payment terminals.<sup>66</sup> Contactless-payment terminals only require customers to tap a chip-embedded card against a terminal.<sup>67</sup> Like a PATT system, the customer would maintain control of his or her card at all times. Encryption algorithms in the cards create a unique value each time the card is used, which protects against fraudulent use of the card.<sup>68</sup> Credit card companies continue to report the issuance<sup>69</sup> of a growing number of these cards.<sup>70</sup>

<sup>66</sup> For discussion of the developments in contactless payment technology, see Smart Card Alliance, *Contactless Payments Security Questions and Answers*, available at <http://www.smartcardalliance.org/publications-contactless-payment-security-qa/>. EMV

technology is available for contactless payment cards. EMV Connection, EMV-FAQ, *supra* Chapter 9, footnote 1 in this supplement, at #17.

<sup>67</sup> See Smart Card Alliance Payments Council, *White Paper, Technologies for Payment Fraud Prevention: EMV, Encryption and Tokenization*, *supra* Chapter 9, footnote 56 in this supplement, at Secs. 2.1 – 2.5 (discussing contactless cards and EMV protection).

<sup>68</sup> See Smart Card Alliance, *Contactless Payments Security Questions and Answers*, *supra* Chapter 9, footnote 66 in this supplement, at #2 - #5.

<sup>69</sup> Some commentators, however, believe that contactless card technology will be supplanted by cell phones with contactless technology, and cell phones will replace the need for plastic cards. *But see* Odysseas Papadimitriou, *Where Does Apple Pay Stand on its First Birthday?*, TechCrunch (Oct. 17, 2015), available at <http://techcrunch.com/2015/10/17/where-does-apple-pay-stand-on-its-first-birthday/> (detailing growth in Apple Pay, but stating that mobile wallets depend on cell phone batteries, and that people still need physical credit and debit cards as a back-up due to risk that Apple Pay will be unavailable due to an uncharged cell phone).

<sup>70</sup> The demand by restaurants and other businesses, including small businesses, for insurance to cover security breaches is growing. Spending on cyberattack insurance nearly doubled in 2014 from 2013, to about \$2 billion. Javier Panzar and Paresh Dave, *Spending on Cyberattack Insurance Soars as Hacks Become More Common*, Los Angeles Times (Feb. 9, 2015), available at <http://www.latimes.com/business/la-fi-hacking-insurance-20150210-story.html>. *See also* Matthew Goldstein, *Hackers Go After Little Fish, Too, While Trawling for Credit Cards*, *supra* Chapter 9, footnote 52B in this supplement, stating that the Beazley Group, which underwrites cyberattack policies, has seen a sizeable uptick in requests for quotes from businesses with less than \$35 million in revenues.

## Chapter 10

### Is That a Camera over There?

#### The Use of Video Surveillance Technologies in Restaurants

##### Chapter 10.A.2

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<sup>24</sup> *Wilkins v. National Broadcasting Company*, 71 Cal. App. 4th 1066, 1078-1079 (Cal. Ct. App. 1999); *see Sanders v. American Broadcasting Cos.*, 20 Cal. 4th 907 (Cal. 1999)(where other elements of the tort of invasion of privacy by intrusion are proven, the cause of action is not defeated simply because the events or conversations upon which the defendant allegedly intruded were not completely private from all other eyes and ears).

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<sup>27</sup> CAL. PENAL CODE §§ 630-638; Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2522, 2701-2711, 3121, 1367. *see Sanders v. American Broadcasting Cos.*, *supra* Chapter 10, footnote 24 in this supplement (failure to establish a violation of CAL. PENAL CODE § 632 does not rule out a cause of action for invasion of privacy by intrusion).

<sup>28</sup> CAL. PENAL CODE §§ 630-638; CAL. PENAL CODE § 647(j)(3)(A)(prohibition against secret videotape or recording of a person in a state of undress in an area where the person has a reasonable expectation of privacy).

##### Chapter 10C.

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<sup>30</sup> For example, under the El Cerrito Video Surveillance Act of 2007, certain businesses in El Cerrito, California were required to install and operate an approved digital surveillance system by October 31, 2008. These businesses included carry-out food and drink establishments. EL CERRITO, CAL. ORDINANCE ch. 6.90 (2007), *available at* [www.el-cerrito.org/DocumentView.aspx?DID=367](http://www.el-cerrito.org/DocumentView.aspx?DID=367).

##### Chapter 10E.

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<sup>40</sup> CAL. LABOR CODE § 435; *see* CAL. PENAL CODE § 653n (any person who installs a two-way mirror permitting surreptitious observation of any restroom, toilet, bathroom, washroom, shower,

locker room, fitting room, or hotel room is guilty of a misdemeanor).

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<sup>47</sup> *Id.* at 293-296. While the *Hernandez* court reiterated that private employers need not justify their conduct as the “least offensive alternative,” *id.* at 296-297, if feasible alternatives existed when an employer undertook video surveillance leading to a privacy violation, the employer’s countervailing interests could appear in a less favorable light to a reviewing court. *See Richards v. County of Los Angeles*, 775 F. Supp. 2d 1176, 1185-1186 (C.D. Cal. 2011)(court found a privacy violation based on the common law tort of intrusion under *Hernandez* due to hidden constant video surveillance in a semi-private area where employees had to perform non-work activities such as eating and taking breaks).

## **Chapter 10F.**

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<sup>49</sup> 4 Witkin Cal. Criminal Law 4th § 110; CAL. PENAL CODE §1523. By way of comparison, a restaurant licensed by the California Department of Alcoholic Beverage Control (hereinafter “ABC”) is obligated to give the ABC access *without* a warrant, and ABC investigators may examine any licensed premises without a search warrant or probable cause. CAL. BUS. & PROF. CODE §§ 25753, 25755, 25616. For more discussion of the ABC and its powers, *see* Chapter 5 *supra* in the EGCRRL and in this supplement.

## Chapter 11

### When Earthquakes Strike and Wildfires Spread: Equipping Restaurants to Weather a Disaster through Emergency Preparedness

*Pages 197 -198*

*The 2nd full paragraph on page 197 and the run-on paragraph on page 198 are replaced with the following text:*

Some public and private agencies have undertaken the difficult task of researching and compiling information in an effort to put together such plans. In San Francisco, for example, the Office of Emergency Services has launched a website that aims to help individuals and families prepare their households for emergencies.<sup>1</sup> Several municipal entities in San Francisco have collaborated to produce a disaster guide for small businesses.<sup>2</sup> Similarly, the Los Angeles Emergency Management Department and the Sacramento Office of Emergency Services each have links on their websites to fairly comprehensive disaster preparation plans for families and households.<sup>3</sup> These are among the first cities in California to develop localized emergency plans, but other cities appear to be following suit. In Berkeley, for example, an emergency website similar to San Francisco's has been launched.<sup>4</sup>

<sup>1</sup> See City of San Francisco, San Francisco Office of Emergency Services, *available at* <http://www.72hours.org> (emergency preparedness website).

<sup>2</sup> The San Francisco Small Business Commission, the San Francisco Mayor's Office, and other agencies have collaborated on a Preparing For Disaster resource guide on the San Francisco Business Portal, *available at* <http://www.businessportal.sfgov.org/manage/disaster/preparing>.

<sup>3</sup> See City of Los Angeles, Emergency Preparedness, *available at* <http://www.lacity.org/for-residents/public-safety-and-emergency-services/emergency-preparedness>; City of Sacramento, Public Safety, *available at* <http://portal.cityofsacramento.org/Living-Here/PublicSafety>.

<sup>4</sup> See City of Berkeley Fire Dep't, Office of Emergency Services, *available at* <http://www.ci.berkeley.ca.us/ContentDisplay.aspx?id=3920>.

**Chapter 11A.**

*Page 198*

*The 2nd full paragraph is replaced with the following text:*

Currently, no effort comparable to the previously cited residential plans is in place to prepare California businesses, including restaurants, for emergencies and disasters. The California Emergency Services Act does not mandate that businesses have an emergency preparedness plan *per se*. More specifically, it states that the California Office of Emergency Services (hereinafter “OES”) may include private businesses within its responsibilities to prepare the state for disasters, but “all participation by businesses and nonprofit associations in this program shall be *voluntary*.”<sup>5</sup> Among other actions, the OES may provide guidance to businesses on how to integrate emergency preparedness measures into governmental disaster planning programs and how to conduct outreach programs to encourage businesses to work with governments to better prepare their employees to survive and recover from disasters.<sup>6</sup>

<sup>5</sup> CAL. GOV’T CODE § 8588.1(b) (emphasis added).

<sup>6</sup> CAL. GOV’T CODE § 8588.1(c)(1)-(2).

**Chapter 11B.**

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<sup>7</sup> According to the National Restaurant Association, there were over 62,469 restaurants in California in 2011. National Restaurant Association, *California Restaurant Industry at a Glance*, available at <http://www.restaurant.org/Downloads/PDFs/State-Statistics/california>.

<sup>8</sup> In 2013, California’s restaurants were projected to register \$67.4 billion in sales. See National Restaurant Association, *California Restaurant Industry at a Glance*, *supra* Chapter 11, footnote 7 in this supplement.

*Pages 199 - 200*

*The 3rd full paragraph on page 199 and the run-on paragraph on page 200 are replaced with the following text:*



The following suggestions are recommended *minimum* standards for restaurants in creating their own plans and in no way are meant to encompass every element that should be a part of a restaurant's emergency preparedness plan.<sup>9</sup> The plan must be tailored to meet the specific needs and attributes of each restaurant, including its size, location, number of employees, and its physical structure. The plan may also differ depending on the type of insurance the restaurant carries.<sup>10</sup> In addition, the plan must take into consideration the Americans with Disabilities Act by considering the needs of individuals with disabilities in the event of a disaster.<sup>11</sup> See Chapter 15(A) *infra* in the EGCR and in this supplement. As will become clear, when restaurant owners or operators begin to consider how they should structure an emergency plan, the eventualities for which they should be prepared are nearly endless. And putting together an emergency preparedness plan is no small task. One of the benefits of putting together a plan, however, is the brainstorming process, which will ultimately reduce the chance that the restaurant will be caught off-guard in a particular emergency situation. As one author put it, restaurants "must have a plan in place long before an event happens. The decisions operators, managers, and staff make in the heat of the moment can save the business and, even more importantly, potentially the lives of employees and customers."<sup>12</sup>

<sup>9</sup> The California Governor's Office of Emergency Management website provides useful information for a disaster plan for small businesses. See <http://www.caloes.ca.gov/for-businesses-organizations>.

<sup>10</sup> Business interruption insurance purchased by a restaurant covers loss of business income and expenses when it suffers disaster-related damage due to a suspension of operations. The amount and length of coverage for business interruptions should be closely examined when a restaurant purchases its property damage insurance. See *General Liability and Property Damage Insurance for Restaurants* discussed *supra* Chapter 2(F) in the EGCR.

<sup>11</sup> See DEP'T OF LABOR, EFFECTIVE EMERGENCY PREPAREDNESS PLANNING: ADDRESSING THE NEEDS OF EMPLOYEES WITH DISABILITIES, *available at*

<http://www.dol.gov/odep/pubs/fact/effective.htm>; Nancy Lee Jones, CRS Report RS22254, *The Americans with Disabilities Act and Emergency Preparedness and Response* (December 29, 2010), available at <http://fas.org/sgp/crs/homsec/RS22254.pdf>.

<sup>12</sup> Jennifer Gregory, *Expect the Unexpected*, QSR MAGAZINE (June 2013), available at <http://www.qsrmagazine.com/operations/expect-unexpected>.

### **Chapter 11.B.1.a**

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<sup>14</sup> See FEDERAL EMERGENCY MANAGEMENT AGENCY, PROTECT YOUR PROPERTY OR BUSINESS FROM DISASTER, available at <https://www.fema.gov/small-business-toolkit/protect-your-property-or-business-disaster> (go to Protect Business Records and Inventory); for an example of software applications, see also Dell Application-Specific Data Protection, Dell Backup and Disaster Recovery Suite, available at <http://software.dell.com/products/backup-and-disaster-recovery-suite/>.

### **Chapter 11.B.1.b**

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<sup>15</sup> See FEMA, EMERGENCY MANAGEMENT GUIDE FOR BUSINESS AND INDUSTRY (Oct. 1993), available at <https://www.fema.gov/media-library/assets/documents/3412?id=1689>; see also FEMA, WHAT TO DO IF YOUR BUSINESS OR FARM WAS DAMAGED, available at <https://www.fema.gov/what-do-if-your-business-or-farm-was-damaged>.

<sup>16</sup> See City of San Francisco, *supra* Chapter 11, footnote 1 in this supplement, available at <http://www.sf72.org/plan>. For more information, see [www.sf72.org/connect](http://www.sf72.org/connect) (suggesting that people, such as restaurant employees, should utilize existing digital networks to connect in the event of an emergency). A company-wide network can help disseminate emergency updates efficiently. *Id.*

### **Chapter 11.B.1.e.**

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<sup>18</sup> 29 C.F.R. § 1910.1200.

### **Chapter 11.B.2.a.**

<sup>21</sup> See San Francisco Department of Emergency Management, Plans, available at <http://sfdem.org/index.aspx?page=413>. The city's Hazard Mitigation Plan provides plans for the following hazards: ground shaking, ground failure (landslide and liquefaction), tsunami, drought,

flood, heat, landslide, wind, reservoir failure, wildfire, urban conflagration, hazardous material, weapons of mass destruction, energy supply, terrorism, pandemic, and climate change.

<sup>22</sup> For extensive resources for restaurants and other businesses engaging in disaster preparedness, *see* the Preparing For Disaster resource guide on the San Francisco Business Portal, *supra* Chapter 11, footnote 2 in this supplement.

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<sup>26</sup> San Francisco City and County Dep't of Public Health, Fact Sheet, Food Safety During Temporary Power Outages, *available at* <https://www.sfdph.org/dph/files/EHSdocs/ehsPublsdocs/foodsafetyfacts/PowerOut.pdf>.

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### **Chapter 11.B.2.b**

<sup>31</sup> San Francisco Office of Emergency Services, What to Do When Disaster Strikes, *available at* <http://sf-police.org/Modules/ShowDocument.aspx?documentid=23376>.

<sup>32</sup> Gary Lee Frantz et al., *Are Foodservice Operators Prepared for Terrorism?* The Consultant (Second Quarter 2007), at 89, *available at* [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0CEwQFjAI&url=ftp%3A%2F%2F68.71.41.237%2FFCSI%2FReachServer%2FDocuments%2F1%2FThe%2520Consultant%2520v.40%2520i.2.pdf&ei=vO79VPCZJcv3oASd74HgCQ&usg=AFQjCNEQt5sbBIBc\\_KCfdpw-WWrwzXojPA&bvm=bv.87611401,d.cGU](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0CEwQFjAI&url=ftp%3A%2F%2F68.71.41.237%2FFCSI%2FReachServer%2FDocuments%2F1%2FThe%2520Consultant%2520v.40%2520i.2.pdf&ei=vO79VPCZJcv3oASd74HgCQ&usg=AFQjCNEQt5sbBIBc_KCfdpw-WWrwzXojPA&bvm=bv.87611401,d.cGU). For a training video with more information, *see* South Dakota State University, Food Defense: Security in a Foodservice Operation, *available at* <https://www.youtube.com/watch?v=4VuDnl5e99k>.

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<sup>35</sup> FOOD AND DRUG ADMINISTRATION, GUIDANCE FOR INDUSTRY: FOOD PRODUCERS, PROCESSORS, AND TRANSPORTERS: FOOD SECURITY PREVENTIVE MEASURES GUIDANCE (updated Oct. 2007), *available at* <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/FoodDefense/ucm083075.htm>.

### **Chapter 11.B.3.a**

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<sup>38</sup> For more information on available relief, *see* U.S. SMALL BUSINESS ADMINISTRATION, Office of Disaster Assistance, *available at* <https://www.sba.gov/offices/headquarters/oda>. *See also* 13 C.F.R. Part 123.

### **Chapter 11.B.3.b**

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<sup>39</sup> *See* Judy Bell, *Long-Term Recovery: Getting Back to Normal*, Disaster-Resource.com, *available at* [http://www.disaster-survival.com/long\\_term.html](http://www.disaster-survival.com/long_term.html).

### **Chapter 11.B.3.c**

<sup>42</sup> “In general, an employer is not required to pay its non-exempt employees for any days or hours the non-exempt employees did not work because the business was closed due to [the disaster]. On the other hand, an exempt employee should receive his or her full salary for any week in which he or she performed any work without regard to the number of days or hours worked.” Morrison & Foerster, *Helping Handbook for Individuals and Small Businesses Affected by the 2007 Southern California Wildfires*, at 8, *available at* <http://media.mofo.com/files/Uploads/Images/SDFireHandbook2007.pdf>. *See also* CAL. LABOR CODE §§ 500-558.

<sup>43</sup> *See* T. Darrow & F. Barrow, *Employers’ Responsibilities in the Wake of a Natural Disaster* (Sept. 2005), *available at* <http://www.littler.com/publication-press/publication/employers-responsibilities-wake-natural-disaster>. *See also* National Center for APEC, *Disaster Recovery Checklist*, *available at* [http://publications.apec.org/publication-detail.php?pub\\_id=1319](http://publications.apec.org/publication-detail.php?pub_id=1319). For additional information, *see* FEMA, EMERGENCY MANAGEMENT GUIDE FOR BUSINESS AND INDUSTRY, *supra* Chapter 11, footnote 15 in this supplement.

## Chapter 12

### If It Can Happen, It Will:

#### Compliance with Safety and Environmental Requirements in Restaurant Operations

#### Chapter 12A.

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<sup>4</sup> *Id.* See also National Restaurant Association, *Don't Trip Up: Preventing Slips and Falls*, available at <http://www.restaurant.org/Manage-My-Restaurant/Operations/Back-of-House/Dont-trip-up-Preventing-slips-and-falls>.

<sup>6</sup> *Id.* In an Illinois case, a jury awarded \$1,000,000 to a plaintiff and \$75,000 to his wife. The plaintiff slipped and fell on an unmarked wet floor when leaving a restaurant and broke his arm in several places. Kevin Haas, *Boone County Man Awarded \$1M in Restaurant Fall*, Rockford Register Star (Oct. 20, 2007), available at <http://www.rrstar.com/article/20071020/News/310209961>.

<sup>7</sup> Greg Hunter, *Faked Slip and Falls Cost Customers*, ABC News (May 10, 2004), available at <http://abcnews.go.com/GMA/story?id=127854> (quoting Russ Kendzior, executive director of the NFSI). The article explains how customers ultimately pay for fraudulent slip and fall claims through increased costs for goods such as food and gasoline.

<sup>8</sup> According to the Consumer Product Safety Commission, floors and flooring materials contribute directly to more than 2 million fall injuries each year. NFSI, *Quick Facts*, available at <http://nfsi.org/nfsi-research/quick-facts/>.

#### Chapter 12.A.1

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<sup>16</sup> United States Access Board, *Floor and Ground Surfaces*, available at <http://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/guide-to-the-ada-standards/chapter-3-floor-and-ground-surfaces>.

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<sup>18</sup> Eric Astrachan, *Updates to an American Method for Measuring Coefficient of Friction*, Tile Dealer (November/December 2008), at 18-19, available at [http://www.tileusa.com/Articles/UpdatestoanAmericanMethod\\_Astrachan07.pdf](http://www.tileusa.com/Articles/UpdatestoanAmericanMethod_Astrachan07.pdf).

<sup>20</sup> There are no longer any actively maintained standards for F1677 and F1679. In formal statements for both the F1677 and F1679, the ASTM notes, “[f]ormerly under the jurisdiction of Committee F13 on Pedestrian/Walkway Safety and Footwear, this test method was withdrawn as

an active ASTM standard by action of the Committee of Standards on September 30, 2006 for failure to include an approved precision statement (violating Section A21 of the Form and Style for ASTM Standards), and for including reference to propriety apparatus where alternatives exist (violating Section 15 of the Regulations Governing ASTM Technical Committees).” ASTM Standards, ASTM F1677-05, Withdrawn Rationale, *available at* <http://www.astm.org/DATABASE.CART/WITHDRAWN/F1677.htm>; ASTM Standards, ASTM F1679-04e1, Withdrawn Rationale, *available at* <http://www.astm.org/DATABASE.CART/WITHDRAWN/F1679.htm>.

*See also* Liberty Mutual Research Institute for Safety, *From Research to Reality, Slips and Falls in Restaurants* (Summer 2011), at 8, *available at* [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CEwQFjAC&url=http%3A%2F%2Fwww.libertymutualgroup.com%2Fomapps%2FContentServer%3Fcid%3D1240004506658%26pagename%3DLMGResearchInstitute%252Fcms\\_document%252FShowDoc%26c%3Dcms\\_document&ei=0eQBVeSCEcHwoASx8IL4Cw&usg=AFQjCNEfWJjqZcwoU3\\_-xx5kjsbn\\_-s3hA&sig2=uHmDmNdCrKjdag6rffPvfg&bvm=bv.88198703,d.cGU](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CEwQFjAC&url=http%3A%2F%2Fwww.libertymutualgroup.com%2Fomapps%2FContentServer%3Fcid%3D1240004506658%26pagename%3DLMGResearchInstitute%252Fcms_document%252FShowDoc%26c%3Dcms_document&ei=0eQBVeSCEcHwoASx8IL4Cw&usg=AFQjCNEfWJjqZcwoU3_-xx5kjsbn_-s3hA&sig2=uHmDmNdCrKjdag6rffPvfg&bvm=bv.88198703,d.cGU) (stating its finding that for every 0.1 increase in a kitchen floor’s mean COF, there was a corresponding 21 percent decrease in slips reported by workers).

<sup>21</sup> Eric Astrachan, *Updates to an American Method for Measuring Coefficient of Friction*, *supra* Chapter 12, footnote 18 in this supplement, stating “[w]hen measuring COF, many things may affect the measurement. This is especially important to remember if making measurement in the field (i.e. outside of a laboratory).” ASTM C1028 was withdrawn in February 2014 due to its limited use by industry. ASTM Standards, ASTM C1028-07e1, Withdrawn Rationale, *available at* <http://www.astm.org/Standards/C1028.htm>.

<sup>22</sup> *Id.*

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<sup>23</sup> For a discussion of the efficacy of now-withdrawn ASTM C1028 and other rival standards, *see* Safety Direct America, *Does ANSI Tile Spec A137.1 Help Protect You from Liability for Slipping Accidents?*, *available at* <http://safetydirectamerica.com/does-ansi-a137-1-protect-you-from-liability-for-accidents/>.

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*The 1st full paragraph is replaced with the following text:*

The United States Occupational Safety and Health Act of 1970 (hereinafter “Fed/OSHA Act”) does not impose a numerical slip resistance standard for floors.<sup>24</sup> Likewise, the Americans with Disabilities Act (hereinafter “ADA”) Accessibility Guidelines’ (hereinafter “ADAAG”)

requirements for floors<sup>25</sup> do not require a numerical slip resistance standard but recommend a stable, firm, and slip resistant surface providing sufficient frictional counterforce to the forces exerted in walking to permit safe ambulation.<sup>26</sup> In Liberty Mutual’s study of restaurant slip and falls, researchers found that the mean COF ranged from 0.45 to 0.86 in the restaurants they studied.<sup>27</sup> They found that for each 0.1 increase in the mean COF, the rate of slipping decreased by 21%.<sup>28</sup> The study found that there were significant reductions in risk for each 0.1 COF increase at values exceeding a COF of 0.5.<sup>29</sup>

<sup>24</sup> The current requirement of the California Occupational Safety and Health Administration for working areas, in CAL. CODE REGS. tit. 8 § 3273(a), is that floors be reasonably free of oil, grease, and water, and that wet surfaces be protected against slipping by mats or other protection. It does not include a coefficient of friction.

<sup>25</sup> The United States Access Board is responsible for developing guidelines for the implementation of the ADA.

<sup>26</sup> In the 2010 ADA Standards for Accessible Design, *available at* [www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm#c3](http://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm#c3), Section 302.1 requires floor and ground surfaces be stable, firm, and slip resistant. The Advisory 302.1 states: “A stable surface is one that remains unchanged by contaminants or applied force, so that when the contaminant or force is removed, the surface returns to its original condition. A firm surface resists deformation by either indentations or particles moving on its surface. A slip-resistant surface provides sufficient frictional counterforce to the forces exerted in walking to permit safe ambulation.”

<sup>27</sup> Liberty Mutual Research Institute for Safety, *From Research to Reality, Slips and Falls in Restaurants*, *supra* Chapter 12, footnote 20 in this supplement, at 6.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

### **Chapter 12.A.3**

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<sup>41</sup> See Brandon O’Dell, *Implementing a Slip and Fall Prevention Program*, *available at* <http://blog.bodellconsulting.com/tag/slip-and-fall/>.

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<sup>44</sup> WASHINGTON STATE DEP'T OF LABOR & INDUSTRIES, RESTAURANT INDUSTRY SAFETY & HEALTH, *available at* <http://www.lni.wa.gov/Safety/Topics/AtoZ/Restaurants/default.asp>.

### **Chapter 12.B.1**

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<sup>47</sup> “The two changes in commercial food preparation techniques that have had the most impact on fire protection in recent years are the use of vegetable cooking oils for frying and the use of energy efficient appliances. The standard type of oil used to fry food is now vegetable oils, which burns at a higher temperature than animal fats and creates fires that are more difficult to extinguish. Energy efficient cooking appliances such as highly insulated fryers help reduce fuel consumption and improve cooking times by maintaining a more consistent temperature. They also help keep cooking oils and metal appliances hotter longer and make fire extinguishment more difficult.” Interstate Fire & Safety Equipment Co. Inc., What is the UL-300 Specification?, *available at* <http://www.interstatefireandsfty.net/faq/>.

*Pages 224 -225*

*The 1st full paragraph on page 224 and the run-on paragraph on page 225 are replaced with the following text:*

Both the National Fire Protection Association<sup>48</sup> and the California Fire Code<sup>49</sup> require a wet-chemical fire suppression system anytime grease-laden vapors are produced.<sup>50</sup> Generally speaking, a wet-chemical suppression system involves the spraying of a chemical suppression agent onto appliances, into the plenum chamber, and up inside exhaust ducts to extinguish a fire and prevent its reignition. As of January 1, 2008, all new automatic fire extinguishing systems used for the protection of commercial cooking operations that produce grease-laden vapors must be equipped with a wet-chemical fire suppression system meeting the Underwriters Laboratories (hereinafter “UL”) 300 standard.<sup>51</sup>

<sup>48</sup> “Wet chemical fire-extinguishing systems for use in cooking operations shall comply with standard ANSI/UL 300, Fire Testing of Fire Extinguishing Systems for Protection of Commercial Cooking Equipment.... Hazards and equipment that can be protected using wet



chemical extinguishing systems include the following: (1) Restaurant, commercial, and institutional hoods (2) Plenums, ducts, and filters with their associated cooking appliances (3) Special grease removal devices (4) Odor control devices (5) Energy recovery devices installed in the exhaust system. Each protected cooking appliance, individual hood, and branch exhaust duct directly connected to the hood shall be protected by a system or systems designed for simultaneous operation.... All systems shall have both automatic and manual methods of actuation.... The extinguishing system shall be connected to the fire alarm system, if provided, in accordance with the requirements of NFPA 72®, National Fire Alarm Code®, so that the actuation of the extinguishing system will sound the fire alarm as well as provide the function of the extinguishing system.” National Fire Protection Association®, Standard for Wet Chemical Extinguishing Systems, 17A-5.1, 5.1.1, 5.1.2.2, and 5.2.1.9 (2013 ed.).

<sup>49</sup> The applicable fire code is the 2016 California Fire Code, effective on January 1, 2017. Comprising Part 9 of 12 parts of the California Building Standards Code, the 2016 California Fire Code is based on the 2015 International Fire Code. Local jurisdictions may make local amendments based on local needs and conditions. The California Fire Code is found at CAL. CODE REGS. tit. 24, Part 9. For convenience, citations in this book are to individual sections of the California Fire Code.

<sup>50</sup> CAL. FIRE CODE § 904.12. “Commercial cooking equipment that produces grease laden vapors shall be provided with a Type I hood, in accordance with the California Mechanical Code, and an automatic fire extinguishing system that is listed and labeled for its intended use as follows: 1. Wet-chemical extinguishing system, complying with UL 300. 2. Carbon dioxide extinguishing systems. 3. Automatic fire sprinkler systems. All existing dry chemical and wet chemical extinguishing systems shall comply with UL 300. Exception: Public schools kitchens, without deep-fat fryers, shall be upgraded to a UL 300 compliant system during state-funded modernization projects that are under the jurisdiction of the Division of the State Architect. All systems shall be installed in accordance with the California Mechanical Code, appropriate adopted standards, their listing and the manufacturers’ installation instructions. Exception: Factory-built commercial cooking recirculating systems that are tested, listed, labeled and installed in accordance with UL 710B and the California Mechanical Code.”

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<sup>51</sup> *Id.* “Underwriters Laboratories (UL) has adopted a new fire testing standard (UL 300) to improve fire protection in restaurant cooking areas. Certain fire suppression systems currently installed in restaurant cooking areas may not provide adequate fire protection due to changes in commercial cooking methods.... The new UL 300 standard now considers cooking appliance design, cooking agent ignition characteristics and worst case fire suppression scenarios. Appliances affected by the UL 300 test protocol changes include fryers, griddles, ranges, char broilers (gas radiant, electric, lava rock), and woks. The UL 300 standard did not change plenum,

hood, and duct test protocols and did not affect chain broilers, upright broilers, and charcoal or mesquite cooking methods. Only wet chemical fire suppression systems, with their increased supply of extinguishing agent, were effective in extinguishing UL 300 test fires.” Interstate Fire & Safety Equipment Co. Inc., *supra* Chapter 12, footnote 47 in this supplement.

<sup>52</sup> California Department of Forestry and Fire Protection, Office of the State Marshal, UL 300 Frequently Asked Questions Concerning Commercial Cooking Protection (July 2, 2009), *available at* <http://osfm.fire.ca.gov>.

<sup>53</sup> CAL. FIRE CODE § 904.12.

*Pages 225 - 226*

*The 2nd full paragraph on page 225 and the run-on paragraph on page 226 are replaced with the following text:*

Additionally, the California Fire Code requires that a Type I hood be installed at or above all commercial cooking appliances and domestic cooking appliances used for commercial purposes that produce grease vapors and that the exhaust hood complies with the requirements of the California Mechanical Code.<sup>54</sup> The exhaust hood and duct system must be protected with an approved automatic fire extinguishing system installed in accordance with the California Fire Code.<sup>55</sup> Automatic fire-extinguishing systems protecting commercial cooking systems must be maintained in accordance with the California Fire Code and State Fire Marshal regulations.<sup>56</sup> They must be serviced upon activation and at least every 6 months by qualified individuals, with a certificate of inspection forwarded to fire code officials.<sup>57</sup> Detailed inspection, testing, maintenance, and recordkeeping requirements apply to such systems.<sup>58</sup>

<sup>54</sup> CAL. FIRE CODE §§ 609.1, 609.2.

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<sup>55</sup> CAL. FIRE CODE § 904.2.2. *See also* Orange County Fire Authority, Fire Extinguishing Systems for Commercial Cooking Operations Guideline D-04 (Jan. 1, 2014), *available at* <http://www.ocfa.org/Uploads/CommunityRiskReduction/OCFA%20Guide-D04-Fire%20Extinguishing%20Systems%20Commercial%20Cooking.pdf>.

<sup>56</sup> CAL. FIRE CODE § 904.12.6.

<sup>57</sup> CAL. FIRE CODE § 904.12.6.2.

<sup>58</sup> CAL. CODE REGS. tit. 19, §§ 904 – 904.7.

## **Chapter 12.B.2**

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<sup>59</sup> CAL. FIRE CODE § 906.2.

<sup>60</sup> CAL. FIRE CODE §§ 906.1, 906.4. Portable fire extinguishers are also required to be installed in areas where there are open flames-torches, flammable, and combustible liquids. *See* CAL. FIRE CODE § 906.1 (Table), which provides a list of areas that require portable fire extinguishers.

<sup>61</sup> CAL. FIRE CODE § 904.12.5.2; CAL. CODE REGS. tit. 19, §§ 561.1(a)(5), 566(b), 567, 573. A placard must be conspicuously placed near the extinguisher that states that the fire protection system must be activated prior to using the fire extinguisher. CAL. CODE REGS. tit. 19, § 573(d).

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<sup>62</sup> CAL. CODE REGS. tit. 19, § 574.1.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> CAL. CODE REGS. tit. 19, § 574.2(a).

<sup>66</sup> CAL. CODE REGS. tit. 19, § 574.3-574.4.

<sup>67</sup> CAL. CODE REGS. tit. 19, § 574.5.

<sup>68</sup> CAL. CODE REGS. tit. 19, § 575.

<sup>69</sup> *See* CAL. CODE REGS. tit. 19, §§ 575, 575.1, 575.2, 575.3.

<sup>70</sup> CAL. CODE REGS. tit. 19, § 575.1(a).

<sup>71</sup> CAL. CODE REGS. tit. 8, § 6151.

<sup>72</sup> State Compensation Insurance Fund, Portable Fire Extinguishers, *available at* [http://www.statefundca.com/Home/StaticIndex?id=http://content.statefundca.com//safety/safety meeting/SafetyMeetingArticle.aspx?ArticleID=84](http://www.statefundca.com/Home/StaticIndex?id=http://content.statefundca.com//safety/safety%20meeting/SafetyMeetingArticle.aspx?ArticleID=84).

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<sup>73</sup> CAL. CODE REGS. tit. 8, § 6151(c)(1).

<sup>74</sup> CAL. CODE REGS. tit. 8, § 6151(c)(4).

<sup>75</sup> CAL. CODE REGS. tit. 8, § 6151(g)(1)-(4).

<sup>76</sup> CAL. CODE REGS. tit. 8, § 6151(e)(1).

<sup>77</sup> CAL. CODE REGS. tit. 8, § 6151(e)(3).

<sup>78</sup> CAL. CODE REGS. tit. 8, § 6151(f)(2), Table L-1.

### **Chapter 12.B.3**

<sup>79</sup> “The preparation of flaming foods or beverages in places of assembly and drinking or dining establishments shall be in accordance with Sections 308.1.8.1 through 308.1.8.5” of the California Fire Code. CAL. FIRE CODE § 308.1.8.

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<sup>80</sup> CAL. FIRE CODE § 308.1.8.3.

<sup>81</sup> CAL. FIRE CODE § 308.1.8.4. Containers must be secured to prevent spillage when not in use. CAL. FIRE CODE § 308.1.8.2.

<sup>82</sup> CAL. FIRE CODE § 308.1.8.1, 308.1.8.5.

### **Chapter 12.B.4**

<sup>83</sup> CAL. FIRE CODE § 404.2; *see Fire Prevention Plans* discussed *infra* chapter 13(E) in the EGCRF for discussion of the fire safety plan requirements of Cal/OSHA that are applicable to certain types of restaurants.

<sup>84</sup> CAL. FIRE CODE § 406.2 (stating also that records must be kept of employee training).

<sup>85</sup> CAL. FIRE CODE § 404.2.2.

<sup>86</sup> CAL. FIRE CODE § 404.2.1.

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<sup>87</sup> CAL. FIRE CODE § 404.3.

<sup>88</sup> “Assembly Group A occupancy includes, among others, the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions; recreation, food or drink consumption . . . .” CAL. FIRE CODE, OCCUPANCY CLASSIFICATIONS § 202, ASSEMBLY GROUP A. A building used for such assembly purposes with an occupant load of less than 50 persons is classified as a Group B occupancy. *Id.*

<sup>89</sup> CAL. FIRE CODE § 405.1.

<sup>90</sup> CAL. FIRE CODE § 405.2 Table.

<sup>91</sup> *See* CAL. FIRE CODE § 405.5 for a complete list of what must be included.

## **Chapter 12C.**

<sup>92</sup> Studies in Orange County have concluded that FOG is one of the primary causes of sanitary sewer blockages. *See* Orange County Sanitation District Fact Sheet, Fats, Oils, and Grease (FOG) Source Control Program, *available at* <http://www.ocsd.com/home/showdocument?id=548>; *see also* City of Cypress Public Works Department, Fats, Oils, and Grease Control Program Manual (Jan. 2005), *available at* [http://www.ci.cypress.ca.us/public\\_works/fog/fog\\_manual.pdf](http://www.ci.cypress.ca.us/public_works/fog/fog_manual.pdf).

### **Chapter 12.C.1**

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<sup>93</sup> County Sanitation District of Los Angeles County, A Factsheet for Restaurant Oil and Grease Rendering, *available at* <http://www.calfog.org/docs/lacsdrendering.pdf>. *See* Los Angeles Industrial Waste Management Division, Pretreatment Programs, Fats, Oil & Grease Control, *available at* [http://www.lacitysan.org/iwmd/biz\\_industry/pre\\_treat\\_fog.htm](http://www.lacitysan.org/iwmd/biz_industry/pre_treat_fog.htm); *see also* City of Richmond, Grease Interceptor, *available at* <http://www.ci.richmond.ca.us/index.aspx?NID=169>.

<sup>94</sup> There is considerable regulation, both civil and criminal in nature, of grease waste hauling. *See* CAL. PEN. CODE § 374.5; *see also* CAL. FOOD AND AGRIC. CODE §§ 19310 *et seq.*

<sup>95</sup> For example, *see* City of Elk Grove, Grease Interceptors in Restaurants and Similar Facilities (Sept. 2004, rev. January, 2011), *available at* [http://elkgrovecity.org/city\\_hall/departments\\_divisions/building/forms\\_handouts\\_featured\\_articles/](http://elkgrovecity.org/city_hall/departments_divisions/building/forms_handouts_featured_articles/).

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<sup>97</sup> City of Los Angeles, Dep't of Public Works, Bureau of Sanitation, Fats, Oil and Grease (FOG) Control Program, *available at* <http://www.lacitysan.org/iwmd/resources/publications.htm#fog>.

## **Chapter 12.C.2**

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<sup>98</sup> The Integrated Waste Management Board has been superseded by California's Department of Resources Recycling and Recovery (CalRecycle). CalRecycle brings together the state's recycling and waste management programs and challenges Californians to achieve the highest waste reduction, recycling, and reuse goals in the nation. CalRecycle, *available at* <http://www.calrecycle.ca.gov>.

<sup>99</sup> City of San Francisco Solid Waste Management Program, Food for Thought: Restaurant Guide to Waste Reduction and Recycling (City and County of San Francisco, 1992), at 9, *available at* [www.calrecycle.ca.gov/publications/Detail.aspx?PublicationID=17](http://www.calrecycle.ca.gov/publications/Detail.aspx?PublicationID=17).

<sup>100</sup> CAL. HEALTH & SAFETY CODE § 114245.8 was repealed by Stats.2009, c. 571 (S.B.241), § 48, eff. Oct. 11, 2009. Any renderer who operates vehicles for the purpose of collecting inedible kitchen grease must register as a transporter of inedible kitchen grease and comply with California Food and Agricultural Code §§ 18677, 19310 – 19317, which regulate transporters of inedible kitchen grease. Due to thefts of increasingly valuable kitchen grease, these laws were amended in 2014 by the California legislature to impose more stringent enforcement and penalties. *See* Assembly Bill 1566, *available at* [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1566](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1566); *see also* John Klemack, “Well-Organized” Thieves Target Restaurants’ Used Kitchen Grease, NBC Los Angeles (February 21, 2014), *available at* <http://www.nbclosangeles.com/news/local/Inedibles-Kitchen-Grease-IKG-Oil-Thefts-Restaurant-CA-Department-Food-Agriculture-246626041.html>. *See also supra* Chapter 12, footnote 94 in this supplement.

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<sup>101</sup> For a description of the ongoing restaurant grease disposal program in San Francisco, including the ability of restaurants to sign up for the program, see City of San Francisco Water Power Sewer, SFGreasecycle, *available at* <http://sfwater.org/index.aspx?page=156>.

## **Chapter 12D.**

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<sup>103</sup> Bay Area Air Quality Management District, Commercial Cooking Operation (Charbroiler) Registration, *available at* <http://www.baaqmd.gov/permits/register-equipment/charbroiler> .

<sup>107</sup> Denis Cuff, *Board OKs Charbroiler Controls*, The Oakland Tribune (Dec. 6, 2007), *available at* <http://www.highbeam.com/doc/1P2-11394659.html>.

## **Chapter 12.D.1**

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<sup>109</sup> S.B. 656, 2003-2004 S., (Cal. 2003) (codified as CAL. HEALTH & SAFETY CODE § 39614). As amended, CAL. HEALTH & SAFETY CODE § 39614(j) included a sunset provision, which terminated the statute as of January 1, 2011. For current Bay Area Air Quality Management District programs, *see* <http://www.baaqmd.gov/Divisions/Planning-and-Research/Particulate-Matter.aspx>.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>113</sup> For current Bay Area Air Quality Management District programs, *see* <http://www.baaqmd.gov/Divisions/Planning-and-Research/Particulate-Matter.aspx>.

## **Chapter 12.D.2**

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<sup>114</sup> South Coast Air Quality Management District, Rule 1138 (Nov. 14, 1997), *available at* <http://www.arb.ca.gov/DRDB/SC/CURHTML/R1138.HTM>; *see also* Lilledeshan Bose, *Controlling the Emissions of Charbroiled Burgers*, UCR Today (Sept. 18, 2012), *available at* <http://ucrtoday.ucr.edu/8896> (UC Riverside is helping the South Coast Air Quality Management District find ways to further reduce the particulate matter emitted by commercial cookers).

<sup>117</sup> On December 5, 2007, the Board of Directors of the Bay Area Air Quality Management District adopted Regulation 6, Rule 2, which required the installation of catalytic oxidizers, or equivalent control devices, on all chain-driven charbroilers. Restaurants with chain-driven charbroilers must install a catalytic oxidizer if they purchase at least 500 pounds of beef per

week. Applicable restaurants were required to install the control and register on the District website by January 1, 2009. Restaurants that can demonstrate that they cook less than 400 pounds of beef per week on the chain-driven charbroiler are exempt. Restaurants with under-fired charbroilers must exhaust their emissions through a control device if their total aggregate grill surface area is at least 10 square feet and they purchase at least 1,000 pounds of beef per week. Restaurants that can demonstrate that they cook less than 800 pounds of beef per week on the under-fired charbroiler are exempt. This standard was effective on January 1, 2010 for restaurants that installed a new under-fired charbroiler on or after January 1, 2009. Owners of under-fired charbroilers had until January 1, 2013 to retrofit their charbroilers to meet the criteria. Restaurants with under-fired charbroilers must also register their charbroilers and emission control devices. Bay Area Air Quality Management District, Commercial Cooking Operation (Charbroiler) Registration, *supra* Chapter 12, footnote 103 in this supplement; *see also* Ezra David Romero, *Valley Air Cleanup Targets Restaurant Charbroilers*, NPR News (Jan. 14, 2014), *available at* <http://kvpr.org/post/valley-air-cleanup-targets-restaurant-charbroilers>.

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<sup>121</sup> Bay Area Air Quality Management District, Commercial Cooking Operation (Charbroiler) Registration, *supra* Chapter 12, footnote 103 in this supplement.

### **Chapter 12.E.1**

<sup>122</sup> National Restaurant Association, *Indoor Air Quality: Tips for the Independent Restaurant Operator* (2003), at 3-4, *available at* <http://reports.melinkcorp.com/documents/IAQNRAManual.pdf>.

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<sup>124</sup> *See* Dennis L. Matula, *Air Balance Fundamentals for the Modern Restaurant*, Engineered Systems (Jan. 2003), *available at* <http://www.highbeam.com/doc/1G1-96951982.html>.

### **Chapter 12.E.2**

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<sup>129</sup> Dennis L. Matula, *Air Balance Fundamentals for the Modern Restaurant*, *supra* Chapter 12, footnote 124 in this supplement; *see also* CAL. ENERGY COMMISSION, 2016 BUILDING ENERGY EFFICIENCY STANDARDS, NONRESIDENTIAL COMPLIANCE MANUAL (2016), at § 4.3 (Mechanical Systems) *et seq.*, *available at* [http://www.energy.ca.gov/2015publications/CEC-400-2015-033/chapters/chapter\\_04\\_mechanical\\_systems.pdf](http://www.energy.ca.gov/2015publications/CEC-400-2015-033/chapters/chapter_04_mechanical_systems.pdf).



<sup>130</sup> CAL. CODE REGS. tit. 8, § 5142(a)(1); *see also* CAL. CODE REGS. tit. 8, § 5143 (General Requirements for Mechanical Ventilation Systems). For more information on Cal/OSHA and its requirements, *see* Chapter 13 *infra* in the EGRCL and in this supplement.

<sup>131</sup> CAL. CODE REGS. tit. 8, § 5142(a)(2).

<sup>132</sup> CAL. CODE REGS. tit. 8, § 5142(b).

### Chapter 12.E.3

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<sup>134</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, MOLD REMEDIATION IN SCHOOLS AND COMMERCIAL BUILDINGS (September 2008), at 39-41, *available at* [http://www.epa.gov/mold/mold\\_remediation.html](http://www.epa.gov/mold/mold_remediation.html); CAL. DEP'T OF HEALTH SERVICES, MOLDS IN INDOOR WORKPLACES (Nov. 2005), at 3, *available at* <http://www.cdph.ca.gov/programs/hesis/Documents/molds.pdf>.

<sup>135</sup> The Toxic Mold Protection Act, S.B. 732, 2001-2001 Reg. Sess. (Cal. 2001), was codified as CAL. HEALTH & SAFETY CODE §§ 26100 – 26157.

<sup>136</sup> CAL. DEP'T OF HEALTH SERVICES, REPORT TO THE CALIFORNIA LEGISLATURE, IMPLEMENTATION OF THE TOXIC MOLD PROTECTION ACT OF 2001 (April 2005), at 5-6, *available at* <http://www.cdph.ca.gov/programs/IAQ/Documents/SB732-LegReport-Final.pdf> (the report states that, due to financial constraints, determining an exposure limit was not feasible and “[w]hen sufficient donations or other funding sources are identified, the remaining tasks mandated in the Toxic Mold Protection Act will be completed”); *see also* SB 732 (Toxic Mold Protection Act of 2001) Implementation Update, July 2008, *available at* <http://www.cdph.ca.gov/programs/IAQ/Documents/SB%20732%20Implementation%20Update%20July%202008.htm>.

The California Department of Public Health, formerly the California Department of Health Services, believes that after considerable research into this question, science-based permissible exposure limits for indoor molds cannot be established and that “[CDPH] agrees with other building and health professionals that indoor dampness, water intrusion, or fungal growth should always be eliminated in a safe and efficient manner.” CAL. DEP'T OF PUBLIC HEALTH, INDOOR MOLD, *available at* <http://www.cdph.ca.gov/programs/iaq/pages/indoormold.aspx>. CDPH states that its current position as to mold is consistent with the current consensus among scientists and medical experts, namely that (1) visible water damage, damp materials, visible mold, and mold odor indicate an increased risk of respiratory disease; (2) the traditional methods used to measure mold exposure do not reliably predict health risks; (3) the differentiation of some molds (such as *Stachybotrys* species) as “toxic molds” that are especially hazardous to healthy individuals is not justified by available evidence; and (4) the most important steps in dealing with indoor dampness

or mold are to identify the source of moisture and to take the necessary steps to make repairs to stop them. *Id.*

<sup>140</sup> See Daniel Sitomer, *Restaurants Create Mold Contamination Risk in Commercial and Residential Buildings*, Real Estate Weekly, Dec. 10, 2003, available at <http://www.thefreelibrary.com/Restaurants+create+mold+contamination+risk+in+commercial+and...-a0111853525>.

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<sup>141</sup> The Toxic Mold Protection Act, S.B. 732, 2001-2001 Reg. Sess. (Cal. 2001), codified as CAL. HEALTH & SAFETY CODE §§ 26100 – 26157, would require mold disclosures for commercial properties if the mold exceeds the permissible exposure limits to molds. However, as noted earlier (*see supra* Chapter 12, footnote 136 in this supplement) permissible exposure limits cannot and have not been established.

<sup>142</sup> U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, A Brief Guide to Mold in the Workplace, available at <http://www.osha.gov/dts/shib/shib101003.html>.

<sup>143</sup> See Centers for Disease Control and Prevention, Facts about Stachybotrys chartarum and Other Molds, available at <http://www.cdc.gov/mold/stachy.htm> (recommending that humidity levels be kept as low as possible—no higher than 50%—all day long).

<sup>145</sup> CAL. CODE REGS. tit. 8, § 5144.

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<sup>146</sup> For a checklist pertaining to HVAC cleaning, see National Air Duct Cleaners Association, NADCA for the Commercial/Industrial Community, available at <http://nadca.com/en/commercial>.

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#### **Chapter 12.E.4**

*Chapter 12(E)(4) is replaced in its entirety with the following text:*

The following resources provide additional information on air quality, HVAC, mold, and mold prevention:

Advanced Mold Inspections: <http://www.moldfixer.com/index.html>.

Cal. Dep't of Health Services, Molds in Indoor Workplaces: <http://www.cdph.ca.gov/programs/hesis/Documents/molds.pdf>.

Centers for Disease Control and Prevention, Mold, General Information:  
<http://www.cdc.gov/mold/basics.htm>.

Gary Rosen, *MOLD & MOLD TOXIN REMEDIATION* (Hope Academic Press 2006).

Leo A. Meyer, *HVAC SECURITY AND SAFETY FOR VULNERABILITY ASSESSMENT* (Lama Books 2004).

National Restaurant Association, *Indoor Air Quality: Tips for the Independent Restaurant Operator* (2003): <http://reports.melinkcorp.com/documents/IAQNRAManual.pdf>.

U.S. Dep't of Labor, Occupational Safety and Health Administration, *A Brief Guide to Mold in the Workplace*: <http://www.osha.gov/dts/shib/shib101003.html>.

U.S. Environmental Protection Agency, *Mold Remediation in Schools and Commercial Buildings* (March 2001): [http://www.epa.gov/mold/mold\\_remediation.html](http://www.epa.gov/mold/mold_remediation.html).

## **Chapter 12F.**

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<sup>147</sup> Earth Resource Institute, *Polystyrene Foam Report*, *available at* <http://www.earthresource.org/campaigns/capp/capp-styrofoam.html>; SF Environment, *Food Service Waste Reduction Ordinance*, *available at* <http://sfenvironment.org/article/food-service-waste-reduction-ordinance>.

<sup>148</sup> Surfrider Foundation, *Polystyrene Ordinances*, *available at* <http://www.surfrider.org/pages/polystyrene-ordinances> (listing numerous local polystyrene ordinances in California affecting restaurants).

<sup>151</sup> SF Environment, *Food Service Waste Reduction Ordinance*, *supra* Chapter 12, footnote 147 in this supplement.

<sup>153</sup> SF Environment, *Food Service Waste Reduction Ordinance*, *supra* Chapter 12, footnote 147 in this supplement.

## **Chapter 12G.**

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<sup>156</sup> *Flex Your Power, Boosting Restaurant Profits With Energy Efficiency: A Guide for Restaurant Owners and Managers*, *available at*

[http://www.pge.com/includes/docs/pdfs/mybusiness/energysavingsrebates/incentivesbyindustry/foods-services/Boosting\\_Restaurant\\_Profits\\_with\\_Energy\\_Efficiency.pdf](http://www.pge.com/includes/docs/pdfs/mybusiness/energysavingsrebates/incentivesbyindustry/foods-services/Boosting_Restaurant_Profits_with_Energy_Efficiency.pdf).

### **Chapter 12.G.1.a**

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*The 1st full paragraph is replaced with the following text:*

The FTC issued revised Green Guides in October of 2012, updating the existing guides and adding new sections on the use of carbon offsets, “green” certifications and seals, and renewable energy and renewable material claims.<sup>162</sup> The revised Green Guides warn marketers to avoid broad “general environmental benefit” claims that a product is sustainable, green, eco-friendly, or the like, and recommend that qualifying language be added to explain to consumers the basis and limits of such claims.<sup>162A</sup> The revised Green Guides also warn against “green” certifications that are not generated by an independent third party, claims that overstate environmental attributes, claims that inaccurately describe actual product usage, recyclability, and/or disposal conditions, and overstated claims that products are “free of” certain ingredients or are non-toxic.<sup>162B</sup> The revised Green Guides require environmental claims to be truthful, not misleading and supported by a reasonable basis, and the FTC has been enforcing this substantiation requirement to underscore its importance.<sup>162C</sup>

<sup>162</sup> 16 C.F.R. §§ 260.1 – 260.17; *see* FTC, FTC Issues Revised “Green Guides” (Oct. 1, 2012), *available at* <https://www.ftc.gov/news-events/press-releases/2012/10/ftc-issues-revised-green-guides>.

<sup>162A</sup> FTC, Environmental Claims, Summary of the Green Guides (Oct. 2012), *available at* <https://www.ftc.gov/tips-advice/business-center/guidance/environmental-claims-summary-green-guides>.

<sup>162B</sup> *Id.*, *See* National Restaurant Association, *When and When Not to say “Green,” available at* <http://www.restaurant.org/Manage-My-Restaurant/Marketing-Sales/Sustainability/When-and-when-not-to-say-green>”.

<sup>162C</sup> 16 C.F.R. § 260.2. For example, the FTC brought an action against EPS, a company that makes and sells plastic lumber products, stating that a reasonable consumer would likely interpret claims such as “Made entirely of recycled plastic lumber” and “All recycled plastic design” to mean that products are made from virtually all recycled plastic, but the products actually contained only about 72% recycled plastic. FTC, Press Release: Too Good To Be Green: Company’s Plastic Lumber Claims Don’t Hold Up (July 17, 2014), *available at* <https://www.ftc.gov/news-events/press-releases/2014/07/too-good-be-green-companys-plastic-lumber-claims-dont-hold>.

### **Chapter 12.G.1.b**

*Page 246*

*The 2nd full paragraph is replaced with the following text:*

The Federal Trade Commission Act is enforced solely by the FTC, and there is no private right of action. However, California’s Environmental Marketing Claims Act (hereinafter “CEMCA”), included as part of the state’s false advertising law, specifically incorporates the FTC’s Green Guides as part of California law.<sup>163</sup> This means that the Green Guides can form the basis of private causes of action under California’s consumer protection statutes, as well as provide defenses to such actions.<sup>163A</sup> Courts faced with these challenges have considered how a reasonable consumer is likely to perceive an environmental marketing claim made visually in a product’s packaging and in written statements made thereupon.<sup>163B</sup>

California law requires that an advertiser who initiates an environmental representation must provide to the public, upon request, written documentation supporting an environmental representation that a consumer good is environmentally friendly, “green,” or any other similar environmental or ecological claim.<sup>163C</sup> Such documentation would include, if applicable, whether or not the consumer good conforms with the uniform standards in the Green Guides for the terms recycled, recyclable, biodegradable, photodegradable, or ozone friendly.<sup>164</sup> Any violation of these foregoing California environmental representation statutes can result in a

misdeemeanor punishable by imprisonment in the county jail not to exceed 6 months, or a fine not to exceed \$2,500, or both.<sup>165</sup>

<sup>163</sup> Under the CEMCA, CAL. BUS. & PROF. CODE § 17580.5(a), it is unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim, and an environmental marketing claim is defined to include any claim contained in the Green Guides. CAL. BUS. & PROF. CODE § 17580.5(b) makes compliance with the Green Guides a defense to any such challenge.

<sup>163A</sup> *Hill v. Roll Intern. Corp.*, 195 Cal. App. 4th 1295 (Cal. Ct. App. 2011), involved a consumer who alleged that the green drop on Fiji water packaging falsely represented that the water was environmentally superior to other waters and that it was endorsed by an environmental organization. The plaintiff, relying on the CEMCA’s prohibition of untruthful environmental claims including Green Guide violations, brought suit under California’s Unfair Competition Law (hereinafter “CUCL”) (CAL. BUS. & PROF. CODE § 17200 *et seq.*), False Advertising Law (hereinafter “FAL”)(CAL. BUS. & PROF. CODE § 17500 *et seq.*), and Consumers Legal Remedies Act (hereinafter “CLRA”) (CAL. CIV. CODE § 1750 *et seq.*).

<sup>163B</sup> In *Hill v. Roll Intern. Corp.*, *supra* Chapter 13, footnote 163A in this supplement, the court concluded that the plaintiff had not met the “reasonable consumer” standard set forth in the Green Guides, and affirmed a lower court ruling that the plaintiff consumer was unreasonable in her belief that the green drop on Fiji water bottles represented a third party organization’s endorsement of Fiji water’s environmental superiority. *See also Jou v. Kimberly-Clark Corp.*, 2013 Westlaw 6491158, 2013 U.S. Dist. LEXIS 173216 (N.D. Cal. 2013) (plaintiff challenged the branding and marketing of Huggies diapers under the CUCL, FAL, and CLRA by relying on the CEMCA and the Green Guides; in its order partially granting and partially denying a motion to dismiss, the court relied on the Green Guides to determine the appropriateness of the use of the claim that the diapers were “natural”).

<sup>163</sup> CAL. BUS. & PROF. CODE § 17580.

<sup>164</sup> CAL. BUS. & PROF. CODE § 17580(a)(5).

<sup>165</sup> CAL. BUS. & PROF. CODE § 17581.

## **Chapter 12.G.2**

*Page 247*

*The 1st full paragraph is replaced with the following text:*

In 2008, California became the first state to pass green building standards. The California Building Standards Commission adopted new standards on July 17, 2008, that took

effect on January 14, 2009, but would remain voluntary until 2010.<sup>167</sup> These standards require reduction in the use of water by 20% (with a reduction of water use by 50% for landscaping) and reduction in the use of energy by 15%. Many cities and counties have passed local green building ordinances furthering “green” initiatives in California.<sup>168</sup>

<sup>167</sup> 2016 California Green Building Standards Code; CAL. CODE REGS. Tit. 24, Part 11 (2016). For an overview of the significant changes that have been made by the California Green Building Code, *see* CALGreen in 2012: A Wider Shade of Green, *available at* [http://www.green-technology.org/green\\_technology\\_magazine/index.php?cID=136](http://www.green-technology.org/green_technology_magazine/index.php?cID=136). For background, *see* California Building Standards Commission, The CALGreen Story, *available at* [www.documents.dgs.ca.gov/bsc/CALGreen/The-CALGreen-Story.pdf](http://www.documents.dgs.ca.gov/bsc/CALGreen/The-CALGreen-Story.pdf); *see also* CAL. DEP’T OF JUSTICE, STATE AND LOCAL GOVERNMENT GREEN BUILDING ORDINANCES IN CALIFORNIA, *available at* [http://ag.ca.gov/globalwarming/pdf/green\\_building.pdf](http://ag.ca.gov/globalwarming/pdf/green_building.pdf).

<sup>168</sup> CAL. DEP’T OF JUSTICE, STATE AND LOCAL GOVERNMENT GREEN BUILDING ORDINANCES IN CALIFORNIA, *supra* Chapter 12, footnote 167 in this supplement (identifying mandatory “green” building ordinances and various local approaches).

### Chapter 12.G.3

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<sup>172</sup> Bay Area Green Business Program, *available at* <http://www.greenbiz.ca.gov/contact.html>.

<sup>173</sup> *Id.* (more than 2,300 businesses and public agencies have been certified since 1996).

<sup>174</sup> San Francisco Green Business, *available at* <http://sfgreenbusiness.org>.

<sup>175</sup> San Francisco’s checklist for “green” restaurants is *available at* <http://sfgreenbusiness.org/Green-Your-Business/Program-Standards/>.

<sup>176</sup> Environment LA, Learn About the City of Los Angeles Green Business Certification Program, *available at* [http://environmentla.com/cgbp/Learn\\_Criteria.html](http://environmentla.com/cgbp/Learn_Criteria.html).

<sup>177</sup> The restaurant certification checklist in Los Angeles is *available at* <http://greenbizla.com/certs.htm>.

<sup>178</sup> San Diego Area Green Business Project, *available at* [http://www.sandiegocounty.gov/deh/doing\\_business/chd\\_greenbus.html](http://www.sandiegocounty.gov/deh/doing_business/chd_greenbus.html). The checklist for food facilities is *available at* [http://www.sandiegocounty.gov/deh/doing\\_business/chd\\_greenbus.html](http://www.sandiegocounty.gov/deh/doing_business/chd_greenbus.html).

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<sup>179</sup> San Diego Area Green Business Project, *supra* Chapter 13, footnote 178 in this supplement. The county has established a comprehensive audit program that examines the heating and cooling systems, refrigeration, cooking equipment, lighting, and sanitation systems of food service operations.

### **Chapter 12.G.5**

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<sup>184</sup> For example, EcoLogo™ sets environmental standards and certifies products in more than 120 categories. Underwriters Laboratory is now involved in environmental certification, with its acquisition of Ecologo. See <http://industries.ul.com/environment>.

*Page 250*

*The 2nd full paragraph is replaced with the following text:*

The drought in California has resulted in water conservation requirements. On March 17, 2015, the State Water Resources Control Board issued emergency regulations that prohibit restaurants from serving water to customers except on request.<sup>185</sup>

<sup>185</sup> CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, WATER CONSERVATION PORTAL – FAQ, WHAT PROHIBITIONS APPLY TO BUSINESSES, *available at* [http://www.waterboards.ca.gov/water\\_issues/programs/conservation\\_portal/faq.shtml](http://www.waterboards.ca.gov/water_issues/programs/conservation_portal/faq.shtml).



## Chapter 13

### Cal/OSHA Safety Standards for Employees: Monitoring the Health and Safety of Restaurant Employees

Page 251

*The 1st full paragraph is replaced with the following text:*

Restaurant employees are one of the largest groups of service workers injured in the State of California each year. According to the California Department of Industrial Relations, approximately 30,300 cases of nonfatal occupational injuries and illnesses and 6 fatalities occurred in the California restaurant industry in 2014.<sup>1</sup> However, the actual number of work-related injuries in the restaurant industry is believed to be even higher due to the fact that many restaurants underreport injuries for legal (i.e. the undocumented immigration status of some restaurant workers) and insurance cost purposes.

<sup>1</sup> CAL. DEP'T OF INDUSTRIAL RELATIONS, OFFICE OF POLICY, RESEARCH AND LEGISLATION, *available at* <http://www.dir.ca.gov/oprl/Injuries/2014/2014Table2.pdf> (nonfatal illnesses and injuries); CAL. DEP'T OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (hereinafter "DOSH"), *available at* [http://www.dir.ca.gov/dosh/cfoi/cfoi\\_2014/cfoi2014-A1.pdf](http://www.dir.ca.gov/dosh/cfoi/cfoi_2014/cfoi2014-A1.pdf) (fatalities).

#### Chapter 13A.

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<sup>5</sup> CAL. LABOR CODE § 6300. In addition to the regulations discussed in this Chapter 13, the following Cal/OSHA regulations may be pertinent to restaurants and their employees: (i) CAL. CODE REGS. tit. 8, § 3249 (safety regulations for cold storage rooms to ensure lighting and ability to exit); (ii) CAL. CODE REGS. tit. 8, § 4552 (safeguards for use of meat, fish, and other food grinders); (iii) CAL. CODE REGS. tit. 8, § 4547 (safeguards for use of rotary dough kneaders); (iv) CAL. CODE REGS. tit. 8, § 4544 (safeguards for operation of dough brakes); (v) CAL. CODE REGS. tit. 8, § 3384 (protections for employees' hands); (vi) CAL. CODE REGS. tit. 8, § 5162 (emergency eyewash and shower equipment for work areas); (vii) CAL. CODE REGS. tit. 8, § 4559 (safeguards for garbage disposal equipment); (viii) CAL. CODE REGS. tit. 8, § 6151 (portable fire extinguisher requirements); and (ix) CAL. CODE REGS. tit. 8, § 3273 (safe working area requirements). Electrical safety work orders for low-voltage and high-voltage systems are contained in CAL. CODE REGS. tit. 8, §§ 2300-2989.1.

**Chapter 13B.**

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<sup>7</sup> Labor Occupational Health Program, University of California, Berkeley, School of Public Health, *available at* <http://www.lohp.org>.

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<sup>9</sup> U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION (OSHA), RECOMMENDATIONS FOR WORKPLACE VIOLENCE PREVENTION PROGRAMS IN LATE-NIGHT RETAIL ESTABLISHMENTS, APPENDIX A: SAMPLE WORKPLACE VIOLENCE FACTORS AND CONTROLS CHECKLIST, *available at* <https://www.osha.gov/Publications/osh3153.pdf>.

**Chapter 13C.**

*Page 254*

*The following text is inserted after the 1st full paragraph:*

An effective IIPP should be tailored to address the specific types of tasks and associated hazards involved in restaurant work. General restaurant safety issues, which should be included in a restaurant's IIPP, include preventing burns; preventing slips, trips, and falls; electrical safety; safe use of freezers, fryers, knives, machinery, and chemical cleaners; and safe lifting and carrying.<sup>16A</sup> Hazard-specific issues such as workplace violence may be incorporated into the IIPP or addressed through stand-alone written programs.<sup>16B</sup>

Restaurants with outdoor dining areas should be aware that Cal/OSHA requires all employers with "outdoor places of employment"<sup>16C</sup> to establish, implement, and maintain an effective heat illness prevention program<sup>16D</sup> that applies "at all times when employees work outdoors."<sup>16E</sup> All employees who work outdoors must have access to at least a quart of drinking water for each hour of the employee's shift.<sup>16F</sup>

Employers are required to provide outdoor workers with access to shade when the temperature is over 80 degrees Fahrenheit, and at all times workers who fear they could develop heat illness must be allowed and encouraged to rest in the shade for at least 5 minutes.<sup>16G</sup>

Employers must monitor employees taking cool-down rest periods, closely observe employees when the temperatures is over 80 degrees Fahrenheit or there is a heat wave, and closely observe the acclimatization of an employee for the first 14 days that he or she is newly assigned to a high heat area.<sup>16H</sup>

An employer's heat illness prevention program must have emergency response procedures, including methods to connect employers by voice, observation, or electronic means with heat stricken employees, to effectively monitor them and offer them first aid, and to contact emergency responders on their behalf.<sup>16I</sup> Ample training programs for both employees and supervisors are required, the content of which must include information about heat illness and acclimatization, the employer's obligations to employees concerning heat illness prevention, and reporting, response, monitoring, first aid, and emergency procedures for employees and supervisors.<sup>16J</sup>

Under new California Labor Code Section 6720, by January 1, 2019, a heat-related illness and injury prevention standard applicable to workers working in indoor places of employment must be proposed by DOSH for review and adoption by the Occupational Safety and Health Standards Board.<sup>16K</sup>

<sup>16A</sup> CAL. DEP'T OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (DOSH), CAL/OSHA GUIDE TO RESTAURANT SAFETY (2012), *available at* [http://www.dir.ca.gov/dosh/dosh\\_publications/Rsg.pdf](http://www.dir.ca.gov/dosh/dosh_publications/Rsg.pdf). *See also* CAL. DEP'T OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (DOSH), GUIDE TO DEVELOPING AN INJURY AND ILLNESS PREVENTION PROGRAM (IIPP) FOR "RESTAURANTS", *available at* [http://www.dir.ca.gov/dosh/dosh\\_publications/RsgIippGuide.pdf](http://www.dir.ca.gov/dosh/dosh_publications/RsgIippGuide.pdf).

<sup>16B</sup> CAL. DEP'T OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (DOSH), GUIDE TO DEVELOPING AN INJURY AND ILLNESS PREVENTION PROGRAM (IIPP) FOR "RESTAURANTS", *supra* Chapter 13, footnote 16A in this supplement, at 11.

<sup>16C</sup> CAL. CODE REGS. tit. 8, § 3395(a). An outdoor place of employment is one that is not an indoor workplace with a roof and enclosed sides. CAL. DEP'T OF INDUSTRIAL RELATIONS,

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (DOSH), HEAT ILLNESS PREVENTION ENFORCEMENT Q & A, QUESTION 2, *available at* <http://www.dir.ca.gov/dosh/heatIllnessQA.html>. *See also* DOSH, HEAT ILLNESS PREVENTION, *at* [www.dir.ca.gov/dosh/HeatillnessInfo.html](http://www.dir.ca.gov/dosh/HeatillnessInfo.html).

<sup>16D</sup> The written heat illness prevention plan may be integrated into the restaurant’s IIPP, or maintained in a separate document. CAL. CODE REGS. tit. 8, § 3395(a)(Note 1). It must be in both English and in the language understood by a majority of employees, and available to employees. For restaurants, it must include at a minimum procedures for provision of water and access to shade, emergency response procedures, and acclimatization procedures. CAL. CODE REGS. tit. 8, § 3395(i). *See also* CAL. DEP’T OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (DOSH), 2015 HEAT ILLNESS PREVENTION TRAINING, *available at* <http://www.dir.ca.gov/dosh/documents/Heat-Illness-Prevention-Training-2015.pdf>.

<sup>16E</sup> CAL. DEP’T OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (DOSH), HEAT ILLNESS PREVENTION ENFORCEMENT Q & A, *supra* Chapter 13, footnote 16A in this supplement, at Question 1.

<sup>16F</sup> CAL. CODE REGS, tit. 8, § 3395(c). The water must be “fresh, pure, suitably cool, and provided to employees free of charge.” *Id.*

<sup>16G</sup> CAL. CODE REGS. tit. 8, § 3395(d). Under CAL. LABOR CODE § 226.7, an employer must provide one hour of pay to employees for missed recovery or “cooldown” periods to prevent heat illness. The high-heat procedures contained in CAL. CODE REGS. tit. 8, § 3395(e), which become applicable at 95 degrees Fahrenheit, apply to certain specified industries, but not to restaurants. CAL. CODE REGS. tit. 8, § 3395(a)(1)-(2).

<sup>16H</sup> CAL. CODE REGS. tit. 8, § 3395(d), (g).

<sup>16I</sup> CAL. CODE REGS. tit. 8, § 3395(f).

<sup>16J</sup> CAL. CODE REGS. tit. 8, § 3395(h).

<sup>16K</sup> CAL. LABOR CODE § 6720. The statute permits DOSH to propose, and the Occupational Safety and Health Standards Board to adopt, a standard that limits the application of high-heat provisions to certain industry sectors. *Id.*

## **Chapter 13F.**

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<sup>30</sup> CAL. CODE REGS. tit. 8, § 5194(e). *See also* CAL. DEP’T OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (DOSH), MODEL HAZARD COMMUNICATION PROGRAM (HAZCOM) FOR RESTAURANTS, *available at* [http://www.dir.ca.gov/dosh/dosh\\_publications/RsgHazcomModel.pdf](http://www.dir.ca.gov/dosh/dosh_publications/RsgHazcomModel.pdf).

<sup>31</sup> CAL. CODE REGS. tit. 8, § 5194(b)(5)(I)(2): “Employers shall maintain copies of any safety data sheets that are received with incoming shipments of the sealed containers of hazardous chemicals, shall obtain a safety data sheet for sealed containers of hazardous chemicals received without a safety data sheet if an employee requests the safety data sheet, and shall ensure that the safety data sheets are readily accessible during each work shift to employees when they are in their work area(s).” CAL. CODE REGS. tit. 8, § 5194 now uses the definition “Safety Data Sheet” in lieu of “Material Safety Data Sheet.”

### **Chapter 13H.**

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<sup>43</sup> University of California, San Francisco, *Restaurant Noise Can Exceed Federal Workplace Standards, UCSF Study Finds*, May 15, 2000, available at [http://www.eurekaalert.org/pub\\_releases/2000-05/UoCS-Rnce-1505100.php](http://www.eurekaalert.org/pub_releases/2000-05/UoCS-Rnce-1505100.php).

### **Chapter 13I.**

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<sup>49</sup> See CAL. DEP’T OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (DOSH), FREQUENTLY ASKED QUESTIONS ABOUT THE BLOODBORNE PATHOGENS STANDARD, Jan. 20, 2002, available at <http://www.dir.ca.gov/dosh/bloodbornefaq.html>; see also U.S. DEP’T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION (OSHA), OSHA’S BLOODBORNE PATHOGENS STANDARD (2011), available at [https://www.osha.gov/OshDoc/data\\_BloodborneFacts/bbfact01.pdf](https://www.osha.gov/OshDoc/data_BloodborneFacts/bbfact01.pdf); CAL. CODE REGS. tit. 8, § 5193(c). See Chapter 4(B)(4) in this supplement for discussion of the duty to assist restaurant customers who become ill.

### **Chapter 13J.**

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<sup>54</sup> Labor Occupational Health Program, University of California, Young Workers Project, Safer Jobs for Teens (2013), available at <http://youngworkers.org/our-materials/employers/>.

### **Chapter 13K.**

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<sup>57</sup> California’s requirements for reporting work-connected fatalities and serious injuries are set forth in CAL. CODE REGS. tit. 8, § 342. Employers use Cal/OSHA Forms 300 and 301 to log such a death, injury, or illness and their details, and Form 300A to summarize them. CAL. CODE REGS. tit 8, §§ 14300.29, 14300.32.

<sup>59</sup> A “serious injury or illness” does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway. CAL. LABOR CODE § 6302(h). The nearest Cal/OSHA office may be found on Cal/OSHA's website at <http://www.dir.ca.gov/dosh/districtoffices.htm>.

### **Chapter 13L.**

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<sup>60</sup> CAL. CODE REGS. tit. 8, § 14300.2(a)(1), Appendix A, now uses North American Industry Classification System (hereinafter “NAICS”) codes. In this regulation, the NAICS code used for full service restaurants is 7221, and the NAICS code used for limited service eating places is 7222. Both codes are listed in Appendix A and are shown as exempt from Cal/OSHA injury and illness records to the extent described in the accompanying text for footnotes 60-64.

<sup>62</sup> CAL. CODE REGS. tit. 8, § 14300.41(b)(3), (4). *See supra* Chapter 13, footnote 60 in this supplement.

### **Chapter 13.M.2.**

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<sup>86</sup> CAL. CODE REGS. tit. 8, § 336(e), (f); CAL. DEP’T OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH POLICY AND PROCEDURES MANUAL, INSPECTION PROCEDURES, *supra* Chapter 13, footnote 68 in the EGCR.

### **Chapter 13O.**

*Pages 265-266*

*The following text replaces Chapter 13(O) in its entirety:*

#### **O. Additional Resources**

For more information on maintaining the health and safety of employees, especially in the context of operation of a restaurant, see the following:

Cal/OSHA, Resources on Restaurant Safety:  
[http://www.dir.ca.gov/dosh/dosh\\_publications/RsgResources.pdf#zoom=100](http://www.dir.ca.gov/dosh/dosh_publications/RsgResources.pdf#zoom=100).

Cal/OSHA, Guidelines for Workplace  
Security:[https://www.osha.gov/OshDoc/data\\_BloodborneFacts/bbfact01.pdf](https://www.osha.gov/OshDoc/data_BloodborneFacts/bbfact01.pdf).  
[http://www.dir.ca.gov/DOSH/dosh\\_publications/worksecurity.html](http://www.dir.ca.gov/DOSH/dosh_publications/worksecurity.html).

Connecticut Department of Public Health, Working Safely in Restaurants:  
[http://www.ct.gov/dph/LIB/dph/environmental\\_health/eoha/pdf/Restaurant\\_Safety.pdf](http://www.ct.gov/dph/LIB/dph/environmental_health/eoha/pdf/Restaurant_Safety.pdf).

Labor Occupational Health Program (LOHP) University of California, Berkeley: Restaurant Safety Training Guide:  
[http://www.dir.ca.gov/chswc/WOSHTEP/Publications/English\\_Trainers\\_Guide.pdf](http://www.dir.ca.gov/chswc/WOSHTEP/Publications/English_Trainers_Guide.pdf).

Restaurant Supervisor Safety Training Program:  
[http://www.dir.ca.gov/CHSWC/English\\_training\\_program.pdf](http://www.dir.ca.gov/CHSWC/English_training_program.pdf).

Safety Tip Sheets: [http://lohp.org/wp-content/uploads/2013/10/safetytips\\_english.pdf](http://lohp.org/wp-content/uploads/2013/10/safetytips_english.pdf).

A Menu For Protecting the Health and Safety of Restaurant Workers:  
[https://www.osha.gov/dte/grant\\_materials/fy10/sh-20864-10/rest\\_worker\\_manual.pdf](https://www.osha.gov/dte/grant_materials/fy10/sh-20864-10/rest_worker_manual.pdf).

National Restaurant Association: <http://www.restaurant.org>.

Restaurant Outreach Program, Keeping Teen Workers Safe in Restaurants - Washington State Department of Labor and Industries:  
<http://www.lni.wa.gov/WorkplaceRights/TeenWorkers/JobSafety/RestaurantProgram>.

Timothy Webster, Occupational Hazards in Eating and Drinking Places, Compensation and Working Conditions (Summer 2001):  
<http://www.bls.gov/opub/mlr/cwc/occupational-hazards-in-eating-and-drinking-places.pdf>.

U.S. Department of Labor / Occupational Safety & Health Administration, Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments:  
<https://www.osha.gov/Publications/osh3153.pdf>.

U.S. Department of Labor / Occupational Safety & Health Administration, Teen Worker Safety in Restaurants:  
<http://www.osha.gov/SLTC/youth/restaurant/index.html>.

Washington Restaurant Association:  
<http://warestaurant.org/wp-signup.php?new=www.wrahome.com>.

## Chapter 14

### Treating Customers Fairly:

#### Restaurants' Liability for Discriminatory Conduct under the Unruh Civil Rights Act

*Pages 269-270*

*The 2nd full paragraph on page 269 and the run-on paragraph on page 270 are replaced with the following text:*

Discrimination by all business establishments in California, including restaurants, is subject to Section 51 of the California Civil Code, which is known and cited as the Unruh Civil Rights Act (hereinafter “UCRA”). As of January 1, 2016, California Civil Code Section 51(b) of the UCRA states that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status<sup>2A</sup> are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”<sup>3</sup> A restaurant may not make distinctions among customers or potential customers on the basis of a classification listed in California Civil Code Section 51(b), and any discrimination based on these protected categories may not be excused by any particular business or investment rationale that the restaurant owner or operator may have.<sup>4</sup>

<sup>2A</sup> California Civil Code Section 51(b)’s amendment to add citizenship, primary language, or immigration status to the UCRA’s protections was part of a much larger current of California legislation concerning immigrants. *See* Senate Bill 600 (signed by Gov. Jerry Brown on Sept. 8, 2015), *available at*

[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB600](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB600); *see e.g.*, California Restaurant Association, Industry Insights, *Immigration-Related Protections in California: What Restaurants Need to Know*, *available at* <http://www.calrest.org/immigration-related-employee-protections-in-california.html>.

<sup>3</sup> CAL. CIV. CODE § 52(a) provides remedies, including a private right of action, to enforce the UCRA. Although the California courts have referred to both CAL. CIV. CODE § 51 and CAL. CIV.



CODE § 52 as the “Unruh Civil Rights Act,” this statutory label “applies more precisely only to Section 51.” *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 668 n. 5 (Cal. 2009).

<sup>4</sup> *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 32 (Cal. 1985). *Wynn v. Monterey Club*, 111 Cal. App. 3d 789, 797-798 (Cal. Ct. App. 1980).

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<sup>13</sup> *Hessians Motorcycle Club*, 86 Cal. App. 4th at 839. See also *Semler v. General Electric Capital Corporation*, 196 Cal. App. 4th 1380, 1402 (Cal. Ct. App. 2011)(investor’s status as a felon not protected by the UCRA);

<sup>14</sup> *Koire*, 40 Cal. 3d at 30-31; *Wynn*, 111 Cal. App. 3d at 797.

### Chapter 14.A.1.

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<sup>19</sup> *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 176 (Cal. Ct. App. 2007)(men challenging lower admission price for female patrons did not have to show that they had demanded equal treatment and been refused in order to pursue a remedy under the UCRA). For discussion of the continuing litigation under the UCRA by male plaintiffs for alleged gender discrimination, see Kelly Puente, *Last Call for Ladies Night? H.B. Man’s Lawsuits Battle For Equality*, Orange County Register (Dec. 8-9, 2014), available at <http://www.ocregister.com/articles/frye-644574-cha-lawsuits.html>.

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<sup>27</sup> *North Coast Women's Care Medical Group, Inc. v. Superior Court*, 44 Cal. 4th 1145 (Cal. 2008)(denial of medical services to a patient on the basis of sexual orientation violates the UCRA). California Civil Code Section 51(b) was amended, effective January 1, 2006, to define “sex” for UCRA purposes to include gender and gender identity. Uncertain whether the explicit then-new prohibitions against gender and gender identity discrimination were retroactive, an administrative judge nonetheless concluded that a dress code prohibiting transgender men from wearing skirts or dresses in a nightclub was impermissible and arbitrary sex discrimination in violation of the UCRA. *In the Matter of the Accusation of the Department of Fair Employment and Housing v. Marion’s Place*, Case No. U-200203 C-0008-00-s C 03-04-070, 2006 Westlaw 1130912 (Cal. F.E.H.C. Feb. 1, 2006). Building on this analysis, advocates argue that exclusion of transgender individuals from bathrooms that correspond with their preferred gender identity is unlawful sex discrimination under the UCRA on the basis of gender identity. Eric Petry, *Discrimination on the Job*, National Lawyers Guild SF Bay Area Chapter (July 12, 2013), available at <http://www.nlgf.org/discrimination-job-0>. Under new CAL. HEALTH & SAFETY CODE § 118600, effective Mar. 1, 2017, all single-user toilet facilities in any business establishment or place of accommodation must be identified as all-gender toilet facilities in

compliance with Chapter 24 of the California Code of Regulations, and designated for use by no more than one occupant at a time or for family or assisted use.

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<sup>33</sup> *Hessians Motorcycle Club*, 86 Cal. App. 4th at 838-839 (the court found that a contrary holding would have led to “increasingly frivolous challenges to dress codes and other neutral admission policies common in many restaurants and retail establishments”); *Gatto v. County of Sonoma*, 98 Cal. App. 4th 744, 765-769 (Cal. Ct. App. 2002). But for a finding that a dress code prohibiting transgender men from wearing skirts or dresses was not rationally related to the safety and security of the challenged nightclub, see *In the Matter of the Accusation of the Department of Fair Employment and Housing v. Marion’s Place*, *supra* Chapter 14, footnote 27 in this supplement.

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<sup>46</sup> *Wynn*, 111 Cal. App. 3d at 797-798 (upholding contractual agreement to exclude pathological gambler from card room as not violating the UCRA based on “good business and social practice”).

<sup>50</sup> *Reilly v. Stroh*, 161 Cal. App. 3d 47, 53 (Cal. Ct. App. 1984). See *Liability for Selling Alcohol to Minors* discussed *supra* Chapter 6(B) in the EGCR and in this supplement. Rules and procedures designed to maintain order, in compliance with the California Department of Alcoholic Beverage Control’s “disorderly house” regulations, could be another permissible basis for exclusion. See *supra* Chapter 5, footnotes 138-139 and accompanying text in the EGCR.

## Chapter 15

### **Making Restaurant Services Available: Avoiding Discrimination Against Individuals With Disabilities**

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*The 1st full paragraph is replaced with the following text:*

When a restaurant and its key employees fail to make the restaurant’s goods and services appropriately available to individuals with disabilities, they become open to liability under federal and California law. One way to minimize the risks of such liability is to have a working understanding of a restaurant’s legal responsibilities to individuals with disabilities, a complex and often perplexing subject. This Chapter 15 sets out the web of federal and California laws and regulations governing access by individuals with disabilities to places of public accommodation, including the 3 most recent pieces of California legislation (known as S.B. 1608, S.B. 1186, and A.B. 1521, respectively), all of which aim to enhance the understanding of physical access requirements by business and property owners while curbing abusive disability access-related lawsuits.

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<sup>3</sup> 42 U.S.C. § 12181(7)(B); 28 C.F.R. § 36.104; *Boemio v. Love’s Restaurant*, 954 F. Supp. 204, 207 (S.D. Cal. 1997).

<sup>4</sup> 42 U.S.C. § 12102(2); 28 C.F.R. § 36.104. In 2008, Congress passed the ADA Amendments Act (“ADAAA”), broadening the ADA’s definition of “disability” and expanding “major life activities” to include both eating and “major bodily functions” such as that of the gastrointestinal system. 42 U.S.C. 12102(2)(A)-(B). The ADAAA further specifies that an impairment that is episodic or in remission is a disability if, when active, it would substantially limit a major life activity. It requires that the determination of whether an impairment substantially limits a life activity is to be made without considering the ameliorative effects of mitigating measures. 42 U.S.C. § 12102(4)(D)-(E)(i); *see also Kemp v. Holder*, 610 F.3d 231, 236 (5th Cir. 2010). While the ADA does not define “substantially limited,” post-ADAAA regulations make clear that the

standard “is not meant to be a demanding [one],” and “should not demand extensive analysis.” 29 C.F.R. § 1630.2(j)(1)(i), (iii).

Based on this expansion, severe food allergies and sensitivities, such as celiac disease, a chronic autoimmune disease affecting the major life activity of eating and the major bodily functions of the immune, digestive, bowel, and neurological systems, may be considered disabilities which require accommodation under the ADA. Celiac disease affects approximately 1 in 144 Americans. NATIONAL INSTITUTES OF HEALTH, CELIAC DISEASE AWARENESS CAMPAIGN, *available at* <http://www.celiac.nih.gov/>. Individuals with celiac disease cannot digest gluten, a protein found in wheat, rye, and barley, and must adhere to a strict, life-long gluten-free diet in order to control the disease. *See* Celiac Disease Foundation, “What Is Celiac Disease?” *available at* <http://celiac.org/celiac-disease/what-is-celiac-disease/>. There is no cure or other effective treatment. Left untreated, celiac disease can cause serious health problems including gastrointestinal symptoms, malnutrition, autoimmune disorders, and neurological conditions. *Id.*

The U.S. Department of Justice (“DOJ”) found that Lesley University’s policies and practices concerning students with food allergies and celiac disease did not comply with Title III of the ADA because the university failed to make reasonable accommodations for such students. The DOJ and Lesley University entered into a 2012 settlement agreement to resolve these issues. DEPARTMENT OF JUSTICE, SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND LESLEY UNIVERSITY, DJ 202-36-231 (Dec. 20, 2012), *available at* [http://www.ada.gov/lesley\\_university\\_sa.htm](http://www.ada.gov/lesley_university_sa.htm).

The Lesley University settlement suggests that restaurants could be open to liability if they fail to honor requests for accommodations by people with severe food allergies or celiac disease who can make the requisite showings of their disability under the ADA. Even so, the DOJ has also stated that the ADA does not require all restaurants that serve the general public to provide gluten-free food. *See* DEPARTMENT OF JUSTICE, QUESTIONS AND ANSWERS ABOUT THE LESLEY UNIVERSITY AGREEMENT AND POTENTIAL IMPLICATIONS FOR INDIVIDUALS WITH FOOD ALLERGIES (Jan. 2013), *available at* [http://www.ada.gov/q&a\\_lesley\\_university.htm](http://www.ada.gov/q&a_lesley_university.htm).

In *Phillips v. P.F. Chang’s Bistro, Inc.*, 2015 Westlaw 7429497, 2015 U.S. Dist. LEXIS 159474 (N.D. Cal. 2015), the plaintiff’s complaint included a cause of action under the Unruh Civil Rights Act (hereinafter “UCRA”), based on a violation of the ADA, alleging that a restaurant chain discriminated against guests with celiac disease or gluten allergies by charging \$1.00 more for some gluten-free menu items than for comparable non-gluten-free menu items. In its denial of a motion to dismiss, and observing that it had not found any case on point, the court concluded that the plaintiff had pled sufficient facts to support her claim that her celiac disease was a disability impacting a major life activity. The court also noted that, had it had a more complete factual record, it might have ruled differently on the issue of whether plaintiff had a disability

under the ADA. 2015 Westlaw 7429497 at 3. After this ruling, the plaintiff voluntarily dismissed her claim. 2016 Westlaw 3136925, 2016 U.S. Dist. LEXIS 73496 (N.D. Cal. 2016). *See supra* Chapter 4(C) in the EGCR and in this supplement for more discussion of food allergies.

<sup>5</sup> 28 C.F.R. Part 36 and Appendix A (Standards for Accessible Design). The United States Access Board, which is responsible for developing guidelines for the implementation of the ADA, issued an updated ADAAG in 2004. *See* UNITED STATES ACCESS BOARD, ABOUT THE ADA STANDARDS: BACKGROUND, at <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards>. The DOJ adopted the 2004 ADAAG in its revised regulations for Titles II and III of the ADA, issued on September 15, 2010, compliance with which was required on March 15, 2012.

<sup>6</sup> The 2010 ADA Standards for Accessible Design ("2010 Standards") for Title III, consisting of the 2004 ADAAG and the requirements set out in 28 C.F.R Part 36 subpart D, set forth minimum requirements for newly designed and constructed or altered public accommodations and commercial facilities in order to ensure that they are readily accessible to, and usable by, individuals with disabilities. DEPARTMENT OF JUSTICE, GUIDANCE ON THE 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN, *available at* <http://www.ada.gov/regs2010/2010ADASTandards/Guidance2010ADASTandards.htm#appendixB> Substantive changes to the regulations relate to scoping and technical requirements for new and altered commercial buildings, including accessibility in employee work areas, heights of elements such as light switches, electrical outlets, and ATM keypads; accessible routes to dining areas in sports facilities; and accessible public entrances. The full text of the 2010 Standards and a summary of the changes to the ADA regulations is *available at* DEPARTMENT OF JUSTICE, 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN, [http://www.ada.gov/2010ADASTandards\\_index.htm](http://www.ada.gov/2010ADASTandards_index.htm).

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<sup>8</sup> 28 C.F.R. § 36.201(b); *Kohler v. Bed Bath & Beyond of California, LLC*, 780 F. 3d 1260, 1266 (9th Cir. 2015)(a tenant does not have liability under the ADA or *Botosan* for areas exclusively under the control of the landlord); *Botosan v. Paul McNally Realty*, 216 F. 3d 827, 832-834 (9th Cir. 2000)(ADA imposes concurrent obligations on landlords and tenants for property leased to or controlled by tenants).

<sup>9</sup> 42 U.S.C. § 12183(a)(1); 28 C.F.R. §§ 36.401, 36.406 (compliance with the 2010 Standards phased in depending on the timing of new construction and alterations).

<sup>10</sup> 42 U.S.C. § 12183(a)(1); 28 CFR § 36.401(c). Compliance is "structurally impracticable" only where the unique characteristics of the terrain prevent the incorporation of accessibility features. 28 C.F.R. § 36.401(c)(1).

<sup>12</sup> 28 C.F.R. § 36.402(c)(alterations are to provide the maximum physical accessibility feasible).

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<sup>14</sup> 42 U.S.C. § 12183(a)(2); 28 C.F.R. §§ 36.402(a), 36.406(a) (compliance with the 2010 Standards phased in depending on the timing of new construction and alterations).

<sup>15</sup> 28 C.F.R. § 36.402(c).

<sup>16</sup> 28 C.F.R. § 36.402(b)(1).

<sup>18</sup> 42 U.S.C. § 12182(b)(2)(A)(iv); *Johnson v. Wayside Property, Inc.*, 41 F. Supp. 3d 973, 977 (E.D. Cal. 2014); *Wilson v. Pier 1 Imports*, 439 F. Supp. 2d 1054, 1067-1074 (E.D. Cal. 2006); *Pinnock v. International House of Pancakes Franchise*, 844 F. Supp. 574, 582 (S.D. Cal. 1993). The 2010 ADA regulations provide an element-by-element safe harbor rule for barrier removal. Business facilities built or altered in compliance with the 1991 Standards prior to March 15, 2012, are not required to be modified in order to be brought into compliance with the 2010 Standards, even if the new standards contain different requirements. 28 C.F.R. § 36.304(d)(2)(i); DEPARTMENT OF JUSTICE, ADA UPDATE: A PRIMER FOR SMALL BUSINESS (2011), *available at* <http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm>. However, if a business alters elements which were built in compliance with the 1991 Standards, the safe harbor does not apply, and the alteration must comply with the 2010 Standards. *Id.*

<sup>19</sup> 28 C.F.R. § 36.304(a).

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<sup>20</sup> 28 C.F.R. § 36.104. In restaurants, bars, and other establishments selling food and drink to the public, patrons with disabilities must have access to tables, food service lines, self-service condiment and beverage bars, and public restrooms. There must also be an accessible route to all of these areas, including raised, sunken, and outdoor dining areas. If it is not readily achievable to construct an accessible route to areas which provide services not offered in other areas, such as special menu items of different prices, the restaurant must make these same services available in accessible dining areas. In addition, tables should be arranged far enough apart so a person using a wheelchair can maneuver between the tables when patrons are sitting at them, and some accessible tables must be provided and must be dispersed throughout the dining area rather than clustered in a single location. In restaurants or bars with only standing tables, some accessible dining tables must be provided. *See* DEPARTMENT OF JUSTICE, ADA UPDATE: A PRIMER FOR SMALL BUSINESS (2011), *supra* Chapter 15, footnote 18 in this supplement.

<sup>22</sup> *Pinnock*, 844 F. Supp. at 581. The ADA also requires that barrier removal be an ongoing obligation; therefore, even smaller businesses are expected to remove barriers when resources become available. When deciding which barriers to remove first, the DOJ suggests that barriers

be removed in this order of priority: first, in order to provide access to the restaurant from the street, parking lot, and public transportation; second, in order to provide access to the restaurant's services; third, in order to provide access to public restrooms; and fourth, a public accommodation should take any measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation. 28 C.F.R. § 36.304(c).

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<sup>27</sup> 28 C.F.R. § 36.305(a).

<sup>28</sup> 28 C.F.R. § 36.305(b).

### Chapter 15.A.3

<sup>30</sup> 42 U.S.C. § 12182(b)(2)(A)(i)-(ii). In *Nat. Fed. of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954-956 (N.D. Cal. 2006), the court held that the ADA does not just apply to services *in* a place of public accommodation but applies more broadly to services *of* those places, and that limiting the application of the ADA to discrimination in the supplying of services on the actual premises would contradict the statute. The court found that the plaintiff had stated a claim under the ADA by alleging that the inaccessibility to the blind of a retail store's website impeded the equal enjoyment of the services offered by the store. *Id.*

The issues raised in the foregoing case remain unsettled. The Web Content Accessibility Guidelines (WCAG) 2.0 AA are a set of technical standards designed to assist vision- and hearing-impaired users, through adaptive software and equipment, to easily navigate through websites. The WCAG 2.0 AA standards have not been incorporated into federal regulations, although they have been incorporated into an ISO standard by the International Organization for Standardization. Even so, the DOJ has intervened in website accessibility lawsuits and secured companies' agreements to adopt the WCAG 2.0 AA standards. See Ron Hurtibise, *Looming ADA Rules Could Affect Millions of Websites*, Sun Sentinel (June 20, 2015), available at <http://www.sun-sentinel.com/business/small-business/fl-ada-website-accessibility-suits-20150623-story.html>.

In investigations and settlements, the DOJ has suggested that WCAG 2.0 AA is the current methodology for providing website accessibility to individuals with disabilities. See, e.g., U.S. DEPARTMENT OF JUSTICE, JUSTICE DEPARTMENT ENTERS INTO A SETTLEMENT WITH PEAPOD TO ENSURE THAT PEAPOD GROCERY DELIVERY WEBSITE IS ACCESSIBLE TO INDIVIDUALS WITH DISABILITIES (Nov. 17, 2014), available at <https://www.justice.gov/opa/pr/justice-department-enters-settlement-agreement-peapod-ensure-peapod-grocery-delivery-website> (in a settlement involving access by individuals who were blind or had low vision, who were deaf or hard of hearing, and/or who had physical disabilities affecting manual dexterity, the DOJ observed that “[i]naccessible websites and mobile applications persist even while there are well-established industry guidelines – the Web Content Accessibility Guidelines (WCAG) 2.0 – for making web content accessible”).

No regulatory resolution appears imminent, since the DOJ has extended the time frame for its own proposed ADA Title III web accessibility rule until fiscal year 2018. For a summary of its position, see DEPARTMENT OF JUSTICE, FALL-2015 STATEMENT OF REGULATORY PRIORITIES, *available at*

[http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement\\_1100.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html).

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<sup>32</sup> *Id.* at 1082; *Baughman v. Walt Disney World Co.*, 217 Cal. App. 4th 1438, 1446-1447 (Cal. App. 2013) (no showing that the theme park's refusal to allow a plaintiff who suffered from muscular dystrophy to use a Segway inside the park was a failure to make a reasonable accommodation, where the transportation device posed a substantial risk of injury to park guests. The court pointed out that "[f]acilities are not required to make any and all possible accommodation that would provide full and equal access to disabled patrons; they need only make accommodations that are reasonable. In deciding what's reasonable, facilities may consider the costs of such accommodations, disruption of their business and safety." *Id.* at 1447 (quoting *Baughman v. Walt Disney World*, 685 F.3d 1131, 1135 (9th Cir. 2012)); *Bodley v. Macayo Restaurant*, 546 F. Supp. 2d 696, 700 (D. Ariz. 2008) (no showing that seating a wheelchair-bound plaintiff outside rather than in an interior dining room was a failure to make a reasonable accommodation);

### **Chapter 15.A.3.a**

*Pages 283-284*

*Chapter 15(A)(3) is replaced in its entirety with the following text:*

#### **a. Service Animals under the Revised ADA Regulations**

Another potential area of required modifications would be to a "no-animal" or "no-pet" policy. A restaurant could be liable under the ADA for failing to make reasonable accommodations in its policies, practices, or procedures to permit the use of a service animal by a person with a disability, unless (i) it showed that the accommodations would fundamentally alter the nature of the restaurant's services, or (ii) it determined that the service animal posed a substantial and direct threat to health or safety which could not be mitigated by reasonable accommodations.<sup>36</sup>



A service animal is defined in the revised ADA regulations as any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.<sup>37</sup> Individuals with disabilities are generally permitted under the ADA to bring a service animal into all areas of restaurants and other public accommodations where customers are allowed to go.<sup>38</sup>

A restaurant owner, manager, or employee cannot ask about the nature or extent of a person's disability, and may permissibly ask only two questions: whether the dog is a service animal required because of a disability, and what work or task the dog has been trained to perform. A public accommodation such as a restaurant cannot require special identification cards or training documentation for the dog, nor require a demonstration of its abilities.<sup>39</sup> A customer with a service animal cannot be segregated from other customers or charged any extra fees (even if extra fees are charged to pet owners); such a customer may be charged for the damages caused by the service animal or the disabled individual only if the restaurant has a policy that all customers are responsible for damages that they cause.<sup>40</sup>

Service animals must be harnessed, leashed, or tethered, but if a person's disability or the animal's tasks make these devices unworkable, a service animal can be controlled by voice, signal, or other effective controls.<sup>41</sup> A service animal that is vicious, out of control and not effectively controlled by the handler, or not housebroken may be excluded from a restaurant, but the individual with a disability who used the service animal must be given the right to continue to enjoy the restaurant without having the service animal on the premises.<sup>42</sup>

The revised ADA regulations include a new, separate provision about miniature horses that have been individually trained to do work or perform tasks for individuals with disabilities. Restaurants and other public accommodations covered by the ADA must modify their policies,

practices, or procedures to permit such miniature horses when reasonable.<sup>42A</sup> The regulations set forth 4 assessment factors to aid the determination of whether miniature horses can be accommodated in a given facility: (i) whether or not the miniature horse is housebroken; (ii) whether the miniature horse is sufficiently under the owner's control; (iii) whether the facility can accommodate the miniature horse's type, size, and weight; and (iv) whether the miniature horse's presence will compromise legitimate safety requirements necessary for safe operation of the facility.<sup>42B</sup> The ADA regulations pertaining to service animals, described above, also apply to miniature horses.<sup>42C</sup>

<sup>36</sup> 28 C.F.R. § 36.302(a), (c)(1),(2),(7); *Davis v. Seven Oaks Medical Group*, 2014 Westlaw 3966295, 2014 U.S. Dist. LEXIS 110059 (E.D. Cal. 2014) (finding that medical office violated the ADA in restricting the disabled plaintiff's regular medical appointments to a 4 p.m. appointment time when she was accompanied by her service dog, because plaintiff was denied an equal opportunity to benefit from defendants' services); *Ascencio v. ADRU Corp.*, 2014 Westlaw 204212, 2014 U.S. Dist. LEXIS 1063 (N.D. Cal. 2014) (finding that Burger King restaurant violated the ADA when employees refused to serve plaintiffs accompanied by service dogs, ejected them from the restaurant, retaliated against them by calling police and threatening plaintiffs with arrest, and thereafter maintained a policy of excluding service animals); *Tamara v. El Camino Hospital*, 964 F. Supp. 2d 1077 (N.D. Cal. 2013) (hospital likely violated ADA by excluding patient's service dog); *Lentini*, 370 F. 3d at 844-846 (finding that the failure of concert hall to allow entry of service animal with disabled patron was in violation of the ADA because it was reasonable and necessary, and it would not fundamentally alter its services).

<sup>37</sup> 28 C.F.R. § 36.104. Other species of animals, whether wild or domestic, trained or untrained, are not service animals under this federal definition. The work or tasks performed by a service animal must be directly related to the individual's disability. The regulation includes examples of work or tasks including, but not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. A dog that deters crime or provides emotional support is not a service animal under this federal definition.

California's definition of a service animal, contained in CAL. HEALTH & SAFETY CODE § 113903, has been amended to conform to the federal definition, except that California's definition of "service animal" includes a dog that is in training to do work or perform tasks for an individual with a disability. See *Pest Control and Live Animals supra* Chapter 2(E) in this supplement.

<sup>38</sup> 28 C.F.R. § 36.302(c)(7).

<sup>39</sup> 28 C.F.R. § 36.302(c)(6)(the regulation admonishes that no inquiries should be made when the training of the service animal is readily apparent); DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY RIGHTS SECTION, SERVICE ANIMALS (July 11, 2011), *available at* [http://www.ada.gov/service\\_animals\\_2010.htm](http://www.ada.gov/service_animals_2010.htm).

<sup>40</sup> 28 C.F.R. § 36.302(c)(8); DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY RIGHTS SECTION, SERVICE ANIMALS, *supra* Chapter 15, footnote 39 in this supplement. This federal regulation sets a different and more restrictive standard for liability for damages caused by a service animal than CAL. HEALTH & SAFETY CODE § 114259.5(c), which states that customers or security personnel are liable for any damage done to restaurant premises by a service dog.

<sup>41</sup> 28 C.F.R. § 36.302(c)(4); DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY RIGHTS SECTION, SERVICE ANIMALS, *supra* Chapter 15, footnote 39 in this supplement.

<sup>42</sup> 28 C.F.R. § 36.302(c)(2),(3).

<sup>42A</sup> 28 C.F.R. § 36.302(c)(9)(i).

<sup>42B</sup> 28 C.F.R. § 36.302(c)(9)(ii)(A)-(D).

<sup>42C</sup> 28 C.F.R. § 36.302(c)(9)(iii).

### **Chapter 15.A.3.b**

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<sup>43</sup> 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a).

<sup>44</sup> 28 C.F.R. § 36.301(b).

### **Chapter 15B.**

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*The 2nd full paragraph on page 286 is replaced with the following text:*

Prior to the enactment of the ADA in 1990, California already had a mosaic of laws and technical standards in place protecting equal access to public accommodations for persons with

disabilities. These are discussed in turn below, as are 4 recent pieces of California legislation – known as S.B. 1608, S.B. 1186, A.B. 1521, and S.B. 269, respectively-- which create new administrative bodies and procedures related to disability access and the lawsuits brought to enforce such access.

### **Chapter 15.B.3**

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<sup>75</sup> CAL. BLDG. CODE, CAL. CODE REGS. tit. 24, Part 2, Vol. 1, Chapter 11B (2016); *see* CAL. DEPARTMENT OF GENERAL SERVICES, DIVISION OF THE STATE ARCHITECT, 2013 CALIFORNIA ACCESS COMPLIANCE ADVISORY REFERENCE MANUAL (effective July 1, 2015), *available at* [https://www.documents.dgs.ca.gov/dsa/pubs/2013cbc\\_advisory\\_manual.pdf](https://www.documents.dgs.ca.gov/dsa/pubs/2013cbc_advisory_manual.pdf). In *Urhausen*, 155 Cal. App. 4th at 267-268, the plaintiff unsuccessfully asserted a violation of the California Standards on a negligence per se theory under CAL. EVID. CODE § 669.

### **Chapter 15.B.5.a**

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<sup>85</sup> *Molski I*, 164 Cal. App. 4th at 792. The California Supreme Court has ruled that CAL. CIV. CODE § 55 makes an award of fees to any prevailing party mandatory, and that the ADA does not preempt this part of the state's attorney fee scheme for disability access suits. *Jankey v. Lee*, 55 Cal. 4th 1038, 1052-1055 (Cal. 2012) (disagreeing with the Ninth Circuit's contrary conclusion, in *Hubbard v. Sobreck, LLC*, 531 F. 3d 983 (9<sup>th</sup> Cir. 2008), that conflict preemption foreclosed an award of fees for a non-frivolous CDPA claim that overlapped with a non-frivolous ADA claim). Accordingly, plaintiffs have the option to seek relief under the ADA, the CDPA, or both, according to their particular circumstances. *Jankey*, 55 Cal. 4th at 1050-1052.

### **Chapter 15.B.5.c**

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<sup>95</sup> CAL. CIV. CODE § 54.3(c); *Munson*, 46 Cal. 4th at 675 (explaining overlap between the UCRA and the CDPA and observing that there is a statutory prohibition against double recovery). The *Munson* court also noted that ADA violations may be actionable under CAL. BUS. & PROF. CODE § 17200 *et seq.* as unlawful business practices. *Id.* at 676. *See Flowers v. Prasad*, 238 Cal. App. 4th 930, 943 (Cal. Ct. App. 2015)(in a challenge to a restaurant's exclusion of patrons due to the presence of a service dog, the court concluded that a plaintiff alleging disability discrimination relating to the use of a service dog may assert claims under both the UCRA and the CDPA subject to any specific limitations in those statutes).

**Chapter 15.B.6***Page 294**The following text is added at the end of the 1st full paragraph on page 294:*

In addition to the aforementioned civil remedies, criminal penalties exist to ensure that disabled patrons in California have access to businesses and services that is equal to that provided by the ADA. It is a misdemeanor, punishable by a criminal penalty of up to \$2,500, for any place of business that serves the general public to refuse to admit, or to deny service to, a blind, deaf, or disabled person who is accompanied by a specially trained guide dog, signal dog, or service dog.<sup>97A</sup>

It is a misdemeanor, punishable by up to 6 months in jail, a fine of \$1,500 to \$2,500, or both, to intentionally interfere with a disabled person's use of a guide, signal, or service dog, or a mobility aid such as a walker, wheelchair, or white cane.<sup>97B</sup> Finally, it is a misdemeanor, punishable by up to 6 months in jail, a fine of up to \$1,000, or both, for any person to knowingly and fraudulently represent himself or herself as the owner or trainer of a licensed or qualified guide, signal, service dog.<sup>97C</sup>

<sup>97A</sup> CAL. PEN. CODE § 365.5.

<sup>97B</sup> CAL. PEN. CODE § 365.6.

<sup>97C</sup> CAL. PEN. CODE § 365.7.

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<sup>100</sup> S.B. 1608 Senate Bill – Bill Analysis, *available at* [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_1601-1650/sb\\_1608\\_cfa\\_20080715\\_152353\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1601-1650/sb_1608_cfa_20080715_152353_asm_comm.html).

<sup>103</sup> CAL. CIV. CODE § 55.53(a), (d). CAL. CIV. CODE §§ 55.51 – 55.54 are known as the California Construction-Related Accessibility Standards Compliance Act.

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<sup>107</sup> CAL. CIV. CODE § 55.56(b), (d), (f) (as amended by S.B. 1186 and S.B. 269, *see infra* Chapter 15, footnotes 115, 124-128, and accompanying text in this supplement). A violation of a construction-related accessibility standard personally encountered by a plaintiff may be sufficient to cause a denial of full and equal access if it causes the plaintiff “difficulty, discomfort, or embarrassment.” CAL. CIV. CODE § 55.56(c). *See infra* Chapter 15, footnote 127 and accompanying text in this supplement for a limitation established by S.B. 269. If the place of public accommodation consists of distinct facilities (such as offered by a hotel or resort) that offer distinct services, then statutory damages may be assessed based on each denial of full and equal access to the distinct facility, and not upon the number of violations of construction-related accessibility standards identified at the place of public accommodation where the denial of full and equal access occurred. CAL. CIV. CODE § 55.56(f).

<sup>113</sup> CAL. CIV. CODE § 55.54(a). A notice advising a business of its legal rights and obligations must be included with a demand letter containing a demand for money relating to a construction-related accessibility claim. CAL. CIV. CODE § 55.3(b). *See infra* Chapter 15, footnote 120 and accompanying text in this supplement. In *Moreno v. Town and Country Liquors*, 2012 Westlaw 2960049, 2012 U.S. Dist. LEXIS 100711 (E.D. Cal. 2012), these procedural requirements of the California Construction-Related Accessibility Standards Compliance Act were held inapplicable to UCRA and CDPA claims filed in federal court.

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<sup>114</sup> CAL. CIV. CODE §§ 55.3(b), 55.53(d). *See* <http://www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx> for information about the State Architect’s CASp certification and an updated directory of those currently certified. *See infra* Chapter 15, footnote 137 in this supplement.

## Chapter 15.B.7

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*The following new Chapter 15(B)(8) is added at the end of Chapter 15(B)(7):*

### **8. S.B. 1186, A.B. 1521, and S.B. 269**

Since the passage of S.B. 1608 in 2008, the California legislature has enacted 3 additional pieces of legislation. S.B. 1186, A.B. 1521, and S.B. 269 are part of a continuing effort in California to strike a balance between the access rights of the disabled community and the rights

of restaurant and other business owners to be free of predatory demand letters and lawsuits.<sup>115</sup>

These bills were intended to deter a small number of plaintiffs and attorneys from pursuing a disproportionately large number of construction-related accessibility claims under the UCRA and the ADA.<sup>116</sup>

**a. Demand Letters and Claim Reporting After S.B. 1186 and A.B. 1521**

Demand letters alleging a construction-related accessibility claim<sup>117</sup> are prohibited from including a request or demand for money, or an offer or agreement to accept money.<sup>118</sup> Demand letters alleging a construction-related accessibility claim must state facts sufficient to allow a reasonable person to identify the basis of the violations, including the barriers encountered, the method by which access was deterred, and the dates involved.<sup>119</sup> The mandatory written advisories accompanying demand letters and complaints alleging a construction-related accessibility claim have been amended so that their text reflects the additional statutory changes made by S.B. 1186 and A.B. 1521, described below.<sup>120</sup>

Attorneys are required to include their State Bar of California license number on any demand letter alleging a construction-related accessibility claim, and must submit copies of any such demand letter to the State Bar of California (until January 1, 2019) and to the California Commission on Disability Access.<sup>121</sup> Attorneys must send a copy of a complaint alleging a construction-related accessibility claim to the California Commission on Disability Access within 5 business days of sending or serving it, must notify the commission within 5 business days of any judgment, settlement, or dismissal of the claims in the complaint, and must report specified information to the commission.<sup>122</sup> The State Bar of California and the California Commission on Disability Access must in turn make annual reports to the California legislature.<sup>123</sup>

**b. S.B. 1186, S.B. 269, and Reductions in Damages**

In combination, S.B. 1186 and S.B. 269 have:

- Reduced the minimum damages available under the UCRA for ADA-related claims to \$1,000 for each offense if all unintentional construction-related accessibility violations that are the basis of a claim are corrected within 60 days of being served with a complaint, and:
  - (i) the defendant can prove that the premises have been inspected by a CASp or otherwise met applicable standards, and were not modified between the time of such compliance and the date that the plaintiff was allegedly denied full and equal access,<sup>124</sup> or
  - (ii) the defendant’s property was “new construction” that the local building department approved after January 1, 2008 and before January 1, 2016 and the premises were not modified between the completion date and the date that the plaintiff was allegedly denied full and equal access,<sup>125</sup>
- Reduced the minimum damages available under the UCRA for ADA-related claims to \$2,000 for each offense if all unintentional construction-related accessibility violations that are the basis of a claim are corrected within 30 days of being served with a complaint, and the defendant is a "small business;"<sup>126</sup>
- Added a rebuttable presumption that a plaintiff is *not* presumed to have experienced difficulty, discomfort, or embarrassment for purposes of being awarded minimum statutory damages if the defendant is a “small business” as referenced in the preceding paragraph, has corrected all “technical violations” asserted in a complaint or written



notice within 15 days of service or receipt of the complaint or written notice, and the “technical violation” is based on one or more of 7 specified violations;<sup>127</sup>

- Permitted the courts to take the reasonableness of the plaintiff’s actions into account for the purpose of determining damages when a plaintiff asserts multiple claims for the same construction-related accessibility violation on different occasions;<sup>128</sup> and
- Required owners of commercial property to disclose on their lease form or rental agreement whether their property is CASp-inspected or not, and if so, whether or not the property has been determined to meet all applicable construction-related accessibility standards pursuant to California Civil Code Section 55.53.<sup>129</sup>

The requirement that commercial property owners disclose whether or not their property is CASp-inspected and whether or not it meets applicable construction-related accessibility requirements could be of particular use to restaurant owners who rent their location from a third-party property owner. The disclosure requirement does not require a property owner to conduct a CASp inspection, nor does it require a property owner to remedy any discovered access defects.<sup>130</sup> However, the disclosure should serve as a baseline for negotiations between a restaurant owner and landlord over compliance with disability access requirements and whether and when CASp inspections are advisable.

*c. A.B. 1521 and High-Frequency Litigants*

Effective Oct. 10, 2015, A.B. 1521 added measures to deter the "high-frequency litigant" who brings construction-related accessibility claims. New California Code of Civil Procedure Section 425.55, enacted by A.B. 1521, states in a preamble as follows:

According to information from the California Commission on Disability Access, more than one-half, or 54 percent, of all construction-related accessibility complaints

filed between 2012 and 2014 were filed by two law firms. Forty-six percent of all complaints were filed by a total of 14 parties. Therefore, a very small number of plaintiffs have filed a disproportionately large number of the construction-related accessibility claims in the state, from 70 to 300 lawsuits each year. Moreover, these lawsuits are frequently filed against small businesses on the basis of boilerplate complaints, apparently seeking quick cash settlements rather than correction of the accessibility violation. This practice unfairly taints the reputation of other innocent disabled consumers who are merely trying to go about their daily lives accessing public accommodations as they are entitled to have full and equal access under the state's Unruh Civil Rights Act (Section 51 of the Civil Code) and the federal Americans with Disability Act of 1990 (Public Law 101-336).<sup>131</sup>

California Code of Civil Procedure Section 425.55(b) defines a "high-frequency litigant" as a plaintiff who has filed 10 or more complaints alleging a construction-related accessibility violation within 12 months prior to the filing of a new complaint alleging such a violation, or (with specified exceptions) an attorney who has represented 10 or more high-frequency litigant plaintiffs in actions that were resolved within the 12 months immediately preceding the filing of a new complaint alleging a construction-related accessibility violation.<sup>132</sup>

Such a high-frequency litigant "utilizes court resources in actions arising from alleged construction-related access violations at such a high level that it is appropriate that additional safeguards apply so as to ensure that the claims are warranted."<sup>133</sup> Accordingly, a high-frequency litigant must pay a supplemental high-frequency litigant filing fee of \$1,000 at the time of the filing of the first paper if the complaint alleges a construction-related accessibility claim.<sup>134</sup>

In addition, A.B. 1521 added disclosure and procedural steps to complaints filed by such litigants, including the need for a disclosure in the complaint that it is filed by or on behalf of a high-frequency litigant. High-frequency litigants who are plaintiffs must also state in the complaint (i) the number of construction-related accessibility complaints he or she has filed in the previous 12 months, (ii) the reason for being in the geographic area where he or she

encountered the accessibility problem, and (iii) the reason why he or she visited the business subject to the complaint.<sup>135</sup> A.B. 1521 added procedures for a court stay and early evaluation conferences for cases that involve a high-frequency litigant and procedures for obtaining a court order for a joint inspection of the premises during an early evaluation conference.<sup>136</sup>

**d. S.B. 269, CASp Inspections, and Timely Remediation**

As noted above in Chapter 15(B)(8)(b), provided that a property is CASp certified, statutory minimum damages are reduced to \$1,000 for each offense so long as the defendant corrected all unintentional construction-related violations that are the basis of the claim within 60 days of being served with the complaint. S.B. 269 adds that certain smaller businesses are not subject to statutory minimum damages with respect to a violation noted in a CASp report if:

- as of the date of the CASp inspection, the business had employed 50 or fewer employees on average over the past 3 years, or for the years it has been in existence if less than 3 years;
- the structure or area of the alleged violation was the subject of an inspection report indicating “CASp determination pending” or “Inspected by a CASp;”
- the inspection predates the filing of the claim by, or receipt of a demand letter from, the plaintiff regarding the alleged violation of a construction-related accessibility standard, and the defendant was not on notice of the alleged violation prior to the CASp inspection; and
- the defendant has corrected, within 120 days of the date of the inspection, all unintentional construction-related violations in the structure or area inspected by the CASp that are noted in the CASp report and are the basis of the claim.<sup>137</sup>

Unless the property is altered, a defendant may claim this protection from liability for minimum statutory damages only once for each structure or area inspected by a CASp.<sup>138</sup> With these measures, S.B. 269 provides additional incentives to business owners to have their premises inspected by a CASp and to make corrections within a reasonable time.

<sup>115</sup> S.B. No. 1186, Chapter 383, 2011-2012 regular session (signed by Gov. Jerry Brown on Sept. 19, 2012), at §§ 24, 25, *available at* [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_1151-1200/sb\\_1186\\_bill\\_20120919\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1186_bill_20120919_chaptered.pdf); A.B. 1521, Chapter 755, 2015-2016 regular session (signed by Gov. Jerry Brown on Oct. 10, 2015), at § 6, *available at* [http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab\\_15011550/ab\\_1521\\_bill\\_20151010\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_15011550/ab_1521_bill_20151010_chaptered.pdf); S.B. No. 269, Chapter 13, 2015-2016 regular session (signed by Gov. Jerry Brown on May 10, 2016), *available at* [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160SB269](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB269).

<sup>116</sup> California State Assembly, Assembly Committee on Judiciary, S.B. 1186 Analysis (July 3, 2012), at 8, *available at* [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_1151-1200/sb\\_1186\\_cfa\\_20120702\\_124215\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1186_cfa_20120702_124215_asm_comm.html) (discussing deleted requirement of a 30 day notice prior to filing of lawsuit as “controversial and potentially difficult to implement”); see Katherine Pankow, *Advocates for the Disabled, or Extortionist Vampires? Chapter 383 Attempts to Prevent Plaintiffs’ Attorneys From Bleeding Small Businesses Dry*, 44 MCGEORGE L. REV. 559, 570-573 (2013) (characterizing S.B. 1186 as applying a “death-by-regulation” approach in lieu of providing a right-to-cure provision, and concluding that the “diluted, yet lengthy” provisions of the legislation would not likely result in serious cutbacks in ADA litigation). A.B. 1521 focused on plaintiffs and attorneys who are the most frequently involved in disability access claims rather than on notice and a right to cure, while S.B. 269 attempted to rein in damages and enhance the benefits of CASp inspection and related remediation.

<sup>117</sup> Under CAL. CIV. CODE § 55.3(a)(2), a “construction-related accessibility claim” means any claim of a violation of any “construction-related accessibility standard” with respect to a place of public accommodation. Under CAL. CIV. CODE § 55.52(a)(6), a “construction-related accessibility standard” is “a provision, standard, or regulation under state or federal law requiring compliance with standards for making new construction and existing facilities accessible to persons with disabilities, including, but not limited to, any provision, standard, or regulation set forth in Section 51, 54, 54.1, or 55 of this [California Civil] Code, Section 19955.5 of the [California] Health and Safety Code, the California Building Standards Code (Title 24 of the California Code of Regulations), the federal Americans with Disabilities Act of 1990 (Public Law 101-336; 42 U.S.C. Sec. 12101 et seq.), and the federal Americans with Disabilities Act Accessibility Guidelines (Appendix A to Part 36 of Title 28 of the Code of Federal Regulations).”

<sup>118</sup> CAL. CIV. CODE § 55.31(a), (b); BUS. & PROF. CODE § 6106.2 (attorneys can be disciplined for violations of CAL. CIV. CODE §§ 55.3, 55.31(b) or (c), 55.32(a)(2), or 55.32(b)(2)).

<sup>119</sup> CAL. CIV. CODE § 55.31(a); CAL. CODE CIV. PRO. § 425.50(a).

<sup>120</sup> CAL. CIV. CODE §§ 55.3; 55.54. A Judicial Council verified answer form must also be provided with a demand letter or complaint to allow a defendant to respond in the event a complaint is filed. CAL. CIV. CODE § 55.3(b).

<sup>121</sup> CAL. CIV. CODE § 55.32(a)(as operative from January 1, 2013 through January 1, 2019).

<sup>122</sup> CAL. CIV. CODE § 55.32(b), (c)(attorney discipline for non-compliance with certain requirements),(f), (g)(as operative from January 1, 2013, and thereafter). Information must be provided to the commission as to correction of violations, early evaluation conferences, and site inspections. CAL. CIV. CODE § 55.32(b).

<sup>123</sup> *Id.* (reports must include information about demand letters and complaints, and notification of case outcomes, as applicable).

<sup>124</sup> CAL. CIV. CODE § 55.56(g)(1)(A), (g)(6). The defendant can also qualify for the reduced statutory minimum damages if after the CASp inspection the defendant took reasonable action to remedy the violations before the plaintiff encountered them, or the defendant was actively remedying the violations when the plaintiff encountered them. CAL. CIV. CODE § 55.56(g)(1)(B), (g)(6).

<sup>125</sup> CAL. CIV. CODE § 55.56(g)(1)(C), (g)(6). The defendant can also qualify for the reduced statutory minimum damages if the new construction or improvement was approved by a local building department official who was a CASp and the premises were not modified between the completion date and the date that the plaintiff was allegedly denied full and equal access. CAL. CIV. CODE § 55.56(g)(1)(D), (g)(6).

<sup>126</sup> CAL. CIV. CODE § 55.56(g)(2). A "small business" had less than 25 employees on average over the 3 prior years, or if less than 3 years old has had average annual gross receipts of less than \$3.5 million over the previous 3 years. CAL. CIV. CODE § 55.56(g)(2)(B).

<sup>127</sup> CAL. CIV. CODE § 55.56(e)(1). The 7 technical violations specified in the statute are:  
(A) Interior signs, other than directional signs or signs that identify the location of accessible elements, facilities, or features, when not all such elements, facilities, or features are accessible.

(B) The lack of exterior signs, other than parking signs and directional signs, including signs that indicate the location of accessible pathways or entrance and exit doors when not all pathways, entrance and exit doors are accessible.

(C) The order in which parking signs are placed or the exact location or wording of parking signs, provided that the parking signs are clearly visible and indicate the location of accessible parking and van-accessible parking.

(D) The color of parking signs, provided that the color of the background contrasts with the color of the information on the sign.

(E) The color of parking lot striping, provided that it exists and provides sufficient contrast with the surface upon which it is applied to be reasonably visible.

(F) Faded, chipped, damaged, or deteriorated paint in otherwise fully compliant parking spaces and passenger access aisles in parking lots, provided that it indicates the required dimensions of a parking space or access aisle in a manner that is reasonably visible.

(G) The presence or condition of detectable warning surfaces on ramps, except where the ramp is part of a pedestrian path of travel that intersects with a vehicular lane or other hazardous area.

The presumption set forth in CAL. CIV. CODE § 55.56(e)(1) affects the plaintiff's burden of proof and is rebuttable by evidence showing, by a preponderance of the evidence, that the plaintiff did, in fact, experience difficulty, discomfort, or embarrassment on the particular occasion as a result of one or more of the above-listed technical violations. CAL. CIV. CODE § 55.56(e)(2).

<sup>128</sup> CAL. CIV. CODE § 55.56(d),(i).

<sup>129</sup> CAL. CIV. CODE § 1938.

<sup>130</sup> *Id.*

<sup>131</sup> CAL. CODE CIV. PRO. § 425.55(a)(2).

<sup>132</sup> CAL. CODE CIV. PRO. § 425.55(b). The determination of whether an attorney is a high-frequency litigant is to be made solely on the basis of the verified complaint and any other publicly available documents, and no discovery is permitted with respect to whether an attorney is a high-frequency litigant. CAL. CODE CIV. PRO. § 425.50(f).

<sup>133</sup> CAL. CODE CIV. PRO. § 425.55(b).

<sup>134</sup> CAL. CODE CIV. PRO. § 70616.5.

<sup>135</sup> CAL. CODE CIV. PRO. § 425.50(a)(4)(A). Complaints alleging construction-related accessibility claims filed by or on behalf of a high-frequency litigant must be verified by the

plaintiff and signed by an attorney of record, with the signature signifying that the claims, defenses, and other legal contentions in the complaint are not improper or frivolous, and are or are likely to have evidentiary support. CAL. CODE CIV. PRO. § 425.50(b).

<sup>136</sup> CAL. CIV. CODE § 55.54(b)(2)(D), (c)(7), (d)(6).

<sup>137</sup> CAL. CIV. CODE § 55.56(g)(3)(A), (g)(6), (j). A defendant relying on these protections must disclose the date and findings of any CASp inspection to a plaintiff if relevant to a claim or defense in an action. CAL. CIV. CODE § 55.56(g)(3)(B). The disclosure requirements for a CASp in these circumstances are set forth in CAL. CIV. CODE § 55.53(a)(3)-(5), CAL. GOV'T CODE § 4459.7.

<sup>138</sup> CAL. CIV. CODE § 55.56(g)(4)-(5).

## Chapter 16

### Vicarious Liability, Background Checks, and Employees: Restaurants' Liability for the Acts of Employees and Awareness of Pre-Hiring Screening Requirements

#### Chapter 16.A.1

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<sup>3</sup>*Id.* at 160 (citing *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 968 (Cal. 1986)). Thus, acts necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal and not acts of service, do not take the employee outside the scope of employment. *Farmers Ins. Group*, 11 Cal. 4th at 1004. See *Vogt v. Herron Construction*, 200 Cal. App. 4th 643 (Cal. Ct. App. 2011)(distinguishing *Baptist* and *Perez*, the court reversed a grant of summary judgment for the employer, finding that framing contractor's employee was acting within the scope of his employment when he moved his personal pickup truck, and that there was respondeat superior liability for employee's collision with a cement worker).

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<sup>7</sup>*Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 213 (Cal. 1991) (“In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment”). See *Purton v. Marriott International*, 218 Cal. App. 4th 499 (Cal. Ct. App. 2014)(court found that there was genuine issue of material fact as to whether employee was acting within the scope of his employment when he became intoxicated at employer holiday party).

<sup>10</sup>*Hinman v. Westinghouse Elec. Co.*, 2 Cal. 3d 956, 961 (Cal. 1970); *Fields v. State*, 209 Cal. App. 4th 1390 (Cal. Ct. App. 2012), *Baptist*, 143 Cal. App. 4th at 160; *Munyon v. Ole's Inc.*, 136 Cal. App. 3d 697, 703, fn. 1 (Cal. Ct. App. 1982) (citing *Gipson v. Davis Realty Co.*, 215 Cal. App. 2d 190, 209-210 (Cal. Ct. App. 1963)).

#### Chapter 16.A.2

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<sup>21</sup>*Z.V. v. County of Riverside*, 238 Cal. App. 4th 889, 902-903 (Cal. Ct. App. 2015); *Mendoza*, 66 Cal. App. 4<sup>th</sup> at 1340-1341; *Juarez*, 81 Cal. App. 4th at 395.

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<sup>30</sup> *Maloney v. Rath*, 69 Cal. 2d 442, 446-448 (Cal. 1968); *Felmlee v. Falcon Cable TV*, 36 Cal. App. 4th 1032, 1036-1038 (Cal. Ct. App. 1995); *Meyer v. Holley*, 537 U.S. 280, 290 (2003). *But see Seabright Ins. Co. v. US Airways, Inc.* 52 Cal. 4th 590 (Cal. 2011)(acknowledging *Maloney*, endorsing *Privette*, and concluding that when a contractor is hired to secure compliance with the Cal-OSHA obligations of the hiring entity, there is no liability imposed on the hiring entity for an injury to the contractor's employee).

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<sup>37</sup> In *Hooker v. Department of Transportation*, 27 Cal. 4th 198, 202 (Cal. 2002) and *McKown v. Wal-Mart Stores, Inc.*, 27 Cal. 4th 219, 222-223 (Cal. 2002), the California Supreme Court held that, where an employer has not fully delegated the responsibility of ensuring safe working conditions to the independent contractor and where the employer's participation affirmatively contributes to the injury, the employer may be held liable. *See Seabright Ins. Co. v. US Airways, Inc.*, *supra* Chapter 16, footnote 30 in this supplement, at 596-600.

<sup>38</sup> *Kinsman v. Unocal Corporation*, 37 Cal. 4th 659, 664 (Cal. 2005) (stating that a carpenter employed by an independent contractor that installed scaffolding for workers who replaced asbestos insulation in an oil refinery facility could sue the refinery owners for injuries caused by exposure to asbestos as only the refinery owner knew the carpenter was being exposed to a hazardous substance); *See also Privette*, 5 Cal. 4th at 689; *Markley v. Beagle*, 66 Cal. 2d 951, 955 (Cal. 1967). *See also Seabright Ins. Co. v. US Airways, Inc.*, *supra* Chapter 16, footnote 30 in this supplement, at 596-600.

<sup>40</sup> Cal. Civ. Practice Torts, § 3:20. However, in *Weir v. Continental Oil Co.*, 5 Cal. App. 2d 714 (Cal. Ct. App. 1935), the court held an oil company liable for the intentional tort of unlawful imprisonment. Employees of a private detective agency, an independent contractor that was hired by the company, had participated in the tort.

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<sup>41</sup> *Campbell v. Security Pac. Nat. Bank*, 62 Cal. App. 3d 379, 386-387 (Cal. 1976); *Draper v. Hellman Com. T. & S. Bank*, 203 Cal. 26, 38-39 (Cal. 1928) (“The principal is liable for the agent's torts committed in the scope of his employment and in performing service on behalf of the principal even though in the commission of the unlawful act the agent violated the principal's express instructions or exceeded his authority.”); *Noble v. Sears Roebuck & Co.*, 33 Cal. App. 3d 654, 661-663 (Cal. Ct. App. 1973). In *Ghaffarpour v. Plaza Commerce Hotel*, 2016 Westlaw 1057050, 2016 Cal. App. Unpub. LEXIS 1939 (Cal. Ct. App. 2016), the court refused to hold a

hotel vicariously liable for the intentional torts of its independent contractor security guards, and opined that *Noble* is properly limited to those narrow facts in which the independent contractor is controlled by and fairly characterized as the agent of the hiring person or entity.

### Chapter 16C.

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<sup>43</sup> CAL. CIV. CODE §§ 1786-1786.60. For questions and answers regarding background checks, see Privacy Rights Clearinghouse, Small Business Owner Background Check Guide, Fact Sheet 16(b) (Aug. 2014), available at <https://www.privacyrights.org/small-business-owner-background-check-guide>.

<sup>44</sup> Privacy Rights Clearinghouse, Employment Background Checks in California: A Focus on Accuracy, Fact Sheet 16(a) (Mar. 2016), at § 4, available at <https://www.privacyrights.org/employment-background-checks-california-focus-accuracy#3>.

<sup>45</sup> Privacy Rights Clearinghouse, Employment Background Checks in California: A Focus on Accuracy, *supra* Chapter 16, footnote 44 in this supplement, at § 3.

<sup>46</sup> CAL. CIV. CODE § 1786.16(a)(2).

<sup>47</sup> Privacy Rights Clearinghouse, Employment Background Checks in California: A Focus on Accuracy, *supra* Chapter 16, footnote 44 in this supplement, at § 4.

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<sup>48</sup> The Fair Employment and Housing Act (hereinafter “FEHA”), Cal. Gov’t Code §12940(d), states that “[i]t is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California... (d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any nonjob-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability [including AIDS], mental disability, medical condition, genetic information, marital status, sex [including pregnancy], gender, gender identity, gender expression, age [over 40], sexual orientation, or military and veteran status, or any intent to make any such limitation, specification, or discrimination. This part does not prohibit an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, where the law compels or provides for that action.”

In the regulations of the Fair Employment and Housing Commission (hereinafter “FEHC”), CAL. CODE REGS., Title 2, § 11016(a)(2) states that, unless pursuant to a permissible defense, an employer or other covered entity shall not engage in any recruitment activity that “A) Restricts,

excludes, or classifies individuals on a basis enumerated in the [California Fair Employment and Housing Act]; B) Expresses a preference for individuals on a basis enumerated in the Act; or C) Communicates or uses advertising methods to communicate the availability of employment benefits in a manner intended to discriminate on a basis enumerated in the Act.” However, “[e]mployers may make the offer of a position contingent on an individual providing certain information which, if requested during the ‘pre-employment’ phase of the selection process would be unlawful. For instance, information regarding birth certificates, naturalization papers, medical histories, etc., may be requested after the employer has decided to hire the individual and so informs him/her, as long as it is job-related.” See Department of Fair Employment and Housing, Enforcement Division Directive No. 224 (Aug. 8, 2007), *available at* [www.dfeh.ca.gov/res/docs/publications/directives/DFEH-Directive224.pdf](http://www.dfeh.ca.gov/res/docs/publications/directives/DFEH-Directive224.pdf).

“Ban the box” laws and regulations prohibit public employers in California from asking about criminal history on an initial job application. The San Francisco Fair Chance Ordinance, *available at* <http://sfgov.org/olse/fair-chance-ordinance-fco>, also prohibits certain private employers from asking about arrest or conviction records on a job application. See generally Michelle Rodriguez and Beth Avery, *Ban the Box: U.S. Cities, Counties, and States adopt Fair Hiring Policies* (Mar. 1, 2016), *available at* <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

### **Chapter 16.C.1**

*Pages 310-311*

*The 2nd full paragraph on page 310 and the run-on paragraph on page 311 are replaced with the following text:*

Employers may find that conducting background screening themselves, in-house, is a daunting task. Knowing where and how to track down information about the employee can be difficult, and employers conducting in-house screening risk liability for negligence and for invasion of privacy if the screening is not completed correctly.<sup>51</sup> Because of these risks and difficulties, background screening and consumer reports are usually completed by third parties called Consumer Reporting Agencies (each hereinafter a “CRA”).<sup>52</sup> Under the FCRA<sup>53</sup> (and equally under the ICRAA),<sup>54</sup> employers and CRAs must work together to comply with the regulations and to ensure that the applicant’s rights are protected throughout the pre-employment screening process.<sup>55</sup> To guide employers and aid them in complying with the law, the FTC has

produced a document titled “Notice to Users of Consumer Reports.”<sup>56</sup> CRAs typically provide this document to employers.

<sup>51</sup> 15 U.S.C. §§ 1681n, 1681o.

<sup>52</sup> 15 U.S.C. § 1681a(f).

<sup>53</sup> 15 U.S.C. § 1681e(a).

<sup>54</sup> CAL. CIV. CODE § 1786.16(a)(2).

<sup>55</sup> See 15 U.S.C. § 1681e for information regarding compliance procedures and 15 U.S.C. § 1681k for details regarding public record information for employment purposes.

<sup>56</sup> 16 C.F.R. § 698, Appendix H.

### **Chapter 16.C.1.c**

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<sup>67</sup> 15 U.S.C. § 1681a(e); CAL. CIV. CODE § 1786.2(c).

<sup>69</sup> 15 U.S.C. § 1681d(a)(1)(B); FEDERAL TRADE COMMISSION, Summary of Your Rights Under the Fair Credit Reporting Act, *available at* <https://www.ftc.gov/sites/default/files/documents/one-stops/credit-reporting/pdf-0096-fair-credit-reporting-act.pdf>.

### **Chapter 16.C.1.d**

*Page 313*

<sup>74</sup> 16 C.F.R. § 698, Appendix F; FEDERAL TRADE COMMISSION, Summary of Your Rights Under the Fair Credit Reporting Act, *supra* Chapter 16, footnote 69 in this supplement.

### **Chapter 16.C.1.e**

*Pages 313-314*

*The 3rd full paragraph on page 313 and the carry-over bullet points on page 314 are replaced with the following text:*

After taking any adverse action, the employer must give the applicant notice of the adverse action, either orally, in writing, or by electronic means,<sup>76</sup> and must give the applicant the following:

- written or electronic notice of the credit score and specified information about the factors, timing, and basis for the credit score;<sup>77</sup>
- the name, address, and telephone number of the CRA used by the employer;<sup>78</sup>
- a statement that the CRA did not make the adverse decision and is not in a position to explain why the decision was made;<sup>79</sup>
- a statement of the applicant's right to obtain a free copy of his or her file from the CRA (the applicant must make this request within 60 days);<sup>80</sup> and
- a statement of the applicant's right to dispute directly with the CRA the accuracy or completeness of any provided information.<sup>81</sup>

<sup>76</sup> 15 U.S.C. § 1681m(a)(1).

<sup>77</sup> 15 U.S.C. § 1681m(a)(2).

<sup>78</sup> 15 U.S.C. § 1681m(a)(3)(A).

<sup>79</sup> 15 U.S.C. § 1681m(a)(3)(B).

<sup>80</sup> 15 U.S.C. § 1681m(a)(4)(A).

<sup>81</sup> 15 U.S.C. § 1681m(a)(4)(B).

### **Chapter 16.C.1.g**

*Page 315*

<sup>93</sup> 16 C.F.R. §§ 682.1 – 682.5.

<sup>94</sup> 16 C.F.R. § 682.3.

### **Chapter 16.C.2.a**

*Page 316*

<sup>96</sup> CAL. CIV. CODE § 1786.2(c); CAL. CIV. CODE § 1785 *et seq.*; *See also Ortiz*, 157 Cal. App. 4th at 604.

### **Chapter 16.C.2.b**

*Pages 316-317*

*The bullet points set forth on the bottom of page 316 and continuing on to page 317 are replaced with the following text:*

- a statement that an ICR will be obtained and a statement of the purpose of the report;
- a statement that the report may include information on the consumer's character, general reputation, personal characteristics, and mode of living;
- the name, address, and telephone number of the ICRA conducting the investigation, and the web address of the ICRA where the consumer may find information about the ICRA's privacy practices (including information as to whether the consumer's personal information will be sent outside of the U.S.);
- notification, in writing, to the consumer regarding the nature and scope of the investigation requested, including a summary of the consumer's right to see and copy the report; and
- a check box allowing the applicant to indicate if he or she would like to receive a copy of the report (a separate form may be included in lieu of a checkbox). This copy of the report must be sent to the applicant within 3 business days from the date the employer receives its copy of the report.<sup>100</sup>

<sup>100</sup> CAL. CIV. CODE § 1786.16(b)(1).

### **Chapter 16.D.1**

*Page 319*

<sup>112</sup> 15 U.S.C. § 1681a(d)(2)(D),(y). Former 15 U.S.C. § 1681a(x) was renumbered as 15 U.S.C. § 1681a(y) in the massive federal Dodd-Frank legislation (Pub. L. 111-203); however, 15 U.S.C. §

1681a(d)(2)(D) still cross-references former 15 U.S.C. § 1681a(x) instead of 15 U.S.C. § 1681a(y).

<sup>113</sup>15 U.S.C. § 1681a(y)(2).

<sup>114</sup>CAL. CIV. CODE § 1786.16(c).

### **Chapter 16.E.1**

*Page 320*

*The 1st full paragraph on page 320 is replaced with the following text:*

Under federal law, an employer can be held liable for negligent non-compliance with the requirements of the FCRA and can be ordered to pay actual damages sustained by the applicant or employee in addition to attorney's fees and costs.<sup>116</sup> An employer can also be held liable for willful non-compliance with the requirements of the FCRA.<sup>117</sup> For willful non-compliance, an employer can be made to pay (i) any actual damages sustained by the applicant or employee as a result of the failure or damages of not less than \$100 and not more than \$1,000; or (ii) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the applicant or employee or \$1,000, whichever is greater.<sup>118</sup> An employer may be made to pay attorney's fees, costs, and punitive damages in cases of willful non-compliance.<sup>119</sup> An employer may also be liable to a CRA for knowing noncompliance.<sup>120</sup> Due to the myriad technical requirements of the FCRA, there have been an increasing number of lawsuits brought against employers for FCRA violations.<sup>121</sup>

<sup>116</sup> 15 U.S.C. § 1681o.

<sup>117</sup> In *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007), the Supreme Court addressed the meaning of “adverse action” in a credit transaction and held that “willful” violations of the FCRA cover both knowing and reckless conduct. *Safeco* increased the employer’s liability for FCRA violations by rejecting the argument that “willfulness” is limited to knowing violations. However, the Court held that an action is only reckless if it is objectively unreasonable. This holding provides a measure of protection when an employer takes actions that are not clearly

addressed by the statute but that are reasonable under the circumstances even if the actions are ultimately proven to be wrongful. Generally, this holding does not mandate any change to practices in the employment setting, and employers should treat any denial of employment or the loss or reduction of any term and condition of employment as an "adverse action" and provide pre-adverse and adverse action notices, as required by law.

<sup>118</sup> 15 U.S.C. § 1681n(a)(1)(A)-(B).

<sup>119</sup> 15 U.S.C. § 1681n(a)(2),(a)(3).

<sup>120</sup> 15 U.S.C. § 1681n(b) ("Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or \$1,000, whichever is greater").

<sup>121</sup> Annie Hunt, *Attorney: Class Actions over Background Checks Performed by Employers Increasing Steadily*, Legalnewsline.com (Jan. 8, 2016), available at <http://legalnewsline.com/stories/510656827-attorney-class-actions-over-background-checks-performed-by-employers-increasing-steadily> (discussing both FCRA and ICRAA litigation).



## Chapter 17

### **Restaurant Employees and Sexual Harassment: Preventive Policies, Procedures, and Training**

*Page 323*

*The 1st full paragraph is replaced with the following text:*

Sexual harassment is a serious problem in businesses of every type, but the restaurant industry can be particularly vulnerable to sexual harassment claims brought by restaurant employees against the restaurants employing them. Moreover, monetary awards for sexual harassment claims can be significant.<sup>1</sup> Courts may require restaurants to pay large amounts to compensate a victim of sexual harassment or to punish the restaurant for mishandling a sexual harassment complaint. As such, it is imperative that restaurant owners and operators and their supervisors take sexual harassment seriously and understand the legal and social implications of such behavior.<sup>1A</sup>

<sup>1</sup> In one recent case, a restaurant agreed to pay \$200,000 on behalf of female employees, including at least one teenager, who were sexually harassed by the restaurant's owner. PRESS RELEASE, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BASTA PASTA TO PAY \$200,000 TO SETTLE EEOC SEXUAL HARASSMENT AND RETALIATION LAWSUIT (May 29, 2014), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/5-29-14c.cfm>.

In another such case, a restaurant agreed to pay \$600,000 on behalf of male employees who were sexually harassed by a male manager. PRESS RELEASE, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SPARKS STEAK HOUSE TO PAY \$600,000 TO SETTLE EEOC CLASS MALE-ON-MALE SEXUAL HARASSMENT SUIT (Nov. 15, 2012), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/11-15-12.cfm>.

<sup>1A</sup> A recent nationwide study of sexual harassment in the restaurant industry found that the restaurant industry accounts for 37% of all sexual harassment claims reported to the U.S. Equal Employment Opportunity Commission, making it the single largest source in the U.S. of sexual harassment claims. Restaurant Opportunity Centers United, *The Glass Floor: Sexual Harassment in the Restaurant Industry 1* (Oct. 7, 2014), at 5, *available at* <http://rocunited.org/the-glass-floor-sexual-harassment-in-the-restaurant-industry/>. Of 688 restaurant workers surveyed, two-thirds of the women and over half of the men had experienced sexual harassment by management; nearly 80% of the women and 70% of the men had experienced sexual harassment by co-workers; and

nearly 80% of the women and 58% of the men had experienced sexual harassment by customers. *Id.* at 13. By way of comparison, 25% of women and 10% of men in a nationwide survey said that they had experienced some form of sexual harassment in the workplace. ABC News, *One in Four U.S. Women Reports Workplace Harassment* (Nov. 6, 2011), available at <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/>.

<sup>2</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT, available at [http://www.eeoc.gov/laws/types/sexual\\_harassment.cfm](http://www.eeoc.gov/laws/types/sexual_harassment.cfm).

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<sup>3</sup> The Fair Employment and Housing Act (hereinafter "FEHA") defines sexual harassment as harassment based on sex or of a sexual nature, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. The definition of sexual harassment includes many forms of offensive behavior, including harassment of a person of the same gender as the harasser. CAL. DEP'T OF FAIR EMPLOYMENT AND HOUSING, PAMPHLET NO. DFEH-185, SEXUAL HARASSMENT: THE FACTS ABOUT SEXUAL HARASSMENT, available at <http://www.dfeh.ca.gov/res/docs/Publications/DFEH-185.pdf>.

<sup>4</sup> CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, CALIFORNIA AIR RESOURCES BOARD, EQUAL EMPLOYMENT OFFICE (EEO) SEXUAL HARASSMENT PREVENTION POLICY, available at <http://www.arb.ca.gov/eo/shpolicy.htm>.

*Pages 325*

*The 2nd full paragraph is replaced with the following text:*

Depending on the number of employees they have, as discussed below, restaurants are subject to California sexual harassment laws, or both federal and California sexual harassment laws. The U.S. Equal Employment Opportunity Commission (hereinafter "EEOC")<sup>6</sup> enforces the federal anti-discrimination and harassment laws.<sup>7</sup> The California Department of Fair Employment and Housing (hereinafter "DFEH")<sup>8</sup> enforces the Fair Employment and Housing Act (hereinafter "FEHA"), which includes California's sexual harassment laws.<sup>9</sup> The Fair Employment and Housing Council (hereinafter "FEHC") has the authority to adopt regulations implementing the FEHA, including sexual harassment training and education regulations.<sup>10</sup>

<sup>6</sup> In fiscal year 2015, 6,822 charges of sexual harassment were filed with the EEOC. In the same fiscal year, the EEOC recovered \$46 million in monetary benefits (not including monetary benefits obtained through litigation) for charging parties and other aggrieved individuals. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGES ALLEGING SEXUAL HARASSMENT: FY 2010- FY 2015, *available at* [https://www1.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm?renderforprint=1](https://www1.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm?renderforprint=1).

<sup>7</sup> Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-19; 42 U.S.C. § 2000e(k); 29 C.F.R § 1604.11; *see also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS AND ANSWERS FOR SMALL EMPLOYERS ON EMPLOYER LIABILITY FOR HARASSMENT BY SUPERVISORS, *available at* <http://www.eeoc.gov/policy/docs/harassment-facts.html>.

<sup>8</sup> CAL. GOV'T CODE § 12930(f)(1). The DFEH's statutory mandate is to protect the people of California from employment, housing and public accommodations discrimination, and hate violence pursuant to the FEHA, the Unruh Civil Rights Act and California Disabled Persons Act (*see supra* Chapters 14 and 15 in the EGCR and in this supplement), and the Ralph Civil Rights Act. CAL. DEP'T OF FAIR EMPLOYMENT AND HOUSING, *available at* <http://www.dfeh.ca.gov/About.htm>.

<sup>9</sup> CAL. GOV'T CODE §§ 12900-12996; *see* DFEH, FAIR EMPLOYMENT AND HOUSING – SEXUAL HARASSMENT, *available at* [http://www.dfeh.ca.gov/Publications\\_StatLaws\\_SexHarrass.htm](http://www.dfeh.ca.gov/Publications_StatLaws_SexHarrass.htm).

<sup>10</sup> CAL. GOV'T CODE §§ 12903, 12935(a); *see* CAL. DEP'T OF FAIR EMPLOYMENT AND HOUSING, FAIR EMPLOYMENT AND HOUSING COUNCIL, *available at* <http://www.dfeh.ca.gov/FEHCouncil.htm>.

## **Chapter 17A.**

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<sup>14</sup> 29 C.F.R. § 1604.11.

### **Chapter 17.A.1**

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<sup>18</sup> A "supervisor" is a person empowered by the employer to take tangible employment actions affecting the victim of sexual harassment. *Vance v. Ball State University*, 133 S. Ct. 2434, 2445-2446 (2013). A "tangible employment action" means a significant change in employment status, such as hiring, firing, promotion, demotion, undesirable reassignment, or a decision causing a significant change in benefits, compensation decisions, and work assignment. *Id.* at 2443. *See also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS AND ANSWERS FOR

SMALL EMPLOYERS ON EMPLOYER LIABILITY FOR HARASSMENT BY SUPERVISORS, *supra* Chapter 17, footnote 7 in this supplement; *Pennsylvania State Police*, 542 U.S. at 137.

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<sup>20</sup> *Vance*, 133 S. Ct. at 2437. See also *Burlington Industries v. Ellerth*, 524 U.S. 742, 745 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS & ANSWERS FOR SMALL EMPLOYERS ON EMPLOYER LIABILITY FOR HARASSMENT BY SUPERVISORS, *supra* Chapter 17, footnote 7 in this supplement.

### Chapter 17.A.2

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<sup>21</sup> “With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.” 29 C.F.R. § 1604.11(d).

### Chapter 17.A.3

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<sup>23</sup> 29 C.F.R. § 1604.11(e); see also *Galdamez v. Potter*, 415 F. 3d 1015, 1022 (9th Cir. 2005); *Watson v. Blue Circle, Inc.*, 324 F. 3d 1252, 1258 n. 2 (11th Cir. 2003); *Little v. Windermere Relocation, Inc.*, 301 F. 3d 958, 968 (9th Cir. 2002); *Folkerson v. Circus Circus Enters., Inc.*, 107 F. 3d 754, 756 (9th Cir. 1997) (holding that an employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct). For an interesting guide on third-party harassment, see John C. Schlinker and Matthew K. Payok, *The Customer Is Not Always Right*, Michigan Bar Journal (Jan. 2005), at 30, available at <http://www.michbar.org/file/barjournal/article/documents/pdf4article830.pdf>.

<sup>24</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC SUES WINDSOR INN FOR SEXUAL HARASSMENT AND RETALIATION (Jan. 20, 2016), available at <https://www1.eeoc.gov//eoc/newsroom/release/1-20-16b.cfm?renderforprint=1> (owner and management knew that customer, among others, sexually harassed female employee but did not take action to stop the harassment); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1073 (10th Cir. 1998).

<sup>25</sup> 34 Fair Employment Prac. Cas. (B.N.A.) 1887, EEOC Dec. No. 84-3 (Feb. 1, 1984). In *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 513 (E.D. Va. 1992), the court relied on EEOC Dec. No. 84-3 to find that an employer could be held liable for the sexual

harassment of one of its employees by a nonemployee if it knew of the harassment and failed to take any corrective actions to remedy the situation. *See also Lockard*, 162 F. 3d at 1073.

<sup>27</sup> *Id.* at 5. *See also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Testimony of Fatima Goss Graves, Vice President for Education and Employment, National Women's Law Center, available at <https://www1.eeoc.gov//eeoc/meetings/1-14-15/graves.cfm?renderforprint=1> (discussing, among other things, harassment of female employees by customers).

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<sup>31</sup> *Equal Employment Opportunity Commission v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981). However, grooming standards, such as requiring women to wear makeup or men to have short hair, are acceptable as long they do not place a greater burden on one sex or the other or force one gender into conforming to a stereotypical image. *Jespersen v. Harrah's Operating Co., Inc.*, 444 F. 3d 1104, 1112-13 (9th Cir. 2006). In California, for example, the FEHC established regulations allowing employers to impose physical appearance, grooming, or dress standards. Such standards, however, cannot discriminate on the basis of sex, cannot burden the individual in his or her employment, and must be flexible enough to take into account religious practices. CAL. CODE REGS. tit. 2, § 11019(c). The FEHA prohibits employers from refusing to allow an employee to wear pants on account of the sex of the employee. The employer, however, may require an employee to wear a uniform in a particular occupation and may require an employee to wear a costume while the employee is portraying a specific character or a dramatic role. The FEHC may exempt an employer from the foregoing requirements for “good cause shown.” CAL. GOV’T CODE § 12947.5.

## **Chapter 17B.**

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<sup>32</sup> CAL. GOV’T CODE § 12940(j); CAL. CODE REGS. tit. 2, § 11019.

<sup>33</sup> CAL. GOV’T CODE § 12940(j)(4)(A) (“For purposes of this subdivision only, ‘employer’ means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract...”); *Kim v. Konad USA Distribution, Inc.*, 226 Cal. App. 4th 1336, 1350 (Cal. Ct. App. 2014) (all employers are subject to FEHA’s prohibition of sexual harassment).

<sup>36</sup> *Lewis v. City of Benicia*, 224 Cal. App. 4th 1519, 1524-1525 (Cal. Ct. App. 2014); *Fisher*, 214 Cal. App. 3d at 607-608; *Mogilefsky v. Superior Court*, 20 Cal. App. 4th 1409, 1414-1415 (Cal. Ct. App. 1993).

<sup>37</sup> *Fuentes v. Autozone, Inc.*, 200 Cal. App. 4th 1221 (Cal. Ct. App. 2011) (hostile work environment found based on retail employee’s testimony that over a period of 3 weeks the acting store manager, assistant store manager, and parts sales manager directed her to turn around so

customers could see her buttocks, spread a rumor that she had herpes, and engaged in profane speculation about a sexual relationship between her and another co-worker); *Mogilefsky*, 20 Cal. App. 4th at 1414-1415.

### **Chapter 17.B.1**

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<sup>40</sup> *State Dept. of Health Services. v. Superior Court (McGinnis)* 31 Cal. 4th 1026 (Cal. 2003); CAL. GOV'T CODE § 12940(j)(1); CAL. CODE REGS. tit. 2, § 11009(b); *Fuentes*, 200 Cal. App. 4th at 1226 (employer liability for sexual harassment by supervisors); *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1328 (Cal. Ct. App. 1996) ("the FEHA provides that an employer is strictly liable for the harassment of an employee by an agent or a supervisor"). Under CAL. GOV'T CODE § 12940(j)(3), an employee is also personally liable for prohibited sexual harassment.

Franchise owners may be liable for sexual harassment by a franchisee's employees if the franchisor's degree of control over the franchisee's daily business operations is sufficient to create an employment or agency relationship between the franchisor and the franchisee. *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474 (Cal. 2014).

<sup>42</sup> *Id.*; *Rosenfeld v. Abraham Joshua Heschel Day School, Inc.*, 226 Cal. App. 4th 886, 900-901 (Cal. Ct. App. 2014).

### **Chapter 17.B.3**

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<sup>44</sup> CAL. GOV'T CODE § 12940(j)(1); *see also* Hugh McCabe, *The Policy of "The Customer Is Always Right" Does Not Extend to Sexual Harassment*, San Diego Business Journal (Oct. 16, 2006), available at <http://www.neildymott.com/policy-customer-always-right-does-not-extend-sexual-harassment>.

### **Chapter 17.C.1**

*Page 334*

<sup>47</sup> 29 C.F.R. § 1604.11(f).

### **Chapter 17.C.2**

*Page 334*

<sup>48</sup> CAL. GOV'T CODE §§ 12950, 12950.1. *See supra* Chapter 7, footnote 3 in this supplement.

**Chapter 17.C.2.a**

*Page 334*

*The 3rd full paragraph is amended to read as follows:*

The DFEH poster concerning the illegality of sexual harassment must be posted by employers in a prominent and accessible location in the workplace.<sup>49</sup> Common posting locations include next to a time clock, on a company bulletin board in a break room, or in any other prominent location where employees are likely to gather. The poster should not be obscured by other flyers or information and should be in an area accessible to employees.

<sup>49</sup> CAL. GOV'T CODE § 12950(a); CAL. CODE REGS. tit. 2, § 11023(b). A free copy of Pamphlet No. DFEH-185 can be downloaded, or obtained by writing or emailing the DFEH at the address provided at [http://www.dfeh.ca.gov/Publications\\_Publications.htm](http://www.dfeh.ca.gov/Publications_Publications.htm).

**Chapter 17.C.2.b**

*Page 335*

*Chapter 17(C)(2)(b) is replaced in its entirety with the following new text:*

***b. DFEH Information Sheet and Written Harassment, Discrimination, and Retaliation Prevention Policy***

The DFEH provides an information sheet that each employer must obtain and distribute to its employees unless the employer provides equivalent information to its employees that contains, at a minimum, the following:<sup>50</sup>

- the illegality of sexual harassment;
- the definition of sexual harassment under applicable state and federal law;
- a description of sexual harassment, utilizing examples;
- the internal complaint process of the employer available to the employee;
- the legal remedies and complaint process available through the DFEH;
- directions on how to contact the DFEH; and

- the protection against retaliation provided by California Code of Regulations, title 2, for opposing the practices prohibited by California Government Code Sections 12940 *et seq.*, or for filing a complaint with, or otherwise participating in an investigation, proceeding, or hearing conducted by, the DFEH or the FEHC.<sup>50A</sup>

In addition to distribution of the information sheet, employers must develop and disseminate to employees a written harassment, discrimination, and retaliation prevention policy.<sup>50B</sup> If 10% or more of an employer's workforce at any facility speak a language other than English as their spoken language, the policy must be translated into every language that is spoken by at least 10% of the employer's workforce.<sup>50C</sup>

A harassment, discrimination, and retaliation prevention policy is required to list the categories of individuals protected under the FEHA, and to make it clear that the FEHA prohibits coworkers, third parties, supervisors, and managers from engaging in discriminatory, harassing, or retaliatory conduct.<sup>50D</sup> The policy must create a complaint process to ensure that complaints are kept confidential to the extent possible, are impartially and timely investigated by qualified personnel, are responded to in a timely fashion, and are documented and tracked.<sup>50E</sup> The complaint process must also provide appropriate options for remedial actions and resolutions and timely closures of complaints.<sup>50F</sup>

A harassment, discrimination, and retaliation prevention policy must also include a complaint mechanism (such as a hotline or an ombudsman) that does not require an employee to complain to a direct supervisor.<sup>50G</sup> Supervisors must be instructed to report complaints to a designated company representative so that the company can try to resolve the claim internally.<sup>50H</sup> The policy must indicate that allegations of misconduct will be addressed through a fair, timely, and thorough investigation, and must state that the employer will keep the investigation



confidential to the extent possible.<sup>50I</sup> The policy must indicate that complaints will be resolved with appropriate remedial measures if misconduct is found, and that there will not be retaliation against an employee for lodging a complaint or participating in an investigation.<sup>50J</sup>

Dissemination of a harassment, discrimination, and retaliation prevention policy must be made to all employees by (i) distributing a copy of the policy by hard copy or email with an acknowledgment form for employees to sign, (ii) posting the policy on a company intranet with a tracking system to ensure receipt by employees, (iii) discussing the policy with new hires, and/or (iv) any other method to ensure employees receive and understand the policy.<sup>50K</sup>

<sup>50</sup> CAL. GOV'T CODE §§ 12950(b), 12926(d)("employer" means any person regularly employing 5 or more persons). The posters and information sheet are available from the DFEH by mail and on-line.

<sup>50A</sup> The information sheet or comparable information must be distributed to employees in a manner that ensures distribution, such as with an employee's pay. A claim that the information did not reach a particular employee does not in and of itself result in employer liability in a sexual harassment action, nor does an employer's compliance with these requirements insulate an employer for liability for sexual harassment. The DFEH may seek an order to require an employer to comply with these information requirements. CAL. GOV'T CODE § 12950(c)-(e).

<sup>50B</sup> CAL. CODE REGS. tit. 2, § 11023(b). For purposes of the foregoing regulation, an "employer" is a person or individual engaged in any business or enterprise regularly employing 5 or more persons. CAL. CODE REGS. tit. 2, § 11008(d).

<sup>50C</sup> CAL. CODE REGS. tit. 2, 11023(d).

<sup>50D</sup> CAL. CODE REGS. tit. 2, 11023(b)(2)-(3).

<sup>50E</sup> CAL. CODE REGS. tit. 2, 11023(b)(4).

<sup>50F</sup> *Id.*

<sup>50G</sup> CAL. CODE REGS. tit. 2, 11023(b)(5).

<sup>50H</sup> CAL. CODE REGS. tit. 2, 11023(b)(6).

<sup>50I</sup> CAL. CODE REGS. tit. 2, 11023(b)(7)-(8).

<sup>50J</sup> CAL. CODE REGS. tit. 2, 11023(b)(9)-(10).

<sup>50K</sup> CAL. CODE REGS. tit. 2, 11023(c).

### **Chapter 17.C.2.c**

*Pages 335-336*

*The 2nd full paragraph on page 335 and the run-on paragraph on page 336 are amended to read as follows:*

California employers with 50 or more employees<sup>51</sup> are required to conduct at least 2 hours of sexual harassment training for supervisors, which also must include training about the prevention of abusive conduct.<sup>51A</sup> Certain specified subjects must be covered in the training. These mandatory training subjects include:<sup>52</sup>

- the legal definition of sexual harassment under both the FEHA and Title VII;
- the statutory provisions and case law principles concerning the prohibition against and prevention of unlawful sexual harassment, discrimination, and retaliation in employment;
- the types of conduct constituting harassment;
- remedies available for sexual harassment victims and potential employer and individual exposure and liability;
- strategies to prevent sexual harassment;
- supervisors' obligation to report sexual harassment, discrimination, and retaliation of which they become aware;
- practical examples of sexual harassment;
- the limited confidentiality of the complaint process;
- resources available for victims of sexual harassment, such as to whom they should report any alleged sexual harassment;

- an employer’s obligation to conduct an effective workplace investigation;
- what to do if the supervisor is personally accused of sexual harassment;
- the essential elements of an anti-harassment policy and how to utilize it if a sexual harassment complaint is filed;
- the elements of abusive conduct,<sup>53</sup> including conduct of an employer or employee undertaken with malice that a reasonable person would find hostile or offensive and that is not related to an employer's legitimate business interests; and
- the negative effects that abusive conduct has on the victim and others in the workplace, and the detrimental consequences of this conduct on employers.

<sup>51</sup> “For purposes of this section only, ‘employer’ means any person regularly employing 50 or more persons or regularly receiving the services of 50 or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities.” CAL. GOV’T CODE § 12950.1(g)(1).

<sup>51A</sup> A.B. 2053 amended CAL. GOV’T CODE § 12950.1, effective Jan. 1, 2015, to add workplace bullying training as a component of sexual harassment training. CAL. GOV’T CODE § 12950.1(b). The proponents of A.B. 2053 maintained that workplace bullying and sexual harassment often went hand in hand, and that educating supervisors about workplace bullying was a strategy for preventing it. STATE OF CALIFORNIA ASSEMBLY, A.B. 2053 Bill Analysis (May 9, 2014), at 2, *available at* [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_2051-2100/ab\\_2053\\_cfa\\_20140509\\_113346\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_2051-2100/ab_2053_cfa_20140509_113346_asm_floor.html).

<sup>52</sup> CAL. CODE REGS. tit. 2, § 11024(c).

<sup>53</sup> "Abusive conduct" may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act does not constitute abusive conduct, unless it is especially severe and egregious. CAL. GOV’T CODE § 12950.1(g)(2); CAL. CODE REGS. tit. 2, § 11024(c)(2)(M).

<sup>53</sup> CAL. CODE REGS. tit. 2, § 11024(c).

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The 1<sup>st</sup> full paragraph is amended to read as follows:

This training requirement applies to all employers who operate in California and who regularly employ 50 or more employees or independent contractors.<sup>54</sup> The determination of whether an employer has 50 or more employees requires the inclusion of all full-time, part-time, and temporary employees<sup>55</sup> as well as contractors. Additionally, if an employer has had 50 or more employees in 20 or more consecutive weeks in the current or prior year, that employer must provide the required training.<sup>56</sup>

<sup>54</sup> CAL. GOV'T CODE § 12950.1(a), (g)(1); CAL. CODE REGS. tit. 2, § 11024(a)(1), (4).

<sup>55</sup> CAL. CODE REGS. tit. 2, § 11024(a)(3).

<sup>56</sup> CAL. CODE REGS. tit. 2, § 11024(a)(5). All of the employees need not be located in California. If an employer has 10 employees in California and 40 employees in other states, that employer must comply with the requirements for sexual harassment training, even if it is headquartered outside California. *Id.*

<sup>57</sup> CAL. CODE REGS. tit. 2, § 11024(a)(9)(A)-(B).

<sup>58</sup> CAL. CODE REGS. tit. 2, § 11024(a)(2).

<sup>59</sup> CAL. CODE REGS. tit. 2, § 11024(a)(2)(E). The training does not need to be completed in 2 consecutive hours. For classroom or webinar training, the minimum duration of a segment must be no less than half an hour. An e-learning program may include bookmarking features, which allow a supervisor to pause the training, so long as the actual e-learning program is 2 hours. CAL. CODE REGS. tit. 2, § 11024(b)(6).

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<sup>60</sup> A "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment. CAL. GOV'T CODE § 12926(t). CAL. GOV'T CODE § 12950.1(a); CAL. CODE REGS. tit. 2, § 11024(a)(8).

<sup>61</sup> CAL. CODE REGS. tit. 2, § 11024(b)(4).

<sup>62</sup> CAL. CODE REGS. tit. 2, § 11024(a)(8).

<sup>63</sup> This reading of the policy and acknowledgment may also occur within 6 months of the person's assumption of the new supervisory position. CAL. CODE REGS. tit. 2, § 11024(b)(5). The current employer has the burden of establishing that the supervisor's prior training was legally sufficient. *Id.*

<sup>64</sup> CAL. CODE REGS. tit. 2, § 11024(b)(1)(A). Alternatively, an employer may designate a "training year" in which it trains some or all of its supervisors and thereafter must retrain these supervisors by the end of the next "training year," 2 years later. For newly hired or promoted supervisors who receive training within 6 months of assuming their supervisory position, the employer may include them in the next group training year, even if that occurs sooner than 2 years. CAL. CODE REGS. tit. 2, § 11024(b)(1)(B).

<sup>65</sup> The documentation must also include the sign-in sheet, a copy of all certificates of attendance or completion that were issued, and a copy of all written or recorded materials that comprised the training. CAL. CODE REGS. tit. 2, § 11024(b)(2).

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<sup>67</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS AND ANSWERS FOR SMALL EMPLOYERS ON EMPLOYER LIABILITY FOR HARASSMENT BY SUPERVISORS, *supra* Chapter 17, footnote 7 in this supplement; Nicole Duncan, *Handling Harassment*, QSR Magazine (Jan. 2015), *available at* <https://www.qsrmagazine.com/human-resources/handling-harassment>.

## Chapter 18

### Wages, Tips, and Breaks: The Most Common Labor Issues in Restaurants Pertaining to Wage and Hour Laws and Other Employee-Related Matters

#### Chapter 18A.

*Pages 341-348*

*Chapter 18(A) is replaced in its entirety with the following text:*

#### A. Wage and Hour Issues and Related Matters

The following table includes key wage and hour rules and common issues concerning non-exempt employees:

TOPIC	LEGISLATION/ RELEVANT WORK ORDER SECTIONS	ISSUES/RULES
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<b>1. MINIMUM WAGE</b>	California Labor Code Section 1182.12 (as amended by S.B. 3, signed by Gov. Jerry Brown on Apr. 4, 2016), effective January 1, 2017 <sup>1</sup>	Beginning Jan. 1, 2017 (unless delayed by the governor of California for economic reasons), California's current minimum wage of \$10/hour will be raised in 6 stepped installments to \$15/hour on January 1, 2022 (or January 1, 2023 for small employers). The increases in the California minimum wage are delayed by 1 year for employers of 25 or fewer employees. Employers exempt under California law must pay the federal
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		<p>minimum wage of \$7.25/hour (as of 7/24/09).</p> <p>The minimum wage is higher in certain California localities in accordance with local "living wage" ordinances; the new California minimum wage law does not prohibit such ordinances.<sup>2</sup></p> <p>Tips may not be used as a credit against minimum wage requirements.</p> <p>An employer may not prohibit employees from discussing their wages or working conditions.<sup>3</sup></p>
<p><b>2. OVERTIME</b></p>	<p>California Labor Code Section 510</p> <p>California Labor Code Section 1194 (Employee may not waive right to overtime pay)</p> <p>IWC wage order, 5-2001 Section 3</p>	<p>The general overtime provisions of California law are that a non-exempt employee (see below) 18 years of age or older, or any minor employee 16 or 17 years of age who is not required by law to attend school and is not otherwise prohibited by law from engaging in the subject work, may not be employed more than 8 hours in any workday or more than 40 hours in any workweek unless he or she receives 1½ times his or her regular rate of pay for all hours worked over 8 hours in any workday and over 40 hours in the workweek. Eight hours of labor constitutes a day's work, and employment beyond 8 hours in any workday or more than 6 days in any workweek is permissible provided the employee is compensated for the overtime at not less than:</p> <p>(i) 1½ times the employee's regular rate of pay for all hours worked in excess of 8 hours up to and including 12 hours in any workday, and for the first 8 hours worked</p>

		<p>on the 7th consecutive day of work in a workweek; and</p> <p>(ii) 2 times the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of 8 hours on the 7th consecutive day of work in a workweek.<sup>4</sup></p>
<p><b>3. REST PERIODS</b></p>	<p>California Labor Code Sections 226.7, 516</p> <p>IWC wage order, 5-2001 Section 12</p>	<p>An employer must authorize and permit non-exempt employees (see below) to take a rest period that must, insofar as practicable, be taken in the middle of each work period. The rest period is based on the total hours worked daily and must be at the minimum rate of a net 10 consecutive minutes for each 4-hour work period, or major fraction thereof. The Division of Labor Standards Enforcement of the California Department of Industrial Relations (hereinafter "DIR") considers anything more than 2 hours to be a "major fraction" of a 4-hour work period. A rest period is not required for employees whose total daily work time is less than 3½ hours. The rest period is counted as time worked and therefore the employer must pay for such periods. Since employees are paid for (their rest periods, they can be required to remain on the employer's premises during such periods.<sup>5</sup></p> <p>Employers are required to authorize and permit rest periods. While employers do not have an affirmative duty to require that employees take rest periods, they also must not interfere with an employee's ability to take a rest period. If an employer fails to provide an employee a rest period in accordance with IWC wage order 5, the</p>



		<p>employer must pay the employee 1 additional hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.<sup>6</sup></p>
<p><b>4. MEAL PERIODS</b></p>	<p>California Labor Code Sections 226.7, 512(a), 516  IWC wage order, 5-2001 Section 11</p>	<p>An employer may not employ an employee for a work period of more than 5 hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than 6 hours, the meal period may be waived by mutual consent of both the employer and employee.<sup>7</sup></p> <p>An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a 2nd meal period of not less than 30 minutes, except that if the total hours worked do not exceed 12 hours, the 2nd meal period may be waived by mutual consent of the employer and the employee provided that the 1st meal period was not waived.</p> <p>Unless the employee is relieved of all duty during a 30-minute meal period, the meal period is considered an “on duty” meal period and counted as time worked.<sup>8</sup></p> <p>If an employer fails to provide an employee a meal period in accordance with IWC wage order 5-2001, the employer must pay the employee 1 additional hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.<sup>9</sup></p>

		<p>An employer does not satisfy its obligations under California Labor Code Section 512 and IWC wage order 5-2001 if its policies or practices prevent or discourage employees from taking their meal periods.<sup>10</sup></p>
<p><b>5. GRATUITIES</b></p>	<p>California Labor Code Sections 350(e), 351</p>	<p>A "gratuity" is a tip, gratuity, or money that has been paid or given to or left for an employee by a customer of a business over and above the actual amount due for services rendered or for goods, food, drink, or articles sold or served to customers. A gratuity is the sole property of the employee(s) to whom it was paid. An employer is prohibited from sharing in or keeping any portion of a gratuity left for or given to 1 or more employees by a customer. Furthermore, it is illegal for an employer to make wage deductions from gratuities, or from using gratuities as direct or indirect credits against an employee's wages.<sup>11</sup></p> <p>In the view of the federal Internal Revenue Service (hereinafter "IRS"), "tips" are discretionary (optional or extra) payments determined by a customer that employees receive from customers. For the IRS, the absence of any of the following factors creates a doubt as to whether a payment is a tip, and indicates instead that a payment is a service charge:</p> <p>(1) the payment is made free of compulsion;</p> <p>(2) the customer retains the right to determine the amount;</p>

		<p>(3) the payment is not subject to negotiation or employer policy; and</p> <p>(4) the customer determines who gets the payment.</p> <p>As a result of this IRS policy, automatic gratuities, such as those added to the bills of large parties of diners, are now considered service charges, not tips. The IRS regards any portion of a service charge distributed to an employee as regular wages, which must be reported for payroll tax withholding. Employers thus have the burden of calculating automatic gratuities and other mandatory service charges as part of the employee's wages to determine the rate of pay for purposes of correctly calculating overtime pay.<sup>11A</sup></p> <p>Until recently, under California appellate court decisions, an employer could require tips given to waitstaff and others to be shared with dishwashers and other back of the house staff so long as no owners or managers shared in the "tip pool" and the employees provided "direct table service" or were in the "chain of service" that contributed to the service of the customer.<sup>12</sup> However, the U.S. Department of Labor rejected this view. It issued regulations in 2011 providing that even for employers in states such as California that are barred by state law from taking a tip credit against their minimum wage obligations, tips are the property of the employees who customarily and regularly receive them (i.e. waitstaff, bussers, bartenders) and they cannot be shared with non-customarily tipped employees such as dishwashers, cooks, and janitors.<sup>12A</sup> This</p>
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		regulation has been upheld by the Ninth Circuit Court of Appeals. <sup>12B</sup> Until further court review, restaurant owners and managers should review and revise their mandatory "tip pool" policies in light of these developments.
<b>6. REPORTING TIME PAY</b>	IWC wage order, 5-2001 Section 5	Each workday that an employee is required to report to work, but is not put to work or is furnished with less than ½ of his or her usual or scheduled day's work, the employee must be paid for ½ the usual or scheduled day's work, but in no event for less than 2 hours nor more than 4 hours, at his or her regular rate of pay. If an employee is required to report to work a 2nd time in any one workday and is furnished less than 2 hours of work on the 2nd reporting, he or she must be paid for 2 hours at his or her regular rate of pay. <sup>13</sup>
<b>7. TIME KEEPING</b>	IWC wage order, 5-2001 Section 7	Every employer must keep accurate information with respect to each employee, including the following: <ul style="list-style-type: none"> <li>(i) full name, home address, occupation and social security number;</li> <li>(ii) birth date, and if under 18 years old, designation as a minor;</li> <li>(iii) time records showing when the employee begins and ends each work period. Meal periods, split shift intervals, and total daily hours worked must also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded;</li> </ul>

		<p>(iv) total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee;</p> <p>(v) total hours worked in the payroll period and applicable rates of pay. This information must be made readily available to the employee upon reasonable request; and</p> <p>(vi) when a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula must be provided to employees. An accurate production record must be maintained by the employer.</p> <p>In case of a dispute over wages, an employer must pay the part of the wages conceded to be due, with the employee reserving his or her rights to pursue the recovery of any remaining balance. Payment of unscheduled overtime hours may be delayed until the next pay period.<sup>14</sup></p>
<p><b>8. SICK LEAVE</b></p>	<p>California Labor Code Sections 245-249</p>	<p>As of July 1, 2015, California employers must provide paid sick leave to employees. Under the Healthy Workplaces, Healthy Families Act of 2014, as amended, in order to qualify for sick leave, employees must work for the same employer for at least 30 days within a year in California, including temporary and part-time employees, and satisfy a 90-day employment period. In general terms, employers must provide and allow employees to use at least 24 hours or 3 days of paid sick leave per year.</p>

		<p>Employers can choose between policies with different accrual methods in order to comply with the paid sick leave requirement.</p> <p>As of January 1, 2015, employers must display a poster on the paid sick leave law, and provide employees with a revised "Notice to Employee" form containing information about the employee's rights to paid sick leave. In addition, employers must notify employees of the amount of sick leave accrued on a wage statement or a separate document issued on the same day as the employee's paycheck.<sup>14A</sup></p>
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<sup>1</sup> Office of Governor Edmund G. Brown Jr., Governor Brown Signs Landmark Legislation to Raise California's Minimum Wage, *available at* <https://www.gov.ca.gov/news.php?id=19368>; Fact Sheet: Boosting California's Minimum Wage to \$15/Hour, *available at* [https://www.gov.ca.gov/docs/Fact\\_Sheet\\_Boosting\\_Californias\\_Minimum\\_Wage.pdf](https://www.gov.ca.gov/docs/Fact_Sheet_Boosting_Californias_Minimum_Wage.pdf).

California's Industrial Welfare Commission (hereinafter "IWC") issues industrial wage orders that regulate wages, work hours, and other matters. Seventeen wage orders currently exist, each for a different industry or occupation, as well as a minimum wage order. Restaurants are subject to IWC wage order, 5-2001, *available at* <http://www.dir.ca.gov/IWC/wageorderindustries.htm>. IWC wage order, 5-2001 §§ 3 to 12, applies to non-exempt employees only. *See Classification of Employees as Exempt and Non-Exempt* in Section 18(B) *infra* in the EGCR and in this supplement.

<sup>2</sup> CAL. DEP'T OF INDUSTRIAL RELATIONS (hereinafter "DIR"), MINIMUM WAGE, *available at* [http://www.dir.ca.gov/dlse/faq\\_minimumwage.htm](http://www.dir.ca.gov/dlse/faq_minimumwage.htm), at 2. Numerous cities and counties in California have passed "living wage" ordinances. Such ordinances impose upon all or some employers the obligation to pay their employees at a rate higher than the minimum wage in force in California. A list of living wage ordinances may be found at UC Berkley Labor Center, California City and County Living Wage Ordinances, *available at* <http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/california-city-and-county-living-wage-ordinances/>.

<sup>3</sup> CAL. LABOR CODE §§ 232, 232.5.

<sup>4</sup> While the calculation of overtime on some types of compensation may be a relatively simple matter, the same calculation may become immensely complicated, especially for bonuses and commissions earned over one pay period. Computation of overtime on a salary can be different under California law than under federal law. See DIR, OVERTIME, *available at* [http://www.dir.ca.gov/dlse/faq\\_overtime.htm](http://www.dir.ca.gov/dlse/faq_overtime.htm). New federal overtime regulations were slated to take effect on Dec. 1, 2016. HR Watchdog, New Federal Overtime Rules Effective December 1 (May 18, 2016), *available at* <http://hrwatchdog.calchamber.com/2016/05/new-federal-overtime-rules-effective-december-1/>. In a case challenging those regulations, a federal judge has issued a nationwide injunction against their effectiveness. *State of Nevada v. U.S. Department of Labor*, Case No. 4-16-CV-00731 (E.D. Tex. Nov. 22, 2016)(Mazzant, J.).

<sup>5</sup> Allowing employees to use toilet facilities during working hours does not meet the employer's obligation to provide rest periods. DIR, REST PERIODS/LACTATION ACCOMMODATION, *available at* [http://www.dir.ca.gov/dlse/faq\\_restperiods.htm](http://www.dir.ca.gov/dlse/faq_restperiods.htm). Recovery or cooldown breaks to prevent heat illness are also distinct from the employee's mandated rest period. DIR, HEAT ILLNESS PREVENTION E-TOOL, *available at* [http://www.dir.ca.gov/dosh/etools/08-006/ewp\\_workSeverity.htm#benefits](http://www.dir.ca.gov/dosh/etools/08-006/ewp_workSeverity.htm#benefits). Like rest periods, cooldown breaks are paid breaks. However, there is no specified limit to the number of cooldown breaks an employee may take per day, and no specified maximum length for such breaks. CAL. LABOR CODE § 226.7; CAL. CODE REGS. tit. 8, § 3395. (For a discussion of California's outdoor heat illness prevention standard, *see supra* Chapter 13(C) in this supplement). Furthermore, employers must allow employees a "reasonable amount of break time to accommodate an employee desiring to express breast milk" for her child; however, this break time may run "concurrently" with any other allotted break time for the employee and is unpaid if it does not run concurrently with the authorized rest period. CAL. LABOR CODE § 1030.

<sup>6</sup> DIR, REST PERIODS/LACTATION ACCOMMODATION, *supra* Chapter 18, footnote 5 in this supplement; IWC wage order, 5-2001 § 12(B); *but see Augustus v. ABM Security Services, Inc.* (Case S224853) (Cal. Dec. 22, 2016) (under Wage Order 4, an employee must be relieved of all duty for a paid 10-minute rest period and cannot be "on call").

<sup>7</sup> DIR, MEAL PERIODS, *available at* [http://www.dir.ca.gov/dlse/faq\\_mealperiods.htm](http://www.dir.ca.gov/dlse/faq_mealperiods.htm). An employer has an obligation under CAL. LABOR CODE § 512(a) and IWC wage order, 5-2001 to provide employees with a reasonable opportunity to take an "off-duty" meal period, meaning an uninterrupted 30-minute break free from employer control during which the employee is relieved of all duty. However, the employer is not obligated to ensure that employees actually take meal periods or that employees do not work during their meal periods. *Brinker Restaurant Corp.*, 53 Cal. 4th 1004, 1034, 1040-1041 (Cal. 2012).

<sup>8</sup> DIR, MEAL PERIODS, *supra* Chapter 18, footnote 7 in this supplement. An "on duty" meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty and when an on-the-job paid meal period is agreed to by the parties in a written agreement.

The written agreement must state that the employee may, in writing, revoke the agreement at any time. IWC wage order, 5-2001 § 11(A).

<sup>9</sup> IWC wage order, 5-2001 § 11(B).

<sup>10</sup> *Brinker Restaurant Corp.*, 53 Cal. 4th at 1040. *See also Perez v. Safety-Kleen Systems, Inc.*, 253 F.R.D. 508 (N.D. Cal. 2008); *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 962 (Cal. Ct. App. 2005).

<sup>11</sup> A gratuity left by a customer using a credit card must be paid to the employee not later than the next regular payday following the date the customer authorized the credit card payment. The employer must pay the employee the full amount of the tip that is indicated on the credit card. The employer may not make any deduction for credit card processing fees or costs that are charged to the employer by the credit card company from gratuities paid to the employee. CAL. LABOR CODE § 351; DIR, TIPS AND GRATUITIES, *available at* [http://www.dir.ca.gov/dlse/FAQ\\_tipsandgratuities.htm](http://www.dir.ca.gov/dlse/FAQ_tipsandgratuities.htm), at #2, 3.

<sup>11A</sup> IRS, TIPS VERSUS SERVICE CHARGES, HOW TO REPORT (FS-2015-8)(Feb. 2015), *available at* <https://www.irs.gov/uac/newsroom/tips-versus-service-charges-how-to-report>; IRS, INTERNAL REVENUE BULLETIN 2012-26 (June 25, 2012), *available at* [http://www.irs.gov/irb/2012-26\\_IRB/ar07.html](http://www.irs.gov/irb/2012-26_IRB/ar07.html); DIR, TIPS AND GRATUITIES, *supra* Chapter 18, footnote 11 in this supplement, at #6.

<sup>12</sup> *Budrow v. Dave & Buster's of Cal.*, 171 Cal. App. 4th 875, 880-884 (Cal. Ct. App. 2009); *Etheridge v. Reins Int'l Cal. Inc.*, 172 Cal. App. 4th 908, 923 (Cal. Ct. App. 2009); *Chau v. Starbucks Corp.*, 174 Cal. App. 4th 688 (Cal. Ct. App. 2009) (shift supervisors whose primary duty is to serve food and drinks allowed to share in tips placed in a collective tip box). *See* DIR, TIPS AND GRATUITIES, *supra* Chapter 18, footnote 11 in this supplement, at #4.

<sup>12A</sup> UNITED STATES DEPT. OF LABOR (hereinafter "DOL"), FACT SHEET #15: TIPPED EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (July 2013), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs15.htm>; DOL, FACT SHEET #15A: OWNERSHIP OF TIPS UNDER THE FAIR LABOR STANDARDS ACT, *available at* <https://www.dol.gov/whd/regs/compliance/whdfs15a.pdf>; 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.52, 531.54.

<sup>12B</sup> *Oregon Restaurant and Lodging Association v. Perez*, 816 F. 3d 1080 (9th Cir. 2016), *rehearing and rehearing en banc denied* (No. 13-35765, D.C. No. 3:12-v-01261-MO Sept. 6, 2016); *cert. petition filed* (No. 16-163 Aug. 1, 2016); DOL, Fact Sheet #15, *supra* Chapter 18, footnote 12A in this supplement (DOL not enforcing its tip retention requirements against employers that do not take the tip credit, pending final resolution of *Oregon Restaurant and Lodging Association v. Perez*).



<sup>13</sup> For several exceptions to these requirements in IWC wage order 5-2001 § 5(C), *see* DIR, REPORTING TIME PAY, *available at* [http://www.dir.ca.gov/dlse/faq\\_reportingtimepay.htm](http://www.dir.ca.gov/dlse/faq_reportingtimepay.htm).

<sup>14</sup> CAL. LABOR CODE § 206; *See* Letter to Maureen Haggarty from Lloyd W. Aubry, Jr., California State Labor Commissioner (May 5, 1988) *available at* <http://www.dir.ca.gov/dlse/opinions/1988-05-05.pdf>.

<sup>14A</sup> DIR, FREQUENTLY ASKED QUESTIONS ABOUT CALIFORNIA'S NEW PAID SICK LEAVE (May 2016), *available at* [http://www.dir.ca.gov/dlse/Paid\\_Sick\\_Leave.htm](http://www.dir.ca.gov/dlse/Paid_Sick_Leave.htm).

## **Chapter 18C.**

*Pages 349-350*

*Chapter 18(C) is replaced in its entirety with the following text:*

### **C. Employment Eligibility Verification Form I-9**

A restaurant or other employer in California is barred by federal immigration law from employing a person if the employer knows or should have known that the person is an undocumented immigrant – that is, a non-U.S. citizen or national who is not lawfully admitted for permanent residence or authorized to work in the U.S.<sup>19</sup> To comply with federal immigration law, employers must verify the identity and employment authorization of each person they hire, complete and retain an Employment Eligibility Verification Form I-9 (hereinafter "Form I-9"), and refrain from discriminating against individuals on the basis of national origin or citizenship.<sup>20</sup>

A restaurant or other employer must ensure that each employee (whether or not a U.S. citizen) hired in the U.S. completes Section 1 of the Form I-9 no later than their 1st day of paid employment. In Section 1, the employee must provide information about his or her identity, and attest to his or her employment authorization (a social security number is optional, unless an employer uses E-Verify as discussed below).<sup>21</sup>

An employee may provide a single document that establishes both identity and employment authorization; an employee lacking such a document must provide the employer with one unexpired identity document from List B of the Form I-9 and one unexpired document from List C of the Form I-9 to establish employment authorization. Within 3 business days of such an individual beginning paid employment, the employer must complete Section 2 of the Form I-9, and then retain the Form I-9.<sup>22</sup>

<sup>19</sup> 8 U.S.C. § 1324(a)(1)(A); 8 C.F.R. § 274a.1(l)(definition of "knowing"). *See infra* Chapter 18, footnote 26 in this supplement. *See generally* California Restaurant Association, Industry Insights, *Immigration-Related Protections in California: What Restaurants Need to Know*, available at <http://www.calrest.org/immigration-related-employee-protections-in-california.html>.

<sup>20</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES (hereinafter "USCIS"), HANDBOOK FOR EMPLOYERS, GUIDANCE FOR COMPLETING FORM I-9, available at <https://www.uscis.gov/sites/default/files/files/form/m-274.pdf>, at 1.

<sup>21</sup> The current Form I-9, effective Mar. 8, 2013, is available at <http://www.uscis.gov/sites/default/files/files/form/i-9.pdf>. It can only be used until Jan. 21, 2017. Beginning Jan. 22, 2017, employers must use USCIS's revised Form I-9. USCIS, *USCIS Revises Form I-9, Used for All New Hires in U.S.* (Nov. 14, 2016), available at <https://www.uscis.gov/news/news-releases/uscis-revises-form-i-9-used-all-new-hires-us>.

<sup>22</sup> 8 U.S.C. § 1324a(b), 8 C.F.R. § 274a.2 (setting forth list of acceptable documents); Current Form I-9, *supra* Chapter 18, footnote 21 in this supplement, at 9.

## **Chapter 18D.**

*Pages 350-352*

*Chapter 18(D) is replaced in its entirety with the following text:*

### **D. No-Match Rule and E-Verify**

Each year, an employer must file the Copy "A" of Wage and Tax Statement(s) (Form W-2) and the Transmittal of Wage and Tax Statements (Form W-3)<sup>23</sup> with the Social Security Administration (hereinafter "SSA") to report how much the employer paid its employees and how much it deducted in taxes from employees' wages throughout the preceding year.<sup>24</sup> An

employer may receive an “Employer Correction Request” letter (commonly known as a “no-match” letter) from SSA if the employee’s name and social security number reported to SSA do not match SSA's records. Employers can minimize the receipt of no-match letters by using SSA’s Social Security Number Verification Service (hereinafter “SSNVS”), a free online service which verifies that an employee’s name and Social Security number match SSA’s records for wage reporting (Form W-2) purposes.<sup>25</sup>

Federal immigration law prohibits an employer who has hired a worker to continue to employ him or her knowing that he or she lacks authorization to work in the U.S.<sup>26</sup> However, a SSA no-match letter does not mean that the referenced employee is not work authorized; rather, it indicates that the employee’s name and social security number do not match SSA’s records.<sup>27</sup> An employer should not assume that an employee referenced in a SSA no-match letter is not authorized to work; should an employer take adverse action against the referenced employee based on that assumption, the employer risks violating the anti-discrimination provision of the Immigration and Nationality Act.<sup>28</sup>

In 2007, the Department of Homeland Security's U.S. Immigration and Customs Enforcement (hereinafter “ICE”) promulgated a final rule which covered no-match letters issued by SSA or by the Department of Homeland Security (hereinafter “DHS”).<sup>29</sup> The thrust of ICE's no-match rule was that if an employer could not resolve the discrepancy referred to in the no-match letter, and if the employee’s identity and work authorization could not be verified using the Form I-9 special verification process, the employer could either terminate the employee under the rule’s “safe harbor” provision, or else run the risk that ICE would find that the employer had “constructive knowledge” that the employee discussed in the no-match letter was

not authorized to work in the U.S.<sup>30</sup> The implementation of ICE's no-match rule was blocked by court order,<sup>31</sup> and DHS rescinded the rule in 2009.<sup>32</sup>

Unlike SSNVS, which may only be used for wage reporting purposes, the federal E-Verify program is specifically designed to confirm an employee's employment eligibility.<sup>32A</sup> E-Verify, which was created by DHS in partnership with SSA, is an internet-based system that allows employers to electronically compare information recorded on a Form I-9 to data from DHS and SSA records.

Although some states currently require the use of E-Verify for at least some employers, the E-Verify program is voluntary for private employers in California.<sup>32B</sup> It is unlawful for state or local government employers in California to require a private employer to use E-Verify, unless required by federal law or as a condition of receiving federal funds.<sup>32C</sup> Restaurants and other employers in California risk committing an "unfair immigration-related practice" if they use E-Verify to check the employment authorization status of an employee, at a time or in a manner not required by federal law, for the purpose of retaliating against that employee when he or she has exercised a protected labor right.<sup>32D</sup> California law specifies that certain E-Verify practices by employers are unlawful, and imposes a civil penalty of up to \$10,000 per violation.<sup>32E</sup>

<sup>23</sup> On-line versions are *available at* <http://www.irs.gov/pub/irs-pdf/fw2.pdf> (Form W-2) and <http://www.irs.gov/pub/irs-pdf/fw3.pdf> (Form W-3).

<sup>24</sup> SSA, CHECKLIST FOR W-2/W-3 ONLINE FILING, *available at* <https://www.ssa.gov/employer/W2checklist.htm>.

<sup>25</sup> U.S. DEPARTMENT OF JUSTICE (hereinafter "DOJ"), SSA NO-MATCH GUIDANCE PAGE, *available at* <https://www.justice.gov/crt/ssa-no-match-guidance-page>; SSA, SOCIAL SECURITY NUMBER VERIFICATION SERVICE, *available at* <http://www.ssa.gov/employer/ssnv.htm>.

<sup>26</sup> 8 U.S.C. § 1324a(a)(2). The current definition of "knowing" can be found at 8 C.F.R. §274a.1(l)(1): "The term *knowing* includes not only actual knowledge but also knowledge which

may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

- (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
- (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
- (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

(2) Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.”

<sup>27</sup> DOJ, FREQUENTLY ASKED QUESTIONS ABOUT NAME/SOCIAL SECURITY NUMBER "NO-MATCHES," *available at* <http://www.justice.gov/crt/about/osc/pdf/publications/SSA/FAQs.pdf>.

<sup>28</sup> *Id.* The anti-discrimination provision of the Immigration and Nationality Act, codified at 8 U.S.C. § 1324b, prohibits discrimination on the basis of national origin, citizenship status or immigration status, document abuse during the employment eligibility verification process, and retaliation.

<sup>29</sup> ICE, SAFE-HARBOR PROCEDURES FOR EMPLOYERS WHO RECEIVE A NO-MATCH LETTER, 8 C.F.R. Part 274a, 72 Fed. Reg. 45611 (Aug. 15, 2007), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2007-08-15/pdf/E7-16066.pdf>.

<sup>30</sup> *Id.*

<sup>31</sup> *American Federation of Labor v. Chertoff*, 552 F. Supp. 2d 999 (N.D. Cal. 2007).

<sup>32</sup> ICE, SAFE HARBOR PROCEDURES FOR EMPLOYERS WHO RECEIVE A NO-MATCH LETTER: RESCISSION, 74 Fed. Reg. 51447 (Oct. 7, 2009), *available at* <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-186558/0-0-0-199368/0-0-0-202774.html>.

<sup>32A</sup> DOJ, FREQUENTLY ASKED QUESTIONS ABOUT NAME/SOCIAL SECURITY NUMBER "NO-MATCHES," *supra* Chapter 18, footnote 27 in this supplement; ICE, E-VERIFY: FREQUENTLY ASKED QUESTIONS, *available at* <https://www.uscis.gov/faq-page/e-verify-frequently-asked-questions#t16966n47097>.

<sup>32B</sup> For a graph showing those states requiring use of E-Verify, *see* ICE, E-VERIFY OVERVIEW, *available at* [https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify\\_Native\\_Documents/e-verify-presentation.pdf](https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/e-verify-presentation.pdf), at 7.

<sup>32C</sup> CAL. LABOR CODE §§ 2812-2813.

<sup>32D</sup> CAL. LABOR CODE § 1019(b)(1)(B). The penalties for engaging in unfair immigration-related practices are spelled out in CAL. LABOR CODE § 1019, and can include suspension of a restaurant or other employer's business license. Should an employer attempt to reinvestigate or reverify an incumbent employee's authorization to work using an unfair immigration-related practice, CAL. LABOR CODE § 1019.1 (effective Jan. 1, 2017) sets forth remedies including equitable relief and a penalty not to exceed \$10,000.

<sup>32E</sup> CAL. LABOR CODE § 2814.

### **Chapter 18.E.1**

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<sup>34</sup> CAL. LABOR CODE § 1286(c); *see* DIR, CHILD LABOR LAWS (2013)(hereinafter "Child Labor Pamphlet"), *available at* <http://www.dir.ca.gov/DLSE/ChildLaborLawPamphlet.pdf> (containing comprehensive information about child labor laws, school attendance, wage, hour, and age requirements, restrictions, employer requirements, and work permits).

### **Chapter 18.E.2**

*Page 353*

*The 1st full paragraph is replaced with the following text:*

California has adopted as its own the federal standards for the employment of 14- and 15-year olds, including all future changes in the federal regulation.<sup>37</sup> Fourteen and 15-year olds who work in the food service industry may only be employed in the occupations expressly permitted to them under federal regulations and California law.<sup>38</sup> Fourteen and 15-year olds may perform limited cooking duties involving gas or electric grills that do not entail cooking over an open flame, may cook with deep-fat fryers that are equipped with and utilize devices that automatically raise and lower the fryer baskets into and out of the hot grease or oil, may heat food in microwave ovens that do not have the capacity to heat food over 140 degrees Fahrenheit,

and may perform other basic kitchen work involved in preparing and serving food and beverages, provided that the work does not involve the use of equipment such as rotisseries, broilers, pressurized equipment including fryolators, and cooking devices that operate at extremely high temperatures.<sup>39</sup>

<sup>37</sup> CAL. LABOR CODE § 1294.1; 29 C.F.R. Part 570, Subparts C and E.

<sup>38</sup> The Child Labor Pamphlet, *supra* footnote 34, at 15, states in part as follows: “Fourteen and fifteen year olds may be employed in the following occupations in the food service and retail industries:

- Office and clerical work, including the operation of office machines.
- Cashiering, selling, modeling, art work, work in advertising departments, window trimming, and comparative shopping.
- Price marking and tagging by hand or by machine, assembling orders, packing and shelving.
- Bagging and carrying out customers’ orders.
- Errand and delivery work by foot, bicycle, or public transportation.
- Cleanup work, including the use of vacuum cleaners and floor waxers, and maintenance of grounds, but not including the use of power-driven mowers or cutters.
- Kitchen work and other work involved in preparing and serving food and beverages, including the operation of machines and devices used in the performance of this work, including but not limited to, dishwashers, toasters, dumbwaiters, popcorn poppers, milkshake blenders, and coffee grinders.
- Cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing, and stocking goods when performed in areas physically separate from areas where meat is prepared for sale and outside freezers or meat coolers.”

Fourteen and 15-year olds are also permitted to perform cooking duties at soda fountains, lunch counters, snack bars, or cafeteria serving counters where such cooking is performed in plain sight of customers and is not the minor’s sole duty. In fast food restaurants where, for example, the french fryer is in plain view, a 14 or 15 year old may perform duties related to that machine. *Id.* at 16. *See also* 29 C.F.R. § 570.34.

<sup>39</sup> CAL. LABOR CODE § 1294.1; 29 C.F.R § 570.34 (c), (i). DOL has published a fact sheet providing general information concerning cooking and baking activities of minors, including 14- and 15-year olds, under the federal Fair Labor Standards Act and the federal youth employment

provisions (29 C.F.R. Part 570). DOL, FACT SHEET #2A: CHILD LABOR RULES FOR EMPLOYING YOUTH IN RESTAURANTS AND QUICK-SERVICE ESTABLISHMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (July 2010), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs2a.htm>.

#### **Chapter 18.E.4**

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<sup>43</sup> Child Labor Pamphlet, *supra* Chapter 18, footnote 34 in this supplement, at 58-66 (setting forth a summary chart and references to the applicable statutes).

<sup>45</sup> Child Labor Pamphlet, *supra* Chapter 18, footnote 34 in this supplement, at 57, 58-66 (setting forth a summary chart and references to the applicable statutes).

#### **Chapter 18.E.5**

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<sup>46</sup> Child Labor Pamphlet, *supra* Chapter 18, footnote 34 in this supplement, at 6. An employer may pay a minor or other "learner" employee (i.e. with no previous similar or related experience in the occupation) 85% of the minimum wage (rounded to the nearest nickel) for the first 160 hours. IWC wage order, 5-2001 § 4.

#### **Chapter 18G.**

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<sup>65</sup> Often a provision is included in the application for employment to help preserve the presumption of at-will employment, meaning that the employment may be terminated at any time. The application could include a provision that any contrary representation must be in writing and signed by the employer. *See Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (Cal. 2000). *See also Esparza v. Sand & Sea, Inc.*, 206 Cal. Rptr. 3d 474 (Cal. Ct. App. 2016)(language in employee handbook stating that it was not intended to create a contract meant that arbitration agreement in employee handbook did not create an enforceable agreement to arbitrate); *Serpa v. California Surety Investigations, Inc.*, 215 Cal.App.4th 695 (Cal. Ct. App. 2013) (upholding arbitration clause in employee handbook).

Under CAL. LABOR CODE § 1102.5, a restaurant or other employer cannot adopt a policy preventing an employee from disclosing information to a government agency, law enforcement agency, person with authority over the employee, employee with power to correct violations, or a public investigative body if the employee reasonably believes that the information discloses activities in violation of federal or California law or in violation or noncompliance with federal, state, or local rules or regulations. A restaurant or other employer that prevents or retaliates against such



disclosures can be liable, among other things, for damages and a civil penalty of up to \$10,000 per violation for corporate or limited liability company employers.

National Labor Relations Board General Counsel Richard Griffin's memorandum 15-04, entitled "Report of the General Counsel Concerning Employer Rules," discusses the ways in which employee handbooks can run afoul of the federal National Labor Relations Act. *See* <https://www.nlr.gov/reports-guidance/general-counsel-memos>.

## Chapter 19

### Postings in Restaurants: Restaurants' Obligatory and Optional Workplace Postings

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<sup>1</sup> Many of the posters described in this chapter can be obtained in a packaged set. *See, e.g.*, CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS (hereinafter "DIR"), WORKPLACE POSTINGS, *available at* <http://www.dir.ca.gov/wpnodb.html>.

#### Chapter 19A.

*Pages 359-363*

*Chapter 19(A) is amended and replaced in its entirety as follows:*

#### A. Labor Law Posters

TITLE OF POSTING	SOURCE AND EXPLANATION	WHO MUST POST?
Wage Order 5	<p>Enforced by DIR's Division of Labor Standards Enforcement, wage orders regulate wages, hours, and working conditions, and are numbered by industry or occupation group. Restaurants are subject to Wage Order 5-2001. <i>See supra</i> Chapter 18 in this supplement.</p> <p><a href="http://www.dir.ca.gov/IWC/IWCArticle5.pdf">http://www.dir.ca.gov/IWC/IWCArticle5.pdf</a></p> <p>California Labor Code Section 1183(d)</p>	All employers
California Minimum Wage MW-2014	<p>Sets forth California's minimum wage in an amendment to Wage Order 5-2001. Available in English and Spanish. <i>See supra</i> Chapter 18 in this supplement.</p>	All employers

	<p><a href="http://www.dir.ca.gov/iwc/MW-2014.pdf">http://www.dir.ca.gov/iwc/MW-2014.pdf</a><sup>1</sup></p> <p>California Labor Code Section 1183(d)</p>	
<p>Healthy Workplaces/Healthy Families Act of 2014/Paid Sick Leave  (11/2014)</p>	<p>Provides information about paid sick leave entitlement and usage. <i>See supra</i> Chapter 18 in this supplement.</p> <p><a href="http://www.dir.ca.gov/DLSE/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf">http://www.dir.ca.gov/DLSE/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf</a></p> <p>California Labor Code Section 247</p>	<p>All employers</p>
<p>Payday Notice Form DLSE 8  (06/02)</p>	<p>Specifies the regular paydays and the time and place of payment. An employer-developed notice is permitted.</p> <p><a href="http://www.dir.ca.gov/dlse/PaydayNotice.pdf">www.dir.ca.gov/dlse/PaydayNotice.pdf</a></p> <p>California Labor Code Section 207</p>	<p>All employers</p>
<p>Safety and Health Protection on the Job  (01/16)</p>	<p>Contains pertinent information regarding safety rules and regulations. Available in English and Spanish. <i>See</i> Chapter 13 in the EGCR and in this supplement.</p> <p><a href="http://www.dir.ca.gov/dosh/dosh_publications/SHPSTR_ENG012000.pdf">http://www.dir.ca.gov/dosh/dosh_publications/SHPSTR_ENG012000.pdf</a></p> <p>California Labor Code Section 6328; California Code of Regulations tit. 8, Section 340</p>	<p>All employers</p>
<p>Access to Medical and Exposure Records  (01/15)</p>	<p>Provides information about rights of employees working with hazardous or toxic substances. Available in English and Spanish. <i>See</i> Chapter 13 in the EGCR and in this supplement.</p>	<p>All employers using hazardous or</p>

<sup>1</sup> Updated posters will reflect California's upcoming minimum wage increases. Beginning Jan. 1, 2017 (unless delayed by the governor of California for economic reasons), California's current minimum wage of \$10/hour will be raised in 6 stepped installments to \$15/hour on 1/1/22 (or 1/1/23 for small employers).

	<p><a href="http://www.dir.ca.gov/dosh/dosh_publications/Access_En.pdf">http://www.dir.ca.gov/dosh/dosh_publications/Access_En.pdf</a></p> <p>California Code of Regulations tit. 8, General Industry Safety Order Section 3204(g)</p>	toxic substances
<p>Notice to Employees— Injuries Caused by Work DWC Form 7 (01/2016)</p>	<p>Advises employees of workers' compensation benefits. Claims administrators and employers need to revise the notice they are currently using and send it to the Division of Workers' Compensation (hereinafter "DWC") administrative director for review and approval or they may download the new form.<sup>2</sup></p> <p><a href="http://www.dir.ca.gov/DWC/NoticePoster.pdf">http://www.dir.ca.gov/DWC/NoticePoster.pdf</a></p> <p>California Code of Regulations tit. 8, Section 9881</p>	All employers
<p>Notice of Workers' Compensation Carrier and Coverage</p>	<p>States the name of the employer's current workers' compensation insurance carrier, or the fact that the employer is self-insured. Obtained from the employer's workers' compensation insurance carrier.</p> <p>California Labor Code Section 3550</p>	All employers
<p>Emergency Phone Numbers (S-500)</p>	<p>Lists emergency responders' phone numbers.<sup>3</sup></p> <p><a href="http://www.dir.ca.gov/dosh/dosh_publications/s500pstr.pdf">http://www.dir.ca.gov/dosh/dosh_publications/s500pstr.pdf</a></p> <p>California Code of Regulations tit. 8, Section 1512(e)</p>	All employers
<p>Whistleblowers are Protected</p>	<p>Must be prominently displayed in lettering larger than size 14 type and include a list of employee rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hotline</p>	All employers

<sup>2</sup> DIR, WORKPLACE POSTINGS, *supra* Chapter 19, footnote 1 in this supplement.

<sup>3</sup> *Id.*

	<p>maintained by the office of the California Attorney General.</p> <p><a href="http://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf">http://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf</a></p> <p>California Labor Code Sections 1102.5 and 1102.8</p>	
<p>No Smoking Signage</p>	<p>Signage must be posted designating where smoking is prohibited/permitted in a place of employment. This law is enforced by local law enforcement agencies, including local health departments. <i>See</i> Chapter 21 in the EGCRL and in this supplement.</p> <p>California Labor Code Section 6404.5(d)(1)</p>	<p>All employers</p>
<p>Annual Summary of Work-Related Injuries and Illnesses</p> <p>Cal/OSHA Form 300A (07/07)</p>	<p>Restaurants are exempt from keeping California Occupational Safety and Health Administration (“Cal/OSHA”) injury and illness records in the absence of a government request. They must still report workplace incidents that result in death or serious injury or illness. Cal/OSHA Forms 300 and 301 are used to log such a death, injury, or illness and their details. Cal/OSHA Form 300A, the annual summary of injuries and illnesses recorded on Form 300, must be posted. <i>See supra</i> Chapters 13(K) and (L) in the EGCRL and in this supplement.</p> <p><a href="http://www.dir.ca.gov/dosh/DoshReg/AppendxB300AFinal.pdf">http://www.dir.ca.gov/dosh/DoshReg/AppendxB300AFinal.pdf</a> (Form 300A)</p> <p>California Code of Regulations tit. 8, Sections 330, 342, 14300.2, 14300.29, 14300.32</p>	<p>Employers with 11 or more employees in the previous year (and receipt of special notice)</p>
<p>California Law Prohibits Workplace Discrimination and Harassment</p> <p>DFEH-162 (12/14)</p>	<p>The latest information can be obtained from the Department of Fair Employment and Housing (hereinafter “DFEH”), reference number 162. Available in English and Spanish.</p> <p><a href="http://www.dfeh.ca.gov/res/docs/Publications/DFEH-162-2015.pdf">http://www.dfeh.ca.gov/res/docs/Publications/DFEH-162-2015.pdf</a></p>	<p>All employers</p>

	California Government Code Section 12950; California Code of Regulations tit. 2, Section 11013	
<p>Your Rights and Obligations as a Pregnant Employee</p> <p>DFEH-100-20 (04/16)</p>	<p>The latest information can be obtained from the DFEH, reference notice DFEH-100-20. Available in English and Spanish.</p> <p><a href="http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2016/DFEH-100-20%20(04-16).pdf">http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2016/DFEH-100-20%20(04-16).pdf</a></p> <p>California Code of Regulations tit. 2, Section 11049(d)</p>	Employers of 5 to 49 employees
<p>Family Care and Medical Leave (CFRA leave) and Pregnancy Disability Leave</p> <p>DFEH-100-21 (07/15)</p>	<p>The latest information can be obtained from the DFEH, reference notice DFEH-100-21. Available in English and Spanish.</p> <p><a href="http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2015/DFEH-100-210-rev072015.pdf">http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2015/DFEH-100-210-rev072015.pdf</a></p> <p>California Code of Regulations tit. 2, Section 11095</p>	All employers with 50 or more employees
<p>Notice to Employees</p> <p>DE 1857A REV. 42 (11/13)</p>	<p>Advises employees of potential unemployment insurance, disability insurance and paid family leave insurance benefits. The latest information can be obtained from the Employment Development Department (hereinafter "EDD"), reference notice DE 1857A. Available in English, Spanish, Vietnamese, and Chinese.</p> <p><a href="http://www.edd.ca.gov/pdf_pub_ctr/de1857a.pdf">http://www.edd.ca.gov/pdf_pub_ctr/de1857a.pdf</a></p> <p>California Unemployment Insurance Code Section 1089; California Code of Regulations tit. 22, Section 1089-1 (explaining when Form 1857A and/or Form 1857D below are required)</p>	All employers

<p>Notice to Employees: Unemployment Insurance Benefits</p> <p>DE 1857D REV. 17 (05/11)</p>	<p>The latest information can be obtained from the EDD, reference notice 1857D. Available in English, Spanish, Vietnamese, and Chinese.</p> <p><a href="http://www.edd.ca.gov/pdf_pub_ctr/de1857d.pdf">http://www.edd.ca.gov/pdf_pub_ctr/de1857d.pdf</a></p> <p>California Unemployment Insurance Code Section 1089; California Code of Regulations tit. 22, Section 1089-1 (explaining when Form 1857A above and/or Form 1857D are required)</p>	<p>All employers</p>
<p>Time Off to Vote</p>	<p>Not less than 10 days before every statewide election, every employer must keep posted conspicuously at the place of work, if practicable, or elsewhere where it can be seen as employees come or go to their place of work, a notice setting forth the provisions of California Elections Code Section 14000 (availability of paid leave for the purpose of voting in statewide elections).</p> <p><a href="http://elections.cdn.sos.ca.gov//pdfs/tov-english.pdf">http://elections.cdn.sos.ca.gov//pdfs/tov-english.pdf</a></p> <p>California Elections Code Section 14001</p>	<p>All employers</p>
<p>Equal Employment Opportunity is the Law</p> <p>EEOC-P/E-1 (11/09)</p>	<p>The latest information (together with Americans with Disabilities Act information) can be obtained from the U.S. Equal Employment Opportunity Commission. Available in English, Spanish, Arabic, and Chinese.</p> <p><a href="http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf">http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf</a></p> <p>Code of Federal Regulations tit. 29, Section 1601.30</p>	<p>All employers</p>
<p>Employee Rights Under the Fair Labor Standards Act- Federal Minimum Wage</p> <p>WH 1088 (07/16)</p>	<p>The latest information can be obtained from the U.S. Department of Labor (hereinafter “DOL”), reference number WH 1088. Available in English, Spanish, and Chinese.</p> <p><a href="https://www.dol.gov/whd/regs/compliance/posters/minwagebw.pdf">https://www.dol.gov/whd/regs/compliance/posters/minwagebw.pdf</a></p>	<p>All employers</p>

	29 U.S.C. § 206; Code of Federal Regulations tit. 29, Section 516.4	
Employee Rights - Employee Polygraph Protection Act  WH Pub. 1462 (07/16)	The latest information can be obtained from DOL, reference number WH 1462. Available in English and Spanish.  <a href="https://www.dol.gov/whd/regs/compliance/posters/eppabw.pdf">https://www.dol.gov/whd/regs/compliance/posters/eppabw.pdf</a>  29 U.S.C. § 2003	All employers
Employee Rights under the Family and Medical Leave Act  WH Pub. 1420  (04/16)	The latest information can be obtained from DOL, reference number 1420. Available in English and Spanish. <sup>4</sup>  <a href="https://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf">https://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf</a>  29 U.S.C. § 2601 <i>et seq.</i> ; Code of Federal Regulations tit. 29, Section 825.300	All employers with 50 or more employees
Your rights Under USERRA  The Uniformed Services Employment and	This notice relates to the protection for employment and reemployment rights and benefits of service members upon their return to civilian life.  <a href="http://www.dol.gov/vets/programs/userra/USERRA_Federal.pdf">http://www.dol.gov/vets/programs/userra/USERRA_Federal.pdf</a>	All employers

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<sup>4</sup> The Family Medical Leave Act was amended to incorporate changes made by the National Defense Authorization Act (hereinafter “NDAA”) for fiscal year 2010 and the Airline Flight Crew Technical Corrections Act. *See* DOL, WAGE AND HOUR DIVISION, MAJOR PROVISIONS: FINAL RULE TO IMPLEMENT STATUTORY AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT, AMENDMENTS TO THE FMLA, *available at* <https://www.dol.gov/whd/fmla/2013rule/militaryAmendments.htm>. These final regulations include provisions addressing and expanding military family leave entitlements, created in 2010 by the NDAA, and provisions establishing special hours of service eligibility requirements for airline flight crew employees.



Reemployment Rights Act (07/08)	38 U.S.C. § 4334	
San Francisco <sup>5</sup> Minimum Wage Ordinance and Paid Sick Leave Ordinance	San Francisco-specific posters. These postings must be displayed in English, Spanish, Chinese, and any language spoken by more than 5% of the San Francisco workforce. Information regarding these ordinances can be found at City and County of San Francisco, Office of Labor Standards Enforcement, San Francisco Labor	All employers

<sup>5</sup> Restaurants and other employers should check for local ordinances requiring workplace postings. San Francisco's posting requirements are included as an example of such local requirements. Additional San Francisco ordinances requiring postings by local employers include:

(i) Health Care Security Ordinance, *available at*

<http://sfgov.org/olse/sites/default/files/FileCenter/Documents/9322-2016%20HCSO%20Notice%20-%20%2011%2024%202015.pdf>,  
San Francisco Administrative Code, Chapter 14;

(ii) Fair Chance Ordinance, *available at*

<http://sfgov.org/olse/sites/default/files/FileCenter/Documents/11600-Art%20%2049%20Official%20Notice%20Final%20091114.pdf>,  
San Francisco Police Code, Article 49, Section 4905;

(iii) Family Friendly Workplace Ordinance, *available at*

<http://sfgov.org/olse/sites/default/files/FileCenter/Documents/11256-FFWO%20Official%20Notice.pdf>,  
San Francisco Administrative Code, Chapter 12Z;

(iv) Formula Retail Employee Rights Ordinance, *available at*

[http://sfgov.org/olse/sites/default/files/FileCenter/Documents/13056-FRERO\\_Notice\\_2015\\_09\\_09\\_final.pdf](http://sfgov.org/olse/sites/default/files/FileCenter/Documents/13056-FRERO_Notice_2015_09_09_final.pdf), San Francisco Police Code, Articles 33F and 33G; and

(v) Paid Parental Leave Ordinance, *available at*

<https://sfgov.legistar.com/View.ashx?M=F&ID=4385532&GUID=9CEF0B41-0BEC-45C7-8368-AD6822B78E3D> (includes workplace posting requirement); San Francisco Police Code Article 33H.

	<p>Laws: Citywide, <i>available at</i>  <a href="http://sfgsa.org/index.aspx?page=430">http://sfgsa.org/index.aspx?page=430</a>.</p> <p>Minimum Wage Ordinance:  <a href="http://sfgov.org/olse/sites/default/files/Document/69_MinWageOrdinancePoster_0616v4.pdf">http://sfgov.org/olse/sites/default/files/Document/69_MinWageOrdinancePoster_0616v4.pdf</a>; San Francisco Administrative Code, Chapters 12R, 12V</p> <p>Paid Sick Leave Ordinance:  <a href="http://sfgov.org/olse/sites/default/files/FileCenter/Documents/8726-2011%20-%20Paid%20Sick%20Leave%20Ordinance1%20Poster.pdf">http://sfgov.org/olse/sites/default/files/FileCenter/Documents/8726-2011%20-%20Paid%20Sick%20Leave%20Ordinance1%20Poster.pdf</a>                  San Francisco Administrative Code, Chapter 12W</p>	
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**Chapter 19B.**

*Page 365*

*Chapter 19(B) is amended by adding the following text at the end of the chart set forth therein:*

<p>Prop. 65                  Safe Harbor Warning                  (BPA)</p>	<p>Safe harbor warnings for food and beverage cans with linings containing bisphenol A (BPA) served in restaurants.</p> <p>California Code of Regulations tit. 27, Section 25603.3(g)</p> <p><i>See supra</i> Chapter 1, footnote 201 in this supplement.</p>	<p>All restaurants with 10 or more employees</p>
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## Chapter 20

### How is that Entrée Prepared? Restaurants and Healthy Lifestyle Issues

*Page 369*

*The 1st full paragraph is replaced with the following text:*

With the growing concern in the U.S. about the incidence of obesity, restaurant food has been the subject of considerable legislative and regulatory attention. California was the first state, in 2008, to pass menu labeling legislation. On March 23, 2010, Section 4205(b) of the Patient Protection and Affordable Care Act (hereinafter, "ACA" and commonly known as Obamacare) amended the Federal Food, Drug, and Cosmetic Act to require nutrition labeling for certain chain restaurants, similar retail food establishments, and vending machines (hereinafter, the "Federal Menu Labeling Law").

After examining federal nutritional labeling requirements and issues relating to obesity, this Chapter 20 reviews the Federal Menu Labeling Law and California's revised menu labeling statute. Chapter 20 continues its examination of healthy lifestyle issues by reviewing California's ban of the use of trans fat in the preparation of restaurant food, the status of its ban of the production and sale of foie gras, and its ban of the possession and sale of shark fins.

#### Chapter 20.A.1

*Pages 369-372*

*Section 20(A)(1) is replaced in its entirety with the following text:*

##### **A. Nutritional Labeling Exemptions**

###### **1. Nutrition Labeling and Education Act of 1990**

The U.S. Congress passed the Nutrition Labeling and Education Act of 1990 (hereinafter "NLEA"), thereby amending the existing Federal Food, Drug and Cosmetic Act (hereinafter

"FDCA") to strengthen the authority of the federal Food and Drug Administration (hereinafter "FDA") to require nutritional labeling of food.<sup>1</sup> A principal aim of the NLEA was to require food manufacturers to provide nutritional labels for most packaged food items sold in retail food stores. To that end, the NLEA established two new food labeling provisions.

The first, Section 403(q) of the NLEA, 21 U.S.C. § 343(q), created new mandatory general nutritional labeling standards and requirements for food. Nutrition information on packaged food items--now familiar to every grocery store shopper--is required under Section 403(q) of the NLEA. Specifically, the labels must include the serving size, the number of servings in the container, the amount of fat, cholesterol, sodium, carbohydrates, sugars, fiber, and protein in a serving size, and the total number of calories.<sup>2</sup> Restaurants not subject to the Federal Menu Labeling Law are largely exempted from Section 403(q)'s disclosure requirements, with exceptions discussed below. Restaurants subject to the Federal Menu Labeling Law are subject to new nutrition disclosure requirements, discussed below in Section 20(C) of this supplement.<sup>3</sup>

The second food labeling section, Section 403(r) of the NLEA, 21 U.S.C. § 343(r), limits the ability of food manufacturers to make voluntary affirmative nutrient (i.e., claims about "low sodium" or "lite" products) and health (i.e., claims that "fiber helps to prevent cancer") claims unless such claims about food are made in accordance with detailed FDA labeling requirements.<sup>4</sup> As discussed below in Section 20(C) of this supplement, restaurants that are subject to the Federal Menu Labeling Law must comply with its nutrition disclosure requirements if they make nutrient content or health claims about food that is a standard menu item.<sup>5</sup>

If a restaurant that is not subject to the Federal Menu Labeling Law claims that certain menu items are "low fat" or "heart healthy," neither complete nutrition information nor strict laboratory analyses of those claims are required.<sup>6</sup> Rather, when such a restaurant makes a

"nutrient content claim"<sup>7</sup> that characterizes the level of a nutrient in an item it serves or makes a "health claim"<sup>8</sup> that characterizes the relationship of any food or substance therein to a disease or a health-related condition, the restaurant must be able to demonstrate that there is a reasonable basis for believing that the food qualifies for these characterizations.<sup>9</sup>

Levels of fat and other nutrient levels in any restaurant food or meal for which a "low fat" or other claim is made by such a restaurant do not need to comply with the strict "Nutrition Facts" labeling requirements of Section 403(q) of the NLEA.<sup>10</sup> Instead, the restaurant may rely on nutrition databases, cookbooks, analyses, or "other reasonable bases" as the back-up for its claim.<sup>11</sup> This nutrition and health information does not need to appear on the menu, but it must be provided "on request."<sup>12</sup> The information can be made available to a customer by means of a poster, brochure, leaflet, notebook, or other reasonable means.<sup>13</sup> This information may also be provided by a menu or electronic device, or by other similar means.<sup>14</sup>

California's Sherman Food, Drug, and Cosmetic Law (hereinafter "SFDC Act") incorporates all food labeling regulations adopted pursuant to the NLEA, while also setting forth its own labeling requirements.<sup>15</sup> Under the SFDC Act, in California Health and Safety Code Section 110665, any food is misbranded if its labeling does not conform with the nutrition labeling required by Section 403(q) of the NLEA. Any food fabricated from 2 or more ingredients is misbranded unless it bears a label clearly stating the ingredients therein; however, the statute does not apply to any food sold for consumption on or off the premises of a restaurant.<sup>16</sup>

<sup>1</sup> 21 U.S.C. § 301 *et seq.* Subsequent to the NLEA, Congress enacted another change to the FDCA's food labeling requirements, the Food Allergen Labeling and Consumer Protection Act of 2004. *See Food Allergies* discussed *supra* Chapter 4(C) in the EGCR and in this supplement.

<sup>2</sup> 21 U.S.C. § 343(q)(1)(A)-(D).

<sup>3</sup> 21 U.S.C. § 343(q)(5)(A)(i) and (ii),(q)(5)(H)(ii) and (iii). The ACA amended Section 343(q) to add the Federal Menu Labeling Law (Pub. L. No. 111-148, § 4205 (Mar. 28, 2010), 124 Stat. 573), to the FDCA. The Federal Menu Labeling Law is codified as Section 403(q)(5)(H) of the FDCA, 21 U.S.C. § 343(q)(5)(H). Its status is unclear in the event of a repeal of the ACA. *See ACA Debate Clouds Menu-Labeling Future*, Nation's Restaurant News (Dec. 5, 2016), available at <http://www.nrn.com/menu/aca-debate-clouds-menu-labeling-future>.

<sup>4</sup> *See* 21 C.F.R. § 101.9 (nutrition labeling of food); *New York State Restaurant Association v. New York City Board of Health* (hereinafter "*NYSR3*"), 556 F.3d 114, 118-120 (2nd Cir. 2009). *See* FDA, FOOD LABELING: REVISION OF THE NUTRITION AND SUPPLEMENT FACTS LABELS, available at <https://www.federalregister.gov/articles/2014/03/03/2014-04387/food-labeling-revision-of-the-nutrition-and-supplement-facts-labels> (21 C.F.R. § 101.9's requirements are being revised).

<sup>5</sup> FDA CENTER FOR FOOD SAFETY AND APPLIED NUTRITION, A LABELING GUIDE FOR RESTAURANTS AND OTHER RETAIL ESTABLISHMENTS SELLING AWAY-FROM-HOME FOODS – PART II (MENU LABELING REQUIREMENTS IN ACCORDANCE WITH 21 CFR 101.11)(HEREINAFTER "FDA GUIDANCE FOR INDUSTRY"), at Q & A #4.4, available at <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm461934.htm>.

<sup>6</sup> FDA GUIDANCE FOR INDUSTRY, *supra* Chapter 20, footnote 5 in this supplement, at Q&A #4.3.

<sup>7</sup> 21 C.F.R. § 101.13.

<sup>8</sup> 21 C.F.R. § 101.14.

<sup>9</sup> 21 C.F.R. § 101.10.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 21 C.F.R. §§ 101.10, 101.45.

<sup>14</sup> FDA GUIDANCE FOR INDUSTRY, *supra* Chapter 20, footnote 5 in this supplement, at Q & A #4.3.

<sup>15</sup> CAL. HEALTH & SAFETY CODE §§ 109875 *et seq.*, CAL. HEALTH & SAFETY CODE §110100(a)-(b). In *Farm Raised Salmon Cases*, 42 Cal. 4th 1077 (Cal. 2008), the California Supreme Court concluded that state law claims under the SFDC Act pertaining to farm-raised salmon additives were not impliedly preempted by 21 U.S.C. § 343-1(a)(3). For more analysis of the relationship between the NLEA and the SFDC Act and related preemption issues, *see, e.g., Gustavson v. Wrigley Sales Company*, 961 F. Supp. 2d 1100 (N.D. Cal. 2013); *Bruton v. Gerber Products Company*, 961 F. Supp. 2d 1062 (N.D. Cal. 2013).

<sup>16</sup> CAL. HEALTH & SAFETY CODE § 110725(a), (e). However, the SFDC Act was amended to require that food prepackaged in a restaurant or other food facility must bear a label that complies with the allergen labeling requirements of the FALCPA. CAL. HEALTH & SAFETY CODE §§ 110673, 114089. *See Food Allergies* discussed *supra* Chapter 4(C) in the EGCR and in this supplement.

## **Section 20.A.2**

*Page 372*

*The 1st full paragraph is replaced with the following text:*

The NLEA, as amended by Section 4205(c) of the ACA, contains two express preemption provisions. For restaurants subject to the Federal Menu Labeling Law, state and local nutrition labeling requirements are preempted unless they are "identical to" federal requirements.<sup>17</sup> State and local nutrition labeling requirements are permitted for food sold in restaurants that are not subject to the Federal Menu Labeling Law.<sup>18</sup>

<sup>17</sup> 21 U.S.C. § 343-1(a)(4); FDA Guidance for Industry, *supra* Chapter 20, footnote 5 in this supplement, at Q&A #6.26, #8.1.

<sup>18</sup> *Id.*; Pub. L. No. 111-148, § 4205(d)(Mar. 28, 2010).

<sup>19</sup> *NYSR3*, 556 F. 3d at 120; *Jones v. Dineequity, Inc.*, 2011 Westlaw 5517830, 2011 Cal. App. Unpub. LEXIS 8724 (Cal. Sup. Ct. 2011). *See* L. Rutkow, S. Vernick, J. Hodge, and S. Teret, *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 *Journal of Law, Medicine and Ethics* 772 (Winter 2008).

## **Chapter 20.B.1**

*Pages 374-375*

*Chapter 20(B)(1) is replaced in its entirety with the following text:*

As discussed by the federal appellate court in *NYSR3*, the statistics documenting the growing obesity of Americans are by now legion. From 1980 to 2010, national obesity rates more than doubled for adults and children 2 to 5 years old, while approximately tripling among those 6 to 19 years old.<sup>30</sup> A significant percentage of California adults (25.4%) and adolescents (15.8%) are obese.<sup>31</sup> Nationally, over 34% of American adults are obese.<sup>32</sup>

The cumulative societal costs of obesity are staggering. In 2012, it was determined that nearly 500,000 hospital admissions annually are due to obesity-related conditions in California, accounting for \$33.8 billion in hospital charges and representing a 39.7% increase since 2005.<sup>33</sup> In light of the heightened public concern about obesity, the lack of required nutritional notification by restaurants to their customers has come under attack in different quarters, as will be discussed below.

<sup>30</sup> CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, ABOUT THE NUTRITION EDUCATION AND OBESITY PREVENTION BRANCH, *available at* <http://www.cdph.ca.gov/programs/NEOPB/Pages/AboutUs.aspx>.

<sup>31</sup> *Id.*

<sup>32</sup> DEP'T OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, ADULT OBESITY FACTS, *available at* <http://www.cdc.gov/obesity/data/adult.html>.

<sup>33</sup> CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, ABOUT THE NUTRITION EDUCATION AND OBESITY PREVENTION BRANCH, *supra* Chapter 20, footnote 30 in this supplement.

## **Chapter 20.B.2**

*Page 375*

<sup>34</sup> *Pelman v. McDonald's Corporation*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003), *reversed and remanded*, 396 F. 3d 508 (2nd Cir. 2005), 396 F. Supp. 2d 439 (S.D.N.Y. 2005) (granting in part and denying in part defendant's motion for a more definite statement), 452 F. Supp. 2d 320 (S.D.N.Y. 2006) (granting in part and denying in part defendant's motion to strike and dismiss). After the court denied the plaintiffs' motion for class certification, the plaintiffs voluntarily dismissed their remaining claims against McDonald's. 272 F.R.D. 82 (S.D.N.Y. 2010) (denying



plaintiffs' motion for class certification), *appeal dismissed per stipulation*, No. 1:02CV07821 (S.D.N.Y. Feb. 25, 2011).

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<sup>38</sup> *Pelman*, 452 F. Supp. 2d 320, *supra* Chapter 20, footnote 34 in this supplement.

<sup>39</sup> As of August, 2013, 26 states had enacted versions of “commonsense consumption” laws. See The Public Health Advocacy Institute, *Study of State Cheeseburger Bills Finds They Go Well Beyond “Tort Reform”* (Aug. 26, 2013), available at [www.phaionline.org/tag/common-sense-consumption-acts](http://www.phaionline.org/tag/common-sense-consumption-acts).

<sup>42</sup> See S.B. 937, 2005-2006 S., (Cal. 2005), Bill Analysis, at p. 5, available at [http://www.leginfo.ca.gov/pub/0506/bill/sen/sb\\_09010950/sb\\_937\\_cfa\\_20050518\\_120807\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/0506/bill/sen/sb_09010950/sb_937_cfa_20050518_120807_sen_comm.html).

## **Chapter 20C.**

*Pages 377-380*

*Chapter 20(C) is replaced in its entirety with the following text:*

### **C. Menu Labeling**

In 2008, California was the first state to pass menu labeling legislation.<sup>43</sup> Former California Health and Safety Code Section 114094 (hereinafter "Original CA Menu Labeling Law") required certain chain restaurants to provide calorie content information on menus and menu boards on or after January 1, 2011.<sup>44</sup> However, the new Federal Menu Labeling Law quickly overtook California's groundbreaking statute.<sup>45</sup>

#### **1. Federal Menu Labeling Law**

Under the Federal Menu Labeling Law, nutrition labeling is required for certain restaurants, similar retail food establishments (hereinafter “SRFE”), and vending machines. Under Section 403(q)(5)(H) of the FDCA, nutrition labeling is required for food that is a standard menu item offered for sale in a restaurant or SRFE that (i) is part of a chain with 20 or more locations doing business under the same name, regardless of the type of ownership of the locations, and (ii) offering for sale substantially the same menu items.<sup>46</sup>

**a. Calories and Nutritional Information**

Chain restaurants and SRFEs subject to the Federal Menu Labeling Law must:

- disclose on menus and menu boards<sup>47</sup> (including drive-through menu boards) in a nutrient content disclosure statement the number of calories contained in a standard menu item as usually prepared and offered for sale, while making sure that the calorie disclosure is clear, conspicuous, and clearly associated with and adjacent to the name of such menu item;
- include on menus and menu boards a prominent, clear, conspicuous, and succinct statement specified by the FDA that puts the calorie information for a standard menu item in the context of a recommended total daily caloric intake;
- make additional written nutrition information available on the premises to consumers upon request;
- include on menus and menu boards a prominent, clear, and conspicuous statement regarding the availability of such additional written nutrition information; and
- provide calorie information, per item or serving, on a sign adjacent to (i) food sold in salad bars, buffets, cafeteria lines, or similar self-service facilities, and (ii) self-service beverages or food on display that is visible to customers.<sup>48</sup>

**b. Exempted Foods**

The requirements of the Federal Menu Labeling Law do not apply to the following: (i) items not listed on a menu or menu board, such as condiments and other general use table or counter items, (ii) daily specials, (iii) temporary menu items appearing on the menu for less than 60 days per year, (iv) custom orders, or (v) food that is part of a customary market test and that appears on the menu for less than 90 days.<sup>49</sup>

**c. Compliance**

Under the Federal Menu Labeling Law, a restaurant or SRFE must have a reasonable basis for its nutrient content disclosures, including nutrient databases, cookbooks, laboratory analyses, and other reasonable means (as described in 21 C.F.R. § 101.10 or a related FDA guidance).<sup>50</sup>

Menu labels, like all food labeling under the FDCA, must be truthful and not mislead consumers.<sup>51</sup> Under the FDCA, food labeling may be found misleading based on the statements, words, or designs it contains, or if it fails to reveal facts that are material in light of representations made in the labeling or with respect to consequences that may result from use of the labels.<sup>52</sup>

**d. Opting-In**

Restaurants or SRFEs that are not chain retail food establishments subject to the Federal Menu Labeling Law may voluntarily register with the FDA and elect to be subject to, and governed by, the Federal Menu Labeling Law.<sup>53</sup>

**e. Preemption**

State and local governments cannot directly or indirectly impose any nutrition labeling requirements on food sold in restaurants and SRFEs subject to the Federal Menu Labeling Law that are not “identical to” federal requirements.<sup>54</sup> State or local food label requirements for statements that provide a warning concerning the safety of the food or a component thereof are not preempted.<sup>55</sup> Section 403A(b) of the FDCA includes a petition process for states and local governments seeking an exemption from the FDA for a state or local law that would otherwise be preempted.<sup>56</sup>

**f. Authority of the FDA**

The Federal Menu Labeling Law requires the FDA to issue regulations to implement the statute and also to resolve specified issues.<sup>57</sup> The FDA must determine the required statement concerning daily caloric intake. It must set the standards for all nutrient content disclosures, including the nutrient content disclosures for standard menu items that are listed as a single menu item but actually come in different flavors, varieties, or combinations, such as soft drinks, ice cream, pizza, doughnuts, or children's combination meals. The FDA must also devise the procedure for establishments wishing to voluntarily opt-in to the Federal Menu Labeling Law.

**g. Effective Date of the FDA's Final Rule**

The Federal Menu Labeling Law became effective immediately on March 23, 2010, when President Obama signed the ACA. However, the FDA chose not to enforce the law until it had issued a final rule, and twice delayed enforcement of the law.<sup>58</sup>

The FDA's final rule on nutrition labeling of standard menu items was issued on December 1, 2014.<sup>59</sup> The compliance date of the final rule is anticipated to be May 5, 2017, when enforcement of the Federal Menu Labeling Law is slated to commence.<sup>60</sup>

**2. California Menu Labeling Law**

In response to the enactment of the Federal Menu Labeling Law, in 2011 the California legislature (i) repealed the Original CA Menu Labeling Law, and (ii) replaced it with an identically numbered statute (hereinafter, "New Section 114094").<sup>61</sup>

**a. Scope and Effectiveness of New Section 114094**

New Section 114094(a) states that a food facility subject to the Federal Menu Labeling Law or subject to the Original CA Menu Labeling Law as it existed on July 1, 2011 must comply

with the Federal Menu Labeling Law and the regulations adopted thereunder. New Section 114094(d) specifies that New Section 114094 will become operative on the same date as the FDA's final menu labeling rule. Accordingly, presuming that the FDA's compliance date for its final rule is moved to May 5, 2017, New Section 114094 should come into effect on the same date.<sup>62</sup>

**b. Enforcement of New Section 114094**

To the extent permitted under federal law and notwithstanding California's regulation of food under its SFDC Act, New Section 114094(b) and (c) provide for enforcement only by local enforcement agencies and the California Department of Public Health. Under New Section 114094(b), violations will not be misdemeanors under California Health and Safety Code Section 114395. Rather, a violation of New Section 114094 will be an infraction, punishable by a fine of not less than \$50, nor more than \$500.<sup>63</sup>

A second violation within a 5-year period from a prior violation will be punishable by a fine of not less than \$100, nor more than \$1,000. For a third or subsequent violation within a 5-year period, the fine will be not less than \$250, nor more than \$2,500. Alternatively, a local enforcement agency may assess a civil penalty of an amount that will be no less than or greater than the foregoing amounts for fines specified in New Section 114094(b). A food facility cannot be found to have violated New Section 114094 more than once during an inspection visit.

New Section 114094(c) provides that, other than the above-mentioned possibility of a civil penalty, the statute must not be construed to create or enhance any claim, right of action, or civil liability that did not exist under California law prior to January 1, 2009, or limit any claim, right of action, or civil liability that otherwise existed under California law prior to January 1, 2009.

<sup>43</sup> S.B. 1420, *see* [http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb\\_1401-1450/sb\\_1420\\_bill\\_20080930\\_history.html](http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1401-1450/sb_1420_bill_20080930_history.html). As originally enacted, CAL. HEALTH & SAFETY CODE § 114094 regulated "food facilities" in California operating under common ownership or control with at least 19 other food facilities with the same name in California offering

substantially the same menu items, or food facilities operating as a franchised outlet of a parent company with at least 19 other franchised outlets with the same name in California offering for sale substantially the same menu items. For a detailed description of the law's provisions, *see* Chapter 20(C) in the EGCR.

<sup>44</sup> The Original CA Menu Labeling Law, former CAL. HEALTH & SAFETY CODE § 114094(b)(1) (repealed by S.B. 20, effective Jan. 1, 2012). *See* [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_00010050/sb\\_20\\_bill\\_20110912\\_enrolled.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_00010050/sb_20_bill_20110912_enrolled.html); [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_00010050/sb\\_20\\_bill\\_20111002\\_chaptered.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_00010050/sb_20_bill_20111002_chaptered.html).

<sup>45</sup> *See supra* Chapter 20, footnote 3 and accompanying text in this supplement. *See infra* Chapter 20(C)(2) in this supplement for discussion of California's revised menu labeling statute.

<sup>46</sup> 21 U.S.C. § 343(q)(5)(H)(i).

<sup>47</sup> “Menus” and “menu boards” are defined as the “primary writing” of the restaurant or SRFE from which a customer makes an order selection. 21 U.S.C. § 343(q)(5)(H)(xi).

<sup>48</sup> 21 U.S.C. § 343(q)(5)(H)(ii).

<sup>49</sup> 21 U.S.C. § 343(q)(5)(H)(vii).

<sup>50</sup> 21 U.S.C. § 343(q)(5)(H)(iv). *See supra* Chapter 20, footnotes 9-13 and accompanying text in this supplement.

<sup>51</sup> 21 U.S.C. § 343(a)(1).

<sup>52</sup> 21 U.S.C. § 321(n).

<sup>53</sup> 21 U.S.C. § 343(q)(5)(H)(ix).

<sup>54</sup> 21 U.S.C. § 343-1(a)(4); *see supra* Chapter 20, footnote 17 in this supplement.

<sup>55</sup> Pub. L. No. 111-148, § 4205(d) (Mar. 28, 2010).

<sup>56</sup> 21 U.S.C. § 343-1(b).

<sup>57</sup> 21 U.S.C. § 343(q)(5)(H)(x).

<sup>58</sup> FDA, FDA STATEMENT ON MENU LABELING ENFORCEMENT (Mar. 9, 2016), and FDA, STATEMENT FROM FDA DEPUTY COMMISSIONER FOR FOODS AND VETERINARY MEDICINE,

MICHAEL R. TAYLOR, ON MENU LABELING EXTENSION OF COMPLIANCE DATE (July 9, 2015), *available at* <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm217762.htm>.

<sup>59</sup> FDA, FOOD LABELING; NUTRITION LABELING OF STANDARD MENU ITEMS IN RESTAURANTS AND SIMILAR RETAIL FOOD ESTABLISHMENTS; CALORIE LABELING OF ARTICLES OF FOOD IN VENDING MACHINES; FINAL RULE, 21 C.F.R. Parts 11 and 101, 79 Fed. Reg. 71156 (Dec. 1, 2014), *available at* <https://www.federalregister.gov/articles/2014/12/01/2014-27833/food-labeling-nutrition-labeling-of-standard-menu-items-in-restaurants-and-similar-retail-food>.

<sup>60</sup> FDA, FDA TO ALIGN MENU LABELING COMPLIANCE DATE WITH THE ENFORCEMENT DATE FOR MENU LABELING TO MAY 5, 2017 (Dec. 2, 2016), *available at* <http://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm531538.htm> (FDA plans to publish a final rule to formally extend the compliance date for the agency's 2014 final rule to May 5, 2017, the date that enforcement of the rule is scheduled to commence); FDA, GUIDANCE FOR INDUSTRY: NUTRITION LABELING OF STANDARD MENU ITEMS IN RESTAURANTS AND SIMILAR RETAIL FOOD ESTABLISHMENTS; SMALL ENTITY COMPLIANCE GUIDE, *available at* <http://www.fda.gov/RegulatoryInformation/Guidances/ucm437403.htm>; FDA, A LABELING GUIDE FOR RESTAURANTS AND RETAIL ESTABLISHMENTS SELLING AWAY-FROM-HOME FOODS-PART II (MENU LABELING REQUIREMENTS IN ACCORDANCE WITH THE PATIENT PROTECTION AFFORDABLE CARE ACT OF 2010); *available at* <https://www.federalregister.gov/articles/2016/05/05/2016-10462/a-labeling-guide-for-restaurants-and-retail-establishments-selling-away-from-home-foods-part-ii-menu>.

<sup>61</sup> S.B. 20 repealed the Original California Menu Labeling Law and enacted New Section 114094. It was signed by Gov. Jerry Brown on Oct. 2, 2011 and became effective on Jan. 1, 2012. *See* [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0001-0050/sb\\_20\\_bill\\_20110912\\_enrolled.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_20_bill_20110912_enrolled.html); [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0001-0050/sb\\_20\\_bill\\_20111002\\_chaptered.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_20_bill_20111002_chaptered.html).

<sup>62</sup> Even before the FDA announced its intention to move the compliance date of the final menu labeling regulation to May 5, 2017, the California Conference Directors of Environmental Health had recommended that California local enforcement agencies not begin their enforcement of New Section 114094 until May 5, 2017. *See* California Retail Food Safety Coalition, California Menu Labeling Guidelines Updated December 1, 2016, at 6 (recommending that local enforcement agencies provide education and guidance during the first 6 months of 2017 to all restaurants and other covered entities to allow them to come into compliance with the menu labeling requirements). While local enforcement agencies can verify whether the requisite information is provided in compliance with the Federal Menu Labeling Law and the regulations thereunder, the California statute does not include a mechanism for local enforcement agencies

to check for accuracy (apart from determining the “reasonable basis” for nutritional information) without collaboration with other government entities. *Id.*

<sup>63</sup> *Id.*

<sup>64-67</sup> Reserved.

## **Chapter 20D.**

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<sup>68</sup> CAL. HEALTH & SAFETY CODE § 114377(d) (a food item is subject to the statute if its trans fat content is at least .5 grams per serving).

<sup>73</sup> CAL. HEALTH & SAFETY CODE § 114377 (c), (e).

<sup>74</sup> CAL. HEALTH & SAFETY CODE § 114377 (f).

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<sup>76</sup> For more state and local trans fat bans, *see* National Restaurant Association, *State and Local Enacted Trans Fat Bans* (July 16, 2013), *available at* [https://www.restaurant.org/Downloads/PDFs/advocacy/maps/map\\_transfat.pdf](https://www.restaurant.org/Downloads/PDFs/advocacy/maps/map_transfat.pdf).

The FDA has issued a declaratory order determining that partially hydrogenated oils (PHOs), the primary dietary source of artificial trans fat in processed foods, are not “generally recognized as safe” for use in food and are thus food additives subject to Section 409 of the FDCA. Food manufacturers will have 3 years, until June 18, 2018, to remove partially hydrogenated oils from products. FDA, FINAL DETERMINATION REGARDING PARTIALLY HYDROGENATED OILS (June 17, 2015), *available at* <https://www.federalregister.gov/articles/2015/06/17/2015-14883/final-determination-regarding-partially-hydrogenated-oils>.

## **Chapter 20E.**

*Pages 382-383*

*The 3rd and 4th paragraphs on page 382 and the run-on paragraph on page 383 are replaced with the following text:*

From July, 2012, to January, 2015, both the production and sale of foie gras were banned in California. Beginning July 1, 2012, a product could not be sold in California if it was the result of force feeding a duck, goose, or other bird for the purpose of enlarging the bird’s liver



beyond normal size.<sup>78</sup> Moreover, beginning July 1, 2012, it was illegal for a person to force feed a duck, goose, or other bird for the purpose of enlarging such bird's liver beyond a normal size, or to hire another person to do so.<sup>79</sup>

For purposes of the foregoing prohibitions, "force feeding" is defined as a process that causes the duck, goose, or other bird to consume more food than a typical bird of the same species would voluntarily eat, and includes but is not limited to delivering feed through a tube or other device inserted into the bird's esophagus.<sup>80</sup> The delayed operative dates of the foie gras statutes were intended to permit persons or entities engaged in agricultural practices that included raising and selling force fed birds to have time to modify their business practices.<sup>81</sup>

The foie gras legislation gave interim immunity to persons or entities engaged in, or controlled by persons engaged in, agricultural practices that involved force feeding ducks, geese, or other birds at the time the legislation was enacted.<sup>82</sup> No civil or criminal cause of action arising on or after January 1, 2005, through and including June 30, 2012, or pending action commenced prior to January 1, 2005, could have been pursued under any provision of law against a person or entity for engaging in, prior to July 1, 2012, any of the above-described prohibited acts.<sup>83</sup> Thereafter, a peace officer, qualified humane society officer, or animal control officer could have issued citations for violations of the foie gras statutes, with civil penalties authorized in amounts up to \$1,000 for each violation and up to \$1,000 for each day the violation continued.<sup>84</sup> A person or entity violating the legislation could have been prosecuted either by the county district attorney or by the city attorney of the city where the violation occurred.<sup>85</sup>

Once operative, the California foie gras legislation came under attack. In 2012, foie gras producers and restaurants challenged the California foie gras sales ban, arguing that it interfered with interstate commerce. That argument failed to persuade the district court and, later, the Ninth

Circuit Court of Appeals.<sup>86</sup> However, in January, 2015, the district court found that California Health and Safety Code Section 25982's foie gras sales ban was expressly preempted by the Federal Poultry Products Inspections Act (PPIA).<sup>87</sup> The court reasoned that the foie gras sales ban imposed an ingredient requirement different from that imposed by the PPIA.<sup>88</sup>

Currently, the sale of foie gras is no longer prohibited in California restaurants, but since there was no challenge to the section of the law banning its production, the production of foie gras in the state is still illegal.<sup>89</sup> The controversy has attracted some public attention.<sup>90</sup>

<sup>78</sup> CAL. HEALTH & SAFETY CODE §§ 25980(a), 25982.

<sup>79</sup> CAL. HEALTH & SAFETY CODE § 25981.

<sup>80</sup> CAL. HEALTH & SAFETY CODE § 25980(b).

<sup>81</sup> CAL. HEALTH & SAFETY CODE § 25984(c). Then-Governor Arnold Schwarzenegger stated that the intent was to provide 7½ years for agricultural husbandry practices to evolve and perfect a humane way for a duck to consume grain to increase the size of its liver through natural processes. *See* CAL. HEALTH & SAFETY CODE § 25980 (governor's signing statement).

<sup>82</sup> CAL. HEALTH & SAFETY CODE § 25984(b)(3).

<sup>83</sup> CAL. HEALTH & SAFETY CODE § 25984(b)(1)–(2).

<sup>84</sup> CAL. HEALTH & SAFETY CODE § 25983(a)–(b).

<sup>85</sup> CAL. HEALTH & SAFETY CODE § 25983(c). After local officials in Napa refused to take action against a chef who served foie gras in conjunction with a tasting menu after the ban took effect, animal control activists sued the chef for violating CAL. HEALTH & SAFETY CODE § 25982. Both the trial and appellate courts determined that the lawsuit could continue, reasoning that the plaintiffs were likely to prove that the restaurant's "gifts" of foie gras or other means of presenting foie gras to diners were actually unlawful sales, and that they did not constitute free speech. *Animal Legal Defense Fund v. LT Napa Partners*, 234 Cal. App. 4th 1270 (Cal. Ct. App. 2015), appeal denied S225790 (Jun. 10, 2015). In the event that the preemption ruling discussed *infra* at Chapter 20, footnotes 86-89 and accompanying text in this supplement is overturned, this case can resume in the trial court. 234 Cal. App. 4th at fn.2.

<sup>86</sup> *Association des Eleveurs de Canards et D'oies du Québec v. Harris*, 729 F. 3d 937 (9th Cir. 2013) (denying plaintiffs' request for a preliminary injunction).

<sup>87</sup> *Association des Eleveurs de Canards et D'oies du Québec v. Harris*, 79 F. Supp. 3d 1136, 1147 (C.D. Cal. 2015) (holding that CAL. HEALTH & SAFETY CODE § 25982's sales ban of foie gras is expressly preempted by the PPIA).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1139 (“Section 25981, which is not at issue in this case, prohibits force feeding a bird for the purpose of enlarging its liver.”)

<sup>90</sup> Tara Duggan, *A Year After Ban's Repeal, Foie Gras Remains Hot Topic*, sfchronicle.com (Jan. 7, 2016), available at <http://www.sfgate.com/food/article/A-year-after-ban-s-repeal-foie-gras-remains-6741702.php>.

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*The following new Chapter 20(F) is added at the end of Chapter 20(E):*

#### **F. Possession and Sale of Shark Fins in California**

In January, 2012, the possession and sale of shark fins became illegal in California.<sup>91</sup> The shark fin law was intended to stop the cutting of fins from live sharks outside U.S. territorial water and to protect consumers from mercury in the fins.<sup>92</sup> However, when it became illegal to sell shark fin soup (a traditional Chinese dish), Chinese-American businesses and shark fin suppliers challenged the law as discriminatory.

The district court found neither persuasive evidence of discriminatory intent nor a likelihood that the shark fin law was preempted by federal law or violated the federal constitution's Commerce Clause, and the Ninth Circuit Court of Appeals affirmed.<sup>93</sup> After remand of the case, the district court dismissed the plaintiffs' complaint with prejudice.<sup>94</sup> The Ninth Circuit Court of Appeals affirmed the dismissal, finding that the shark fin law was not preempted by federal law and did not violate the Commerce Clause.<sup>95</sup>

<sup>91</sup> CAL. FISH & GAME CODE §§ 2021, 2021.5.

<sup>92</sup> Bob Egelko, *Shark Fin Ban Stands While Opponents Challenge Law*, SFGate.com (Aug. 27, 2013), available at <http://www.sfgate.com/science/article/Shark-fin-ban-stands-while-opponents-challenge-law-4765894.php>.

<sup>93</sup> *Chinatown Neighborhood Ass'n v. Brown*, 539 Fed. Appx. 761 (9th Cir. 2013) (denying motion for a preliminary injunction).

<sup>94</sup> *Chinatown Neighborhood Ass'n v. Harris*, 33 F. Supp. 3d 1085 (N.D. Cal. 2014) (making a final determination on the merits of the case and finding that plaintiffs had not shown evidence of a discriminatory purpose, and that the ban was not preempted by federal law).

<sup>95</sup> *Chinatown Neighborhood Ass'n v. Harris*, 794 F. 3d 1136 (9th Cir. 2015).

## Chapter 21

### Where's the Smoking Section? The Smoking Ban in California Restaurants

#### Chapter 21.A.1

*Pages 385-387*

*The introductory paragraph on page 385 and Chapter 21(A)(1) are replaced with the following text:*

It is well-known that smoking generally has been prohibited in California restaurants since the mid-1990's. However, people are largely unaware of the reason behind the ban on smoking. The aim of the California legislature in enacting California's Clean Indoor Air Law was not to protect restaurant customers, but to protect the health and safety of employees working in restaurants and elsewhere. Several exceptions in the original law had permitted smoking to continue in some workplaces. Newly-enacted laws effective June 9, 2016, largely did away with those exceptions, ensuring that California workplaces and certain enclosed areas are smoke-free.<sup>1</sup>

#### **A. California Law Regulating Smoking in and near the Workplace**

##### **1. Places of Employment and Enclosed Spaces**

As of June 9, 2016, an employer or owner-operator of an owner-operated business<sup>2</sup> must not knowingly or intentionally permit (and no person must engage in) the smoking<sup>3</sup> of tobacco products<sup>4</sup> at a place of employment<sup>5</sup> or in an enclosed space.<sup>6</sup> Smoking is prohibited as of June 9, 2016 in the following places which were previously exempt from California's indoor smoking ban: owner-operated businesses (even if the owner-operator works alone), businesses with 5 or fewer employees, warehouses, employee breakrooms, hotel lobbies, and covered parking lots.<sup>7</sup>

<sup>1</sup> See S.B. X2-5, S.B. X2-7, A.B. X2-7, A.B. X2-9, A.B. X2-11, *available at* [www.leginfo.ca.gov/billinfo.html](http://www.leginfo.ca.gov/billinfo.html) (each enacted during the 2015-2016 legislative session and signed by Gov. Jerry Brown on May 4, 2016). See Chapter 21(A)(1) in the EGCRl for a description of the exceptions to the Clean Indoor Air Law that existed prior to June 9, 2016.

<sup>2</sup> An "owner-operated business" is a business having no employees, independent contractors, or volunteers, in which the owner-operator of the business is the only worker. CAL. LAB. CODE § 6404.5(b)(effective June 9, 2016).

<sup>3</sup> "Smoking" now includes the use of an electronic smoking device that creates an aerosol or vapor, and the use of an oral smoking device. CAL. LAB. CODE § 6404.5(l); CAL. BUS. & PROF. CODE § 22950.5(c), (d) (all effective June 9, 2016).

<sup>4</sup> "Tobacco products" includes products made or derived from tobacco or nicotine, in whatever form, such as cigarettes, cigars, and the like, and also "an electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah." CAL. LAB. CODE § 6404.5(m); CAL. BUS. & PROF. CODE § 22950.5(d)(all effective June 9, 2016).

<sup>5</sup> A "place of employment" does not include 20% of guest rooms at a hotel, retail or wholesale tobacco shops and private smokers' lounges attached to such shops, cabs of motortrucks, theatrical production sites or medical research or treatment sites (if smoking is integral to their activities), private residences, and patient smoking areas in long-term health facilities. CAL. LAB. CODE § 6404.5(e)(effective June 9, 2016).

<sup>6</sup> An "enclosed space" includes covered parking lots, lobbies, lounges, waiting areas, elevators, stairwells, and restrooms. CAL. LAB. CODE § 6404.5(b)(effective June 9, 2016).

<sup>7</sup> CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, SMOKE-FREE PROTECTIONS IN THE WORKPLACE AND ELECTRONIC SMOKING DEVICES (JUNE 2016), *available at* <http://www.cdph.ca.gov/programs/tobacco/Documents/Resources/Fact%20Sheets/Smoke-free%20Protection%20in%20California%20Workplaces.pdf>. *See* Chapter 21(A)(1), footnotes 7-10 and accompanying text in the EGCRl for a discussion of the prior law.

<sup>8-11</sup> Reserved.

## **Chapter 21.A.2**

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<sup>12</sup> CAL. HEALTH & SAFETY CODE § 113977(a). However, as of June 9, 2016, smoking is no longer permitted in employee breakrooms. *See supra* Chapter 21, footnotes 1-7 and accompanying text in this supplement.

<sup>13</sup> CAL. HEALTH & SAFETY CODE § 113953.3(a)(5).

## **Chapter 21.A.3**

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<sup>15</sup> CAL. GOV'T CODE §§ 7596-7598. Effective June 9, 2016, CAL. GOV'T CODE § 7597(c) and (d) have been amended to refer to the new definitions of "smoking" and "tobacco products" included in CAL. BUS. & PROF. CODE § 22950.5(c) and (d). *See supra* Chapter 21, footnotes 3 and 4 in this supplement.

<sup>16</sup> CAL. HEALTH & SAFETY CODE § 104495(b). Effective June 9, 2016, CAL. HEALTH & SAFETY CODE § 104495(a)(4) and (a)(7) have been amended to refer to the new definitions of "smoking" and "tobacco products" included in CAL. BUS. & PROF. CODE § 22950.5(c) and (d). *See supra* Chapter 21, footnotes 3 and 4 in this supplement.

## **Chapter 21B.**

*Pages 388-389*

*Chapter 21(B) is replaced in its entirety with the following text:*

### **B. Compliance with and Enforcement of Smoking Prohibition**

California restaurant owners and operators must not knowingly or intentionally permit smoking inside of their restaurants so as to protect the health of their employees. In order to control smoking by customers and other nonemployees on the premises, a restaurant is required by California Labor Code Section 6404.5(d) to take the following steps:

- where smoking is prohibited throughout a building or structure, posting clear and prominent signs stating “No Smoking” at each building entrance;
- where smoking is permitted in designated areas of a building or structure, posting a sign at each entrance stating “Smoking is prohibited except in designated areas;”
- requesting that non-employees who are smoking in prohibited areas refrain from doing so.<sup>17</sup>

Employers are not required to physically eject nonemployees who refuse to abide by a request to refrain from smoking, nor are employers required to take any action that would put themselves or any employees at risk of physical harm.<sup>18</sup>

The California workplace smoking restrictions are enforced by local law enforcement agencies including, but not limited to, local health departments.<sup>19</sup> The following fines may be assessed against violators of California Labor Code Section 6404.5(c):

- not more than \$100 for the 1st violation;
- not more than \$200 for the 2nd violation within 1 year; and
- not more than \$500 for the 3rd and subsequent violations within 1 year.<sup>20</sup>

After a third violation within 1 year, the California Occupational Safety and Health Administration, discussed *supra* Chapter 13 in the EGCR and in this supplement, is required to investigate complaints. It may cite employers with fines up to \$7,000 for violations classified as general or serious, and fines up to \$70,000 for violations classified as willful serious.<sup>21</sup>

<sup>17</sup> CAL. LAB. CODE § 6404.5(d)(effective June 9, 2016).

<sup>18</sup> *Id.*

<sup>19</sup> CAL. LAB. CODE § 6404.5(i)(effective June 9, 2016).

<sup>20</sup> *Id.*

<sup>21</sup> CAL. LAB. CODE § 6404.5(j)(effective June 9, 2016). This regulatory approach dates to the early days of California's Clean Indoor Air Law, prior to the recent revisions to the law. *See* CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, AB-13 Fact Sheet, California Workplace Smoking Restrictions (Oct. 10, 1997), *available at* [https://www.dir.ca.gov/dosh/dosh\\_publications/smoking.html](https://www.dir.ca.gov/dosh/dosh_publications/smoking.html).

## **Chapter 21C.**

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<sup>22</sup> CAL. LAB. CODE § 6404.5(a)(effective June 9, 2016) now provides that it is the intent of the California legislature that an area not defined as a "place of employment" pursuant to CAL. LAB. CODE § 6404.5(e) is subject to local regulation of smoking of tobacco products.

<sup>23</sup> CAL. LAB. CODE § 6404.5(h)(effective June 9, 2016) now provides that an area not defined as a "place of employment" or in which smoking is not regulated pursuant to CAL. LAB. CODE § 6404.5(e) is subject to local regulation of smoking of tobacco products.



<sup>25</sup> See SANTA BARBARA, CAL., CODE § 9.20; WOODLAND, CAL., CODE § 15-40(d); STOCKTON, CAL., CODE § 8.48.040.

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<sup>28</sup> OAKLAND, CAL., CODE Chapter 8.30.

<sup>29</sup> See, e.g., Smoke Free San Diego, Local Laws, *available at* <http://www.smokefreesandiego.org/laws/local-laws/>.

## **Chapter 21D.**

*Page 391*

<sup>33</sup> CAL. BUS. & PROF. CODE § 22960(b)(1); CAL. BUS. & PROF. CODE § 23039(a): “‘Public premises’ means: (1) Premises licensed with any type of license other than an on-sale beer license, and maintained and operated for the selling or serving of alcoholic beverages to the public for consumption on the premises, and in which food shall not be sold or served to the public as in a bona fide public eating place, but upon which premises food products may be sold or served incidentally to the sale or service of alcoholic beverages, in accordance with rules prescribed by the department.

(2) Premises licensed with an on-sale beer license, in which food shall not be sold or served to the public as in a bona fide public eating place, and in which sandwiches, salads, desserts, and similar short orders shall not be sold and served, in accordance with rules prescribed by the department.

(b) ‘Public premises’ does not include railroad dining or club cars, passenger ships, airplanes, or bona fide clubs after the clubs have been lawfully operated for not less than one year; nor does it include historic units of the state park system, premises being operated under a temporary on-sale beer license other than permitted pursuant to Section 24045.5, or on-sale beer licensed stadia, auditoria, fairgrounds, or racetracks; nor does it include nonprofit theater companies licensed pursuant to Section 24045.7; nor does it include theaters licensed pursuant to Section 24045.75, nor does it include licensed winegrowers' premises.”

## Chapter 22

### Restaurant Ambience and the Discord of Copyright Infringement: Playing Music and Airing Television Broadcasts Legally

#### Chapter 22

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<sup>1</sup> Restaurants may use music to create a sense of privacy, thus enabling people to speak without fear of eavesdroppers. They also may use music to accompany the food and wine, influence menu choices, create atmosphere, and affect the pace of dining. Neel Burton, *The Psychology of Restaurant Music* (July 4, 2014), available at <https://www.psychologytoday.com/blog/hide-and-peek/201407/the-psychology-restaurant-music>.

#### Chapter 22A.

Page 394

<sup>10</sup> American Society of Composers, Authors and Publishers (hereinafter "ASCAP"), *Why ASCAP Licenses Bars, Restaurants & Music Venues, Frequently Asked Questions, Do Business Owners Need to Pay a Fee If They're Only Playing Recorded Music like CDs, Radio, or TV?*, available at <http://www.ascap.com/playback/2013/10/action/why-ascap-licenses-bars-restaurants-music-venues.aspx#general>. See also Kristi Heim, *Who Has to Pay if Music Plays?*, *The Seattle Times* (Aug. 8, 2007), available at <http://www.seattletimes.com/business/who-has-to-pay-if-music-plays/>.

<sup>11</sup> Todd B. Tatelman, *CRS Report for Congress, Copyright Law's "Small Business Exception": Public Performance Exemptions for Certain Establishments* (Dec. 10, 2003), available at [http://www.ipmall.info/hosted\\_resources/crs/RS21107\\_031210.pdf](http://www.ipmall.info/hosted_resources/crs/RS21107_031210.pdf).

#### Chapter 22B.

Pages 395-396

*The 2nd full paragraph on page 395 and the run-on paragraph on page 396 are replaced with the following text:*

As discussed in *Exceptions to the Public Performance License Requirements* below, an exception to the Copyright Act may allow restaurants that meet certain criteria to retransmit radio and television performances without a license. However, even if it meets the criteria for this limited exception, a restaurant is still required to obtain a license in order to host live

performances of copyrighted music or to originate its own broadcasts of such material, such as by playing copyrighted music on tapes or CDs over a speaker system. This will require consideration of whether the restaurant should obtain a license from one or more of the performing rights organizations, a process that may be commenced by contacting their respective websites. In the alternative, because it may be difficult to determine, in advance, which performing rights organization represents all of the music that a restaurant owner or operator may wish to broadcast, restaurants may instead enter into an agreement with a background music provider, such as Mood Media,<sup>16</sup> or may seek out royalty free restaurant music libraries.<sup>17</sup>

<sup>16</sup> See National Restaurant Association, *11 Questions about Music Licensing*, available at <http://www.restaurant.org/Manage-My-Restaurant/Operations/Regulatory-back-office/11-questions-about-music-licensing>. For more information on Mood Media (the purchaser of MUZAK), see [us.moodmedia.com](http://us.moodmedia.com). In order to broadcast Pandora© internet radio over loudspeakers within a restaurant or other business, a business license through Moodmedia is required in order to avoid copyright infringement. See [pandora.moodmedia.com/licensing/](http://pandora.moodmedia.com/licensing/).

<sup>17</sup> See, e.g., Royalty Free Music.com, available at <http://www.royaltyfreemusic.com>.

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<sup>18</sup> ASCAP files between 250 and 300 copyright infringement lawsuits every year against eating and drinking establishments across the U.S., even if they are very small, while Broadcast Music, Inc. (hereinafter "BMI") files between 75 and 125 copyright infringement lawsuits each year. Jordan Melnick, *Think Twice Before Pushing Play*, QSR Magazine, available at <https://www2.qsrmagazine.com/articles/exclusives/1209/copyright-1.phtml>.

<sup>19</sup> *Id.* ("Copyright infringement lawsuits can be costly, with penalties ranging from \$750 to \$30,000 per song, whereas the average cost of a subscription with BMI, for example, is about \$650 for restaurants."); ASCAP, *Why ASCAP Licenses Bars, Restaurants & Music Venues, Frequently Asked Questions, Why Does ASCAP Occasionally Take Action Against Small Businesses*, *supra* Chapter 22, footnote 10 in this supplement, stating that "[i]n past cases, several venues that could have paid ASCAP a license fee of between \$1000 and \$7000 a year ended up paying between 25 and 100 times that amount in damages").

## **Chapter 22C.**

*Page 397*

<sup>25</sup> *Id.* If a jukebox does not meet the statutory definition, such as the new generation of digital jukeboxes providing high speed Internet access to a wide range of music and video, the jukebox license agreement is inapplicable. The performing rights organizations offer licenses for use of these digital devices. *See, e.g., BMI, Music Licensing for Jukebox Owners, Common Questions, If You Have a Digital Audio or Video Jukebox, available at <http://www.bmi.com/licensing/entry/jukebox>.*

## **Chapter 22.D.1`**

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<sup>28</sup> Todd B. Tatelman, *CRS Report for Congress, supra* Chapter 22, footnote 11 in this supplement.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>34</sup> *See* National Restaurant Association, *11 Questions about Music Licensing, What are the Exemptions for Radio and TV, supra* Chapter 22, footnote 16 in this supplement.

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<sup>39</sup> 17 U.S.C. § 110(5)(B)(i)(I)-(II); 17 U.S.C. § 101 (definition of "establishment").

## **Chapter 22.D.2**

*Page 400*

<sup>47</sup> *Black's Law Dictionary* defines public domain as “the realm of publications, inventions, and processes that are not protected by copyright or patent” and “can be appropriated by anyone without liability or infringement.” *Black's Law Dictionary* 1243 (7th ed. 1999). For more information on copyright, how long copyright protection lasts, and the public domain, *see* U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS, *available at* <http://www.copyright.gov/circs/circ01.pdf>.

<sup>48</sup> U.S. COPYRIGHT OFFICE, EXTENSION OF COPYRIGHT TERMS, *available at* [www.copyright.gov/circs/circ15t.pdf](http://www.copyright.gov/circs/circ15t.pdf).

### **Chapter 22.D.3**

*Page 401*

<sup>51</sup>17 U.S.C. § 110(4)(B). The copyright owner must also not lodge an objection to the performance. *Id.*

## Chapter 23

### Pinball Machines and Pool Tables: Regulations for Arcades and Billiards

#### Chapter 23A.

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*The 2nd full paragraph is replaced with the following text:*

The rating system used for arcade games is different from the rating system used for home video games.<sup>3.5</sup> The arcade rating system, which is called the Coin-Operated Video Game Parental Advisory System, is a color-coded (“traffic-light”) system that allows players and parents to quickly assess the content of video games.<sup>4</sup> While many coin-operated video games are suitable for play by children of all ages, some coin-operated video games contain scenes of violence, sexual content, or strong language. Under this color-coded system, a “green” label means the game is appropriate for players of all ages; a “yellow” label means the game contains “mild” animated or life-like violence, “mild” sexual content (sexually suggestive references or material), or “mild” language (commonly used four-letter words); and a “red” label means the game contains “strong” animated or life-like violence, “strong” sexual content, or “strong” language.<sup>5</sup> The Parental Advisory Disclosure Messages appear either in a color-coded sticker that is affixed to the header of arcade games or are incorporated into the artwork on the header of such games in a location that is readily visible to the players of the game at all times.<sup>6</sup>

<sup>3.5</sup> Concerning home video games, in 2011, the U.S. Supreme Court struck down CAL. CIV. CODE §§ 1746-1746.5, which would have imposed a \$1,000 fine for the sale and rental of violent video games to minors (even though the games had rating labels). The Court reasoned that while minors could be protected by law in certain exceptional categories of expression (obscenity, incitement, and fighting words), violent content could not be added as a new category to the historical exceptions. Averting that the rating labels on the games were already sufficient warning for parents, retailers, and minors, the Court also noted that minors whose parents did not object to their purchasing or renting such games would be affected if the California law were upheld. *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011). However, proponents

of the California law, worried that the most violent video games will be sold to young children without consequence, may continue their advocacy in this area. Owners and managers of restaurants with arcades should be aware of this debate about the access of minors to violent video games. *See* David G. Savage, *Supreme Court Strikes Down California Video Game Law*, Los Angeles Times (June 28, 2011), *available at* <http://articles.latimes.com/2011/jun/28/nation/la-na-0628-court-violent-video-20110628>.

<sup>4</sup> American Amusement Machine Association, PAS - Frequently Asked Questions, *available at* [http://www.coin-op.org/?page\\_id=269](http://www.coin-op.org/?page_id=269).

<sup>5</sup> American Amusement Machine Association, Parental Advisory System, *available at* <http://www.coin-op.org/resources/parental-advisory-system/>; American Amusement Machine Association, PAS Kit Game Ratings List, *available at* <http://www.coin-op.org/wp-content/uploads/2013/05/PAS-Kit-Game-Ratings-List.pdf>.

<sup>6</sup> American Amusement Machine Association, PAS - Frequently Asked Questions, *supra* Chapter 23, footnote 4 in this supplement.

<sup>7</sup> CAL. BUS. & PROF. CODE § 20600.

<sup>8</sup> CAL. BUS. & PROF. CODE §§ 20600, 20602.

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<sup>10</sup> American Amusement Machine Association, *available at* <http://www.coin-op.org>; Amusement and Music Operators Association, *available at* <http://www.amoa.com>.

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<sup>21</sup> SAN FRANCISCO, CAL., POLICE CODE § 1036.00 *et seq.* The city of San Francisco recently updated its regulatory requirements for arcades. *See* Ordinance 195-14 (Sept. 2, 2014), *available at* <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0195-14.pdf>.

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<sup>29-34</sup> The city of Newport Beach has repealed its ordinance regulating pool tables. Newport Beach City Ordinance 2013-7, *available at* [http://newportbeach.granicus.com/Viewer.php?view\\_id=44&clip\\_id=1706&meta\\_id=133659](http://newportbeach.granicus.com/Viewer.php?view_id=44&clip_id=1706&meta_id=133659).

## Chapter 24

### Inside or Out?

#### Standards for Outdoor Dining

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<sup>1</sup> CAL. HEALTH & SAFETY CODE §§ 113849, 113889, and 114266(a)-(b) require restaurants to be fully enclosed by permanent floors, walls, and overhead structures, except for (i) dining areas or any other operation approved by the local enforcement agency for outdoor food service; and (ii) food facilities that were not fully enclosed on all sides and were in operation on January 1, 1985, so long as they have not been remodeled or had a significant menu change or a significant change in its method of operation. These statutes are part of the California Retail Food Code (hereinafter “Food Code”), CAL. HEALTH & SAFETY CODE § 113700 *et seq.*, effective July 1, 2007, which is discussed in Chapters 1 and 2 *supra* in the EGCR and in this supplement.

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<sup>4</sup> For illustration purposes, *see* the conditions imposed by Redwood City for a sidewalk café permit. City of Redwood City, Sidewalk Café Permit Checklist, *available at* <http://www.redwoodcity.org/home/showdocument?id=4667>. Should a restaurant be denied an encroachment permit, local agencies in charge of processing the permits typically have appeal procedures.

#### Chapter 24.A.1

<sup>5</sup> For example, *see* Engineering Services Department, City of Encinitas, Sidewalk Café Encroachment Permit, *available at* <http://www.ci.encinitas.ca.us/modules/showdocument.aspx?documentid=6426>. *See also* City of Newport Beach, Sidewalk Café Standards and Procedures, *available at* <http://www.newportbeachca.gov/home/showdocument?id=2409>; City of Palo Alto Public Works Engineering, Encroachment Permits and Temporary Leases, *available at* <http://www.cityofpaloalto.org/civica/filebank/blobdload.asp?BlobID=2314>; SAN LUIS OBISPO, CAL., CODE § 5.50.025(C).

<sup>6</sup> The Encroachment Permits and Temporary Leases guide for the City of Palo Alto explains, “[s]hould someone suffer injury related to a permitted encroachment, and a lawsuit be filed, it is likely that the plaintiff will name the City as one of the defendants, because the encroachment is on city property with City approval. When the City is named as an additional insured, the applicant's insurance company will be required to defend the City, relieving the City of the burden and cost of defending itself, or of going to the expense of having itself removed from the



suit.” City of Palo Alto, Encroachment Permits and Temporary Leases, *supra* Chapter 24, footnote 5 in this supplement.

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<sup>7</sup> The City of Fullerton, California, for example, usually requires the posting of a bond for this purpose. *See* City of Fullerton, Processing Site Plans, Development Projects & Conditional Use Permits, *available at* [http://www.cityoffullerton.com/gov/departments/public\\_works/engineering/applications\\_n\\_permits/site\\_plans\\_dev\\_projects\\_n\\_conditional\\_use\\_permits.asp](http://www.cityoffullerton.com/gov/departments/public_works/engineering/applications_n_permits/site_plans_dev_projects_n_conditional_use_permits.asp).

### **Chapter 24.A.2**

<sup>9</sup> City of Redwood City, Sidewalk Café Design Guidelines, *available at* <http://www.redwoodcity.org/home/showdocument?id=4665>, at 29.

<sup>11</sup> For more information, *see* <http://casqa.org>. *See also* California Stormwater Quality Association, Stormwater Best Management Practice (BMP) Handbooks, *available at* <https://www.casqa.org/resources/bmp-handbooks>.

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<sup>12</sup> City of Redwood City, Sidewalk Café Design Guidelines, *supra* Chapter 24, footnote 9 in this supplement, at 29. For the Food Code's requirements for cleaning methods and materials utilized by restaurants, *see Janitorial Areas and Poisonous Substances* discussed *supra* Chapter 2(E)(3) in the EGCR and in this supplement.

### **Chapter 24.A.3**

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<sup>13</sup> 42 U.S.C. § 12181 *et seq.*; 28 C.F.R. §§ 36.201(a), 36.202(b). *See* Chapter 15(A) *supra* in the EGCR and in this supplement.

<sup>14</sup> *Bodley v. Macayo Restaurants, LLC*, 546 F. Supp. 2d 696 (D. Ariz. 2008) (ADA as applied to disabled patron who complained of being seated in a restaurant's outdoor patio. Cal. Bldg. Code, Cal. Code Regs. tit. 24, Part 2, Vol. 1, Chapter 11B (2016); *see* Cal. Department of General Services, Division of the State Architect, 2013 CALIFORNIA ACCESS COMPLIANCE ADVISORY REFERENCE MANUAL (effective July 1, 2015), *available at* [https://www.documents.dgs.ca.gov/dsa/pubs/2013cbc\\_advisory\\_manual.pdf](https://www.documents.dgs.ca.gov/dsa/pubs/2013cbc_advisory_manual.pdf). For illustration purposes of a locality specifying access to individuals with disabilities in outdoor dining areas, *see* HERMOSA BEACH, CAL., CODE § 12.16.090(C)(9).

<sup>15</sup> *Bodley*, 546 F. Supp. 2d at 701-702. *See also* U.S. DEPARTMENT OF JUSTICE, ADA UPDATE: A PRIMER FOR SMALL BUSINESS (2011), *available at*

<http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm>. The "Food and Restaurants Services" section addresses ADA requirements for outdoor dining.

#### **Chapter 24.A.4**

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<sup>16</sup> City of Redwood City, Sidewalk Café Design Guidelines, *supra* Chapter 24, footnote 9 in this supplement, at 25.

<sup>17</sup> See City of Sunnyvale South Murphy Avenue Sidewalk Use Regulations, *available at* <https://sunnyvale.ca.gov/>.

#### **Chapter 24.A.5**

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<sup>18</sup> Unidocs, *available at* <http://www.unidocs.org>, is a compilation of uniform documents that are prepared under the guidance of a committee made up of representatives of the Santa Clara County Environmental Health Department's Hazardous Materials Compliance Division; Santa Clara County Fire Department; fire departments in the cities of Gilroy, Milpitas, Mountain View, Palo Alto, San Jose, and Santa Clara; Sunnyvale Department of Public Safety; and industry, represented by the Santa Clara Valley Manufacturing Group. The goal of Unidocs is to provide standardized information, forms, guidelines, and other documents related to the management of hazardous materials, hazardous wastes, and fire prevention within Santa Clara County fire and environmental health agencies' jurisdictions. Unidocs, *Standards for Storage and Use of Portable Liquefied Petroleum Gas Outdoor Heaters UN-048* (Sept. 4, 2012), *available at* <http://www.unidocs.org/fire/un-048.pdf>.

<sup>19</sup> Under the 2016 California Fire Code, the following regulations apply to portable outdoor gas-fired heating appliances. Such appliances must be located outdoors and installed and maintained in accordance with the manufacturer's instructions. CAL. FIRE CODE §§ 603.4.2, 603.4.2.2.2. Such appliances must not be located beneath, or closer than 5 feet to, combustible decorations and combustible overhangs, awnings, sunshades, or similar building attachments. CAL. FIRE CODE § 603.4. 2.1.3. Such appliances must be located at least 5 feet from buildings. CAL. FIRE CODE § 603.4. 2.1.2. Such appliances are not permitted for interior use, and are prohibited inside tents, canopies, and membrane structures, and on exterior balconies. CAL. FIRE CODE § 603.4.2.1.1. Such appliances must not be located within 5 feet of exits or exit discharges. CAL. FIRE CODE § 603.4.2.1.4. Smoking is prohibited where conditions make smoking a hazard, and where flammable or combustible materials are stored or handled. A fire code official is authorized to post a "No Smoking" sign in such a location. CAL. FIRE CODE §§ 310.2, 310.3, 6107.2. Liquefied petroleum gas containers and equipment are regulated by Chapter 61 of the 2016 California Fire Code.

<sup>20</sup> *Id.*; see also Newport Beach Fire Department, Guideline A.04 Candles and Open-Flames in Assembly Areas (June 22, 2016), *available at*

<http://www.newportbeachca.gov/home/showdocument?id=5045>; San Francisco Fire Department Division of Fire Prevention and Investigation, Information Bulletin No. 2005-01 (June 10, 2005; revised March 8, 2007), *available at* <http://sf-fire.org/sites/default/files/FileCenter/Documents/195-Bulletin2005-01FireDeptRegulatedActivitiesinPublicAssembly.pdf>.

## Chapter 24.A.6

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<sup>21</sup> The aim of the California legislature in enacting California's Clean Indoor Air Law was not to protect restaurant customers, but to protect the health and safety of employees working in restaurants and elsewhere. Several loopholes in the original law had permitted smoking to continue in some workplaces and related spaces. Newly-enacted laws effective June 9, 2016, closed those loopholes to ensure that all California indoor "places of employment" and certain "enclosed spaces" are smoke-free. *See supra* Chapter 21 in this supplement for more discussion.

CAL. HEALTH & SAFETY CODE § 6404.5(a) states that areas not defined as a "place of employment" are subject to local regulation of smoking of tobacco products. For a list of California municipalities banning smoking in outdoor dining areas, *see* <http://www.no-smoke.org/goingsmokefree.php?id=519> (#36 - Municipalities with Smokefree Outdoor Dining and Patio Laws). For example, smoking is now prohibited in an "outdoor dining area" in Los Angeles. LOS ANGELES, CAL., CODE § 41.50(A)(7), (B)(18).

<sup>22</sup> Clark Mason, *Sonoma May Stub Out Outdoor Smoking*, The Press Democrat (May 22, 2016), *available at* <http://www.pressdemocrat.com/news/5627956-181/sonoma-may-stub-out-outdoor?artslide=3>.

<sup>23</sup> Secondhand Smoke Survey: Outdoor Dining, *available at* <http://center4tobaccopolicy.org/tobacco-policy/smokefree-outdoor-areas/secondhand-smoke-california-voters/>.

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*The second full paragraph is replaced with the following text:*

It is important to note that smoking restrictions will apply in areas where conditions make smoking a hazard and where flammable or combustible materials are stored or handled.<sup>24</sup>

<sup>24</sup> Unidocs, *Standards for Storage and Use of Portable Liquefied Petroleum Gas Outdoor Heaters*, *supra* Chapter 24, footnote 18 in this supplement; CAL. FIRE CODE §§ 310.2 and 310.3.

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<sup>25</sup> See City of Newport Beach, General Plan, Chapter 12: Noise Element, *available at* <http://www.newportbeachca.gov/government/departments/community-development/planning-division/general-plan-codes-and-regulations/general-plan>; NEWPORT BEACH, CAL., CODE § 10.26.025.

**Chapter 24.A.8**

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*The 1st full paragraph is replaced with the following text:*

Restaurants serving alcoholic beverages may be required to have a supervisor on site at all times who must prevent any behavior that disturbs customers, pedestrians, and residents of adjoining properties.<sup>27</sup> If a restaurant serves alcoholic beverages in its outdoor dining area, some local communities require that the restaurant maintain a business relationship with a taxi service to ensure the safety of its customers.<sup>28</sup> In addition, some communities require businesses serving alcohol outdoors to send certain employees to a certified training program for responsible methods and skills for serving alcohol.<sup>29</sup>

<sup>27</sup> See WEST HOLLYWOOD, CAL., CODE § 19.36.210(G).

<sup>28</sup> See City of Santa Monica, Santa Monica Outdoor Dining Standards for Transit Mall (Santa Monica Boulevard and Broadway), Operational Standard #5, *available at* <https://www.smgov.net/uploadedFiles/Departments/PCD/Applications-Forms/Outdoor-Dining-Transit-Mall-Standards.pdf>.

<sup>29</sup> *Id.*

**Chapter 24.A.9**

<sup>31</sup> CAL. HEALTH & SAFETY CODE § 113984(b), (f).

<sup>32</sup> CAL. HEALTH & SAFETY CODE § 113818 (definition of limited food preparation includes heating, frying, and other assembly of nonprepackaged food, dispensing of nonpotentially

hazardous food, holding and dispensing of food prepared for satellite food service by the onsite permanent food facility or prepackaged by another approved source, slicing and chopping of food on a heated cooking surface during the cooking process, cooking and seasoning to order, and juicing or preparing beverages that are for immediate service, in response to an individual customer order, that do not contain frozen milk products)(effective Jan.1. 2017, as amended by S.B. No. 1067). *See supra* Chapter 1, footnote 7 in this supplement.

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<sup>34</sup> CAL. HEALTH & SAFETY CODE § 113984(c). The Food Code has separate procedures and approvals for “satellite food service,” which is a remotely located food service operation conducted on the same property as, in reasonable proximity to, and in conjunction with and by, a restaurant or other fully enclosed permanent food facility. CAL. HEALTH & SAFETY CODE §§113899, 114067.

Satellite food service is restricted to limited food preparation (as set forth *supra* Chapter 24, footnote 32 in this supplement). CAL. HEALTH & SAFETY CODE § 114067. Limited food preparation also includes holding, portioning, and dispensing of any foods that are prepared for satellite food service by the onsite permanent food facility or prepackaged by another approved source, but it does not include hot holding of nonprepackaged potentially hazardous food except for roasting corn on the cob, steamed or boiled hot dogs, and tamales in the original inedible wrapper. CAL. HEALTH & SAFETY CODE §113818(a)(3), (b)(6). Limited food preparation does not include slicing and chopping unless done on a heated cooking surface, thawing, cooling of cooked potentially hazardous food, grinding raw ingredients or potentially hazardous food, reheating potentially hazardous foods for hot holding other than steamed or boiled hot dogs and tamales in the original inedible wrapper, washing of foods, and cooking of potentially hazardous foods for later use. CAL. HEALTH & SAFETY CODE §113818(b).

A local enforcement agency must approve procedures submitted by a restaurant permit holder before satellite food service can begin. CAL. HEALTH & SAFETY CODE § 114067(c). All food preparation must be conducted within a food compartment or approved fully enclosed facility. CAL. HEALTH & SAFETY CODE § 114067(d), (h). Satellite food service areas must have overhead protection over all food handling areas. CAL. HEALTH & SAFETY CODE § 114067(e). Satellite food service operations’ required approved handwashing and warewashing facilities may be permanently plumbed or self-contained. CAL. HEALTH & SAFETY CODE § 114067(f). During nonoperating hours and periods of bad weather, food, food contact surfaces, and utensils must be stored within (1) a fully enclosed satellite food service operation; (2) approved food compartments where food, food contact surfaces, and utensils are protected at all times from contamination, exposure to the elements, ingress of vermin, and temperature abuse; or (3) a fully enclosed permanent food facility. CAL. HEALTH & SAFETY CODE § 114067(h). Satellite food service activities must be conducted by and under the constant and complete control of the permit holder of the fully enclosed permanent food facility, or the personnel of, or third-party

providers to, the permitholder. CAL. HEALTH & SAFETY CODE § 114067(i). The permitholder of the permanent food facility and the permitholder of the satellite food service must be the same. CAL. HEALTH & SAFETY CODE § 114067(j). For satellite food service, any replacement or significant modification of an integral piece of equipment is a “remodel.” CAL. HEALTH & SAFETY CODE § 113889.

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<sup>41</sup> CAL. HEALTH & SAFETY CODE § 114069; *see* County of Sacramento Environmental Management Department, California Retail Food Code Field Inspection Guide, Item #27 (minor violation), *available at* [http://www.emd.saccounty.net/EH/FoodProtect-RetailFood/Documents/CalCode\\_FieldGuide.pdf](http://www.emd.saccounty.net/EH/FoodProtect-RetailFood/Documents/CalCode_FieldGuide.pdf).

#### **Chapter 24.A.10**

<sup>42</sup> CAL. FIRE CODE § 1004.5.

<sup>43</sup> City of Milpitas, *Milpitas Planning Commission Agenda Report* (Oct. 11, 2006) (specifying maximum occupancy for interior and outdoor dining areas).

#### **Chapter 24.A.11**

<sup>44</sup> City of Fullerton, Community Development Department, Addendum to Application for ARUP/CUP, *available at* <https://www.cityoffullerton.com/civicax/filebank/blobdload.aspx?BlobID=9517>, at #33.

#### **Chapter 24.A.13**

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<sup>45</sup> City of Fullerton Central Business Design Guidelines, *available at* <http://cityoffullerton.com/civicax/filebank/blobdload.aspx?blobid=2644>, at 17.

#### **Chapter 24.A.14**

<sup>46</sup> City of Newport Beach, Zoning Administrator Agenda (Dec. 14, 2011), Exhibit A, #19, *available at* [http://www.newportbeachca.gov/PLN/zoning\\_administrator\\_archive/2011/2011-12-14\\_Agenda.pdf](http://www.newportbeachca.gov/PLN/zoning_administrator_archive/2011/2011-12-14_Agenda.pdf); *see also* National Electrical Manufacturers Association, White Paper on Outdoor Lighting Issues and Quality Lighting Applications (Sept. 2010), *available at* <http://www.nema.org/Standards/Pages/White-Paper-on-Outdoor-Lighting-Issues-and-Quality-Lighting-App>.

#### **Chapter 24.A.15**

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<sup>47</sup> For example, *see* City of Brentwood Police Department, Sign Postings, BRENTWOOD, CAL., CODE § 17.640.001 *et seq.*

<sup>48</sup> City of Redwood City, Sidewalk Café Design Guidelines, *supra* Chapter 24, footnote 9 in this supplement, at 26.

<sup>49</sup> For example, *see* Unidocs, *Standards for Tents and Other Temporary Membrane Structures UN-044* (Sept. 4, 2012), *available at* <http://www.unidocs.org/fire/un-044.pdf>.

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*The following new Chapter 24(B) is added at the end of Chapter 24(A)(17):*

**B. Pet Dogs in Outdoor Dining Areas**

Effective January 1, 2015, unless prohibited by a local ordinance,<sup>50</sup> a restaurant owner or manager may choose to permit pet dogs in outdoor dining areas so long as all of the following conditions are met:

- pet dogs must be brought into the outdoor dining area through a separate outdoor entrance, and they are not allowed on chairs, benches, seats, or other fixtures;
- the outdoor dining area must not be used for food or drink preparation other than the refilling of beverage glasses, and must not be used for the storage of utensils;
- food and water provided to pet dogs must only be in single-use disposable containers;
- food employees must not have direct contact with pet dogs while on duty, and they must wash their hands if there is any such contact;
- the outdoor dining area must be kept clean, and surfaces contaminated with dog excrement or other bodily fluids must be cleaned and sanitized;
- pet dogs must be kept on a leash or in a pet carrier and under the control of the pet dog owner; and

- the restaurant must be in compliance with all local ordinances related to sidewalks, public nuisance, and sanitation, and with other control measures approved by the local enforcement agency.<sup>51</sup>

<sup>50</sup> CAL. HEALTH & SAFETY CODE § 113709 (local governments may prohibit pet dogs in outdoor dining areas of food facilities).

<sup>51</sup> CAL. HEALTH & SAFETY CODE §§ 114259.5(d), 113953.3 (handwashing).



## Chapter 25

### Restaurants' Outdoor Playgrounds: Safety and Operations

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*The 1st full paragraph is replaced with the following text:*

California was the first state to mandate development of statewide regulations for playground safety. The first regulations governing the design, installation, inspection, and maintenance of outdoor playground and playground equipment went into effect on January 1, 2000, with enabling legislation preceding the regulations.<sup>1</sup> California standards conform to the national technical standards for playgrounds set by the U.S. Consumer Product Safety Commission (hereinafter "CPSC")<sup>2</sup> and by the American Society of Testing Materials (hereinafter "ASTM").<sup>3</sup>

<sup>1</sup> The first regulations went into effect on January 1, 2000, as CAL. CODE REGS. tit. 22, §§ 65700-65750 (2009). These regulations were succeeded by A.B. 1144, 2005-06 Leg., Reg. Sess. (Cal. 2006), codified as CAL. HEALTH & SAFETY CODE § 115725, discussed below.

In August, 2012, the California legislature passed A.B.1513, which set forth cleaning and maintenance requirements for indoor playgrounds at food facilities, including restaurants. A.B.1513, *available at* [https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201120120AB1513](https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201120120AB1513). Gov. Jerry Brown declined to sign the bill, stating that existing health and safety regulations were sufficient. *See* Patrick McGreevy and Ari Bloomekatz, *Gov. Jerry Brown Signs 25 Health-Related Bills*, Los Angeles Times (Sept. 23, 2012), *available at* <http://articles.latimes.com/2012/sep/23/local/la-me-0923-brown-bills-20120923>.

<sup>2</sup> U.S. Consumer Product Safety Commission, *The Public Playground Safety Handbook*, Publication #325 (2010 ed.), *available at* <http://www.cpsc.gov/PageFiles/122149/325.pdf> (setting forth current playground standards).

<sup>3</sup> ASTM F 1487 (equipment standards) and ASTM F 1292 (surfacing). *See* CAL. DEPARTMENT OF PUBLIC HEALTH, CALIFORNIA PLAYGROUND SAFETY, *available at* <https://www.cdph.ca.gov/HealthInfo/injviosaf/Pages/PlaygroundSafety.aspx>.

## Chapter 25A.

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<sup>10</sup> The California Park and Recreation Society offers a certified playground safety inspector course. See <http://www.cprs.org/page/cpsi>.

<sup>12</sup> Kenneth S. Kutska, *Playground Maintenance or Inspection: Which Comes First?* (Apr. 2001), available at <https://www.questia.com/magazine/1G1-74337045/playground-maintenance-or-inspection-which-comes>.

<sup>13</sup> Monty Christiansen, *Playground Maintenance Needs Assessment: Initial Steps to Maintain Children's Playgrounds* (Apr. 2002), available at <http://connection.ebscohost.com/c/articles/6725110/playground-maintenance-needs-assessment-initial-steps-maintain-childs-play>.

<sup>14</sup> David Spease, *California Playground Safety Regulations Fact Sheet*, available at [www.spease.com/files/Resources-Playground\\_Fact\\_Sheet.pdf](http://www.spease.com/files/Resources-Playground_Fact_Sheet.pdf).

## Chapter 25B.

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<sup>15</sup> The 2010 ADA Standards for Accessible Design ("2010 Standards") for Title III of the Americans with Disabilities Act set forth minimum requirements for newly designed and constructed or altered public accommodations and commercial facilities in order to ensure that they are readily accessible to, and usable by, individuals with disabilities. See *supra* Chapter 15(A) in the EGCRL and in this supplement. Sections 240 and 1008 of the 2010 Standards now set forth requirements for play areas. See DEPARTMENT OF JUSTICE, 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN, available at <https://www.ada.gov/regs2010/2010ADASTandards/2010ADAstandards.htm#406a>. ADA standards are incorporated into the national playground standards. CAL. DEPARTMENT OF PUBLIC HEALTH, CALIFORNIA PLAYGROUND SAFETY, *supra* Chapter 25, footnote 3 in this supplement.

<sup>16</sup> CAL. HEALTH & SAFETY CODE § 104495(b), (e). Effective June 9, 2016, CAL. HEALTH & SAFETY CODE § 104495(a)(4) and (a)(7) have been amended to include the new definitions of "smoking" and "tobacco products" included in CAL. BUS. & PROF. CODE § 22950.5(c) and (d). See *supra* Chapter 21, footnotes 3 and 4 in this supplement.

<sup>18</sup> CAL. HEALTH & SAFETY CODE § 104495(h)(local regulations of smoking near playgrounds not preempted).

<sup>22</sup> CAL. OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, *available at* <http://oehha.ca.gov/proposition-65/chemicals/silica-crystalline-airborne-particles-respirable-size>.

<sup>24</sup> CAL. OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, BUSINESSES AND PROPOSITION 65, *available at* <http://oehha.ca.gov/proposition-65/businesses-and-proposition-65>; *see* CAL. CODE REGS. tit. 27, § 25603.2 for text of warnings.

[New]  
Chapter 26

**Food on the Move:  
Regulating Mobile Food Facilities**

Food trucks have exploded in popularity over the past several years.<sup>1</sup> Many restaurants view food trucks as prime competitors,<sup>2</sup> even as food truck operators go on to found restaurants and restaurants launch food trucks of their own.<sup>3</sup>

Whether food is prepared on a food truck or in a commissary supporting it, or whether it arrives at the food truck in ready-to-eat form, there are opportunities for food to become contaminated with hazardous substances that can render it harmful upon consumption. As a result, food trucks and the vehicles that support them are regulated as “mobile food facilities”<sup>4</sup> and

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<sup>1</sup> See Cary Stemle, *Has the Food Truck Bubble Burst*, QSRweb.com (May 1, 2013), available at [http://www.qsrweb.com/article\\_print/211573/Has-the-food-truck-bubble-burst](http://www.qsrweb.com/article_print/211573/Has-the-food-truck-bubble-burst) (concluding that food trucks continue to enjoy growth in the marketplace, and setting forth statistics).

<sup>2</sup> Renée Frojo, *Restaurants Want Food Trucks to Hit the Brakes*, San Francisco Business Times (June 23, 2013), at 5, available at <http://www.bizjournals.com/sanfrancisco/print-edition/2013/06/21/restaurants-want-food-trucks-to-hit.html>.

<sup>3</sup> See David Weber, *THE FOOD TRUCK HANDBOOK* (John Wiley & Sons 2012), at 167; Eliza Barclay, *Food Truck Pioneer Battles Food Deserts with High Cuisine*, NPR: The Salt (Oct. 8-9, 2013), available at <http://www.npr.org/blogs/thesalt/2013/10/07/230142780/food-truck-pioneer-battles-food-deserts-with-high-cuisine> (describing food truck entrepreneur Roy Choi’s expansion into restaurant ownership).

<sup>4</sup> A “mobile food facility” means any vehicle used in conjunction with a commissary or other permanent food facility upon which food is sold or distributed at retail, but does not include a “transporter” used to transport packaged food from a food facility or other approved source to the consumer. CAL. HEALTH & SAFETY CODE § 113831(a).

“mobile support units”<sup>5</sup> under Chapter 10 of the California Retail Food Code (hereinafter “Food Code”).

Mobile food facilities and mobile support units are included within a larger group of “nonpermanent food facilities”<sup>6</sup> under the Food Code, and are subject to Chapters 1-8, Chapter 12.6, and Chapter 13 of the Food Code unless specifically exempted therefrom.<sup>7</sup> As with restaurants, mobile food facilities and mobile support units must comply with the Food Code and applicable local regulations prior to commencing operations, and be permitted and approved by local enforcement agencies.<sup>8</sup>

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<sup>5</sup> A “mobile support unit” means a vehicle used in conjunction with a commissary or other permanent food facility that travels to and services mobile food facilities as needed to replenish supplies, including food and potable water, clean the interior of the unit, or dispose of liquid or solid wastes. CAL. HEALTH & SAFETY CODE § 113833.

<sup>6</sup> A “nonpermanent food facility” means a food facility that operates from a mobile unit or at a nonpermanent location, including but not limited to a certified farmers’ market, a mobile food facility, a mobile support unit, a temporary food facility, or a vending machine. CAL. HEALTH & SAFETY CODE § 113839. For the broad definition of a “food facility,” see Chapter 1, footnote 6 and accompanying text in this supplement.

<sup>7</sup> CAL. HEALTH & SAFETY CODE § 114294(a). Chapters 1-8 and Chapter 13 of the Food Code are discussed in Chapters 1-3 in the EGCRL and in this supplement as they apply to restaurants, which are regulated as “permanent food facilities.” See Chapter 2, footnote 2 and accompanying text in the EGCRL and in this supplement. CAL. HEALTH & SAFETY CODE § 114294(a) also specifically subjects mobile food facilities and mobile support units to Chapter 12.6’s regulation and prohibition of the use of trans fats, discussed in Chapter 20(D) in the EGCRL and in this supplement.

<sup>8</sup> CAL. HEALTH & SAFETY CODE §§ 114294(b), 114295(d), 114327(a). All food facilities, which include mobile food facilities and mobile support units, are subject to the enforcement provisions of Chapter 13, including inspections by local enforcement agencies. CAL. HEALTH & SAFETY CODE §§ 114294(a), 114390 *et seq.* Reapproval may be required if necessary. CAL. HEALTH & SAFETY CODE § 114294(b). See Chapter 26(D) *infra*.

In addition, a mobile food facility that is an enclosed “special purpose commercial modular” or a “commercial modular and coach,” as defined in California Health and Safety Code Sections 18012.5 and 18001.8, respectively, must be certified by the California Department of Housing and Community Development under applicable regulations, although local enforcement agencies must approve all equipment installation prior to the operation of such a mobile food facility.<sup>9</sup>

Under Chapter 10 of the Food Code, discussed below in this Chapter 26, mobile food facilities and all equipment and utensils must be protected from potential contamination, and kept clean, sanitary, in good repair, and free from vermin.<sup>10</sup> The exterior of a mobile food facility and its surrounding area relating to the operation of food service must also be maintained in sanitary condition.<sup>11</sup> During transportation, storage, and operation of mobile food facilities, food and food-contact surfaces and all utensils must be protected from contamination.<sup>12</sup> Subject to certain requirements discussed below, all mobile food facilities must operate in conjunction with a

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<sup>9</sup> CAL. HEALTH & SAFETY CODE § 114294(c); *see* CAL. HEALTH & SAFETY CODE § 18025 *et seq.*; more information is *available at* <http://www.hcd.ca.gov/codes/rt/>.

<sup>10</sup> CAL. HEALTH & SAFETY CODE § 114303(b).

<sup>11</sup> CAL. HEALTH & SAFETY CODE § 114317.

<sup>12</sup> CAL. HEALTH & SAFETY CODE § 114303(c).

commissary,<sup>13</sup> mobile support unit, or other facility approved by the local enforcement agency to provide support, storage, and other critical services.<sup>14</sup>

**A. Mobile Food Facilities and Food under the California Retail Food Code**

***1. Mobile Food Facilities Engaged in Food Preparation***

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<sup>13</sup> A “commissary” means a food facility that services mobile food facilities, mobile support units, or vending machines where any of the following occurs: food, containers, or supplies are stored, food is prepared or prepackaged for sale or service at other locations, utensils are cleaned, or liquid and solid wastes are disposed or potable water is obtained. CAL. HEALTH & SAFETY CODE § 113751.

<sup>14</sup> CAL. HEALTH & SAFETY CODE § 114295(a). This requirement does not apply to mobile food facilities that operate at community events and remain in a fixed position during food preparation and their hours of operation, if potable water and liquid waste disposal facilities are available to mobile food facilities requiring potable water. CAL. HEALTH & SAFETY CODE § 114295(b); *see* CAL. HEALTH & SAFETY CODE § 114307 for specific operating requirements for such mobile food facilities. Potable water requirements for mobile food facilities are discussed below in Chapter 26(B)(2)(a).

Mobile food facilities that engage in food preparation<sup>15</sup> (other than limited food preparation<sup>16</sup>) are not allowed to use mobile support units.<sup>17</sup> They must have adequate and suitable counter space with overhead protection to safely prepare food, which must be prepared with suitable utensils on properly cleaned, rinsed, and sanitized surfaces.<sup>18</sup>

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<sup>15</sup> “Food preparation” includes packaging, processing, assembling, portioning, or any operation that changes the form, flavor, or consistency of food, but does not include trimming of produce. CAL. HEALTH & SAFETY CODE § 113791.

<sup>16</sup> “Limited food preparation” means food preparation that is restricted to one or more of the following: (1) heating, frying, baking, roasting, popping, shaving of ice, blending, steaming or boiling of hot dogs, or assembly of nonprepackaged food, (2) dispensing and portioning of nonpotentially hazardous food, (3) holding, portioning, and dispensing of any foods prepared for satellite food service by the onsite permanent food facility or prepackaged by another approved source, (4) slicing and chopping of food on a heated cooking surface during the cooking process, (5) cooking and seasoning to order, or (6) juicing or preparing beverages that are for immediate service, in response to an individual consumer order, that do not contain frozen milk products. CAL. HEALTH & SAFETY CODE § 113818(a)(as amended by S.B. No. 1067, effective Jan. 1, 2017). *See supra* Chapter 1, footnote 7 in this supplement. “Limited food preparation” does not include (i) slicing and chopping unless it is on the heated cooking surface, (ii) thawing, (iii) cooling of cooked, potentially hazardous food, (iv) grinding raw ingredients or potentially hazardous food, (v) reheating of potentially hazardous foods for hot holding, except for steamed or boiled hot dogs and tamales in the original, inedible wrapper, (vi) except for holding, portioning, dispensing of food prepared for satellite food service as described in CAL. HEALTH & SAFETY CODE § 113818(a)(3), hot holding of nonprepackaged, potentially hazardous food, except for roasting corn on the cob, steamed or boiled hot dogs, and tamales in the original, inedible wrapper, (vii) washing of foods, or (viii) cooking of potentially hazardous foods for later use. CAL. HEALTH & SAFETY CODE § 113818(b). *See also* CAL. HEALTH & SAFETY CODE § 113807 (definition of a “hot dog”).

<sup>17</sup> CAL. HEALTH & SAFETY CODE § 114295(e).

<sup>18</sup> CAL. HEALTH & SAFETY CODE § 113984(a), (d)-(e).



Food preparation must be conducted within a fully enclosed vehicle<sup>19</sup> with doors that are self-closing and kept closed when not in use.<sup>20</sup> Food must be thawed, washed, sliced, and cooled within the approved fully enclosed vehicle itself.<sup>21</sup> Based upon local environmental conditions, location, and other similar factors, the enforcement officer may establish additional structural and/or operational requirements for mobile food facilities to ensure that foods, food-contact surfaces, and utensils are of a safe and sanitary quality.<sup>22</sup>

These mobile food facilities must report daily to a commissary or other approved facility, and during an operating day they must be cleaned and serviced at least daily.<sup>23</sup> They must be stored at or within a commissary or other location approved by the local enforcement agency in order to have protection from unsanitary conditions.<sup>24</sup>

## ***2. Mobile Food Facilities Engaged in Limited Food Preparation***

Mobile food facilities engaged in limited food preparation<sup>25</sup> may be supported by a commissary, mobile support unit, or other facility approved by the local enforcement agency.<sup>26</sup>

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<sup>19</sup> CAL. HEALTH & SAFETY CODE § 113984(b), (c).

<sup>20</sup> CAL. HEALTH & SAFETY CODE § 114303(a).

<sup>21</sup> CAL. HEALTH & SAFETY CODE § 113984(f).

<sup>22</sup> CAL. HEALTH & SAFETY CODE § 113984(g).

<sup>23</sup> CAL. HEALTH & SAFETY CODE § 114297(a), (b).

<sup>24</sup> CAL. HEALTH & SAFETY CODE § 114295(c).

<sup>25</sup> *See supra* Chapter 26, footnote 16 in this supplement.

<sup>26</sup> CAL. HEALTH & SAFETY CODE § 114295(a), (e).

Such mobile food facilities must be cleaned and serviced at least daily during an operating day and report to a commissary or other approved facility on a daily basis.<sup>27</sup> However, if supported by a mobile support unit, these mobile food facilities need not report to a commissary on a daily basis if they are stored in a manner that protects the mobile food facility from contamination.<sup>28</sup> All food from these mobile food facilities must be stored at the commissary or other approved facility at the end of the operating day.<sup>29</sup>

Included in this category of mobile food facilities are unenclosed “single operating site mobile food facilities”<sup>30</sup> which are restricted<sup>31</sup> to limited food preparation and to serving

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<sup>27</sup> CAL. HEALTH & SAFETY CODE § 114297(a)-(c). The mobile support units supporting these food facilities must also operate from a designated commissary and report to a commissary or other approved facility for cleaning, servicing, and storage at least daily. CAL. HEALTH & SAFETY CODE §§ 114295(d), 114297(d).

<sup>28</sup> CAL. HEALTH & SAFETY CODE § 114297(c).

<sup>29</sup> *Id.*

<sup>30</sup> “Single operating site mobile food facilities” means at least 1, but not more than 4, unenclosed mobile food facilities, and their auxiliary units, that operate adjacent to each other at a single location. CAL. HEALTH & SAFETY CODE § 113831(b).

<sup>31</sup> CAL. HEALTH & SAFETY CODE § 114306(a). However, notwithstanding CAL. HEALTH & SAFETY CODE § 113984, when operating within a fully enclosed structure, a mobile food facility is not required to provide a secondary food compartment over food preparation areas. CAL. HEALTH & SAFETY CODE § 114306(b). *See supra* Chapter 26, footnotes 18-22 and accompanying text in this supplement.

produce<sup>32</sup> and prepackaged food.<sup>33</sup> The permit holder<sup>34</sup> of an unenclosed mobile food facility handling nonprepackaged food is required to develop and follow written operational procedures for food handling and the cleaning and sanitizing of food-contact surfaces and utensils.<sup>35</sup>

### **3. *Conveying, Storing, and Serving Food from Mobile Food Facilities***

During operation, food intended for retail must not be conveyed, held, stored, displayed, or served from any place other than a mobile food facility.<sup>36</sup> Food preparation counter space must be provided commensurate with the food operation, adjacent to all cooking equipment.<sup>37</sup> Food products remaining after each day's operation must be stored in an approved commissary

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<sup>32</sup> “Produce” means any whole edible portion of a plant in its raw and natural state. CAL. HEALTH & SAFETY CODE § 113877.

<sup>33</sup> “Prepackaged food” means any properly labeled processed food, prepackaged to avoid any direct human contact with the food product upon distribution from the manufacturer, a food facility, or other approved source. CAL. HEALTH & SAFETY CODE § 113876.

<sup>34</sup> Single operating mobile food facilities include by definition up to four unenclosed mobile food facilities operating adjacent to each other at a single location. For purposes of permitting and enforcement, the permit holder of each single operating mobile food facility location must be the same. CAL. HEALTH & SAFETY CODE §§ 113831(b), 113853, 114306(e). Under CAL. HEALTH & SAFETY CODE § 114381, every food facility must be operated with a valid permit from the local enforcement agency. For the food safety examination requirements, *see supra* Chapter 1, footnotes 17 – 19 and accompanying text in the EGCRL and in this supplement. For the food handler requirements, *see supra* Chapter 1, footnote 24 in this supplement.

<sup>35</sup> CAL. HEALTH & SAFETY CODE § 114303(d). The local enforcement agency must review and approve the procedures prior to implementation and an approved copy of the procedures must be kept on the mobile food facility during periods of operation. *Id.*

<sup>36</sup> CAL. HEALTH & SAFETY CODE § 114305(a). The one exception to this rule is the restocking of food products in a manner approved by the local enforcement agency. *Id.*

<sup>37</sup> CAL. HEALTH & SAFETY CODE § 114305(b).

or other approved facility, except that potentially hazardous foods<sup>38</sup> held at or above 135°F on a mobile food facility or mobile support unit must be destroyed at the end of the operating day.<sup>39</sup>

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<sup>38</sup> “Potentially hazardous food” means a food that requires time or temperature control to limit pathogenic micro-organism growth or toxin formation. CAL. HEALTH & SAFETY CODE § 113871(a). It includes a food of animal origin that is raw or heat-treated, a food of plant origin that is heat-treated or consists of raw seed sprouts, cut melons, cut tomatoes or mixtures of cut tomatoes that are not modified to render them unable to support pathogenic micro-organism growth or toxin formation, and garlic-in-oil mixtures that are not acidified or otherwise modified at a food processing plant in a way that results in mixtures that do not support growth or toxin formation as specified under subdivision (a). CAL. HEALTH & SAFETY CODE § 113871(b).

Under CAL. HEALTH & SAFETY CODE § 113871(c), “potentially hazardous food” does not include any of the following:

- (1) A food with an a(w) value of 0.85 or less.
- (2) A food with a pH level of 4.6 or below when measured at 75°F.
- (3) An air-cooled, hard-boiled egg with shell intact, or an egg with shell intact that is not hard boiled, but has been pasteurized to destroy all viable salmonellae.
- (4) A food in an unopened, hermetically sealed container that is commercially processed to achieve and maintain commercial sterility under conditions of nonrefrigerated storage and distribution.
- (5) A food that has been shown by appropriate microbial challenge studies approved by the enforcement agency not to support the rapid and progressive growth of infectious or toxigenic micro-organisms that may cause food infections or food intoxications, or the growth and toxin production of *Clostridium botulinum*, such as a food that has an a(w) and a pH that are above the levels specified under paragraphs (1) and (2) and that may contain a preservative, other barrier to the growth of micro-organisms, or a combination of barriers that inhibit the growth of micro-organisms.
- (6) A food that does not support the rapid and progressive growth of infectious or toxigenic micro-organisms, even though the food may contain an infectious or toxigenic micro-organism or chemical or physical contaminant at a level sufficient to cause illness.

<sup>39</sup> CAL. HEALTH & SAFETY CODE § 114305(c),(d).

No person is permitted to store clothing or personal effects in any area used in a mobile food facility for the storage and preparation of food.<sup>40</sup>

#### **4. Commissaries**

Like restaurants, commissaries providing the required servicing and storage for mobile food facilities and mobile support units are “permanent food facilities”<sup>41</sup> and are regulated as such under the Food Code. Restaurants themselves may serve as commissaries when approved by local enforcement agencies.<sup>42</sup> Commissaries servicing mobile food facilities that conduct limited food preparation must themselves provide a food preparation area.<sup>43</sup>

#### **B. Operating Requirements for Mobile Food Facilities and Mobile Support Units under the California Retail Food Code**

As mentioned above, mobile food facilities and mobile support units are generally subject to Chapters 1 – 8, Chapter 12.6, and Chapter 13 of the Food Code, but are specifically exempted

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<sup>40</sup> CAL. HEALTH & SAFETY CODE § 114256.1(c).

<sup>41</sup> A “permanent food facility” means a food facility operating in a permanently constructed structure, including any room, building, place, or portion thereof, maintained, used, or operated for the purpose of storing, preparing, serving, manufacturing, packaging, or otherwise handling food at the retail level. CAL. HEALTH & SAFETY CODE § 113849.

<sup>42</sup> See e.g. Los Angeles County Department of Public Health, Mobile Food Facility Information Packet Operational Guidelines, Sec. A(2) (Dec. 9, 2011), available at [http://www.publichealth.lacounty.gov/eh/docs/vip/Rules\\_and\\_Regulations\\_4.pdf](http://www.publichealth.lacounty.gov/eh/docs/vip/Rules_and_Regulations_4.pdf).

<sup>43</sup> CAL. HEALTH & SAFETY CODE § 114326(f)(explicitly overruling CAL. HEALTH & SAFETY CODE § 113984, which permits limited food preparation to be conducted in food compartments or as otherwise approved by the local enforcement agency); CAL. HEALTH & SAFETY CODE §§ 113791, 113984.

from some of its provisions.<sup>44</sup> The Food Code also sets out additional equipment and design regulations specifically applicable to mobile food facilities and/or mobile support units, as set forth below.

### **1. Business Name Information**

The business name(s) of the operator of a mobile food facility or mobile support unit and the name of the permitholder, if different, must be legible, clearly visible to consumers, and permanently affixed (i) on the consumer side of a non-motorized mobile food facility or mobile support unit, or (ii) on both sides of a motorized mobile food facility or mobile support unit.<sup>45</sup>

The business name must be in letters at least 3 inches high, while the letters and numbers for the city, state, zip code, and permitholder name (if different from the business name) must not be less than one inch high.<sup>46</sup> The colors of all letters and numbers must contrast with their backgrounds.<sup>47</sup>

### **2. Mobile Water and Wastewater Tanks**

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<sup>44</sup> CAL. HEALTH & SAFETY CODE § 114309(a)(exempting mobile food facilities and mobile support units from compliance with CAL. HEALTH & SAFETY CODE §§ 114250 (toilet facilities not required), 114256.1 (lockers and dressing areas not required), and 114279 (janitorial sinks not required)). Certain mobile food facilities approved for operation prior to the adoption of the Food Code may be grandfathered from Food Code requirements. CAL. HEALTH & SAFETY CODE § 114309(b).

<sup>45</sup> CAL. HEALTH & SAFETY CODE § 114299(a)(as amended by S.B. No. 1067, effective Jan. 1, 2017), (c). *See supra* Chapter 1, footnote 7 in this supplement.

<sup>46</sup> CAL. HEALTH & SAFETY CODE § 114299(b) (as amended by S.B. No. 1067, effective Jan. 1, 2017). *See supra* Chapter 1, footnote 7 in this supplement.

<sup>47</sup> CAL. HEALTH & SAFETY CODE § 114299(c).

Nonpermanent food facilities such as mobile food facilities and mobile support units that handle nonprepackaged food must be equipped with potable water and wastewater tanks, unless approved temporary water and wastewater connections are approved by the local enforcement agency.<sup>48</sup> The Food Code mandates that a mobile water system be designed and constructed using materials that enable water to be introduced without contamination.<sup>49</sup> All tanks, line couplings, valves, and all other plumbing must be designed, installed, maintained, and constructed of materials that will not contaminate the water supply, food, utensils, or equipment.<sup>50</sup>

The materials used to construct potable water and wastewater tanks and their appurtenances must be safe, durable, corrosion-resistant, nonabsorbent, and finished to have a smooth, easily cleanable surface.<sup>51</sup> Potable water and wastewater tanks must be sloped to an outlet that ensures complete drainage and designed and constructed so as to be easily and completely drained.<sup>52</sup> A potable water or wastewater tank mounted within a mobile food facility

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<sup>48</sup> CAL. HEALTH & SAFETY CODE § 114205(a). Chapter 7, Article 3 of the Food Code (CAL. HEALTH & SAFETY CODE §§ 114205 – 114244) sets out the mobile water and wastewater tank requirements for nonpermanent food facilities. Permanent food facilities must comply with CAL. HEALTH & SAFETY CODE §§ 114190 – 114201's water, plumbing, and waste requirements. CAL. HEALTH & SAFETY CODE § 114205(b). *See supra* Chapters 1 and 2 in the EGCRL and in this supplement for discussion of those requirements for permanent food facilities.

<sup>49</sup> CAL. HEALTH & SAFETY CODE § 114211(a).

<sup>50</sup> CAL. HEALTH & SAFETY CODE § 114211(b).

<sup>51</sup> CAL. HEALTH & SAFETY CODE § 114207.

<sup>52</sup> CAL. HEALTH & SAFETY CODE § 114209.

or mobile support unit must have an air vent overflow provided in a manner that will prevent potential flooding of the facility's interior.<sup>53</sup>

**a. Potable Water Tanks**

The potable water tank of a nonpermanent food facility such as a mobile food facility or mobile support unit must be of sufficient capacity to furnish an adequate quantity of potable water for food preparation, warewashing,<sup>54</sup> and handwashing purposes, delivering at least one gallon per minute to each sink basin.<sup>55</sup> At least 5 gallons of water must be provided exclusively for handwashing for each nonpermanent food facility.<sup>56</sup> An additional 25 gallons of water must be provided for food preparation and warewashing; however, for a nonpermanent food facility that conducts limited food preparation, at least 15 gallons of water must be provided.<sup>57</sup>

A potable water tank must be installed in a manner that will allow water to be filled with an easily accessible inlet, with the inlet and outlet positioned so that they are protected from

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<sup>53</sup> CAL. HEALTH & SAFETY CODE § 114213(a). If provided, a water tank vent must terminate in a downward direction and be covered with a 16 mesh per square inch screen or equivalent when the vent is in a protected area, or be covered with a protective filter when the vent is in an area that is not protected from windblown dirt and debris. CAL. HEALTH & SAFETY CODE § 114213(b).

<sup>54</sup> “Warewashing” means the cleaning and sanitizing of utensils and food-contact surfaces of equipment for Food Code purposes. CAL. HEALTH & SAFETY CODE § 113940.

<sup>55</sup> CAL. HEALTH & SAFETY CODE § 114217(a),(e).

<sup>56</sup> CAL. HEALTH & SAFETY CODE § 114217(b). Any water needed for additional purposes must be in addition to these 5 gallons. *Id.*

<sup>57</sup> CAL. HEALTH & SAFETY CODE § 114217(c)-(d).



contaminants such as waste discharge, dust, oil, or grease.<sup>58</sup> It must be enclosed from the filling inlet to the discharge outlet and emptied to ensure its complete drainage.<sup>59</sup> It must have an access port for inspection and cleaning.<sup>60</sup> When compressed air is used to pressurize the water tank system, a filter that does not pass oil or oil vapors must be installed in the air supply line between the compressor and the potable water system.<sup>61</sup>

Potable water tanks may be constructed in a manner that will allow for them to be removed from within the nonpermanent food facility compartments for refilling or replacement in an approved and sanitary manner, such as at a commissary.<sup>62</sup> Storage of prefilled water tanks, or of empty and clean water tanks, or both, must be within the nonpermanent food facility or in an approved manner that protects against contamination.<sup>63</sup>

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<sup>58</sup> CAL. HEALTH & SAFETY CODE § 114225(a)-(b). Nonpermanent food facilities such as mobile food facilities and mobile support units must be provided with a connection of a size and type that will prevent its use for any other service and constructed so that backflow and other contamination of the water supply is prevented. CAL. HEALTH & SAFETY CODE § 114225(c).

<sup>59</sup> CAL. HEALTH & SAFETY CODE § 114219.

<sup>60</sup> CAL. HEALTH & SAFETY CODE § 114221(a). The access port must be in the top of the tank and flanged upward for at least ½ inch and equipped with a port cover assembly that is provided with a gasket and a device for securing the cover in place and flanged to overlap the opening and sloped to drain. *Id.* However, a local enforcement agency may review and approve, prior to implementation, written operational procedures for cleaning and sanitizing potable water tanks that are not accessible for inspection. An approved copy of those procedures must be kept on the mobile food facility during hours of operation. CAL. HEALTH & SAFETY CODE § 114221(b).

<sup>61</sup> CAL. HEALTH & SAFETY CODE § 114227.

<sup>62</sup> CAL. HEALTH & SAFETY CODE § 114239(a)-(b).

<sup>63</sup> CAL. HEALTH & SAFETY CODE § 114239(c). If not in use, a potable water tank and hose inlet and outlet fitting must be protected with a cap and keeper chain, quick disconnect, closed cabinet, closed storage tube, or other approved protective cover or device. CAL. HEALTH &

**b. Hoses**

A water tank, pump, and hoses must be operated so that backflow and other contamination of the water supply are prevented,<sup>64</sup> and if used for conveying potable water must not be used for any other purpose.<sup>65</sup> They must be flushed and sanitized before being placed in service after construction, repair, modification, and periods of nonuse.<sup>66</sup>

A nonpermanent food facility's potable water tank inlet must be  $\frac{3}{4}$  inch in diameter or less and provided with a hose connection of a size or type that will prevent its use for any other service.<sup>67</sup> A hose used for conveying potable water from a water tank in a nonpermanent food facility such as a mobile food facility or mobile support unit must be safe, durable, corrosion-resistant, and nonabsorbent.<sup>68</sup> It must be resistant to pitting, chipping, crazing, scratching, scoring, distortion, and decomposition, and finished with a smooth interior surface.<sup>69</sup> It must be protected from contamination at all times, and clearly and durably identified as to its use if not

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SAFETY CODE § 114229.

<sup>64</sup> CAL. HEALTH & SAFETY CODE § 114235.

<sup>65</sup> CAL. HEALTH & SAFETY CODE § 114238.

<sup>66</sup> CAL. HEALTH & SAFETY CODE § 114233.

<sup>67</sup> CAL. HEALTH & SAFETY CODE § 114231.

<sup>68</sup> CAL. HEALTH & SAFETY CODE § 114215(a)(1), (a)(2).

<sup>69</sup> CAL. HEALTH & SAFETY CODE § 114215(a)(3), (a)(4).

permanently attached.<sup>70</sup> Liquid waste lines must not be the same color as hoses used for potable water.<sup>71</sup>

Potable water tank connectors and hoses used on a mobile food facility or a mobile support unit must have matching connecting devices.<sup>72</sup> Devices for external cleaning must not be used for potable water purposes on the mobile food facility.<sup>73</sup> Exterior hose-connection valves must be attached to mobile food facilities or mobile support units and must be located above the ground with an approved water connection.<sup>74</sup>

**c. Wastewater Tanks**

Any connection to a wastewater tank must preclude the possibility of contaminating any food, food-contact surface, or utensil.<sup>75</sup> All waste lines must be connected to wastewater tanks with watertight seals.<sup>76</sup> Wastewater tanks on nonpermanent food facilities such as mobile food facilities and mobile support units must be equipped with a shut-off valve.<sup>77</sup>

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<sup>70</sup> CAL. HEALTH & SAFETY CODE § 114215(a)(5), (a)(6). Only when a hose is permanently attached may a fitting with “V” type threads on a water tank inlet or outlet be allowed. CAL. HEALTH & SAFETY CODE § 114223.

<sup>71</sup> CAL. HEALTH & SAFETY CODE § 114215(b).

<sup>72</sup> CAL. HEALTH & SAFETY CODE § 114215(c).

<sup>73</sup> *Id.* Hoses and faucets equipped with quick connect and disconnect devices for these purposes shall be deemed to meet these requirements. *Id.*

<sup>74</sup> CAL. HEALTH & SAFETY CODE § 114215(c).

<sup>75</sup> CAL. HEALTH & SAFETY CODE § 114211(d).

<sup>76</sup> CAL. HEALTH & SAFETY CODE § 114211(c).

<sup>77</sup> CAL. HEALTH & SAFETY CODE § 114240(e).

Wastewater tanks must be of a capacity commensurate with the level of food handling activity.<sup>78</sup> They must have a minimum capacity that is 50% greater than the potable water tanks of the mobile food facility in question, and in no case less than 7.5 gallons.<sup>79</sup> Where potable water must be supplied for the preparation of a food or beverage, there must be an additional wastewater tank capacity equal to at least 15% of the water supply.<sup>80</sup> Where ice is utilized in the storage, display, or service of food or beverages, an additional minimum wastewater holding tank must be provided with a capacity equal to 1/3 of the volume of the ice cabinet to accommodate the drainage of ice melt.<sup>81</sup> Additional wastewater tank capacity may be required where wastewater production is likely to exceed tank capacity.<sup>82</sup>

Wastewater tanks may be constructed in a way that permits them to be removed from within approved mobile food facility compartments for replacement.<sup>83</sup> Retail food operations must cease during removal and replacement of wastewater tanks.<sup>84</sup> Sewage and other liquid wastes must be removed from a nonpermanent food facility such as a mobile food facility or mobile support unit at an approved waste servicing area or by an approved sewage transport

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<sup>78</sup> CAL. HEALTH & SAFETY CODE § 114240(a).

<sup>79</sup> CAL. HEALTH & SAFETY CODE § 114240(b).

<sup>80</sup> *Id.*

<sup>81</sup> CAL. HEALTH & SAFETY CODE § 114240(d).

<sup>82</sup> CAL. HEALTH & SAFETY CODE § 114240(c).

<sup>83</sup> CAL. HEALTH & SAFETY CODE § 114241(a).

<sup>84</sup> CAL. HEALTH & SAFETY CODE § 114241(b).

vehicle in a way that avoids creation of a public health hazard or nuisance.<sup>85</sup> Wastewater tanks must be thoroughly flushed and drained in a sanitary manner during the servicing operation.<sup>86</sup>

**d. Water Heater**

Interconnected with the potable water supply and operated independently of the vehicle engine, a mobile food facility (i) must have a minimum 1/2 gallon-capacity water heater or an instantaneous water heater capable of heating water to a minimum of 100°F, if it utilizes the water only for handwashing purposes, or otherwise (ii) must have a water heater or an instantaneous heater capable of heating water to a minimum of 120°.<sup>87</sup> A water heater with a minimum capacity of 4 gallons must be provided for mobile food facilities that have a warewashing sink.<sup>88</sup>

**3. Sinks and Toilet Facilities**

**a. Warewashing Sinks**

Under California Health and Safety Code Section 114095, all food facilities in which food is prepared or in which multiservice utensils are used must provide manual methods to

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<sup>85</sup> CAL. HEALTH & SAFETY CODE § 114241(c).

<sup>86</sup> CAL. HEALTH & SAFETY CODE § 114242.

<sup>87</sup> CAL. HEALTH & SAFETY CODE § 114325(a).

<sup>88</sup> CAL. HEALTH & SAFETY CODE § 114325(b). Prior to its amendment in 2013, CAL. HEALTH & SAFETY CODE § 114325(b) required a water heater with a minimum 3 gallon capacity (instead of the current 4 gallon capacity) for mobile food facilities, and a minimum water heater capacity of ½ gallon for mobile food facilities approved for limited food preparation. Under CAL. HEALTH & SAFETY CODE § 114325(c), mobile food facilities equipped with a 3-gallon capacity water heater on January 1, 2014 that were in compliance with the prior standard are grandfathered and deemed to be in compliance with CAL. HEALTH & SAFETY CODE § 114325(b) in its current form.

effectively clean and sanitize utensils in accordance with California Health and Safety Code Section 114099.<sup>89</sup> With exceptions discussed below, mobile food facilities must provide a warewashing sink with at least 3 compartments and at least 2 integral metal drainboards if nonprepackaged food is to be cooked, blended, or otherwise prepared.<sup>90</sup> The dimensions of each sink compartment must be large enough to accommodate the cleaning of the largest utensil used in operations and an item of either of the following dimensions: (i) at least 12 inches wide, 12 inches long, and 10 inches deep, or (ii) at least 10 inches wide, 14 inches long, and 10 inches deep.<sup>91</sup> Each drainboard must be at least the size of one of the sink compartments, have at least a ½ inch lip or rim to prevent spillage, and installed with at least 1/8 inch per foot slope towards the sink compartment.<sup>92</sup> The sink must be equipped with a mixing faucet and a swivel spigot capable of servicing all sink compartments.<sup>93</sup>

An unenclosed mobile food facility that prepares potentially hazardous beverages for immediate service in response to an individual consumer order must either (i) provide a three-

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<sup>89</sup> Notwithstanding CAL. HEALTH & SAFETY CODE § 114095, if a single operating site mobile food facility is required to provide a warewashing sink, that sink may be shared by not more than 4 mobile food facilities operating as a single operating site mobile food facility so long as the sink is conveniently located so as to be accessible during all hours of operation. CAL. HEALTH & SAFETY CODE § 114306(c)-(d).

<sup>90</sup> CAL. HEALTH & SAFETY CODE § 114313(a). Mobile food facilities with one-compartment or two-compartment sinks that were approved for operation prior to adoption of the Food Code need not provide a three-compartment sink. CAL. HEALTH & SAFETY CODE § 114309(c).

<sup>91</sup> CAL. HEALTH & SAFETY CODE § 114313(a)(1).

<sup>92</sup> CAL. HEALTH & SAFETY CODE § 114313(a)(2).

<sup>93</sup> CAL. HEALTH & SAFETY CODE § 114313(a)(3).

compartment sink as described above, (ii) provide at least one two-compartment sink that complies with California Health and Safety Code Section 114099.3(e),<sup>94</sup> or (iii) provide a one-compartment sink with at least one integral metal drainboard, an adequate supply of spare preparation and serving utensils to replace those that become soiled or contaminated, and warewashing facilities that comply with those described above in reasonable proximity to, and readily accessible for use by, food employees at all times.<sup>95</sup> Warewashing sinks for unenclosed mobile food facilities must be an integral part of the primary unit or on an approved auxiliary conveyance and equipped with overhead protection made of wood, canvas, or other materials that protect the sinks from bird and insect droppings, dust, precipitation, and other contaminants.<sup>96</sup>

If all utensils and equipment of a mobile food facility are washed and sanitized on a daily basis at the approved commissary or other approved food facility, and an adequate supply of spare preparation and serving utensils is provided and maintained in the mobile food facility as needed to replace those that are soiled or contaminated, then the mobile food facility is not required to provide a warewashing sink to only handle the following items: (i) nonpotentially hazardous foods that do not require preparation other than heating, baking, popping, portioning,

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<sup>94</sup> CAL. HEALTH & SAFETY CODE § 114099.3 sets forth permissible alternative manual warewashing equipment for situations when there are special cleaning needs or constraints. Subparagraph (e) permits a 2-compartment sink when there is only limited batch warewashing of utensils if specified cleaning and sanitization methods are used.

<sup>95</sup> CAL. HEALTH & SAFETY CODE § 114313(c).

<sup>96</sup> CAL. HEALTH & SAFETY CODE § 114314(a),(b).

bulk dispensing, assembly, or shaving of ice, (ii) steamed or boiled hot dogs, or (iii) tamales in the original, inedible wrapper.<sup>97</sup>

Mobile support units cannot be approved for warewashing.<sup>98</sup>

**b. *Toilet Facilities and Handwashing Sinks***

Whenever a mobile food facility is stopped to conduct business for more than 1 hour, there must be within 200 feet travel distance an approved and readily available toilet and handwashing facility, or as otherwise approved by the local enforcement agency, available to its employees.<sup>99</sup>

Mobile food facilities that sell nonprepackaged food must provide handwashing facilities separate from the warewashing sink unless (i) they were under a valid permit as of January 1, 1997, or (ii) they handle only whole produce or the bulk dispensing of nonpotentially hazardous beverages.<sup>100</sup> The handwashing sink must have a minimum dimension of 9 inches by 9 inches in length and width and 5 inches in depth and must be easily accessible by food employees.<sup>101</sup> Unless the distance between the handwashing and warewashing sinks is 24 inches or more, the

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<sup>97</sup> CAL. HEALTH & SAFETY CODE § 114313(b).

<sup>98</sup> CAL. HEALTH & SAFETY CODE § 114327(c).

<sup>99</sup> CAL. HEALTH & SAFETY CODE § 114315(a). *See supra* Chapter 26, footnotes 44 and 159 and accompanying text in this supplement. This requirement does not limit the authority of a local governing body to adopt under CAL. VEH. CODE § 22455 additional requirements for public safety, including reasonable time, place, and manner restrictions. CAL. HEALTH & SAFETY CODE § 114315(b). *See* Chapter 26(D) *infra*.

<sup>100</sup> CAL. HEALTH & SAFETY CODE § 114311(c).

<sup>101</sup> CAL. HEALTH & SAFETY CODE § 114311(a).



handwashing sink must be separated from the warewashing sink by a metal splashguard with a height of at least 6 inches that extends from the back edge of the drainboard to the front edge of the drainboard, with the corners of the barrier being rounded.<sup>102</sup> Handwashing sinks for unenclosed mobile food facilities must be an integral part of the primary unit or on an approved auxiliary conveyance that is used in conjunction with the mobile food facility.<sup>103</sup>

#### **4. *Height***

Mobile food facilities permitted after January 1, 1996, that are occupied during normal business operations must have a clear, unobstructed height over the aisleway portion of the unit of at least 74 inches from floor to ceiling, and a minimum of 30 inches of unobstructed horizontal aisle space.<sup>104</sup>

#### **5. *Storage***

No spare tires, related automotive equipment, or special tools relating to the mobile food facility's mechanical systems can be stored in food preparation or food storage areas.<sup>105</sup> If insecticides or other poisonous substances are used, they must be stored in accordance with California Health and Safety Code Section 114254 in their original containers in a separate cabinet or drawer installed for that purpose and in a manner that completely prevents a

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<sup>102</sup> CAL. HEALTH & SAFETY CODE § 114311(b).

<sup>103</sup> CAL. HEALTH & SAFETY CODE § 114314(a).

<sup>104</sup> CAL. HEALTH & SAFETY CODE § 114321.

<sup>105</sup> CAL. HEALTH & SAFETY CODE § 114319(a).

contamination hazard to food or utensils.<sup>106</sup> When the mobile food facility is not in operation, food and utensils must be stored either (i) within approved food storage facilities at a commissary or other approved facility, or (ii) in approved food compartments where the food is protected at all times from contamination, exposure to the elements, ingress of rodents and other vermin, and temperature abuse.<sup>107</sup>

#### **6. *First Aid And Other Safety Requirements***

A first-aid kit must be provided and located in a convenient area in an enclosed case.<sup>108</sup> Light bulbs and tubes must be covered with a completely enclosed plastic safety shield or its equivalent, and the shield must be installed in a way that poses no hazard to personnel or food.<sup>109</sup> All gas-fired appliances must be properly insulated in a manner that prevents injury and the buildup of excessive heat.<sup>110</sup>

All liquefied petroleum equipment must be installed to meet applicable fire standards, and this installation must be approved by the appropriate fire authority.<sup>111</sup> Any mobile food

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<sup>106</sup> CAL. HEALTH & SAFETY CODE § 114319(b). *See supra* Chapter 2, footnote 163 in the EGCR and accompanying text.

<sup>107</sup> CAL. HEALTH & SAFETY CODE § 114319(c).

<sup>108</sup> CAL. HEALTH & SAFETY CODE § 114323(a).

<sup>109</sup> CAL. HEALTH & SAFETY CODE § 114323(c).

<sup>110</sup> CAL. HEALTH & SAFETY CODE § 114323(g).

<sup>111</sup> CAL. HEALTH & SAFETY CODE § 114323(d). This does not apply to a special purpose commercial modular or a commercial modular and coach regulated by the Department of Housing and Community Development under CAL. HEALTH & SAFETY CODE § 18000 *et seq.*, which has its own standards. CAL. HEALTH & SAFETY CODE §§ 114323(d), 18028, 18029.5.

facility that has heating elements or cooking equipment must properly mount a readily accessible, charged and maintained minimum 10 BC-rated fire extinguisher to combat grease fires.<sup>112</sup> A second means of exit must be provided in the side opposite the main exit door, or in the roof, or the rear of the unit, with an unobstructed passage of at least 24 inches by 36 inches.<sup>113</sup> The interior latching mechanism must be operable by hand without special tools or key, and the exit must be labeled “Safety Exit” in contrasting colors with letters at least one inch high.<sup>114</sup>

Mobile food facilities operating at more than one location in a calendar day must meet additional safety requirements designed to protect against danger from moving or falling equipment. To protect against sudden stops, collisions, or overturning: (i) all utensils must be stored so as to prevent their being thrown about, and (ii) coffee urns, deep fat fryers, steam tables, and similar equipment must be equipped with positive closing lids fitted with a secure latch mechanism to prevent excessive spillage of hot liquids.<sup>115</sup> Coffee urns must have metal protective devices installed on the glass liquid level sight gauges.<sup>116</sup> Easily cleanable knife

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<sup>112</sup> CAL. HEALTH & SAFETY CODE § 114323(e).

<sup>113</sup> CAL. HEALTH & SAFETY CODE § 114323(f)(1). A special purpose commercial modular or a commercial modular and coach regulated under CAL. HEALTH & SAFETY CODE §§ 18000 *et seq.* must comply with CAL. HEALTH & SAFETY CODE §§ 18028 and 18029.5 as to the size, latching, and labeling of the second means of exit. CAL. HEALTH & SAFETY CODE § 114323(f)(2).

<sup>114</sup> CAL. HEALTH & SAFETY CODE § 114323(f)(1).

<sup>115</sup> CAL. HEALTH & SAFETY CODE § 114323(b)(1),(b)(2).

<sup>116</sup> CAL. HEALTH & SAFETY CODE § 114323(b)(3).

holders manufactured of materials approved by the local enforcement agency must be provided in cabinets, boxes, or counter aisle slots to avoid loose storage of knives.<sup>117</sup>

As employers, operators of mobile food facilities and mobile support units are subject to the California Occupational Safety and Health Act of 1973 and the regulations thereunder, discussed in Chapter 13 in the EGCRL and in this supplement.<sup>118</sup>

## 7. ***Equipment***

As with restaurants, all new and replacement food-related and utensil-related equipment must be certified or classified for sanitation by the American National Standards Institute (ANSI) accredited certification program or by the local enforcement agency if there is no such standard.<sup>119</sup> All new and replacement gas-fired appliances must meet applicable ANSI standards, and all new and replacement electrical appliances must meet applicable Underwriters Laboratory standards.<sup>120</sup> Mobile food facilities that handle potentially hazardous foods, except for

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<sup>117</sup> CAL. HEALTH & SAFETY CODE § 114323(b)(1).

<sup>118</sup> CAL. LABOR CODE §§ 3300, 6300, 6400. *See, e.g.*, San Francisco Department of Public Health, Health Permit Application for Mobile Food Facilities, *available at* <https://www.sfdph.org/dph/files/EHSdocs/ehsFood/Mobile/MobilePermitAppPacket2012.pdf> (San Francisco's mobile food facility permit application, which includes Cal/Osha checklist); *see generally* Mobile Cuisine, *Would Your Mobile Business Pass OSHA Food Truck Inspections* (Aug. 13, 2014), *available at* <http://mobile-cuisine.com/under-the-hood/osha-food-truck-inspections/>.

<sup>119</sup> CAL. HEALTH & SAFETY CODE § 114130(b).

<sup>120</sup> CAL. HEALTH & SAFETY CODE § 114301(d). A special purpose commercial modular or a commercial modular and coach regulated under CAL. HEALTH & SAFETY CODE §§ 18000 *et seq.* must comply with the standards contained in CAL. HEALTH & SAFETY CODE §§ 18028, 18029.3 and 18029.5. CAL. HEALTH & SAFETY CODE § 114301(d). Except to the extent that alternative construction standards are explicitly set forth in CAL. HEALTH & SAFETY CODE § 114301, construction standards for mobile food facilities that are special purpose commercial modulars or commercial modular and coaches are governed by the California Department of Housing and

prepackaged frozen ready-to-eat foods, whole fish, and whole aquatic invertebrates, must be equipped with refrigeration units as defined in California Health and Safety Code Section 113885.<sup>121</sup>

Mobile food facility equipment (including without limitation cooking equipment, the interior of cabinet units, and compartments) must be designed and made of materials that result in smooth, readily accessible and easily cleanable surfaces, with no unfinished wooden surfaces and with tightly fitted construction joints and seams that are easily cleanable.<sup>122</sup> Space around pipes, conduits, or hoses that extend through cabinets, floors, or outer walls must be sealed with smooth and easily cleanable closures.<sup>123</sup> Drip trays must be fitted under equipment that is likely to have spills so that the spillage drains into a waste tank.<sup>124</sup> Except for approved auxiliary conveyances containing sinks for unenclosed mobile food facilities, nonportable equipment must be an integral part of the mobile food facility.<sup>125</sup>

Equipment installed in a mobile food facility must be spaced apart or sealed together for easy cleaning, must prevent the infestation of vermin, and must provide adequate access for

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Community Development under CAL. HEALTH & SAFETY CODE § 18000 *et seq.* CAL. HEALTH & SAFETY CODE § 114301(a).

<sup>121</sup> CAL. HEALTH & SAFETY CODE §§ 113871, 113881, 114301(c).

<sup>122</sup> CAL. HEALTH & SAFETY CODE § 114301(b). *See infra* Chapter 26, footnote 129 in this supplement.

<sup>123</sup> CAL. HEALTH & SAFETY CODE § 114301(e).

<sup>124</sup> CAL. HEALTH & SAFETY CODE § 114301(f).

<sup>125</sup> CAL. HEALTH & SAFETY CODE §§ 114301(b)(3), 114314(a).

service and maintenance.<sup>126</sup> There must be at least 4 inches of unobstructed space for sanitary maintenance beneath counter mounted equipment or between the sides of adjacent equipment.<sup>127</sup> Floor mounted equipment must be sealed to the floor to prevent moisture from getting under the equipment, or it must be raised at least 6 inches off the floor by means of an easily cleanable leg and foot.<sup>128</sup>

Floors, walls, and ceilings of all enclosed food preparation areas must be constructed so that the surfaces are easily cleanable, impervious, and smooth,<sup>129</sup> and must be designed to provide employees with safety from slipping.<sup>130</sup> The juncture of the floor and wall must be coved with a 3/8 inch minimum radius coving, with the floor surface extending up the wall at least 4 inches.<sup>131</sup>

If a mobile food facility's cooking processes are conducted from a grill, barbecue, or other unenclosed cooking unit, the underlying ground or floor surfaces must be constructed so

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<sup>126</sup> CAL. HEALTH & SAFETY CODE § 114301(g).

<sup>127</sup> CAL. HEALTH & SAFETY CODE § 114301(g)(1). There is an exception to the minimum leg height rule for portable equipment or machinery. CAL. HEALTH & SAFETY CODE § 114301(g)(2). Threads, nuts, or rivets must not be exposed where they interfere with cleaning, and if they do they must be sealed or capped. CAL. HEALTH & SAFETY CODE § 114301(g)(3).

<sup>128</sup> CAL. HEALTH & SAFETY CODE § 114301(g)(4).

<sup>129</sup> "Easily cleanable" means a characteristic of a surface that allows effective removal of soil, food residue, or other organic or inorganic materials by normal cleaning methods. CAL. HEALTH & SAFETY CODE § 113767. "Smooth" in this context means a floor having an even or level surface with no roughness or projections that render it difficult to clean. CAL. HEALTH & SAFETY CODE § 113916(c).

<sup>130</sup> CAL. HEALTH & SAFETY CODE § 114301(h).

<sup>131</sup> *Id.*

that the surfaces are easily cleanable, impervious, and smooth,<sup>132</sup> and must be designed to provide employees with safety from slipping.<sup>133</sup> Such surfaces must extend a minimum of 5 feet on all open sides of where cooking processes are conducted.<sup>134</sup>

Mechanical exhaust ventilation equipment must be installed and maintained in compliance with the California Mechanical Code over all cooking equipment as required to effectively remove cooking odors, smoke, steam, grease, heat, and vapors; provided, however, that such ventilation equipment in vehicles subject to regulation by the California Department of Housing and Community Development is to be installed and governed pursuant to an alternative code adopted pursuant to California Health and Safety Code Section 18028.<sup>135</sup>

#### **8. *Compressor Units***

Compressor units that are not an integral part of food equipment, auxiliary engines, generators, and similar equipment must be installed in an area that is completely separated from food preparation and food storage and that is accessible from outside the unit for proper cleaning and maintenance.<sup>136</sup>

#### **9. *Seat Belts***

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<sup>132</sup> See *supra* Chapter 26, footnote 129 in this supplement.

<sup>133</sup> CAL. HEALTH & SAFETY CODE § 114301(i) (providing that it governs mobile food facilities notwithstanding the rules for open-air barbecues or outdoor wood-burning ovens set forth in CAL. HEALTH & SAFETY CODE § 114143). See *supra* Chapter 24, footnotes 35-39 and accompanying text in the EGCR.

<sup>134</sup> CAL. HEALTH & SAFETY CODE § 114301(i).

<sup>135</sup> CAL. HEALTH & SAFETY CODE § 114149.1(a).

<sup>136</sup> CAL. HEALTH & SAFETY CODE § 114322.

Under California Vehicle Code Section 27315, a person must not operate a motortruck or other motor vehicle<sup>137</sup> on a highway<sup>138</sup> unless the person and all passengers are properly restrained by a safety belt.<sup>139</sup> Accordingly, operators and employees of mobile food facilities and mobile support units must wear a seat belt when in transit.

#### **10. *Additional Special Requirements for Mobile Support Units***

Mobile support units are subject to plan review and must be approved by the local enforcement agency.<sup>140</sup> The operating requirements imposed upon a mobile support unit are based upon its proposed method of operation and the number of mobile food facilities to be serviced by it.<sup>141</sup>

Mobile support units must meet all of the applicable requirements set forth above in Chapter 10 of the Food Code, starting with the requirement that they operate from a designated commissary and report to a commissary or other approved facility for cleaning, servicing, and storage at least daily.<sup>142</sup> In addition, the Food Code specifies that mobile support units must be constructed of smooth, washable, impervious material capable of withstanding frequent

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<sup>137</sup> A “motortruck” means a motor vehicle designed, used, or maintained primarily for the transportation of property. CAL. VEH. CODE § 410. A “motor vehicle” means a self-propelled vehicle. CAL. VEH. CODE § 415.

<sup>138</sup> A “highway” means any publicly maintained way or place open to the use of the public for purposes of vehicular travel, and includes a street. CAL. VEH. CODE § 360.

<sup>139</sup> CAL. VEH. CODE § 27315(c)-(e).

<sup>140</sup> CAL. HEALTH & SAFETY CODE § 114327(a).

<sup>141</sup> *Id.*

<sup>142</sup> CAL. HEALTH & SAFETY CODE §§ 114295(d), 114297(d), 114327(b).



cleaning with approved sanitizing agents.<sup>143</sup> Their interior floors, sides, and top must be free of cracks, seams, or linings which might provide a home for vermin.<sup>144</sup> They must be constructed and operated so that no liquid waste can drain onto any street, sidewalk, or premises.<sup>145</sup>

Mobile support units that transport potentially hazardous food must have approved equipment to maintain food at the required temperatures.<sup>146</sup> Food, utensils, and supplies must be protected against contamination, with a separate storage area required in the mobile support unit for detergents, bleaches, cleaning compounds, poisonous substances, and all other injurious or poisonous materials.<sup>147</sup>

### **C. Operating Requirements for Commissaries under the California Retail Food Code**

All commissaries and other approved facilities servicing mobile food facilities and mobile support units must meet the applicable requirements for permanent food facilities set forth in the Food Code.<sup>148</sup> They must also meet certain special requirements to accommodate all operations necessary to support mobile food facilities and mobile support units,<sup>149</sup> beginning with

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<sup>143</sup> CAL. HEALTH & SAFETY CODE § 114327(b)(1).

<sup>144</sup> *Id.*

<sup>145</sup> CAL. HEALTH & SAFETY CODE § 114327(b)(2).

<sup>146</sup> CAL. HEALTH & SAFETY CODE § 114327(b)(3).

<sup>147</sup> CAL. HEALTH & SAFETY CODE § 114327(b)(4), (b)(5). As noted previously, warewashing is not permitted on mobile support units. CAL. HEALTH & SAFETY CODE § 114327(c).

<sup>148</sup> CAL. HEALTH & SAFETY CODE § 114326. *See* Chapters 1-3 in the EGCR L and in this supplement.

<sup>149</sup> *Id.*

adequate facilities for the storage of food, utensils, and other supplies and adequate electrical outlets to support electrical service.<sup>150</sup>

Commissaries must have potable water available for filling the water tanks of mobile food facilities and mobile support units that require potable water, with faucets and other potable water sources constructed, located, and maintained so as to minimize the possibility of water contamination.<sup>151</sup> Commissaries must also have hot and cold water under pressure available for cleaning.<sup>152</sup> Servicing areas used for cleaning must be sloped and drained to an approved wastewater system.<sup>153</sup>

Commissaries that service mobile food facilities and mobile support units must have adequate facilities for the sanitary disposal of liquid waste and for the handling and disposal of garbage and refuse from those vehicles.<sup>154</sup> Servicing areas at commissaries must be provided with overhead protection, except that no overhead protection is required for areas used only for loading water or discharging sewage and other liquid waste through the use of a closed system of hoses.<sup>155</sup>

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<sup>150</sup> CAL. HEALTH & SAFETY CODE §§ 114182, 114326(e),(i).

<sup>151</sup> CAL. HEALTH & SAFETY CODE § 114326(c).

<sup>152</sup> CAL. HEALTH & SAFETY CODE § 114326(d).

<sup>153</sup> CAL. HEALTH & SAFETY CODE § 114326(h).

<sup>154</sup> CAL. HEALTH & SAFETY CODE § 114326(a), (b).

<sup>155</sup> CAL. HEALTH & SAFETY CODE § 114326(g). As noted previously, food preparation areas must be provided for mobile food facilities that conduct limited food preparation. CAL. HEALTH & SAFETY CODE § 114326(f).

**D. Local Regulation of Mobile Food Facilities**

California Vehicle Code Section 22455(a) permits the driver of a commercial vehicle engaged in vending on a street to sell products on a street in a residence district only after the vehicle is completely stopped and lawfully parked adjacent to the curb in accordance with the Vehicle Code and local ordinances thereunder.<sup>156</sup> California Vehicle Code Section 22455(b) further provides that, notwithstanding California Health and Safety Code Section 114315(a)<sup>157</sup> or any other law to the contrary, a local authority may by ordinance or resolution adopt “additional requirements for the public safety regulating the type of vending and the time, place, and manner of vending from vehicles upon any street.”

Just as with restaurants, a dense patchwork of local regulations governing mobile food facilities has been adopted in counties across California, specifying the local permits and

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<sup>156</sup> See *Barajas v. City of Anaheim*, 15 Cal. App. 4<sup>th</sup> 1808 (Cal. Ct. App. 1993)(construing CAL. VEH. CODE Section 22455 as preempting a local ordinance banning vending from vehicles parked on public streets in residential areas).

<sup>157</sup> See *supra* Chapter 26, footnote 99 and accompanying text in this supplement.

requirements,<sup>158</sup> and the inspections,<sup>159</sup> necessary for operations. There has been a considerable amount of attention and litigation<sup>160</sup> given to the scope of those regulations, and to the question of

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<sup>158</sup> See e.g., Contra Costa Health Services FAQs for Mobile Food Facilities, *available at* <http://cchealth.org/eh/retail-food/faq-mobile-food.php>; County of Los Angeles Public Health Plan Check Guidelines for Mobile Food Facilities and Mobile Support Unit, *available at* [http://publichealth.lacounty.gov/eh/docs/vip/PLAN\\_CHECK\\_GUIDELINES\\_1.pdf](http://publichealth.lacounty.gov/eh/docs/vip/PLAN_CHECK_GUIDELINES_1.pdf); County of Los Angeles Department of Public Health Environmental Health, Mobile Food Facility Inspection Guide, *available at* [publichealth.lacounty.gov/eh/docs/vip/MobileFoodFacilityInspectionGuide.pdf](http://publichealth.lacounty.gov/eh/docs/vip/MobileFoodFacilityInspectionGuide.pdf); Sacramento County Environmental Management Mobile Food Vendors, *available at* <http://www.emd.saccounty.net/EH/FoodProtect-RetailFood/Pages/MobileFood.aspx>; and San Francisco Department of Public Health Food Safety Program for Mobile Food Facilities, *available at* <http://www.sfdph.org/dph/eh/Food/mobile.asp>.

<sup>159</sup> See *supra* Chapter 26, footnotes 7, 8 and 99 and accompanying text in this supplement. Reports have emphasized the need for more frequent inspections of food trucks in California, so that food truck operators and employees can be evaluated in unannounced inspections while their vehicle and food preparation are in operation. See Brenda Vanschaik Faw and Joyce L. Tuttle, Mobile Food Trucks: California EHS-NET Study on Risk Factors and Inspection Challenges, *Journal of Environmental Health* 76: 8 (April 2014), *available at* <http://www.cdc.gov/nceh/ehs/docs/jeh/2014/april-food-trucks.pdf> (reporting that annual public health inspections of food trucks in California usually do not occur when the food trucks are in operation, so food and water safety risk factors cannot be evaluated, and finding numerous Food Code violations including improper or no handwashing in 84% of the 95 food trucks in the study); David Lazarus, *L.A. County Food-Truck Safety Program Leaves a Bad Taste in the Mouth*, *Los Angeles Times* (April 7, 2014), *available at* <http://www.latimes.com/business/la-fi-lazarus-20140408-column.html#axzz2yJNB0FTs&page=1> (reporting that 40% of the roughly 3,200 food trucks and carts in L.A. have never been inspected in the field by health officials since letter grades were introduced three years ago, and most of the remaining 60% have been inspected only once a year, even though official guidelines call for at least two annual field inspections). Local inspection requirements vary. See e.g., San Bernardino County, Mobile Food Facilities FAQs, *available at* <http://www.sbcounty.gov/dph/dehs/Depts/EnvironmentalHealth/FAQs/FAQMobileFoodFacilities.aspx> (requiring one “in-office” inspection and two unannounced field inspections annually for permitted food trucks in the county).

<sup>160</sup> See Baylen J. Linnekin, Jeffrey Dermer & Matthew Geller, *The New Food Truck Advocacy: Social Media, Mobile Food Vending Associations, Truck Lots & Litigation in California and*

whether those regulations are driven by economic competitors of mobile food facilities<sup>161</sup> rather than based primarily on public safety. With the continued growth of mobile food vending, these regulatory tensions will likely continue.

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*Beyond*, available at <http://www.keepfoodlegal.org/PDFs/linnekindermergeller.pdf> (detailing legal challenges on behalf of food truck operators brought by the Southern California Mobile Food Vendors' Association).

<sup>161</sup> For example, San Francisco's amendments in 2013 to its mobile food facilities ordinance prohibit a Mobile Caterer (as defined therein) from operating within a 75 foot radius of a restaurant, subject to the refinements set forth in the ordinance. San Francisco Public Works Code, Article 5.8, Sec. 184.85(b)(1)(4). A proposed 2012 bill in the California Assembly to prohibit food trucks from operating within 1,500 feet of any elementary, middle, or high school (Assembly Bill No. 1678) sparked intense controversy in the mobile vending and school food communities until it was withdrawn by its sponsor, Assemblyman Bill Monning. For Assemblyman Monning's press release concerning the bill's withdrawal, *see* <http://sd17.senate.ca.gov/news/2012-03-28-assemblymember-monning-issues-statement-mobile-food-vending-bill>.

**[New]**  
**Chapter 27**

**Homemade Food:  
Regulating Cottage Food Operations**

When the California Retail Food Code (hereinafter "Food Code") was adopted in 2007, it prohibited restaurants from using or selling food prepared in a private home.<sup>1</sup> The California legislature subsequently enacted the California Homemade Food Act (hereinafter "CHFA"), concluding that small home-based artisanal food businesses could be antidotes to poverty, hunger, joblessness, obesity, and "food deserts" in low-income and rural communities.<sup>2</sup> Due to

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<sup>1</sup> CAL. HEALTH & SAFETY CODE § 114021(b) (effective through Dec. 31, 2012) (food stored or prepared in a private home could not be used or offered for sale in a food facility).

<sup>2</sup> A.B. 1616, § 1(a) – (h)(approved by Gov. Jerry Brown on Sept. 21, 2012), *available at* [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201120120AB1616](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB1616).

the enactment of the CHFA, as of January 1, 2013, some non-refrigerated homemade food items that are not “potentially hazardous food”<sup>3</sup> can be produced for sale in home kitchens.<sup>4</sup>

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<sup>3</sup> “Potentially hazardous food” means a food that requires time or temperature control to limit pathogenic micro-organism growth or toxin formation. CAL. HEALTH & SAFETY CODE 113871(a). It includes a food of animal origin that is raw or heat-treated, a food of plant origin that is heat-treated or consists of raw seed sprouts, cut melons, cut tomatoes or mixtures of cut tomatoes that are not modified to render them unable to support pathogenic micro-organism growth or toxin formation, and garlic-in-oil mixtures that are not acidified or otherwise modified at a food processing plant in a way that results in mixtures that do not support growth or toxin formation as specified under subdivision (a). CAL. HEALTH & SAFETY CODE 113871(b).

Under CAL. HEALTH & SAFETY CODE 113871(c), “potentially hazardous food” does not include any of the following:

- (1) A food with an a(w) value of 0.85 or less.
- (2) A food with a pH level of 4.6 or below when measured at 75°F.
- (3) An air-cooled, hard-boiled egg with shell intact, or an egg with shell intact that is not hard boiled, but has been pasteurized to destroy all viable salmonellae.
- (4) A food in an unopened, hermetically sealed container that is commercially processed to achieve and maintain commercial sterility under conditions of nonrefrigerated storage and distribution.
- (5) A food that has been shown by appropriate microbial challenge studies approved by the local enforcement agency not to support the rapid and progressive growth of infectious or toxigenic micro-organisms that may cause food infections or food intoxications, or the growth and toxin production of *Clostridium botulinum*, such as a food that has an a(w) and a pH that are above the levels specified under paragraphs (1) and (2) and that may contain a preservative, other barrier to the growth of micro-organisms, or a combination of barriers that inhibit the growth of micro-organisms.
- (6) A food that does not support the rapid and progressive growth of infectious or toxigenic micro-organisms, even though the food may contain an infectious or toxigenic micro-organism or chemical or physical contaminant at a level sufficient to cause illness.

<sup>4</sup> Effective Jan. 1, 2013, CAL. HEALTH & SAFETY CODE § 114021(b) was amended to provide that food stored or prepared in a private home must not be used or offered for sale in a food

The CHFA added a new chapter 11.5, entitled “Cottage Food Operations,” to the Food Code. In 2015 and thereafter, a “cottage food operator”<sup>5</sup> is allowed, under specified conditions, to generate up to \$50,000 in gross annual sales volume from a “cottage food operation”<sup>6</sup> operated in his or her private home kitchen.<sup>7</sup> As discussed below in Chapter 27(B) and Chapter 27(D), the operator of a legally registered or permitted cottage food operation may sell his or her products directly to consumers, and in some cases, also to third-party retailers such as restaurants.

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facility unless it is prepared by a cottage food operation that is registered or permitted under CAL. HEALTH & SAFETY CODE § 114365. *See infra* Chapter 27(B) in this supplement.

<sup>5</sup> A “cottage food operator” means an individual who owns and operates a cottage food operation in his or her own private home (including an apartment dwelling or other leased space) where he/she resides. CAL. HEALTH & SAFETY CODE § 113758(a), (b)(2), (b)(6).

<sup>6</sup> A “cottage food operation” means an enterprise operated by a cottage food operator with gross annual sales not exceeding \$35,000 in 2013, \$45,000 in 2014, and \$50,000 in 2015 and thereafter, where cottage food products are prepared or packaged within the registered or permitted area of the private home where the cottage food operator resides for direct, indirect, or both direct and indirect sales to consumers. CAL. HEALTH & SAFETY CODE § 113758(a). One “full-time equivalent cottage food employee” may on a paid or volunteer basis prepare, package, handle, and store a cottage food product, or otherwise work for the cottage food operation. CAL. HEALTH & SAFETY CODE § 113758(a), (b)(1). Immediate family members or household members of the cottage food operator are not cottage food employees, and there is no limitation on their participation in cottage food operations. CAL. HEALTH & SAFETY CODE § 113758(b)(1).

<sup>7</sup> The CHFA amended the California Government Code to ease zoning, building, and fire code requirements relating to cottage food operations in residential areas. See CAL. GOV. CODE § 51035 (adding Chapter 6.1 on Cottage Food Operations to Part I of Division I of Title 5 of the California Government Code). The CHFA also amended California’s Sherman Food, Drug and Cosmetic Law (hereinafter “SFDC Act”), CAL. HEALTH & SAFETY CODE § 109875 *et seq.*, by specifying that cottage food operations are neither “food processing facilities” nor “food processing establishments” regulated thereunder. See CAL. HEALTH & SAFETY CODE §§ 109947, 110460, 111955.



In the years since the enactment of the CHFA, numerous cottage food operations have been established throughout California.<sup>8</sup> A successful cottage food operator must consider whether and how to expand into a restaurant or other food facility when his or her sales volume approaches the cap established in the CHFA.<sup>9</sup>

#### **A. Definition of Cottage Food Products**

A “cottage food product” prepared in the kitchen of a cottage food operation must be a food that does not require refrigeration, so that it is unable to support bacterial growth that can

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<sup>8</sup> Emily Han, *Cottage Food Law Creates Opportunities for Los Angeles Food Artisans*, KCET (Mar. 5, 2014), available at <https://www.kcet.org/food/cottage-food-law-creates-opportunities-for-los-angeles-food-artisans> (stating that nearly 350 cottage food operations were established in Los Angeles County in 2013). Some counties keep an online list of registered and permitted cottage food operations, which show hundreds of such operations. See, e.g., COUNTY OF SACRAMENTO, ENVIRONMENTAL MANAGEMENT, COTTAGE FOOD PROGRAM, available at <http://www.emd.saccounty.net/EH/FoodProtect-RetailFood/Pages/CottageFood.aspx>; COUNTY OF ORANGE, ENVIRONMENTAL HEALTH, COTTAGE FOOD OPERATIONS, available at <http://ocfoodinfo.com/cottage>.

<sup>9</sup> Luke Tsai, *So You Want to Start a Food Business*, East Bay Express (Aug. 14, 2013), available at <http://www.eastbayexpress.com/oakland/so-you-want-to-start-a-food-business/Content?oid=3681110>.

lead to foodborne illness.<sup>10</sup> The list of such nonpotentially hazardous “cottage food products”<sup>11</sup> that can be sold by a cottage food operation includes but is not limited to:<sup>12</sup>

- baked goods without cream, custard, or meat fillings (such as breads, biscuits, churros, cookies, pastries, and tortillas),
- candy (such as brittle and toffee);
- chocolate-covered nonperishable foods, such as nuts and dried fruit;
- dried fruit;
- dried pasta;
- dry baking mixes;
- fruit pies, fruit empanadas, and fruit tamales;
- granola, cereals, and trail mixes;
- herb blends and dried mole paste;
- honey and sweet sorghum syrup;

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<sup>10</sup> CAL. HEALTH & SAFETY CODE §§ 113871, 114365.5(a) (requiring the California Department of Public Health (hereinafter “CDPH”) to post a list of “nonpotentially hazardous foods and their ethnic variations” that are approved for sale by a cottage food operation). *See supra* Chapter 27, footnote 3 and accompanying text in this supplement.

<sup>11</sup> A “cottage food product” means a nonpotentially hazardous food prepared for sale in the kitchen of a cottage food operation. CAL. HEALTH & SAFETY CODE § 113758(b)(3). A “cottage food product” includes but is not limited to those items listed in CAL. HEALTH & SAFETY CODE § 114365.5(b). *See infra* Chapter 27, footnotes 12 and 14 and accompanying text in this supplement.

<sup>12</sup> CAL. HEALTH & SAFETY CODE § 114365.5(b).

- jams, jellies, preserves, and fruit butter that comply with the standard described in Part 150 of Title 21 of the Code of Federal Regulations;<sup>13</sup>
- nut mixes and nut butters;
- popcorn;
- vinegar and mustard;
- roasted coffee and dried tea;
- waffle cones and pizelles; and
- other foods that the State Public Health Officer chooses to add to the items listed above, known as the “approved food products list,” after specified statutory periods for public notice and comment.<sup>14</sup>

## **B. Establishment of Class A and Class B Cottage Food Operations**

### ***1. Class A Cottage Food Operations***

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<sup>13</sup> See CAL. HEALTH & SAFETY CODE § 114023 (food in a hermetically sealed container must be obtained from a food processing plant that is regulated by the food regulatory agency that has jurisdiction over it, or from a cottage food operation that produces jams, jellies, and preserves and that is registered or permitted under CAL. HEALTH & SAFETY CODE § 114365).

<sup>14</sup> CAL. HEALTH & SAFETY CODE § 114365.5(b)(1) - (b)(16), (c)(1). The State Public Health Officer is also given the power, in CAL. HEALTH & SAFETY CODE § 114365.5(c)(2), to delete items from the approved food products list if the State Public Health Officer explains the basis upon which the removed food item has been determined to be potentially hazardous. For explanation of the applicable procedures to add items to the approved cottage food products list, see CALIFORNIA DEPARTMENT OF PUBLIC HEALTH FOOD AND DRUG BRANCH, REQUEST TO ADD A FOOD PRODUCT TO THE COTTAGE FOOD APPROVED FOOD LIST, *available at* <http://www.cdph.ca.gov/programs/Documents/fdbCFOaddfoodrequest.pdf>. The CDPH has added numerous food items to the approved products list. See CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, APPROVED COTTAGE FOODS, *available at* <https://www.cdph.ca.gov/programs/Documents/fdbCFOfoodslist.pdf>.

There are two types of cottage food operations under the CHFA, Class A and Class B. Class A cottage food operations may only engage in “direct sales” to "consumers" (which exclude restaurants) from the cottage food operation or from other authorized direct sales venues.<sup>15</sup>

Before opening for business, these Class A cottage food operations are required to register with the local enforcement agency, commonly the county environmental health department, and to prepare and submit that agency’s self-certification checklist.<sup>16</sup> The self-certification checklist must verify that the cottage food operation conforms to Chapter 11.5 of the Food Code, including the following basic safe food handling practices:

- no cottage food preparation, packaging, or handling may occur in the home kitchen concurrent with any other domestic activities (such as family meal preparation, dishwashing, clothes washing or ironing, kitchen cleaning, or entertaining of guests), or when infants, small children, or pets are present;

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<sup>15</sup> CAL. HEALTH & SAFETY CODE § 113758(a)(1). “Direct sales” are transactions within the State of California between a cottage food operation operator and a consumer, where the consumer purchases cottage food products directly from the cottage food operation. Direct sales include but are not limited to holiday bazaars and other temporary events such as bake sales or food swaps, sales at farm stands, certified farmers’ markets, or through community-supported agriculture subscriptions, and in-person transactions that occur at the cottage food operation. CAL. HEALTH & SAFETY CODE § 113758(b)(4). A “consumer” is a person who is a member of the public, takes possession of food, is not functioning as the operator of a food facility (such as a restaurant), and does not offer the food for resale. CAL. HEALTH & SAFETY CODE § 113757. While cottage food operators may advertise, accept orders, and take payment over the phone and on the internet, they must still deliver cottage food products in person (and not by mail or other third party delivery service) to the consumer under applicable CDPH guidance. CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, CALIFORNIA HOMEMADE FOOD ACT FREQUENTLY ASKED QUESTIONS, *available at* <http://www.cdph.ca.gov/programs/Documents/fdbCFOfaqs.pdf>, at Question 9.

<sup>16</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(1)(A).

- kitchen equipment and utensils used to produce cottage food products must be clean and maintained in a good state of repair;
- all food contact surfaces, equipment, and utensils used for cottage food products preparation, packaging, or handling must be washed, rinsed, and sanitized before each use;
- all food preparation and food and equipment storage areas must be maintained free of rodents and insects; and
- smoking must be prohibited in the portion of the private home used for the preparation, packaging, storage, or handling of cottage food products and related ingredients or equipment, or both, while cottage food products are being prepared, packaged, stored, or handled.<sup>17</sup>

A local enforcement agency must post the above information on the internet and issue a registration number to a Class A cottage food operation that has registered and submitted the self-certification checklist.<sup>18</sup>

No initial or routine inspection of a Class A cottage food operation is required.<sup>19</sup> However, a local enforcement agency representative may for inspection purposes access the “registered area”<sup>20</sup> of a private home where a cottage food operation is located if the inspector has, on the

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<sup>17</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(1)(A)(i) – (vi).

<sup>18</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(1)(B)(ii).

<sup>19</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(1)(C)(i).

<sup>20</sup> CAL. HEALTH & SAFETY CODE § 113758(b)(7)(a registered or permitted area means the portion of a private home that contains the private home’s kitchen used for the preparation, packaging, storage, or handling of cottage food products and related ingredients or equipment, or both, and attached rooms within the home that are used exclusively for storage).

basis of a consumer complaint, reason to suspect that adulterated or otherwise unsafe food<sup>21</sup> has been produced by the cottage food operation or that the cottage food operation has violated the cottage food statutes contained in Chapter 11.5 of the Food Code.<sup>22</sup> A Class A cottage food operation must renew its registration annually.<sup>23</sup>

## **2. Class B Cottage Food Operations**

Before opening for business, Class B cottage food operations must obtain an annual permit from the local enforcement agency.<sup>24</sup> The local enforcement agency has the right to make an initial inspection of the Class B cottage food operation prior to issuance of a permit, and a yearly inspection thereafter.<sup>25</sup>

Like their Class A counterparts, Class B cottage food operations may engage in “direct sales” of cottage food products to consumers from the cottage food operation or from other authorized direct sales venues.<sup>26</sup> They may also engage in “indirect sales” by selling to

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<sup>21</sup> See CAL. HEALTH & SAFETY CODE §§ 113703, 113980, 114087(a) (food offered for human consumption must be safe, unadulterated, unspoiled, and honestly presented).

<sup>22</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(1)(C)(ii). Access is limited to the registered area and solely for the purpose of enforcing and administering Chapter 11.5 of the Food Code, and a Class A cottage food operation may be charged for inspection costs if a violation is found. CAL. HEALTH & SAFETY CODE § 114365(a)(1)(C)(iii)-(iv).

<sup>23</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(2)(D).

<sup>24</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(2)(A). CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, CALIFORNIA HOMEMADE FOOD ACT FREQUENTLY ASKED QUESTIONS, *supra* Chapter 27, footnote 15 in this supplement, at Question 12.

<sup>25</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(2)(B)(ii),(a)(2)(C).

<sup>26</sup> CAL. HEALTH & SAFETY CODE § 113758(a)(2). See *supra* Chapter 27, footnote 15 in this supplement.

restaurants and other third-party retailers.<sup>27</sup> This means that a consumer may purchase cottage food products made by the Class B cottage food operation from offsite events, from restaurants or retail shops, and from other third-party retail food facilities such as markets, bakeries, and delis holding valid food facility permits where food may be immediately consumed on the premises.<sup>28</sup> These indirect sales may only occur in the county in which the Class B cottage food operation is located and permitted.<sup>29</sup>

Class B cottage food operations must comply with the safe food handling requirements outlined above for Class A cottage food operations.<sup>30</sup> The local enforcement agency

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<sup>27</sup> CAL. HEALTH & SAFETY CODE § 113758(a)(2). An “indirect sale” means an interaction between a cottage food operation, a third-party retailer, and a consumer, where the consumer purchases cottage food products made by the cottage food operation from a third-party retailer that holds a valid permit issued pursuant to CAL. HEALTH & SAFETY CODE § 114381. CAL. HEALTH & SAFETY CODE § 113758(b)(5).

<sup>28</sup> CAL. HEALTH & SAFETY CODE § 113758(a)(2), (b)(5). *See also* CAL. HEALTH & SAFETY CODE § 113789 (a food facility is an operation that stores, prepares, packages, serves, vends or otherwise provides food for human consumption at the retail level, whether or not the food is consumed on the premises or sold, and any place used in conjunction with these activities, such as storage facilities for food-related utensils, equipment and materials). Under CAL. HEALTH & SAFETY CODE § 114381, no food facility can be operated without a valid permit from the local enforcement agency. CAL. HEALTH & SAFETY CODE § 113789(c)(2) excludes validly registered and permitted cottage food operations from the definition of a food facility.

<sup>29</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(2)(E)(i). A county may agree to allow a Class B cottage food operation with a permit issued in another county to engage in the indirect sales of cottage food products in the county. CAL. HEALTH & SAFETY CODE § 114365(a)(2)(E)(ii).

<sup>30</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(2)(B)(i). *See supra* Chapter 27(B)(1) in this supplement.

representative may access the permitted area<sup>31</sup> of a private home where a Class B cottage food operation is located if the representative has, on the basis of a consumer complaint, reason to suspect that adulterated or otherwise unsafe food has been produced by the cottage food operation, or that the cottage food operation has violated the cottage food statutes contained in Chapter 11.5 of the Food Code.<sup>32</sup>

### **C. Additional Requirements for Class A and Class B Cottage Food Operations**

Cottage food registrations or permits, once in place or issued, are nontransferable and are limited to the person, location, type of food sales, distribution activity, and duration specified therein.<sup>33</sup> The registration or permit, or an accurate copy thereof, must be retained by the cottage food operator onsite at the time of direct or indirect cottage food sales.<sup>34</sup>

Registered or permitted Class A and Class B cottage food operations, with their combined living and food preparation areas, are deemed to be “restricted food service facilities” under California Health and Safety Code Section 114365.2 for certain Food Code purposes.<sup>35</sup> As

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<sup>31</sup> CAL. HEALTH & SAFETY CODE § 113758(b)(7). *See supra* Chapter 27, footnote 20 in this supplement.

<sup>32</sup> CAL. HEALTH & SAFETY CODE § 114365(a)(2)(D)(i). Access is limited to the permitted area and solely for the purpose of enforcing and administering Chapter 11.5 of the Food Code. *See* CAL. HEALTH & SAFETY CODE § 114365(a)(2)(D)(ii) and CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, CALIFORNIA HOMEMADE FOOD ACT FREQUENTLY ASKED QUESTIONS, *supra* Chapter 27, footnote 15 in this supplement, at Question 15.

<sup>33</sup> CAL. HEALTH & SAFETY CODE § 114365(b)(1).

<sup>34</sup> CAL. HEALTH & SAFETY CODE § 114365(b)(2).

<sup>35</sup> CAL. HEALTH & SAFETY CODE § 114365.2 (deeming registered or permitted cottage food operations “restricted food service facilities” so that CAL. HEALTH & SAFETY CODE §§ 113953.3 (handwashing by employees), 114259.5 (regulation of pets), 114285 (regulation of sleeping accommodations), and 114286 (separation of sleeping and living quarters) apply to cottage food



a result, cottage food operations must comply with the Food Code's rules as to when food employees must wear single-use gloves and its prohibition of live animals and of contaminated or adulterated food, food-contact surfaces, and utensils.<sup>36</sup>

California Health and Safety Code Section 114365.2 contains additional specific food safety provisions for cottage food operations, namely:

- that no person with a contagious illness be permitted to work in the registered or permitted area of the cottage food operation;<sup>37</sup>
- that persons involved in the preparation or packaging of cottage food products keep their hands and exposed portion of arms clean and wash their hands before any food preparation or packaging activity in a cottage food operation;<sup>38</sup>
- that the Food Code's potable drinking water requirements or local water standards be applicable to the preparation of cottage food products, although cottage food operations are not required to have an indirect sewer connection;<sup>39</sup> and

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operations). A "restricted food service facility" is a food facility with up to 20 guestrooms or an agricultural homestay facility, both of which provide meals or snacks and have primarily an innkeeper-guest relationship with occupants. CAL. HEALTH & SAFETY CODE § 113893.

<sup>36</sup> CAL. HEALTH & SAFETY CODE § 114365.2 (subjecting registered or permitted cottage food operations to CAL. HEALTH & SAFETY CODE §§ 113967, 113973, 113980, and 114259.5).

<sup>37</sup> CAL. HEALTH & SAFETY CODE § 114365.2(a).

<sup>38</sup> CAL. HEALTH & SAFETY CODE § 114365.2(b).

<sup>39</sup> CAL. HEALTH & SAFETY CODE § 114365.2(c). These water standards apply to the washing, sanitizing, and drying of equipment and hands and arms, as well as water used as an ingredient. CAL. HEALTH & SAFETY CODE § 114365.2(c)(1)-(3).

- to protect public health, that persons preparing or packaging cottage food products complete a food processor course approved by the CDPH within 3 months of registration, and repeat the course every 3 years during operation.<sup>40</sup>

All of these food safety regulations are to be monitored, to the extent permitted by statute, by local enforcement authorities. Class A and Class B cottage food operations are subject to the compliance and enforcement provisions of the Food Code.<sup>41</sup>

#### **D. Cottage Food Labeling and Disclosure Requirements by Restaurants**

All cottage food operations must label cottage food products in compliance with the Federal Food, Drug, and Cosmetic Act.<sup>42</sup> To the extent permitted by federal law, cottage food product labels must also include at least the following:

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<sup>40</sup> CAL. HEALTH & SAFETY CODE § 114365.2(d). *See* CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, CALIFORNIA HOMEMADE FOOD ACT FREQUENTLY ASKED QUESTIONS, *supra* Chapter 27, footnote 15 in this supplement, at Question 11 (food processor course must be completed within 3 months of being permitted or registered.) Cottage food operators, their employees, and family members involved in the cottage food operation may take one of the ANSI accredited food handler courses that are taken by retail food facility food handlers. *See* CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, COTTAGE FOOD OPERATOR TRAINING, *available at* <http://www.cdph.ca.gov/programs/Documents/fdbCFOTrain.pdf>.

<sup>41</sup> CAL. HEALTH & SAFETY CODE § 114390 (local enforcement officers are to enforce the Food Code and any regulations thereunder with powers specified therein); CAL. HEALTH & SAFETY CODE § 114365.2 (subjecting cottage food operations to CAL. HEALTH & SAFETY CODE §§ 114405 – 114413, which provide for revocation of cottage food operation permits and suspensions and closures for imminent health hazards). *See also* CAL. HEALTH & SAFETY CODE § 114395 (violations of the Food Code are punishable as misdemeanors).

<sup>42</sup> CAL. HEALTH & SAFETY CODE § 114365.2(e); 21 U.S.C. § 343 *et seq.* *See* CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, LABELING REQUIREMENTS FOR COTTAGE FOOD PRODUCTS, *available at* <http://www.cdph.ca.gov/programs/Documents/fdbCFOLabel.pdf> (setting forth additional federal requirements and providing a sample cottage food label). It is a misdemeanor under the SFDC Act to misbrand food in violation of federal labeling requirements or to offer

- the words “Made in a Home Kitchen” or “Repackaged in a Home Kitchen”, as applicable, with a description of any purchased whole ready-to-eat product not used as an ingredient in 12-point type on the cottage food product’s primary display panel;
- the name commonly used for the food product or an adequately descriptive name;
- the name of the cottage food operation which produced the cottage food product;
- the registration or permit number of the Class A or Class B cottage food operation, respectively, which produced the cottage food product and the name of the county of the local enforcement authority that issued the permit or registration number; and
- the ingredients of the cottage food product, in descending order of predominance by weight, if the product contains 2 or more ingredients.<sup>43</sup>

If a restaurant or other food facility serves a cottage food product without the above-described packaging or labeling, the cottage food product must be identified to the consumer as homemade on the menu, menu board, or other location “that would reasonably inform a consumer of its homemade status.”<sup>44</sup> Law and guidance in the area of products liability and insurance for cottage food products are still developing.<sup>45</sup>

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misbranded food for sale. CAL. HEALTH & SAFETY CODE §§ 109935, 110660, 110665, 110670, 111825.

<sup>43</sup> CAL. HEALTH & SAFETY CODE § 114365.2(e)(1) – (5).

<sup>44</sup> CAL. HEALTH & SAFETY CODE § 114088.

<sup>45</sup> A homeowner’s or renter’s insurance policy may not extend liability coverage to liabilities arising out of a home-based business. CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, CALIFORNIA HOMEMADE FOOD ACT FREQUENTLY ASKED QUESTIONS, *supra* Chapter 27, footnote 15 in this supplement, at Question 20.

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