



10 Common Issues in Food and Beverage Advertising and Labeling



BUSINESSES IN THE FOOD AND BEVERAGE industry are frequent targets for regulation and litigation. Here are some common issues to be aware of.

1. CLASS ACTIONS/LITIGATION/ENFORCEMENT

Consumers and state regulators can bring actions for unfair or deceptive business practices under state consumer protection laws; competitors can bring false advertising and unfair competition claims under state competition laws, the federal Lanham Act and National Advertising Division guidelines; and the FTC can bring enforcement actions under the FTC Act. The number of class action lawsuits targeting food manufacturers has dramatically increased in recent years.

2. TRUTH-IN-ADVERTISING LAWS

Truth-in-advertising laws require express and implied advertising claims (intended or not) to be true and not misleading. Businesses must substantiate ad claims with sufficient, credible evidence before publication. Ads must clearly and prominently disclose material qualifying information to avoid communicating false or misleading claims.

3. MADE IN USA ORIGIN ADVERTISING

Any product advertised, promoted or labeled as “Made in USA,” “Manufactured in USA” or “Made in America” (without appropriate qualifiers) must meet high state and federal manufacturing, assembly, and sourcing legal standards.

4. HEALTH CLAIMS

With consumers focused on making healthy choices, there is pressure on food and beverage businesses to advertise products as healthy alternatives. Numerous “healthy” lawsuits have been brought related to “all-natural,” organic and other health and “good-for-you” claims. This is a developing area, and all such claims should be carefully vetted to ensure compliance with the higher standards that often apply to health claims.

5. FDA AND USDA LABELING

Food and beverage product labels and labeling must comply with FDA and USDA regulations.

6. SLACK-FILL CLAIMS

Slack-fill is the difference between the actual capacity of a container and the volume of product in the container. The FDA prohibits the use of “nonfunctional slack-fill,” and the Fair Packaging and Labeling Act gives broad authority to the FTC to regulate nonfunctional slack-fill. State law also applies to the use of slack-fill, including in California.

7. SOCIAL MEDIA

In addition to general truth-in-advertising requirements, advertising and marketing on social media must comply with the terms and rules of each social media platform, including rules governing spam-like behavior, contests and sweepstakes, and paid posts. Disclosures of necessary qualifying information must be clear and prominent across all platforms.

8. ENDORSERS AND INFLUENCERS

The use of endorsements and social media influencers has increased exponentially through the web and social media. The FTC requires endorsements to be truthful, not misleading, and to disclose the “material connections” between the advertiser and the endorser.

9. CONTESTS AND SWEEPSTAKES

Contests and sweepstakes are cost-effective tools for engaging with customers and generating buzz about products. However, businesses should keep contest and sweepstakes laws in mind and use Official Rules and required disclosures for their promotions. Businesses should also pay attention to specific rules regarding social media and text-entry promotions.

10. NATIVE ADVERTISING

Advertisers must not disguise advertising content as non-advertising content. If the materials are ambiguous as to their nature or the source of the advertising content, special disclosure rules apply.

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