

OCTOBER 8, 2024

Bite-Sized Insights: Legal Trends Impacting the Food & Beverage Industry

Bobby Malhotra, Partner
Kevin Simpson, Partner
Becky Troutman, Co-Chair, Technology, Media & Telecommunications Group

Negotiating SaaS Agreements for the Food & Beverage Industry

Becky Troutman, Co-Chair, Technology, Media & Telecommunications Group

SaaS Agreements – Common Red Flags

- ▶ Small Print; Linked Terms; Not Mutual
- ▶ Warranty; Warranty Disclaimer; Limited Remedy
- ▶ Indemnity
 - No indemnity or limited IP indemnity; broad customer indemnity
- ▶ Limitations of Liability
 - Disclaimer of lost profits and indirect damages and low liability cap, without exceptions
- ▶ Confidentiality; Use of Data
- ▶ Exclusivity; Non-Compete
- ▶ Term; Termination
- ▶ Other (Publicity, Assignment, Governing Law/Jurisdiction/Venue)



AI Issues

AI Output

- Accuracy/verification
- Ownership
- Warranties; Remedies

Use of Your Data

- What data will be used, and how?
- Will data be anonymized and aggregated?
- Could sensitive confidential information or PII be compromised?
- Could customer or other third party data be disclosed, and would that violate any contractual obligations?

Negotiation Tips

BUSINESS REQUIREMENTS

- Know your business requirements, contract value, and leverage
- Involve legal early in any RFP process
- Consider test/acceptance; SLAs; remedies

WARRANTY; DISCLAIMER

- Performance warranty
- Right to terminate

INDEMNITY; INSURANCE

- IP infringement; breach of agreement; acts/omissions; breach of confidentiality
- Breach of privacy/data breach (subject to super cap)
- Gross negligence or willful misconduct

Negotiation Tips CONTINUED

LIMITATIONS OF LIABILITY

- Damages Disclaimer – consequential, incidental, indirect, lost profits
- Liability Cap; Super Cap; Insurance
- Exceptions – indemnity; breach of confidentiality; privacy/security/data breach; fraud, gross negligence, willful misconduct

CONFIDENTIALITY; USE OF DATA

- No use to train AI; if not negotiable consider internal AI policy/playbook (use limitations on data entered into AI tool (allowed business uses; no confidential information, customer information or PII; no generation of work product for customers)

EXCLUSIVITY; NON-COMPETE; RESTRICTIONS ON DEVELOPMENT

- Mutual; limitations

Negotiation Tips CONTINUED

TERMINATION

- For convenience
- For cause

ASSIGNMENT

- Exceptions for assignments to affiliates, merger, sale of stock/assets
- No restriction on change of control/corporate transactions

RIGHT OF PUBLICITY

- Permission; right to review; trademark usage

GOVERNING LAW/JURISDICTION VENUE

- Neutral or silent

Privacy Trends in Food & Beverage Litigation

Kevin Simpson, Partner

Wiretapping Laws in the 21st Century

Wiretapping laws from the 1960s and 70s are finding new life

- California Invasion of Privacy Act, Pennsylvania's Wiretap Act
- Draconian statutory damages
- Private right of action → Class actions

RISK AREAS

- ▶ Consumer-facing websites (SDKs, chatbots, Meta Pixel)
- ▶ Contact Center as a Service (CCaaS)
- ▶ Artificial Intelligence Training



Text Message Marketing

- Text message marketing is fertile ground for the plaintiff's bar
- Federal and State laws with patchwork requirements
- Statutory damages up to \$1,500 per message → Class actions

RISK AREAS

- Invalid consent records
- Wrong/reassigned phone numbers
- Failure to honor opt-outs

AI [Data] Governance Strategies For the Food & Beverage Industry

Bobby Malhotra, Partner

Definitions/Level Setting

AI GOVERNANCE

- **Broader in Scope:** Encompasses the strategic vision and overall framework for AI systems
- **Comprehensive Framework:** Guides the development, deployment, and use of AI systems within an organization through overarching policies and guidelines

AI DATA GOVERNANCE

- **Narrower in Scope:** Focuses specifically on the management of data used in AI systems
- **Detailed Framework:** Establishes policies and procedures to ensure data is used responsibly, ethically, and in compliance with regulations and internal policies set forth by the overall AI governance strategy
- **Data Management Guidelines:** Provides specific guidelines for collecting, storing, processing, and using data within AI systems

Why Does AI [Data] Governance Matter for F&B Companies?

- Regulatory compliance
- Mitigate business and reputational risks
- Protect sensitive information (e.g., trade secrets, process flows, highly sensitive information, etc.)
- Proactive approach = cost savings and efficiencies down the line

Common Methods of Trade Secret Theft and Exposure

**INSIDER
THREATS**

**CYBER
ATTACKS**

**PHYSICAL
THREAT**

**SOCIAL
ENGINEERING**

**GENERATIVE
AI RISKS**



Mitigating Gen AI Trade Secret Exposure Risks

- AI Policy and guidance
- Employee training
- Prohibit/limit use of public LLM models
- Use LLM models that maintain confidentiality

Patchwork of Laws to Navigate

EU AI ACT

Comprehensive regulation affecting anyone who makes, uses, imports, or distributes AI systems in the EU

CHINA

Stringent AI regulations focusing on data security and ethical use

BIDEN ADMIN'S EXECUTIVE ORDER ON AI

U.S. federal guidelines aimed at promoting responsible AI development and use

STATE-SPECIFIC LAWS

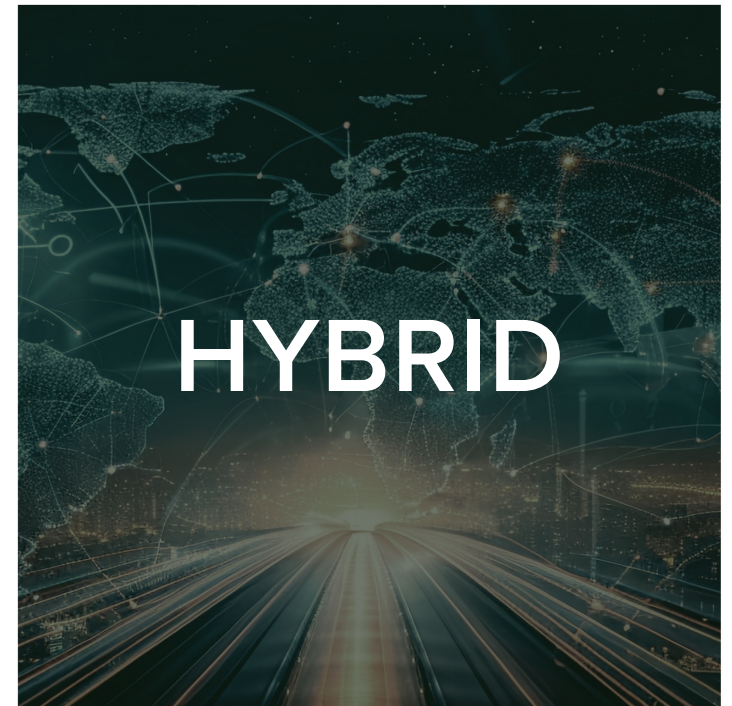
Regulations in states like California and Colorado that impose additional requirements on AI use

FUTURE LEGISLATION

Additional significant AI legislation expected in 2025, necessitating proactive compliance measures

Governance Approaches

EACH APPROACH HAS ITS OWN ADVANTAGES AND CHALLENGES!



Key Considerations for AI [Data] Governance

- Map out AI deployment areas and use cases
- Evaluate and potentially restrict high-risk use cases
- Train models with lawful and reliable data
- Limit the ingestion of sensitive private data
- Develop robust internal policies
- Conduct periodic monitoring and auditing of AI systems
- Stay informed about developing AI regulations and technologies
- Foster operational synergies and cross-functional collaboration

WINSTON
& STRAWN
LLP