

# TO EAT OR NOT TO EAT?: HOW OHIO CAN FOSTER MORE CONFIDENCE BETWEEN RESTAURANTS AND FOOD ALLERGIC INDIVIDUALS

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## I. INTRODUCTION

For up to 15 million people in this country, eating outside their own home is as fear-inducing as going into surgery.<sup>1</sup> Their lives are literally in others' hands until the end of the meal; they are trusting that everything and everyone is well-cleaned, that the cook or chef received the allergy warning, and that anyone handling the food knows enough about food allergies to prepare it correctly and not cross-contaminate in some way. Just exactly how unprepared those hands are was shown by a 2007 New York study.<sup>2</sup> Even though 90% of restaurant staff stated that they would be comfortable serving a food allergic individual, almost 25% thought that a food allergic individual could eat a small amount of the allergen without issue, 25% thought that just removing an accidentally added allergen from a meal was safe (e.g., taking nuts off of a salad), 34% believed that they could "dilute" an allergic reaction by giving the individual water, 35% thought that baking or frying could destroy an allergen, and only 42% had received any food allergy training.<sup>3</sup>

Imagine a man, Joe, who has a peanut allergy, eating out with his friends at the pub down the street. He finishes his burger, takes a sip of his beer, and then feels constriction and itching in his throat. His heart speeds up until it is thudding against his ribs, but his friends have not noticed yet, as they are all focused on the funny story being told by, Bill, the guy at the other end of the table. Joe tries to calm himself down but reaches for his EpiPen, a contradiction that his mind is not buying. The feeling in his throat gets worse and a flood of heat rushes through his body making it hard to think. One of his friends asks, "Are you okay? You're white as a sheet!" Joe shakes his head, since he feels ready to pass out and his throat is only getting worse. His friends move into action as he focuses on breathing.

After Joe's friends call the squad, pay the check, and work on getting him to the door, the restaurant manager takes notice of the situation. The manager stops Bill, the one who stayed behind to sign the receipt, and asks

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<sup>1</sup> *About Food Allergies*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/about-food-allergies/> (last visited Aug. 1, 2016); Sydney Knell Leavitt, *Death by Chicken: The Changing Face of Allergy Awareness in Restaurants and What to Do When Food Bites Back*, 42 U. TOL. L. REV. 963, 963 (2011).

<sup>2</sup> Ryan Ahuja & Scott H. Sicherer, *Food-allergy Management from the Perspective of Restaurant and Food Establishment Personnel*, 98 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 344, 344 (2007).

<sup>3</sup> *Id.* at 344, 347.

what happened. Bill explains about Joe's nut allergy and says that he seemed to have had an allergic reaction after eating. The manager looks taken aback, "What did he eat?"

"A burger," Bill responds.

"There are no nuts in that item," the manager states flatly.

Bill shrugs and stays silent. The manager repeats himself, and still Bill is silent.

The manager crosses his arms. "It could not have been an allergic reaction. It doesn't have nuts in it."

When Bill again says nothing, the manager demands a phone number and information about the incident. Since Bill just wants to pay and get back to his friends, he finally gives the persistent manager a number just to get him to go away. As he signs and hurries after the others, he realizes that the manager never once mentioned that he hoped that Joe would be okay.

The manager's reaction is exactly how *not* to deal with allergic reactions in a restaurant. It was likely the result of poor training and such an extreme fear of legal liability that he ignored the human being in the situation who was in the worst moment of his life. There is an increasingly hostile environment in the food service world toward those with food allergies, shown by these common examples of disclaimers attached to ingredients listings: blanket warnings against any food in the establishment; disclaimers that food could have come from a supplier that uses the allergen in its manufacturing plant, making the entire allergen information sheet unreliable; or statements that, even though they use stringent cleaning procedures to avoid cross-contamination, a doctor should be consulted before consuming the product.<sup>4</sup> For all of the effort put into making the allergic individual feel safe, these disclaimers undo every ounce of it in one single sentence.

It has been argued that allergic individuals should just learn to live with it and not eat outside their houses, since most of the time eating out is an optional activity.<sup>5</sup> Then again, how are they ever supposed to travel, go to conferences for work, go on dates, or even go to weddings? Packing food takes up a lot of space, and is not polite or even allowed in many situations. Social and business events focus around food, and banishing the food allergic

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<sup>4</sup> *Food Allergies*, OLIVE GARDEN, <http://www.olivegarden.com/nutrition#food-allergies> (last visited Aug. 1, 2016); *Allergen Information*, TIM HORTONS CAFÉ & BAKE SHOP 1, 1, [http://www.timhortons.com/us/en/pdf/AllergenInformation\\_USA\\_-\\_October2014.pdf](http://www.timhortons.com/us/en/pdf/AllergenInformation_USA_-_October2014.pdf) (last updated Oct. 2014); *Allergen Info*, TACO BELL, <https://www.tacobell.com/food/nutrition/allergen-info> (last visited Aug. 1, 2016); *Special Diets Wizard*, KFC, <http://www.kfc.com/nutrition/pdf/kfcallergens.pdf> (last visited Aug. 1, 2016); *Frequently Asked Questions: Allergies, Dietary Restrictions and Safety*, SILK, <http://silk.com/faqs> (last visited Aug. 1, 2016).

<sup>5</sup> See *Allergies and Restaurants*, CHOWHOUND (Jan. 3, 2009, 8:43 PM), <http://chowhound.chow.com/topics/584892>.

population entirely is not an option, especially since it is rapidly growing.<sup>6</sup> There were only about 12 million food allergic Americans a mere four years ago—that’s a 6% increase each of the past four years.<sup>7</sup> It is little wonder that the U.S. Department of Justice just recently pulled severe food allergies under the umbrella of the Americans with Disabilities Act (“ADA”).<sup>8</sup> But that development may make restaurants even more skittish around food allergic customers than ever, now that it has created a new cause of action up the customers’ sleeves.<sup>9</sup> This growing discord between the food service industry and allergic individuals must be remedied quickly.

Massachusetts took a first step in that direction by enacting the first allergy legislation to address how food service establishments handle food allergies, the Massachusetts Food Allergy Awareness Act.<sup>10</sup> It is a small, but helpful, first step, but now it is up to Ohio to take another step toward bridging the gap between restaurants and food allergic individuals. Legislation creating the voluntary designation of “Food Allergy Friendly,” as well as a small number of mandatory standards for Ohio restaurants is that next step. By making restaurant procedures more aligned with what decreases the chances of allergic reactions, this new legislation would bring restaurants into compliance with the ADA, and give businesses that participate in the voluntary program a new, loyal customer base, lower legal liability, and more good will with their existing customer base.

Ohio needs to create legislation addressing the relationship between restaurants and food allergic customers that will improve the relationship and lower the risk. It can do this by implementing four vital mandatory standards for restaurants, and creating a voluntary designation for restaurants that wish to be known as Food Allergy Friendly. In order to show just why this is needed, this Comment will first look at what food allergies are and what law is in place now in Ohio regarding food allergies. Then, a closer view of the Massachusetts statute will give a good starting point for creating better food allergy law regarding restaurants.<sup>11</sup> After that, this Comment will explore the liability of Ohio restaurants to food allergic individuals as the law stands now. Next, the possibilities for a proposed law will be addressed. Finally, this

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<sup>6</sup> Cat Wise, *Millions in the U.S. Impacted by Food Allergies, but a Cure may be on the Horizon*, PBS (May 11, 2015, 4:29 PM), <http://www.pbs.org/newshour/updates/diet-food-allergies/>.

<sup>7</sup> *12 Million Americans Have Food Allergies: Unique New Website Helps Them Find Accommodating Restaurants*, ALLERGYEATS.COM (Aug. 2, 2010), <https://www.allergyeats.com/wp-content/uploads/2015/09/allergyeats-august-release-for-website-100802.pdf>.

<sup>8</sup> Mary Clare Jalonick, *Gov’t: Food Allergies may be Disability Under Law*, WASH. TIMES (Jan. 18, 2013), <http://www.washingtontimes.com/news/2013/jan/18/govt-food-allergies-may-be-disability-under-law/?page=all>.

<sup>9</sup> *See Classifying Food Allergies Like Celiac as Disabilities Could Make Restaurants More Liable*, N.Y. DAILY NEWS (Jan. 18, 2013, 1:13 PM), <http://www.nydailynews.com/life-style/health/food-allergies-disabilities-restaurants-liable-article-1.1242534> (discussing new ways in which a restaurant may be liable due to the U.S. Department of Justice’s decision); Jalonick, *supra* note 8.

<sup>10</sup> *See generally* MASS. GEN. LAWS ANN. ch. 140, § 6B (West Supp. 2015).

<sup>11</sup> *Id.*

Comment will delineate what incentives restaurants would have to participate in a voluntary designation program.

## II. BACKGROUND

### A. *Food Allergies and Intolerances*

The range of people who make up the “food allergic” community actually includes those with varying degrees of food allergies as well as those with food intolerances. Food allergies create a more immediate risk; they occur because the body’s immune system incorrectly identifies molecules of a specific kind of food as foreign, and attacks them.<sup>12</sup> Any amount of protein from the allergen at all can cause a reaction, even one protein molecule.<sup>13</sup> The resulting release of histamines and other chemicals can cause symptoms anywhere from “digestive problems to hives to the life-threatening reaction that is anaphylaxis.”<sup>14</sup>

During anaphylaxis, either the victim’s breathing is impaired or the reaction affects two organs (skin is an organ too); some of the most common indicators are a severe swelling of the throat and a drop in blood pressure.<sup>15</sup> The only treatment is to give the individual a shot of epinephrine to counteract the allergic reaction for a short time and take him to the hospital as soon as possible.<sup>16</sup> A food allergic individual cannot predict whether the next reaction will be mild or severe because his reactions might change over time.<sup>17</sup> Things are made even more complicated by the fact that symptoms sometimes occur within seconds, and other times do not occur until several hours after eating the food.<sup>18</sup> Any severity of food allergy can be connected to any kind of food, even though there are some that are much more common.<sup>19</sup>

A food intolerance, on the other hand, cannot cause anaphylaxis, but it can still wreak a lot of havoc with the victim’s body and may present many of the other symptoms associated with allergies.<sup>20</sup> Rather than a misguided immune system, these are caused by how the digestive system handles, or fails to handle, certain kinds of food.<sup>21</sup> These individuals may be able to avoid a reaction if only a small amount is eaten, but cannot predict how small of an

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<sup>12</sup> Amy McKeever, *How Restaurant Pros are Handling the Surge of Food Allergies*, EATER (June 19, 2014), <http://www.eater.com/2014/6/19/6207199/how-restaurant-pros-are-handling-the-surge-of-food-allergies>; *About Food Allergies*, *supra* note 1.

<sup>13</sup> McKeever, *supra* note 12.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; *Symptoms*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/symptoms> (last visited Aug. 1, 2016).

<sup>16</sup> McKeever, *supra* note 12.

<sup>17</sup> *Id.*

<sup>18</sup> *Symptoms*, *supra* note 15.

<sup>19</sup> McKeever, *supra* note 12.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; *Related Conditions*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/related-conditions#intolerances> (last visited Aug. 1, 2016).

amount may cause them to get sick.<sup>22</sup> Lactose intolerance is a common example, where the small intestine does not produce enough lactase enzymes to break down any dairy products that are ingested.<sup>23</sup> The reaction usually starts within 30 minutes to two hours after eating.<sup>24</sup>

Celiac disease is an outlier even though it is typically grouped with the intolerances.<sup>25</sup> It is also caused by the immune system attacking normal food molecules, specifically gluten, but the reaction only occurs in the small intestine.<sup>26</sup> This can damage the small intestine and its ability to absorb nutrients, which can affect many other organs in the long term.<sup>27</sup> For all three of these conditions, complete avoidance of all triggering proteins is the only way to manage them.<sup>28</sup> This becomes difficult when you consider that cross-contact (e.g. using a knife to spread peanut butter, wiping it down, and then using it to spread butter) can cause reactions too, especially for those with food allergies; cross-contact can only be prevented by cleaning all utensils that touched the allergen with hot, soapy water before the allergen is eliminated.<sup>29</sup> All three of these types of reactions to food are among those that restaurants should work to accommodate.

## *B. Laws Governing How Restaurants Address Food Allergies*

### 1. Ohio Laws

There are merely four state laws and two state regulations addressing food allergies in Ohio. The laws only address how food allergies are handled in the school environment.<sup>30</sup> They address three issues: (1) allowing schools to obtain and use epinephrine injectors; (2) letting students carry epinephrine pens; and (3) requiring each board of education to set up a food allergy protection policy.<sup>31</sup>

The regulations are a bit more relevant to the general public. The first one, located in the Ohio Administrative Code, gives the Director of Health the power to approve what constitutes certification for basic food handlers and for food protection managers; it obliquely refers to food allergies when it states that both certifications require completion of a food protection course

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<sup>22</sup> McKeever, *supra* note 12.

<sup>23</sup> *Related Conditions*, *supra* note 21.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> McKeever, *supra* note 12.

<sup>28</sup> Wise, *supra* note 6; *Avoiding Cross-Contact*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/tools-and-resources/managing-food-allergies/cross-contact?> (last visited Aug. 1, 2016).

<sup>29</sup> *Avoiding Cross-Contact*, *supra* note 28.

<sup>30</sup> OHIO REV. CODE ANN. §§ 3313.718–19 (LexisNexis 2013); OHIO REV. CODE ANN. §§ 3313.7110–11 (LexisNexis 2014).

<sup>31</sup> OHIO REV. CODE ANN. §§ 3313.718–19; OHIO REV. CODE ANN. §§ 3313.7110–11.

that includes “cross-contamination” in the curriculum.<sup>32</sup> It does not directly address cross-contamination as it applies to food allergies though, and the food handler certification requirements specifically state that cross-contamination should be included only “as it relates to foodborne illness risk factors . . . .”<sup>33</sup> The second is located in the Ohio Uniform Food Safety Code, and governs the owners of restaurants or retail food stores.<sup>34</sup> It requires that each restaurant or store have a “person in charge” present whenever it is open for business who is responsible for identifying the eight major food allergens in any offered food (milk, soy, wheat, fish, egg, soybean, tree nuts, and peanuts, hereinafter known as the “Big Eight”).<sup>35</sup> That person is also responsible for the employee training “in food safety, including food allergy awareness, as it relates to their assigned duties . . . .”<sup>36</sup> This regulation is a direct result of Ohio’s adoption of the 2009 version of the Federal Food Code, which contains almost identical provisions regarding the required “person in charge” and his or her training and duties.<sup>37</sup>

### C. Other States’ Laws

Several states have attempted to pass legislation to help govern the relationship between food allergic consumers and restaurants.<sup>38</sup> Very few have succeeded and even less have succeeded with laws that require more than a fact sheet about food allergies to be created and distributed to restaurants.<sup>39</sup> Massachusetts was the first state that managed to put through a stronger law; soon after Rhode Island implemented a law closely based on the Massachusetts law, and now Michigan has as well.<sup>40</sup> The Massachusetts law has four prongs: (1) every restaurant must have a designated person who has watched a 30 minute, state-approved allergy training video; (2) every restaurant must include a statement on their menus requesting that guests inform their server of their food allergies; (3) every restaurant kitchen must

<sup>32</sup> OHIO ADMIN. CODE 3701–21–25(A), (C)(2)(a)(iii) (2015).

<sup>33</sup> OHIO ADMIN. CODE 3701–21–25(C)(2)(a).

<sup>34</sup> OHIO ADMIN. CODE 3717–1–01(B)(63); OHIO ADMIN. CODE 3717–1–02.4(A).

<sup>35</sup> OHIO ADMIN. CODE 3717–1–02.4(A), (B)(9), (C)(12).

<sup>36</sup> OHIO ADMIN. CODE 3717–1–02.4(C)(12).

<sup>37</sup> *Real Progress in Food Code Adoptions*, FOOD & DRUG ADMIN. (Feb. 22, 2016), <http://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM476819.pdf>; *Food Code Revisions*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/laws-and-regulations/food-code-revisions> (last visited Aug. 1, 2016); U.S. FOOD & DRUG ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., FOOD CODE § 2-101.11–103.11 (2009).

<sup>38</sup> H.R. 749, 238th Gen. Assemb., Reg. Sess. (N.Y. 2015); H.R. 273, 116th Gen. Assemb., Reg. Sess. (Fla. 2014); H.R. 8425, 237th Gen. Assemb., Reg. Sess. (N.Y. 2014); H.R. 2723, 25th Gen. Assemb., Reg. Sess. (Haw. 2010); H.R. 7622, 232d Gen. Assemb., Reg. Sess. (N.Y. 2009); H.R. 6715, 232d Gen. Assemb., Reg. Sess. (N.Y. 2009); H.R. 45, 193d Gen. Assemb., Reg. Sess. (Pa. 2009).

<sup>39</sup> See N.J. STAT. ANN. § 26:3E-14, 15 (West 2014); see also Gideon Martin, Note & Comment, *Allergic to Equality: The Legislative Path to Safer Restaurants*, 13 APPALACHIAN J. L. 79, 90–92 (2013) (citing MASS. GEN. LAWS ch. 140, § 6B (2013)).

<sup>40</sup> MICH. COMP. LAWS ANN. § 289.2129 (West Supp. 2015); MICH. COMP. LAWS ANN. § 289.6152 (West Supp. 2015); *Food Allergy Laws for Restaurants Should be More Comprehensive*, RESTAURANT NEWS RESOURCE (May 1, 2013), <http://www.restaurantnewsresource.com/article71092.html>.

have the state-provided allergy awareness poster displayed in a highly visible location; and (4) the creation of a state-governed Food Allergy Friendly designation for restaurants.<sup>41</sup> The Food Allergy Friendly designation is to be a voluntary program through which a restaurant could go above and beyond what is legally required to qualify it to use the label “Food Allergy Friendly.” The criteria for the program were to be developed by the Massachusetts’ Department of Public Health, but the program has yet to be implemented even though the law took effect in 2010.<sup>42</sup> The efficacy of these different parts of the law will be discussed in more detail later.

### III. LIABILITY OF OHIO RESTAURANTS REGARDING FOOD ALLERGIES

The amount of case law in Ohio dealing with suits by those who had allergic reactions from food served by a restaurant is even smaller than the amount of statutes and regulations governing the relationship. *Brown v. McDonald’s Corporation* is the only case on point. Mrs. Brown had an allergic reaction due to the presence of carrageenan in a McLean sandwich from McDonald’s.<sup>43</sup> Unbeknownst to her, carrageenan is derived from seaweed, and can trigger allergic reactions in those with seafood allergies.<sup>44</sup> She filed suit against McDonald’s under a failure to warn product liability claim.<sup>45</sup> The Court of Appeals applied the products liability analysis from the Restatement (Second) of Torts § 402 (codified in O.R.C. § 2307.76), and looked specifically at comment (j).<sup>46</sup> It states that when a “product contains an ingredient to which a substantial number of the population are allergic, . . . the ingredient is one whose danger is not generally known, or . . . is one which the consumer would reasonably not expect to find in the product,”<sup>47</sup> and the seller has actual or inquiry notice of the presence of the ingredient, then the server is required to warn the consumer of the ingredient.<sup>48</sup>

Failure to warn product liability is one of three of the traditionally accepted theories of recovery available for those who have suffered allergic reactions in restaurants.<sup>49</sup> Allergic individuals can also use a negligence theory or a breach of warranty theory.<sup>50</sup> Both are quite difficult to prove. The negligence cause of action is particularly difficult because it is so hard to

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<sup>41</sup> *Food Allergy Laws for Restaurants Should be More Comprehensive*, *supra* note 40.

<sup>42</sup> MASS. GEN. LAWS ANN. ch. 140, § 6B (West Supp. 2015); 105 MASS. CODE REGS. 590.009(G) (2014) (lacking any mention of the Food Allergy Friendly designation in the administrative code amendments); *State Food Allergy Laws Must Progress, Not Stand Still*, ALLERGY EATS BLOG (Apr. 11, 2013), <http://www.allergyeats.com/blog/index.php/state-food-allergy-laws-must-progress-not-stand-still/> (reporting no implementation of the Food Allergy Friendly designation as of April 2013).

<sup>43</sup> *Brown v. McDonald’s Corp.*, 655 N.E.2d 440, 441 (Ohio Ct. App. 1995).

<sup>44</sup> *Id.* at 443.

<sup>45</sup> *Id.* at 441.

<sup>46</sup> *Id.* at 444.

<sup>47</sup> *Id.*

<sup>48</sup> Leavitt, *supra* note 1, at 970.

<sup>49</sup> *Id.* at 968.

<sup>50</sup> *Id.* at 974–79.



prove that the restaurant breached its duty to the patron, and that there was a causal connection between the eating of the food and the patron's reaction.<sup>51</sup> The court requires a showing that the allergen was present in the meal at the time it was served to show that there was a breach, and since the food is typically either eaten or thrown away soon after the incident, this is very difficult to do.<sup>52</sup> The unavailability of the food also makes it difficult to show the causal connection, especially because most allergic reactions do not occur right after eating the allergen.<sup>53</sup>

Using the theory of *res ipsa loquitur*—a doctrine allowing circumstantial evidence to show a breach where the specific cause of plaintiff's injury is unknown—might help a food allergic individual meet her burden, but it still runs into some of the same problems. In order to show a breach using this doctrine, the consumer has to show that there was no other likely explanation for the reaction and that the food was in the exclusive control of the restaurant, which again is difficult to do once the food has been served.<sup>54</sup> In *Anderson v. Real Mex Restaurants, Inc.*, for example, the plaintiff was severely allergic to dairy and had eaten at the restaurant with friends.<sup>55</sup> Anderson shared chips and salsa with her friends while the friends also were sharing guacamole with cheese, and when her meal arrived she inspected it to be sure that the kitchen had remembered to not put cheese on her salad.<sup>56</sup> After she left the restaurant, she had an allergic reaction that warranted hospitalization.<sup>57</sup> She was unable to succeed in court under a *res ipsa* theory because the fact that she shared the chips and salsa was a likely explanation for her reaction, and because she was unable to show that no one had meddled with her salad after the waiter delivered it.<sup>58</sup> As difficult as this makes a negligence claim seem, a breach of warranty claim is even more difficult than a negligence claim because, absent an express warranty by the restaurant, the court typically will not find that the restaurant warranted its food.<sup>59</sup>

The liability for restaurants might have already increased though. Recently, the U.S. Department of Justice said in a settlement between Lesley University and one of its students that severe food allergies could, depending on their severity, qualify as a disability under the ADA.<sup>60</sup> This change came about because of an amendment to the ADA in 2009 to include “episodic

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<sup>51</sup> *Id.* at 975.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 976.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 977.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 979.

<sup>60</sup> Mary Clare Jalonick, *Food Allergies, Celiac, May Be Classified as a Disability*, NATURE'S FOOD PATCH (Jan. 27, 2013), [http://www.naturesfoodpatch.com/common/news/news\\_results.asp?task=Headline&id=14214&storeID=A5PJLP3ME3S92N5800AKHLBD34WS3RL1](http://www.naturesfoodpatch.com/common/news/news_results.asp?task=Headline&id=14214&storeID=A5PJLP3ME3S92N5800AKHLBD34WS3RL1).

impairments that substantially limit activity.”<sup>61</sup> The U.S. Department of Justice has since released a Questions and Answers document in which it clarifies how this might affect restaurants.<sup>62</sup> It said that its decision did not “require all restaurants to provide gluten-free or allergen-free foods,” but it could make it mandatory that restaurants reasonably try to accommodate allergic or sensitive consumers, as long as there is no “‘fundamental alteration’ of the restaurant’s operation.”<sup>63</sup> So, although the liability of restaurants regarding food allergy reactions was low before 2013 in Ohio, now that severe food allergies qualify under the ADA, their liability may be much higher. No restaurant wants to be the first to find out just how much higher that liability is.

#### IV. ANALYSIS

##### A. Proposed Law

###### 1. Big Picture Analysis

Some commenters believe that the solution to this situation is to implement a federal law that would be mandatory for every single restaurant in the nation in order to address the concern as quickly as possible.<sup>64</sup> That is incorrect. The best way to approach the problem of how to improve the relationship between restaurants and allergic individuals is to put a state law into place that is bifurcated into mandatory provisions for all Ohio restaurants and a voluntary provision creating an official designation of Food Allergy Friendly, just as the Massachusetts law does, albeit with some improvements.<sup>65</sup>

The problem with enacting nationwide legislation is that we still do not know what will lower the risk of allergic reactions successfully while also lowering restaurants’ liability. The enactment of this kind of legislation will take a very careful balancing act between the allergic consumers’ needs and the restaurants’ business needs.<sup>66</sup> That is in part why Massachusetts’ law is so limited, and why so many other laws have failed, because the restaurants push back if their interests are not considered as well.<sup>67</sup> In order to do its job well the law must have the support of the restaurants behind it and foster a

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<sup>61</sup> *Id.*

<sup>62</sup> *Restaurants Not Required to Serve Allergen-free Foods, Justice Department Says*, NAT’L RESTAURANT ASS’N (Feb. 8, 2013), <http://www.restaurant.org/News-Research/News/Restaurants-not-required-to-serve-allergen-free-fo>; CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, QUESTIONS AND ANSWERS ABOUT THE LESLEY UNIVERSITY AGREEMENT AND POTENTIAL IMPLICATIONS FOR INDIVIDUALS WITH FOOD ALLERGIES (2013), <http://www.ada.gov/q&a/lesleyuniversity.htm>.

<sup>63</sup> *Restaurants Not Required to Serve Allergen-free Foods, Justice Department Says*, *supra* note 62.

<sup>64</sup> Martin, *supra* note 39, at 101.

<sup>65</sup> MASS. GEN. LAWS ANN. ch. 140, § 6B (West Supp. 2015).

<sup>66</sup> See Jordan Melnick, *The Allergy Issue*, QSR, <http://www2.qsrmagazine.com/articles/features/142/allergy-1.phtml> (last visited Aug. 1, 2016).

<sup>67</sup> See *id.*; *State Food Allergy Laws Must Progress, Not Stand Still*, *supra* note 42.

cooperative relationship between them and their customers.<sup>68</sup> It would be more advantageous to keep attempting to find the “right” balance in each of the fifty states simultaneously, rather than only take one shot at it federally that may or may not succeed.<sup>69</sup>

Another related reason to use state legislation, rather than federal, is that the free market system will assist the process of putting food allergy procedures into place.<sup>70</sup> There are so many regional and nationwide chains of restaurants today<sup>71</sup> that if one state puts requirements in place and the chain’s business improves in that state, then the chain may voluntarily implement those same requirements in their otherwise-located restaurants just for the sake of uniformity.<sup>72</sup> Another example of the free market addressing concerns faster than legislation is the new SafeFARE website where they are building a database of restaurants that have voluntarily trained their staff with either the ServSafe® Allergens Online Course or MenuTrinfo’s AllerTrain™ course, so that food allergic individuals may look for allergy friendly restaurants.<sup>73</sup> The website was launched on April 17, 2014 and already has 131 restaurants listed in its database.<sup>74</sup> In that case, the free market could address food allergy concerns faster than any federal legislation would, just because one state took a step in the right direction.

The law should not be entirely mandatory either because of how the legislation will be perceived by the restaurants. It should have a few mandatory pieces and a voluntary designation component. If all of the statute’s pieces are mandatory, the restaurants will view it as oppressive and will not want to let the legislation be enacted at all, let alone effectively implement what it requires of them.<sup>75</sup> If the statute uses the split design

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<sup>68</sup> See *Working Around Allergies*, FOOD SERVICE, Sept. 2007, at 10.

<sup>69</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>70</sup> See Christopher Weiss, *Progress in Food Allergy Awareness in Restaurants*, ALLERGYHOME.ORG (Jan. 4, 2014), <http://www.allergyhome.org/blogger/food-allergy-awareness-in-restaurants/> (describing how the simple act of amending the 2005 Food Code was enough to spur many larger chain restaurants to voluntarily create allergen listings for their menu items).

<sup>71</sup> See *Top 100 Chains: U.S. Sales*, NATION’S RESTAURANT NEWS, <http://nrm.com/us-top-100/top-100-chains-us-sales> (last visited Aug. 1, 2016) (showing the sales of only the highest grossing restaurant chains nationwide).

<sup>72</sup> See Alisa Fleming, *Seafood Restaurant Chain Sets Precedence for Effective Food Allergy Practices*, GODAIRYFREE.ORG (Feb. 17, 2011), <http://www.godairyfree.org/news/nutrition-headlines/seafood-restaurant-chain-sets-precedence-for-effective-food-allergy-practices> (stating that a restaurant chain that has altered their procedures to comply with the new Massachusetts Food Allergy Awareness law uses the same protocols across their 30 restaurants); *Restaurants by State*, LEGAL SEA FOODS, <http://www.legalseafoods.com/restaurants> (last visited Aug. 1, 2016) (listing that ten out of the 34 Legal Sea Foods chain restaurants are located in states other than Massachusetts).

<sup>73</sup> Press Release, Food Allergy Res. & Educ., Food Allergy Research & Education Launches Online Resource Center for Diners with Food Allergies (Apr. 17, 2014), <https://www.foodallergy.org/press-room/2014/041714>.

<sup>74</sup> *Id.*; E-mail from SafeFARE to Jessica L. Brewer, Associate Attorney at Gorman, Veskauf, Henson & Wineberg (Mar. 10, 2015, 2:09 PM EST) (on file with author).

<sup>75</sup> See Melnick, *supra* note 66 (discussing how the Massachusetts bill took five years to pass because the state restaurant association would not accept its original strong language). The requirement for each

instead, then the few mandatory pieces will not seem too onerous and can be limited to those requirements that are probably needed to come into compliance with the recent ADA change anyway.<sup>76</sup> Then, the stricter portions will be voluntary, and will be seen as an opportunity that restaurants can take advantage of if they have the will and the means, rather than a burden the government unfairly dropped on them.

Using a split design would also allow businesses whose menus depend heavily on one or more of the Big Eight to continue their business relatively close to how they function now. This would track with how the issue was addressed in the Questions and Answers document released by the U.S. Department of Justice where they stated that restaurants would only be required “to take ‘reasonable steps’ to accommodate” those with food sensitivities and allergies, but not if it would cause “a ‘fundamental alteration’ of the restaurant’s operation.”<sup>77</sup> A “fundamental alteration” would be “a modification . . . so significant that it alters the essential nature of the good or services that a business offers.”<sup>78</sup> An example would be expecting Dairy Queen or Marble Slab Creamery to accommodate those with dairy allergies; in order to serve those individuals, those chains would have to modify their products to not include ice cream, which would be significant enough to “alter[] the essential nature” of their products.<sup>79</sup> So rather than force them to meet the same standards as all other restaurants as to food allergy accommodation, it would be in line with the U.S. Department of Justice’s decision to only require the basics from them, rather than force them to offer allergen-free food items.<sup>80</sup> The allergic individuals at risk already know that those kinds of restaurants are off limits due to their blanket warnings, and probably would not feel safe eating there, even if a new law did force the restaurant to accommodate them.<sup>81</sup>

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restaurant to have a master ingredient list on hand was not allowed into the final law specifically because the state restaurant association did not believe that restaurants could actually create an accurate list or follow it. *Id.*

<sup>76</sup> See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *supra* note 62 (stating that in order to accommodate a food allergic individual a restaurant has to take reasonable steps, including being able to “answer[] questions from diners about menu item ingredients . . .” or “omit[] or substitut[e] certain ingredients upon request”). The mandatory prongs of this Comment’s proposed law are all requirements that would allow a restaurant to at least minimally meet these two ways to accommodate food allergic individuals. See *infra* Section IV.A.3.

<sup>77</sup> *Restaurants Not Required to Serve Allergen-free Foods, Justice Department Says, supra* note 62; CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *supra* note 62.

<sup>78</sup> CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *supra* note 62.

<sup>79</sup> *Id.*; see *Treats*, DQ, <http://www.dairyqueen.com/us-en/Menu/Treats/> (last visited Aug. 1, 2016) (showing how most of Dairy Queen’s menu items include ice cream); see also *Menu*, MARBLE SLAB CREAMERY, <http://www.marbleslab.com/menu/> (last visited Aug. 1, 2016) (showing that most of Marble Slab Creamery’s menu items contain ice cream).

<sup>80</sup> See *generally* CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *supra* note 62.

<sup>81</sup> *Allergens*, MARBLE SLAB CREAMERY, <http://www.marbleslab.com/wp-content/uploads/2015/09/allergens.pdf> (last visited Aug. 1, 2016).

## 2. Problems to be Addressed

There are two main problems that need to be addressed by Ohio's new law in order to improve the consumer-restaurant relationship.<sup>82</sup> The first is that food service managers and food workers have to be better educated in the area of food allergies.<sup>83</sup> The second is that communication must be made clearer and more reliable both between the customers and the workers.<sup>84</sup> The Massachusetts law attempted to improve both of these issues and it succeeded to a small extent, but it is already receiving criticism from Paul Antico, one of the most vocal of the food allergy and intolerance community, as well as others.<sup>85</sup>

The requirement that one person in the restaurant must watch one 30-minute allergy training-specific video is better than nothing, but it is not enough.<sup>86</sup> That one person cannot be in the restaurant at all times, for every shift. The Massachusetts Department of Public Health even stated that the video is not intended to function as training, but is only meant to raise awareness in addition to a training program.<sup>87</sup> That begs the question, why do they require the food protection manager to pay \$10 to prove that he watched it, when he is actually receiving his training somewhere else?<sup>88</sup> It would be better to just include the actual training in the law as a requirement, rather than including an awareness video as just an additional hoop to force restaurants to jump through. Plus, even though the video is available to watch for free, the Massachusetts law does not require anyone else in the restaurant to watch it, nor does it require any other type of food allergy-specific training for restaurant employees.<sup>89</sup>

Next, Massachusetts' requirement that restaurants put a statement on their menus is backfiring.<sup>90</sup> According to the law, all menus must include a

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<sup>82</sup> See Press Release, National Restaurant Association, Welcoming Guests with Food Allergies to Restaurants (Aug. 25, 2008), <http://www.restaurant.org/Pressroom/Press-Releases/Welcoming-Guests-With-Food-Allergies-to-Restaurant> (stating the two requirements needed for serving guests with food allergies).

<sup>83</sup> *Id.*; Louise Kramer, *Chef: Accommodating People with Food Allergies a Worthy Challenge*, NATION'S RESTAURANT NEWS, Oct. 2, 2006, at 24; Erica Duecy, *Food Allergies Nothing to Sneeze at, Chains Say*, NATION'S RESTAURANT NEWS, Sept. 20, 2004, at 1, 143. A study of 62 food service locations in 2005 discovered that when a peanut-free meal was requested shortly after a meal containing peanuts was made in the same kitchen that 21% of the meals delivered were contaminated with peanut protein, and the workers reassured that they were peanut-free upon delivery of 11% of those meals. Jaclyn Maurer Abbot, Carol Byrd-Bredbenner & Darlene Grasso, "Know Before You Serve": *Developing a Food-Allergy Fact Sheet*, CORNELL HOTEL & RESTAURANT ADMIN. Q. 274, 281 (2007).

<sup>84</sup> Press Release, *supra* note 82.

<sup>85</sup> Leavitt, *supra* note 1, at 983–84; *State Food Allergy Laws Must Progress, Not Stand Still*, *supra* note 42.

<sup>86</sup> *State Food Allergy Laws Must Progress, Not Stand Still*, *supra* note 42.

<sup>87</sup> *Q&As for MDPH Allergen Awareness Regulation*, MASS.GOV (Aug. 19, 2010), <http://www.mass.gov/eohhs/docs/dph/environmental/foodsafety/food-allergen-3-reg-faqs.pdf>.

<sup>88</sup> See *id.* (stating that the video is not intended to replace training and that the food protection manager must pay \$10 to be certified).

<sup>89</sup> See *id.* (stating that the video is just an additional statutory requirement).

<sup>90</sup> *State Food Allergy Laws Must Progress, Not Stand Still*, *supra* note 42.

statutory statement: “Before placing your order, please inform your server if a person in your party has a food allergy.”<sup>91</sup> This is good in theory because it is addressing the communication problem by prompting those with allergies to speak up.<sup>92</sup> The problem is that the mere fact that restaurants are now putting this on their menus makes the customers believe that the staff are knowledgeable and can competently handle all allergy issues.<sup>93</sup> This lowers customers’ anxiety and vigilance too much.<sup>94</sup>

As previously mentioned, one 30 minute video watched by one person on staff does not make an entire restaurant competent and able to handle all allergy requests. Even when you consider the fact that there is an informative, helpful poster in the kitchen for the rest of the staff (also due to the Massachusetts law) one poster is no replacement for allergy training.<sup>95</sup> The poster should be more of a last line of defense, where employees can double-check and confirm what their training has already told them. But, since the law does not require the rest of the employees to be trained, one 8.5 x 11 inch poster is not enough to qualify a restaurant capable of competently handling allergy issues.<sup>96</sup> The presence of the statement on the menu is not making it clear which restaurants are actually capable of dealing with allergy issues well and which are not.<sup>97</sup> Instead, it gives customers a false sense of security.<sup>98</sup>

Finally, the largest problem with the Massachusetts law is what it has not done. The most exciting part of it was the voluntary Food Allergy Friendly designation.<sup>99</sup> The standards and procedures for this were supposed to be created by the state’s Department of Public Health.<sup>100</sup> The law went into effect in 2010, and as of now there is still no indication that the Department of Public Health has ever finalized anything.<sup>101</sup> So, arguably, one of the best pieces of the Massachusetts law has never even been implemented.<sup>102</sup>

### 3. Proposed Law

The best way to improve upon the Massachusetts law and take this needed step toward repairing the relationship between restaurants and allergic individuals is to enact a state law with both required aspects for all restaurants

<sup>91</sup> *Q&As for MDPH Allergen Awareness Regulation*, *supra* note 87.

<sup>92</sup> *State Food Allergy Laws Must Progress, Not Stand Still*, *supra* note 42.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See *Q&As for MDPH Allergen Awareness Regulation*, *supra* note 87 (outlining the poster requirement).

<sup>96</sup> See *id.* (lacking any requirement for staff training beyond the food protection manager); 105 MASS. CODE REGS. 590.009(G) (2014) (outlining the poster requirements).

<sup>97</sup> *State Food Allergy Laws Must Progress, Not Stand Still*, *supra* note 42.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> MASS. GEN. LAWS ANN. ch. 140, § 6B (West Supp. 2015).

<sup>102</sup> *State Food Allergy Laws Must Progress, Not Stand Still*, *supra* note 42.

and a voluntary Food Allergy Friendly designation. The required portions must remain as minimal as possible while still working to make restaurants at least meet basic allergy handling procedures in order to meet the minimum level of accommodation under the ADA.<sup>103</sup> It can do this by improving the two largest problems in allergy handling: lack of employee education and failure in communication.<sup>104</sup>

#### a. Education of All Employees

The education of employees can easily be improved by requiring all employees to undergo basic allergy training, and requiring more intensive allergy training for several managers, so that one of the more highly trained individuals can always be on the premises. This is not going much further beyond what Ohio law already requires.<sup>105</sup> Ohio already requires at least one “person in charge” to be present whenever the restaurant is open, and that “person in charge” is responsible for knowing if any of the Big Eight are present in any of the dishes that are offered.<sup>106</sup> That “person in charge” is also already responsible for ensuring that all employees receive training in “food allergy awareness, as it relates to their assigned duties . . . .”<sup>107</sup> Therefore, enacting a law that explicitly requires all employees to be trained in allergy handling and a more highly trained manager to be on the premises at all times, is not really much of a change.

The only alterations that would really be made are changing what constitutes sufficient training for both the regular employees and for the “persons in charge.” The training has to be cost-effective in order for the restaurants to accept the law.<sup>108</sup> There are several options available that are all low cost. First, the National Restaurant Association offers a well-regarded program called ServSafe that now has an online allergen course that could be used for anyone who is a “person in charge,” and has added an allergy-specific component to its Food Handler program as well.<sup>109</sup> The Food Handler program is built to be cost-effective at \$15 per person, and the specific allergen course is only \$22 a person.<sup>110</sup> Any restaurants that use this program

<sup>103</sup> CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *supra* note 62.

<sup>104</sup> See Press Release, *supra* note 82.

<sup>105</sup> See OHIO ADMIN. CODE 3717-1-02.4(A), (B)(9), (C)(12) (2015) (outlining the “person in charge” requirement and his responsibilities); see also OHIO ADMIN. CODE 3701-21-25 (A), (C)(2) (describing which employees get what training).

<sup>106</sup> OHIO ADMIN. CODE 3717-1-02.4(A), (B)(9), (C)(12).

<sup>107</sup> OHIO ADMIN. CODE 3717-1-02.4(A), (B)(9), (C)(12).

<sup>108</sup> See Abbot, Byrd-Bredbenner & Grasso, *supra* note 83, at 278 (stating that the cost of training employees is one of the biggest obstacles to training restaurant staff).

<sup>109</sup> Press Release, National Restaurant Association, National Restaurant Association Partners with Food Allergy Research & Education on New Allergen Awareness Program (July 30, 2013), <http://www.restaurant.org/Pressroom/Press-Releases/National-Restaurant-Association-Partners-with-FARE>;

*Employee Food Safety Training Made Easy*, NAT’L RESTAURANT ASS’N (July 22, 2011), <http://www.restaurant.org/News-Research/News/Employee-food-safety-training-made-easy>.

<sup>110</sup> *ServSafe® Allergens Online Course and Assessment*, SERVS SAFE: NAT’L RESTAURANT ASS’N, <http://www.servsafe.com/ss/catalog/ProductList.aspx?SCID=84&RCID=46> (last visited Aug. 1, 2016);

already would be in compliance with this requirement without any change to their procedure. There is something similar called the AllerTrain® Program, but it is listed as an alternative to the ServSafe Allergens Online course, although it seems to be a bit pricier, at \$69 per person.<sup>111</sup> Second, Ohio's Department of Health could develop a training program with the help of Food Allergy Research & Education ("FARE"), which is one of the leading nonprofit groups who advocate for food allergic individuals, similar to how Massachusetts had them create the awareness material required by the new Massachusetts law.<sup>112</sup> The video and a booklet created by FARE for Massachusetts are offered for free on the FARE website and YouTube, and are a good starting point to create something more intensive than just one 30 minute video.<sup>113</sup> Massachusetts requires its certified food protection managers to watch the video through a training provider in order to receive certification, which costs \$10 per person.<sup>114</sup> Since Massachusetts only requires one person per restaurant to be certified, the cost for certification is less daunting than it would likely be in Ohio though.<sup>115</sup> Third, the training programs already required for food safety certification can be adapted to include comprehensive allergy training in both the programs for the persons in charge and all the other employees as well, which would be delivered by approved providers for that county, and, theoretically, would cause no increase in cost.<sup>116</sup> Fourth, although insurance companies likely will not provide training themselves, they may instead give restaurants that take the training a credit or lower premiums, which would lower costs in areas other than training.<sup>117</sup>

Restaurants may argue that a high employee turnover rate means that adding more training is not going to be worthwhile for them.<sup>118</sup> This is just more of an incentive to make sure that the cost for allergy training is kept at

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*ServSafe® Ohio Food Handler Program*, SERVS SAFE: NAT'L RESTAURANT ASS'N, <http://www.servsafe.com/ss/catalog/productlist.aspx?SCID=52&RCID=21> (last visited Aug. 1, 2016).

<sup>111</sup> *Training Programs*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/training-programs> (last visited Aug. 1, 2016); *AllerTrain™*, SCHOOX, <http://www.schoox.com/28650/allertrain%E2%84%A2-food-allergy-&-gluten-free-training-for-food-service> (last visited Aug. 1, 2016).

<sup>112</sup> *About FARE*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/about> (last visited Aug. 1, 2016); *Food Allergies and Restaurants*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/advocacy/restaurants/> (last visited Aug. 1, 2016); Food Allergy Research & Education, *FAAN's Restaurant Training Video, Part I*, YOUTUBE (Jan. 19, 2011), <https://www.youtube.com/watch?v=fLhYgo2ltNw&list=UUE125yuQxOM0PXPOKj93w&index=17> (stating in the description that it was created by a member of Food Allergy & Anaphylaxis Network ("FAAN"), which is one of the organizations that combined to create FARE).

<sup>113</sup> *Food Allergies and Restaurants*, *supra* note 112; Food Allergy Research & Education, *supra* note 112.

<sup>114</sup> *Food Allergies and Restaurants*, *supra* note 112; *Q&As for MDPH Allergen Awareness Regulation*, *supra* note 87.

<sup>115</sup> *Q&As for MDPH Allergen Awareness Regulation*, *supra* note 87.

<sup>116</sup> *See generally Ohio Certification*, OHIO DEP'T HEALTH, <http://www.odh.ohio.gov/odhprograms/eh/foods/cert/cert.aspx> (last updated Jan. 14, 2016).

<sup>117</sup> *See Melnick*, *supra* note 66 (stating that high employee turnover was listed as one of the primary obstacles to educating employees by restaurant owners).

<sup>118</sup> Abbot, Byrd-Bredbenner & Grasso, *supra* note 83, at 278.



a reasonable price. If the price is right, it should not be an issue. Plus, the small cost of training will pay enormous dividends when the number of food allergic customers that one employee may have an impact on even in a short span of employment is calculated. LuLu's, a restaurant in Gulf Shore, Alabama, has found that once they strengthened their allergy program (4% of their tickets are from allergic individuals), it tripled the number of allergy tickets they averaged before improving their program, and as LuLu's general manager discovered, "the allergy community . . . [is] very close knit, and they all belong to the same blogs and . . . watch the same websites . . ." <sup>119</sup> As a result, for every one allergic customer that has a competent waiter who delivers a good experience, the restaurant will secure possibly triple that in loyal customers. <sup>120</sup> Plus, it is good to keep in mind that each allergic individual has friends and family who all want to defer to his or her decision when it comes to where to eat as a group. <sup>121</sup>

#### b. Allergy Managers

Another mandatory requirement in the law should be that there is at least one allergy manager, who is specially trained to handle food allergy orders, on duty whenever the restaurant is open. Again, this is not that large of a departure from the existing Ohio regulations. <sup>122</sup> There is already to be one "person in charge" on the premises whenever the establishment is open for business, and one of the duties of that "person in charge" is to be able to identify the Big Eight in any food that they offer. <sup>123</sup> Since the education requirement for "persons in charge" would already be heightened by the first mandatory provision of this proposed law, this would not add any extra burden beyond what would be required due to the first provision. <sup>124</sup>

There are three things that would improve allergy handling immensely if they were added to the allergy manager's duties, and they are the following: (1) taking the order of all of the allergic customers; (2) delivering allergy tickets personally directly to the chef, or to the person in the kitchen in charge of preparation of allergy meals; and (3) delivering the allergy ticket meals directly from the chef to the customer himself. <sup>125</sup> These three small procedures are a huge step in reducing the chance of miscommunication. <sup>126</sup> Not only do they ensure that the most educated person

<sup>119</sup> Vanessa Van Landingham, *LuLu's at Homeport Reacts to Allergies*, NATION'S RESTAURANT NEWS, Sept. 26, 2011, at 56.

<sup>120</sup> *See id.*

<sup>121</sup> *See Serving Customers with Food Allergies Good for Business, Restaurateurs Say*, NAT'L RESTAURANT ASS'N (Dec. 11, 2013), <http://www.restaurant.org/News-Research/News/Serving-customers-with-food-allergies-good-for-bus>.

<sup>122</sup> *See* OHIO ADMIN. CODE 3701-21-25(A), (C) (2015); OHIO ADMIN. CODE 3717-1-02.4(A), (B)(9), (C)(12).

<sup>123</sup> OHIO ADMIN. CODE 3717-1-02.4(A), (B)(9).

<sup>124</sup> *See supra* Section IV.A.3.a.

<sup>125</sup> Landingham, *supra* note 119.

<sup>126</sup> *Id.*

is the one interacting with the customer and writing down what that customer's restrictions are, but it also makes sure that there is a minimal chance for the order to get confused through multiple translations. Instead, the order goes straight from the person who talked to the customer, to the person who will fix the food, and directly back to the person who spoke with the customer who understands the dangers of cross-contact. Besides greatly reducing a restaurant's risk by reducing the chance of miscommunications, these procedures also make a world of difference in the customer's eyes.<sup>127</sup> The patron sees that the restaurant knows that allergy meals need to be treated a little differently, and makes note of that extra amount of care taken to deliver that special attention.<sup>128</sup>

### c. Menu Statement

A standard statement on the restaurant's menu is a good idea, but it needs to be written in such a way so that it does not fall into the same trap that the Massachusetts law did of giving patrons a false sense of security.<sup>129</sup> This is something that could be best designed by FARE, or a collaboration between the Ohio Department of Health and FARE, just like the Massachusetts poster and video.<sup>130</sup> A suggestion that has been made by Paul Antico, CEO and founder of the AllergyEats website, to improve the statement is the addition of a clause explaining that the statement is required by law.<sup>131</sup> Or, another way to do this is to request that the customer make her waiter aware of any food allergies she has, but then state that she should also inquire whether the restaurant is actually state designated Food Allergy Friendly or not. Said in a different way, the statement on the menu should in no way suggest that the restaurant has been designated as Food Allergy Friendly by the state.

### d. Poster in the Kitchen

As small of a step as it may seem, the required poster in the kitchen that Massachusetts introduced is still a good piece to have in any required legislation regarding allergy procedure in restaurants.<sup>132</sup> The poster can be developed with the help of FARE or even adapted from Massachusetts', New Jersey's, or Rhode Island's posters.<sup>133</sup> They can be freely available to

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<sup>127</sup> *Id.*

<sup>128</sup> *See id.*

<sup>129</sup> *State Food Allergy Laws Must Progress, Not Stand Still*, *supra* note 42.

<sup>130</sup> *Food Allergies and Restaurants*, *supra* note 112.

<sup>131</sup> *State Food Allergy Laws Must Progress, Not Stand Still*, *supra* note 42.

<sup>132</sup> *See Health and Human Services: Special Operations*, MASS.GOV, <http://www.mass.gov/eohhs/gov/departments/dph/programs/environmental-health/food-safety/retail-food/policies/special-operations.html> (last visited Aug. 1, 2016) (offering the Food Allergen Awareness Poster for free on the Massachusetts Department of Health website, which means that the only cost is the price of printing the poster).

<sup>133</sup> *See Abbot, Byrd-Bredbenner & Grasso*, *supra* note 83, at 275 (describing how New Jersey created their poster through a twenty-five person panel of which some of the members were from the predecessor of FARE).

restaurants, just as they are in Massachusetts.<sup>134</sup> It would make the posters easier to read if the state required them to be a bit larger, rather than only requiring an 8.5 x 11 inch sheet, like Massachusetts.<sup>135</sup> As mentioned above, this poster is important as a last line of defense, and can be extremely helpful as a place for an employee to quickly double-check what they already have learned during training.<sup>136</sup> That is why this requirement should be included as a mandatory part of the law.

e. Food Allergy Friendly Designation Program

The little direction that was given in the Massachusetts law for their version of a voluntary Food Allergy Friendly designation program is a good place to start building the voluntary piece of Ohio's law.<sup>137</sup> The Massachusetts law says that the state's Department of Public Health shall develop the program and will create the guidelines and requirements for the program in conjunction with the Massachusetts Restaurant Association and the Food Allergy & Anaphylaxis Network, which has since merged with another non-profit to create FARE.<sup>138</sup> It also states that the designation is voluntary and that the Department will keep a listing of all the participating restaurants on its website.<sup>139</sup> Finally, it requires that any restaurant seeking this designation keep "a master list of all the ingredients used in the preparation of each food item available for consumption" on hand at the restaurant at all times and make it available to the public.<sup>140</sup> These are all great issues to address in the statute creating a voluntary program, although as a result of Massachusetts' failure to put this program in place, there is at least one more needed provision.<sup>141</sup> There needs to be a set deadline; the statute should require a compliant program to be in place within a specific number of years of the statute's enactment.

When considering what should actually go into the requirements for a Food Allergy Friendly designation, the additional provisions could be included explicitly in the statute if the legislature deems them important enough to require them.<sup>142</sup> Or, they could be left out of the statute and included in the requirements to be determined by the Ohio Department of

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<sup>134</sup> *Q&As for MDPH Allergen Awareness Regulation, supra* note 87.

<sup>135</sup> 105 MASS. CODE REGS. 590.009(G) (2014).

<sup>136</sup> *See supra* Section IV.A.2.

<sup>137</sup> MASS. GEN. LAWS ANN. ch. 140, § 6B(g) (West Supp. 2015).

<sup>138</sup> MASS. GEN. LAWS ANN. ch. 140, § 6B.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *State Food Allergy Laws Must Progress, Not Stand Still, supra* note 42.

<sup>142</sup> *See* MASS. GEN. LAWS ANN. ch. 140, § 6B (West Supp. 2015) (containing two requirements for the Food Allergy Friendly designation program, which are maintaining a list of qualified restaurants on the Department of Health's website and requiring restaurants wanting the designation to keep a master ingredients and allergens list).

Health after the statute is enacted.<sup>143</sup> Either way, the following list includes the most commonly used procedures by restaurants that have already gone above and beyond when it comes to handling food allergies, and are highly recommended to be included in any Food Allergy Friendly program.<sup>144</sup>

#### i. Master List of Ingredients

The master list of ingredients is one of the most important procedures that should be included in the voluntary provision of the statute, because at the height of the dinner rush “no one is going to remember every single ingredient.”<sup>145</sup> It was included as a statutory requirement of Massachusetts’ unimplemented allergy friendly designation scheme.<sup>146</sup> The concept is being used in many restaurants already, most noticeably in fast food restaurants.<sup>147</sup> The sit-down restaurants of one of the biggest proponents of the Massachusetts law, Ming Tsai, use reference books in which “all recipes featuring wheat, dairy and eggs . . . [are] highlighted and listed out by dish, garnish, sauce, protein and marinade.”<sup>148</sup> A restaurant chain that is known for its food allergy program, P.F. Chang’s, does something similar.<sup>149</sup> Its waiters have a database that crosschecks a customer’s allergies with menu items to see which dishes the customer cannot eat, and they also update the ingredient lists in the database every two weeks.<sup>150</sup> The master list should exist for the staff’s use, but if it is made available to the customers, then it must be made clear somehow that the ingredient lists are only part of the issue, that cross-contact can still play a big part, in order to avoid the same effect that the statutory menu statement had in Massachusetts.<sup>151</sup>

The restaurants also should not be allowed to completely disclaim any contamination by their suppliers; allowing them to do so is essentially allowing them to tell food allergic individuals to not eat there and, consequently, a failure to accommodate under the ADA because the

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<sup>143</sup> See *id.* (lacking any other kinds of requirements for Food Allergy Friendly designation, instead leaving the remainder for the Department of Health, in association with the Massachusetts Restaurant Association and FAAN, to determine).

<sup>144</sup> See, e.g., *Serving Customers with Food Allergies Good for Business, Restaurateurs Say*, *supra* note 121.

<sup>145</sup> *Gluten-free Dining: Front-of-the-house Protocols*, NAT’L RESTAURANT. ASS’N, <http://www.restaurant.org/Manage-My-Restaurant/Food-Nutrition/Trends/Gluten-free-dining-Front-of-the-house-protocols> (last visited Aug. 1, 2016).

<sup>146</sup> MASS. GEN. LAWS ANN. ch. 140, § 6B (West Supp. 2015).

<sup>147</sup> See Weiss, *supra* note 70 (describing how fast food restaurant chains began keeping master ingredient lists on their websites); see also *Serving Customers with Food Allergies Good for Business, Restaurateurs Say*, *supra* note 121 (describing how Blue Ginger and P.F. Chang’s both keep master ingredient lists in some format).

<sup>148</sup> Sydney Lupkin, *Chef Ming Tsai Recalls Son’s Struggle with Food Allergies*, ABC NEWS (Dec. 5, 2012), <http://abcnews.go.com/Health/AllergiesNews/massachusetts-regulations-make-food-allergies-restaurant-responsibility/story?id=9813327>; *Serving Customers with Food Allergies Good for Business, Restaurateurs Say*, *supra* note 121.

<sup>149</sup> *Serving Customers with Food Allergies Good for Business, Restaurateurs Say*, *supra* note 121.

<sup>150</sup> *Id.*

<sup>151</sup> See *supra* Section IV.A.2.

restaurant is refusing to answer a question about menu item ingredients of which it has knowledge, or could easily obtain knowledge.<sup>152</sup> Plus, the customers who are turned away by the blanket warnings will go to the restaurant's competitors instead, meaning the restaurant is losing sales.<sup>153</sup> The restaurant is the one in privity with the supplier, not the customer, and since the restaurant is the one with the packaging information and access to the supplier it should not be too difficult for it to obtain ingredient information, especially since the Food Allergy Labeling and Consumer Protection Act ("FALCPA") requires any food manufacturers to include any presence of the Big Eight in their products on the product's packaging.<sup>154</sup> As a result of their privity with the suppliers and their ready access to the information, it should be the restaurant's job to read the labels and keep track of those warnings in their master list.

The restaurants should also be required to include any regional, seasonal, or new test food items in their master lists, because several fast-food chains that do offer master lists to their customers typically do not include regional, test, or promotional products.<sup>155</sup> Along those same lines, restaurants need to be responsible for updating their master list regularly as well, just as P.F. Chang's does, in order to be able to catch when a supplier changes their recipe or allergy warnings.<sup>156</sup>

## ii. Different Colored Tickets

An easy way to help avoid miscommunications as to food allergy orders is something that is used both at LuLu's and at any of the Lettuce Entertain You Enterprises' restaurants, and that is using different colored tickets for food allergy orders.<sup>157</sup> The use of bright or fluorescent colored paper of some kind for the tickets helps to quickly identify allergy orders even if the verbal communication is not clear.<sup>158</sup>

## iii. Different Colored Dishes

Again, another easy-to-use communication aid is using a specific color of dish only for the food allergy orders.<sup>159</sup> This is a low cost

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<sup>152</sup> See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 62. The ADA requires a restaurant to take reasonable steps such as "answering questions . . . about menu item ingredients" or "omitting or substituting certain ingredients upon request . . ." *Id.*

<sup>153</sup> Steven A. Kronenberg, *Food Allergy Risk Management: More Customers, Less Liability*, 15 J. FOODSERVICE BUS. RES. 117, 120 (2012).

<sup>154</sup> Food Allergen Labeling and Consumer Protection Act of 2004 § 203(a)(1), 21 U.S.C. § 343(w) (2013); *Food Allergen Labeling and Consumer Protection Act*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/laws-and-regulations/falcpa> (last visited Aug. 1, 2016).

<sup>155</sup> Michael Malone, *Hazardous Taste*, RESTAURANT BUS., Feb. 1, 2003, at 30.

<sup>156</sup> *Serving Customers with Food Allergies Good for Business, Restaurateurs Say*, *supra* note 121.

<sup>157</sup> Pamela Parseghian, *A Tough Nut to Crack*, NATION'S RESTAURANT NEWS, Sept. 6, 2010, at 28, 32; Landingham, *supra* note 119.

<sup>158</sup> See Landingham, *supra* note 119.

<sup>159</sup> *Working Around Allergies*, *supra* note 68, at 11.

investment—if it costs more than buying the restaurant’s traditionally colored dishware at all—that does not detract from the customer’s experience. Using different plates also means that they are not going to have to come into contact with allergens. Just like using brightly colored tickets, it is a high return of minimized confusion for such a low cost.<sup>160</sup>

#### iv. Separate Cookware, Utensils, and Kitchen Space

Using a separate set of cookware and utensils reserved for each specific allergy is something that takes a little more effort than just using different colors. The reduction in risk, and subsequent liability, could be huge though.<sup>161</sup> When you have *never* used anything with gluten in one set of cookware, it takes the question of how well the cookware was cleaned out of the equation entirely. There are still a lot of issues that would have to be addressed, such as ensuring that the cookware is separately stored, well marked, and washed separately and thoroughly as well.<sup>162</sup> Not to mention that it is likely that there would need to be one set of cookware for each of the Big Eight, which could cost quite a bit. But with an initial investment and care this could become just a normal part of the kitchen’s procedures.<sup>163</sup>

#### v. Use of Gloves

Another small procedure that could make a world of a difference is if the cook or other food handler wears disposable gloves while preparing or delivering the food allergy meal.<sup>164</sup> Of course, if the cook or food handler were only assigned to allergy orders, then this requirement would be superfluous.

#### vi. Hostess Inquiry

Finally, one more low-cost procedure that could be implemented is having the hostess ask before or upon seating the customers whether any members of the party have food allergies or sensitivities.<sup>165</sup> Then, have him

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<sup>160</sup> See *supra* Section IV.A.3.e.ii.

<sup>161</sup> See generally Jane Anderson, *Replace These 12 Kitchen Tools Immediately When Going Gluten-Free*, VERYWELL (May 9, 2016), <https://www.verywell.com/gluten-free-cookware-and-kitchen-utensils-563068> (describing the myriad of different ways that cookware can retain particles of allergens even after a normal cleaning).

<sup>162</sup> See generally *id.* (stating repeatedly that safe cookware and utensils should be labeled as such and only used for that allergen).

<sup>163</sup> See Duecy, *supra* note 83, at 143 (explaining how one cook with his own separate surfaces in the kitchen prepares all of the allergy meals); see also *Serving Customers with Food Allergies Good for Business*, *Restaurateurs Say*, *supra* note 121 (describing how P.F. Chang’s has separate woks just for allergen dishes that are sanitized between each use).

<sup>164</sup> See McKeever, *supra* note 12 (recounting Ming Tsai’s explanation that he makes his employees treat handling allergens as if they are raw meat, and wash everything that came into contact with them); see also OHIO ADMIN. CODE 3717-1-03.2(N) (2015) (requiring food handlers to wear gloves only when they are touching ready-to-eat foods or raw animal foods).

<sup>165</sup> *Gluten-free Dining: Front-of-the-house Protocols*, *supra* note 145.

communicate that directly to the allergy manager on duty as well as the waiter, that way the waiter will not be left out of the loop and the allergy manager is aware of which customer he has to serve.<sup>166</sup> The allergy manager can then clarify what types of allergies there are and their severity and, if needed, ask to see if the customer has an unexpired EpiPen, or other brand of injector, available.<sup>167</sup>

By using only procedures that have either been included in other state's statutes or in restaurants with well-recognized food allergy programs, the Ohio statute can combine only those that have been shown to make a significant difference in the risk of food allergy reactions in restaurants. As a result, Ohio's law will greatly improve the relationship between restaurants and food allergic individuals and bring the restaurants into compliance with the ADA by making these reasonable food allergy accommodations standard across the state.

#### f. Liability Allocation

Naturally, restaurants are going to balk at any increase in regulations, especially a voluntary designation that might be found to make some kind of legal standard that can create liability.<sup>168</sup> They need to be assured that the passage of this new law will not increase their liability, and that in fact it will decrease their liability. Other commentators have said that a new law should contain "a private right of action . . . [to] give the law teeth," but that is the wrong way to handle the liability of this situation.<sup>169</sup> This argument ignores the fact that the purpose of this kind of law should be to put both the restaurants and food allergic individuals on the same page, and that page is working together to provide the safest experience possible; forcing restaurants to jump through extra hoops only to give them a threat of litigation in return will have the opposite effect and will only degrade the relationship further.<sup>170</sup> The Massachusetts law again sets a good precedent for how liability should be handled with its provision stating "[t]his section shall not establish or change a private cause of action nor change a duty under any other statute or the common law, except as this section expressly provides."<sup>171</sup> A similar provision in the new Ohio law could even be strengthened as needed, in order

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<sup>166</sup> See *id.* (suggesting that there is communication between the hostess and waiter by saying that the waiter double-checks dietary concerns); Kramer, *supra* note 83, at 24 (describing how the waiter notifies the manager of the dietary concern, who in turn notifies the chef).

<sup>167</sup> Kramer, *supra* note 83, at 24. An EpiPen is a device that allows an individual to inject himself with a single dose of epinephrine in order to counteract the allergic reaction until he can get to a medical facility. *Highlights of Prescribing Information*, EPIPEN, <https://www.epipen.com/en/prescribing-information#Patient> (last updated May 2016).

<sup>168</sup> See Melnick, *supra* note 66 (describing the concerns of the spokeswoman for the Massachusetts Restaurant Association regarding the Massachusetts Food Allergy Awareness Law).

<sup>169</sup> Martin, *supra* note 39, at 97.

<sup>170</sup> See *Working Around Allergies*, *supra* note 68, at 10; see also Duecy, *supra* note 83, at 143 (describing why using personalized ingredient cards helps the restaurant and customer work together).

<sup>171</sup> MASS. GEN. LAWS ANN. ch. 140, § 6B (West Supp. 2015).

to appease the restaurants.

Second, the procedures that restaurants would implement to come into compliance with this law would actually lower their *actual* risk, which would also lower their legal liability.<sup>172</sup> If the insurance companies take note of the higher standards used in Ohio or that the restaurant that they insure has taken the extra steps to become Food Allergy Friendly, then they may even lower the restaurant's premium.<sup>173</sup> Chef Ming Tsai believes that insurance companies could do this because of the effect that the Training for Intervention Procedures ("TIPS") program had on the restaurant industry; TIPS was implemented to lessen liability of restaurants related to drunk driving and insurance companies took note and lowered the premiums for the restaurants that participated in the program.<sup>174</sup> Plus, the expansion of the ADA to cover severe food allergies has already increased restaurants' liability, whether they know it or not.<sup>175</sup> The requirements of this proposed new Ohio law would likely bring all restaurants into compliance with the U.S. Department of Justice's decision, and therefore lower the newly created, ADA-related liability.<sup>176</sup>

#### 4. Incentives for Businesses to Support the Law and Become Food Allergy Friendly

##### a. Higher Profits

An estimated 15 million possible customers in the United States are now allergic or sensitive to at least one type of food, and that number increased by 25% from the estimate 4 years ago.<sup>177</sup> That means that a significant portion of a restaurant's customer base is allergic to some type of food, and that portion is only going to grow. Not to mention that food allergic individuals are known for their loyalty and networking with other food allergic individuals, making them even more important than the average customer to restaurants.<sup>178</sup> Finally, food allergic individuals usually are the determining factor in where their group, be it family or friends, eats since their health and/or life depends upon it.<sup>179</sup> So, not only is the restaurant losing the business of that food allergic individual if it doesn't make an effort to address his allergy, it is also losing all of the food allergic individuals that know him,

<sup>172</sup> Anthony Marshall, *Take Unforeseen Risks in Restaurant Service Off the Menu*, HOTEL MGMT., Nov. 5, 2007, at 8.

<sup>173</sup> Leavitt, *supra* note 1, at 983 (outlining chef Ming Tsai's hope that insurance companies will realize how a Food Allergy Friendly designation lowers a restaurant's liability, as they did with "the Training for Intervention Procedures ("TIPS") program [that was] designed to prevent drunk driving liabilities").

<sup>174</sup> Melnick, *supra* note 66.

<sup>175</sup> Jalonick, *supra* note 8.

<sup>176</sup> See *supra* note 76 and accompanying text.

<sup>177</sup> *About Food Allergies*, *supra* note 1; Ahuja & Sicherer, *supra* note 2, at 344; Leavitt, *supra* note 1 (stating that the estimate was 12 million in 2011 according to the Food Allergy & Anaphylaxis Network).

<sup>178</sup> See, e.g., Landingham, *supra* note 119; McKeever, *supra* note 12.

<sup>179</sup> *Serving Customers with Food Allergies Good for Business*, *Restaurateurs Say*, *supra* note 121.



as well as any friends or family who regularly eat with him.

The standards set by this law could also increase profits with customers who have no allergies or sensitivities, because of the trend toward more natural foods and special diets such as gluten-free, just because consumers feel that it improves their day-to-day life.<sup>180</sup> A good example of this is the growth in the past several years of the “‘free from’ food category,” which is estimated to hit \$26.5 billion by or before 2017.<sup>181</sup> Enjoy Life Foods is one of the brands that has been booming as a result of this trend because it seeks to create products that offer clear statements of what ingredients are in a product as well as the sourcing of those ingredients (e.g., non-GMO).<sup>182</sup> It offers “products that are free from gluten, soy, dairy and nuts,” and strives to provide “a complete product line . . . [of] great-tasting products that are safe for the entire population.”<sup>183</sup> As a result, Enjoy Life Foods had sale increases of 783% and 805% in 2007 and 2008, respectively.<sup>184</sup>

Not to mention the recent debacles that started when consumers discovered an unsavory ingredient that was being used in a multitude of products for a long period of time, but under a name that they do not recognize. One of which was the inclusion of azodicarbonamide (a chemical also used in yoga mats for its elasticity) in many bread products, especially those used at fast food restaurants such as Subway, McDonald’s, and Starbucks.<sup>185</sup> There was a petition signed by over 58,000 people, and soon Subway announced that it was removing the azodicarbonamide from its bread.<sup>186</sup> More recently the attention has also been drawn to carrageenan, an emulsifier that is used to keep food from separating, but which has just been suggested to be contributing to higher rates of obesity, irritable bowel syndrome, and metabolic syndromes, due to the havoc it wreaks on the natural microbes in human gastrointestinal tracts.<sup>187</sup> With a population that is growing increasingly conscious of how the ingredients in their food are produced and what ingredients are actually included, is it smarter for restaurants to start being more clear about what is in their food, too?

#### b. Lower Licensing Fees

Ohio could take a cue from the recently enacted St. Paul, Minnesota

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<sup>180</sup> *Classifying Food Allergies Like Celiac as Disabilities Could Make Restaurants More Liable*, *supra* note 9; Hadley Malcolm, *Subway: ‘Yoga Mat’ Chemical Almost Out of Bread*, USA TODAY (Apr. 11, 2014, 9:14 AM), <http://www.usatoday.com/story/money/business/2014/04/11/subway-yoga-mat-chemical-almost-out-of-bread/7587787/>.

<sup>181</sup> *Enjoy Life Grows in ‘Free from’ Food Niche*, CHAIN DRUG REVIEW, June 25, 2012, at 76.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Kronenberg, *supra* note 153, at 119.

<sup>185</sup> Malcolm, *supra* note 180.

<sup>186</sup> *Id.*

<sup>187</sup> Elizabeth Grossman, *The Food Ingredient That Could Be Messing With Your Gut*, TIME (Feb. 25, 2015, 4:23 PM), <http://time.com/3722809/emulsifiers-guts-fat/>.

ordinance and grant a small discount on the restaurant license fee if the restaurant can show that it is following the optional aspects of statute.<sup>188</sup> The St. Paul, Minnesota ordinance offers a 7% discount on a restaurant's licensing fee if the restaurant can show (1) that it has a worker trained in food allergy handling on duty at all times, and (2) that it has a written allergy alert procedure, which must, at least, require the employee who has been alerted to a customer's food allergy to report it to the on-duty, allergy-trained worker.<sup>189</sup> While restaurants will already be required to comply with the several prongs of the new statute, offering a license discount would add even more incentive for restaurants to implement whatever procedures end up in the Food Allergy Friendly designation portion of the final statute voluntarily.

### c. Less Liability

Now that the ADA has been expanded to cover severe food allergies, restaurant liability has increased to a level that should cause concern.<sup>190</sup> Any food allergic individual, even those who were only turned away or not accommodated, could bring a discrimination claim based on Title III of the ADA.<sup>191</sup> If the lawsuit is a "case[] of general public importance or" shows "a 'pattern or practice' of discrimination" then the allergic individual could file a complaint with the Attorney General and he would bring the lawsuit instead.<sup>192</sup> All of the mandatory, as well as the voluntary, pieces of this proposed law could be considered reasonable steps taken to accommodate food allergic individuals and in fact probably go above and beyond just reasonable steps; therefore, they would lower the risk of a restaurant being found to have failed to accommodate them in the event that a former customer tries to sue under the ADA.<sup>193</sup>

Plus, all of the requirements in this law would lower the chances of allergic reactions happening at all and therefore would lower the risk that someone who has an allergic reaction would sue as a result.<sup>194</sup> The fact that the restaurant is taking further steps toward safety regarding food allergies might also make its insurance company take notice, as mentioned earlier.<sup>195</sup> A restaurant might obtain a lower premium as a result.<sup>196</sup> The statute itself would not add any extra liability either, as mentioned earlier, due to the express prohibition of any civil causes of action arising out of the statute.<sup>197</sup> If this law works as it should and does succeed in repairing the relationship

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<sup>188</sup> ST. PAUL, MINN. CODE OF ORDINANCES § 310.19 (2015).

<sup>189</sup> *Id.*

<sup>190</sup> Jalonick, *supra* note 8.

<sup>191</sup> *Title III Highlights*, ADA.GOV, <http://www.ada.gov/t3highlight.htm> (last visited Aug. 1, 2016).

<sup>192</sup> *Id.*

<sup>193</sup> See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 62.

<sup>194</sup> Marshall, *supra* note 172, at 8.

<sup>195</sup> Leavitt, *supra* note 1, at 983.

<sup>196</sup> *Id.*

<sup>197</sup> See *supra* Section IV.A.3.f.

between restaurants and food allergic individuals, then the customers would be more likely to know what risk they are taking on themselves because of the clear communication of the restaurant.<sup>198</sup> When that is combined with the customer's knowledge that the restaurant was taking strong measures to prevent an allergic reaction, it is possible that customers will feel less justified to sue.<sup>199</sup> Unlike now where the customer is likely to assume that the reaction occurred because of the ignorance or negligence of one of the restaurant's employees, if a restaurant was designated Food Allergy Friendly, the customer would be more likely to understand that, even though both parties did everything they could to lower the risk, sometimes allergic reactions do happen.

#### d. Morality

The final reason why restaurants should embrace this new law is one that is echoed by many of the pioneering individuals in the restaurant industry who have been accommodating food allergic individuals for years, and that is, it is the right thing to do.<sup>200</sup> Bob Okura, the Vice President of Culinary Development for The Cheesecake Factory, made a decision to specially package individual portions of pecans in sealed cups in order to be able to use them on a new salad that he developed, but still protect the nut allergic customers.<sup>201</sup> The restaurant chain agreed to do it even though it cost more.<sup>202</sup> Okura said that the reason the costs did not bother them was "because it [was] the right thing to do."<sup>203</sup> The senior vice-president of the restaurant group Lettuce Entertain You said that dealing with allergies is "not a legal concern . . . [i]t's more of a moral obligation."<sup>204</sup>

### V. CONCLUSION

A state statute that can repair the worsening relationship between restaurants and their potential food allergic consumers is sorely needed. Massachusetts made a good first attempt at a law to do just that, and Ohio can incorporate what worked and improve what did not in making its own law. A law that is bifurcated into those standards that are mandatory for all restaurants and those that are voluntary for those restaurants who wish to be designated Food Allergy Friendly is the best way to address food allergy procedures without causing the restaurants to balk at more regulations. The mandatory provisions will bring all restaurants at least up to where they meet

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<sup>198</sup> See Duecy, *supra* note 83, at 143 (discussing how greater communication between the restaurant and the customer means that the customer can better control the foods they are consuming).

<sup>199</sup> *Allergies and Restaurants*, *supra* note 5.

<sup>200</sup> Parseghian, *supra* note 157, at 28; Malone, *supra* note 155.

<sup>201</sup> Parseghian, *supra* note 157, at 28.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Malone, *supra* note 155.

the new ADA requirement announced by the U.S. Department of Justice and improve food allergy procedures across the board. The voluntary provisions will create a state designation that restaurants can meet if they have the will and means to attract more food allergic consumers and improve their business. In order to avoid the same pitfall that Massachusetts had, the statute must state a deadline for the Ohio Department of Health to enact the designation scheme. If put into place, this statute would generate higher profits for restaurants and lower their liability. Finally, as many restaurant owners who have already voluntarily implemented these kinds of procedures in their own establishments have said, accommodating food allergic consumers is just the right thing to do.