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FOOD, BEVERAGE & AGRIBUSINESS NEWSLETTER | NIXON PEABODY LLP

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Food & Beverage Crystal Ball: Trends we're following

In the 2020 third-quarter edition of Nixon Peabody's Crystal Ball Newsletter, our [Food, Beverage & Agribusiness](#) (FBA) team provide insight into various industry issues caused by human rights and equality, the coronavirus (COVID-19) pandemic, and antitrust investigations into broiler chicken processors. 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.

What should food and beverage companies consider in relation to branding and rebranding in view of the social justice movement?

Some of the largest and most longstanding food and beverage brands in the U.S. are responding to public calls to rebrand racist imagery and wording that, in some cases, dates back to the 1800s. Iconic brands like Aunt Jemima, Mrs. Butterworth, Cream of Wheat, and Uncle Ben's have all announced that they will modify their branding in order to help put an end to racial bias, stereotypes, and injustices. Grocer Trader Joe's also recently announced that it would modify parts of its branding for its international foods with names like "Trader Jose's" and "Trader Ming's." Trader Joe's said that the names were intended to be "a lighthearted attempt at inclusiveness;" but it now realizes that they instead had the opposite effect. In view of the current landscape of change, now is a good time for food and beverage companies of all sizes to consider their current and planned branding to ensure that it does not promote or suggest division, even inadvertently. **In the event that a rebrand is advisable, companies should consult trademark counsel and consider a comprehensive trademark clearance search to ensure that the new brand will not create new risks, including from prior users of similar marks.** [Lauren Arnold](#)

Restaurants may need additional stimulus funds to remain solvent.

The pandemic is severely adversely impacting restaurants and their landlords. **With dining sales down nearly 80% compared to last year, restaurants are struggling to replace lost revenue and maintain their lease obligations.** Urban, office markets are particularly hard hit as "work-from-home" arrangements have limited the numbers of professionals frequenting "downtown" restaurants. However, restaurants outside the city—near peoples' residences—have the ability to make up volume on both lunch and dinner services, to expand outdoor dining capacity, and to provide pick-up and carry-out options. Interestingly, many restaurants that received Paycheck Protection Program loans, under the Coronavirus Aid, Relief, and Economic Security Act, recently (as opposed to the first wave of such funding) have better liquidity as the industry faces renewed closures. The initial response from landlords was supportive, but forbearance periods are ending.

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Extended closures, limited indoor sales, and threats of renewed closings create strong and unpredictable headwinds. **Landlords remain supportive but are taking steps to protect their legal rights as they look to pay operating costs and taxes.** However, unfortunately, landlords cannot support their tenants indefinitely as landlords' lenders increase pressure to perform and meet their financial covenants. Restaurants may need additional stimulus funding, including federal and local support, to survive the pandemic. [Christopher Desiderio, Brooke Furst](#)

How can food and beverage companies inquire about the health of their employees without violating those employees' privacy rights?

Food and beverage manufacturers and restaurants, deemed essential business in many states, continue operating despite the ongoing COVID-19 pandemic. While employers have greater leeway than in the past to inquire about employees' health, it is not limitless. The federal Equal Employment Opportunity Commission has issued guidance that permits employers to take the temperatures of employees who come to work and to require testing to determine whether employees have the coronavirus (provided it is job-related and not administered in a discriminatory fashion). But employers must be careful in requesting and handling employee health information. Failure to maintain confidentiality or wrongfully using health information to make hiring or firing decisions can lead to invasion of privacy and discrimination claims. **Before obtaining employees' confidential health information, food and beverage employers should seek guidance regarding applicable local, state, and federal laws and guidelines, including the Americans with Disabilities Act and state privacy laws, to make sure they do not incur liability in the process of trying to keep their workforce safe.** [Hillary Baca](#)

Will DOJ's antitrust investigation into broiler chicken processors heat up with more indictments and civil claims?

In June, the Department of Justice (DOJ) indicted four current or former executives (of Pilgrim's Pride and Claxton), for conspiring to fix prices in the sale of broiler chickens. The indictment alleges that from at least early 2012 through at least early 2017, several unnamed processors fixed broiler prices for sale to, among other entities, grocers and fast-food franchises (and their buying cooperatives). Trial is set for February 16, 2021, and DOJ's investigation continues. **Notably, Tyson, one of the industry's leading producers, announced in 2019 it had "self-reported" to DOJ and applied for leniency under the DOJ Antitrust Division's Leniency Program. Under that program, the first company or individual to report an antitrust crime can avoid criminal penalties for the conduct.** A number of civil cases, including purported class actions and claims by individual purchasers, such as Walmart, are pending in federal district court in Chicago. Those suits allege that Tyson, Pilgrim's Pride, Koch, and others conspired to fix prices by reducing supply and manipulating a pricing index. DOJ's indictment has spawned several new cases. [Gordon Lang, Alycia Ziarno](#)

Restaurant leases get creative with variable rent during the pandemic.

It is no secret that the restaurant industry has been hit hard by the pandemic. Some restaurants that were struggling before the pandemic are simply closing for good, while others are restructuring through bankruptcy. Many restaurant owners are utilizing as many creative strategies as they can to boost sales: increasing on-line marketing, offering curbside pick-up or delivery, selling groceries, and expanding outdoor dining when possible. Even after implementing all these measures, certain high, fixed costs, such as rent, are making it difficult to survive. Many landlords

and tenants have been negotiating rent deferrals over the past few months as a temporary solution. **Another potential solution that is gaining interest in the restaurant industry is a variable rent structure. Instead of a fixed monthly rent, variable rents include a percentage of sales based on a negotiated formula. This percentage-based rent structure is allowing some restaurants to weather the pandemic.** However, restructuring a lease requires careful planning and negotiation between landlord and tenant and their respective legal counsel, to ensure that the resulting lease is mutually beneficial. [Louis Cisz, Ian O'Banion](#)

Will food and beverage companies exposure to class actions increase during COVID-19?

While food and beverage companies were the targets of an increasing number of class actions before the pandemic, there have also been a consistent number of class-action lawsuits involving food and beverage companies and COVID-19. For example, a class-action lawsuit filed in California claims that Whole Foods, Costco, Walmart, Trader Joe's, and other grocers tripled the price of their eggs since the outbreak. The plaintiffs claim to represent a class of more than 40 million Californians. The plaintiffs allege that "[b]ecause the price of eggs ha[s] risen more than 180% during the COVID-19 emergency, it is clear that some or all of the defendants have raised their prices to an extent that violates the law." Another proposed class-action lawsuit was filed in California federal court against Hometown Buffet Inc. Their employees accused the restaurant and its corporate affiliates of laying off all employees in California without proper notice during the onset of the pandemic, and that they failed to provide overtime, breaks, and sick leave. **As the COVID-19 pandemic shows little signs of ceasing, it is critical that companies consult with their counsel concerning the best ways to mitigate risk and get ahead of potential class claims.** [Daniel Schnapp](#)

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Lauren Arnold, 202-585-8210, larnold@nixonpeabody.com
- Hillary Baca, 415-984-8393, hbaca@nixonpeabody.com
- Louis Cisz, III, 415-984-8320, lcisz@nixonpeabody.com
- Christopher Desiderio, 212-940-3085, cdesiderio@nixonpeabody.com
- Brooke Furst, 617-345-1011, bfurst@nixonpeabody.com
- Gordon Lang, 202-585-8319, glang@nixonpeabody.com
- Ian O'Banion, 415-984-8313, iobanion@nixonpeabody.com
- Daniel Schnapp, 212-940-3026, dschnapp@nixonpeabody.com
- Alycia Ziarno, 202-585-8265, aziarno@nixonpeabody.com