

Crimes and misdemeanors

Recalls can mean jail time.

Over the last year, we've provided guidance on to handle some of the critical issues that arise when your food manufacturing plant is confronted with allegations of product contamination and the possibility of a recall. We've addressed how to effectively plan and implement a food recall. We've explained the science employed by government agencies during foodborne pathogen outbreak investigations, and outlined how to undertake and document an internal investigation of your plant. We've also addressed issues that may arise in civil litigation brought by consumers and customers. One vital issue that food processors should be aware of is the potential for criminal liability to be imposed on your company and its employees.

Although criminal prosecutions for processing and distributing contaminated food products are fairly rare, and the vast majority of actions taken to redress statutory violations are civil or regulatory in nature, you should be aware of the manner in which federal criminal statutes are enforced; the penalties that are imposed; and how criminal convictions may adversely affect your defense of civil litigation.

The U.S. Department of

Agriculture cannot bring a criminal action, so it typically refers information concerning violations of federal criminal statutes to the United States Attorney who has jurisdiction over the place of the alleged violation, usually the manufacturing facility. Under the applicable federal statutes, however, the Secretary of the Department of Agriculture has the discretion to decline to refer a case to the U.S. Attorney if the violation is sufficiently minor that the Secretary believes that the public interest will be adequately served by a written notice of warning.

You should be aware, however, that a U.S. Attorney may decide on his or her own accord to investigate and prosecute a violation of a federal food safety statute.

Strict liability misdemeanors

Potential criminal liability for the processing, transport, or sale of adulterated meat and food products under federal law is extremely broad. Violations of the pertinent statutes, such as the Wholesome Meat Act, the

Poultry Products Inspection Act, the Federal Meat Inspection Act, and the Food, Drug, and Cosmetic Act, are strict liability crimes, meaning that the government does not need to prove that a food processor knew that a product was adulterated in order to prevail in a prosecution.

Courts, citing concerns about protecting the lives and health of human beings under circumstances in which they might be unable to protect themselves, have repeatedly interpreted federal food and drug statutes as not requiring a prosecutor to prove that a company was aware of some wrongdoing. It is simply enough for a prosecutor to show that the company transported in interstate commerce adulterated products.

The term "adulteration" is defined quite broadly in federal statutes. For example, the Federal Meat Inspection



Act defines "adulterated" by simple terms: "filthy," "putrid," "decomposed substance," "unsound," "unhealthful," "unwholesome," and "unfit for human food." Some courts have defined "adulteration" to extend to food products that are not in fact contaminated, but were prepared under conditions sufficiently unsanitary that it is reasonably likely that the product could have become contaminated.

Violations of the federal statutes governing food production may result in misdemeanor or felony prosecutions. Misdemeanor criminal liability may be imposed upon corporations and individual employees for the sale or shipment of adulterated food in interstate commerce, notwithstanding the fact that the defendant may have had no actual knowledge that the food was adulterated at the time the sale or shipment was made.

The Federal Sentencing Guidelines, which govern the fines and imprisonment terms for violations of federal criminal statutes, have the potential to impose harsh penalties for misdemeanor convictions. A company may be charged with multiple counts that significantly increase its criminal penalties.

For example, in the mid-1990s a juice company pled guilty to 16 misdemeanor counts of delivery of adulterated food products into interstate commerce. As a result of the plea agreement, the company was sentenced to pay \$2,000 as a mandatory special assessment, contribute to various food safety research programs and pay \$1.5 million in criminal penalties. The company also was sentenced to five years' probation.

Potential felony charges

If the government believes that your company or its employees intentional-



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ly put adulterated food into the stream of commerce, such actions may turn a misdemeanor violation into a felony prosecution—and increase the penalties accordingly.

Courts have considered "willful blindness" as to the authenticity or quality of a product to be sufficient to support an inference of intent to defraud and, accordingly, charged a company with a felony. If the violation involves an "intent to defraud"—which may be evidenced by a company concealing tainted product from regulators, or otherwise acting to subvert the statutory procedures for inspection and approval of meat and poultry product—a felony may be charged.

Under the Federal Sentencing Guidelines, a felony conviction is subject to a significant fine and imprison-

ment. The scope of a conviction can lead to large fines: An apple juice manufacturer that pled guilty to 215 felony counts after admitting it willfully sold adulterated products paid a fine of \$2 million.

Officers may be liable

Criminal liability also can be imposed on all corporate personnel who stand in a "responsible position" with respect to the violation and had the opportunity to prevent it. In the past, the government has prosecuted a food company's general manager, president, quality assurance personnel, as well as shareholders, along with the corporation itself.

For example, in the mid-1970s, the federal government instituted a misdemeanor criminal proceeding against the Philadelphia-based CEO of a national food chain because the company's warehouse had been exposed to rodent contamination and the company failed to act on several notices from the FDA about the infestation over an 18-month period.

The company's CEO went to trial and was convicted. He appealed all the way to the U.S. Supreme Court arguing that he should not be personally liable for the insanitary conditions at his company's warehouse because he did not cause the conditions, lacked personal knowledge of them, and had relied on his division vice-president and sanitation personnel to address the sanitation issues of which he had been advised. The Supreme Court rejected the executive's argument on the premise that companies that engage in the food business, and the people who manage them, have an affirmative duty to insure that the food they sell to the public is safe.

In the late 1980s, two officers of a fruit juice company were prosecuted because they ignored warnings about

their product being adulterated and, after becoming aware of the investigation, tried to delay government investigators in order to sell their inventory and avoid the loss of funds and goodwill that would result from a recall.

And in 1997, federal prosecutors indicted two employees of a beef producer because they lied to government regulators during the recall

victions to be introduced as evidence, the facts that are the bases for the conviction likely may be considered proven, or conclusively established, in those civil actions.

Hands tied

In other words, if your company is sued by a consumer or customer for manufacturing or distributing adulterated products, and your company has

article and our earlier articles, the issues relating to food recalls are frequently complex, and they involve the interplay between governmental agencies, administrative actions and potential civil and/or criminal litigation. You should plan now for the various contingencies you may confront if you ever are faced with a product recall. ®

Authors: Anton R. Valukas, Jeffrey D. Colman, Dean N. Panos and Edward F. Malone are partners at Jenner & Block, Chicago. Julie L. Bentz, Molly J. Moran and Chaka M. Patterson are associates at the firm. Jenner & Block has extensive experience in food recalls and food product litigation.

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process. The employees—one was the quality assurance director and the other the company's president—were prosecuted for conspiracy based on allegations that they provided false information to the USDA in an effort to limit the scope of a recall.

Effect of a plea or conviction

A company's criminal liability may have broader implications because it may affect its ability to fully defend against civil litigation. In federal court and in some state courts—evidence of a criminal conviction, either misdemeanor or felony, whether by guilty plea or after a trial on the merits—may be admissible in subsequent civil litigation as evidence that a company engaged in the improper conduct alleged by a plaintiff.

Some states reason that the disparate purposes at issue in civil and criminal proceedings are so significant that allowing a criminal conviction to be introduced as evidence is too prejudicial and unfair. However, if a jurisdiction allows guilty pleas or con-

been found or pled guilty on that very issue, you may be prohibited from asserting any defense in the civil litigation that contradicts the substance of the plea or any material facts underlying the plea, namely that the product was in fact adulterated.

As can readily be seen from this

Editor's note: the full series of these articles may be accessed through www.foodprocessing.com or www.jenner.com

Seeking separate counsel

Because any illegal acts of employees have the potential to be imputed to an entire corporation, if you learn, or even suspect, that any of your employees may be the target of a government investigation into improper practices related to food manufacturing or distribution, you should confer with your company's counsel, who likely will recommend that these employees retain separate attorneys.

If an employee is prosecuted for actions taken while working for a company, there is a possibility that company's interests and the interests of its employees may conflict. To best protect the company's legal position, and that of the employee, retaining separate counsel is vital. The extent to which a company must pay the legal fees of an employee under investigation or indictment likely is governed by your bylaws and the terms of his or her employment contract or arrangements.

