

# Agricultural Law Update

The Official Newsletter of the



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Winter 2020

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## Inside This Issue

A WORD FROM THE EDITORS

TOOLS OF THE TRADE

THE AGRICULTURAL LAW BIBLIOGRAPHY

FEATURE ARTICLES: CURRENT ISSUES IN FOOD LAW

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## A Word from the Editors

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This issue came together a bit slowly while we transitioned the Update committee. As a newly elected member of the AALA Board of Directors, Paul Goeringer has stepped off the committee but will serve as our board liaison. Many thanks to Paul for several years of service as a co-editor of the Update and his work on this Update issue. Members Jesse Richardson and Jackie Schweichler have joined the committee and are already at work on the first issue of 2021, which will feature articles on topics addressed at AALA's 2020 symposium.

Food law is the focus of our feature articles in this issue. Our guest editor, Allison Condra, has compiled several articles reflecting current issues in food law. We hope you'll gain insight from the articles and enjoy the "tools of the trade" contributions from AALA members. We've also included the latest Agricultural Law Bibliography from the National Agricultural Law Center. We are grateful to the engagement of members who've contributed to this issue of the Update.

Happy reading and happy holidays to all,

AALA Update Editorial Committee  
*Peggy Kirk Hall, The Ohio State University, [aglaw@osu.edu](mailto:aglaw@osu.edu)*

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## Tools of the Trade

*ALA members in the Buckeye State offer a few ideas that may aid you in your work. If you have a tip to share with members, please send it to the editors.*

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### **The Personal Touch of Including a Thank You with Your Bill**

**Evin Bachelor**

*Evin is an attorney with Wright & Moore Law Co. LPA in Delaware, Ohio.*

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Most of us practice in agricultural law because we enjoy the content area, but also because we appreciate and love the clientele. We work for farmers, ranchers, and landowners. These are down-to-earth, no nonsense people who help deliver us new clients via word-of-mouth. They are our family, friends, and neighbors, and as clients should be treated as such from start to finish. Whenever my family or friend does something for me, I was raised to say thank you. This is why I like to include some sort of thank you letter or note

whenever I send a bill to a client.

The letter is usually short. Just a couple sentences to say thank you for choosing me, I enjoyed working you, you are all set for the time being, reach out if you need anything moving forward, and please find your bill enclosed. Sometimes I will include a comment about something they mentioned in the initial meeting or on a phone call so that they know it is not a form letter. Maybe it takes me 5 minutes.

The thank you is not something that you can bill for, but it is an investment. Rather than having their last memory of working with you just be a costly bill, by including a thank you, you have made sure that your client knows that you care. It is a simple gesture that takes little effort to add, but gives your client one more reason to like you. Hopefully one more reason for them to come back to you for any future legal needs, refer their family and friends to you, and maybe even send you a Christmas card. Thank you for reading!

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### **Finding New Sources Using Westlaw Folder Analysis**

**Hannah Scott**

*Hannah is a Research Fellow with the National Agricultural Law Center, a 3L at the University of Cincinnati College of Law, and program manager for the Center for Cooperatives at Ohio State University.*

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When I begin researching a legal topic that is new to me, I want to be sure that I'm not missing the various facets of an issue, important related topics, or, perhaps most importantly, key cases, treatises, or articles. But how do I make sure that I am not missing something important when I don't know what I don't know? Westlaw's Folder Analysis tool helps. As I research a new topic, I save the sources that are on point in a dedicated folder. Not only can I easily

get back to the sources, Westlaw analyzes the resources I save, identifies common issues, and recommends additional resources. The folder analysis tool is in the upper right corner with an expansion tab that allows me to view Westlaw's issues analysis and recommendations.

For example, I am currently researching personal liability for directors of agricultural cooperatives. My Westlaw folder contains a lot of resources that

might be pertinent to such a broad issue. The Folder Analysis has identified five common issues and 29 additional recommended sources. As I save new sources, the analysis is updated, and new recommendations are added. While not all the recommendations are on point, they alert me to issues I may not have considered and help me ensure that I am not overlooking important sources. I recommend trying the tool the next time you are learning about a new legal issue.

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## Converting from an In-Class to an Online Debate Assignment Peggy Kirk Hall

*Peggy teaches Agribusiness Law in the College of Food, Agricultural & Environmental Sciences at The Ohio State University.*

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When advised that COVID required me to convert my undergraduate class in Agribusiness Law to an online format, I worried about replacing the debate assignment that I typically assign in the class. The debate assignment works well in a live class room setting, where I can divide students into small groups and monitor as they debate one another--not so easy in an online classroom. Having a large number of online students and random connectivity issues complicated the logistics. Even with the "breakout rooms" option on Zoom, I wasn't confident that I could manage a dozen debate groups effectively.

My solution was to revise the debate to an out-of-class assignment and have students debate themselves. Each student selected an issue statement from a list that I provided. A student had to research both sides of the issue, then create a video presenting arguments and rebuttals for each side of the issue. I intentionally left the video details a bit vague, outlining only minimum time requirements. I added the requirement to reach a conclusion or solution for the issue at the end of the debate, based upon their analysis of each side. Students uploaded their debates to the course website along with a written bibliography.

The debate was my favorite grading assignment of the semester. The videos were better than expected in several ways. Nearly all students were surprisingly thorough in their analysis, seemingly better prepared than I had observed in a live classroom debate. Having freedom to do so, students structured their arguments in a variety of ways. Some covered one side completely before moving to another while others used a point/rebuttal format, and some used PowerPoint and visuals to organize or emphasize their points. Most conclusions were well-grounded, and I

wondered if that was a result of viewing themselves on video or re-recording their presentations. I appreciated that I could associate a face with a name, stop a video to comment or raise a question, or repeat a video if necessary. But most exciting was the opportunity to hear a student thinking out loud, an attribute of the live classroom that's difficult to replace in an online classroom.

## Agricultural Law Update

The official newsletter of the American  
Agricultural Law Association

Agricultural Law Update Committee  
Peggy Hall, Jesse Richardson, and Jackie  
Schweichler

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Views expressed herein are those of the individual authors and should not be interpreted as statements of policy by the American Agricultural Law Association, its officers or its members. Letters and editorial contributions are welcome and should be directed to:

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# The Agricultural Law Bibliography

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The National Agricultural Law Center maintains the Agricultural Law Bibliography at <https://nationalaglawcenter.org/ag-law-bibliography/>. We've included the recently published Second Quarter Update of the bibliography below.

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## Feature Articles: Food Law

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Our guest editor for the feature articles in food law is Allison Condra, who has been an AALA member since attending law school at Drake University. Alli is now an associate with Davis Wright Tremaine LLP in its Portland office, where she represents food, beverage and pet food companies, distributors, retailers, farms and restaurants. Readers may want to check out DWT's Food Venture Financing News, available here:

<https://www.dwt.com/insights/2020/11/food-venture-financing-news-weekly-issue-no-36>.

When we first discussed potential food law topics with her, Alli churned out a list of at least two dozen ideas-- a testament to her engagement in and knowledge of current food law issues. She narrowed that list to the three topics you'll see below. Thank you to Alli for

servicing as our guest editor and bringing these articles to the Update, and many thanks to the authors for sharing their time and expertise in food law.

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### Legalizing Home Cooking: Legislating the Next Food Economy

**Liz Allen**

*Liz is an attorney and the Policy Director for COOK Alliance in Oakland, California, which advocates legalization of home restaurants.*

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Imagine getting takeout from your neighbor rather than a restaurant. Imagine the Tamale lady able to legally cook out of her home. Imagine dining-in with friends at a neighbor's home. This is a new reality in California.

In 2018, the non-profit the [COOK Alliance](#) ("Creating Opportunities, Opening Kitchens") passed the Microenterprise Home Kitchen Operation bill in California ("MEHKO") and created a way under certain circumstances for people to permit their home kitchens and sell meals to the public. COOK Alliance is a group of activists, cooks, entrepreneurs, and policy-makers focused on legalizing home restaurants in the United States. This [new law](#) (followed up by a 2019 clean-up bill) created the first-of-its kind permit for budding food entrepreneurs, adding a much needed bottom rung to the food entrepreneurship ladder.

This new law allows cooks to serve hot meals, distinguishing it from cottage food laws. However, it imposes some limits, such as prohibiting oysters and raw milk, foods that require a HACCP plan, and serving alcohol without the appropriate license from the California Department of Alcoholic Beverage Control. Additionally, the law limits the number of meals per week (60) and

imposes a \$50,000 per year revenue cap. To further ensure food safety, each cook must earn their Food Managers certification. You can read more about the requirements [here](#).

After the passage of the MEHKO law in California, generally considered a trend-setting state, Washington and Utah introduced copycat bills in 2020. More states are expected to follow suit in 2021. Similar to cottage food laws, food policy experts expect this trend to slowly sweep the nation. Advocates who want to work on such legislation should first examine what statutory schemes are already allowed, such as cottage food, food trucks, and food carts. They will then need to consider a myriad of topics, such as zoning regulations, water and waste requirements, and existing and additional food safety regulations. They will need to create permitting schemes, enforcement mechanisms, and ways to ensure that cooks are not being criminalized. COOK Alliance put together an [Equity Framework](#) for new advocates to better understand the background of at-home cooking and how to legalize it in an equitable manner.

The California law is opt-in by county, as the health department sits at the county level. Thus far, 2 counties have opt-ed in and several more are poised to do

so in the coming months. Progress has stalled due to the COVID-19 pandemic. However, because food production is largely a recession-proof industry, this law is also helpful in the COVID-era because it ensures greater safety for those purchasing food and greater opportunities for those would-be chefs who might have lost jobs in other industries.

You can read more about this new food movement at: [cookalliance.org](http://cookalliance.org).

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## Meeting the Legal Needs of Food Hubs during COVID-19 and Beyond

### Sophia Kruszewski

*Sophia is an Assistant Professor of Law and the Clinic Director for the Center for Agriculture and Food Systems at Vermont Law School.*

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It's clear that COVID-19 has roiled our food system: from farmers whose restaurant and institutional customers shuttered overnight, to essential food and farm workers who have lacked access to personal protective equipment, to exacerbated food insecurity among the most vulnerable. We still don't know how far-reaching the impacts of the COVID-19 pandemic will be on our food system—but there are bright spots. Local and regional food hubs, for example, have shown nimbleness and ingenuity, responding to supply chain needs and filling gaps traditionally served by larger food distributors.<sup>1</sup>

As our food system continues to adjust to the COVID-19 pandemic and other forces, attorneys may find opportunities to support the creation and development of food hubs. Our Food and Agriculture Clinic, within Vermont Law School's Center for Agriculture and Food Systems, recently worked with a food hub client and we identified a number of issues that attorneys working with food hubs should be aware of when approaching this work.

While food hubs can, and do, take many forms, a food hub is essentially a food distributor, purchasing and aggregating from multiple producers, and serving clients like retail grocers, schools, and other distributors. Food hubs may perform some processing in addition to aggregation and distribution, and may sell directly to consumers in addition to institutional and wholesale buyers. Regardless of the types of activities

<sup>1</sup>See, e.g., Anna Paige, [Billings-area food hub grows as consumers seek alternatives to grocery stores](#), BILLINGS GAZETTE, Apr. 4, 2020 (Montana); [Carrboro launches local food hub amid coronavirus outbreak](#), WRAL.COM, Mar. 19, 2020 (North Carolina); and, Douglas Trattner, [Central Kitchen Teams up With Local Farms to Offer End-Around to National Meat Shortages](#), CLEVELAND SCENE, May 6, 2020 (Ohio).

the food hub conducts or the markets within which it operates, food hubs are distinguished by their unique focus on local and regional products, and many hold dual missions of ensuring fair prices to farmers while increasing access to healthy food. Indeed, a survey of 119 food hubs, conducted by the [Wallace Center](#) and [Michigan State University's Center for Regional Food Systems](#) in 2017, found that over 90% of respondents identified improving human health, market access for small-scale farmers, and environmentally sensitive production practices as central values. Nearly 90% of hubs surveyed sourced primarily, if not exclusively, from small- and mid-sized farms. USDA's [Food Hub Directory](#) currently identifies 250 of these entities nationwide, though some estimates put the total number of operations that identify as food hubs closer to 400. That number may well be increasing to meet supply chain needs during the COVID-19 pandemic, as farms and organizations have pivoted their models to aggregate farm products and get them on grocery store shelves and directly to customers seeking contactless pickup and delivery options.

While some of these entities may already have formal legal structures in place, others are newly formed. As these entities determine whether to continue operating post-COVID-19, they will likely need legal support to address issues of liability and governance. They may also need help navigating the various local, state, and federal requirements that come into play as they mature and expand.

The food hub our Clinic worked with had been storing products and dispatching deliveries from their primary supplier's farm, but had outgrown the space. Preparing to move into a new warehouse, they wanted

to understand the legal obligations that came with expanding their sales, products carried, and markets served. As we discussed the food hub's willingness to grow and carry a range of new products, we realized just how rapidly the sector is expanding.

The food hub only aggregated products, marketing a mix of fresh, frozen, and shelf-stable goods ranging from raw produce, to cheese and yogurt, to frozen meat, to chocolate. Because they did not process the foods, the range of potentially applicable regulations narrowed, but was still quite extensive. Here's what we learned from our work:

- Food hubs may serve a range of clients from direct to wholesale; some may offer freight services (bill of lading) in addition to purchasing and reselling products; some may only aggregate products while others may also do some light processing. Understanding the full picture of products, activities, and markets is critical to identifying which regulations apply.
- At the state level, meat and dairy handling, warehouse, and alcohol licensing requirements are most common, depending on the type of products the hub is storing and transporting.
- At the federal level, a range of food safety regulations applies. And depending on sales volume and hub structure, requirements may vary. Most food hubs need to register with FDA as food facilities. A limited number may meet the definition of a secondary activities farm if they are majority owned by farmers, and the majority of aggregated product comes from those



Preventive Controls for Human Food Rule (21 C.F.R. Part 117) requirements, depending on sales.

- Many food hubs, as food carriers, also need to comply with the FSMA Sanitary Transportation Rule, which is triggered by food sales over \$500,000 averaged over the past three years ([or \\$561,494 in 2020 dollars](#)). Notably, FSMA expanded the definition of “adulterated” under 21 U.S.C. 331(a) to include food that has been transported under conditions that do not comply with the Sanitary Transportation Rule, in addition to adding noncompliance with the Sanitary Transportation Rule as a separate prohibited act at 21 U.S.C. 331(hh).

- Only 6% of food hubs surveyed had over \$7 million in food sales. So it is reasonable to assume that most will not have to comply with the FSMA Intentional Adulteration Rule—both because the threshold to trigger compliance is \$10 million (or \$11.2 million in 2020 dollars), and because facilities that only hold food (other than in liquid storage tanks) are also exempt.

- Finally, in our experience, one of the most overlooked requirements for food hubs is obtaining a license under the [Perishable Agriculture Commodities Act](#) (PACA, 7 U.S.C.

499a-t), which establishes a process for prompt resolution of contract disputes between produce buyers and sellers. Nearly all entities involved in the marketing of “commercial quantities” of fruits and vegetables— or more than 2,000 pounds on any given day—must have a PACA license. Notably, if a food hub meets the 2,000-pound threshold and has been operating without a license, they must pay retroactive fees for each month since they reached the threshold.

Each state has its own nuanced requirements when it comes to entities that aggregate, store, and distribute various food and agricultural products—and each food hub is unique. As farmers, food producers, and food hubs consider formalizing and continuing the ad hoc aggregation and distribution efforts that arose during the COVID-19 crisis, there is a clear role for lawyers in supporting the viability of these enterprises. We hope these insights may prove useful for attorneys newly engaging with this sector.

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## The COVID-19 Pandemic’s Impact on Investments in Early-Stage Food and Beverage Startups

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The current COVID-19 pandemic has disrupted the traditional methods of business and operations of food and beverage startups. In our work with food and beverage startups, we have noticed that our food and beverage startup clients were unexpectedly faced with the task of adapting future projections amid economic uncertainty. Early-stage food and beverage startups initially faced difficulties negotiating company valuations with third-party investors. After a solid start to 2020, economic uncertainty caused investors

to calculate lower valuations for startups in all sectors, including food and beverage. Additionally, the rapid demand for CPG products overburdened traditional supply chains, which resulted in third-party distributors and vendors reneging key terms in contracts with food and beverage startups in order to fulfill contract terms for large food and beverage companies.

The disruption caused by the COVID-19 pandemic has impacted the ability of food and beverage startups to attract

investors and raise private capital after a strong climate for capital investments in 2019 and the beginning of 2020. The initial few months of the COVID-19 pandemic caused many investors to rethink their investment strategies, and we saw a dip in the number of private capital investments through the summer of 2020 as compared to last year. Initially, many food and beverage companies sought out government assistance programs, such as the Paycheck Protection Program (“PPP”), as a source of capital to survive until private capital

investments resume. However, PPP loans were only temporary measures, and many companies have realized the need to adapt their financial projections and business models to attract other sources of capital.

Companies seeking other sources of capital may need to reassess their expectations of investment terms. In the current investment environment, we would recommend that attorneys guide emerging food and beverage startups on the following points:

- **Convertible Securities.** It is preferable for food and beverage companies to raise funds through convertible securities to avoid pegging the valuation of the securities to the outside financing round. Convertible promissory notes, warrants, and Simple Agreements for Future Equity (SAFEs) are attractive investment instruments.
- **Financial Runway.** We would recommend that food and beverage startups raise enough funds for a 12-month runway in the current environment. The hope is that economic uncertainty due to the pandemic will subside toward the end of that period, and startups will be able to negotiate reasonable valuations to raise priced equity and debt rounds.
- **Valuations.** Valuations have been in flux since the beginning of the pandemic, and it is difficult for investors and early-stage food and beverage companies to agree on valuations. Food and beverage companies should seek funds from other sources, such as banks and government loan programs, rather than raise capital. Companies with a stable 6-12 month revenue run rate in the pandemic business environment may be able to improve valuations afterwards.

Although food and beverage startups faced challenges adjusting to the effects of COVID-19 and economic uncertainty, many innovative startups are created

during economic downturns. Based on prior trends, we expect a number of innovative food and beverage startups to spring up. As food and beverage startups begin to embrace innovation, technology becomes a key component of these companies. Attorneys working with startups in the food and beverage technology space should advise their clients to ensure that all intellectual property, both tangible and intangible, related to the company's business is properly assigned to the company. Investors of food and beverage technology startups will begin to diligently analyze the company's intellectual property, so it is important that attorneys review intellectual property matters in sufficient detail with their food and beverage startup clients.

While many food and beverage companies have traditionally depended on brick-and-mortar to sell products, the COVID-19 pandemic has forced companies to explore new options to reach consumers. The reliance on ecommerce platforms and food delivery services has increased substantially in order to adapt to consumer preferences. Although the initial shift to minimize person-to-person contact was spurred by lockdown and social distancing measures, consumers are likely to increase the use of ecommerce platforms, prompting food and beverage startups to factor ecommerce and food delivery into their long-term growth plans. Attorneys should work with their early-stage food and beverage clients to assess whether these companies have adjusted their long-term strategies to incorporate technology solutions, if possible. Investors will want to see that companies have adapted their marketing and sales strategies to reach a broader range of consumers that will rely on technology to purchase food and beverage products.

Along with the move towards ecommerce solutions, consumers have changed their dietary habits by focusing on healthier and sustainable food and beverage options. Certain sectors, such as plant-based proteins, nutritional supplements, and health and wellness, have been able to prosper in the current

environment as a result of consumer emphasis on healthier products. The COVID-19 pandemic has substantially increased the growth rates of these sectors, which will expect to continue to grow in the future. Thus, we expect to see growth in the number of new companies entering these sectors, and we expect investors ranging from food and beverage to tech will continue to focus their investments here.

As the economy adjusts to the current COVID-19 environment, potential investors and buyers have slowly resumed capital investments and acquisitions in the food and beverage sector. Rather than focusing primarily on revenue as a factor for evaluating target companies, strategic investors and buyers have factored in long-term growth, profitability, market conditions, and the COVID-19 pandemic's effects on business for calculating valuations for food and beverage companies. This broader approach for valuing companies reflects the belief that changes due to the COVID-19 pandemic, such as reliance on ecommerce platforms and preferences for sustainable products, will have long-term impacts on the food and beverage industry. Food and beverage startups should evaluate how the COVID-19 pandemic has affected their business models and consumer bases in order to be well-positioned to thrive in a post-COVID-19 world.