

DING DONG, ITS BACTERIA: AVOIDING FOOD SAFETY LITIGATION DURING THE COVID-19 PANDEMIC NEBRASKA

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During the COVID-19 outbreak, many restaurants and markets have expanded into the forum of food home delivery. Having the option of home delivery accommodates customers who feel more comfortable staying at home and allows restaurants and retailers to continue to obtain income despite mandatory closures in many states. Many restaurants are accomplishing this through the use of a third-party delivery services. However, expansion into the food delivery market is not without its challenges, one of which is ensuring food safety and the integrity of the food is maintained from the time the product leaves the restaurant or retailer and arrives at the home of the consumer.

In a study completed by US Foods, Inc. in 2019, 21% of customers complained that they suspected their delivery driver had eaten some of the food being delivered to them and a staggering 28% of drivers admitted to previously taking food from an order. This creates significant concern for potential food contamination, as a driver's physical contact with the food product could cause the product to become contaminated. 17% of customers complained they were consistently irritated with food arriving not warm and/or fresh. Failure to keep food warm and/or fresh during the delivery process can also be a cause for concern for development of bacteria.

Food safety lawsuits may be brought under several different theories of recovery. The majority of jurisdictions have recognized multiple theories of recovery in food safety litigation, including negligence, breach of warranty, breach of contract, and strict liability products liability. These lawsuits are marked with complicated issues such as securing causation testimony by medical experts as to what food items may have caused a particular illness and analyzing traceback evidence to identify sources of food poisoning and where a product may have become contaminated. Adding third-party food delivery services to the this picture will make these sophisticated cases even more difficult.



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With a rapidly expanding need for delivery services, it is important for restaurants and grocers to protect themselves from potential claims that can arise from these circumstances. The following steps can be taken to help avoid food contamination litigation arising from delivery services:

Test whether food quality standards are maintained during delivery: If you are a restaurant or grocer that is new to food delivery services, test which of your products/recipes hold up to a home delivery. Some products will maintain freshness better than others during the delivery process, and limiting your delivery menu to items you know will survive the trip can help avoid illness. Make sure the food products being delivered can withstand the delivery times of a third-party vendor while maintaining integrity, quality and freshness.

Packaging and labeling of products: Use of tamper-resistant packaging and labeling can assist you with helping to negate liability when using a third-party vendor. Use of tamper-resistant labels or seals on packaging of foods make it readily apparent when a delivery driver has tampered with the product and alerts the customer that the product has been tampered with.

Precautions during contact free-delivery: When using contact free delivery, make sure there are safeguards in place such as photo documentation of the date and time food is left at the front door of the consumer to avoid liability if the customer fails to maintain.

Separation of hot and cold foods: Keep hot foods with hot foods and cold foods with cold foods to avoid the cooling of hot items and warming of cold items. If possible, request items be delivered in insulated bags to maintain the temperatures of the products.

Awareness of what services are delivering your products: Some third-party vendors will work with restaurants without a contract, i.e., delivering your products without your permission, sometimes even using restaurant logos or other trademarked materials. In order to limit liability for these deliveries, become aware if any third-party vendors are delivering your products without your permission, and clearly advertise on your website which vendors you are partnered with and disclaimers of liability for unsanctioned services.

Review and be aware of third-party vendor contracts: When partnering with a third-party vendor for delivery, review the contractual agreement you are executing in detail and be aware of all terms and conditions contained within the merchant contract, including any limitations of liability and indemnification clauses.

Training of in-house delivery couriers: If you elect to provide delivery through an in-house courier or company employee, training these individuals in food safety, food tampering and food handling can help in the defense of a food safety litigation.

Implementation of COVID-19 protocols for delivery servicers: If you already provide training, adding in protocols dealing with COVID-19 safety such as frequent handwashing, use of hand sanitizer, contactless drop-off and pickup and checking delivery drivers for virus symptoms could be helpful in preventing the spread of the virus.

As long as proper precautions are contemplated and taken, expansion into the delivery business can be a beneficial service for both the customer practicing social distancing protocols and the business experiencing lost profits during the COVID-19 outbreak.

¹ *New Study Shows What Consumers Crave in a Food Delivery Service*, US Foods, Inc., 2019, <https://www.usfoods.com/our-services/business-trends/2019-food-delivery-statistics.html>.

² *Liability for Injury or Death Allegedly Caused by Spoilage, Contamination, or Other Deleterious Condition of Food or Food Product*, 2 A.L.R.5th 1 (1992), Jane Massey Draper, B.C.L.