



LEGISLATION, REGULATIONS & STANDARDS

California Assembly Passes Food Additive Bill

The California Assembly has passed a first-in-the-nation bill banning the use of five food additives, including Red Dye No. 3 and titanium dioxide, in food products manufactured, sold or distributed in the state.

The Assembly gave its approval to [Assembly Bill 418](#), which seeks to end the use of brominated vegetable oil, potassium bromate, propyl paraben, Red Dye No. 3 and titanium dioxide.

Assemblymember Jesse Gabriel (D-Woodland Hills), chair of the Assembly Committee on Privacy and Consumer Protection, introduced the bill. He said in a statement that the vote “is a major step forward in our effort to protect children and families in California from dangerous and toxic chemicals in our food supply.”

“It’s unacceptable that the U.S. is so far behind the rest of the world when it comes to banning these dangerous additives,” he said. “We don’t love our children any less than they do in Europe, and it’s not too much to ask food and beverage manufacturers to switch to the safer alternative ingredients that they already use in Europe and so many other nations around the globe.”

FDA Releases Draft Compliance Policy Guide for Allergen Labeling

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The U.S. Food and Drug Administration (FDA) has announced the release of a draft Compliance Policy Guide on the agency’s “enforcement policy regarding major food allergen labeling and cross-contact.” The guide covers labeling requirements for major food allergens, proper use of “Contains” statements, requirements for manufacturers implementing controls for cross-contact exposure, and additional allergen-labeling violations.

Food Navigator noted that the guidance partially responds to a petition filed by the Center for Science in the Public Interest aiming to prevent companies from declaring the inclusion of potential allergens as a way to avoid implementing controls that would prevent cross-contamination. The guidance does not prohibit the practice but does state, “Allergen advisory statements are not a substitute for adherence to current good manufacturing practices and, when used by a facility, food allergen preventive controls. In addition, any allergen advisory statement must be truthful and not misleading.”

Comments on the draft guide will be accepted until July 17, 2023.

LITIGATION

Fireball Labeling Suit to Proceed

A federal court has denied a bid by the maker of Fireball Cinnamon Whisky to throw out a putative class action alleging the company misleads consumers into believing its miniature-sized bottles labeled "Fireball Cinnamon" contain whisky when they instead contain a malt beverage with whisky flavoring. *McKay v. Sazerac Co., Inc.*, No.23-0522 (N.D. Cal., May 17, 2023).

The ruling was in a suit brought by a California man who alleges he purchased the malt beverage on multiple occasions from gas stations falsely believing they were a full single serving of Fireball Whisky. He alleged that, had it not been for the packaging, he would have either paid less for the malt beverage or not bought it at all.

Sazerac filed a motion to dismiss, arguing in part that the plaintiff’s claims under California’s Consumer Legal Remedies Act, Unfair Competition Law and False Advertising Law fail under the “reasonable consumer” test.

The court disagreed, finding that, taken as true, the complaint sufficiently alleges that Sazerac's label and packaging are affirmatively misleading. The court said the two labels are substantially similar, with the brand name “Fireball,” Sazerac’s firebreathing dragon logo, the words “RED HOT,” the same color



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ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.



scheme, burnt edge, font and labeling, and the words “CINNAMON.”

The court noted a case in which the Ninth Circuit held that a district court's grant of a motion to dismiss claims of false advertising of fruit juice snacks was inappropriate. The court said in the present case, a number of features of the Whisky Malt product's packaging could affirmatively mislead consumers.

“Indeed, ‘a product label can be misleading even if the alleged misrepresentation is corrected on the ingredient list,’” the court said. “Thus, while the labels do indeed accurately state that Fireball Malt has an ABV of 16.5% and Fireball Whisky has an ABV of 33%, a reasonable consumer would still be confused or misled by the labels when making the purchase.”



Taco Bell Asks TTAB to Cancel ‘Taco Tuesday’ Trademark Registrations

Taco Bell has petitioned the U.S. Patent and Trademark Office to cancel two companies' trademark registrations for “Taco Tuesday.” In a pair of petitions to the Trademark Trial and Appeals Board (TTAB), Taco Bell IP Holder LLC said that it believes “Taco Tuesday” “should be freely available to all who make, sell, eat, and celebrate tacos.”

The petitions target trademark registrations held by Gregory Hotel, Inc., a New Jersey-based restaurant, which has held the trademark registration for the use of the phrase in New Jersey since 1995, and Wyoming-based Spicy Seasonings, LLC, which, along with its associated entities, have owned a federal registration for “Taco Tuesday” since 1989. Spicy Seasonings’ registration covers the rest of the United States outside of New Jersey.

“The Registration potentially subjects Taco Bell and anyone else who wants to share tacos with the world to the possibility of legal action or angry letters if they say ‘Taco Tuesday’ without express permission from Registrant—simply for pursuing happiness on a Tuesday,” Taco Bell said. “This violates an American ideal: ‘the pursuit of happiness.’”

Taco Bell said that “Taco Tuesday” is a common phrase, used ubiquitously by restaurants across the country. The company said it is not seeking damages. “If one of us is not free to celebrate ‘Taco Tuesday,’ then none of us are free to celebrate ‘Taco Tuesday,’” Taco Bell asserted. “A win for Taco Bell here is a win for all. When tacos win, we all win.”

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