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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 fourth-quarter edition of Nixon Peabody's Crystal Ball Newsletter, our [Food, Beverage & Agribusiness](#) (FBA) team shares insights into various industry trends, including issues caused by the devastating West Coast wildfires, the use of plastics during the pandemic, and an interesting branding movement by craft breweries. We will continue to watch closely as these issues, and others, unfold in the months ahead and as we transition into 2021.

### **A look at the impact of the wildfires on the food & beverage industry**

#### ***Wine industry real estate transactions adapt to wildfires and smoke***

The West Coast wine industry is having a challenging year. In addition to the COVID-19 pandemic that brought restrictions on gatherings—keeping many tourists away from wineries—multiple wildfires across California and Oregon damaged wineries and threatened countless others. The fires hit just as harvest was starting and many vineyards grew concerned about the potential of smoke tainted grapes. Unfortunately, dealing with fires and smoke damage may become increasingly common as climate change elevates the threat of wildfires. **As parties contemplate buying or selling wineries and vineyards in fire-prone areas, certain contract terms become increasingly crucial, including casualty provisions and crop testing for potential smoke damage.** However, with careful planning and cooperation between purchasers and sellers and their respective legal counsel, parties should still be able to reach mutually beneficial agreement terms even during these challenging times. [Ian O'Banion](#)

#### ***Lasting impacts of wildfires and smoke on commercial operations and agreements***

In addition to creating complications in real estate transactions, the damage from the wildfires on the West Coast has severely impacted the general operations and commercial transactions of wineries. As a result, numerous wineries were forced to accelerate grape-crushing to help minimize the amount of smoke damage or other grape loss. For wineries that typically sell some or all of the resulting wine to third parties, the success of these efforts is crucial. **In particular, the outcome will help determine whether a winery can satisfy the volume and quality requirements of its contracts with third parties.** This is further complicated in instances where the winery has operational needs for its own brand(s) of wines. **Wineries will be required to closely balance all of these dynamics in order to have a successful 2020 harvest year.** [Isaac Figueras](#)

### ***How should food and beverage employers in California respond to the shortage of N95 respirators during wildfires?***

Beyond protecting their employees from COVID-19, West Coast wildfires have presented additional challenges for food and beverage employers seeking to safeguard their employees. In California, 8 CCR 5141.1 requires employers to provide NIOSH-certified respirators for voluntary use when the AQI for PM 2.5 is greater than 150. However, acquiring a supply of NIOSH-certified respirators can be difficult with the supply chain already taxed by COVID-19. Cal/OSHA recently issued new temporary guidance on strategies for optimizing the supply of N95 respirators for wildfire smoke events during respirator storages. **Employers should continue their efforts to increase the supply of NIOSH-certified respirators (e.g., N95s) and should follow available guidance under Cal/OSHA.** In certain limited circumstances, employers may also provide a respirator that is not NIOSH-certified only if they meet certain criteria outlined in the guidance. [Maritza Martin, Rachel Conn](#)

### **Plastics get viral resurgence**

When the pandemic hit, companies' practices of utilizing bulk consumer products and biodegradable/compostable alternatives quickly shifted. Just as take-out orders began to rise, the U.S. Centers for Disease Control (CDC) provided interim guidelines that recommended restaurants "use disposable food service items (utensils, dishes)" and "avoid using food and beverage implements brought in by customers." Grocery stores almost simultaneously stopped allowing eco-friendly re-usable bags for fear of spreading COVID-19. Furthermore, plastic bag bans and surcharges, including California's 10-cent per bag surcharge, were put on hold. Now seven months later, governments are readjusting—reusable bags are again permitted. Some states, like New York, announced they will re-enforce the plastic bag ban on October 19. **Health experts and the U.S. Food and Drug Administration also confirmed that reusable bags are no more dangerous than single-use disposable bags, and there is no evidence of containers or packaging spreading COVID-19.** [Alison Torbitt](#)

### **What should breweries and other beverage alcohol companies keep in mind when developing new brand names inspired by current events and well-known individuals?**

Recently, breweries and ale companies have been inspired by reputable and influential individuals to generate limited edition beers. Samuel Adams re-released its "When There Were Nine" IPA as a tribute to the late Justice Ginsburg, and Old Planters Brewing Co. partnered with Loma Brewing for the production of "Swing Oil" IPA, an homage to the late Pete Frates. Despite the overwhelming effect of COVID-19, the pandemic has also provided a source of branding creativity. Breweries like Outer Range Brewing named an IPA "I Miss Loud Taprooms" and Wild Haven Beer released "Don't Stand So Close to Me" and "Fauci Spring." Others selected names based on current communication and virtual trends—such as "Zoom Casual" by Denver Beer Co., "Zoom to the Moon" by Baere Brewing and Cerebral Brewing, and "Casey, You're On Mute" by 4 Noses Brewing. **When considering these specialty sub-brands, beverage alcohol companies should consult experienced trademark counsel and conduct a comprehensive trademark clearance search to ensure significant risks of prior third-party use are cleared.** Consideration should also be given to the individuals or events that have inspired the new brand. Certain permissions are likely to be recommended before proceeding with the names. [Jennette Psihoules](#)

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