

IN THIS ISSUE FOOD WASTE • EU PLASTIC STRAW BAN • CLIMATE CHANGE

# THE Scitech LAWYER

VOLUME 15 ISSUE 4

SUMMER 2019

SCIENCE & TECHNOLOGY LAW SECTION

AMERICAN BAR ASSOCIATION

ABA

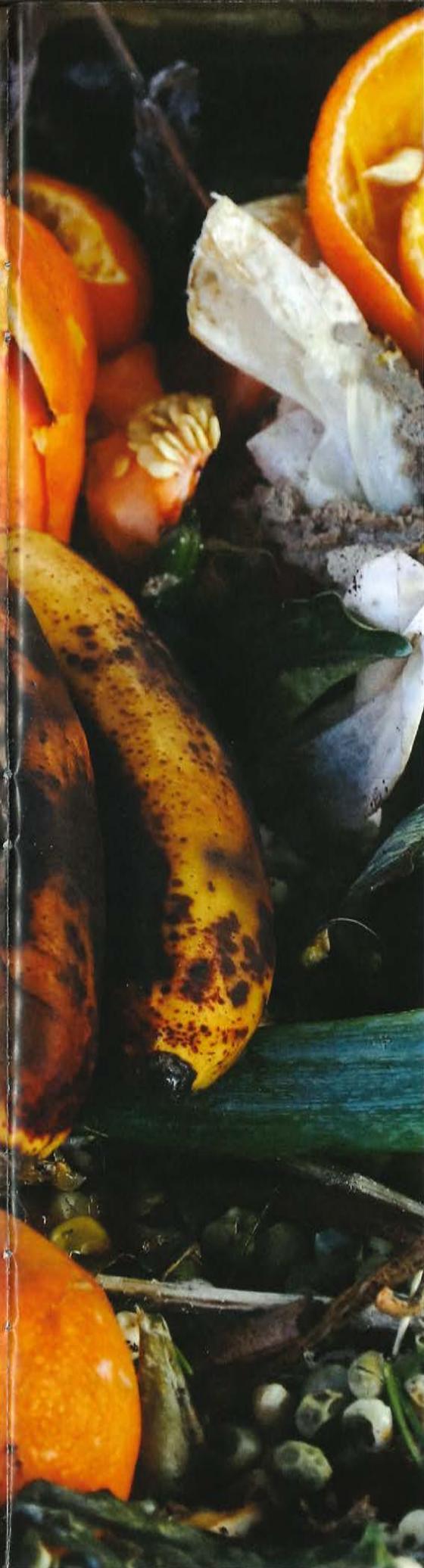
**THE  
CIRCULAR  
ECONOMY**

PETER McLAUGHLIN AND SARAH E. McMILLAN, ISSUE EDITORS



# FOOD INDUSTRY TRENDS TOWARDS SUSTAINABILITY & THE CIRCULAR ECONOMY & THE MIXED EFFECT OF LAWS

**POOJA S. NAIR & JESSICA H. KRAUS**



**T**his article provides an overview of how the overall move to sustainability and the circular economy is affecting the food industry. The article also examines the complex effect of law and regulations in these trends. Laws both drive and hinder the move towards sustainability. Increasingly, laws and regulations seek to ban single-use plastics and other unsustainable materials to force the industry to adapt less harmful alternatives. However, the food safety and consumer protection infrastructure also creates a legal and regulatory framework that may resist innovations necessary to move the industry closer to a circular economy.

The food and beverage industry has a massive social and economic effect, both in the United States and in the world. Within the United States, food, agriculture, and related industries contributed \$1.053 trillion to U.S. gross domestic product (GDP) in 2017. This represented a 5.4% share of the overall economy.<sup>1</sup>

Demand for production by the food and beverage industry is on a massive upswing. In December 2018, the United Nation's World Resources Institute reported that with the global population projected to grow from 7 billion to 9.8 billion people by 2050, overall food demand would grow by 50%.<sup>2</sup>

The food industry is in a unique position with respect to building a more circular economy. The goals of extracting the maximum value from existing resources while regenerating products is uniquely suited to an industry built on agricultural products and consumption.

#### **Redistributing Food to Prevent Waste: Achieving Maximum Value from Resources While Complying with Legal Framework**

The food and beverage industry has significant challenges with waste, distribution, and reuse. According to the U.S. Department of Agriculture, 30 to

40% of the food supply in the United States is ultimately wasted.<sup>3</sup> In 2010, this amount of waste corresponded to approximately 133 billion pounds and \$161 billion worth of food.<sup>4</sup> In California alone, food is the single most prevalent item in the state's waste stream, and uneaten food and other organic waste release more than 8.3 million tons of greenhouse gases.<sup>5</sup> At the same time as this level of food is being wasted, approximately 42 million Americans are "food insecure," meaning that at some point during the year, they lack access to a sufficient amount of food to lead an active, healthy lifestyle.<sup>6</sup>

One of the goals of the circular economy model is to reduce waste streams by reusing waste or potential waste as a resource. Given the high levels of both food waste and consumer need, some technology companies have come up with solutions that would achieve the goal of maximum value for resources.<sup>7</sup> Often, these solutions rely on technology to connect an alternative end-consumer of the expiring food resource with the manufacturers, restaurants, and grocery stores that would otherwise dispose of the food. For example, Flashfood resells grocery foods approaching their best-before date to consumers at a discount. Food for All connects consumers with restaurants and cafes that offer surplus meals for a 50% discount.

However, both logistical and legal challenges may hinder this type of repurposing of the food waste stream. Once food is prepared or packaged, it has a shelf life after which it may no longer be safely consumed. State and local food safety laws across the country may prohibit or hamper the donation of food that is safe to eat but may be at or near its expiry date. Several states have strict liability laws for illness or damages caused by the consumption of food. These legal requirements add an additional burden on donors and recipients and make it more difficult to achieve the goal of extracting the maximum value from existing food resources that is inherent in the circular economy.

---

*Pooja S. Nair is a business litigator and the head of the Food and Beverage practice group at TroyGould in Los Angeles. Jessica Kraus is an attorney in TroyGould's Litigation Department.*

# THE WAR ON PLASTICS ISN'T NEW, BUT IT IS GAINING MOMENTUM.

In 1996, Congress passed the Bill Emerson Good Samaritan Food Donation Act.<sup>8</sup> That Act protects against liability for food donations that were “apparently wholesome” except in the case of gross negligence or intentional misconduct. In order to be apparently wholesome, food must meet “all quality and labeling standards imposed by Federal, State, and local laws and regulations.” This meant that donors needed to make food donations to a nonprofit rather than directly to end recipients of the food, and that food past its expiration date could not be donated, regardless of whether the food was spoiled.

Despite the passage of the federal law, the concerns of food producers, retailers, and restaurants were not fully alleviated. According to a 2016 survey conducted by the Food Waste Reduction Alliance, 44% of manufacturers, 25% of retailers and wholesalers, and 39% of restaurants identified liability concerns as a top barrier to donating food.<sup>9</sup>

Some states have passed their own version of the Good Samaritan laws. For example, in 2017, California passed the California Good Samaritan Food Donation Act that expands the protections for food donation to include foods that are past their expiration date as long as the donor “makes a good faith evaluation that the food to be donated is wholesome.”<sup>10</sup>

When food is prepared in a form that can be sold to consumers, either as grocery products or as perishable food in restaurants, there is a limited window during which that resource can be used. Diverting expiring food to be used by end-users, both through the utilization of technological solutions to connect alternative consumers with expiring food or by incentivizing food donations by reducing liability threats, will contribute to the maximization of resources.

## Moving Towards the End of Single-Use Plastics: Initiatives and Pushbacks

While legal requirements can be a hindrance to redistributing consumer food resources out of the waste stream, legislation also has pushed the food industry to use sustainable materials in packaging and serving food. The push towards ending single-use plastics has been taken on by state and local governments and is being adapted by the food industry.

The war on plastics isn't new, but it is gaining momentum. First there was a ban on plastic bags and now plastic straws, but the trend doesn't end there. There is movement towards banning all single-use plastics and developing reusable or more cost-effective recyclable plastic packaging in general.

The impact of plastics on long-term environmental sustainability is significant. Environmentalists have estimated that at least 8 million tons of plastic ends up in our oceans each year.<sup>11</sup> The amount of plastic dumped into our oceans is harming the marine life, “from coral reefs smothered in bags, to turtles gagging on straws, to whales and seabirds that starve because their bellies are so jammed with bits of plastic that there's no room for real food.”<sup>12</sup> For these reasons, bans surrounding single-use plastics have become popular.

Before plastic straws, the issue du jour was plastic bags. Most state legislation to regulate plastics pertains to plastic bags. In an effort to reduce plastic pollution, in 2014 California became the first state in the U.S. to ban single-use plastic bags.<sup>13</sup> The law banned retailers from providing single-use plastic bags to customers, unless they charged \$0.10 and the bags offered were made of thicker materials.<sup>14</sup> The law ultimately went into effect in November 2016. Other jurisdictions, including Hawaii, New York, and Washington, D.C., have enacted similar

legislation on single-use plastic bags by either banning or taxing their use.<sup>15</sup>

Now straws have become the latest casualty in the war on plastics. It is estimated that, in the U.S. alone, 500 million straws are used every single day.<sup>16</sup> And some scientists estimate that there are 7.5 million plastic straws polluting the coastal United States and up to approximately 8 billion plastic straws on the shoreline worldwide.<sup>17</sup> These statistics have led cities, states, countries, and Fortune 500 companies alike towards the latest trend of banning plastic straws.

In 2018 the United Kingdom became the first country to ban plastic straws as part of the plan to get rid of all plastic waste by 2042.<sup>18</sup>

Seattle became the first U.S. city to ban plastic straws in July 2018, and several cities followed, including Malibu and Miami Beach.<sup>19</sup>

California is the first state to regulate plastic straws. The law went into effect on January 1, 2019, and prohibits full-service restaurants from automatically giving out plastic straws to customers. However, it is not a complete ban on plastic straws. Customers who want a plastic straw can still have one, but now they have to ask for it. This law does not apply to fast-food restaurants or take-out orders.<sup>20</sup>

The straw ban in California will be enforced by state or local health inspectors. Restaurants will get a warning for the first two violations, but the third and all subsequent violations will be deemed infractions punishable by a \$25 fine per day, and the maximum fine a restaurant can receive is capped at \$300 annually. Although the ramifications of noncompliance with the state “straw ban” don't seem that harsh, the state law does not preempt more restrictive rules or ordinances enacted by local governments.<sup>21</sup>

Along with cities and states, there is a growing list of companies that are taking the initiative to ban plastic straws.

Starbucks decided to stop using plastic straws in all of its 28,000 stores by 2020. The company has designed a strawless lid for most of its cold drinks and will offer paper straws for others.<sup>22</sup> Other restaurant groups moving toward banning plastic straws include Bon Appétit Management Company, IKEA, airport food service company HMSHost, and Pret A Manger and Costa.<sup>23</sup>

There has been significant push-back against straw bans by advocates for people with disabilities. While some restaurants and companies have decided to offer alternative options such as straws made from biodegradable paper, or strawless lids, advocates for people with disabilities say those options are not suitable for people with certain disabilities.<sup>24</sup>

In the U.S., the trend towards banning straws appeared to be gaining momentum, but now it looks like the tide is turning and some states are starting to push back. Colorado and Florida have introduced bills to impose straw-on-request policies similar to California's; however, unlike in California, those bills specifically forbid local governments

from introducing outright bans.<sup>25</sup> Utah has introduced a bill that preempts local governments from banning plastic straws without including a straw-on-request mandate.<sup>26</sup> While these preemption laws might initially strike a chord with progressive municipalities that want to do more for the environment by banning straws outright, they are a win for people with disabilities.

Unfortunately, the plastic straw bans are only a small step in moving towards sustainability. While the statistics sound staggering, plastic straws make up only 0.025% of all plastic waste found in the oceans each year.<sup>27</sup> In the end, the straw-on-request policies are designed to change people's behavior and create awareness of the environmental impact of single-use plastics. The hope is that the change in behavior in this one area will lead to other changes that will help move us towards a more circular economy. ♦

#### Endnotes

1. *Ag and Food Sectors and the Economy*, ECON. RES. SERVS., U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/data-products/>

[ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/](https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/)

2. TIM SEARCHINGER, RICHARD WAITE, CRAIG HANSON & JANET RANGANATHAN, WORLD RES. INST., *CREATING A SUSTAINABLE FOOD FUTURE: SYNTHESIS REPORT* (Dec. 2018), [https://wriorg.s3.amazonaws.com/s3fs-public/creating-sustainable-food-future\\_2.pdf?\\_ga=2.191119276.721308503.1555717875-1419236842.1555717875](https://wriorg.s3.amazonaws.com/s3fs-public/creating-sustainable-food-future_2.pdf?_ga=2.191119276.721308503.1555717875-1419236842.1555717875).

3. *U.S. Food Waste Challenge: FAQs*, OFF. CHIEF ECONOMIST, U.S. DEP'T OF AGRIC., <https://www.usda.gov/oce/foodwaste/faqs.htm>.

4. *Id.*

52017. Cal. Legis. Serv. ch. 619 (A.B.-1219) (West).

6. Emily Broad Leib et al., *FOOD LAW & POL'Y CLINIC, HARV. L. SCH., FOOD SAFETY REGULATIONS & GUIDANCE FOR FOOD DONATIONS: A FIFTY-STATE SURVEY OF STATE PRACTICES* (Mar. 2018), [https://www.chlpi.org/wp-content/uploads/2013/12/50-State-Food-Regs\\_March-2018\\_V2.pdf](https://www.chlpi.org/wp-content/uploads/2013/12/50-State-Food-Regs_March-2018_V2.pdf).

7. Katerina Bozhinova, *16 Apps Preventing Food Waste*, FOODTANK (Sept. 2018), <https://foodtank.com/news/2018/09/apps-preventing-food-waste/>.

*Continued on page 25*

## Food Industry

Continued from page 13

8. Bill Emerson Good Samaritan Food Donation Act, Pub. L. No. 104-210, 110 Stat. 3011 (1996).

9. FOOD WASTE REDUCTION ALLIANCE, ANALYSIS OF U.S. FOOD WASTE AMONG FOOD MANUFACTURERS, RETAILERS, AND RESTAURANTS (Fall 2016), [http://www.foodwastealliance.org/wp-content/uploads/2013/05/FWRA-Food-Waste-Survey-2016-Report\\_Final.pdf](http://www.foodwastealliance.org/wp-content/uploads/2013/05/FWRA-Food-Waste-Survey-2016-Report_Final.pdf).

10. CAL. FOOD & AGRIC. CODE § 58502 (West 2018).

11. *The Facts*, PLASTIC OCEANS INT'L (2019), <https://plasticoceans.org/the-facts/>.

12. Brian Clark Howard, Sarah Gibbens, Elaina Zachos & Laura Parker, *A Running List of Action on Plastic Pollution*, NAT'L GEOGRAPHIC: ENVIRONMENT | PLANET OR PLASTIC? (Jan. 17, 2019), <https://www.nationalgeographic.com/environment/2018/07/ocean-plastic-pollution-solutions/>.

13. 2014. Cal. Legis. Serv. ch. 850 (S.B. 270) (West).

14. *State Plastic and Paper Bag Legislation*, NAT'L CONG. STATE LEGISLATURES (Apr. 5, 2019), <http://www.ncsl.org/research/>

[environment-and-natural-resources/plastic-bag-legislation.aspx](http://environment-and-natural-resources/plastic-bag-legislation.aspx).

15. *Id.*

16. Laura Parker, *Straw Wars: The Fight to Rid the Oceans of Discarded Plastic*, NAT'L GEOGRAPHIC (Feb. 23, 2019), <https://news.nationalgeographic.com/2017/04/plastic-straws-ocean-trash-environment/>.

17. Alix Langone, *No One Knew How Many Plastic Straws Americans Use Every Day. Then a 9-Year-Old Kid Did the Math*, MONEY: EVERYDAY Money (July 23, 2018), <http://money.com/money/5343736/how-many-plastic-straws-used-every-day/>.

18. Jacqueline Thomsen, *UK to Become First Country to Ban Plastic Straws*, THE HILL (Apr. 19, 2018), <https://thehill.com/policy/energy-environment/383880-uk-to-become-first-country-to-ban-plastic-straws>.

19. Melissa Locker, *Here Are the U.S. Cities That Have Banned Plastic Straws So Far*, FAST CO. (June 1, 2018), <https://www.fastcompany.com/40580132/here-are-the-u-s-cities-that-have-banned-plastic-straws-so-far>.

20. CAL. PUB. RES. CODE § 42271 (West 2018).

21. *Id.*

22. Julia La Roche, *Here's Every Big Company That Says It's Banning Plastic Straws*, YAHOO! FINANCE (July 11, 2018), <https://finance.yahoo.com/news/heres-every-big-company-says-banning-plastic-straws-130558231.html>.

23. *Id.*

24. Gina Martinez, *'Disabled People Are Not Part of the Conversation.'* Advocates Speak Out Against Plastic Straw Bans, TIME (July 12, 2018), <http://time.com/5335955/plastic-straws-disabled/>.

25. Christian Britschgi, *State Legislators Suggest Banning Plastic Straw Bans*, REASON (Feb. 19, 2019), <https://reason.com/blog/2019/02/19/state-legislators-suggest-banning-plasti>.

26. *Id.*

27. Sarah Gibbens, *A Brief History of How Plastic Straws Took over the World*, NAT'L GEOGRAPHIC: ENVIRONMENT | PLANET OR PLASTIC? (Jan. 2, 2019), <https://www.nationalgeographic.com/environment/2018/07/news-plastic-drinking-straw-history-ban>.