

How Should Restaurants Handle and Declare Major Food Allergens?

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Although many restaurants are not in states that require food allergens to be declared on menus, the declaration (or labeling) and handling of food allergens is a growing concern for restaurants, due to the significant risks of liability and poor public relations, if handled incorrectly. Restaurants should create careful plans to address food allergens, from ensuring that food product suppliers provide comprehensive allergen checklists to training food handlers in methods to prevent cross-contact among food products that contain major food allergens and those that do not.

According to the Centers for Disease Control and Prevention (CDC), food allergies affect an estimated 15 million people in the United States and are reportedly responsible for 30,000 emergency room visits and between 150 and 200 deaths each year.¹ As there is no cure for food allergies, the only way to prevent potentially harmful, sometimes life-threatening, reactions is to avoid the applicable allergens entirely. This has proven to be particularly difficult in the restaurant setting where the safety of food-sensitive consumers is threatened by issues like miscommunication between and among restaurant staff and customers, unexpected or hidden food allergens, and cross-contact during food preparation. Accordingly, regulatory oversight of restaurants has increased, and additional laws have emerged as tools to hold food establishments legally responsible for how they are handling allergens. To ensure customer safety and legal compliance, restaurants must be aware of the applicable laws and implement proper protocols for the treatment of food allergens.

Federal Allergen Laws

There are currently two federal statutes that relate to food allergens: the Food Allergen Labeling and Consumer Protection Act of 2004 (FALCPA) and the FDA Food Safety Modernization Act of 2011 (FSMA). FALCPA mandates the labeling of certain packaged food products and thus does not apply to restaurants, but it may be instructive as to the most important legislative safety concerns and applicable best practices.² Importantly, FALCPA identifies the eight allergens that are responsible for 90 percent of reactions to food allergens in the U.S.: milk, eggs, fish, Crustacean shellfish, tree nuts, peanuts, wheat, and soybeans. To the extent that a packaged food product contains any of these allergens, it must comply with FALCPA.

FSMA and the applicable implementing regulations set forth at 21 CFR Part 117, in relevant part, requires that the operator of a food facility have a written plan, which: (i) identifies and evaluates known and reasonably foreseeable hazards; (ii) identifies and implements preventative controls to minimize the risks; (iii) monitors the effectiveness of such controls; (iv) establishes corrective actions upon failure of preventative controls; (v) verifies plan function; and (vi) maintains records to demonstrate the plan's effectiveness.³ Allergens are included in the list of foreseeable hazards under FSMA, which means that restaurant operators must have written risk-based preventative control plans for handling allergens that comply with the above requirements.

State Food Allergy Awareness Legislation

Many state legislatures have followed the federal government's lead having enacted consumer protection statutes with food allergen provisions. Because of the dangers associated with food-sensitive consumers' inadvertent consumption of products that contain or have come in contact with a major food allergen, a number of state departments of health have promulgated rules requiring restaurant employees to be "properly trained in food safety, including food allergy awareness, as it relates to their assigned duties."⁴ In addition, recently enacted statutes in Maryland, Massachusetts, Rhode Island, Virginia, Illinois, and Michigan have set forth standards specifically designed to promote food allergy awareness in restaurants. Similar legislation has been

proposed in Arizona, Connecticut, and New Jersey.⁵ In general, these statutes require food service establishments to:

- Display an educational poster in the employee work area covering allergens and related issues;
- Display on menus, menu boards, or at the point of service, a statement similar to the following: “Before placing your order, please inform your server if a person in your party has a food allergy;” and
- Have at least one certified food protection manager who has received food allergen awareness training.

The Illinois statute additionally requires that all restaurant food handlers receive American National Standards Institute-accredited training in basic safe food handling principles within thirty days of employment and every three years thereafter.⁶ This requirement is designed to combat issues with allergen cross-contact. More states are expected to join the ranks of those described above in developing and implementing food allergy awareness legislation, but it is important to note that the absence of a state food allergy awareness statute does not equate to the absence of liability for restaurants that mishandle allergens.

The Americans with Disabilities Act as an Additional Source of Liability

Regardless of whether a given state has enacted legislation, restaurants must take the necessary steps to comply with best practices for handling food allergens, as there are numerous other potential sources of liability, including common law tort doctrines (primarily failure to warn) and, more recently, the Americans with Disabilities Act (ADA). While common law theories of liability have been largely unsuccessful due to the difficulty of proving causation in this context, recent amendments have broadened the scope of the ADA, such that a severe food allergy may be recognized as a legally cognizable disability.⁷ The Department of Justice (DOJ) confirmed the ADA’s expansion to food allergens in 2012, as it brought an action against Lesley University in Cambridge, Massachusetts, for its failure to offer gluten-free options within its mandatory meal plan. The DOJ ultimately entered into a settlement agreement with the University, which purported “to ensure that students with celiac disease and other food allergies would be able to fully and equally enjoy the university’s food services in compliance with the Americans with Disabilities Act (ADA).”⁸

The DOJ distinguished restaurants from universities like Lesley, as restaurants do not have mandatory meal plans and, accordingly, are not *required* to serve gluten-free or allergen-free options. Instead, according to the DOJ, restaurants may have to take “some reasonable steps to accommodate individuals with disabilities where it does not result in a fundamental alteration of that restaurant’s operations.”⁹ This may include (i) “answering questions from diners about menu item ingredients, where the ingredients are known,” or (ii) “omitting or substituting certain ingredients upon request if the restaurant normally does this for other customers.”¹⁰

Recommended Practices

Each of the laws addressed herein can be instructive for restaurants in developing and implementing internal policies for handling food allergens in a safe, compliant manner. However, efforts must go beyond compliance with an allergy awareness statute. While certainly a step in the right direction, the effectiveness of internal awareness-centric protocols is limited to managing risks associated with *intentional* allergen presence. A truly comprehensive system for handling and declaring allergens must also account for the *unintentional* presence of allergens, which can only be done by addressing and safeguarding against potential hazards at each key phase of food production, starting with the raw ingredients and ending with the final product placed in front of guests. While there is no one-size-fits-all formula, the following general considerations are critical in developing and implementing an effective plan:¹¹

Supply Chain Management/Sourcing: The in-house operations of a restaurant will only be successful in handling food allergens if there are systems in place to ensure adequate control over what comes into the facility from suppliers. ACPs should establish policies for reviewing and documenting how allergens are treated at every step along the food supply chain. Restaurant operators must solicit information about the ingredients used by suppliers, as well as documentation describing suppliers’ production practices as they relate to preventing cross-utilization of equipment or other cross-contamination. For example, many restaurants obtain an allergen checklist from each supplier, which requires the supplier to list possible allergens and respond to specific questions about how allergens are handled during food production.

The Menu: Maintaining updated, allergen-friendly menus is a challenge for many restaurants, as menus are subject to frequent changes. However, to the extent possible, menus should inform consumers when food allergens are ingredients in menu items. The following chart provides examples of simple menu changes that may better alert consumers as to the presence of food allergens: ¹²

Instead of:	Describe As:
Apple Cake	Apple-Walnut Cake
Blue Cheese Dressing	Blue Cheese & Walnut Dressing
Chicken Stir-Fry	Chicken Cashew Stir-Fry
Asian Noodles	Asian Noodles with Peanuts
Pasta with Pesto	Pasta with Pesto (Contains Pine Nuts)

Additionally, many food-sensitive patrons explore a restaurant’s website/online menu before a dining experience in search of any information about food allergens. Thus, the website may be an effective first step in opening the lines of communication between patrons and restaurant staff. At the very least, menus should include a phrase similar to those required under the allergy-awareness statutes described above (e.g., “Before placing your order, please inform your server if a person in your party has a food allergy.”).

Internal Operations: After tackling supply chain management and menu issues, restaurants should confront its internal operations and develop clear, consistent protocols for both front-of-house and back-of-house allergen treatment. Typically, the primary elements of a restaurant’s internal allergen control plan relate to (i) staff training, (ii) preventing cross-contact, and (iii) communication with guests. The National Restaurant Association (NRA) suggests the following action steps for restaurants generally seeking to establish or improve allergen treatment practices:

- 1. Train staff on proper handling of food allergens** - ServSafe has partnered with Food Allergy Research & Education (FARE) in creating a comprehensive online course designed to provide restaurant employees and managers with critical information needed to accommodate guests with food allergies and respond to emergencies.¹³
- 2. Involve a certified manager to establish and maintain open dialogue with customers.**
- 3. Create a back-of-house system for allergen-specific equipment** - Consider using color-coded, allergen-specific plateware, prepware, and other equipment.
- 4. Make ingredient lists available to guests.**
- 5. Sub-out widely used allergens.**
- 6. Never Guess** - Ensure that employees understand that they should never guess when asked a food allergy question they cannot answer and should instead consult a manager.
- 7. Invest in allergy-specific technology** - Some restaurants have implemented technology that involves an “allergy key,” which front-of-house employees press to alert the back-of-house and a manager whenever a customer has a food allergy.

Conclusion

As the prevalence of food allergies continues to grow, restaurants will be held to a perpetually increasing standard of care for handling and declaring food allergens. Restaurant operators should seriously consider the advantages of utilizing an online training course as a means to stay up to date with best practices and eliminate the guess work in allergen control and prevention. Regardless of the chosen methods, restaurants must take an integrative approach to developing and implementing allergen policies that confronts and mitigates risks at all stages in the food supply chain.

¹ Laura G. Brown, et al., [*Restaurant Food Allergy Practices – Six Selected Sites, United States 2014*](#), CENTERS FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WEEKLY REPORT.

² 21 U.S.C.A. § 301 Note (2004).

³ 21 U.S.C. § 350g.

⁴ See, e.g., MODEL FOOD CODE § 2-103.11(M) (2013).

⁵ See, e.g., 105 C.M.R. 590.009(H)(1).

⁶ [IL Gen. Assembly, Pub. L. No. 100-036](#).

⁷ 42 U.S.C.A. § 12102 (West).

⁸ Press Release, U.S. Department of Justice, [*Justice Department and Lesley University Sign Agreement to Ensure Meal Plan is Inclusive of Students with Celiac Disease and Food Allergies*](#) (Dec. 20, 2012).

⁹ [*Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*](#), U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY RIGHTS SECTION (Jan. 23, 2013).

¹⁰ *Id.*

¹¹ The considerations described in this section synthesize recommendations from various industry experts, including the National Restaurant Association, Food Safety Magazine, and the USDA Food Safety and Inspection Service (FSIS). See [*Allergy-Friendly Practices to Protect Guests and Increase Your Business*](#), NATIONAL RESTAURANT ASSOCIATION (Last visited Feb. 13, 2018); [*Putting Together an Effective Allergen Control Plan*](#), FOOD SAFETY MAGAZINE (Oct./Nov. 2017); [*Allergens and Ingredients of Public Health Concern: Identification, Prevention and Control, and Declaration through Labeling*](#), FSIS COMPLIANCE GUIDELINES (Nov. 2015).

¹² [*Welcoming Guests with Food Allergies*](#), THE FOOD ALLERGY AND ANAPHYLAXIS NETWORK (FAAN) (2010).

¹³ [*ServSafe Allergens Training*](#)