



Legal NewsBITE: Food and Drink Quarterly

September 2017

Our Food and Drink Sector Focus

Our food and drink sector team have a busy quarter coming up, with a number of speaking engagements and events planned this side of Christmas. In September, Nicola Smith attended the Westminster Forum seminar on the future of food labelling post-Brexit; and Hannah Kendrick and Carlton Daniel are attending the FDF Awards Dinner. In October, Hannah Kendrick and Nicola Smith are running a breakfast workshop for FDF members on getting a business for sale; and Nicola, Anita Lloyd and Caroline Almond are running a masterclass on the Circular Economy at the FDF Sustainability Convention. Nicola Smith is also presenting to delegates from the China Food and Drug Agency (China FDA) on the UK and EU Legal System for Food and Drink (the delegates will be in the UK as part of a Programme run by Manchester University). In November, Rob Elvin is presenting a FDF webinar on managing a global product recall, Aline Doussin is chairing a Brexit discussion at [Food Matters Live](#) and we are hosting a Regional Dinner in Birmingham.

If you would like further details on any of these events, please do get in touch.

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Post-Brexit EEA immigration policy: MAC Call for Evidence

The prospect of Brexit-related labour shortages is a particular concern for the food and drink sector. The sector has a strong reliance on EU labour at all skill levels, particularly in those roles where, for a variety of reasons, there is difficulty in recruiting at a local level. The Migration Advisory Committee (MAC) has recently launched a call for evidence on the issue of post-Brexit EEA immigration policy and our Business Immigration team will be responding formally, with the views of clients and contacts. We are also hosting two events in our [Birmingham](#) and [London](#) offices where clients and contacts can provide feedback to the MAC directly. We summarised government proposals on post-Brexit immigration in an article published by [Food Matters Live](#). However, the proposals give no indication of the government's post-Brexit immigration policy for EU nationals. Adapting the current Points Based System applied to skilled non-EU nationals is one possibility, but this will only provide sufficient access to middle and lower skilled EU workers if a currently unused part of the system (known as "Tier 3") is implemented. This is likely to be prohibitively cumbersome and expensive for most businesses to navigate. Of greater benefit would be a separate lighter-touch registration scheme for EU nationals with a focus on those sectors (including food and drink) at greatest risk from labour shortages. Clarity on future access to the EU workforce including a "sector deal" is needed as a matter of urgency. We will report on any developments in future editions of NewsBITE.

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Court Fines: £60k for Failure of Hygiene Controls; and £1 Million for Fall from Height

The FSA has [reported](#) details of a substantial fine being imposed by Birmingham magistrates' court. The charges related to a company's failure to ensure that meat was kept at the correct temperature on their premises and the court fined the company £60,000, ordered it to pay the FSA's costs of £8,043.74 plus an additional £120 victim surcharge, making a total of £68,163.74. This significant fine reflects the upward trend of fine levels since sentencing guidelines came into force in February 2016, with the guidelines including food safety and hygiene offences for the first time. The sentencing guidelines also cover health and safety and this month, a bakery has been fined £1 million following the death of a self-employed electrical contractor who died following a fall from height (he fell from a step ladder). The HSE investigation found that the bakery had failed to properly plan this workplace activity (work at height regulations require all work at height is properly planned and appropriate access is provided).

Under the guidelines, turnover is taken into account, as well as culpability and risk. In light of such penalties for hygiene and health and safety offences, the approach of food and drink businesses to risk management is increasingly important: being able to establish a "due diligence" defence in the event of an issue will be a significant advantage (where the defence is made out, the company will not be sentenced).

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Unintentional Breaches of National Living Wage in the Food Sector

We have recently received numerous queries from food and drink sector clients on alleged breaches of the National Living Wage Regulations (the "Regulations"). HMRC inspectors can attend sites with little or no notice and ask to speak with employees. The queries may start with something specific, such as requesting uniform policy, then can spread much wider. As some queries are quite obscure, businesses can be caught out with unintentional breaches. If policies require any of the following there *may* be a breach of the Regulations: workers to provide any item of uniform (e.g. black trousers); salary sacrifice arrangements; annualised hours contracts; deduction of deposit for uniform or equipment; and early starts/late departures (e.g. to startup/shutdown machinery, for team briefings, compulsory bag searches, or clocking in/out).

We are supporting a number of clients with policy reviews to identify potential breaches; and with queries from HMRC. If your policies include any of the above, early analysis of the impact on wage levels could be beneficial.

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Groceries Code: Dealing with Suppliers – New Case Study

The Groceries Code Adjudicator (GCA) has released a [case study](#) relating to Asda Stores Limited (Asda), following a number of complaints by Asda's suppliers for its application of the Groceries Supply Chain Code of Practice (the "Code"). The GCA clarified that demanding prospective financial contributions and cost-price reductions from suppliers at short notice and using aggressive tactics were culturally against the Code. This serves as an important reminder of the need for food and drink retailers to deal with their suppliers fairly, even when attempting to implement cost saving measures. Otherwise, they risk reputational damage and costly fines.

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