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FOOD, BEVERAGE & AGRIBUSINESS ALERT | NIXON PEABODY LLP

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Food & Beverage Crystal Ball: Trends we're following

In the 2020 second quarter edition of Nixon Peabody's Crystal Ball Newsletter, our [Food, Beverage & Agribusiness](#) (FBA) team provide insight into various industry issues caused by the coronavirus (COVID-19) pandemic, the increase of artificial intelligence, and the unique business workarounds stemming from 2020 Expo West's **cancellation**. Please also check out Nixon Peabody's recent alerts on the Coronavirus Aid, Relief, and Economic Security Act's (CARES Act) [impact on the FBA industry](#) and its [special considerations for restaurants and franchised businesses](#). We will continue to closely watch as these issues evolve, including, most specifically, the effect of the COVID-19 epidemic across the industry, in the months ahead.

How should food and beverage manufacturers respond to employee requests to voluntarily wear cloth face coverings?

While most of the country is on lockdown due to the coronavirus, many food and beverage manufacturers are still operating as essential businesses. The CDC and some local governments recently announced new guidelines and recommendations regarding the use of cloth face coverings by the general public. In some localities, the use is actually required for certain essential workers. In areas where it is only recommended and not required, some employees have also requested to wear their own face coverings at work. Allowing employees to voluntarily use face coverings would be in accordance with CDC and local government recommendations. However, employers should still conduct a risk assessment to determine whether there are any safety hazards with the voluntary use of face coverings in their facilities. Further, employers should provide simple instructions to employees to ensure safe use. [Rachel Conn](#)

How can food and beverage companies mitigate temporary labor shortages of non-immigrant workers during COVID-19?

Food and beverage employers who rely on a temporary non-immigrant workforce through the [H-2 Program](#) have expressed serious concern regarding the ability of their workers to enter the United States due to U.S. consulate and border closures, as well as worldwide travel bans related to coronavirus. **The U.S. government has taken steps to ensure this [mission-critical workforce can still apply for visas and travel to the United States, recognizing that these workers are essential to the economy and food security of the United States](#).** The United States Department of Agriculture and the Department of Labor have also identified nearly [20,000 H-2A and H-2B-certified positions](#) that have expiring contracts in the coming weeks. There will be workers leaving these positions who *could be* available to transfer to a different employer's labor certification. The

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international response to coronavirus is creating unique [immigration and worksite compliance issues](#) for employers and foreign nationals across the United States. [Rachel Winkler](#) and [John Sandweg](#)

FDA relaxes food labeling requirements during COVID-19 crisis

On March 26, 2020, the Food and Drug Administration (FDA) provided what it called “Temporary Flexibility Regarding Nutrition Labeling of Certain Packaged Food in Response to the COVID-19 Pandemic.” With an emphasis on “temporary,” FDA issued its guidance without the normal comment period and with plans for further follow up once the crisis abates. This flexibility applies to restaurants and food manufacturers that may have food not labeled for retail sale that they wish to sell at retail. For example, if a restaurant wishes to sell packaged food directly to consumers, or other businesses for sale to consumers, the FDA “does not intend to object if the packaged food lacks a Nutrition Facts label, provided that the food does not have any nutrition claims and contains other required information on the label” (e.g., identity statement, ingredient statement; business name/place, net quantity, allergen information). And although labeling and marketing of food products will likely return to pre-pandemic parameters once the crisis is over, there will be lessons learned during this period that may inform how labeling is viewed and regulated. For now, the “relaxed” labeling requirements should allow for much-needed flexibility in the hard-hit restaurant and related food distribution industry. [Vivian Quinn](#)

Artificial intelligence intellectual property continues to grow in food and beverage sector

Artificial Intelligence (AI) has gone from science fiction to impacting every industry in a relatively short time. Areas experiencing rapid AI growth include flavor and ingredient selection, order and delivery technology, supply chain, and robotics. Such technological growth also brings unprecedented intellectual property (IP) activity in these areas. A recent study found food and agribusiness patent filings increased more than 30% annually over a four-year period. Accordingly, we closely monitor the government’s recent AI initiatives, including the response to the White House’s February 2019 “Executive Order On Maintaining American Leadership in Artificial Intelligence” and the United States Patent and Trademark Office’s request for comments on the need to address patentability and enforceability issues in the patent laws as they relate to AI, including unique issues such as whether a non-natural person—*i.e.*, an AI machine—can be an “inventor.” Nixon Peabody is prepared to guide clients through the regulatory, statutory, and commercial changes regarding AI and IP. [Daniel Schwartz](#)

Cancelling 2020 Expo West inspires online trade show

[Natural Products Expo West \(Expo West\)](#), which was scheduled from March 3–7, was cancelled on March 2 due to the growing health concerns caused by COVID-19. Each year, Expo West gathers more than 85,000 industry professionals, including more than 3,600 exhibitors from over 130 countries. Expo West has become synonymous with the debut of new food companies and/or innovative natural food products seeking to attract buyers and influence global food trends. When it was abruptly cancelled, food companies were left scrambling to find creative ways to showcase their products. **To fill this void, an online trade show was developed by an international group of natural food companies. Using social platforms like LinkedIn and Facebook, this group created the ultimate ‘virtual experience’ to showcase products using video demos and pictures. The interest stemming from these “showcases” resulted in the distribution of samples worldwide.** Using the hashtag—#helpwithexpowest—numerous accounting firms, publications,

and other service providers began offering free services to emerging and smaller brands decimated by Expo West's cancellation. The hashtag—#InfluencersMakingLemonade—also emerged, connecting exhibitors with registered social media influencers. As the new normal continues to be defined, food companies have found creative workarounds to navigate the cancellation of business-critical trade shows, like Expo West. [Alison Torbitt](#)

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