

## **Allergen Toolkit Investigation Tips and Interview Questions**

### **Introduction**

In the event of an allergic reaction following consumption of food, requested to be allergen free, a full investigation will be required to be carried out.

This should involve a joint inspection by Trading Standards Officers and Environmental Health officers to ascertain the level of allergen management and control in the premise. As at the time of the reaction, officers won't know if the reaction is a result of mis-labelling or cross contamination, both sets of skills are required to investigate the matter.

Offences would potentially be under Food Information Regulations 2014, Food Safety and Hygiene (England) Regulations 2013, Food Safety Act 1990 Sections 7, 14 and 15, Health and Safety at Work Act 1974 and also Involuntary Manslaughter by Gross Negligence.

In the event of a serious allergic reaction leading to a death a number of things need to be considered. There will be number of agencies involved in the investigation. Primarily the police will lead on the investigation. The likely offence will be manslaughter by gross negligence.

For this the police need to be able to prove that the food killed the person involved – this is shown through the pathologists report and analysis results of the food in question. The second element is perhaps more difficult to prove, as it must be proven that the food business operator was grossly negligent in providing the food that killed the person. This would require a series of negligent events in the run up to the death. This may mean advice from local authorities being ignored on a number of occasions, previous failed samples, previous complaints, all resulting in little or no improvement at the business.

It is imperative that local authorities are involved in the police investigation at the outset. They can offer vital advice and guidance on what is expected of businesses, and if at some point in the future the police decide they don't have enough evidence to proceed with their charges, local authorities could pick up the case and seek to prosecute for regulatory offences. Whilst this is never ideal in the case of a death, it may provide some comfort for the family of the deceased person.

This guidance has been written following lessons learned in Lancashire County and Hyndburn District, following the death of a 15 year old girl due to anaphylactic shock from eating a take away.

The aim of this guidance is to give officers who may be in the position of investigating an incident some direction as to where to start with their investigation, and how to progress as the investigation moves along.

### **On receipt of information**

#### **Consider:**

- Previous history with the business with both TS and EH – have they received advice, how many times? Have complaints been received before? Any complaints of allergic reaction? Result of these complaints?

- Liaise between EH and TS, (and police if a death is involved) to establish a plan of action
- Is the food that caused the reaction available to be sampled and sent for analysis
- The police will want to know what the legal requirements are in relation to the food business, what would normally be expected of a business of this type, and common problems with these types of businesses. They will also want to know about any history.
- Consider whether a test purchase / formal sample is appropriate or whether the business should be notified, inspected and advised to prevent future occurrences.
- Consider what the potential vehicles for cross contamination may be in the type of premise, and where samples might be taken to show that cross contamination is taking place.
- Is the business part of a chain?
- Is there a Primary Authority involved?
- What notices could be served by EH –EPN? HEPN? (if there are also issues with Hygiene)

#### **Actions:**

- Contact the Food Standards Agency Incident team to advise of the incident. [Food.incidents@Food.gov.uk](mailto:Food.incidents@Food.gov.uk) and keep them updated of developments (as per Food Law COP)
- Making appropriate notifications under RIDDOR and Work related Deaths Protocols.
- Notify Primary authority/Home Authority where appropriate
- Arrange collection of any complaint sample and submission to the PA laboratory to test for the allergen concerned.
- If notification and inspection is deemed the most appropriate course of action, arrange a joint inspection between EH and TS. Both sets of skills will be required, due to the cause being unknown – mis-labelling or cross contamination.
- It may be deemed appropriate to take a formal sample in the first instance before advising the business. If so, arrange this.
- If after inspection, it is deemed appropriate by EH, serve EPN to close the business.

(N.B. In Lancashire we decided it was more important to prevent the further sale of potentially dangerous food, so decided to advise the business immediately and ask them to voluntarily stop selling food to allergic people, until we were able to attend the premises to inspect them and assess their procedures. In the event of a non-fatal reaction advice would be given and follow up covert test purchasing/ sampling would be taken very quickly after and repeated.

#### **At the premises**

##### **Consider and discuss with business:**

- Are the requirements of FIRs met? – poster/signposting? Able to tell consumers what allergens are in which foods?
- Allergen audit carried out by the business? Recorded in anyway?
- Procedures for handling queries from consumers about allergens?
- Training for staff on allergens? Records?
- Is there any substitution of ingredients taking place? Check stores vs what's described on menus

**Actions:**

- Formal sample of offending meal/dish
- Grab samples of ingredients – ensuring cross contamination by the officer is minimised. This can help to show where contamination has occurred.
- Audit of allergen matrix – have they done it correctly? Considered cross-con / may contain warnings?
- Check knowledge of staff on allergen procedures
- Listen to how staff are handling customer orders? – any discussion on allergens? In person? On the phone?
- Inspect prep, cooking and storage areas
  - o How are allergenic ingredients stored and handled?
  - o How is equipment stored? washed after use? And then stored after washing?
  - o How are surfaces cleaned down after use?
  - o Any separate equipment for allergy sufferers?
  - o Separate prep/cooking area for allergy sufferers?
- Given the circumstances, is there an imminent risk to health currently in those premises, for people who are allergic to certain foods? due to lack of consideration and control of allergens - EHO should consider issuing EPN to close the business until issues are under control.

**Interviewing potential defendants****Consider:**

Who is liable? – Food Business Operator? Limited company? Manager/ Director? Chef? Individual?

This will vary depending on the potential charges

Business ownership – proof. Establish if it's a limited company and that the appropriate person is speaking on behalf of the company.

Make sure the right people are interviewed.

**Things/exhibits you may need:**

Notes from inspection and any significant statements made

Analysis results of any samples taken

Screen shots of websites, just eat/hungry house menus, paper menus

Photographs of anything of note found on inspection

Pathology results (in the event of a death)

Medical reports

Statements from complainants/ officers involved

Previous inspection reports/letters/advice given

**What are your potential offences?*****Food Information Regulations 2014***

Section 10 FIRS (TS/Standards offence)

Requirements for caterers

**5 Foods that are not prepacked etc containing an allergenic substance or product etc**

- (1) A food business operator who offers for sale a relevant food to which this regulation applies may make available the particulars specified in Article

9(1)(c) (labelling of certain substances or products causing allergies or intolerances) in relation to that food by any means the operator chooses, including, subject to paragraph (3), orally.

(2) This regulation applies to a relevant food that is offered for sale to a final consumer or to a mass caterer otherwise than by means of distance communication and is—

- (a) not prepacked,
- (b) packed on the sales premises at the consumer's request, or
- (c) prepacked for direct sale.

(3) Where a food business operator intends to make available the particulars specified in Article 9(1)(c) relating to a relevant food orally, and a substance or product listed in Annex II or derived from a substance or product listed in Annex II is used as an ingredient or processing aid in the manufacture or preparation of the food, the operator must indicate that details of that substance or product can be obtained by asking a member of staff.

(4) The indication mentioned in paragraph (3) must be given—

- (a) on a label attached to the food, or
- (b) on a notice, menu, ticket or label that is readily discernible by an intending purchaser at the place where the intending purchaser chooses that food.

(5) In relation to a relevant food to which this regulation applies, the Article 9(1)(c) particulars made available by a food business operator must be made available with a clear reference to the name of the substance or product listed in Annex II where—

- (a) the relevant ingredient or processing aid is derived from a substance or product listed in Annex II, and
- (b) the particulars are made available otherwise than by means provided for in FIC.

(6) In this regulation “relevant food” means a food in which an ingredient or processing aid listed in Annex II, or derived from a substance or product listed in Annex II, has been used in its manufacture or preparation and that is still present in the finished product (even if in an altered form).

## 10 Offence

(1) A person is guilty of an offence if the person fails to comply with—

- (a) any provision of FIC specified in paragraph (2), as read with Articles 1(3) and 6 and the first subparagraph of Article 54(1), or
- (b) regulation 5(5).

- (2) The provisions of FIC are—
- (a) Article 9(1)(c), as also read with Annex II;
  - (b) Article 21(1)(a), as also read with Articles 9(1)(c) and 18(1) and Annex II;
  - (c) the second subparagraph of Article 21(1), as also read with Articles 9(1)(c) and 19(1) and Annex II; and
  - (d) Article 44(1)(a), as also read with Article 9(1)(c) and regulation 5.

## **FIC**

Article 1(3) This Regulation shall apply to food business operators at all stages of the food chain, where their activities concern the provision of food information to consumers. It shall apply to all foods intended for the final consumer, including foods delivered by mass caterers, and foods intended for supply to mass caterers.

### Article 6

Any food intended for supply to the final consumer or to mass caterers shall be accompanied by food information in accordance with this Regulation.

### Article 9(1)(c)

In accordance with Articles 10 to 35 and subject to the exceptions contained in this Chapter, indication of the following particulars shall be mandatory: any ingredient or processing aid listed in Annex II or derived from a substance or product listed in Annex II causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form;

Article 21(1) (a) refers to prepacked foods.

1. Without prejudice to the rules adopted under Article 44(2), the particulars referred to in point (c) of Article 9(1) shall meet the following requirements:

- (a) they shall be indicated in the list of ingredients in accordance with the rules laid down in Article 18(1), with a clear reference to the name of the substance or product as listed in Annex II; and

Art 44. (1) Where foods are offered for sale to the final consumer or to mass caterers without prepackaging, or where foods are packed on the sales premises at the consumer's request or prepacked for direct sale:

- (a) the provision of the particulars specified in point (c) of Article 9(1) is mandatory;

2. Member States may adopt national measures concerning the means through which the particulars or elements of those particulars specified in paragraph 1 are to be made available and, where appropriate, their form of expression and presentation. Article 54 – transitional measures.

***Example offence: Failed to comply with Regulation 5(5), in that they didn't supply the information required by article 9(1)(c) of FIC, contrary to Regulation 10 of the Food Information Regulations 2014.***

Evidence required:  
Copy of the order

Any paperwork that was delivered with the order  
The lids/packaging on the order with any writing on  
Statements to say what was said on delivery  
Admission?

### **Food Safety Act 1990**

Section 7 (TS/EH offence)

#### **7 Rendering food injurious to health**

(1) Any person who renders any food injurious to health by means of any of the following operations, namely—

- (a) adding any article or substance to the food;
- (b) using any article or substance as an ingredient in the preparation of the food;
- (c) abstracting any constituent from the food; and
- (d) subjecting the food to any other process or treatment,

with intent that it shall be sold for human consumption, shall be guilty of an offence.

[(2) In determining for the purposes of this section whether any food is injurious to health, regard shall be had to the matters specified in sub-paragraphs (a) to (c) of Article 14(4) of Regulation (EC) No 178/2002.]

(3) . . .

Article 14(4)

4. In determining whether any food is injurious to health, regard shall be had:

- (a) not only to the probable immediate and/or short-term and/or long-term effects of that food on the health of a person consuming it, but also on subsequent generations;
- (b) to the probable cumulative toxic effects;
- (c) to the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers.

Evidence required:

The order with reference to a requirement for no allergens  
The food containing allergens and/or allergens  
Adverse analysis results

***Example Offence: did render food, namely a peshwari naan, injurious to health by means of using nuts as an ingredient in the preparation of that food, with the intent that it be sold for human consumption, to a person allergic to nuts, contrary to section 7 (1)(b) of the Food Safety Act 1990, having regard to article 14(4) (c) of EC regulation 178/2002.***

Section 14 (TS Offence)

#### **14 Selling food not of the nature or substance or quality demanded**

(1) Any person who sells to the purchaser's prejudice any food which is not of the nature or substance or quality demanded by the purchaser shall be guilty of an offence.

(2) In subsection (1) above the reference to sale shall be construed as a reference to sale for human consumption; and in proceedings under that subsection it shall not be a defence that the purchaser was not prejudiced because he bought for analysis or examination.

Evidence required:

A description of the food

The food

Adverse analysis results

Section 15 (TS Offence)

### **15 Falsely describing or presenting food**

(1) Any person who gives with any food sold by him, or **displays with any food** offered or **exposed by him for sale** or in his possession for the purpose of sale, a label, whether or not attached to or printed on the wrapper or container, which—

(a) falsely describes the food; or

(b) **is likely to mislead as to the nature or substance or quality of the food, shall be guilty of an offence.**

***Example offence: Did expose for sale a peshwari naan, with a description on a menu, that was likely to mislead as to the substance of the food, contrary to section 15 of the Food Safety Act 1990, in that the product was not described as containing peanuts, when in fact it did.***

Evidence required:

Someone who was misled

Menu description

Analysis to show description is incorrect

***Food Safety and Hygiene (England) Regulations 2013 (TS/EH offence – check authorisations)***

### **Regulation 19**

(1) Subject to paragraphs (4) to (8), any person who contravenes or fails to comply with any of the specified EU provisions commits an offence.

Specified EU Provision: Art 14(1) ec 178/2002 *Requirement that unsafe food must not be placed on the market.*

***Example offence: Did place food on the market, namely a chicken burger, that was unsafe for persons allergic to milk, contrary to Regulation 19(1) of the Food Safety and Hygiene (England) Regulations 2013 by virtue of Article 14(1) of EC regulation 178/2002.***

Benefit of using FS&H regs is that the Food Safety sentencing guidelines can be used, which attract much higher penalties.

Evidence required:

Food was placed on the market

That food was unsafe

Analysis results to show food was unsafe for a particular section of society

## **DEFENCES**

### **What are the potential defences?**

Potential defences for all these offences will be that all Due Diligence and Reasonable Precautions were exercised.

This means that there is a system in place to prevent the offence being committed, that system was sufficient given the size and nature of the business, and checks were made to ensure that the system was adhered to.

Depending on the nature and size of business, you would expect to see different processes or procedures in place, but generally speaking you would like to see that full consideration had been given to allergen management and control.

### **What may you expect to see as part of a defence?**

All staff trained on allergens – preferably using the FSA on line course – and records to show this

Poster/notice in place inviting customers to ask staff about allergens or complete and accurate allergen information is present on the menu

Fully completed and accurate allergen matrix for all dishes, sauces and condiments (including taking into account the cross contamination/may contain warnings)

Consideration of cross contamination of allergens in all aspects of storage, preparation, cooking, hot/cold holding and service.

Procedures in place for handling orders for allergenic customers and preparation of their meals.

Staff training on these procedures and records of this

Checks made by management to make sure that procedures are adhered to