

Restaurant Operators

4 legal pitfalls that could be costly for your business



A guide to regulations and legal developments which could impact on your bottom line, with practical points for your business to implement.

- Allergens regulations
- Immigrant workers
- Rising fines for food safety breaches
- Theft at work

Allergen Regulations – have you got your menu right?

Research by the Food Standards Agency and Allergy UK published in April 2016 found that 25% of people with a food allergy has suffered a reaction while eating out in a restaurant or cafe since new allergen labelling legislation came in at the end of 2014, with 19% of those resulting in a hospital visit.

Despite an overall improvement, more than two-thirds of respondents had experienced staff not understanding the severity of an allergy, and how easily a mistake can cause a reaction or found that staff lacked of knowledge of what's on the menu.

Consequences of failing to comply

Apart from causing serious consequences for the diner, getting it wrong could result in hefty fines. **The maximum financial penalty for failing to give the correct allergen information required by the Regulations is £5,000.** However, the real penalty must be in the fact that if a diner suffers an allergic reaction or even death as a result of inaccurate allergen information then the damage to the reputation of your premises and potentially group of outlets could be irrevocable.

Checklist

Refresh yourself on what you need to do:

- **Understand the ingredients you use**

The Food Information Regulations 2014 means you must declare 14 major allergens in the food you serve, ranging from common allergens such as peanuts and gluten to less well known triggers such as mustard and celery. This means that you must work with your suppliers to ascertain the contents of all ingredients used in the food served on your premises. You will also need to be careful about storage and labelling of ingredients in your kitchens.

- **Train staff**

The obligation is on you, as operator, to give the relevant information to customers. So ensure staff are fully trained in how to answer questions on any allergens contained in the food served – even if they are on temporary contracts.

They must be up to speed on allergens and your policy on how to deal with enquiries from day one. Information on food contents must be readily available to staff and they must know where to locate it. The Food Standards Agency website contains useful guidance, including a chef's recipe sheet and an allergen matrix which can be completed and printed off, so that staff can easily check the contents of dishes on the menu.

- **Provide information to customers**

The information about allergens can be supplied on the menu rather like vegetarian options; a series of symbols could be used to denote dishes containing allergens, or could be given on a chalk board.

Information does not have to be written; it can also be provided orally by staff – but if this is the case you must put up a notice informing customers that this is the case. It might be more practical to include a note to this effect on the menu or specials board rather than print the allergen content of every dish on every menu. Be careful if the information is only given orally as this must be 100% accurate. Questions of proof are always harder when no written evidence is available.

- **Drinks can have an effect too**

You should also make customers aware that allergy information is available, upon request, about the draught beer or other drinks served by the glass such as wine. Allergen information could be written on the pump clip so that staff are clear on allergen content or on the wine menu.

Immigrant workers: a checklist for staying legal

Illegally employed workers equal big fines; up to £20,000 per worker. With its high reliance on casual staff, the restaurant trade is very attractive to migrant workers.

New sanctions for 2016

Besides very significant fines, the Immigration Bill 2015-2016, due to come into force in 2016, introduces tough new sanctions for employing workers without the right to work in the UK. These include making the criminal offence easier to prove, higher fines, potential closure of the business and, crucially, loss of licence for licensed premises:

- **Custodial sentence:** In addition to a fine of up to £20,000 for each illegal worker, the custodial sentence relating to the criminal offence of employing workers without the right to work here will increase from 2 to **5 years imprisonment**. As well as the company being liable, directors' personal liability may also apply. This will cause quite some concern. As a director of a restaurant business you may be concerned that you have insufficient control over whether restaurant managers are recruiting staff illegally.

The thought that you could be prosecuted personally for consenting to employ illegal workers is a real but daunting one.

Ensure that you and the company are protected by having the right policies and procedures in place.

- **Proceeds of Crime** – Courts will be able to order an illegal worker's wages to be seized as proceeds of crime to act as a deterrent to those contemplating working illegally in the UK.
- **Closure of Business** - The Bill also introduces a power to close a business for up to 48 hours if the employer is found to be employing an illegal worker **and** if they have previously breached illegal working legislation.

- **Loss of Licence** - Immigration offences may be considered by licensing authorities when considering granting or forfeiture of a premises licence. **BEWARE:** Employing illegal workers could mean that operators are stripped of their licence.

Employers' responsibilities

- **Record Keeping** - Employers must check the validity of documents provided by prospective employees and comply with verification, retention, copying and recording requirements.
- **Statutory Excuse** - Employers will have a statutory excuse if relevant documents are checked before a potential employee starts work.

Checklist: steps you must take before employment

1. Check relevant documents

There are 2 lists of documents which can be checked. The documents on List A show that the employee has an ongoing right to work in the UK (checking documents correctly gives you a statutory excuse for the duration of the persons work with you). Documents on List B show a right to work in the UK for a limited time - to be covered by the statutory excuse you must repeat the document check **at least every 12 months**. The lists are set out in the Home Office Employer guide at www.gov.uk

2. Follow verification and copying requirements

- Accept only an original document
- Take all reasonable steps to check the validity of the document
- Be satisfied that any photographs in documents are those of the prospective employee
- Ensure you are satisfied a date of birth is consistent with the appearance of the employee

- Take reasonable steps to check that the employee is the owner of the document
- Check that entry and expiry dates have not been passed
- Check any endorsements to see that the person can do the type of work that you are offering
- Copy the document and retain the copy securely for not less than 2 years after the end of the employment

- If the document is a passport or other travel document copy following pages in a format which cannot be altered
- If the document is not a passport or other travel document you must take a copy of the whole document in a format which cannot be subsequently altered.

3. Repeat checks annually

Repeat document checks at least once a year for employees who have limited leave to enter or remain in the UK, for the statutory excuse to remain valid and keep a record of the date of such checks.

4. Check Biometric Residence Permits

Biometric residence permits are now widely used; these make document checking simpler. A BRP is the size of a credit card and holds a person's fingerprints and photograph. You can carry out an online check on the validity of a BRP and the person's right to work in the UK.

5. Employee status

The legislation applies only when you employ an illegal worker not if you engage someone who is self employed, or an agency or contract worker. However be aware that a casual worker MAY be considered an employee even where there is no written contract. Where there is any doubt, you should establish the defence for that person rather than risking conviction for employing an illegal worker.

5. Good practice

- Build checks into your recruitment procedure and implement them in a way which is not discriminatory.
- Agree a central recruitment policy, endorsed and monitored by directors, detailing the checks to be carried out and who is responsible for them.
- Review implementation of the policy regularly – providing that robust records are kept.
- Record keeping is very important in proving that you have carried out checks.

6. Avoid race discrimination issues

entitlement to work in the UK a way which is discriminatory way - so do not ask only those who appear to be foreign whether they have the right to work in the UK. Monitor your recruitment practices taking account of equality issues.

Rising fines for food safety and hygiene offences

New guidelines on how penalties for food hygiene offences are calculated now take into account the turnover of the offending organisation. The fine range extends up to £3m.

If a customer becomes ill after eating at your outlet, the ensuing bad publicity and potential legal action can be very damaging to your business. To add to this, new guidelines on how penalties for food hygiene offences are calculated have been issued. Fines now take into account the financial circumstances of the offending organisation and its turnover. The starting point for fines for a large organisation found guilty of a food safety offence, where both the harm and culpability levels are high, is £1.2m and extends up to £3m.

The Government introduced new sentencing guidelines in February 2016, to ensure that the sentence is proportionate to the offence and that there is consistency in sentencing between courts. Three steps will be considered in setting an appropriate fine for breaches:

Health and safety offences:

1. **Degree of culpability** – to establish whether culpability is *low, medium, high or very high* the court will consider factors such as measures that were in place; the extent of which failures at different levels of the organisation and whether any warning signs indicated a risk to health and safety.
2. **Level of harm** – the court will consider the risk of harm, including whether the offence exposed a number of people to the risk of harm or significant actual harm.
3. **Company turnover** – governs the starting point for a fine; large being £50m or over, medium £10m – £50m, small £2m – £10m and micro turnover less than £2m.

Food safety and food hygiene regulations

1. **Degree of culpability** – factors such as failure to put in place recognised industry standards, ignoring concerns of regulators and the length of time of breach.

2. **Level of harm** – similar issues to those outlined above and will also whether consumers were misled regarding food compliance with religious and personal beliefs.
3. **Company turnover** – companies are categorised in the same way as for health and safety offences.

Mitigating and aggravating factors

The court will consider aggravating and mitigating factors which may result in an adjustment to the fine.

Mitigating factors include whether this is the first conviction and evidence of steps taken voluntarily to remedy the problem and procedures in place. Conversely aggravating factors include poor health and safety record, breach of a court order or previous relevant convictions.

Practical steps to take

This highlights how important it is for operators to have proper procedures in place and to ensure that staff are trained so that the procedures are followed and documented. It is essential to have in place:

- robust due diligence procedures
- staff training to operate due diligence procedures effectively
- records keeping of safety checks done
- monitoring of staff to ensure that procedures are always followed in practice.

Increased fines – what it could cost

- *Breach of health and safety regulations at the highest level of harm and culpability*
- Turnover of £50m: starting range of £2.6 – £10m.
- Turnover of over £50m: courts may move outside the suggested range to achieve a proportionate sentence.
- *Food hygiene offences*
- Turnover of £50m or more: starting range: £1.2m (with the fine range being £500,000 up to £3m).

Theft at Work – a costly problem

According to the BII, theft costs retail industries, including the hospitality sector, £4.2 billion per year. Whilst a large proportion is customer theft, it is closely followed by employee theft. Having the right policies and procedures in place to detect and deal with employee theft could help you see a rise in profits.

Theft comes in many guises in the sector. Bar staff may, for example, pour themselves a drink without paying for it, take money straight from the till or ring cheap drinks into the till, serve more expensive ones and pocket the difference.

But when does theft entitle you to dismiss an employee and, if so, can you dismiss them on the spot?

When to take action

The first issue to consider if such an incident comes to light is the conduct itself. Has your employee done something relatively minor, such as helping themselves to a drink or free meal at the end of his shift? If so, in the first instance this may be dealt with by simply having a word with the employee. If the employee has done something more serious such as taking money from the till then you will need to consider disciplinary action. You will also need to consider suspending the employee with pay pending a full investigation.

Disciplinary procedure

If you are contemplating the dismissal of an employee the question of unfair dismissal will always be a concern. There are 5 statutory fair reasons for dismissal; to show that a dismissal was fair, one of these 5 reasons for dismissal must apply and you must act reasonably in all the circumstances in dismissing the employee.

Misconduct

In the case of theft at work the statutory reason will be misconduct. The starting point for any employee misconduct is your company disciplinary procedure which will give examples of what is regarded as misconduct and gross misconduct. Ensure that your disciplinary procedure specifically covers employee theft at work.

Fair procedure

As well as having a potentially fair reason to dismiss your employee you will need to ensure that you follow a fair disciplinary procedure prior to any dismissal. The first stage of your procedure is to carry out a full and thorough investigation.

Suspension

You may need to consider suspending an employee pending investigation. The period of suspension should be as short as is possible and should be kept under regular review. Suspension should be a way for you to carry out an investigation, not a form of punishment for the employee. Unless there is a clear contractual right to do so, you will not be entitled to suspend without pay.

Investigation

- You may have CCTV or witness evidence to consider; collect as much evidence as possible. If CCTV footage is collected and is to be used as evidence, assess whether the footage is conclusive; it may need to be reviewed in light of any further evidence presented.
- Meet with the employee to hear their version of events.
- If, following initial investigation, you consider the matter serious enough to move to a disciplinary, you should invite the employee to a formal disciplinary meeting, at which the employee has a right to be accompanied. The disciplinary process must be carried out fairly and objectively. Before the disciplinary meeting the evidence gathered during the investigation should be sent to the employee.

Disciplinary Meeting

The employee should be given a chance to provide their version of events and state any mitigating circumstances. If, after the investigation and hearing, you form a reasonable belief that the employee has committed a theft from the workplace confirm your decision to them, as well as the sanction being imposed, both in person and in writing, and inform the employee of their right to appeal.

Gross Misconduct

If your employee has committed an act of gross misconduct such as serious theft then you will have the right to dismiss him without notice or any payment in lieu of his notice period. However, note that gross misconduct does not mean that you can dismiss the employee on the spot. You still need to go through a fair procedure - i.e. suspend the employee, carry out an investigation and hold a disciplinary hearing prior to concluding that the conduct amounts to gross misconduct entitling you to summarily dismiss him.

Police Investigation

Even though there is no legal obligation on you as an employer to refer an employee's conduct to the police, you may feel that you have a moral duty to do so. If you do so it will be up to them to commence investigations. This does not remove the need for you to carry out your own investigations and conduct your disciplinary procedure. Indeed, you should not wait until the police have concluded their investigations before proceeding with the disciplinary procedure. Even if the police decide not to charge the employee, this should not have a bearing on your disciplinary decision.

Practical Points

To discourage employee theft and avoid loss of revenue check that your disciplinary procedure adequately covers theft. You should also make it clear to staff that theft is taken very seriously by the business and that action will be taken – which may include dismissal and involvement of police.

For more help with these or any other legal issues you are facing please contact our Drinks, Hospitality & Leisure specialists:



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