

A photograph of a modern restaurant interior. The space features a high ceiling with exposed wooden beams and industrial-style lighting, including several pendant lamps with wire cages. In the foreground, a round wooden table is set with black leather chairs, a glass of water, a napkin, and a small vase with flowers. In the background, a long wooden bar with black stools is visible, along with a kitchen area where a staff member is working. The overall atmosphere is warm and contemporary.

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RESTAURANT AND FOOD SERVICE ESTABLISHMENTS

**OPPORTUNITIES AND
CONSIDERATIONS
HEADING INTO 2024**

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RESTAURANTS AND FOOD SERVICE ESTABLISHMENTS: OPPORTUNITIES AND CONSIDERATIONS HEADING INTO 2024

From a new employment trend to the advantages and risks of technology to an emerging area of class action litigation to a heightened focus on sustainability, restaurants and food service establishments are facing a number of opportunities and challenges heading into 2024. This report examines some of the bigger trends anticipated to shape the industry and offers best practices for successful business operations.

KEY CONSIDERATIONS WHEN EVALUATING AN EMPLOYER'S PREDICTIVE SCHEDULING AND FAIR WORKWEEK OBLIGATIONS

Predictive scheduling is a new trend that is being implemented in some of the major metro areas across the United States for the purpose of giving employees the ability to plan their lives around a stable schedule and hours. However, staying in compliance when requirements vary across jurisdictions can be complex.

For employers, there are a host of questions to consider as a first step:

- Are you a covered employer? Who is a covered employee?
- How far in advance and how much of a schedule should be announced? What constitutes a change?
- Are there scheduling restrictions (e.g., closings)? Under what circumstances and at what rate is any predictability pay due?
- What are the recordkeeping requirements? What are the penalties and enforcement mechanisms?

Several jurisdictions have passed fair workweek laws, with New York City's being one of the strictest. It has a separate set of rules for [fast-food](#) and [retail](#) employers. For fast-food establishments, employers are required to provide a regular work schedule (RWS), whereas in other jurisdictions, a good faith estimate schedule is sufficient. The RWS must include the number of hours an employee can expect to work per week for the duration of the employee's employment; the expected days, times, and locations of those hours; and the date the regular schedule takes effect, which is different from a "weekly work schedule." Also unique to New York City's law is the "Just Cause Law," which prevents employers from terminating employees without "just cause," in all but a few circumstances.

Other fair workweek laws are in force in [Philadelphia](#) and [Chicago](#), and ordinances are in effect on the West Coast, including in [Los Angeles](#), [Berkeley](#), [San Jose](#), [Emeryville](#), [San Francisco](#), Oregon, and Seattle. Some similarities among the jurisdictions are requirements to create and post written work schedules, schedule changes (add/remove hours), and premium penalties, and to give current employees access to hours. For employers, there are strict recordkeeping requirements; for employees, safeguards are put into place around terminations, layoffs, and reduction of hours.

EMPLOYMENT LAWS COULD BE SUBJECT TO GOVERNMENT REGULATION

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With California being the birthplace of several prominent fast-food brands, it once again is leading the pack, this time in demonstrating how employment laws for the fast-food industry could be subject to government regulation. Viewed as a compromise between the restaurant industry and labor groups, the New Fast Food Labor Deal ([AB 1228](#)) was passed by the California state senate on September 14, 2023, modifying the Fast Food Accountability and Standards Recovery Act (FAST Act) and repealing and replacing [AB 257](#).

The compromise includes the following key elements: setting an initial minimum wage of \$20/hour for fast-food workers (beginning on April 1, 2024); limiting the authority of any Fast Food Council (which would set wage and employment standards for the industry); eliminating efforts to extend joint liability to franchisors for legal violations by franchisees in California; and defunding the Industrial Welfare Commission.

WIRETAPPING AND PRIVACY UPDATES FOR WEBSITES AND APPS

Within the last two years, many companies with an online presence have been faced with so-called wiretapping and other privacy-related litigation. Wiretap acts historically prohibit the interception of telephone communications without consent. However, recent claims allege “wiretapping” through three main types of internet technologies: session replay, chatbots, and tracking pixels. These lawsuits target a wide swath of companies with steep potential penalties ranging from \$1,000 to \$5,000 per violation. These claims appear to be arising in US states with laws that are potentially more adaptable to these types claims, including California, Pennsylvania, and Florida.

Separately, the Video Privacy Protection Act (VPPA), which originally targeted traditional video tape technology, is now being used to challenge videos displayed online. For a restaurant, food distributor, or related food services business, claims under the VPPA could be brought against such businesses for the alleged improper use of third-party technology for purposes of measurement, analytics, and marketing with regard to videos displayed on the company’s websites and apps.

Best Practices for Websites and App Protection Against Privacy-Related Litigation

- Revisit privacy policies and ensure that the appropriate disclosures are stated, including how consumer information is reported, tracked, and shared.
- Implement a cookie banner or pop-up notice on a website or app that informs of the tracking practices, if any, and links to a company’s privacy policy.

THE RISE OF FOOD AND BEVERAGE FALSE ADVERTISING AND CLASS ACTION LAWSUITS

False advertising lawsuits in the food and beverage industry are steadily on the rise, with more than 200 class actions filed each year from 2020 to 2022, compared to 81 filed in 2014. Plaintiffs are arguing that companies are misrepresenting their food and beverages, whether indicating ingredients that are not actually included or a disparity between promotional images and real-life sizes and items. In addition to filing within the federal and state court systems, the National Advertising Division (NAD) of the Better Business Bureau serves as an alternative dispute-resolution forum for these types of false, misleading, or unsubstantiated labeling or advertising cases.

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There are four major categories for these claims:

- **“0” or “No” Labeling Claims:** Continue to be a target for both NAD and false advertising class actions.
- **“Non-Genetically Modified Organism (GMO) Labeling”:** Remain a litigation concern for companies, especially manufacturers, which need to ensure that all raw materials included in their products are non-GMO before making such statements to prevent class actions.
- **Greenwashing Class Actions:** A rise in this type of litigation, with courts appearing to be taking greenwashing suits seriously.
 - Greenwashing occurs when companies make false or overstated claims about the environmental or social impact of their products, such as “sustainably sourced” ingredients or “recyclable” packaging.
 - California and New York, which have some of the strictest consumer protection laws in the United States, are the usual venues for greenwashing class action litigation.
 - Over the last three years, the US Securities and Exchange Commission and the Federal Trade Commission have turned their attention to greenwashing.
- **Third-Party Certifications:** Increase in challenges before the NAD regarding third-party animal welfare and environmental certifications. The NAD has concluded that consumers, who are willing to pay above-average prices for a certified product because they understand it to be above average as to the certified metric, expect truthful animal welfare and environmental certifications.

Retailers’ Liability for False Advertising on Food Product Labels

If the claim only appears on the product label, it is unlikely that a retailer would have liability for an unsubstantiated claim. However, if a retailer adopts a false claim as its own and the false claim is displayed through advertising or packing materials, then the risk for the retailer increases. The NAD has concluded that when a retailer makes a claim about a product it sells, the retailer is responsible for the truth and accuracy of that claim.

Best Practices to Avoid Food-Labeling Liability for False Advertising

- Perform due diligence on new vendors and obtain evidence of claim substantiation from vendors.
- Use contractual provisions to allocate risk, such as broad warranties and indemnities relating to claims on packing and labeling. Have the right to comment on or veto product claims, especially for private-labeled products.
- Put in place a vendor code of conduct that requires vendors to have adequate claim substantiation and to be responsible for product labels, including for any subsequent changes to labeling and marketing materials.
- If creating their own campaigns based on manufacturer advertising materials, vet campaigns with legal counsel.

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- If creating a private-label product, ensure that claims do not go beyond what can be substantiated. If relying on a manufacturer that is using a third-party material supplier, retailers should ensure that they have contractual protection on those third parties' claims.
- Ensure that vendor insurance covers the retailers adequately for recalls, rejections, and other potential liabilities.

ACHIEVING EMISSIONS REDUCTION GOALS THROUGH CARBON OFFSET TRANSACTIONS

Many companies in the restaurant and food services industry have announced commitments to decarbonize and achieve carbon neutrality. To achieve these emissions reduction goals, many have made changes to their operations and supply chains to prepare for a specified reduction percentage by 2030, 2040, and 2050 target dates. Emissions reductions can be achieved through changes in their food products, building design, equipment and lighting, and packaging. For some companies, even with these changes, it may not be feasible to achieve the commitments and goals through operational changes and they are considering or turning to carbon offsets to meet those measures.

Carbon offsets reflect a permanent reduction or removal of emissions of carbon dioxide or other greenhouse gases. Corporate entities have demonstrated interest and announced significant investments in carbon offset projects, such as forest management and conservation and carbon removal projects.

Key commercial considerations that companies should bear in mind include variability in standards applied to carbon offset projects, permanence of carbon reduction or removal, additionality of the project that generated the offset, and registration and retirement of the offset.

To date, the voluntary carbon markets have been without any regulatory oversight in US markets; however, recent actions from the Commodity Futures Trading Commission (CFTC) have signaled to companies that it is now the key regulator. Within the last four months, the CFTC announced that its [whistleblower program](#) is seeking tips on potential fraud and manipulation in the carbon markets, held the [second Voluntary Carbon Markets Convening](#), and created the [Environmental Fraud Task Force](#) within the Division of Enforcement.

Through these actions, the CFTC has dedicated additional resources and directed coordination of these resources across the agency to step up its oversight of the carbon markets.

Best Practices

Carbon offsets are expected to play an important role in the energy transition, and in companies' ability to meet their net-zero commitments. However, concerns have been raised regarding the quality, permanence, additionality, and validity of carbon offsets that are transacted in the voluntary carbon markets.

Companies should keep in mind two main components: due diligence and documentation. Companies transacting carbon offsets or investing in carbon offset projects need to ensure their carbon offsets are valid, verifiable, and unclaimed, and that the projects that generated the carbon offsets permanently removed emissions from the atmosphere. Additionally, companies should evaluate whether they have supporting documentation in hand that can be relied on to validate and verify the carbon offsets held, and their quality, additionality, permanence, and environmental benefits as represented and used.

OPTIMIZING ELECTRIC VEHICLE CHARGING TO DRIVE CUSTOMER TRAFFIC

The last decade has seen an upward trajectory of electric vehicle (EV) sales in the United States, but the concept of “range anxiety” is perceived to be one of the greatest barriers preventing fleets from going fully electric.

Defined as the fear that the EV won’t have sufficient charge to complete its duty, there are three primary problems driving the continuation of this consumer uncertainty: lack of public charging stations, reduction in reliability of charging stations; and uncertainty in most viable business cases/business models for successfully monetized charging station operations.

There are two main solutions to address range anxiety:

- Increasing consumer access to charging
- More reliable charging—for example, charging stations are fully operational and charge at the speed advertised

Consumer Access to More Charging

To alleviate the large upfront costs, there are numerous federal funding programs and tax incentives that could fund part or potentially all of the charging station installation.

For a food service establishment, there are ways to monetize charging infrastructure and explore partnership opportunities, including advertising revenue, data collection, and usage revenue sources; energy sales and demand charge management; and driving foot traffic into stores and restaurants. The latter combats the aforementioned range anxiety and enables consumers to stay longer at a locale with the comfort of having access to a charging station.

Other considerations include effective and efficient interconnections for infrastructure and minimizing siting risk exposure and promotion of reputational brand through beneficial site host agreements.

More Reliable Charging

Effective March 30, 2023, the Federal Highway Administration and the US Department of Transportation issued a [final rule](#) establishing regulations setting minimum standards and requirements for projects funded under the National Electric Vehicle Infrastructure Formula Program and projects for the construction of publicly accessible EV chargers under certain statutory authorities.

The standards and requirements apply to the installation, operation, or maintenance of EV-charging infrastructure; its interoperability; acquisition, installation, or operation of a traffic control device or on-premises signage; data and network connectivity; and information on publicly available EV-charging infrastructure locations, pricing, real-time availability, and accessibility through mapping applications.

Considerations for Food Service Establishments

As retailers consider integrating EV-charging stations into their operations, they should consider the following five key points at the outset:

- Whether to lease or license real estate to charge point operators (CPOs) for the installation and operation of EV-charging infrastructure

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- Advantages and disadvantages of granting exclusivity to a CPO or a right of first offer for additional public charging infrastructure
- Market trends on site license and lease fees and revenue sharing of charging energy sales by a CPO to further commercially successful monetization of charging infrastructure
- Metering and utility interconnection rights and responsibilities as well as ancillary permitting issues
- Indemnities and/or liquidated damages for EV-charging damage and/or change in retail site use

Striking a Balance

With rising class actions and false claims litigation and regulatory developments impacting labor laws and climate disclosures, 2023 had a significant impact on restaurateurs and food service owners. Heading into 2024, the industry will need to strike a balance between serving consumers' demands for innovation, technological enhancements, and sustainability, while responding to increasing regulatory oversight and truth in labeling and advertising, all while maintaining profitable business operations.

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