



LEGISLATION, REGULATIONS & STANDARDS

FDA Draft Guidance Seeks to Minimize Allergen Cross-Contact, Undeclared Allergens

The U.S. Food and Drug Administration (FDA) has issued updated [draft guidance](#) to help food manufacturers comply with requirements for current good manufacturing practices and preventive controls for human food. A chapter on food allergens provides a guide to ensuring protection of food from major food allergen cross-contact and ensuring that the finished food is properly labeled with respect to major food allergens.

In a [news release](#), FDA noted that with the passage of the Food Allergy Safety, Treatment, Education, and Research (FASTER) Act, the agency and families with sesame-allergic members hoped those with sesame allergies could feel more confident in their food choices; however, some manufacturers have intentionally added sesame and labeled products to indicate its presence rather than take steps to minimize or prevent cross contact. FDA said that while doing so helps manufacturers comply with the law, it limits options for those allergic to sesame, “a result the FDA does not support.”

“The FDA is looking for opportunities that could help consumers who are allergic to sesame and other major food allergens find foods that are safe for them to consume,” FDA Commissioner Robert Califf said in a statement. “We encourage manufacturers to follow the guidelines in the draft guidance updates released today to prevent allergen cross-contact and ensure proper labeling.”

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AGs Urge Congress to Reject EATS Act

The attorneys general of 15 states have urged Congressional leaders to oppose the Ending Agricultural Trade Suppression (EATS) Act, arguing that the proposed law would be “a severe incursion into the rights of States and local governments to regulate agricultural products sold within their jurisdictions.” The EATS Act would prevent states from regulating agricultural practices that affect producers in other states. “As an example, in Michigan alone, the EATS Act threatens laws that govern subjects as varied as cage-free eggs, flammability standards for cigarettes, restrictions on the sale of foods that are past their due date, and restrictions on the production and sale of foods that are not prepared in a commercial kitchen,” the attorneys general assert.

“Constraining the States’ traditional regulatory role would harm the States’ residents, who have come to rely on these important protections in a number of areas, among which are the regulation of food and agricultural products,” the letter states. “Indeed, States are in a unique position to regulate in a way that is responsive to local circumstances and local needs. Yet the EATS Act would jeopardize numerous such laws and regulations across all States and potentially erect a barrier to new state laws that would address local concerns.”

Italian Scientists Call for Regulations, Limits on Energy Drink Consumption

Italian researchers are calling for stricter limits on the consumption of energy drinks and the establishment of regulations governing their consumption, citing their potential impact on human health, in a study published in *Nutrients*. The scientists undertook an extensive literature review, including a large number of research studies on the potentially fatal health effects of both acute and chronic use of energy drinks, reporting their findings in an article titled "The Dark Side of Energy Drinks: A Comprehensive Review of Their Impact on the Human Body."

The authors note that in recent years, young adults and athletes have increased their consumption of energy drinks, while health officials have raised concerns about their safety. The review found nine cases of cardiac arrest requiring intensive cardiopulmonary resuscitation and three documented deaths resulting from energy drink abuse, which the authors said may suggest a plausible under-reporting of deaths associated with energy drinks. The researchers recommend that the daily intake of energy drinks should be lower than the safety limits established by the European and American regulatory authorities.



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ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.



“Given that the concentration of caffeine in these drinks is between 50 and 150 mg per can (250 mL), we recommend no more than one can at a time and two cans per day to remain within an acceptable safety limit,” they said. The authors also said the sale and consumption of energy drinks in minors should be regulated because their long-term effects are not yet known and that increased public education on the potential risks associated with misuse of energy drinks is warranted to help consumers make informed decisions.



FDA to Hold Public Meeting on Reducing Added Sugars

The U.S. Food and Drug Administration (FDA) will hold a virtual public meeting and listening session on strategies to reduce the consumption of added sugars in the United States. The meeting will include a discussion of strategies implemented in other countries and an examination of efforts by federal agencies, industry and communities to reduce added-sugars consumption. The meeting will be held November 6, 2023.

LITIGATION

Court Dismisses Burger-Size Advertising Claims Against McDonald’s, Wendy’s

A federal court in New York has thrown out a proposed class action claiming that McDonald’s and Wendy’s advertisements overstate the toppings and hamburger patty size compared to the products that customers receive. *Chimienti v. Wendy’s International, LLC*, No. 22-2880 (E.D.N.Y., filed September 30, 2023). The plaintiff brought claims under state consumer protection laws including New York’s General Business Law, as well as breach of contract and unjust enrichment. In his complaint, the plaintiff alleged that McDonald’s and Wendy’s publish advertising with pictures of their menu items that look more appealing than how the menu items turn out when served to customers.

The court held that the plaintiff’s New York claims cannot stand because he failed to allege that he saw the specific advertisements that he asserts were misleading. The court said that even if the plaintiff had seen the advertisements he cited in his complaint, he also failed to adequately allege that a reasonable customer would likely be misled by them. The court said that the defendants’ act of advertising their products in a visually appealing way falls under a form of non-actionable puffery.

The defendants' depiction of the size of their products relate to an objective fact, however, and is not puffery, the court said. The court said the plaintiff's claims still fail because he does not allege that the defendants created a misleading impression about the size of their meals by using more meat in their advertisements than what they serve in their stores, but rather alleges that the defendants create this impression by using an identical amount of uncooked meat in their ads. "This concession that both the advertisements and the products served in stores contain the same amount of meat is fatal to Plaintiff's claims," the court held.

The court also rejected the plaintiff's breach of contract claim, finding that the advertisements themselves did not constitute offers to enter into a contract with the plaintiff, and the unjust enrichment claim, ruling that the plaintiff failed to allege the defendants engaged in any unfair practices. The court denied the plaintiff's request for leave to amend his complaint.

Court Dismisses Feta Font Allegations

A New York federal court has granted a motion to dismiss a lawsuit alleging Lactalis American Group Inc. misleads consumers into believing its feta products are produced in Greece by featuring an "ancient-Greek font" on the packaging, finding the allegations not reasonable. *Gallager v. Lactalis Am. Grp. Inc.*, No. 22-0614 (W.D.N.Y., entered September 21, 2023). Other challenged packaging representations included the statement "Europe's Leading Cheese Expert" and an image of a "gold olive branch wreath."

"[N]o reasonable consumer would view the statement, image, and font on the Feta Crumbles packaging and automatically conclude that the product was made in Greece when the packaging states that the product is distributed in 'Buffalo, NY' and references 'French heritage'—but nowhere states that the product was made in Greece," the court held, granting Lactalis' motion to dismiss.

Juice Makers' 'No Preservatives' Claims Misleading, Consumers Assert

Consumers in California and New York have filed proposed class actions against PepsiCo and William Bolthouse Farms Inc., alleging their juice product packaging misleads consumers to believe their products are preservative-free despite containing ascorbic acid. *Bell v. PepsiCo Inc.*, No. 23-8600 (S.D.N.Y., filed September 29, 2023); *Jackson v. William Bolthouse Farms Inc.*, No. 23-4853 (N.D. Cal., filed September 21, 2023).

Included in the suits are a wide range of Bolthouse juice products and PepsiCo's Ceres "100 Juice Blend" products. The plaintiffs allege that while the products at issue are labeled as having "no preservatives" or "no artificial preservatives," both manufacturers' products contain ascorbic acid, which the plaintiffs assert is an artificial preservative. "Ascorbic acid functions as an antioxidant that helps prevent microbial growth and oxidation in food products, thereby preserving their color and freshness," the plaintiffs in the Bolthouse suit asserted in their complaint. "Although Defendant identifies ascorbic acid as a source of vitamin C, Defendant adds it for its preservative qualities as well."

"By labeling its Products as being made with a '100% Juice Blend' with 'No Preservatives,' Defendant deceptively attempts to distinguish itself from other fruit juices that do contain additional synthetic preservatives," the plaintiff in the suit involving PepsiCo said in his complaint. "Defendant's deceptive marketing campaign helped place the Products on the front rows of the shelves of grocery stores throughout the country and online marketplaces. As a result, Defendant has enjoyed a virtual monopoly, and commanded a substantial premium, over other '100% juice' beverages with added ingredients."

The *Bolthouse* plaintiffs assert claims under California's Unfair Competition Law, New York's General Business Law, unjust enrichment and breach of express warranty. The plaintiff in *PepsiCo* has asserted violations of state consumer protection laws, including California's False Advertising Law, Consumer Legal Remedies Act and Unfair Competition Law. The plaintiffs in both cases are seeking class certification, declaratory judgment, damages, prejudgment interest, restitution, damages, reasonable attorney's fees, expenses and costs.

Plaintiff Alleges PRIME Energy Drinks Mislead Consumers

A California woman has filed a proposed class action against the maker of PRIME Energy beverages, alleging the company intentionally markets to young people who should not be consuming the products. *T.K. v. Prime Hydration LLC*, No. 23-0476 (W.D. Ky., filed September 12, 2023).

The plaintiff brought the suit in her capacity as legal guardian of a 10-year-old who consumed PRIME Energy on multiple occasions and allegedly suffered sudden mood swings and sleep issues as a result. The defendants include social media influencer Logan Paul and his former boxing rival Olajide Olayinka Williams Olatunji, who co-founded the energy drink company.

The plaintiff alleges the defendants' marketing leads young, unsuspecting consumers to believe the product is a healthy hydration drink, highlighting that it is vegan, contains electrolytes and has zero sugar. "However, despite Defendants' consistent and pervasive marketing representations, the inordinately high caffeine content raises 'a serious health concern for the kids it so feverishly targets,'" she said in the complaint. The plaintiff alleges violations of California's Consumers Legal Remedies Act and False Advertising Law and Kentucky's Consumer Protection Act, as well as common law fraud, unjust enrichment and public nuisance. She seeks class certification, injunctive relief and restitution, damages, and costs and attorney's fees.

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