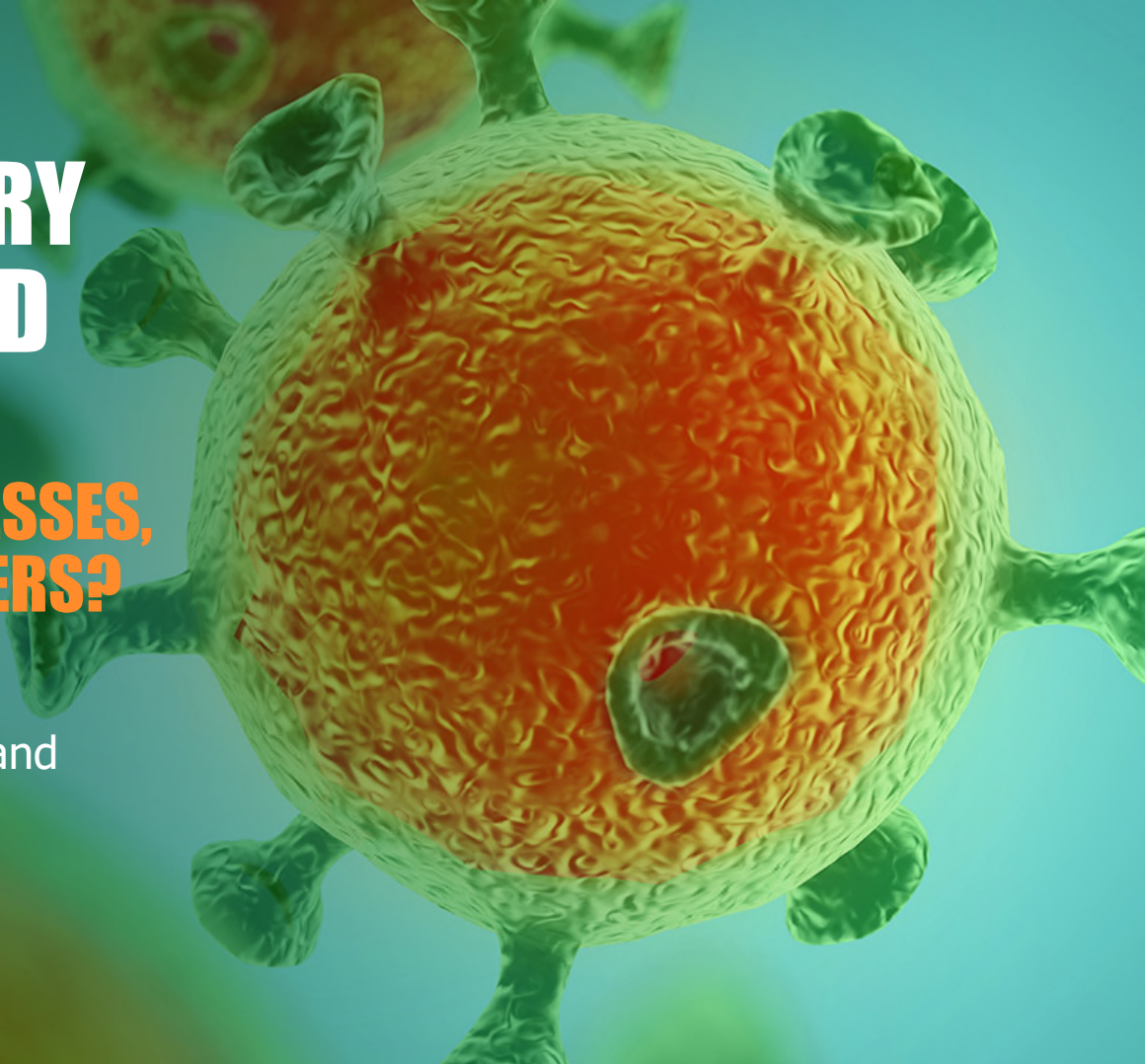


Morgan Lewis

MEAT AND POULTRY PLANTS DECLARED ESSENTIAL:

WHAT'S NEXT FOR BUSINESSES, WORKERS, AND CONSUMERS?

Bob Hibbert, John Lavelle,
Stephen Ruscus, Jonathan Snare, and
Alana Genderson
May 5, 2020



Presentation Topics

1. USDA/FSIS Inspection Realities
2. Summary of the Executive Order and DPA Implications
3. OSHA Issues
4. Defense Production and Related Liability Concerns

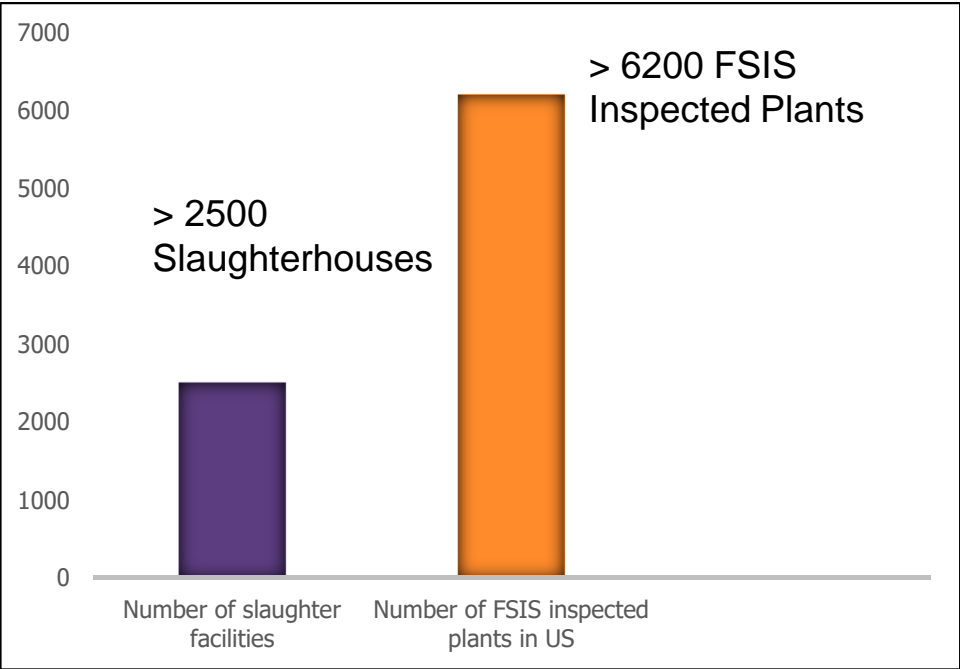
SECTION 1

USDA/FSIS INSPECTION REALITIES

USDA/FSIS Inspection Basics

- Mandatory carcass by carcass inspection at slaughter facilities
- Mandatory continuous inspection at all further processing facilities
- Uninspected product ineligible for distribution in commerce
- Regular schedules at public expense, overtime charges billed to establishment

FSIS FACILITIES ACROSS THE U.S.

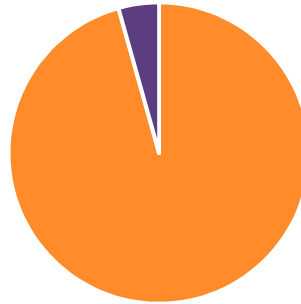


Breaking Down U.S. Meat and Poultry Production

In 2017, the U.S. produced 100 billion pounds of meat and poultry

The top 5 meat and poultry (“top 5”) producers account for 80% of meat and poultry production

FSIS Inspected Plants

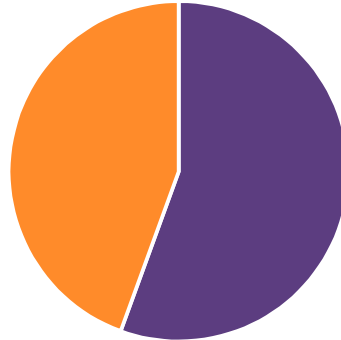


- Number of FSIS inspected plants in US
- Number of Plants Among the Top 5

Breaking Down U.S. Meat and Poultry Production (Cont.)

Of the 6461 FSIS-inspected plants, the top 5 collectively operate 282

Meat and Poultry Production



- Total Meat and Poultry Production in the U.S.
- Meat and Poultry Production of Top 5 Producers

SECTION 2

EXECUTIVE ORDER

**On Delegating Authority Under the
Defense Protection Act with Respect to
Food Supply Chain Resources During
the National Emergency Caused by the
Outbreak of COVID-19**

Executive Order and DPA Implications

- April 28, 2020: President Donald Trump signs an executive order regarding processors of beef, pork, and poultry
 - Triggers Defense Production Act (“DPA”) statutory authorities
 - Determines that
 - (1) such material is a scarce and critical material essential to the national defense, and
 - (2) the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship
 - Necessary finding for DPA control over the general distribution of any material in the civilian market

Executive Order and DPA Implications

- Source and extent of DPA authority
 - Korean War era statute
 - Gives the President the authority to prioritize or allocate items or services
 - Necessary or appropriate to promote national defense
 - Including emergency preparedness, response, and critical infrastructure protection and restoration

Executive Order and DPA Implications

- USDA authority to exercise DPA includes food resources and food resource facilities.
- **Food resources** includes all commodities and products capable of being ingested by either human beings or animals, at all stages of processing.
- **Food resource facilities** includes plants, machinery, vehicles and other facilities required for the production, processing, distribution, and storage (including cold storage) of food resources

Executive Order and DPA Implications

- Prioritization
 - Effected through issuance of “rated orders”
 - Requiring delivery of supplies or services under rated government orders prior to filling any commercial order or government order that is unrated or carries a lower rating
 - Very common
 - DOD issues 300,000 rated orders per year, most related to traditional defense supplies and services.

Executive Order and DPA Implications

- Allocation
 - Extremely rare and uncharted territory for USDA (unused for over 60 years).
 - May only be used
 - when there is insufficient supply of a material, service, or facility to satisfy national defense requirements using the priorities authority, or
 - or when the use of the priorities authority would cause a severe and prolonged disruption in availability to support normal U.S. economic activities; and
 - may not be used to ration materials or services at the retail level
 - Exercise of allocation authority must be preceded by a formal plan specified by regulation.
 - Further findings are required before allocations by USDA may be used to control the general distribution of a material in the civilian market
 - These findings have been made and incorporated into the EO

Executive Order and DPA Implications

- Three types of allocation orders:
 - Set-asides;
 - Directives; and
 - Allotments.
- “Directive” simply requires a person to take or refrain from taking certain actions.
 - USDA currently has not issued a directive-form allocation order.
- Such an order likely would direct continued operation of “food resource facilities” in accordance with certain requirements.
- A person must accept and comply with every allocation order that the person is capable of fulfilling.
- USDA regulations establish processes that must be followed in the event circumstances prevent a person from being able to accept an allocations order.

Executive Order and DPA Implications

- The DPA provides purportedly broad liability protections relating to compliance
- Willful violation of the DPA is a crime and upon conviction, a person may be punished by fine or imprisonment, or both.
 - maximum penalty is a \$10,000 fine, or 1 year in prison, or both.

Pending Issues

- Scope of Secretary's authority
 - “identify additional specific food supply chain issues”
- Practical authority of onsite inspectors
- Priority access to testing and protective equipment
- Economic impact
 - Smaller plants and overtime
- Residual authority of other actors
 - OSHA and local public health officials
- Liability Concerns

SECTION 3

THE MEATPACKING INDUSTRY AND THE WORKPLACE: OSHA ISSUES

COVID-19 Challenges for the Meatpacking Industry

- Several distinctive factors affect workers' risk of exposure to COVID-19 in the meatpacking industry, including:
 - Distance between workers during assembly line operations, in changing rooms, and in other parts of the facilities
 - Duration of contact due to long work shifts
 - Volume of employees in plant facilities
 - Common practice of sharing transportation to plant facilities
- As a result, there is worry that meatpacking and processing plants have become incubators for COVID-19
- According to the United Food and Commercial Workers International Union, 20 meatpacking and processing workers have died and at least 6,500 have been affected by COVID-19 as of late April

COVID-19 Challenges for the Meatpacking Industry

- Multiple meatpacking and processing plants have been forced to close due to concerns about the spread of COVID-19 at their facilities
- For example:
 - Smithfield Foods closed its pork processing plant in Sioux Falls, South Dakota, on April 14. News reports indicated that more than 350 plant employees had tested positive for COVID-19. According to Smithfield, the plant provides around 4% to 5% of pork produced for U.S. consumers. Other meat/poultry processing plants across the country have closed for similar reasons.

OSHA COVID-19 General Guidance

- General Duty Clause
 - OSHA always requires all employers to take reasonable steps to protect employees from recognized hazards
- OSHA issued general COVID-19-related guidance identifying steps all employers could take to reduce their workers' risk of exposure. The recommended steps include:
 - Developing an infectious disease preparedness and response plan
 - Implementing basic infection prevention measures, such as frequent hand washing, encouraging sick workers to stay at home, and maintaining regular housekeeping practices
 - Developing policies and procedures for prompt identification and isolation of sick workers
 - Implementing workplace engineering and administrative controls and providing necessary PPE

OSHA COVID-19 Enforcement Guidance

- On April 13, OSHA issued interim enforcement guidance providing OSHA Area Offices flexibility in handling COVID-19-related matters
- OSHA will prioritize COVID-19 inspections where there is an imminent danger of exposures and fatalities
- OSHA instructed its compliance officers to collect certain documents and programs during any COVID-19 onsite inspection, including:
 1. A written pandemic response plan as recommended by the CDC
 2. A hazard assessment for PPE to protect against COVID-19
 3. Employee training records related to pandemic preparedness and COVID-19 exposure prevention

OSHA COVID-19 Enforcement Guidance

- PPE
 - OSHA warns that for complaints related to lack of PPE, employers should provide documentation showing their efforts to obtain PPE
- Respiratory Protection
 - OSHA has eased requirements on use of expired respirators and respirator reuse, which aligns with the CDC's goal of making more facemasks and respirators available to the general workforce
- Injury and Illness Recordkeeping and Reporting
 - OSHA clarified employee COVID-19 cases are recordable only if they are work-related and otherwise meet the recordkeeping criteria
 - Only the healthcare, emergency response and correctional institution industries need to undertake the work-relatedness determination for recordkeeping purposes
 - Other industries will not need to make this determination unless there is clear evidence that the illness was work-related

OSHA/CDC Guidance for Meat and Poultry Processing Workers and Employers

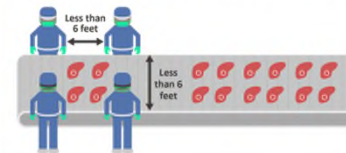
- OSHA and CDC issued joint guidance on April 26
- The guidance contains several recommendations for preventing worker infections, such as:
 - Create a COVID-19 assessment and control plan, and identify a coordinator to regulate it
 - Educate and train workers and supervisors about how they can reduce spreading COVID-19
 - Engineering controls
 - Administrative controls
 - Provision of necessary PPE
 - Frequent cleaning and sanitization of shared equipment
 - Use of cloth face coverings
 - Screening of workers

OSHA/CDC Guidance for Meat and Poultry Processing Workers and Employers – Engineering Controls

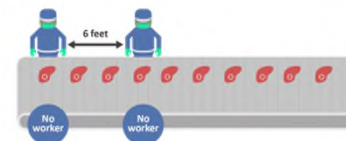
- Reconfigure workstations to provide six feet of distance between employees and implement physical barriers (such as plexiglass) between workers
- Place handwashing stations or touch-free hand sanitizers with at least 60% alcohol in multiple locations to encourage hand hygiene

How to Align Meatpacking and Meat Processing Workstations, If Feasible

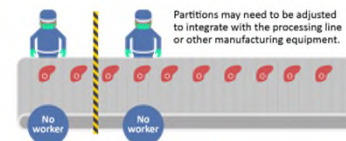
Bad: Workers are within six feet of one another, including at side-by-side or facing workstations.



Good: Workers are spaced at least six feet apart, not facing one another. Other configurations may be used to achieve similar distancing between workers.

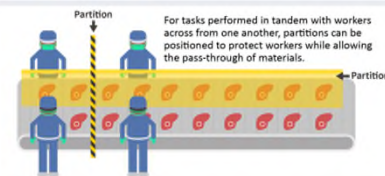


Good: Physical barriers, such as partitions, separate workers from each other.



Partitions may need to be adjusted to integrate with the processing line or other manufacturing equipment.

Good: Physical barriers, such as partitions, separate workers from each other, including where workers need to perform tasks in tandem across from one another.



OSHA/CDC Guidance for Meat and Poultry Processing Workers and Employers – Engineering Controls

- Add additional clock in/out stations, if possible, that are spaced apart, to reduce crowding in these areas
- Remove or rearrange chairs and tables, or add partitions to tables, in break rooms and other areas workers may frequent to increase worker separation
- Identify alternative areas to accommodate overflow volume such as training and conference rooms, or use outside tents for break and lunch areas
- Consult with a heating, ventilation, and air conditioning engineer to ensure adequate ventilation in work areas to help minimize workers' potential exposures.

OSHA/CDC Guidance for Meat and Poultry Processing Workers and Employers – Administrative Controls

- Stagger break times to avoid groups of workers clustering together
- Stagger arrival and departure times to avoid congestion in parking lots and areas of egress
- Implement visual cues (signs, floor markings) as a reminder to workers to maintain social distancing



OSHA/CDC Guidance for Meat and Poultry Processing Workers and Employers – Administrative Controls

- If possible, spread employees out over additional shifts
 - For example, a plant that operates one 8-hour shift per day may be able to split workers between two or three shifts throughout a 24-hour period
- Cohort workers so that groups of workers are always assigned to the same shifts with the same coworkers
 - This reduces the number of different individuals who come into close contact with each other over the course of a week
- Modify attendance policies so employees aren't penalized for taking sick leave

OSHA/CDC Guidance for Meat and Poultry Processing Workers and Employers – Administrative Controls

- Encourage single-file movement with a six-foot distance between each worker through the facility, where possible
- Designate workers to monitor and facilitate distancing on processing floor lines.
- Encourage workers to avoid carpooling to and from work, if possible
 - Where carpooling is unavoidable, it should operate in accordance with the Guidance

OSHA Guidance on Anti-retaliation

- On April 8, OSHA released a statement reminding employers that they cannot retaliate against workers who report unsafe or unhealthy working conditions due to COVID-19
 - The statement highlighted common acts of retaliation such as terminations, demotions, denials of overtime or promotion, or reductions in pay or hours
- OSHA's statement likely signals that it will use its authority to investigate complaints arising out of COVID-19-related health and safety concerns if sufficient facts support opening an investigation
- Most of these complaints will likely fall under Section 11(c) of the OSH Act
 - But OSHA also administers the anti-retaliation provisions of more than 20 other statutes

OSHA Informal Complaints

- OSHA will issue an “informal complaint” in cases where it determines that no on-site inspection is warranted
- Generally, the company must provide a response within five business days
- So long as the employer investigates and provides a response by the requested date, OSHA will not conduct an on-site inspection
- Best practices for responding to informal complaints, include:
 - Demonstrate the company’s commitment to employee safety and health and identify any proactive measures implemented by the company
 - Present findings of the company’s internal investigation of the alleged hazard
 - Explain how the company has addressed the allegations
 - Provide supporting documentation (e.g., copies of photographs, safety plans, etc.)

SECTION 4

DEFENSE PRODUCTION AND RELATED LIABILITY CONCERNS

Liability Concerns

“We have had some difficulty where they’re having a liability that’s really unfair to them.”

“We’re going to sign an executive order today, I believe, and **that will solve any liability problems.**”

“We’re working with Tyson, which is one of the big companies in that world. And we always work with the farmers. There is plenty of supply, there is plenty of, as you know, there’s plenty of supply — it’s distribution and we will probably have that today solved. It was a very unique circumstance because of liability.”

- President Trump, 4/28/20

Liability Concerns

- Executive Order contains **no** reference to liability waiver or immunity
- Possible sources:
 - The Act
 - Future USDA Order or Action

Section 707 of the Act

Liability for compliance with invalid regulations; discrimination against orders or contracts affected by priorities or allocations

No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this chapter, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

50 U.S.C.. § 4557

Section 707 of the Act

- Broad, sweeping language but:
 - Very little case law addressing or interpreting
 - No definitive, binding interpretation from U.S. Supreme Court
 - Scope of protection from liability uncertain
- Will this provision provide protection against claims by:
 - customers or vendors for breach of contract?
 - employees for infection/personal injury?
 - family members of employees for infection/personal injury?
 - Consumers for infection/personal injury?

In re Agent Orange Product Liability Litigation, 597 F.Supp. 740 (1984)

- Addressed in *dicta* potential scope of liability immunity
- Factors weighing against giving full literal effect to liability immunity provision:
 - Enacted to address possible need for contractor to break contracts with third parties or “the increased risk to employees or users posed by speeded-up production”
 - Unlikely Congress would have intended to make a major change in tort law without being explicit

Future USDA Order or Action

Executive Order – Sec. 2

- The President delegates his authority, under section 101(b) of the Act, to the Secretary of Agriculture to:
 - “Issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order.”

Morgan Lewis

CORONAVIRUS COVID-19



[VIEW OUR CORONAVIRUS COVID-19 RESOURCE PAGE >](#)

**[SUBSCRIBE TO RECEIVE OUR DAILY DIGEST OF CORONAVIRUS
COVID-19 ALERTS >](#)**

Robert Hibbert



Partner

Washington, D.C.

Phone

[+1.202.739.5611](tel:+12027395611)

robert.hibbert@morganlewis.com

Robert G. Hibbert advises clients in the food and agricultural industries on federal regulation, particularly relating to the US Department of Agriculture (USDA), as well as the US Food and Drug Administration (FDA). Clients seek his counsel on labeling, advertising, recalls, food safety compliance, animal health, and new product development issues. Bob's experience with civil litigation in federal court includes successful challenges to the scope of USDA jurisdiction and authority over major segments of the food processing industry.

John P. Lavelle, Jr.



Partner

Philadelphia

Princeton

Phone

[+1.215.963.4824](tel:+12159634824)

john.lavelle@morganlewis.com

John P. Lavelle, Jr., represents clients in crisis management and complex litigation, including product liability, commercial, class action, and election law matters, both at trial and on appeal. John has successfully defended clients in product liability disputes involving medical devices, pharmaceuticals, vaccines, nutritional supplements, consumer products, chemicals, and industrial equipment. John's class action practice includes the defense of consumer products, telecommunications, insurance, and financial services companies in US federal as well as state courts.

Stephen Ruscus



Stephen E. Ruscus represents clients in government contracts procurement, US federal drug pricing programs, and in litigation before the Boards of Contract Appeals, the US Court of Federal Claims, and the US Government Accountability Office (GAO). He also advises in protest practice before the US Small Business Administration and in matters relating to federal procurement of commercial items and services, including those under Federal Supply Schedule contracts.

Partner

Washington, D.C.

Phone

[+1.202.739.5870](tel:+12027395870)

stephen.ruscus@morganlewis.com

Jonathan Snare



Partner

Washington, D.C.

Phone

[+1.202.739.5446](tel:+12027395446)

jonathan.snare@morganlewis.com

Jonathan L. Snare brings the perspective of a former US Department of Labor (DOL) official to his practice, which focuses on labor-related legislative, regulatory, and administrative issues at local, state, and federal levels. Leader of the firm's occupational safety and health practice, Jon advises on workplace safety and health issues involving enforcement, compliance, workplace investigations, and emergency response matters, including disputes before the Occupational Safety and Health Administration (OSHA), Chemical Safety Board, Mine Safety and Health Administration (MSHA), and OSHA state plan departments.

Alana Genderson



Associate

Washington, D.C.

Phone

[+1.202.739.5271](tel:+12027395271)

alana.genderson@morganlewis.com

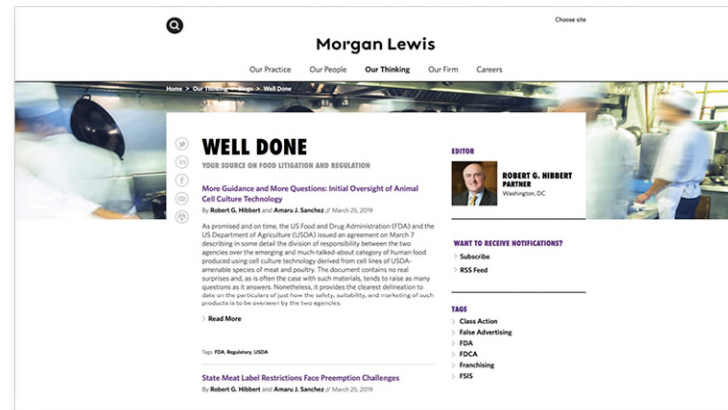
Alana Genderson advises clients on labor and employment best practices and defends clients in all phases of federal, state, and administrative employment litigation. Among other matters, Alana defends employers in whistleblower proceedings and against claims of discrimination, harassment, retaliation, and wrongful discharge. Alana is a key member of the firm's Occupational Safety and Health Administration (OSHA) practice, representing clients in matters ranging from initial investigations to trials and appeals.

Morgan Lewis

VISIT OUR BLOG

WELL DONE

YOUR SOURCE ON FOOD LITIGATION AND REGULATION



The screenshot shows a web browser displaying a blog post on the Morgan Lewis website. The page features a search bar at the top right, a navigation menu with links for 'Our Practice', 'Our People', 'Our Thinking', 'Our Firm', and 'Careers', and a breadcrumb trail: 'Home > Our Thinking > Well Done'. The main article is titled 'WELL DONE' and is categorized under 'YOUR SOURCE ON FOOD LITIGATION AND REGULATION'. The author is identified as Robert G. Hibbert, a partner in Washington, DC. The article text discusses a recent agreement between the US Food and Drug Administration (FDA) and the US Department of Agriculture (USDA) regarding the labeling of human food products containing cell culture technology. The article includes a 'Read More' link and a 'Type: FDA Regulatory, USDA' tag. On the right side of the page, there are sections for 'WANT TO RECEIVE NOTIFICATIONS?' with links for 'Subscribe' and 'RSS Feed', and a 'TAGS' section listing 'Class Action', 'False Advertising', 'FDA', 'FDCA', 'Franchising', and 'FSIS'.

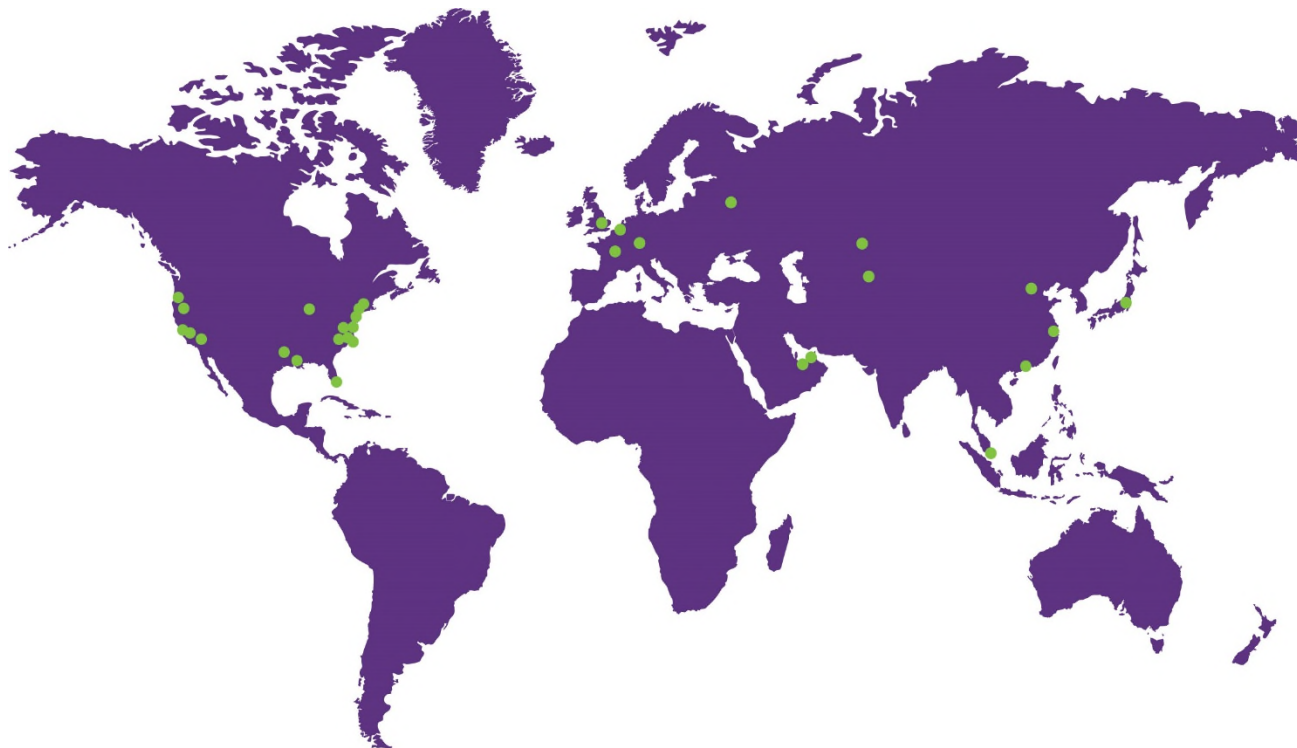
► www.morganlewis.com/blogs/welldone

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing*
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
Moscow
New York
Nur-Sultan
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Shanghai*
Silicon Valley
Singapore*
Tokyo
Washington, DC
Wilmington



Morgan Lewis

*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

THANK YOU

© 2020 Morgan, Lewis & Bockius LLP
© 2020 Morgan Lewis Stamford LLC
© 2020 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.