



LEGISLATION, REGULATIONS & STANDARDS

Proposed Ban on SSB Taxes in Pennsylvania Forthcoming

A state senator in Pennsylvania has reportedly announced plans to introduce a bill that would bar any municipality in the state from levying a tax on sugar-sweetened beverages (SSBs). If enacted, the bill could invalidate the 1.5-cent-per-ounce tax that took effect in Philadelphia in January 2017 after a failed challenge in court. Although Rep. Mark Mustio (R-Allegheny) represents part of the Pittsburgh area, he has been critical of the effect of the tax on Philadelphia retailers, claiming that grocery stores have experienced as much as a 20 percent drop in revenues as consumers crossed over to suburban counties to buy SSBs and other items.

Labor Department Proposes New Tip-Sharing Rules

The Wage and Hour Division of the U.S. Department of Labor (DOL) has announced a proposal to allow some employers to use tip sharing among tipped and non-tipped workers, rescinding portions of the tip regulations in the Fair Labor Standards Act. The proposal would apply only to employers who pay the full minimum wage to employees and do not take a tip credit. DOL

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Shook offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

For additional information about Shook's capabilities, please contact



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will accept public comment on the proposed changes until January 4, 2018.

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LITIGATION

Five Guys Faces Allegations of Gender-Based Pay Discrimination

A former employee has filed a discrimination lawsuit alleging Five Guys Operations paid female employees less than similarly situated male employees, echoing a similar lawsuit she filed in 2016. *Finefrock v. Five Guys Operations, LLC*, No. 17-2214 (M.D. Pa., filed December 1, 2017). The plaintiff asserts that after she and two other female general managers confronted executives about the alleged pay disparity, she was placed on a performance improvement plan and later fired. Alleging violations of Title VII and the Equal Pay Act provisions of the Fair Labor Standards Act, the plaintiffs seek class certification, damages, back and front pay and attorney's fees.

Sonic Data Breach Cases Transferred to Northern District of Ohio

The U.S. Judicial Panel on Multidistrict Litigation (JPML) has transferred five class actions related to a data breach at Sonic restaurants to the Northern District of Ohio, where the assigned court is presiding over a potential tag-along case. *In re Sonic Corp. Customer Data Sec. Breach Litig.*, MDL No. 2807 (entered December 6, 2017). Sonic confirmed on September 27, 2017, that point-of-sale systems had been breached at its drive-in restaurants.

Utz Settles “Natural” Class Action for \$1.25 Million

Utz Quality Foods Inc. has agreed to pay \$1.25 million to settle a putative class action alleging that some products were labeled “natural” despite containing genetically modified organisms

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.





(GMOs) and synthetic ingredients. *DiFrancesco v. Utz Quality Foods, Inc.*, 14-14744 (D. Mass., settlement agreement filed December 6, 2017). The complaint alleged the snacks contained GMO grains and synthetic ingredients such as caramel color, malic acid and citric acid. Class members will receive \$2 for each qualifying purchase up to a total of \$20 and residual funds will be paid to nonprofit group Consumers Union. Utz has also agreed to stop using the terms “natural” and “all natural” on labeling and advertising of the products.

Plaintiff Seeks Class Action Over Bumble Bee Smoked Salmon Labeling

A plaintiff has filed a lawsuit alleging Bumble Bee Foods’ Medium Red Smoked Salmon Fillet in Oil is neither medium red wild coho salmon nor smoked. *Rodriguez v. Bumble Bee Foods Inc.*, No. 17-2447 (S.D. Cal., filed December 6, 2017). The complaint asserts that the term “medium red” is commonly used to describe wild coho salmon, which is often fished in Alaska and the Pacific Northwest, and that the product label shows an image of a salmon “jumping from water with snow-capped mountains and evergreens in background, which is evocative of Alaska.” The salmon used in Bumble Bee’s product, the plaintiff argues, is “low-quality” farm-raised Chilean coho salmon dyed red to resemble wild-caught fish. The complaint alleges Bumble Bee discloses that the company’s oyster and smoked trout products are farm-raised but omits the farm-raised disclosure on the salmon product.

In addition, the complaint alleges the salmon is not smoked but rather features an added artificial smoke flavoring. Claiming violations of California’s consumer-protection statutes and breach of warranties, the plaintiff seeks class certification, injunctive relief, corrective advertising, restitution, damages, disgorgement and attorney’s fees.

Federal Court Dismisses “Natural” Labeling Suit Against Dannon

A New York federal court has dismissed a false labeling suit against Dannon Co., finding “no legal support for the idea that a cow that eats [genetically modified organism (GMO)] feed or is

subjected to hormones or various animal husbandry practices produces ‘unnatural’ products.” *Podpeskar v. Dannon Co. Inc.*, No. 16-8478 (S.D.N.Y., entered December 3, 2017). The proposed class action alleged that Dannon falsely labeled 12 varieties of yogurt products as “natural” despite being produced with milk from cows raised on GMO feed. The court noted that the U.S. Food and Drug Administration is reviewing regulatory standards for the use of “natural,” but federal law does not require the products of animals fed GMOs must be labeled as containing GMOs. The plaintiff’s arguments were conclusory and “based on her own feelings,” the court noted, and the complaint did not allege that any ingredient used in the product is unnatural.

Plaintiff Alleges Whole Foods “Calculated” Overcharges on Snack Bars

A consumer has filed a putative class action alleging Whole Foods Market Group Inc. charged him \$1.29 for snack bars despite advertising them as \$1.00 each. *Alston v. Whole Foods Mkt. Grp. Inc.*, No. 17-2580 (D.D.C., removed to federal court December 4, 2017). The plaintiff alleges that he purchased snack bars over several visits to a Whole Foods store in Washington, D.C., but did not notice until later that he had been overcharged. The complaint asserts that Whole Foods “calculated that most consumers would not notice the 29 cents overcharge, would not bother to say anything after they noticed the overcharge or that they would simply refund the overcharge if a customer requested a refund.” Claiming violations of the District of Columbia Consumer Protection Procedures Act and fraud, the plaintiff seeks class certification, damages, a \$25,000 incentive award and attorney’s fees.

MEDIA COVERAGE

Report Explores Possible Causes for Rise in Saturated Fats

Responding to pressure from health groups, the government and consumer demand, food companies have been reducing levels of

sugar and salt in their foods, the *Washington Post* reports, but levels of saturated fats in the updated recipes for these reduced-salt or -sugar foods have surged. The *Post* cites a November 2017 report from the U.S. Department of Agriculture (USDA) that purportedly found a significant rise in saturated fats in four of the five food categories examined—cereals, yogurts, snacks and frozen/refrigerated meals showed increases, although candy did not—while the same categories largely showed decreases in salt and sugar.

Food scientists who formulate products with reduced sugar and salt told the *Post* that decreasing one nutrient often results in increases for others to account for the weight and volume lost, especially when less of the replacement ingredient is required, such as the use of stevia to replace sugar. The author of the USDA report speculated that the rise in saturated fats may be attributable to efforts to reduce or remove *trans* fats but noted that further modeling would be necessary.

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