



Legal NewsBITE: Food and Drink Quarterly

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Latest COVID-19 Restrictions: Advice for UK Employers

On 24 September, new regulations were introduced, bringing into effect the announcement of the government two days previously, about further national restrictions to seek to restrict the infection rate of the coronavirus disease 2019 (COVID-19) pandemic. In addition to further measures for hospitality businesses (including requiring closure by 10 p.m. daily and reducing the 30-person limit for weddings and other events to 15), the requirement to wear face coverings in England was expanded to cover more places. There is also a requirement for staff working in hospitality and retail to wear facemasks. We issued [guidance](#) for employers on the latest changes earlier this month.

Plastic Straws, Cotton Buds and Drink Stirrers: Ban Imposed

In September 2020, the Department for Environment, Food and Rural Affairs introduced new legislation that will ban the distribution and sale of plastic drinking straws, plastic-stemmed cotton buds and plastic drink stirrers in England from 1 October 2020. However, there are some exemptions with regard to the sale and distribution of these items, confirmed in [government guidance](#). These include catering establishments such as restaurants, pubs and canteens, where plastic straws can be supplied if they are kept out of view/reach of customers and only given on request (they must not be offered to customers, either verbally, or in writing).

Breach of the prohibitions is an offence, but a civil sanctions regime has also been introduced to enable regulators to impose a range of sanctions, such as variable monetary penalties, compliance notices, stop notices and enforcement undertakings. There are transitional provisions, which allow for the supply of existing stock for six months from the date of prohibition (1 October) without committing an offence.

Drinks producers should be aware that one of the offences under the regime is the supply (or offer of supply) of a drink product with an attached plastic straw to an end user. Therefore, it will not be possible for retailers and catering establishments to sell juice cartons, or similar, with attached straws. However, this provision will not come into effect until the slightly later date of July 2021. There have been recent reports of producers trialling paper straws attached to cartons in readiness for this change.

New Job Support Scheme (Part of the Winter Economy Plan): Administrative and Audit Considerations

The Chancellor's [announcement](#) and [scheme details](#) were published on 24 September. We have produced a [detailed summary](#) by way of guidance setting out details on eligibility criteria and how it will work in practice. The scheme will likely be of interest to many in the food and drink sector, as the furlough scheme comes to an end and with hospitality coming back under increasing pressure (with the consequent impact on those supplying hospitality businesses). From an administrative and audit perspective, it will be important to remember that:

- As with the furlough scheme, any revised short-time working hours arrangements will need to be agreed with employees
- The agreement will need to be in writing, as you will be obliged to provide a copy of it to HMRC upon request
- Any claims made to the scheme must be calculated correctly in accordance with the scheme rules
- To avoid over-claiming under the scheme, actual worked hours will need to be carefully monitored and recorded to ensure that they are in accordance with the agreed short-time working arrangements and consistent with claims made under the rules

The nature of the scheme will mean that calculations made under it will often be more complex than under the furlough scheme, particularly given the amount of flexibility employers will have to vary working patterns each week. A clear paper trail, careful recording of hours and attention to detail in the calculations will, therefore, be key.

The B Corp Movement

There is a growing phenomenon of businesses seeking to incorporate environmental, social and governance (ESG) factors into investment processes and decision-making as part of a "green recovery" from the effects of the COVID-19 pandemic. Food and drink businesses are no exception, and there has been a significant rise in businesses in the sector looking to certify as "B Corporations" or "B Corps".

Certified B Corps are those that meet high standards of verified social and economic performance, public transparency and legal accountability, and "balance profit with purpose". Earlier this year, there were [reports](#) in the trade press of the movement, although there is now a growing discussion, with more recent [reports](#) highlighting the impact that B Corps can make.

Impact of Brexit on Food and Drink Labelling

Nicola Smith presented a [webinar](#) for the Food and Drink Federation (FDF) in August on the impact of Brexit on food and drink labelling. Many businesses are now determining the changes that will be needed on labels of products placed on the market after 1 January 2021. A key concern for many is the name and address that will be required on labels of UK goods exported to the EU (as EU legislation requires that this is the name or business name of the food business operator under whose name the product is sold, or if that party is not established in the EU, the importer into the EU market, which must be given). Similar considerations will apply for products originating in the EU that will be sold or supplied in the UK. Where label details must change, this may pose questions around corporate structures (for example the establishment of an EU subsidiary) and/or on commercial arrangements (for example where a third party agrees to be named as the importer).

Food business operators with organic-labelled products or ingredients are particularly concerned as to the impact of Brexit. Organic standards in the UK will remain similar to the EU's, and UK control bodies (and producers) hope that UK organic standards will be recognised as "equivalent" after the end of transition (in which case a UK organic logo will be allowed in the EU), but this is not yet certain. There is growing pressure to agree equivalence of organic standards and earlier this month, the FDF [reported](#) that it has written to the UK's chief negotiators to express serious concern in relation to this issue.

Financial Conduct Authority (FCA) Publishes Approach to Listing of "Cannabis-related" Businesses

The FCA [statement](#) is reportedly ahead of a guidance consultation and clarifies that proceeds from recreational cannabis companies may constitute "criminal property" (even where a company is based in a jurisdiction that has legalised cannabis use) and, therefore, the FCA will not admit the securities of such a company to the Official List. The position with "oil" companies is more complex, with the current statement saying, "for medicinal cannabis and cannabis oil companies with overseas activities, the company will need to satisfy us that their activities would be legal if carried out in the UK." For overseas cannabis oil companies, these may be admitted to the list, but only provided that the FCA is satisfied that proceeds of crime provisions do not apply and that they otherwise satisfy the criteria for listing.

As reported in a previous [newsBITE](#), exploration of the use of CBD oil in food and drink products has been growing, but the Food Standards Agency (FSA) earlier this year announced a deadline of March 2021, after which, only CBD food products that have submitted a valid novel food application will be allowed to remain on the market. The published approach of the FCA perhaps provides further indication that UK enforcement authorities are unlikely to take a tolerant approach of CBD products without the proper approval/application having been made.

Is Lab-grown Food the Future?

There have been [reports](#) this month of Singapore's food tech sector developing lab-grown milk and "fake" shrimp dumplings. Of course, in the EU, food produced using new technologies and production processes will be classified as novel food, which must be authorised before being placed on the market. The approval process will assess whether the foods are safe, properly labelled so as not to mislead, and are not worse for you nutritionally (where the new food is intended to replace another food in your diet). It will be interesting to see whether such applications become more common, as technology seeks to combat vulnerabilities in the food supply chain for a growing population.

Proceeds of Crime: Application to Offences Under Food Laws

In August, the Court of Appeal quashed a proceeds of crime confiscation order as disproportionate (we reported on this case in our [August edition](#) of frESH law horizons). The case was an example of how the correct application of the Proceeds of Crime Act 2002 (POCA) is often unclear and how the amounts involved can be significant (and, indeed, dwarf any fine imposed for the offence itself). Against this background, on 17 September, the Law Commission published a consultation paper, "[Confiscation under Part 2 of the Proceeds of Crime Act 2002](#)". Suggested reforms include improving the enforcement of confiscation orders and ensuring that when confiscation orders are made, they realistically reflect what a defendant gained from crime.

POCA allows prosecutors to deprive a business of the financial benefit that it gained as a result of criminal conduct and confiscation orders can be sought following conviction for any other offence. While we have not to date seen enforcement authorities regularly pursuing POCA for breaches of food safety or labelling laws (and while, in practice, the circumstances in which a confiscation order would be appropriate for food offences), it is possible that POCA will be relevant to some cases. Given the recent High Court decision confirming that offering food for sale after expiry of the use-by date is an offence (see our [June edition](#) of newsBITE) and the current review of this area, this is something to watch out for, as there has been a growing focus on the nature of "food crime" over recent years, particularly following the establishment of the [National Food Crime Unit](#) in 2015. With the recognition that parties can benefit from such crimes, food business operators should be aware that such action could follow a conviction.

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