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Foley's Quarterly Food Industry Web Conference Series


Presenters:

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Tuesday, December 14, 2010
11:30 a.m. – 12:30 p.m. CT


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Today's Presenters




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- We will take questions throughout the program via the Q & A tab at the top of your screen
- Foley will apply for CLE credit after the Web conference. If you did not supply your CLE information upon registration, please e-mail it to mroth@foley.com
- Today's program is being recorded and will be available on our Web site
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Food Safety Legislation

Nathan A. Beaver, Partner Ladonna Y. Lee, Strategic Counselor
Vice Chair,
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A Constitutional Problem


- Senate-passed bill (S. 510) contained revenue raisers in the bill to fund implementation.
- Under U.S. Constitution, all tax bills must originate in the House of Representatives. (Art.1 Sec. 7 Clause 1)
- House leaders threatened to “blue slip” bill as originally passed.

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The Proposed Fix

- House added the Senate-passed bill to the must pass Continuing Resolution for the rest of FY 2011 to remedy Constitutional problem.
- House passed the food safety bill as part of the FY 2011 Spending bill CR on Dec 8.
- But...


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The New “Old” Problem

- Objections raised by Sen. Coburn during original Senate food safety debate now get a second airing. Opposes S. 510 and the House-passed CR.
- Procedural challenges to the new House-passed bill and/or CR could delay final vote in Senate as it did the first time through.
- Calendar running out on 111th Congress.

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The Way Ahead

- Senate lame duck calendar is very crowded.
 - Tax Cut Deal
 - START Treaty
 - DREAM Act
- CR/Food Safety passage could take up significant floor time if opponents wish to delay it.
- Senate may try to replace CR with Omnibus spending bill – that change would require another House vote.

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If Not Now

- Legislation would need to be re-introduced for the 112th
- It will not be a priority for the new Members focused on smaller and less government
- Smaller government advocates will not be seeking to add new regulations

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H.R. 2749 Overview

- \$500 annual registration fee/facility
 - Capped at \$175,000 per company
 - Foods from unregistered facilities would be deemed “misbranded”
 - Defines “retail food establishment” and “farm”
- Payment for Re-inspections and Recalls
 - FDA would set fees to fully cover costs

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H.R. 2749 Overview

- HACCP-like provisions
 - Requires creation of “food safety” plan including hazard analysis before introduction of food into interstate commerce
 - Requires companies to establish a written plan and preventative actions to evaluate hazards, implement controls, develop effectiveness tests, implement corrective actions, and maintain records. (Re-analyzed at least every two years).

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H.R. 2749 Overview

- Institutes “Risk Based Inspection Schedule”
 - Cat. 1, (high risk) inspected every 6-12 months
 - Cat. 2 (low risk) inspected ever 18 months to 3 years
 - Cat. 3 (facility that only holds food) inspected every 5 years.

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H.R. 2749 Overview

- Traceability of Food Requirements
 - Permits FDA to establish regulations for a tracing system “to identify each person who grows, produces, manufactures, processes, packs, transports, hold or sells such food”.
 - Essentially a “pedigree” system.

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H.R. 2749 Overview

- Mandatory Recall Authority
 - Requires “credible evidence or information” that food presents “imminent threat of serious adverse health consequences or death to humans or animals”
 - Firm required to immediately comply with order while stipulated appear procedures were carried out

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H.R. 2749 Overview

■ Record Keeping

- Removes requirement that FDA “have a reasonable belief that an article of food is adulterated and presents a threat of serious adverse health consequences or death to humans or animals”
- No longer requires FDA to provide written request for records (thus would be subject during routine inspections)
- Records must be kept for 3 years and maintained in standardized electronic format.
- Farms exempt from providing access unless FDA determines particular commodities pose risk to health

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S. 510 Overview

- No Registration Fees (unlike House bill)
 - But requires biennial registration
- Re-inspection, Recall fees and Export Certification Fees
 - FDA to set amounts which cover costs
- Fees for participants in voluntary qualified importer program (VQIP)

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S. 510 Overview

■ Hazard Analysis

- Requires companies to establish a written plan and preventative actions to evaluate hazards, implement controls, develop effectiveness tests, implement corrective actions, and maintain records. (Re-analyzed every three years).
 - “Very small business” including less than \$500,000 for the past 3 years are exempt
 - Where sold to “qualified end users” and same state or within 275 miles.

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S. 510 Overview

■ Inspections

- Requires FDA to identify “high risk facilities” based on known safety risks: type of food, history of recalls, hazard evaluation, etc. – inspection required not less than once in five year period following enactment and not less than once every 3 years following (domestic)
 - Non-high risk = once/7 enactment and once/5 after
 - Foreign firms = at least 600 year enactment and double each year for next 5 years.
 - FDA can rely on state and local inspectors

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S. 510 Overview

- **Mandatory Recall Authority**
 - “reasonable probability that food is adulterated ...or misbranded... and use or exposure will cause serious adverse health consequences or death to humans or animals” FDA must provide an opportunity to recall. If the party does not do so “within the time and manner prescribed by FDA,” FDA may order recall.
 - If mandatory by FDA, must offer party informal hearing within 2 days of order.
 - Civil monetary penalties for non-compliance.

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S. 510 Overview

- **Tracking and Tracing**
 - Requires FDA to establish pilot programs for rapidly tracking and tracing foods in the event of outbreak.
 - Requires rulemaking to establish recordkeeping requirements for “high risk” foods.

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S. 510 Overview

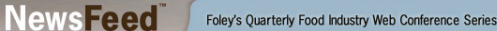
- Reportable Food Registry
 - Requires consumer-oriented information (except for raw fruits and veggies)
 - Description of food
 - Affected product id codes
 - Contact info for responsible parties

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S. 510 Overview

- Reportable Food Registry
 - FDA required to prepare 1 page summary of reportable foods for internet and groceries
 - If store sold food, must display for 14 days no later than 24 hours after available.
 - FDA must issue list of “conspicuous locations” for notifications with 1 year

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S. 510 Overview

- Record Keeping
 - Access to records if FDA “has reasonable belief that an article of food is adulterated and presents a threat of serious adverse health consequences or death to humans or animals,” or “reasonable probability that use or exposure will cause serious adverse health consequences...”
 - Farms and restaurants fully exempt from provisions

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S. 510 Overview

- Many other provisions in bill (over 200 pages)
 - Foodborne surveillance by FDA
 - Food import requirements
 - Produce Standards (raw agriculture commodities)
 - Whistleblower protections
 - Sanitary Transportation of Food and more...

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The Inevitable Disclosure Doctrine Applied In The Food Industry


To prevent a key employee from competing (at least for a while)

Bernard J. Bobber, Partner

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The Realities

- Businesses need protection from “unfair” competition, more than ever
 - Intense competition in most every industry
 - Increased employee mobility
 - Decreased employee loyalty to one employer
 - Technology advances that make it easier than ever for employees to abscond with an employer’s confidential business information and use competitively

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The Realities

- Some employers do not use noncompetes
 - Or some just use them for the top executives

And, even if an employer utilizes noncompetes,

- Enforcing noncompetes can be “iffy”
 - Because they are restraints of trade, covenants not to compete are disfavored and are viewed with skepticism by courts

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Another Tool: The Inevitable Disclosure Doctrine

- Based on state trade secret law
- The Uniform Trade Secret Act (adopted by 46 states)
 - Defines “trade secret” to mean any type of information that:
 - derives economic value from not being known or readily ascertainable by others; AND
 - is subject to reasonable efforts to maintain its secrecy.
- “No person...may misappropriate *or threaten* to misappropriate a trade secret by...:
 - Disclosing *or using* ...a trade secret of another.”
- A court may grant an injunction against a person who misappropriates *or threatens* to misappropriate

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PepsiCo, Inc. v. Redmond (7th Cir. '95)

- Redmond was PepsiCo's GM of California business unit with \$500MM annual sales
 - Gave input to strategic plan
- Negotiated with competitor May-October, and accepted job as VP-Field Operations for Gatorade in November
 - Arguably made some misreps to PepsiCo
- PepsiCo sued and sought injunction

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PepsiCo, Inc. v. Redmond

- Injunction granted, and affirmed on appeal
 - Redmond prohibited from assuming duties for Quaker Oats for about 5.5 months
- Rule: “a plaintiff may prove a trade secret misappropriation by demonstrating that a defendant's new employment will inevitably lead him to rely on plaintiff's trade secrets.”

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PepsiCo, Inc. v. Redmond

■ Rationale:

- “unfairly armed with knowledge of [PepsiCo’s] plans, [Quaker Oats] will be able to anticipate its distribution, packaging, pricing, and marketing moves.”
- “PepsiCo finds itself in the position of a coach, one of whose players has left, playbook in hand, to join the opposing team before the big game.”

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Subsequent Case Law

- Most states’ law that addresses the “inevitable disclosure” theory supports it
- California expressly rejects it
- The next, big appellate court case...

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Bimbo Bakeries USA, Inc. v. Botticella, (3rd Cir. 2010)

- Facts: Botticella was Bimbo's VP of Operations for California (2001 to 1/13/10)
 - 5 plants; salary \$250,000/yr.
 - One of few persons with access to “code book” containing formulas and process parameters
 - “nooks and crannies” of Thomas' English Muffins (\$500MM annual sales)
 - Attended executive meetings and discussed national business strategy

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Bimbo Bakeries

- Signed confidentiality agreement (but no noncompete)
- 9/28/09: Hostess Brand offered position in Tx as VP of Bakery Operations for east region
 - 10/15/09: Botticella accepted for 1/10
- Resigned 1/4/10, w/o disclosing Hostess job (gave 2 weeks notice)
 - First told Bimbo of Hostess on 1/13/10

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Bimbo Bakeries

- Bimbo's forensic investigation revealed suspicious computer activity
 - Deleted files; thumb drives attached; accessing multiple files of sensitive info simultaneously
- Bimbo sued and sought preliminary injunction preventing Botticella's work for Hostess pending trial
- Federal trial court agreed and entered injunction on 2/9/2010, through trial scheduled 4/12/2010

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Bimbo Bakeries

- Botticella made an immediate appeal, and 3d Cir. Ct. of Appeals affirmed (7/27/2010)
- Applied "inevitable disclosure doctrine" concept based on Botticella's "likely" use of Bimbo's trade secrets in Hostess job
 - Hostess job was "substantially similar" to Bimbo job b/c both involved broad oversight over bakery operations, and both were executive positions with similar salary

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Bimbo Bakeries


- “[A] person may be enjoined from engaging in employment...where that employment is likely to result in the disclosure of information held secret by a former employer, of which the employee gained knowledge as a result of his former employment situation.”

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Bimbo Bakeries

- Court affirmed injunction based on Botticella's behaviors:
 - Failure to disclose to Bimbo his acceptance of a job offer from a direct competitor, remaining in a position to receive confidential business information
 - Copying Bimbo's trade secrets from Bimbo computer to external storage devices

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The Keys To the Doctrine

- Substantial job overlap
 - Job duties of prior job required person to know trade secrets
 - Job duties of new job will require person to consider that knowledge in order to make good decisions for new employer
- The person behaved in sneaky, deceitful or otherwise unfair ways
 - undermines a claim that he/she will actively protect the former employer's trade secrets and otherwise behave in good faith

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If you lose a key employee to a competitor

Perhaps a claim of inevitable disclosure can protect your business

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Construct A Claim – Step 1

- Demonstrate the individual had working knowledge of your trade secrets
 - Emphasize what he/she created; not just had access to
 - Business plan; budget; forecast; RFP response
 - If not created, necessarily relied on to do job
 - Recent and fresh information
 - Emphasize forward-looking info, such as plans
 - Internally confidential stuff is best

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Construct A Claim – Step 2

- Demonstrate the new job will require him/her to draw upon that trade secret knowledge in order to make good decisions for the new employer
 - Seek job description; posting
 - Interview former employee
 - Demand detailed explanation from employer
 - Review competitor's website, public filings and press releases to determine emphasis

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Construct A Claim – Step 3

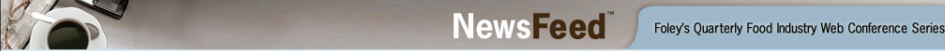
- Demonstrate deceitful, or at least suspicious, behavior by individual that calls into question his/her trustworthiness
 - This supports the “threat” argument
 - Grab some moral high ground
- Harder if person was fired; easier if they secretly quit

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Immediately Capture Evidence

- The good stuff will often fade quickly
- Purpose? To determine if:
 - You have a claim of actual misappropriation
 - You can support of claim of threatened misappropriation by showing deceit


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Immediately Capture Evidence

- Preserve and analyze computer information
 - Look for suspicious communications, with competitor, recruiter, home email account
 - Spot unusual downloading activities
 - Use of external hard drives like flash drives
 - Look for recent access of key documents
 - At unusual times? With unusual frequency?

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Immediately Capture Evidence

- Preserve the paper trail
- Preserve evidence of access
 - Looking for the “unusual”
- Capture witness accounts before fading
 - Consider whether to prepare witness statements that persons review, edit and sign

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If you hire a key employee from a competitor

Proactively undermine any potential claim of inevitable disclosure

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Proactively undermine an inevitable disclosure claim

- Distinguish new position from prior job
 - Maybe preclude certain duties for 3 or 6 months
- Create paper trail of mutual commitment to respect former employer's information
- Coach candidate to avoid suspicious behaviors
 - No last minute accessing key info
 - No false representations
- See www.tradesecretnoncompete.com (10/28/10 posting)

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Questions?

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