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LEGAL newsletter

Stay Informed

The one constant in the club industry is change. Utilize this edition of *Legal Newsletter* to stay informed of the new trend of paid leave legislation, how to handle allergies in your food and beverage outlets, how to avoid wage and hour disputes and much more.

❖ What are the Consequences of the Trend of Paid Leave Legislation for Clubs?

By Cheoma Julien

Most people are familiar with the federal Family Medical Leave Act which allows certain employees to take up to 12 weeks of unpaid leave and receive continued health coverage for the birth or adoption of a child, the care of an immediate family member who is ill or for an illness affecting the employee herself. This law applies to employers with 50 or more employees, which is the case for many professional clubs. Some states have recently taken this act a step further by implementing paid leave programs for these employees who may not otherwise take such leave. This leave may have serious consequences for employers and so all club managers should be aware of this trend.

Paid Leave: The New Trend

Three states have implemented paid leave programs for workers. New Jersey recently passed its paid family leave bill (which will commence on July 1, 2009); California and Washington already have such a law in place. Under New Jersey's law, employers with 50 or more employees must give their employees six weeks of paid leave for the care of a sick child, parent, spouse or for the birth of a newborn or adoption of a child. The employers will not bear the financial burden of funding this leave; rather, each employee will pay about $33 per year through a self-insurance program for the right to take this leave. Under this law, employees will receive two-thirds of their salary, up to $524 a week, during this leave.

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3. Employers should train the relevant personnel on the elements of the paid leave program.
4. Employers should establish a system to keep track of the amount of paid leave employees take.
5. Human resources or personnel departments should establish an efficient and fair reinstatement program.

For other employers who may face such paid leave programs in the future, preparation is key as well.

1. Assess your staffing needs and plan for the loss of several employees who could take paid leave at the same time.
2. Evaluate the current system for monitoring unpaid leave for employees to make sure it is efficient and could be used for a paid leave program.
3. Maintain vacation and leave records for employees for at least a year or more so that at the time of implementation of the law, eligible employees and prior unpaid or sick leave time for that year are easily established.

These tips will help clubs to prepare for the inevitable reality of paid leave and avoid potential liability and loss of productivity.

Cheoma Julien is an associate at Drinker Biddle & Reath LLP in Florham Park, NJ, where she focuses on labor and employment and commercial litigation. She can be reached at Cheoma.Julien@dbr.com or at (973) 549-7375. This information provided is general and educational and not legal advice. For additional information, please visit www.hospitalitylawyer.com.

❖ Shock Treatment: Avoiding Liability for Allergy Claims in Food and Beverage Operations

By David T. Denney, Esq.

Food allergies are different from food preferences. The former is a medical condition that should be attended to with utmost care, while the latter is more of a customer service issue and can be accommodated (or not) according to the club's policies. This article will look at common allergies and ways in which a smart food and beverage operator can avoid allergy liability.

Studies estimate that 2 million people in the United States suffer from food allergies, with approximately 30,000 receiving life-saving emergency room treatment each year. Unfortunately, the most common food allergies are to items essential in running a successful food and beverage operation. The "big eight" are cow's milk, eggs, peanuts, wheat, soy, fish, shellfish and tree nuts. While there are varying degrees of allergy and allergic reactions, a severe reaction can result in anaphylaxis, which can result in coma or even death if not immediately treated.

Though many severely allergic diners elect to take meals at home, a growing number of these consumers are eating out at full-service and fast-casual restaurants, as well as private clubs (both as members and guests). As such, these diners are becoming increasingly sophisticated in both their ordering and their expectations from foodservice establishments.

Though it seems like common sense, it should quickly be said that a restaurant will have no liability for causing an allergic reaction when it has not been informed of the diner's allergy. Servers and chefs are not mind readers, and if a diner fails to inform you of her peanut allergy but suffers a reaction to French fries cooked in peanut oil, the restaurant should not be at fault. A caveat here, though, is that if the diner asks about a specific ingredient (e.g. "Does the

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pesto contain nuts?") and your employee answers incorrectly, the restaurant will be at risk for liability. Further, if a diner informs the server of an allergy and the information is not relayed to the kitchen, the restaurant will most likely have a big problem if that diner suffers an allergic reaction as a result.

When a diner informs your staff of an allergy, you have two options: (1) do not serve her; or (2) take adequate precautions and serve her a safe meal. If you opt for the second choice (or answer a question about a specific ingredient, like nuts), you are giving the customer an express warranty that the meal will not injure her. This warranty is just like the warranty you would get with any other product – and is fully enforceable in court. In fact, most lawsuits involving allergic reactions in restaurants are for "breach of warranty" and "negligence." In some states, if a plaintiff can establish that you "knowingly" breached a warranty, the foodservice establishment could be liable for treble (3x) damages.

How, then, does a food and beverage operation shield itself from liability when serving an allergic diner? After learning the "Big Eight," you must identify the most likely causes of allergic reaction. Aside from actually serving a dish containing an allergen, the most likely cause is "cross-contamination." This occurs when an allergen from elsewhere in the kitchen comes into contact with the allergic diner's food. Whether from a knife that was used to chop nuts, frying oil that was used for shellfish or a cook's fingers in the salt container, cross-contamination must be eliminated when preparing food for an allergic diner.

The most practical way to ensure an allergic diner receives a safe meal is to establish a system-wide policy for dealing with allergy-related requests. First, the restaurant should identify a manager for each shift as the one person who will take the lead in managing such a situation. Wait staff, hosts, bussers, etc. must all be trained to submit such requests to this manager. This eliminates the need to train potentially high-turnover front-of-the-house employees on specific allergens used in your menu items. It also ensures uniformity of responses – and streamlines the process so only one person is interacting with the chef on these matters. It is simply bad business to put servers and hosts in situations that could expose the establishment to significant liability, when it can easily be helped.

More specifically, when an allergic diner makes an order, it should be written on a special pad (most food and beverage operations use a distinct color) and walked by the manager to the kitchen, where the special order is communicated directly to the chef (and cross-contamination can be controlled). The ticket should be tracked as the order is prepared, and when the dish leaves the kitchen it should do so alone – as the only thing carried by the waiter on that particular trip.

Even though they will not be answering specific questions about allergens, train your staff on how to spot the symptoms of an allergic reaction. Quick response in such an emergency can mean the difference between life and death.

Foodservice establishments that fail to implement cogent policies to deal with food allergies run the risk of exposing their guests to life-threatening conditions and exposing themselves to unnecessary liability. Simple safeguards, however, can assure both you and your guests that allergy concerns can be addressed safely and effectively.

David T. Denney is an attorney based in Dallas, TX, who specializes in restaurant law. He can be reached at (214) 800-2319 or at david@foodbevlaw.com. This information provided is general and educational and not legal advice. For additional information, please visit www.hospitalitylawyer.com.