

# PUBLICATION

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## Chipotle's Record \$25 Million Fine Sends Tough Message as the Restaurant Industry Begins Reopening

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Chipotle Mexican Grill Inc. agreed to pay a \$25 million criminal fine, the largest ever in a food safety case, to resolve criminal charges related to the company's involvement in foodborne illness outbreaks that sickened more than 1,100 people between 2015 and 2018, the Department of Justice announced last week. This news is a wake-up call for the nation's restaurant industry as it prepares to reopen this week in several states amid concerns about employee and customer safety. The message is simple: despite the burdens of reopening under "social distancing" guidelines, this is no time for restaurants to cut corners on food safety, particularly with food inventories that pre-date the shutdown and working capital stretched to the breaking point.

### Lessons Learned from the Chipotle Fine and Settlement

The Newport Beach, California-based company agreed to a three-year deferred prosecution agreement (DPA) that will allow it to avoid conviction for adulterating food in violation of the Federal Food Drug and Cosmetic Act, if it complies with an improved food safety program.

"This case highlights why it is important for restaurants and members of the food services industry to ensure that managers and employees consistently follow food safety policies," said Assistant Attorney General Jody Hunt of the Department of Justice's Civil Division. "The Department of Justice will vigorously enforce food safety laws in order to protect public health."

"Chipotle failed to ensure that its employees both understood and complied with its food safety protocols, resulting in hundreds of customers across the country getting sick," said U.S. Attorney Nick Hanna for the Central District of California. "Today's steep penalty, coupled with the tens of millions of dollars Chipotle has already spent to upgrade its food safety program since 2015, should result in greater protections for Chipotle customers and remind others in the industry to review and improve their own health and safety practices."

"The FDA will hold food companies accountable when they endanger the public's health by purveying adulterated food that causes outbreaks of illness," said FDA Commissioner Stephen M. Hahn, M.D. "We will continue to investigate and bring to justice any company whose food products present a health hazard to consumers."

According to the facts recited in the DPA and confirmed by Chipotle, the company was implicated in at least five foodborne illness outbreaks between 2015 and 2018 connected to restaurants in the Los Angeles area, Boston, Virginia, and Ohio. These incidents primarily stemmed from store-level employees' failure to follow company food safety protocols at company-owned restaurants, including a Chipotle policy requiring the exclusion of employees who were sick or recently had been sick. As set out in the DPA, some store-level Chipotle employees from the 2015 to 2018 time period reported inadequate staffing and food safety training. Employees also reported pressure to work while sick, even though that was against Chipotle's sick-exclusion policies.

Chipotle agreed in the DPA to develop and follow an improved, comprehensive food safety compliance program. They also agreed to evaluate the company's food safety audits, restaurant staffing, and employee training, among other areas, to mitigate the issues that led to the outbreaks. While franchisees were not involved in the DPA, the procedures effectively set a standard for food safety practices throughout the chain. The pressure to do more with less at the store level left Chipotle vulnerable to food safety compromises.

### **The Restaurant Industry Prepares to Reopen Amid COVID-19 Concerns**

Given the size and timing of the Chipotle settlement, restaurants must be hypervigilant regarding food safety at a time when they will also be required to take on additional safeguards and procedures to protect customers and employees from COVID-19 exposure. This will be a delicate balancing act as the restaurant industry seeks to recover from devastating stay-at-home orders that have crippled business for weeks.

The reopening plans announced this week by three southern states impose burdensome and costly procedures on restaurants such as requiring employees to wear gloves and masks, sanitizing all front-of-house surfaces every two hours, using disposable menus and not allowing shared buffets, condiments or beverage stations. Under the [Tennessee plan](#), in addition to limiting occupancy to 50 percent of seating capacity, restaurants must also space tables six feet apart, limit seating to six persons per-table and use social distancing guidelines in waiting areas. For now, there will be no bar access or live music. The [Georgia plan](#) released by Governor Brian Kemp lists 39 guidelines to meet what he calls "minimum basic operations" for restaurants. Those guidelines require employees to wear masks or face coverings at all times, screening of staff for COVID-19 symptoms and fevers over 100.4 degrees, staggering shifts, spacing out tables and bar seating in the dining room to allow six feet between other seating arrangements, and posting signs at the entrance stating no one is allowed in the restaurant who is exhibiting COVID-19 symptoms or a fever over 100.4 degrees. Florida's governor issued an [executive order](#) on April 29 permitting restaurants (but not bars) in all counties other than Miami-Dade, Broward, and Palm Beach Counties to reopen beginning May 4 as long as appropriate social distancing requirements could be met. Those include limiting indoor occupancy to no more than 25% of maximum capacity, keeping tables at least six feet apart, closing seating at bar counters, and limiting table seating to no more than 10 people. Outdoor seating is permitted as long as tables are six feet apart. As other states roll out reopening plans in the near future, it is likely they will include similar burdensome requirements. Although South Carolina's governor [lifted restrictions](#) this week on many businesses, restaurants are still waiting for guidance on when they will be allowed to reopen dining rooms.

### **Restaurants Should Draft Return to Work Protocols Now**

As the focus turns to reopening, now is the time for restaurants to prepare a reopening plan, taking guidance from the two states mentioned who have taken the lead, as well as best practices from the industry. The National Restaurant Association has released a comprehensive COVID-19 reopening guide for the industry to ensure a safe and secure environment for employees and guests. The [ten-page guide](#), created with input from the FDA, Centers for Disease Control and Prevention and Environmental Protection Agency, lists a variety of recommendations such as sanitizing tabletops between seatings, discarding single-use items like paper menus, and installing sneeze guards along buffet bars.

Some of the key reopening tips, which in some respects mirror the state plans discussed, include:

- Where salad bars and buffets are permitted, they must have sneeze guards. Change, wash and sanitize utensils frequently and place appropriate barriers in open areas.
- If providing a "grab and go" service, stock coolers to no more than minimum levels.
- Thoroughly detail, clean and sanitize entire facility, especially if it has been closed.
- Between guest seatings, clean and sanitize table condiments, digital ordering devices, check presenters, self-service areas, tabletops, and common touch areas. Single-use items should be discarded. Consider using rolled silverware and eliminating table presets.

- Remove lemons and unwrapped straws from self-service drink stations.
- Clean and sanitize reusable menus.
- Discard paper menus after each customer use.
- Avoid all food contact surfaces when using disinfectants.
- Make hand sanitizer readily available to guests.
- Consider touchless hand sanitizing solutions.
- In terms of employees, the NRA said employee temperature checks can be done at the discretion of the employer, although it is not mandated by the CDC.
- Employers should follow local and state requirements when it comes to face coverings, which the CDC recommends as an effective tool to mitigate risk from individuals who show COVID-19 symptoms.

Many sources of cleaning and sanitation products for the industry offer new cleaning systems and equipment promising more effective antiviral results, including aerosol misters and surface disinfectants. This rapidly evolving market will introduce new, even more effective products now in the later stages of testing and approval. Risk averse operators should be aware of these advances in anti-pathogenic products and methods, and be ready to switch to those products and methods demonstrating improved outcomes and safety.

Baker Donelson's labor and employment lawyers have created a comprehensive protocol that can be adapted to your business needs. For more information, [click here](#).

For any questions, please contact one of the authors or any member of Baker Donelson's [Hospitality, Franchising, and Distribution Team](#). You may also visit the [Coronavirus \(COVID-19\): What You Need to Know information page](#) on our website.