



**Ask the Magic 8-Ball:
A Glimpse into the Post-COVID World for F&B Operators**

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The COVID-19 pandemic, which, at the time of writing is still with us, has left the food and beverage industry in a state of utter disaster. Some estimate six (6) years of economic growth in restaurants was destroyed in 2020.¹ At the height of the pandemic in 2020, approximately eight (8) million restaurant employees had been laid off or furloughed.² At the dawn of 2021, two and one-half (2.5) million restaurant industry jobs had evaporated.³

The COVID-19 crisis has forever altered most functions of the restaurant industry—how we forecast supply, how we schedule labor, how we configure our kitchens to meet off-premise demand, how consumers access restaurants in general.

Even when things started to feel somewhat “normal” again in the summer [of 2020], with capacities and customers trickling back, things were different. And they will stay different.⁴

Now, as restaurants, bars, and other hospitality venues return to full-capacity dining, operators find themselves faced with new, unexpected challenges, including:

- Shifting expectations from guests (e.g. increased requirements for employee hygiene, continued social distancing, vaccination and mask policies, and increased demand for take-out/to-go ordering);
- Too few restaurant workers to staff the immediate demand for jobs;
- Expensive third-party delivery contracts into which many entered during 2020; and
- Various real estate demographic and site selection concerns.

Customer Expectations

On April 8, 2021, one of our clients in Texas was served with a civil rights lawsuit by a *pro se* plaintiff claiming the restaurant “refused to serve him while he was not wearing a mask, wrongfully enforcing Covid-19 mandates.” <eyeroll>

Despite the clear language of Governor Abbot’s executive order lifting the statewide mask mandate (“Nothing in this executive order precludes businesses or other establishments from requiring employees or customers to follow additional hygiene

¹ Kate Rogers, “Restaurants staged nimble responses to Covid’s blows in 2020, but 6 years of growth were wiped away” – *CNBC*, Jan. 26, 2021; available at <https://www.cnbc.com/2021/01/26/restaurant-industry.html> (last visited April 12, 2021).

² Mike Pomranz, “Two-thirds of Restaurant Employees Have Lost Their Jobs Due to COVID-19, National Restaurant Association Says” – *Food & Wine*, April 21, 2020; available at <https://www.cnbc.com/2021/01/26/restaurant-industry.html> (last visited April 12, 2021).

³ Rogers, *supra* note 1.

⁴ Alicia Kelso, “What Does The Restaurant Industry Look Like In 2021 And Beyond?” *Forbes*, Dec. 30, 2020; available at: <https://www.forbes.com/sites/aliciakelso/2021/12/30/what-does-the-restaurant-industry-look-like-in-2021-and-beyond/?sh=2e88494e26a4> (last visited April 12, 2021).

measures, including the wearing of a face covering”),⁵ this plaintiff chose, instead, to file suit against our client (and various other businesses, large and small) to make his voice heard in the ongoing (and often heated) debate about mask-wearing. This frivolous and ill-advised suit is merely an illustration of the extreme result of customer expectations modified by the pandemic, and is likely not the last of these nuisance suits we will see in the coming months.

“Customer behavior isn’t something that will likely change overnight, so a challenge in 2021 will be to instill customer confidence in your business while still maintaining healthy operations.”⁶

Perhaps the best news is found in pent-up guest demand. Data from the National Restaurant Association that 83% of adults say they are not eating on the premises at restaurants as often as they would like—up from 45% pre-pandemic. Baby boomers especially miss eating out, with 90% reporting they would like to dine at restaurants more frequently.⁷

Hiring for Reopening

Put simply:

No one knows exactly what the job market will look like when the virus finally ends its rampage.⁸

Despite the millions of workers furloughed and unemployed in 2020, restaurants working to reopen their dining rooms, whether to 50% or 100% capacity, are finding themselves in the toughest job market in years. In March 2021, the “leisure and hospitality sector” added only 280,000 jobs,⁹ barely a dent in the millions of hospitality industry jobs still unfilled. Whether workers have left the restaurant job market for other jobs that were available during 2020 (as a result of eliminated, reduced, or unstable hours), are afraid to return to customer-facing roles until a broader rollout of the COVID vaccine has occurred, have been required to stay home to ensure their children participated in on-line school, or because they simply became fond of stimulus-funded unemployment checks, the market has

⁵ Gov. Greg Abbott, Executive Order GA-34 “Relating to the opening of Texas in response to the COVID-19 disaster,” March 2, 2021, available at: <https://open.texas.gov/uploads/files/organization/opentexas/EO-GA-34-opening-Texas-response-to-COVID-disaster-IMAGE-03-02-2021.pdf> (last visited April 12, 2021).

⁶ “12 Restaurant Operational Challenges and Opportunities for 2021,” Restaurant365, December 5, 2020, available at <https://www.restaurant365.com/blog/12-restaurant-operational-challenges-and-opportunities-for-2021/> (last visited April 12, 2021).

⁷ Alicia Kelso, “What Does The Restaurant Industry Look Like In 2021 And Beyond?” Forbes, Dec. 30, 2020; available at: <https://www.forbes.com/sites/aliciakelso/2021/12/30/what-does-the-restaurant-industry-look-like-in-2021-and-beyond/?sh=2e88494e26a4> (last visited April 12, 2021).

⁸ Paul Wiseman & Alexandra Olson, “Why the pandemic left long-term scars on the global job market,” ABC News, March 10, 2021, available at: <https://abcnews.go.com/Business/wireStory/pandemic-left-long-term-scars-global-job-market-76365245> (last visited April 12, 2021).

⁹ Ben Cassleman, “Strong U.S. Job Growth in March Fuels Optimism on Recovery,” The New York Times, April 2, 2021, available at: <https://www.nytimes.com/2021/04/02/business/economy/jobs-report-march.html> (last visited April 12, 2021).

never been tighter for operators. At this time, as recovery moves forward, “many of the unemployed are not available for jobs that need to be filled.”¹⁰

In 2021 and beyond, increased labor costs, coupled with the specter of a rising minimum wage will plague restaurant planning. “Historically, restaurants would draw from a labor pool made up of high school and college students, and that has dried up over the years. So restaurants are struggling to adapt to that labor drought and this will be even more challenging if a \$15 minimum wage comes.... Restaurants are also having to pay more for personal protective equipment, health insurance and wages that would retain good employees.”¹¹

Be mindful, however, that a continued labor shortage coupled with a national minimum wage of \$15, could lead operators to increase modernization/automation, whether via ordering kiosks, automated, card-activated wine dispensers, drone delivery, and the like.

Curbside Pickup, Drive-Through, and Third-party delivery

Third-party delivery, in just a few short years, changed the face of the food and beverage industry. As of March 2020, however, third-party delivery became necessary for survival for both fast casual and dine-in restaurants (QSRs use them, too, but most QSR units feature drive-up/drive-through, and thus were forced to rely less on costly delivery services).

During the early pandemic months of March and April 2020, “thirty-three percent (33%) of customers reported that they were ordering more take-out.”¹²

By the height of the pandemic, however, the numbers told a far different story:

“With dine-in operations limited and consumers in search of contactless foodservice, digital restaurant orders from mobile apps, text messages, and the internet grew by +138% in the July, August, and September quarter compared to same quarter year ago. Off-premises orders from carry-out, delivery, and drive-thru increased by +22% in the quarter compared to year ago while on-premises/dine-in declined by -62%. Delivery had the strongest visit growth in the quarter, up +106%, but held the smallest traffic share, 9%, of off-premises services. Carry-out held the largest traffic share at 46% with

¹⁰ Bill Conerly, “The Labor Market is Tight Despite High Unemployment,” Forbes, Feb. 19, 2021, available at: <https://www.forbes.com/sites/billconerly/2021/02/19/the-labor-market-is-tight-despite-high-unemployment/?sh=70dbf3127924> (last visited April 12, 2021).

¹¹ Emma Liem Beckett, “6 restaurant trends that will shape 2021,” Restaurant Dive, Jan. 4, 2021, available at: <https://www.restaurantdive.com/news/6-restaurant-trends-that-will-shape-2021/592676/> (last visited April 12, 2021).

¹² Heather Lalley, “How Will the COVID-19 Pandemic Crisis Change Consumer Dining Behavior?” Restaurant Business, April 10, 2020; available at <https://www.restaurantbusinessonline.com/consumer-trends/how-will-covid-19-crisis-change-consumer-dining-behavior> (last visited April 12, 2021).

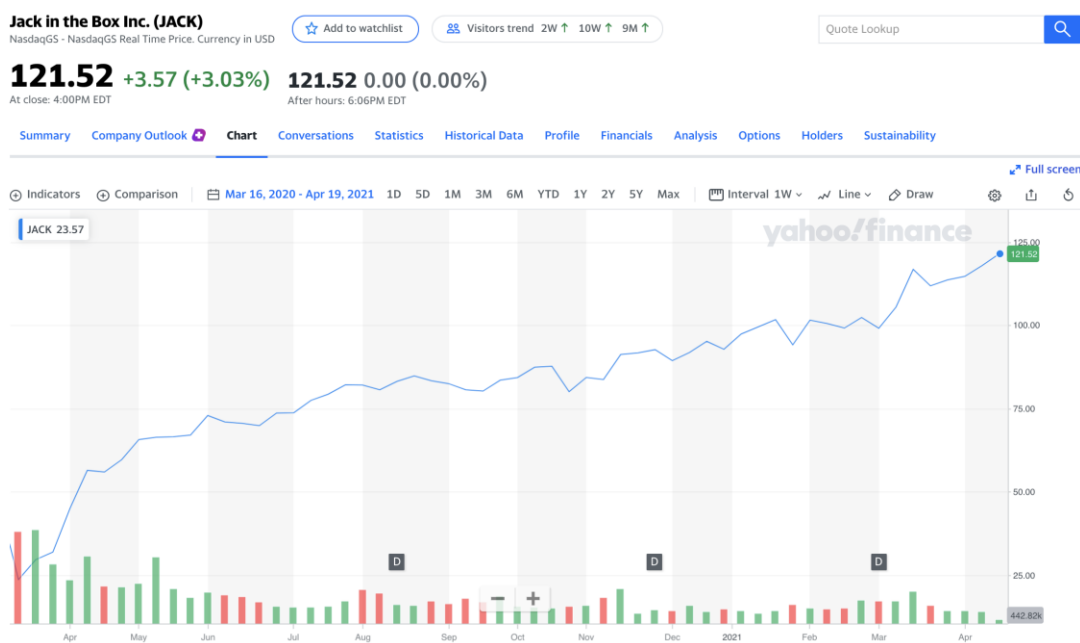
visits up +9%, and drive-thru visits grew by +27% in the third quarter and represented 44% of off-premises visits.”¹³

In 2021 and beyond, the most important delivery-related considerations for foodservice operators (after negotiating the fees) are determining ownership of customer data, ensuring brand integrity (often through the use of tamper-resistant/tamper-evident packaging), the negotiation of contractual liability/indemnity provisions, marketing via paper goods or labels on containers and bags, and generating enough sales to stay alive.

The Jack in the Box Phenomenon

While many independent and full-service restaurants were paralyzed in the opening days and weeks of COVID-19, Jack in the Box jumped into action in the early days of the pandemic, focusing on employee and guest safety. The brand also launched the #StayInTheBox digital campaign, which celebrated guests who chose to stay inside due to the national and state mandates of social distancing. Through the campaign, Jack in the Box provided a series of content, meal bundle deals, and offered free delivery with Postmates, UberEats, GrubHub and DoorDash.¹⁴

As a result, the stock rose over 400%, from a low of \$16.81 on March 16, 2020, to close at \$121.52 on April 19, 2021.



¹³ “Digital and off-premises order growth help to steady transaction declines,” The NPD Group, Nov. 9, 2020; available at: <https://www.npd.com/wps/portal/npd/us/news/press-releases/2020/us-restaurant-chain-customer-transaction-declines-stabilize-at-9-percent-compared-to-year-ago-in-october/> (last visited April 12, 2021).

¹⁴ “Jack in the Box Combats COVID-19 with #StayInTheBox Campaign,” QSR Magazine, April 3, 2020; available at <https://www.qsrmagazine.com/news/jack-box-combats-covid-19-stayinthebox-campaign> (last visited April 12, 2021).

Ghost Kitchens and Virtual Concepts

Ghost Kitchens are, simply put, cooking facilities producing food and beverages only for delivery or take-out. There is no dine-in option.

Pre-COVID, ghost kitchens were few and far between, created by enterprising F&B folks to capitalize on the growing market for food obtained by third-party delivery. During the COVID-19 pandemic, however, ghost kitchens experienced a meteoric rise in popularity as thousands of restaurants were forced to (a) close entirely, (b) close their dining rooms and sell to-go or by delivery only, or (c) close their dining rooms for a time, then see their dining room capacities limited to 25% - 50% occupancy (as in Texas), while still being able to sell to-go and by delivery.

The allure of ghost kitchens/virtual concepts is clear:

Ghost Kitchens lack the typical infrastructure of servers, table service, and so on. Instead, this is a virtual restaurant restricted to mere takeout and delivery and restrained primarily by budget and imagination, and frequently a departure from a chef's typical repertoire. It's ideal for the low-touch COVID-19 age, when customers are leery of dining in but, perhaps, a captive and forgiving audience for experiments.¹⁵

While the advent of ghost kitchens in recent, pre-pandemic years largely involved experimental independents, chain restaurants have gotten into the game. As famously reported during the height (let's hope) of the COVID-19 pandemic, a Philadelphia GrubHub customer sparked Internet outrage after learning that her order from Pasqually's Pizza & Wings (which she thought was a local pizzeria), had originated at a Chuck E. Cheese's restaurant.¹⁶ After finding her pizza was suspiciously familiar, a little internet research uncovered that:

not only was Pasqually P. Pieplate the name of the fictional chef in the Chuck E. Cheese universe, the Pasqually's "restaurant" had the same street address as Chuck E. Cheese. (And, making things worse—and more confusing—there's a *real* West Philly pizza place called Pasqually's, one that has no affiliation with a giant cartoon rat.)¹⁷

¹⁵ Baskin, Kara; "Aberration or apparition? Ghost kitchens could replace your favorite haunt," Boston Globe, Jan. 26, 2021; available at <https://www.bostonglobe.com/2021/01/26/lifestyle/aberration-or-apparition-ghost-kitchens-could-replace-your-favorite-haunt/> (last visited Jan. 31, 2021).

¹⁶ Castrodale, Jessica; "Trying to Support a Local Pizzeria? Just Make Sure it isn't Actually Chuck E. Cheese" Food & Wine, April 24, 2020; available at <https://www.foodandwine.com/news/local-restaurant-on-delivery-app-actually-chuck-e-cheese-pasquallys> (last visited April 12, 2021).

¹⁷ *Id.*

“Virtual Concepts”¹⁸ are foodservice operations that utilize existing restaurant space, staff, and equipment to leverage a new virtual online/delivery experience from the restaurant premises.

During 2020, in Dallas, Texas, acclaimed chef Nick Badovinus used his existing restaurant locations, their staffs, and their fully-equipped kitchens, to launch take-out/delivery-only concepts Vantina, Burrito Jamz '03, Fajita Monster, Ese Pollo, Solid Gold Fried Chicken, and Pizza Parm Project. Unlike Chuck E., Badovinus marketed these concepts as “side hustles” from his parent company, FlavorHook.¹⁹ In addition to allowing him to keep his staff employed, the new offerings allowed Badovinus to serve his guests more fully, many of whom are either in high-risk categories for COVID, or simply skittish of going into restaurant dining rooms.

Thus, virtual concepts can allow restaurants to make up delivery costs, and become a multi-meals-per-week dining destination for families.²⁰

Real Estate

As restaurants headed into 2019 and 2020, the outlook remained bright:

In the coming year, retailers and restaurants will continue to seek real estate options that foster the interactive customer experience today’s consumers seek. Mixed-use developments, historic or unique architecture, and space for in-store classes and gathering places will become site selection priorities.²¹

Those priorities ended in March 2020. What we will see in 2021 are QSR chains launching drive-thru-only models, some of which “eradicate the dining room all together, while others prioritize mobile-ahead and delivery orders via a dedicated drive-thru lane. These prototypes are perhaps the clearest pandemic-inspired trend to emerge throughout the past year.”²² Fast casual restaurants will seek space where delivery and to-go orders can be efficiently retrieved, without disruption to dine-in guests, and patio space will be at a premium. Whether in the form of parklets, rooftop patios, or even a few tables along a

¹⁸ Alicia Kelso, “What Does The Restaurant Industry Look Like In 2021 And Beyond?” Forbes, Dec. 30, 2020; available at: <https://www.forbes.com/sites/aliciakelso/2021/12/30/what-does-the-restaurant-industry-look-like-in-2021-and-beyond/?sh=2e88494e26a4> (last visited April 12, 2021).

¹⁹ Ziots, Megan; “Nick Badovinus Adds Two More Restaurants to his Pandemic-Friendly Pop-Up Experiments,” Paper City, Sept. 17, 2020; available at <https://www.papercitymag.com/restaurants/dallas-restaurants-chef-nick-badovinus-pop-ups-fajita-monster-solid-gold-fried-chicken/> (last visited Jan. 31, 2021).

²⁰ See Baskin.

²¹ “Buxton 2019 Retail & Restaurant Real Estate Outlook,” Buxton, available at: [https://cdn2.hubspot.net/hubfs/7653748/Reports/2019_Retail_and_Restaurant_Real_Estate_Outlook%20\(1\).pdf](https://cdn2.hubspot.net/hubfs/7653748/Reports/2019_Retail_and_Restaurant_Real_Estate_Outlook%20(1).pdf) (last visited April 12, 2021).

²² Alicia Kelso, “What Does The Restaurant Industry Look Like In 2021 And Beyond?” Forbes, Dec. 30, 2020; available at: <https://www.forbes.com/sites/aliciakelso/2021/12/30/what-does-the-restaurant-industry-look-like-in-2021-and-beyond/?sh=2e88494e26a4> (last visited April 12, 2021).

sidewalk, consumer demand for outdoor dining (perceived by many as safer than indoor dining) is not expected to wane anytime soon.²³

Moreover, many speculate that urban office environments will not reach pre-pandemic levels in the near future, as work-from-home or hybrid arrangements remain in place, which would have a detrimental effect on restaurants located in urban/downtown areas.

Both Independents awash in PPP/EIDL funds, and chains that increased sales by relying on drive-thrus and delivery specials will be on the hunt for real estate in 2021. The chains themselves have provided a glimpse into their not-so-secret gameplan:²⁴

“You see a number of brands that are either bankrupt or struggling and there’s going to be a lot of sites available. We want to make sure we go after the best ... I think this is a great moment to be in the market and being a buyer.” – Randy Garutti, Shake Shack CEO

“Our teams are taking a look at the real estate opportunities that are presented by the fact that there are quite a few other restaurant and retail businesses that are closing out ... I do believe that the shakeout and turmoil is going to create opportunity for us to further take share and continue to grow. Our teams are out there every day, looking for real estate opportunities that are opening up as a result of the pandemic.” – Ritch Allison, Dominoe’s CEO

“Definitely the real estate market is favorable ..., given the unfortunate circumstance of this pandemic ... we are seeing plenty of sites available, our solid banking relationships and generating cash flow from our restaurants is fueling further development.” – Charlie Morrison, Wingstop CEO

Conclusion

The Restaurant industry, from quick-service to fine dining, was decimated in 2020. Those restaurants that survive 2021 will likely look far different from the way they looked in 2019. While no one can be certain which trends will stay with us, smart operators are looking ahead to maximize their efforts in managing customer expectations, hiring for success, navigating the changing landscape of third-party delivery and ghost/virtual kitchens, and finding new real estate that will meet the needs of a changing industry and its changing guests.

²³ Leslie Chapus, “Outdoor Dining is Here to Stay,” Retail & Restaurant Facility Business, March 12, 2021; available at: <https://retailrestaurantfb.com/outdoor-dining-is-here-to-stay/> (last visited April 12, 2021).

²⁴ Alicia Kelso, “What Does The Restaurant Industry Look Like In 2021 And Beyond?” Forbes, Dec. 30, 2020; available at: <https://www.forbes.com/sites/aliciakelso/2021/12/30/what-does-the-restaurant-industry-look-like-in-2021-and-beyond/?sh=2e88494e26a4> (last visited April 12, 2021).