

DeCoster Decision—What Food and Beverage Companies Need To Know

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In a recent US Court of Appeals decision that every food and beverage executive should note, the Eighth Circuit ruled that two "responsible corporate officers" must serve jail time for failing to prevent the distribution of contaminated eggs despite the fact that they did not know the eggs were infected.[1] The decision in *United States v. DeCoster* reflects the increasing risks faced by executives and top employees of food and beverage companies of government scrutiny, criminal investigation and prosecution.

The Federal Food, Drug and Cosmetic Act of 1938 (FDCA) imposes criminal liability for the introduction or delivery into interstate commerce of adulterated or misbranded food. A food can be considered adulterated if, among other things, it is contaminated with a substance that may make someone sick or if it was prepared, packed, or held under unsanitary conditions.[2] Violations can be addressed through civil enforcement mechanisms, but they are also punishable criminally—as misdemeanors by up to one year imprisonment and a fine or, if they involve repeat violations or are committed with an intent to defraud, as felonies by up to three years in prison and a fine.[3] Further heightening the potential risks, in April 2016, the US Department of Justice (DOJ) announced that it would partner with the Food and Drug Administration (FDA) in conducting criminal investigations and prosecutions of companies and employees that sell products that cause human illness as part of a "focus on food safety" and "aggressive enforcement of the FDCA and other food safety laws….".[4]

In *DeCoster*, the Eighth Circuit endorsed the imposition of jail time for violations of the FDCA based on the activities of Quality Egg LLC, its owner, Jack DeCoster and CEO Peter DeCoster. Quality Egg, a vast operation stretching from Maine to Iowa, was determined to be the cause of a salmonella outbreak that resulted in approximately 56,000 people becoming ill. A criminal investigation of the company's food safety practices followed and ultimately both the company and the DeCosters were charged. Quality Egg pled guilty to a felony count of bribing a USDA inspector and two misdemeanor counts of unknowingly introducing adulterated food into interstate commerce, and paid a $6.8 million fine. But, the government actions did not stop at the company door for Quality Egg. Rather, the

government went after individual officers—members of the family who owned and ran the company. The DeCosters pled guilty as responsible corporate officers for introducing adulterated eggs into interstate commerce under the FDCA and were sentenced to three months. They appealed their sentences to the Eighth Circuit, arguing that the penalties were "unconstitutional because [the DeCosters] did not personally commit wrongful acts."[5] Indeed, as the Court noted, "nothing in the record indicated that Peter and Jack had actual knowledge that the eggs they sold were infected with salmonella."[6] Furthermore, at relevant times, the government's investigation had "not identified *any personnel* employed by or associated with Quality Egg, including the defendant(s) who had knowledge . . . that the eggs sold by Quality Egg were, in fact, contaminated with salmonella,"[7] there was no legal or regulatory requirement for Quality Egg to comply with certain egg safety rules, and given the state-of-the-art of poultry sanitation management, egg-safety difficulties, especially involving salmonella contamination, were inherent in such operations.

Nevertheless, the Court rejected all challenges to the prison sentences. It noted that under the FDCA, "individuals who 'by reason of [their] position in the corporation [have the] responsibility and authority' to take necessary measures to prevent or remedy violations of the FDCA and fail to do so, may be held criminally liable as 'responsible corporate agents,' regardless of whether they were aware of or intended to cause the violation."[8] Despite their familiarity with conditions in their facility, the DeCosters failed to take sufficient steps to improve them and negligently failed to prevent the salmonella outbreak. A corporate officer could avoid liability by showing that he was "powerless to prevent or correct the violation"[9] but neither of the DeCosters had made such a claim. As the Court observed, the DeCosters had "created a work environment where employees not only felt comfortable disregarding regulations and bribing USDA officials, but may even have felt pressure to do so."[10] The Court made clear that the language of the FDCA and Supreme Court precedent did not require defendants to have known that they violated the act to be subject to its penalties, including incarceration. On August 3, the DeCosters sought rehearing or a review *en banc*, and their petition is currently awaiting ruling.

Conclusion

The food and beverage industry should expect an increase in government investigations and criminal prosecutions of food safety violations, alert to the fact that they can lead in certain circumstances to prison sentences for individuals who have no direct knowledge of the food adulteration. The DOJ expressed in April its "commit[ment] to continuing to vigorously prosecute food safety cases."[11] The FDA and the civil side of the DOJ have increasingly easier mechanisms to make referrals to criminal prosecutors, and this trend is expected to continue to increase significantly. Particularly, in light of these developments, executives and top employees would be well-served to enhance their diligence, ensure effective quality, safety and reporting compliance programs, encourage a culture committed to

compliance and transparency concerning food safety issues, and establish a recall and crisis management plan to address food safety issues, should they arise.

[1] *United States v. DeCoster*, No. 15-1890, 2016 WL 3615684, at *1 (8th Cir. July 6, 2016).

[2] 21 U.S.C. § 342(a)(3).

[3] 21 U.S.C. § 333(a).

[4] Benjamin C. Mizer, Department of Justice Principal Deputy Assistant Attorney General, *Remarks at the Consumer Federation of America's 39th Annual National Food Policy Conference* (Apr. 6, 2016), available here.

[5] *DeCosters*, WL 3615684 at *3.

[6] *Id.*

[7] *Id.* at *9 (emphasis added).

[8] *DeCosters*, WL 3615684 at *3 (quoting *United States v. Park*, 421 U.S. 658, 673–74 (1975)).

[9] *DeCosters*, WL 3615684 at *3 (quoting *Park*, 421 U.S. at 673).

[10] *Id.*

[11] Mizer, *supra* note 4.

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