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Restaurant STARTUP & GROWTH™

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TRAGIC CONSEQUENCES

Avoiding Food Allergen Crises and Liability in Your Restaurant

By David T. Denney, Esq.

When you started in the restaurant business, you may have assumed that the only “life or death” scenarios you would face would involve dealing with payroll, rent or food costs. I’ll bet no one told you that decisions you make could result in the death of a customer. If you haven’t faced such a scenario, you could soon.

In fact, if a diner has a severe allergic reaction in your restaurant and you get sued, legal costs, settlement or judgment payments and lost business due to bad publicity could be enough to cripple or ruin your restaurant.

Here we will look at a few examples of lawsuits based on restaurants’ failed responses to their guests’ allergy concerns, actions to minimize the risk of a crisis, suggestions on policies to reduce allergy liability, and what to do should such a crisis occur in your establishment.

Food Allergy Basics

Studies estimate that between 10 million and 13 million Americans suffer food allergies. In addition to the 30,000 people who receive lifesaving emergency room treatment each year, allergic reactions to food result in 150-200 deaths.

The most common food allergies are seafood (both fish and shellfish), peanuts, tree nuts, dairy, soy, wheat and eggs. These cause 90 percent of all food allergic reactions, and though they seemingly include the fundamentals found in any restaurant pantry, many allergic individuals still either dine in our restaurants or they order takeout.

A study in the *Journal of Allergy and Clinical Immunology* published in February 2006 (Ahuja, Hsi & Sicherer. “Food Allergy Management from the Perspective of Restaurant/Food Establishment Personnel”) reported that, overall, restaurant workers believe themselves to have a high knowledge of allergy-related issues, as well as a high estimation of their ability to deal with an allergy emergency. The survey targeted managers, servers and chefs across a broad range of restaurant types. Not surprisingly, however, their knowledge was revealed to be woefully inadequate. For example, 34 percent of those surveyed believed fryer heat

would destroy allergens (it doesn’t), 29 percent thought removing an allergen from a finished meal (i.e., scraping off the nuts) would render the dish safe (it doesn’t), and 25 percent indicated that consuming a small amount of an allergen would be safe for a person with a food allergy (it wouldn’t — in fact, British Columbia’s FOODSAFE Secretariat has reported that as little as *one-five-thousandth of a teaspoon* of allergens has been fatal).

Legal Ramifications

When a diner asks whether a certain food contains an allergen and you answer with specifics (e.g., “there are no nuts in the pesto”), the restaurant provides an *express warranty* which, if not honored (because there *are* nuts in the pesto), can expose the restaurant to liability for a breach of that warranty. In certain states, a breach of warranty that occurs “knowingly,” can result in treble damages under consumer protection statutes.

Similarly, any time a diner indicates that she has an allergy and the restaurant elects to serve her, it assumes a legal duty to serve her food without allergens. A restaurant’s failure to meet that duty could be deemed negligence, which would leave it exposed to liability.

Moreover, the U.S. Food & Drug Administration (FDA) now requires manufacturers to clearly label foods to indicate whether they contain any ingredients derived from the major food allergens. While that rule does not directly affect restaurants, the FDA’s 2005 updates to the Model Food Code (intended to provide guidelines for state and local food safety regulations) recommend that each restaurant have a manager on duty who can (among other tasks) identify both the major food allergens and symptoms suffered during an allergic reaction, and discuss the restaurant’s control of cross-contamination (where allergens get into food from an unknown and unintended source).

The one-two punch, then, is this:

1. In a state that has adopted the new FDA Food Code, a restaurant must maintain a vigil against cross-contamination, thereby requiring someone to read the

labels on the manufactured foods it purchases to prevent allergens from coming into contact with other foods.

2. When the kitchen staff reads the label (now containing allergen information), the restaurant will be presumed to have *knowledge* of the ingredients, including the allergens. If the restaurant then serves one of these ingredients to an allergic diner, it breaches its duty of care to that customer.

Also, as food allergies have become more prevalent they have garnered more attention from state politicians. Various bills regarding food allergies were introduced across the nation in 2007, including those which would require restaurants to:

- Train at least one employee on site in food safety issues, including allergies.
- Place an allergy warning on its menus or tables.
- Post allergy information in food preparation areas and train employees on food allergies.

How, then, can a restaurant protect itself from liability when dealing with allergic customers who might die within minutes if exposed to certain ingredients? First, learn from your colleagues’ mistakes.

The ‘Secret’ Sauce

A diner with a tree nut allergy asked her server if the chicken pesto sandwich contained nuts, and the server erroneously assured her that it did not. Of course, the pesto sauce contained pine nuts, which sent the diner into anaphylactic shock, quickly resulting in a coma that lasted until she died a week later. Not surprisingly, her widower proceeded to file a wrongful death lawsuit against the restaurant, seeking more than \$10 million in damages.

Lesson 1: While the server’s incorrect answer may have been partially attributable to the fact that the ingredients for the restaurant’s “secret sauce” had been withheld from the servers, it is simply never prudent to allow anyone but a chef or manager to answer such life-or-death questions.

Lesson 2: Most of us know that even a “secret” pesto sauce is likely to contain pine nuts. Educate your entire staff on the fundamentals of your food.

In Case of Emergency: What to Do When a Guest Has an Allergic Reaction to Food

A food allergic reaction can begin to present signs and symptoms from seconds to several hours after an allergic individual ingests or is exposed to an allergen; however, in many cases, you will know that a guest is having an allergic reaction before he or she leaves the table. As soon as any guest complains of the signs and symptoms of a severe allergic reaction, **call 9-1-1 immediately**. The medical term for a systemic allergic reaction is “anaphylaxis,” which is characterized by one or more of the following signs and symptoms: difficulty breathing, swelling airways, rapid heartbeat, severe stomach cramping and diarrhea, or confusion, drowsiness or unconsciousness. In some cases, individuals who know they are predisposed to these types of reaction will carry an “epinephrine” injection, which can reduce airway swelling and increase blood pressure. If the guest and/or his family member indicate the guest needs the injection, assist them, if necessary, to locate and administer it. In nearly all cases when a severe reaction occurs, every second counts, and advanced medical care is warranted. Many people dislike attention drawn to themselves and will resist your summoning medical support. Do not hesitate to contact emergency medical services if a guest is in physical distress due to an apparent food allergic reaction. Too many deaths occur when individuals with food allergies misread their symptoms, thinking all they need is a couple of puffs on an asthma inhaler to ease their discomfort. If a diner vigorously refuses medical treatment, you should document that decision and have witnesses.

As soon as possible after the incident, call your attorney so the entire situation can be reviewed and employee statements may be taken while the event is fresh in everyone’s memory. After the incident, write down what happened and the names of any witnesses, whether employees or patrons.

Lesson 3: Even if you do not have a policy on who should answer allergy questions, make sure your staff knows that “I don’t know” is both a correct and acceptable response.

Peanuts

A Minnesota man with a peanut allergy dined at a Chinese restaurant. Based on experience, the man knew to ask whether the restaurant’s egg rolls were prepared in peanut oil. The waitress assured him they were not. Ninety minutes after his first few bites, he was dead.

What the waitress did not know (or simply failed to mention) was that the egg rolls were prepared with peanut butter to seal the dough and enhance their flavor. As you might expect, the man’s widow sued the restaurant for negligence.

Lesson 4: Sometimes the servers do not have all the information. In this case,

the diner received a technically correct answer. Unfortunately, the server in this instance did not have a complete answer that was specific to his condition, which resulted in a dead patron and the restaurant paying a \$450,000 settlement.

MSG

A diner asked his server at a national restaurant chain whether the soup contained MSG, another common allergen. She assured him that it did not, offering instead that the chef made all the soups from scratch daily. After consuming the soup, he suffered MSG Symptom Complex, which caused his lungs to shut down and sent him into cardiac arrest, resulting in brain damage due to lack of oxygen. Though he survived, he, too, sued the restaurant.

Lesson 5: Sometimes you just have to revisit lessons 1-4.

Cross-contamination

A diner informed his server at a (different) national chain that he was extremely allergic to fish. He had dined at that very restaurant six months earlier and suffered a severe allergic reaction, so he took special care to inform his server of his condition. Nevertheless, his food (which contained no fish) was prepared on a grill that had been used to prepare seafood. He was then promptly rushed to the emergency room for lifesaving treatment. He, too, sued the restaurant.

Lesson 6: Cross-contamination deserves special attention. Even trace amounts of an allergen on a cooking surface, cutting board or utensil can be enough to kill.

The Afterthought

A diner with a severe coconut allergy was eating at a five-star New York institution. The diner was a trained chef, and he informed both the wait staff and kitchen staff a total of five times about his allergy. The dinner was executed flawlessly, without incident. When the check arrived, however, it was accompanied by two chocolate truffles, which contained coconut. Fifteen seconds after the first bite he was violently ill and spent the night in the emergency room — and not receiving the sweet finale the restaurant intended.

Lesson 7: Be vigilant and track every morsel of food served — including the prepackaged ones.

A Restaurant Wins One

A customer with a severe peanut allergy and her friend ordered Chinese takeout. Without consulting the menu, the allergic customer ordered almond chicken, which she had ordered many times before from that restaurant. Though her friend placed the order, the allergic diner did not ask her to inform the restaurant of her allergy or inquire about ingredients.

Unfortunately, her almond chicken had become cross-contaminated with traces of peanut. After the first bite, the allergic diner felt the onset of an allergic reaction and ended up receiving lifesav-

disclaimer is probably not enough to prevent Brinker from being sued by a diner who has an allergic reaction, it does make great strides in attempting to meet its customers' needs while informing them of the realities of cross-contamination and may be enough to win such a suit. If a diner elects to order one of the recommended entrees with knowledge of the possibility of cross-contamination, it will make it much harder for that diner to prevail in a lawsuit.

Designate a manager. The reality of high turnover in both front- and back-of-the-house employees will likely make it impractical to keep all your employees trained on detailed ingredient information. Thus, the most comprehensive policy for managing these concerns will likely be to name one manager-level staff member per shift to handle all allergy-related questions. While the servers in the examples above either answered the diners' questions incorrectly or failed to inform the kitchen of the diners' concerns, a manager will be more likely to

take ownership of the situation and ensure the diner's needs are met. The designee does not need to be fully versed on each ingredient that goes into each dish, but such an employee can be more specifically trained on ingredients and will be more competent to discuss allergy concerns with the kitchen than a server.

Such a policy might include language such as this: "When a server learns of a diner's allergy, he will immediately inform the designated manager, who then can answer specific questions about ingredients or provide a chef to do so. If there is ever uncertainty about whether a certain menu item contains an allergen, the manager can provide an alternate suggestion. The order should be written on a special ticket (perhaps even on a different color paper). The manager will then get the ticket to the kitchen staff, ensuring they are made aware of the allergy concern so appropriate ingredients are used and cross-contamination does not occur. Once the items are prepared, the manager will

track the order as it is served to the guest. Finally, after the meal the manager should check on the diner to ensure that they are satisfied."

This policy would likely have eliminated the tragedies from examples 1-4. Anything less entrusts the guest's health and the future of your business to a server's imperfect knowledge. For this policy to work, however, you must train your staff to look to the designee for answers to all allergy concerns, without exception.

Train. In addition to requiring wait staff to address allergy questions to a designated manager, your entire staff should be trained on the signs of an allergic reaction. Some common symptoms include swelling, difficulty breathing, hives, cramps and vomiting, and loss of consciousness. Awareness of these symptoms may allow restaurant staff to notice a reaction early, which can result in quicker treatment for the diner. The allergy policy should be incorporated into your employee handbook materials and revisited on a semi-annual basis to ensure both old and new employees stay up to speed.

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The Food Allergy & Anaphylaxis Network, in conjunction with the National Restaurant Association, has produced a training guide, including written materials and a video, to educate both front-and back-of-the-house staff on how to safely prepare and serve food to guests with allergies. The materials retail for about \$100.

Prevent cross-contamination. The other major cause of allergic reactions in restaurant patrons is cross-contamination. Cross-contamination occurs when, though no allergens were used in the preparation of an order, trace amounts of an allergen get into the food from an unexpected source.

Though there are many ways cross-contamination can occur in a restaurant kitchen, the most likely culprits are fryers, grills and woks. Oil used to fry seafood is not safe for frying the chicken of a diner with a seafood allergy because proteins from the seafood will remain in the oil after cooking. As seen above, residue on a grill can contaminate otherwise nonallergenic food.

Furthermore, unclean hands, spat-ter, cutting boards and utensils can also be sources of cross-contamination. Nuts, for example, leave oils on both the cutting surface and knife, which must be removed with a cleaning agent.

Should you unintentionally send a contaminated plate to an allergic diner (e.g., the amuse bouche is served with a milk-based foam), it is not enough to simply remove the item and return that plate to the customer when the item is sent back. The customer must receive a new plate and new food that has not been in contact with the allergen. While this might result in your throwing that particular portion out, the potential danger is too high to do otherwise.

Solutions to cross-contamination include the use of designated areas in the kitchen for working with seafood or nuts, the exclusive use of color-coded cutting boards for allergenic foods and training your staff to watch for spillage.

In This Case, It's Better to Learn From Others' Mistakes

The dietary restrictions on customers with food allergies can be stringent, but with some forethought a restaurant can adopt sound policies to address their needs. When it comes to dealing with food allergies, the owner/operator should strive to remain in control: control of the servers, control of the information flowing from the table to the kitchen and control of the finished product. Furthermore, employees should be trained to pass all allergy-related questions to a designated manager, to avoid cross-contamination and how to spot and respond to a customer's severe allergic reaction.

Learn from the mistakes others have made. Putting in place these simple policies should provide you with peace of mind regarding your restaurant's ability to both address the needs of allergic diners and avoid the crippling liability that could otherwise accompany a food allergen crisis. **RS&G**

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