

Allergy Standards and Liability in the Restaurant Industry: A Legislative Update

By: Mark A. Abramson & Nick E. Abramson

I. Introduction

A new allergy awareness bill, inspired by the tragic death of our former client, Rachel Hunger, is once again making its way through the New Hampshire legislature. Spearheaded by Rachel's parents, HB 65, formerly HB 1102, initially passed the New Hampshire House by a vote of 232-81 in March 2020, days before the COVID-19 pandemic brought the bill's progress to a halt. Rachel's parents have recently renewed their effort, however, and the bill is currently before the House's Commerce and Consumer Affairs Committee. If passed, "Rachel's Law" would amend R.S.A. 143-A by requiring all food service establishments licensed in New Hampshire to (1) include a notice on all menus and menu boards of the customer's obligation to inform the server of his or her food allergies; and (2) have an employee on staff who is trained and certified as a "food protection manager by a program approved by the department which includes training regarding food allergens."¹ These requirements are consistent with the applicable industry standards, and had they been in place in 2019, would likely have prevented Rachel's premature and tragic death.²

II. Background

In April 2019, Rachel dined with friends at a local New Hampshire restaurant. Rachel, who had significant allergies to nuts, legumes, and soy protein, reviewed the menu and selected the egg roll appetizer, followed by a main course of crab rangoon, both of which she had consumed many times at other similar restaurants without incident. Although the spring roll appetizer warned that it contained "[p]ork and shrimp inside" – presumably denoting the presence of shellfish, a common allergen – the egg roll menu item neither listed any ingredients, nor warned that it contained peanuts, which are also among the most prevalent allergens. Unsuspecting diners, like Rachel, had no forewarning that the item in fact contained 2% peanut butter, a potentially lethal amount for those with a severe allergy. Similarly, the rest of the menu was devoid of any reference to allergens, or any request that patrons notify their servers of any potential allergies.

When the restaurant server approached to take their order, she did not inquire about any food allergies; she did not request that Rachel or her friends alert the staff to any food allergies; and she did not warn them that any of the menu items might contain common allergens. When Rachel placed her order, the server again failed to ask Rachel if she had any allergies, and neglected to inform Rachel that the egg roll contained peanuts or peanut derivative. In

short, based on Rachel's past eating experiences, the lack of any notice or warning on the menu, and the failure of the restaurant's staff to inquire about allergies or warn about the presence of common allergens in Rachel's selected food items, there was no reason for Rachel to suspect that the egg roll appetizer contained peanuts or any peanut products.

Shortly after consuming her meal, Rachel developed facial redness and shortness of breath. When her inhaler and EpiPens failed to alleviate her telltale respiratory symptoms, a friend called 911. Upon arrival of the EMS crew just three minutes later, Rachel was in patent respiratory distress. Approximately fifteen minutes later, the EMS crew transferred Rachel's care to the emergency department at Wentworth-Douglass Hospital. Sustained interventional efforts at Wentworth-Douglass, and subsequently at Dartmouth Hitchcock Medical Center, were unsuccessful. She had suffered anaphylactic shock, hypoxic respiratory failure, cardiac arrest, and an irreversible anoxic brain injury with a very poor prognosis. Sadly, Rachel succumbed to these injuries a few weeks later, the day before she turned 21.

Approximately four days after what proved to be Rachel's fatal meal, a close friend contacted the restaurant by telephone. She asked the answering employee what was in the egg roll appetizer, to which the employee responded "pork and cabbage." When pressed specifically about whether the dish contained peanuts, the employee responded "[o]h, [it contains] peanut butter."

It became apparent, in discovery, that the restaurant maintained no written policies of any kind: no orientation materials for new employees; no employee training materials; no materials on allergens or common customer hazards; and no management training materials. Had the menu, or Rachel's server, made a simple notification, or had Rachel's server been appropriately knowledgeable about the risks and hazards associated with common allergens in the restaurant's various dishes, Rachel would likely still be alive today.

III. The Industry Standards

Among the myriad standards governing public dining establishments, three stood out prominently in this case:

First, to meet the industry standard of care for the safety, health, and security of patrons, a restaurant must have allergen training for management and for employees, in writing, and it must be continual and ongoing, from the first day of employment to the last day of employment. Management and employees serving the public must be able to recognize the industry-recognized hazards, which include, but are not limited to, allergens, and must be able to resolve, mitigate, eliminate, and/or warn of the industry-recognized hazards,

including, but not limited to, allergens, using both written and verbal communication. These standards of care apply to every restaurant, restaurant manager, and restaurant employee working in the industry, regardless of the size, type, or location of the subject restaurant.

Second, restaurant industry best practices require that restaurants identify the ingredients of their prepared foods, particularly ingredients which constitute common allergens, such as shellfish and peanuts. Those identifications should be made both in writing on the menu, and verbally by the wait-staff directly to restaurant patrons.

Third, when a restaurant inserts a commonly-allergenic ingredient into a menu item in which the average patron would not expect it to be present, it is incumbent upon the restaurant and its staff to ensure that patrons are aware of the presence of that common allergen.

IV. The Proposed Legislation

The proposed legislation, referred to as “Rachel’s Law,” seeks to narrowly codify some of these existing restaurant industry standards, with the hope of avoiding unnecessary deaths like that of Rachel Hunger. The pertinent statute is N.H. RSA 143-A, which generally governs food service licensure in New Hampshire. Rachel’s Law, HB 65, would specifically require food service establishments to establish food allergy awareness procedures, as follows:

143-A:8-a Food Allergy Awareness.

I. Each food service establishment licensed by the state under RSA 143-A:6 or by the municipality in which it operates shall:

(a) Include on all menus and menu boards a notice to customers of the customer's obligation to inform the server of his or her food allergies.

(b) Have a person in charge during all hours of operation trained and certified as a food protection manager by a program approved by the department which includes training regarding food allergens. Such person shall ensure that employees are properly informed of food safety issues, including awareness of food allergies, as it is related to the employees' assigned duties.

II. A food service establishment that violates this section shall be subject to enforcement in accordance with rules adopted under RSA 143-A:9, XI, or local ordinance relative to food service licensure.

III. This section shall not apply to any food service establishment exempt from licensure or inspection under RSA 143-A:5.

IV. Nothing in this section shall establish or affect any private cause of action. This section shall not affect any other right or remedy available by statute.

3 Exemption for Food Service Establishments Regulated By Municipalities Limited. Amend RSA 143-A:5, I-II to read as follows:

I. Food service establishments and retail food stores licensed by city health officers under RSA 47:17, *except with regard to the food allergy provisions of RSA 143-A:8-a.*

II. Food service establishments and retail food stores licensed by town health officers under RSA 147:1, *except with regard to the food allergy provisions of RSA 143-A:8-a*.

4 New Paragraph; Food Service Licensure; Rulemaking. Amend RSA 143-A:9 by inserting after paragraph X the following new paragraph:

XI. Requirements for food allergy awareness under RSA 143-A:8-a.

5 Effective Date. This act shall take effect January 1, 2022.

V. Conclusion

Rachel Hunger's premature death underscores the need for allergy awareness legislation, like Rachel's law, in New Hampshire. In the absence of such legislation, many restaurants will skirt industry standards regarding food allergens, which will inevitably result in additional allergic reactions and preventable deaths. Until meaningful legislation is passed, it is up to New Hampshire's attorneys to continue to hold food service establishments in the Granite State accountable for their violations of the industry standards regarding the safety, health, and security of patrons.

¹ H.B. 65, 2021 Session (N.H. 2021), https://legiscan.com/NH/text/HB65/id/2227521/New_Hampshire-2021-HB65-Introduced.html.

² Rachel's case was settled with multiple defendants before trial.