SheppardMullin

The Tasting MENU

Restaurant Work | Task Force

The Sheppard Mullin Restaurant Task Force is a vertically integrated team of attorneys who coordinate their institutional knowledge of the restaurant industry and legal expertise to provide seamless representation. The team delivers a full menu of resources on matters that particularly affect the restaurant industry, including counseling clients through acquisitions, joint ventures and fund formation, franchise, supplier, and distribution agreements, data privacy, labor and employment, financing, bankruptcy and restructurings, ADA, and lease issues. The Tasting Menu is a collection of emerging issues we see impacting this industry.

APPETIZERS

Biometric Ingredients in the Privacy Pie: BIPA Updates

Employees often "scan" their biometric identifiers (e.g., fingerprint, facial scan, etc.) in order to access workplace tools or timekeeping software. In Illinois, the Biometric Information Privacy Act ("BIPA") allows individuals to sue businesses for collecting or disclosing their biometric information without their consent. In 2023, the Illinois Supreme Court held that plaintiffs could recover liquidated damages of $1,000 (or $5,000) each time an employer scanned their biometric identifier without consent. Governor Pritzker signed a new BIPA bill in August – the first BIPA reform since 2008. The amendment prohibits the recovery of "per-scan" damages. If a business collects or discloses an individual's biometric data without consent, the business is only liable for one BIPA violation. That said, businesses should continue to obtain the required consent. Contact David Poell for more details.

Can't Take the Heat? Check Your Heat Illness Plan

California's new "Heat Illness Prevention in Indoor Places of Employment" standard became effective on July 23, 2024. The new regulation applies to most California workplaces where the indoor temperature reaches 82°F or higher. Cal/OSHA's guidance expressly identifies restaurants as likely needing to comply. The new standard requires covered employers to create and maintain a written indoor heat illness prevention plan that includes procedures on access to drinking water and cool-down areas, acclimatization, and emergency response measures. In addition, employers must provide comprehensive training on the plan and heat illness risk factors to all employees before they engage in any work involving a risk of heat illness. More on the new standard can be found here. Contact Bobby Foster for assistance.

Forever Chemicals a Forever Problem for Restaurants?

Restaurants can expect to continue to face new PFAS requirements and challenges. Food packaging has been one of the early targets of PFAS regulation, with at least eight states adopting regulations prohibiting food packaging containing intentionally added PFAS. Other regulations target cookware, textiles, and cleaning products, which will require many restaurants to transition to products not containing intentionally added PFAS. Restaurants should also be aware of litigation risk related to the use of products containing PFAS, particularly based on consumer safety and truth-in-advertising laws. Contact Jeffrey Parker and Louise Dyble for additional information.

MAINS

When Litigation Is On The Menu, Make Sure Your Online Disclosures Are Sufficient

Online ordering has become a key staple of the restaurant industry. However, differences between the presentation of menu information online and in-store can create problems for restaurants who find themselves in litigation over alleged "false advertising." A California district court's recent opinion in *Linda Cytryn v. Crumbl, LLC*, No. 8:23-cv-01218-MWF-KES (C.D. Cal.) is illustrative of one such problem.

In *Cytryn*, the plaintiffs alleged that the defendant's in-store and online menus misrepresented the calorie content of the defendant's cookies because the displayed amounts were based on the products' serving sizes rather than the entire cookie. On that basis, the plaintiffs brought claims on behalf of putative classes under eight states' consumer protection statutes. Moving to dismiss the complaint, the defendant argued *inter alia* that the calorie content on the menu boards included asterisk disclaimers which clarified that the displayed calorie content was *per serving* rather than *per cookie* and therefore no reasonable consumer would be misled.

With regard to the in-store menu boards, the court agreed with the defendant, finding that the disclaimer "explains that the Product's calorie content is per servings and there are four servings per Product" – thus making it "impossible for [Plaintiffs] to prove that a reasonable consumer was likely to be deceived" (quoting *Whiteside v. Kimberly Clark Corp.,* 108 F.4th 771 (9th Cir. 2024)). In contrast to the in-store menu boards, however, the court found that the "in-app and website menu are not as clear" because the associated disclaimers stated only that "serving size varies based on product." The court also refused to consider arguments pertaining to the product's nutrition on other webpages, which might have further clarified the calorie content. On these bases, the court denied defendant's motion to dismiss in part.

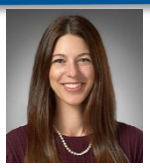
The court's divergent findings in *Cytryn* raise several points to consider when evaluating litigation risks associated with the use of disclaimers in menu boards online: (1) Are the disclaimers consistent across all media (e.g., in-store, website, and mobile applications)?; (2) Does all of the relevant disclaimer information appear on the same web page as the menu?; and (3) Is the disclaimer sufficiently conspicuous to alert consumers? Contact Khirin Bunker for more information and to assist with mitigating menu risk.

DESSERTS

Some sweet events are coming up!

- On October 15, 2024, Sheppard Mullin will be launching a Food and Beverage Blog, featuring our experts' updates on key legal issues facing the industry. You can subscribe to the blog here.
- *Competition Crosshairs on the Food and Beverage Industry: DOJ and FTC Priorities in a Changing Administration*. On November 6, 2024—the day after the election—our former DOJ and FTC attorneys will weigh in how the new administration will impact enforcement priorities, specifically for the food and beverage industry. You can register for this complimentary CLE program (approved for California and New York) here.

Restaurant Task Force



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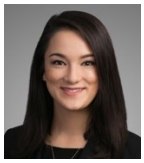

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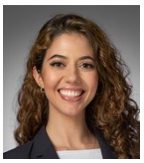

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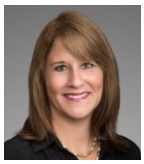

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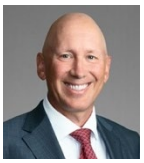

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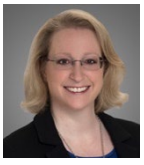

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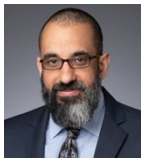

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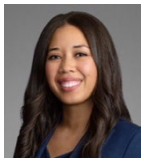

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