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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 first quarter edition of Nixon Peabody's Crystal Ball Newsletter, our [Food, Beverage & Agribusiness](#) (FBA) lawyers address important legal issues involving immigration, products containing cannabidiol (CBD), and the spike in the overall accessibility to nutritionists, among other topics, and how these developments will continue to impact food and beverage companies. We will continue to watch closely as these issues, and others, unfold in the months ahead as we transition into 2020.

Worksite audits and criminal arrests: Is your company prepared?

Employers face significant fines and potential criminal and civil liability as the U.S. Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) has significantly increased activity involving employment compliance and verification. **ICE Homeland Security Investigations (HSI), the investigative arm of DHS/ICE, announced record-high numbers of criminal worksite arrests and civil fines in FY19.** It is crucial employers understand law enforcement policies and track DHS trends to anticipate challenges, address needs, and ensure compliance, especially in high-priority target industries like agriculture, manufacturing, hospitality, and food and beverage. Recent raids illustrate that companies not only lose profits and incur costly legal expenses, but they can also result in negative press attention, which is harmful to a company's brand. Employers should review their internal I-9 and E-Verify practices and hiring policies to ensure they are prepared for an audit and take immediate steps to mitigate existing areas of risk. [Rachel Winkler](#) and [John Sandweg](#)

FDA clarifies stance on CBD food & beverage products

The Food and Drug Administration (FDA) recently clarified its stance on food and beverage products containing cannabidiol (CBD), signaling a more aggressive position on the matter. In addition to publishing a revised Consumer Update broadly detailing the agency's safety concerns about CBD-infused products—namely, that FDA is not aware of any basis to conclude that CBD is generally recognized as safe (GRAS) for use in human or animal food—the FDA issued 15 warning letters to manufacturers for selling products containing CBD in ways that violate the Food, Drug and Cosmetic Act. The warning letters cover a wide range of products, including oils, drops, dietary supplements, conventional food, vape pens, and topical products. While FDA warning letters are not akin to a final agency determination, the plaintiffs' bar has incorporated (and will continue to incorporate) the FDA's public position as the basis for a new wave of class action lawsuits against CBD product manufacturers. Indeed, recently filed lawsuits allege that companies' CBD products

violate state consumer protection laws because the products are “illegal to sell” according to the FDA’s recent announcement. Companies with CBD products on the market, therefore, should closely monitor the evolving regulatory process and recognize the risks associated with class action litigation in this space. [Tracey Scarpello](#)

Bring home the bacon—Nutritionists as health care market disruptors

Nutritionists can provide cost-effective, high-quality care to patients. As health care clinics pop up in places like pharmacies, local shopping centers, and employer-sponsored health clinics, access to embedded nutritionists is becoming increasingly simple. While these clinics started with flu shots and certain primary care services, they are expanding to include yoga classes and nutrition services. Similarly, virtual nutritionist services through apps, tablets, and wearable devices can provide customized diet and food advice. Creating successful nutritionist programs is no longer limited to traditional health care professionals, especially as technology companies, employers, and nutritionists set up these virtual programs. As these innovative nutritional services and lifestyle medicine increase in popularity, they have the potential to disrupt not only the health care market but also could influence the food and beverage products consumers purchase. [Sarah Swank](#)

How is BIPA affecting the food & beverage industry?

The Illinois Biometric Privacy Act (BIPA) triggers automatic statutory damages for employers’ collection of an employee’s biometric information (e.g., fingerprint, retina, or facial scans) without complying with the various safeguards dictated by the statute. Most frequently, this collection arises with a fingerprint time clock or in conjunction with security or access to a facility. **Clients in the food and beverage industry often have a high volume workforce with significant turnover and seasonal fluctuations.** Such employers, regardless of size, have higher exposure to potential liability through an employee class action lawsuit alleging BIPA violations. Defending against these actions is expensive and potential liability adds up quickly (e.g., \$1,000 per negligent violation, \$5,000 per intentional or reckless violation, and reimbursement of attorneys’ fees to class counsel). Even temporary employees are eligible class members. Employers with operations in Illinois should address BIPA compliance immediately. The key features of compliance are notice of collection and written consent from each individual whose biometric information will be collected. [Laura Bacon](#)

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