

Unfair Competition Defense Podcast
Greenberg Traurig, LLP
Episode 13

Speaker 1 ([00:00](#)):

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Adil Khan ([00:18](#)):

Good morning and good afternoon, everyone. This is Adil Khan at Greenberg Traurig. I'm joined by my co-host, Greg Nysten, and our special guest, Riley Lagesen. Thank you for joining us today for the Unfair Competition Defense Podcast. Riley here, our colleague, he's chair of Greenberg Traurig's Global Restaurant Industry Group, and he's here to talk about the new junk fee law in California that got added to the CLRA, the Consumer Legal Remedies Act, a few months ago. It was effective as of July 1st. People might know these as SB-478 and SB-1524.

([00:56](#)):

He's here to tell us a little bit about junk fees and compliance issues with a particular focus on how they impact the restaurant industry. He'll give a brief overview of the legislative focus on transparency and consumer pricing and fee disclosures, and he'll give us some best practices for restaurants and businesses in the hospitality space to keep tabs on. Riley, thank you for joining us. Greg, good to see you again.

Riley Lagesen ([01:21](#)):

Likewise.

Adil Khan ([01:22](#)):

Riley, let's start with having you set the table for us, so to speak. Can you tell us a little bit about how we got here and what was happening in the restaurant industry that prompted this legislative action and regulatory interest?

Riley Lagesen ([01:36](#)):

Well, thank you for having me, Adil and Greg. It's great to be here. The purpose behind this legislative activity, both SB-478 and 1524, is a continuing movement in California and elsewhere around the country towards legislation that encourages pricing transparency. As a consumer, I think I could safely say and share with many others that nobody likes being surprised with hidden fees. When you go to a hotel, when you buy a concert ticket or any other transaction and you end up being charged substantially more than what you thought you were supposed to pay, it's not a welcome experience. This legislation in California, as well as a movement towards other legislation around the country, is meant to curb drip pricing or lack of pricing transparency and to provide consumers with accurate information about the price that they're going to require to pay prior to consummating the transaction.

([02:36](#)):

Now, when we take a step back and see what is the genesis of the history behind these mandatory surcharges and other fees that businesses have been using in California and elsewhere around the country, it really goes back at least in restaurants to around 2012 and 2013 when we began to see a movement called the Fight for 15. The Fight for 15 was a movement organized and promoted by union labor activists to raise the minimum wage in restaurants, specifically fast food restaurants, to \$15 an hour. That was the Fight for 15. At the time, I think the minimum wage in California was around 7 or \$8 an hour. People said, "Oh, \$15, it's unrealistic. Wages will never get that high in the restaurant industry or elsewhere because you've just seen slow incremental wage increases over the course of many years in all businesses and California and other states,"

[\(03:36\)](#):

But with the Fight for 15, what it triggered was actually some fairly dramatic wage increases in a number of different cities and a number of different states. Very soon, Los Angeles, Seattle, San Francisco, Portland, New York and certain other markets were calling for progressive wage increases from around 7, \$8 an hour up to 13, \$14 an hour or so over the course of years. Restaurant clients began to say, "Wow, we are going to have to charge a lot more to our customers in order to sustain the wage increase," because the biggest costs for restaurants are wages and food and beverage, and labor costs were becoming increasingly more important in front and center, so a number of groups started to implement surcharges. You started to see line items on checks in restaurants and also other businesses where a mandatory surcharge would be applied, 3%, 4%, 5% of the ticket that would go towards increased labor costs or other purposes described on the receipt.

[\(04:46\)](#):

At the same time, we also started to see a lot of litigation activity around it because in a number of states, California included, there were consumer protection statutes that guarded against deceptive business practices and other things that litigators caught onto that inspired them to file lawsuits. We started to see a number of lawsuits pop up involving businesses, especially restaurants that were adding surcharges. Most often a lot of these cases were around they were not properly disclosed to the consumer prior to purchase. The consumer was surprised and shocked to see after they had paid, they looked back and they went, "I didn't realize I had to pay another surcharge before I dined here. What's this all about?" 478, which went into effect I believe it was July.

Adil Khan ([05:32](#)):

That's right.

Riley Lagesen ([05:33](#)):

I think it was July 1st of 2024, was looked at for a long time by many industries in California because it just does not apply to restaurants and applies to all types of industries. But especially restaurants because surcharge has been a pricing practice that had been common for some time, and especially when an FAQ came out by the Department of Justice in May of 2024 that seemed to suggest, based upon the authors of that FAQ, that restaurants might have to dramatically change their pricing practices. Meaning-

Adil Khan ([06:08](#)):

That's the California Attorney General's Office you're referring to, I think, right?

Riley Lagesen ([06:11](#)):

Correct. Yep. I think it was the May 8th [inaudible 00:06:15] from the Department of Justice that gave guidance on the applicability of SB-478 to restaurants. It stated at least some of the relevant sections that restaurants, anytime they added a mandatory fee or surcharge, it needed to be included in what's called the advertised price. For restaurants saying, "Well, we've added mandatory gratuities for parties of six or more for the last four decades. Now that needs to be rolled into the menu price? Or for catering or special events or other things where mandatory gratuities are common and built in, how can you do that in terms of the pricing enrolled in the menu price?"

[NEW_PARAGRAPH]There are a lot of practical issues that provided pause for concern and also the obvious concern about potential legal liability for noncompliance with SB-478, given the potential remedies available to litigants and especially plaintiff's attorneys that may bring claims. There's a lot of concern in the restaurant community between May and July of 2024 over the summer for those that can remember back that far seems, like a very long time ago. In that time, the California Restaurant Association, along with a number of restaurateurs, lobbied and worked with lawmakers for the creation and implementation of SB-1524.

Adil Khan ([07:44](#)):

That's super helpful.

Riley Lagesen ([07:45](#)):

Yeah.

Adil Khan ([07:46](#)):

Sorry. Before we dive into 1524, can you give us a thumbnail sketch on what SB-478 requires? Because I think that's helpful to understand before we talk about the exceptions and the allowances that 1524 might permit.

Riley Lagesen ([08:00](#)):

SB-478, as mentioned, is about pricing transparency. It's as simple as possible. It's the price needs to be the advertised price. The price the consumer pays needs to be the price that they see. If you've been booking hotel rooms recently in California and you look at the advertised price, if businesses are compliant, they are including all additional fees or anything else that they're including in that price to the customer. Back in the old days before SB-478 a few months ago, you'd have a lot of à la carte fees that would pop up later on and you'd say, "Oh, I thought the hotel room was only \$200. Why is it 329? Why is the concert ticket \$400 when I thought it was a \$100?" Because there are all these different fees that were added on afterwards. The overarching purpose of 478 is to provide pricing transparency to the consumer prior to purchase so that they understand the amount they're actually going to have to pay.

Greg Nysten ([09:04](#)):

Can you take a minute, Riley, to talk about SB-1524 and how that might interplay with 478?

Riley Lagesen ([09:09](#)):

SB-1524 is an exception of sorts. A carve out for restaurants from the applicability of 478. It's not just restaurants. There's other food service businesses that are covered by this, food served grocery stores, food served stadiums, or other venues where there's food service businesses that they do not need to

roll every surcharge or fee into the advertised price. It allows them the ability to continue to add separate mandatory surcharges that they can charge to customers so long as they meet certain requirements in terms of pre-sale disclosure. 1524 essentially codifies best practices that had been recommended to operators using these types of fees prior to the implementation of SB-1524. Prior to 478, prior to SB-1524 businesses, to avoid liability, were advised to engage in pre-sale disclosure, clear and conspicuous disclosure of any fees to consumers prior to purchase. That's a requirement of SB-1524.

[\(10:37\)](#):

If an operator, if a restaurant wants to continue to charge a separate mandatory surcharge, say, "We want to charge an extra 5% to offset the increased cost of labor caused by the California Fast Act that went into effect last April and raised minimum wage across a number of restaurants to over \$20 an hour." A lot of folks are struggling with that. If they want to add a separate surcharge as opposed to raising menu prices to offset that, that surcharge needs to be clearly and conspicuously disclosed. Customers need to be able to see it prior to making the purchase. Where it's disclosed... There's language in SB-1524 as to where it's supposed to be disclosed. It says, "On any advertisement menu or other display that contains the price of the food or beverage menu item." You're seeing it on menu boards, you're seeing it in menus in the restaurants, digital sales. You're seeing it online.

[\(11:39\)](#):

You look at the most cautious and thoughtful brands that are implementing these surcharges. There's broad conspicuous disclosure every step of the way before the consumer makes the transaction because the consequences for noncompliance can be significant. You can be sued in potentially a class action, and everybody knows that's very expensive and no fun to deal with. Another requirement of 1524 to be in, I wouldn't say it's a safe harbor, but a safer harbor in terms of using fees. You have to provide an explanation of the purpose of the surcharge. This is where a lot of businesses had been less than forthcoming with some of these surcharges in the past. Some would say, "Oh, it's a happy kitchen fee. It Makes the kitchen happy, right?" Yeah. Does it make the kitchen happy if the owner takes all the surcharge and gives the kitchen nothing? Who knows?

[\(12:33\)](#):

The consumer needs to understand where the money is actually going. What is the real purpose? Under the CLRA and related statutes, California, elsewhere, any deceptive business practices on behalf of the business obviously present liability and risk. Operators that are going to make these charges, if it's going to the owner as opposed to employees, you better make really sure it's clear that your disclosure says, "The 5% fee that you're paying to offset the California wages are going to the owner of the business. No portion of this money is going to the staff or directly to the staff. Any monies going to the staff are indirect and not directly through this fee," or language like that to make it exactly and abundantly clear what the purpose of the surcharge is. That needs to be disclosed in all the places that SB-1524 requires such information to be disclosed prior to such sale.

[\(13:33\)](#):

Now, 1524 still has some things that are going to be I think learned over time in terms of what does on any advertisement that contains the price of the food or beverage item mean? If you're doing an advertisement in a newspaper, how much disclosure do you need to get into? Or any digital disclosure if it's online through social media channels or what have you, and how much granularity do you need to get into these disclosures? I think a lot of these questions are going to be answered over time through folks bringing cases, and these being litigated loopholes being closed through the legislative process or more clarity given around the legislation. It's not 100% foolproof in terms of operator guidance as to

what exactly you can or cannot do, but it's certainly a lot better than it was for restaurants under 478, which provided a lot of discomfort and an uncertainty.

[\(14:33\)](#):

1524 gives a little more predictability, a little more comfort, a little pathway to those who want to implement these fees. Now, operators can also not implement mandatory surcharges. They're free not to do that and greatly eliminate all kinds of risk by not doing that. We've seen a lot of folks moving that direction as well, saying, "It's just not worth the trouble. It's not worth the risk, and raising menu prices or doing other things other than asking for mandatory surcharges." But the trend towards surcharges, we do not see ending or abating. Costs are continuing to go up in both food and especially labor in California. There's a trend towards more surcharges in other parts of the country. There's also a trend towards more regulation and laws around surcharges. Similar to what California has done with SB-478. Junk fees are a big conversation topic generally in the country right now. This topic's not going to go away. There's certainly a lot more to come and folks should stay tuned and stay on top of the laws that impact their businesses and themselves as consumers.

Greg Nysten [\(15:44\)](#):

Great. Riley, as a former brewery owner and restaurant owner, to the extent you haven't talked about it already, are there any specific recommendations you would have for operators in how to move forward in this regard? Because I know when I had a restaurant, given that there is no tip credit in California and the minimum wage was going up and up and up, a lot of brewery owners that I knew who had... Food service in particular, were trying to figure out whether they could implement some kind of surcharge or something like that as an alternative to a tipping structure. But are you seeing people going away from this now in light of this legislation or what kind of recommendations do you have going forward?

Riley Lagesen [\(16:23\)](#):

We still see a lot of businesses implementing surcharges in California and elsewhere. We see a lot of dynamic and interesting pricing practices in California and elsewhere. Some that are more in the legal end of the spectrum. Some are in gray areas and some are flat out illegal that we see. We see a lot of operators just doing things that they should not be doing. Those are the ones that are most likely to pay the high price of non-compliance with California and other laws, which would be a expensive and painful lesson. Personal recommendation, why risk it? Everybody's in the same boat in California in terms of dealing with labor issues, with costing issues on food, occupancy, all the other key elements. Why risk the potential consequences? It's certainly de-risks it if you don't charge mandatory surcharges. It takes a lot of the sleepless night issues off the table.

[\(17:22\)](#):

We have plenty of businesses that we work with that have opted not to charge them, that have raised their prices or have moved towards more efficiencies in labor and other parts of the business to decrease costs and maintain profitability. Individual decision that any business needs to make, but on balance the risk presented by these surcharges, even if done legally, there's still some risk even if a compliance with 1524 because there's not complete holistic guidance on it yet. Nothing prevents anybody from being opportunistic and sending a demand letter through an attorney anyways. If somebody does that, even if it's non-meritorious claim, we all know it can be expensive and cumbersome to deal with that. If there's not an extremely compelling reason, just don't do the mandatory surcharges. But we understand with a lot of businesses, it's very important to them. They see it as a continuing source of survivability, and we certainly understand why they're continuing to do it. If you're going to do it, we recommend following the law.

Adil Khan ([18:29](#)):

Thanks for that. Of course, just to clarify on this podcast, we're not here to offer legal advice. These are all considerations for practitioners and businesses to consider. If they have specific questions, they should reach out to people like Riley or Greg. Riley, you've given us a really great overview of these statutes. Before we sign off, do you have any concluding remarks or anything you want to share with our listeners?

Riley Lagesen ([18:53](#)):

Well, thank you for having me. It's been one of the most interesting years in I'd say California history in terms of two of the most significant pieces of legislation, the Fast Act and SB-478, I guess it's three with SB-1524, that came in. California is often ahead of the curve in terms of trends that spread to other parts of the country. We're already seeing similar legislation in efforts elsewhere. For businesses that are operating in markets other than California, really important to pay attention to what is going on in California and to see how it might affect you and your business wherever you are conducting it. Because these trends, I think, are only going to continue for the foreseeable future.

Adil Khan ([19:43](#)):

That's really helpful. Thank you very much. I think that's it for today's episode. Thank you everyone for participating. Riley, to see you again. Greg. Thank you. We'll see each other next time.

Riley Lagesen ([19:54](#)):

Great. Thank you for having me.