

On the Menu: Food Allergen Disclosures for Restaurants and Food Service

Federal law already requires disclosure of the nine major food allergens on packaged food products: milk, eggs, fish, seafood, peanuts, tree nuts, wheat, soy, and sesame. However, businesses that sell unpackaged food at retail—such as restaurants, convenience stores, and grocery delis—are not generally required to disclose allergens in unpackaged foods they sell, although many do so voluntarily. A recent update to the U.S. Food and Drug Administration (FDA) Food Code will usher in such disclosure obligations in the coming years. The FDA also updated its requirements to train employees of retail food establishments on allergen awareness. Planning to comply with these new requirements can be tricky. This Update provides an overview of these changes, and how they might affect food establishments across the country.

What's the FDA Food Code?

The [FDA Food Code](#) is a nonbinding set of model regulations issued by the FDA. The FDA updates the Food Code periodically, typically every four years. The agency released the 2022 Food Code on December 28, 2022.

The FDA calls the Food Code the agency's "best advice for a uniform system of provisions that address the safety and protection of food offered at retail and in food service." The model Food Code is not binding unless and until it is adopted by a state or local government as part of that jurisdiction's law governing retail food establishments. According to the FDA, as of 2021, 49 of the 50 states have adopted some version of the FDA Food Code in whole or in part, ranging from the 1995 to the 2017 version. California, the sole outlier, does not have a state agency that has adopted the FDA Food Code and maintains its own [California Retail Food Code](#).

What's Changed?

To prevent unknowing exposure to food allergens in retail food service establishments, the 2022 Food Code for the first time requires food businesses to notify consumers in writing of the presence of any of the nine major food allergens as an ingredient in *unpackaged* food served or sold to consumers. *See* FDA Food Code § 3-602.12(C).

In announcing this change, the FDA wrote that "[u]nintended food allergen exposure poses a serious risk to consumers with food allergies," and "[c]onsumers with food allergies depend on allergen information that is made available either verbally or written by the food establishment."

The agency provided further guidance that the written notification could be provided in physical or electronic form, including but not limited to: brochures, deli case or menu notifications, label statements, table tents, placards, or "other effective written means."

In addition to introducing the disclosure obligation, the FDA also provided further detail regarding the responsibility of operators to ensure that employees are properly trained in food allergy awareness, including an understanding of the nine major food allergens and symptoms of allergic reactions. *See* FDA Food Code § 2-

103.11(O). This training might include identification of major food allergens, recognition of allergic reactions and responses thereto, and principles to prevent cross-contamination. Relatedly, the Conference for Food Protection has released [industry guidance](#) suggesting that food establishments: (1) provide a list of menu items and ingredients for workers to reference frequently, (2) conduct training for front-of-house and back-of-house staff regarding food allergens and cross-contamination prevention, and (3) appoint at least one staff member during each shift to respond to food allergy questions from customers.

What Does This Mean?

These changes in the 2022 FDA Food Code do not represent new governing law, as it is up to state and/or local jurisdictions to decide whether and how to incorporate the Food Code's model regulations into their own law. This means that jurisdictions will choose for themselves whether to incorporate these changes into their local law. It is likely that state and local governments will soon begin to adopt the 2022 Food Code in whole or in part, making the disclosure of allergens in unpackaged foods mandatory in at least some parts of the country.

Food businesses with a local or regional footprint will need to keep apprised of adoption of these requirements in their areas. Businesses with a nationwide footprint will likely see piecemeal adoption of the new allergen disclosure requirement over time around the country. Businesses should look to experienced counsel to help develop an effective strategy to comply with the Food Code's new provisions and applicable local law.

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