

The 10 Biggest Regulatory Potholes for Food Service Franchises

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Dateline 2013: The foodservice industry's leading news source, Nation's Restaurant News, is currently conducting a survey asking readers to choose among 8 regulatory issues for the one they think will have the biggest impact on food service businesses in the next 2 years: menu labeling; soda/ingredient bands; health care reform; tax reform; immigration; mandatory paid time off; minimum wage; or environmental issues. We've added two more regulatory potholes to the list: food safety and ADA. Here are the **10 biggest regulatory potholes for food services franchises today** supplemented by footnotes with sources for further reading.

(1) Health care reform¹

- Starting in 2014, the federal Affordable Health care Act requires employers with 50 or more full-time or full-time equivalent ("FTE") workers to make available "affordable" health insurance with minimum benefits, or else face a penalty of \$2,000 per worker after the first 30 workers.
 - FTE: "Full-time equivalent" means employees averaging 30 or more hours per week.
 - "Common control" provision may cause employers to meet the "50 FTE" threshold due to combining FTEs from two or more locations/establishments under common ownership (i.e. affiliated employers = single employer).
 - ◆ *Impact:* 5 or fewer people owning at least 80% of each affiliate satisfies the "common control" definition.²
- Penalties³
 - Penalties apply if (i) the employer does not offer coverage; and (ii) at least one FTE receives a premium tax credit or cost sharing subsidy in a health care exchange (penalty is \$2,000 annually times the number of FTEs minus 30; penalty increases each year).
 - Penalties apply if (i) the employer-offered insurance does not cover 60% of health care expenses for a typical population (FTE's out-of-pocket is more than 40%); and (ii) an FTE buys coverage in a health care exchange and receives a premium tax credit (penalty is \$3,000 annually for each FTE receiving a tax credit, up to a maximum of \$2,000 times the number of FTEs minus 30; penalty increases each year).
 - Penalties apply if (i) FTEs have to pay more than 9.5% of their family income for employer coverage; and (ii) FTEs buy coverage on a health care exchange and receive a premium tax credit (same penalty as prior bullet).
- Small business tax credits may be available to small business owners meeting 3 criteria: (i) fewer than 25 FTEs; (ii) average annual W2 wages of FTEs is less than \$50,000; and (iii) employer contributes at least 50% of the cost of single (not family) health care coverage per worker.⁴
- W-2 changes: employers filing more than 250 W-2s must report total cost of group health coverage and identify portion paid by the employer and the portion paid by the employee.⁵
- Although the mandate is set to take effect in 2014, the Labor Department said employers will not have to comply until regulations have been issued further explaining the rule.⁶

(2) Federal Tax Reform⁷

- 15 year depreciation schedule for leasehold improvements is set to expire at the end of 2013. Proposed legislation would make the 15 year depreciation schedule permanent, reducing food service businesses' tax liability considerably

¹ Rodriguez, Kelly, *The Time Is Now: Restaurateurs Must Plan a Strategy to Comply with the Mandates of the New Affordable Care Act*, Food and Drink (March 22, 2013).

² Mandelbaum, Robb, *Is Dividing a Company the Way to Beat the Affordable Care Act?*, nytimes.com: You're the Boss (July 20, 2011).

³ *Employer Responsibility Under the Affordable Care Act*, The Henry J. Kaiser Family Foundation.

⁴ *Small Business Health Care Tax Credit for Small Employers*, IRS.gov (Sept. 26, 2012).

⁵ *Employer-Provided Health Coverage Informational Reporting Requirements: Questions and Answers*, IRS.gov

⁶ Frumkin, Paul, *Health Care Among Top Restaurant Lobbying Efforts* (April 19, 2013).

⁷ *Kudos to Congress for Taking on Tax Reform*, National Restaurant Association (April 16, 2013).

as compared to the 39 year depreciation schedule that would otherwise take effect in 2014.

- Work Opportunity Tax Credit: tax credits for employers who hire veterans and other target group workers ends in 2013. President Obama's 2014 budget proposes making this tax credit permanent to encourage veteran hiring.⁸
- FICA Tax Tip Credit Reimbursement: restaurant industry is lobbying to retain reimbursement for restaurant employers' portion of FICA taxes on reported tip income above minimum wage. Would encourage accurate tip reporting.
- Charitable food inventory donations deduction: restaurant industry is lobbying to change temporary deduction to permanent deduction for charitable donations of food inventory to help alleviate hunger.⁹
- State tax nexus: There is still no federal solution to individual states asserting tax liability on out-of-state franchisors based on royalties and other fees received from in-state franchisee.¹⁰

(3) Menu labeling: Calories and Nutrition Content¹¹

- State, county, and city regulations regarding menu labeling:
 - No federal law yet (see below).
 - State-wide menu labeling laws: California (calories on menus and other nutritional information in brochures), Maine (calorie information), Massachusetts (calorie information), Oregon (calories on menus and other nutritional information in brochures).
 - ◆ *Important:* check each state as list is constantly changing. Focus is not only on calories, but nutritional content.¹²
 - County and other local laws: *Examples:* King County, WA (nutritional information on menus; calories on other displays); Multnomah County, OR (calories on menus and nutrient values on menus or as a supplement); Ulster County, NY and Westchester County NY (calories on menus); Suffolk County, NY (regulations pending).
 - ◆ *Important:* Again check local governments.
- Federal: The FDA is currently writing regulations to implement a new national menu-labeling standard:
 - Will require restaurants to post caloric information on menus / menu boards.
 - Will require restaurants to provide additional nutritional information upon request.
 - Will not apply to approximately 75% of US restaurants (would only apply to chains with 20 or more locations).
 - Exempts chain grocery and convenience stores.

(4) Soda and ingredient bans

- Local laws: NYC banned sodas over 16 ounces; law recently struck down by NY Supreme Court as arbitrary.¹³
- Trans-fat bans (laws that completely ban or severely limit the use of hydrogenated vegetable oils and spreads in restaurants): New York City; Baltimore; Boston; Philadelphia; King County (Seattle); California. Proposals to ban trans-fat have been introduced on some local level in nearly every state.¹⁴

⁸ Jameson, Dawn, *Obama Administration Proposes Permanent Extension of WOTC Program*, (April 17, 2013).

⁹ *America Works Here: America's Restaurants*, National Restaurant Association.

¹⁰ Tellijohn, Andrew, *Taxing Situation*, Franchise Times.

¹¹ Hodge, James G.; White, Lexi C., *Supplementing National Menu Labeling*, American Journal of Public Health (December 2012); *MenuCalc Info Center: Menu-Labeling Laws*, Menucalc.com.

¹² *Trans Fat and Menu Labeling Legislation*, National Conference of State Legislatures (January 2013).

¹³ *New York Soda Ban Reversal Embodies FDA's Ongoing Struggle with Ingredient and Calorie Regulation in Restaurants and Grocery Stores – Agency Describes Process as a "Thorny Issue"*, Bulldog Reporter's Daily Dog (March 13, 2013).

¹⁴ *Trans Fat and Menu Labeling Legislation*, National Conference of State Legislatures (January 2013).

(5) Immigration¹⁵

- Form I-9 Audit Center, created in 2011, results in criminal prosecutions of employers and steep fines for knowingly employing illegal immigrants (took effect in 2012).
- Estimates indicate up to 30% of restaurant workers may lack credentials to work legally.
- Impact of employing illegal workers:
 - Civil penalties of \$110 to \$1,100 per violation for each undocumented worker.
 - Knowing violations lead to fines between \$376 and \$16,000 for each worker, possible claims of document fraud or unlawful discrimination, and possible criminal penalties.
 - Crackdown on restaurants:
 - ◆ *Example:* Pegasus Restaurant received a fine of \$131,554 (ultimately reduced to \$47,427); a Subway franchisee received a fine of \$111,078 (ultimately reduced to \$27,000).¹⁶

(6) Minimum wage / pay disputes

- Federal Fair Labor Standards Act: allows employees' tips to satisfy 50% of the minimum wage if (i) employer provides certain tip credit information to employees, and (ii) tipped employees retain all tips except those in a tipping pool for employees who customarily receive tips through important customer service functions.¹⁷
 - Issues arise in determining which employees can be tipped: employees must "customarily and regularly" receive tips, and engage in "important customer service functions".
 - Employers cannot share in tips. As a result, employees with substantial managerial authority should not receive tips, as they may be deemed "employers."
 - Mandatory tip pooling arrangements are prohibited in some states.
- Federal Fair Minimum Wage Act of 2013 proposes a nearly 40% increase in the federal minimum wage (increasing to \$10.10 in three years), and would increase the minimum cash wage for tipped employees to \$7.07 (currently, the minimum cash wage for tipped employees is \$2.13 an hour).
- Wide variation in state and local laws regulating minimum wages, tips, exempt employees, mandatory benefits, et al.

(7) Mandatory paid time off

- Paid sick leave passed in Philadelphia, Portland, New York, San Francisco, Washington, D.C., Seattle, and Connecticut¹⁸.
- Anti-mandatory legislation underfoot seeking to prevent local governments from passing paid sick leave laws.¹⁹

(8) Food safety and sanitation

- State and county regulations: Some jurisdictions require workers to wear disposable gloves when prepping and plating food. *Examples:* New York, Washington, Oregon (pending)²⁰.
- Federal Food Safety Modernization Act²¹ – *Annually*, about 48 million people get sick, 128,000 are hospitalized, and

¹⁵ Baker, Helen N., *What You Need to Know About I-9 Compliance*, Restaurant Hospitality (November 7, 2012).

¹⁶ Chichoni, Hector A., *OCAHO Decisions Imposing Lower Fines Reflects a Trend*, Duane Morris Institute (April 12, 2013).

¹⁷ Hrubos, Natalie, *How to Avoid Tip Related Traps*, Restaurant Hospitality (July 12, 2012).

¹⁸ McGregor, Jena, *The Washington Post*, *Should Paid Sick Leave Be Mandated for All Employees?*, Bangor Daily (April 14, 2013).

¹⁹ Bouffard, Karen, *GOP Seeks to Stop Paid Sick Leave Mandates*, The Detroit News (March 30, 2013).

²⁰ Krummert, Bob, *Food Safety: Look Ma, No Bare Hands*, Restaurant Hospitality (Penton) (July 5, 2012).

3,000 die from foodborne diseases.²²

- Proposed Produce Safety Rule: many provisions apply to restaurants and food retailers; burden remains on restaurants to ensure the safety of their produce.
- Imported Foods/Ingredients: extends responsibility up and down the supply chain; places burden on restaurants to ensure products/ingredients comply with FSMA regulations.
 - ◆ *Example:* a restaurant using local produce is responsible for knowing what food safety plan and procedures are used by local growers.
- New FDA enforcement authority
- Restaurants must implement programs to certify a food protection manager and adopt written food safety programs, operating procedures, and tracking of suppliers' compliance.
- Documentation is key to avoid violations and fines from FDA inspectors.²³

(9) Environmental regulations

- Plastic bag bans: numerous cities and counties have banned plastic bags. *Examples:*
 - Hawaii: bans are in effect in Maui, Kauai, Molokai, Hawaii, and Lanai²⁴.
 - California: More than 24 jurisdictions have banned plastic bags,²⁵ including Santa Cruz²⁶, Oakland, Santa Monica, Palo Alto, Long Beach, San Jose, San Francisco.
 - Others: Portland, Oregon; Homer, Alaska.
- Polystyrene bans – regulations still on a local level
 - New York City: proposal to ban polystyrene foam packaging (could cost suppliers \$100 million/year²⁷).
 - Seattle: banned polystyrene food containers in 2010; take-out food containers must be recyclable or compostable.
 - Others: Novato, CA's city council endorsed a ban²⁸.

(10) Americans with Disabilities Act (ADA)²⁹

- Goal of equal access to public accommodations undermined by frivolous lawsuits or lawsuits over minor violations. "Drive by" lawsuits are on the rise (i.e. lawsuits by non-patrons looking for violations).
- 2012 Legislation to amend ADA to give businesses a 120-day cure period to fix violations before an ADA lawsuit may be filed was unsuccessful.

²¹ Public Law 111-353, 124 Stat. 3885 (January 4, 2011); Sklare, Steven, *For Now, Food Produce Is Up to You*, Restaurant Hospitality (March 2013).

²² *Food*, FDA.gov (March 19, 2013).

²³ Sklare, Steven, *Not Documented? It Didn't Happen*, Restaurant Hospitality, (September 1, 2012).

²⁴ O'Connell, Maureen, *Big Island Mayor Signs Bill to Ban Plastic Bags at Store*, Restaurant Checkouts, Hawaii Magazine (January 19, 2012).

²⁵ *Palo Alto to Ban Plastic Bags at Stores, Restaurants*, Palo Alto Online.

²⁶ Hoppin, Jason, *Santa Cruz County Bans Plastic Bags, Imposes Fee on Paper Bags*, Santa Cruz Sentinel.

²⁷ *Potential New York City Polystyrene Foam Ban Could Cost \$100M a Year*, National Restaurant Association (March 26, 2013).

²⁸ *Novato Moves Toward Ban of Polystyrene Restaurant Containers*, marinjin.com.

²⁹ *America Works Here: America's Restaurants*, National Restaurant Association.