

Ban on Coupons and Other Incentive Items Promoting Restaurant Foods Based on Nutritional Standards in Santa Clara, CA Presents Significant First Amendment Issues

May 18, 2010

On May 11, 2010, the Board of Supervisors for Santa Clara County, California, passed a new ordinance which prohibits restaurants from "providing" toys, coupons, or other "incentive items linked to the purchase" of any product containing "excessive" calorie, fat, saturated fat, sodium, added sugars, or prohibited levels of trans fat, non-nutritive sweeteners, or caffeine. The ordinance includes no food labeling requirements and provides that the requirements must be construed in a manner that is consistent with state and federal law. The County will begin to enforce the new requirements in 90 days (i.e., August 11, 2010).

The new ordinance bans the use of incentive items for products based on formulation and nutrient profile. The ban encompasses coupons and other incentive items that qualify as commercial speech and presents significant First Amendment issues. The ordinance defines "incentive item" broadly to include "any toy, game, trading card, admission ticket or other consumer product, whether physical or digital... or any coupon, voucher, ticket, token, code, or password redeemable for or granting digital access to any [of the aforementioned items]."

Restaurants will be prohibited from providing incentive items for single food items, meals, and beverages meeting the criteria specified in the chart below.

	Single Food Item (does not include beverages)	Meal (may include single food items and/or beverages)	Beverage
"Excessive Calories"	> 200 kcals	> 485 kcals	> 120 kcals
"Excessive Sodium"	> 480 mg	> 600 mg	NA
"Excessive Fat"	> 35% kcals from fat*	> 35% kcals from fat*	> 35% kcals from fat
"Excessive Saturated Fat"	> 10% kcals from saturated fat*	> 10% kcals from saturated fat*	NA
Trans Fat	>0.5g	>0.5g	NA
"Excessive Sugars"	>10% kcals from added caloric sweeteners	>10% kcals from added caloric sweeteners	>10% kcals from added caloric sweeteners

Added Non-nutritive Sweeteners	NA	NA	>zero
Caffeine	NA	NA	>zero

* Excludes fat from nuts, seeds, peanut butter, egg (single food item), low fat/reduced fat cheese.

Restaurants that violate the new ordinance will be subject to administrative and civil penalties, including fines. The county will use fines collected under the ordinance to fund obesity prevention programs conducted by the county public health department. The Board of Supervisors has found that "restaurants encourage children and adolescents to choose specific menu items by linking them with free toys and other incentives," citing 2006 data regarding fast food child-directed promotional expenditures published by the Federal Trade Commission.

Kelley Drye & Warren LLP

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