



Kernel

The Scotland Food and Drink Bulletin



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Kernel

Welcome to the latest issue of Kernel, our Scotland food and drink bulletin. In Kernel, we examine current legal issues affecting the Scottish food and drink industry and provide bite-size articles on key developments. In this issue, we consider the following:

- Crisis Management for Food Business Operators
- St James Centre – Q&A with Ed Corrigan, Assistant Leasing Director
- Employment Law update – April 2021
- Blockchain – the key to frictionless, authentic food and drink?
- Ode to the Office – a call to support food and drink businesses

If you would like to discuss any of the articles in this edition of Kernel or wish to provide any feedback, please contact Alison McCartney at **alison.mccartney@cms-cmno.com**

Crisis Management for Food Business Operators

May 2021

As restrictions continue to ease and the UK exits lockdown (again), what steps can food businesses be taking in preparation for an increase in Covid-19 cases and site outbreaks?

Background

One year of Covid-19: one year since businesses closed their doors and sent their workforce home. For so many food businesses there was neither the option of shutting down, nor any guidance available, advising them what to do. Pressure mounted to “feed the nation”, supply chains transformed over-night and food business operators (FBOs) adapted fast. In health and safety terms, it was a matter of planning and doing, checking and acting... but all at the same time.

Twelve months on and huge operational changes have been made within food businesses in order to manage the risk of transmission of the virus. Risks have been assessed, control measures implemented, changes made, lessons have been learned and then the process begins again. At times, on a daily basis. It has come at a huge cost to FBOs, many operating on already tight margins. However, even higher costs have arisen when an outbreak has shut a site down.

There have been numerous widely reported cases of shutdowns following outbreaks. For example, Dawn Meats, one of Ireland’s biggest beef companies and Greencore sandwich-making plant in England, have both been impacted by this. Food businesses have been hugely affected – and with many unreported closures too; and not just in food manufacturing but across the industry.

Legal duties

What should a FBO do to manage both health and safety and the risks of Covid?

Both the emergency coronavirus legislation and guidance changes frequently. FBOs across the UK are familiar with different regulatory bodies and processes: Food Standards Scotland, compared to the Food Standards Agency in England, Wales and Northern Ireland. Nevertheless, it can be a full-time job tracking the developments and managing the divergence in approaches by jurisdiction to understand – what is required of the FBO on top of the pre-existing UK wide health and safety law.

The main framework for health and safety is the Health and Safety at Work Act 1974. It imposes an overriding and non-delegable duty to do all that is reasonably practicable, to ensure safety. It is this broad legal duty that provides the potential for criminal liability to attach in the event of exposure to the virus as a result of an organisation’s failure to manage risk. It is not injury which creates an offence but the exposure to risk of harm.

The critical question is what an organisation must do to demonstrate that it is doing “all that is reasonably practicable” to ensure safety, in the context of the Covid pandemic? The Regulators and the court tend to start by referring to the guidance available “at that time”. This has imposed a considerable burden on any organisation that seeks to justify departure from Covid related guidance, making it at times effectively mandatory. As with so much of the Emergency Legislation the line between law and guidance has become dangerously blurred.



There have been many discussions around the use of the 1974 Act to manage the risks associated with what is a public health emergency, rather than a workplace risk. The political appetite for formal enforcement action has been unclear throughout and remains so. However, what has been very clear is the availability and exercise of regulatory powers to shut down sites, whether that be under emergency corona virus legislation or under pre-existing health and safety legislation. FBOs are left to deal with the costs and repercussions of regulator-imposed site shutdowns.

5 Top tips for fbos

The progress on vaccinations has made for a far more positive outlook. However as restrictions continue to lift in the weeks ahead, there are already warnings of how easily a third wave could take off. It is inevitable that cases will increase, and the risks to businesses will therefore increase too. FBOs should be reviewing their procedures and considering the following;

1. The guidance

Ensure your business is familiar with all Guidance available and updates are still being monitored.

For FBOs operating in Scotland, the go-to documents are two Food Standard Scotland documents in particular:

- (1) Guidance for food business operators and their employees:** this document was last updated on 21 January 2021. It provides incredibly helpful advice to FBOs, albeit setting a very high standard on FBOs. For example, there is an extensive questionnaire to support managers to assess where there is a need to strengthen their existing controls and carry out a gap analysis.
- (2) Guidance for Food Business Operators (FBOs): What to expect from an Incident Management Team (IMT)**

investigation: (published 28 October 2020). FBOs often work with Regulators but the last twelve months has been a steep learning curve getting to grips with Incident Management Teams. Consequently, this essential Guidance is for all FBO's wanting to plan ahead and be ready to manage regulatory intervention, in the event of an outbreak.

Although, these two documents are Food Standards Scotland (FSS) publications, much of the information is relevant and useful to businesses operating across the UK.

The Food Standards Agency has similarly published extensive Covid specific Guidance on their website. We recommend the "Changing your business model" section and the "Reopening and adapting your food business during COVID-19" section offering guidance for food businesses at each stage in the process: restaurants and takeaways; food manufacturers; farming and agriculture. Within each section there is specific guidance for "rapid shut-down in response to Covid-19".

- (2) Guidance for Food Business Operators (FBOs): What to expect from an Incident Management Team (IMT) investigation:** (published 28 October 2020). FBOs often work with Regulators but the last twelve months has been a steep learning curve getting to grips with Incident Management Teams. Consequently, this essential Guidance is for all FBO's wanting to plan ahead and be ready to manage regulatory intervention, in the event of an outbreak.

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2. Crisis management plan

Ensure your Crisis Management Plan is up to date with Covid specific provision

FBOs will be familiar with Crisis management and business continuity planning. What is still relatively new is the frequency with which those crisis management plans are now being referred to and the need to evidence a Covid specific plan in place.

Where there is a suspected outbreak (2 or more confirmed cases, within 14 days) sites have to act fast. The risk of transmission needs to be contained and FBOs have had months of practice to fine-tune their processes: the emergency response, named personnel leading the process, internal track and trace, quick decision making, isolation of close contacts and action. Then, preparing for regulatory intervention needs to begin immediately.

If there is any indication that an outbreak of COVID-19 may have occurred in the workforce (or that there may be an increased risk of one occurring), the local NHS Board Health Protection Team (HPT) must be contacted at the earliest opportunity. In Scotland, the process has been set out clearly in the Food Standards Scotland Guidance noted above and aims to help FBOs understand how Health Protection Teams will decide on the actions that need to be taken to protect public health. In England, the guidance indicates that “you will be provided with information about the outbreak management process” if the local public health protection team declares an outbreak.

3. Regulatory intervention

Prepare information in anticipation of a Covid outbreak onsite

Investigations are fast-paced and information needs to be provided very quickly if a FBO is to be in the best position to demonstrate to the regulator that the situation is under control and an outbreak is being managed.

For example, have ready-made portfolios in place for sites, setting out comprehensive and up to date information on all aspects of the site’s operations. Incident Management Teams need to be educated with an overview of the site, what it entails and how it operates. This can be achieved with maps and plans of the site, photographs, staff names, departments, separation of staff or “bubbles”, one way systems, separation of welfare facilities, cleaning routines, risk assessments, control measures, safe systems of work, toolbox talks etc. This should be a working file, regularly reviewed, with changes and updates recorded.

4. Consult, communicate and manage complacency

Ensure the business is effectively managing communication with the workforce

There is a legal requirement to consult with the workforce on matters concerning health and safety. In times of change this becomes increasingly important. Some changes to health and safety can be controversial or misunderstood. Explaining why things are happening and ensuring a two-way line of communication increases compliance. Communicating is key to gaining and maintaining the confidence of the workforce. Successful management of the risks of transmission of Covid-19 is not achieved simply by the introduction of control measures. The actual and continuous implementation of these measures must be ensured and will be scrutinised in any regulatory intervention. For example, it is not enough to provide improved and increased hygiene facilities; sites need to ensure these are being used consistently. Similarly, social distancing; what steps are being taken to ensure that it is maintained at all times? Further, complacency of the workforce must be carefully managed.

In the event of a site outbreak, an Incident Management Team will be carrying out a risk assessment in order to conclude what steps need to be taken; whether a site should remain open or closed. This assessment will focus on what was actually happening on site. What was the business doing to consult and communicate with the workforce in order to ensure that safety measures were actually being implemented and upheld?

5. Housekeeping

Ensure an easily accessible paper trail documenting safe systems of work

If ever there was a time for good housekeeping, it is now. This is not just in the sense of cleanliness, site organisation and personal hygiene but also in the paper / electronic sense - record keeping.

To manage the many legal risks FBOs face just now, processes for ensuring a strong “traceability” trail should be reviewed. Records should include publication dates of documents, dates of amended versions, dates when new processes and procedures are implemented and how they are implemented. Systems for accessing records need to be strong, to ensure incidents can be responded to. This has always been a feature of good health and safety management however it is particularly important now.

Comment

FBO’s have made huge efforts to manage the risks of operating during the Covid-19 pandemic. Nevertheless, regulatory intervention is a highly stressful and complex process to manage for any business. CMS has been working with food businesses to support the regulatory response to Covid outbreaks. We have a team of health, safety and food law experts available and ready to provide advice and support, answer questions and support food businesses in crisis. We are also keen to hear more about the experiences and daily challenges operators are facing.



Jacqueline Rédarès
Senior Associate
T +44 131 200 7326
E jacqueline.redares@cms-cmno.com



Fiona Carter
Consultant
T +44 20 7367 2672
E fiona.carter@cms-cmno.com





St James Centre – Q&A with Ed Corrigan, Assistant Leasing Director, Retail, Nuveen Real Estate

1. What are you most excited about in terms of the new food and beverage offerings that are coming to St James Quarter?

We're most looking forward to creating a new destination that will be unique and will add something new to the city. We want to blend together the best of local, the best of national and the best of international brands in one place. We believe we're achieving that by introducing the new Bonnie & Wild Scottish Marketplace, as well as by adding quality established brands such as The Alchemist, Tortilla and the stellar signing of Sushisamba at the top of the new W Edinburgh Hotel.

2. St James Quarter has seen and survived many challenges over the years to present day, especially with the pandemic affecting the F&B/leisure sector. How do you see the F&B market recovering in the next 6-12 months?

It's an incredibly resilient and creative sector – I am certain it will recover. People are desperate to go out and socialise in restaurants, cafes and bars. You still cannot replicate that experience online. But there are new channels coming forward - delivery, kerbside pickup, coffee subscriptions, meal kits. I think these are habits that we as consumers have become accustomed to, and will continue to demand - and they should create new opportunities for operators to capture extra spend.

3. What would you say are the most important things you look for in an F&B tenant who wants a place at the table (pardon the pun) at a brand new mixed use shopping centre, as opposed to being on a high street/city centre?

We look at the product, the people behind it, and the ability to drive synergies and ultimately sales in the restaurants and surrounding stores. St James Quarter is more akin to a series of streets and public squares than a traditional shopping centre, so I wouldn't say as a destination we're too different from a high street, but everything we do is about trying to give the best experiences to the customer. Ultimately this should drive returns for the brands and the developer.

4. What do you think will be the next trend in F&B and how are St James Quarter and its tenants placed to make the most of that?

I think the last year has proven that it's impossible to predict the future. Trends also move so quickly. What I can say is that in the immediate future it will all be about making people feel safe. St James Quarter is really well placed to welcome customers venturing out after lockdown and to capture that 'revenge spend'. Whilst we have a roof, it's an open air space, so it's the same fresh air as outdoors. We have a dedicated security team and cleaning team in place. The fit outs will be brand new and will have the latest and cleanest air handling systems. It should feel like a really safe place to visit, and I believe that confidence will be so important to our and our brand partners' success.

Employment law update

May 2021

April each year sees changes in statutory rates and compensation limits and is normally a key date in the employment law calendar. We have set out below the key employment law developments which are particularly relevant to the food and drink sector.

National Living Wage

From 1 April the national living wage increased from £8.72 to £8.91 and is extended to 23 and 24 year olds for the first time.

This year the national minimum wage increase is as follows:

- 21 to 22 year old rate from £8.20 to £8.36 per hour;
- 18 to 20 year old rate from £6.45 to £6.56 per hour;
- 16 to 17 year old rate from £4.55 to £4.62 per hour; and
- apprentice rate from £4.15 to £4.30 per hour.

Food and drink sector employers will need to ensure that all employees are paid in accordance with these rates going forward or face the risk of Tribunal claims or enforcement action from HMRC.

Statutory rates

There have also been increases to rates of pay for family leave – statutory maternity, paternity, adoption and shared parental pay has increased from £151.20 to £151.97 per week from 4 April. Statutory parental bereavement pay will also be paid at £151.97.

Further annual increases to the following statutory payments/limits that took place from 6 April 2021 include:

- an increase in statutory sick pay from £95.85 to £96.35 per week;
- an increase in a week's pay from £538 to £544 (for the purposes of calculating a basic award or a statutory redundancy payment); and
- the maximum compensatory award for unfair dismissal increased from £88,519 to £89,493 (but subject to a lower cap of 52 weeks' gross pay if this is less).

Enforcement of gender pay gap reporting is delayed

The enforcement of gender pay gap regulations has been suspended for six months until 5 October 2021. Normally the deadline for reporting is 4 April each year. However, this year employers are being given an additional 6 months to report in view of the ongoing challenges of the pandemic. The Equality and Human Rights Commission is encouraging affected employers to report by the usual deadline of 4 April 2021 wherever possible.

Vento Bands

Finally, the bands and awards for injury to feelings in a successful discrimination claim in the Employment Tribunal, known as the 'Vento Bands' were revised on 6 April 2021.

For claims brought on or after 6 April, the Vento bands are now:

- Lower band - £900 to £9,100 (less serious cases);
- Middle Band - £9,100 to £27,400 (cases that do not merit an award in the upper band);
- Upper Band - £27,400 to £45,600 (the most serious cases);

The most exceptional cases will be capable of exceeding £45,600, which increases potential exposure for employers found liable for discrimination in the Tribunal.



Matt Leon

Senior Associate

T +44 131 200 7464

E matt.leon@cms-cmno.com





Blockchain – the key to frictionless, authentic food and drink?

In May 2021 a new Directive will introduce Unique Device Identifiers into the EU’s medical device regime (albeit not in the UK). The Unique Device Identifiers will comprise a series of numeric or alphanumeric characters that are created through a globally accepted standard, allowing the unambiguous identification of a specific medical device on the market. This example of a legally mandated use of traceability technologies could pave the way for wider application to other industries, and the food and drink sector is high up on the list. Increasing sustainability and transparency of supply chains are key objectives of the European Commission’s Green Deal and Farm to Fork Strategy. Food business operators (“**FBOs**”) often have complex supply chains. Blockchain technology (developed just over a decade ago via the digital currency, Bitcoin) is emerging as a potential solution.

The technology can allow FBOs to record and exchange time-stamped information via a decentralised and secure database. It essentially creates a verifiable audit trail ledger, allowing those with permission to access the data to trace the product back through the supply chain. Blockchain is particularly useful in solving the problems inherent in supply chains, because it is designed to work in situations where there are multiple parties that do not necessarily all have deep relationships together but nevertheless need to find a mechanism that enables them to trust one another.

Existing legislation already requires that food and drink products be traceable to the source under Regulation (EC) No 178/2002. A widespread means of achieving this to date has been to use digital tagging systems or QR codes on the packaging. However, these methods do not allow other operators in the supply chain to identify what has occurred in the chain before them. Currently, consumers tend to only be exposed to information about the product that is included on the packaging, such as origin labelling, without access to a deeper dive into the product's source, or information about how the product came into being. Blockchain technology offers a potential solution to FBOs looking to increase transparency and offer reliable and verifiable data on their supply chains. During the COVID-19 pandemic, there has been a rising consumer focus on both sustainability and provenance.

There are already examples of pilot schemes in the industry, including, for example, **Nestlé**, which traced milk from farms in New Zealand to Nestle factories and warehouses in the Middle East. Used in this way, Blockchain can help businesses demonstrate a commitment to transparency. It can also allow FBOs to showcase sustainability efforts. For example, in August 2020, Starbucks stores in the US allowed customers to trace the origins of their coffee beans via a code on the packaging, and farmers to see where their product was sold. Blockchain can therefore harmonise disparate entities of the supply chain, as well as allow consumers to verify and gain assurance that their product is what the label claims.

Blockchain could also assist the regulator. For example, The Food Standards Agency ("FSA") completed a **pilot** in 2018 using Blockchain in a cattle slaughterhouse, in what they assert was the first use of the technology as a tool to regulate compliance in the food and drink industry. Operators in the supply chain have various obligations in respect of regulatory compliance, and it can be difficult to pinpoint responsibility when non-compliances arise. With the regulator having permission to access Blockchain ledgers, it is anticipated that investigations would be expedited, and FBOs would be able to action any necessary recall or withdrawal efficiently. The outcome of the pilot was successful, with the regulator encouraging opportunities for developing this approach with industry and government.

An exciting new example of the potential of Blockchain is being reported as a potential solution to the search for a frictionless border between Great Britain ("GB") and Northern Ireland ("NI"). Following the UK's exit from the EU, certain foods now require evidence of a range of certifications and attestations before being transported across the Irish Sea, after which the lorry must be physically sealed at the point of destination. This is causing significant disruption, particularly for FBOs transporting mixed groupage loads, as they often pick up goods from several different warehouses en-route. In response, a developer has proposed a "frictionless border pass" named TruckPass for the GB / NI border which will incorporate Blockchain technology to electronically seal a particular pallet of goods, removing the need for the lorry as a whole to be sealed, describing this as a "mobile bonded warehouse ". If successful, this would also reduce the burden of checks on food by demonstrating to inspectors via a randomly generated number, that, provided the seal has not been broken, the loads have not been tampered with.

This type of project illustrates the potential for Blockchain not only to offer solutions to practical problems – to facilitate good relations between the regulator and the regulated - but also to deliver the authenticity that the consumer demands. Blockchain is one to keep watching.

For further insight into the use of Blockchain in Scotland, take a look at our Digital Scotland article [here](#).



Fiona Carter

Consultant

T +44 20 7367 2672

E fiona.carter@cms-cmno.com



Charles Kerrigan

Partner

T +44 20 7067 3437

E charles.kerrigan@cms-cmno.com

Ode to the office – a call to support food and drink businesses

2021. New year, new start. After a year of unprecedented change in the way that we work, employers in all sectors, but particularly those that operate in white collar, office based, environments, are looking at their workplace arrangements and thinking about whether things can be done in a better way.



Likewise, many employees who are office workers have adapted to working from home and many recent surveys have shown that a substantial proportion of office workers would like to work from home, at least part of the time, in the medium to long term. Indeed, there are potentially many benefits to this approach, and all the signs are that agile working is likely to be a key talking point for employers for a long time to come, particularly for larger employers with access to more sophisticated home working technology.

To illustrate that, according to some market research, **60%** of the UK's adult population has been working from home during the coronavirus lockdown, with more than **25%** planning to continue to work from home at least occasionally after lockdown. Some employers have already committed allowing remote working post-pandemic, to varying degrees, and many are contemplating such a move. The government have not yet indicated when a return to office work will be on the table, and the current advice across the UK is that those who can work from home should continue to do so where possible.

However, despite all the potential benefits of agile working, what about the downsides? What about the city centre businesses, and their suppliers, in the food and drink/eating out sector that rely on the passing commuter trade?

According to the IGD, the total UK food and drink market sales declined by up to **12%** during 2020, and the eating out sector shrank by over **50%**, particularly down to a sharp decrease in footfall in city centres as a result of the national lockdown, the closure of the retail and hospitality industries, and, importantly due to the rise in home working. The amount of workers in the city centre in the daytime on weekdays is now significantly reduced. Unsurprisingly, the city centre cafes and takeaways that have been able to reopen following the easing of the initial lockdown, usually reliant on business from city centre workers, have seen a large amount of their customer base disappear.

Notwithstanding that, being an optimist, I do not think that the city centres, and the food and drink businesses built around the flow of hungry commuters with money to spend, are consigned to the past by any means. Employers a big role to play in getting people back to the office and supporting the food and drink businesses, and their suppliers, that supported them and their people in the years before the lockdown.

Although agility has (rightly) been a focus recently, there is much to be said about all the great things about office working, for both employers and their people. The exchange of ideas between colleagues is much more fluid and constructive when people are in the same room. Furthermore, the mentoring of more junior staff who are just getting started in their careers simply cannot be replicated by virtual means. There are so many benefits to working in the physical presence of colleagues, and meeting one another in person is essential to build the collegiate relationships that define the workplace and make it what it is.

It is therefore not surprising that we are now seeing some major global employers such as Apple, Google and Goldman Sachs speak out for the place of the office in the new world of work. The office brings colleagues together, and there is no substitute for building cohesive teams and for driving innovation and ideas. The place of the office in the world of work should hopefully be secure, and over time we will get back to our city centres and some semblance of normality. As that happens, in their time of need, we owe our support to all the food and drink businesses that have brightened up our lunch hours for years.

There is scope to build back better, and indeed it would be foolish not to ask how we can improve how we do things. But it is equally important that the best things about working before the lockdown are not needlessly lost, and the food and drink businesses that supported our old working lives – the pubs, restaurants and sandwich shops – have full and exciting roles to play in continuing to serve us as we get back to business.



Matt Leon

Senior Associate

T +44 131 200 7464

E matt.leon@cms-cmno.com

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