Moving Away from Meal Customization Smart Move for Many Restaurants, But Surprising Risk of Discrimination Claims Looms

Chicago, IL, April 15, 2013 - Many restaurants, especially upscale and higher-end independents, are moving toward prix-fixe menus, tasting menus, and policies that restrict additions, subtractions, and substitutions. Such policies afford restaurants and their chefs several advantages. They allow restaurants to honor their chef's creative visions, systematically execute proprietary recipes, manage the dining experience, and control ingredient inventory.

Yet, at the same time, awareness of severe food allergies and autoimmune illnesses, such as celiac disease, is also on the rise. This leads to concerns that strict anti-customization policies might result in lawsuits under the Americans with Disabilities Act [ADA] and state discrimination laws.

"The [U.S.] Department of Justice [DOJ] has clearly taken the position that celiac disease and various food allergies may be disabilities under the ADA," says Tawfiq Ali, a Chicago lawyer who advises restaurants and represents them in court. "That position is controversial—and should be vigorously debated—but the food-service industry should be aware that legal fights are looming."

The ADA generally defines food establishments as covered "public accommodations," and prohibits any "failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford ... goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, [etc.]"

Ali notes that an expansive settlement was recently reached between the DOJ and Lesley University, after students complained that inadequate gluten-free and allergen-free meals were available to those suffering from celiac disease or severe food allergies. Under the settlement, the university agreed to make significant changes to accommodate the students.

"The settlement does not amount to legal precedent because it is not a court or administrative ruling," says Ali, "but it certainly indicates where things may be heading."

Because restaurants, like universities, are covered under the ADA, Ali predicts that anti-customization policies on restaurant menus may come under fire.

"I can see food allergy sufferers arguing that 'no-subtraction' and 'no-substitution' policies fail to reasonably accommodate their dietary needs."

Ali recommends that food service establishments, especially those aiming to eliminate customization, immediately begin training employees on how to communicate with customers who have dietary

restrictions. They should also assess and fully document the feasibility (or lack thereof) of various options to accommodate such restrictions, possibly with the help of a qualified restaurant lawyer.

“We want to be able to demonstrate with high certainty that, if we are unable to accommodate dietary restrictions, it is not just because the costs are too high, but also because doing so will fundamentally alter the nature of the goods or services offered,” Ali advises.

Ali also recognizes compelling freedom of speech concerns under the First Amendment.

“Great chefs will tell you that their culinary creations are some of the highest forms of artistic expression. Their right to freely choose what foods they will offer or what ingredients they will use or not use is one no one should interfere with lightly.”

Contact

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