![ALFA International – The Global Legal Network]

2023 Hospitality & Retail Practice Group Seminar
January 25-27, 2023

Hot Topics:
"I feel the need… the need for speed"

Tamara K, Nelson
Moderator
FIRM NAME MERRICK HOFSTEDT & LINDSEY, P.S.
Seattle, WA
tnelson@mhlseattle.com

Jesse Conrad
HALLORAN & SAGE LLP
Hartford, CT
conrad@halloransage.com

Retail and Hospitality Trends and Hot Topics for 2023

Since 2020, the retail industry has been challenged by numerous threats and challenges. At first, it was the pandemic that shook the world, pushing the eCommerce adoption rate to +30% over the 2019 levels and fiercely switching the purchase behavior of consumers across the world. In 2022 and as the world tried to normalize its pace, the Ukrainian War, the energy crisis, and inflation shook the world, with 52% of the consumers claiming that the rising costs affect their ability to purchase goods. The retail industry has been adapting to a new reality, consequently, cutting-edge retail trends are on the forefront. Thus, with the market in continued decline and operational costs constantly rising, it is of significant importance for retailers to remain ahead of the competition.

The hospitality industry equally has been plagued with far-and-wide disruption over the past three years. No aspect of the industry was left untouched by the COVID-19 pandemic, save for the basic principles of hospitality. The 50 most valuable hospitality brands lost a third of their value in 2021. As the public's fear from the COVID-19 pandemic receded, pent-up desire for travel and leisure boosted revenue across various sectors. But as high inflation affects the cost of goods, services and labor, profitability and stability remain elusive. Hospitality industry profit margins are expected to continue to shrink in 2023 as supply chain shortages, inflation and increasing wages for workers continue to put pressure on profit margins.

In 2023 expect consumers to gravitate toward blended experiences; and quality will trump quantity. Post-pandemic behavior will see a regression to old habits but in a way that optimizes the experience. Moviegoers will rush back to theaters to see the next big blockbuster while ordering their popcorn with QR codes. Travelers will seek more outdoor, life-fulfilling/hybrid adventures. In 2023, consumers will blend newly gained digital fluidity with old-fashioned familiarity. Consumers will reconcile their fiscal caution with their spending impulse by being highly selective about which brands and experiences to patronize. The goal: Squeeze maximum value out of each outlay. In 2023, consumers will continuously curate experiences, selecting those that deliver high value while abandoning those that do not.

While this paper in not an exhaustive list of 2023 trends, it does provide an overview of key considerations moving through the year.

Consumer Behavior/Desire Changes

Understanding consumer behavior is elemental to brand and business strategy, and 2023 will be a whopper of a year for those challenged with fathoming the consumer mind. Unlike previous years, 2023 will be a jumble of mixed signals, reflecting a unique environment characterized by opposing forces: exuberance as the pandemic wanes, tempered by caution in the face of economic turbulence. Consumer spending will continue to rise, but consumers will be far pickier — seeking out fewer, richer experiences that blend the digital fluidity of the pandemic with the familiarity and intimacy of the times that came before.

Social Responsibility and Sustainability

As we face more environmental issues each day, sustainability becomes a primary concern. To succeed in 2023, businesses have to continue to adapt to the fact that the crux of consumer buying decisions increasingly lies around questions of ethics, environmentalism, and sustainability. A sustainable business culture influences customers' decisions. Studies also noted that younger employees are more willing to work in industries whose focus is extended to the community's development.

Two out of three of consumers consider themselves to be "belief-driven buyers", with a strong desire to know that the products and services purchased are created in an environmentally friendly way by organizations with

solid environmental, social, and governance (ESG) principles. Rather than an obstacle or hindrance to industry, organizations that successfully adapt to this trend will find that they quickly build stronger bonds of trust and loyalty with their customers while often also developing more efficient operations and processes. This can be achieved by reducing wastage associated with excess packaging and reducing overall energy consumption.

As more and more consumers become aware of the increasingly critical nature of threats facing our environment and the planet, technology that enables companies to both find new solutions to these problems, and to do it in a way that's transparent and accountable. Companies need to invest in corporate social responsibility programs to attract both customers and employees. Over 75% of consumers are motivated to purchase from companies committed to making the world a better place with over 65% willing to pay more for goods from brands that demonstrate social commitment.

Wellness, Health, and Safety

Wellness will continue to be a priority for consumers in 2023. For hospitality, this means shifting towards more holistic packages: in-room massage, sunrise yoga and other workout classes, wellness shots at your hotel's bar, as well as vegan and vegetarian menu options.

Never was cleanliness and feeling safe more important for guests. As we come out of two years of a global pandemic, a first priority for any retail or hospitality business should be stepping up to the challenge of making guests' health and safety the number one concern. This means investing in extra cleaning staff to keep properties impeccable at all times and taking extra precautionary measures.

Marketing messages should be aligned to let consumers know their safety of a priority, i.e., using UV lights to disinfect, wiping surfaces with bacteria-cleansing sprays, providing disinfectant gel, and offering complimentary masks if necessary.

Personalized Experiences

The struggle to attract, convert, and retain customers is always present in retail and hospitality. Personalization of services is the latest development to transform these industries. Thus, going after a personalized experience has become a powerful and transforming trend.

Capturing and using consumer data for more relevant engagement can be a complicated task. But once done, however, it is well worth the effort. Consumer data can be used to provide a personalized experience as it helps anticipate needs, send relevant and related offers, and customize their purchasing experience. Data analytics software allows for tracking and analyzing customer behavior and trends. AI technology can also develop targeted and relevant sales and marketing materials differentiated for specific individuals or groups.

Studies reveal that customer experience can soon overtake price and product as a key brand differentiator. Thus, it is now more necessary for businesses in the retail and hospitality sectors to deliver satisfactory services. Consumers have been shown to respond well to personalization throughout the consumer journey – from sales and marketing, where email and e-commerce portals will serve up personalized recommendations, to upselling and after-sales support. Businesses that successfully react to this trend in 2023 will understand how to take the myriad of data points that are available to them today and create products and services that appear "special" or uniquely tailored to individuals. They will create personalized touchpoints across the customer journey, making customers feel that they are made not just for people like them but that they are uniquely relevant to themselves as individuals. Applying technology to enable "personalization at scale" is key to capitalizing on this trend.

The Blend of Work and Travel

In May 2020, 48.7 million Americans were working from home — about 35% of the working population compared to 6% in 2019. However, as homes also became schools (and gyms and restaurants and movie theaters), about one-third of Pew respondents said interruptions made work difficult, while 36% struggled to stay motivated. One solution: working vacations, aka "work from hotel:" "workspitality." 2022 statistics on remote workers reveal that more than 4.7 million people work remotely at least half the time in the United States. 44% of companies do not allow remote work and only 16% of companies hire remote only workers.

Technology

Contactless/Autonomous experiences

A 2020 research found that 80% of travelers prefer using an app to check-in and out, order room service and communicate with hotel staff. Another study found 71% of travelers would be more likely to stay at a hotel with self-service technology. Digital concierges, Chatbots, digital room keys and self-selection of room locations, and even the ability to control room temperature, TV, lights, etc. via your smartphone are the next steps in contactless hospitality.

This trend also revolves around the convergence of hybrid and omnichannel innovations but focuses on the all-important "last mile" of the retail experience. Consumers are demanding more streamlining and efficiency in the way they pay for goods and services and how they make their way into our hands. Convenience trends such as buy-online-pickup-in-store (BOPIS), buy-online-return-in-store (BORIS), and buy-online-pickup-at-curbside (BOPAC) are quickly becoming expected as standard. Artificial intelligence and advanced analytics make these a possibility by automating the complex inventory management processes required. It's also essential for the new methods of autonomous delivery that retailers are increasingly trialing, piloting, and rolling out in real-world deployments.

Augmented Reality/Virtual Reality

Virtual reality (VR) transformed and enriched the retail and hospitality industries. It is one of today's biggest emerging technology trends, with 57.4 million users in the United States alone (eMarketer, 2020). Thus, many businesses incorporate VR for the various opportunities it creates.

VR in the hospitality industry is applied in travel experiences, hotel tours, and booking processes. High-quality VR headsets are now a mainstream consumer product, thanks to the increased investments from the likes of Samsung, Facebook, and Google. Along with augmented reality, VR allows customers to virtually experience a recreation of a hotel room or explore nearby attractions. In recent years, VR enhanced customer experience when exploring the surrounding area. For an average customer, VR provides more accurate information related to booking a hotel room. Reading through descriptions pales in comparison to VR, which offers customers the opportunity to virtually experience things for themselves. This way, hotels benefit from the try-before-you-buy concept of marketing.

AR/VR in the retail sector includes such advances as:

- Virtual Try On that requires no mobile app & no 3D renderings. Customers can see what a product will look on themselves without leaving the product page.
- Contextual Shopping allows online shoppers to compare an item to other catalog items (side-by-side) or compare against common, everyday items such as a laptop or iPhone.
- Room View lets customers adjust, interact, and experience multiple products from the same retail

catalog.

- In Jewelry Stacking online customers can "stack" multiple pieces of jewelry (from the same catalog) on their hand, wrist, ear, or neck.

- In-Store Virtual Navigation, with a store app, customers can plan their next offline store visit. Using a navigation feature, they can get exact locations to the products they are looking for from wherever they are in the offline store. AR makes navigation a lot easier and can even provide a shortcut to the space to find the item faster.

The AR/VR space is also being used to integrate ESG and tap into consumer emotion. Consider the example of TOMS, known for its "one to one" philosophy of giving a pair of shoes to a needy child for every pair of footwear it sells. The company uses retail virtual reality as a compelling and novel way both to engage with customers and inspire them to stop by a store for an experience they can't get anyone where else. Two years ago, TOMS acquired Samsung virtual reality headsets for use in 100 stores, giving visitors the ability to immerse themselves in a 360-degree video of children at a Peruvian school receiving free shoes as part of TOMS's one-for-one brand promise. In 2016 as TOMS commemorated its 10th anniversary, the brand approached AT&T, a longtime partner, to create a retail virtual reality video that followed one customer's trip from California to Colombia to see firsthand the actual impact his TOMS shoe purchase had on a child.

Marketing

User-Generated Content

Unlike ads or branded content, user-generated content is created by regular consumers. Unboxing videos, makeup reviews and shopping haul videos will continue to be popular. Consumers appreciate the authenticity of user-generated content and trust it more than videos created by brands. When a prospective customer looks for your brand's content online, he or she will normally read the customer reviews about your company on other websites or social media platforms. User-generated content implemented correctly, can increase brand awareness significantly. An effective tool is to encourage consumers to share their experiences on social media.

Story Driven Content

Put simply, storytelling is the art and science of using a fictitious or non-fictitious narrative, character, and plot to convey a message that indirectly markets your product or category of products. Consumers are 85% more likely to buy a product after watching a video about it. Social media posts with images produce 180% more engagement than posts without images. Consumers of all ages like to feel engaged and part of the product story.

Omnichannel Experience

Omnichannel marketing is a tactic that's become incredibly popular in recent years due to an obvious fact: its effectiveness. In short, it's a practice that aligns content delivery across marketing channels—both online and offline—to provide a seamless, consistent experience. It is the synchronization of channels of mobile, desktop and store to support a customer's seamless purchase process. The strategy supports the customer from discovery to conversion, through fulfillment and post-purchase.

Omnichannel marketing is effective because it addresses the fact that the modern customer is no longer dedicated to a single channel or platform for interaction with a brand, organization, or publisher. A brand with an omnichannel strategy will ensure that no matter where the customer journey begins—a physical store, mobile app or different channel—and no matter where it ends, the individual will have a seamless, consistent experience all the way through.

Social Commerce

Native buying experiences on a social media site are referred to as social commerce. It allows customers to purchase online in a more seamless manner. Users may make purchases directly from the social networking app or site, rather than going to a third-party website. The barriers between app users and retail consumers blurred as media platforms became the one-stop shop for real-time engagement, interesting content, and purchasing inspiration. As a result, social commerce has offered hyper-personalized end-to-end buying experiences based on a wealth of real-time customer data. The customer journey has flipped on its head. 90% of product research and decision-making is now accomplished before customers enter a store.

The popularity of social commerce is on the upswing. We'll see cooperation between Shopify and TikTok, as well as Facebook businesses, in 2020. By the close of 2021, sales of social commerce in the United States are predicted to have increased by 35%, surpassing $36 billion.

SCOTUS

The U.S. Supreme Court decisions that were issued in June 2022 had a significant impact on employers, and employers are now looking at implementing policies and practices in response to the decisions. The Court's decisions in *Dobbs v. Jackson Women's Health Organization* and *Kennedy v. Bremerton Sch. Dist.* broadly affected employment in areas such as privacy, benefits, religious accommodation, and gender discrimination.

The following previews cases with potential implications for retail and hospitality in the upcoming months (cases heard but no opinion issues as of January 2023, and/or cases awaiting argument):

Mallory v. Norfolk Southern Railway Co., No. 21-1168: Petitioner Robert Mallory is a Virginia resident formerly employed by Norfolk Southern Railway, a Virginia-based company. Mallory claimed that work-based exposure to carcinogens caused him to develop colon cancer. Mallory brought suit in Pennsylvania Superior Court against Norfolk, but he did not allege that any of the exposure occurred in Pennsylvania. Norfolk filed objections, arguing that the court lacked personal jurisdiction. Pennsylvania law states that a foreign corporation that registers to do business in the commonwealth, enables Pennsylvania tribunals to exercise personal jurisdiction over the corporation. The Pennsylvania Supreme Court, however, held that this "consent-by-registration scheme" did not comport with due process and upheld the lower court's dismissal of Mallory's suit for lack of jurisdiction.

Impact: If the Supreme Court agrees with Mallory that a corporation that registers to do business in a state voluntarily consents to personal jurisdiction in that state, employees could bring suit against an employer in any state where the employer is merely registered to do business, regardless of whether the employer has any continuous and systematic connections to the state.

303 Creative LLC v. Elenis, No. 21-476: Lorie Smith filed the underlying lawsuit on behalf of her graphic design firm, 303 Creative LLC. Smith seeks to expand her business and begin designing websites for weddings. However, Smith opposes same-sex marriage on religious grounds. Her suit challenges a Colorado law prohibiting businesses open to the public from discriminating against LGBTQ+ customers or announcing an intent to do so. The U.S. Court of Appeals for the 10th Circuit held that the Colorado law was sufficiently narrowly tailored to the state's interest in ensuring LGBTQ+ customers have access to 303's unique services and, therefore, did not violate Smith's First Amendment rights.

Impact: A decision in favor of 303 would invalidate the Colorado law prohibiting discrimination against LGBTQ+ customers, as well as any other state laws that provide similar protections, granting broad discretion for a company to deny services to customers based on the religious beliefs of the company's owners or executives. Employers that provide services to the public will need to carefully consider the economic, social, and

reputational impact of allowing employees to refuse services to LGBTQ+ individuals if such conduct is no longer prohibited by law.

Helix Energy Solutions Group, Inc. v. Hewitt, No. 21-984: Michael Hewitt held a supervisory position on an offshore oil and gas rig and was paid biweekly at a daily rate. Helix Energy Solutions Group, Inc. terminated Hewitt's employment, and Hewitt then filed a putative class action suit seeking retroactive overtime pay. Hewitt argued that his pay was computed on a daily basis, and he therefore was a non-exempt employee and entitled to overtime pay. Helix argued that Hewitt was exempt as a "bona fide executive, administrative, or professional" and a "highly compensated" employee. The U.S. Court of Appeals for the Fifth Circuit overturned the lower court's decision, holding that Hewitt was non-exempt because he was a salaried employee.

Impact: If the Court agrees with the Fifth Circuit's analysis that daily rate pay is not equivalent to a salary, regardless of how highly compensated the employee is, employers will face increased liability for failure to pay overtime. Employers with highly compensated employees paid on a daily basis should consider whether to revise its pay practices.

Gonzalez v. Google LLC (21-1333): These arguments involve Section 230 of the Communications Decency Act, a law dating back to the 1990s that grants Internet companies such as Google, Facebook, and Twitter immunity from lawsuits about content posted by third parties on their public services. Reynaldo Gonzalez sued Google after his daughter's death in a 2015 ISIS terrorist attack. In this case, the petitioners argue that Google lost its Section 230 immunity after ISIS members were able to leverage Google's recommendation algorithms to recruit terrorists on YouTube, which Google owns. The petitioners are asking the court to distinguish between automatic content recommendations and traditional editorial decisions under Section 230's immunity provisions, a decision that could have far-reaching consequences.

Twitter, Inc. v. Taamneh (21-1496): In a case related to *Gonzalez v. Google*, the Taamneh family sued Twitter, Google, and Facebook after a 2017 fatal ISIS attack in Turkey. The *Gonzalez* and *Taamneh* cases were considered together by the Ninth Circuit Court of Appeals. But in the *Taamneh* case, the Ninth Circuit decided that the three companies faced liability for aiding-and-abetting under Section 2333 of the Anti-Terrorism Act, reversing a lower court decision. Twitter is seeking to have the Ninth Circuit ruling overturned.

Impact: At stake is the very manner in which online content is delivered to users. Currently, every big-name internet platform – Facebook, Google, Twitter – uses algorithms which recommend content based on users' online behavior. If the Court were to find that interactive computer services can be held liable for their recommendations, this could fundamentally change how those platforms operate. Users who have become accustomed to platforms "curating" content for them may dislike having to hunt through mountains of random content to find what they want to see if these platforms stop making recommendations altogether. If platforms continue to make recommendations, they may face significant increased costs in the form of more stringent recommendation algorithms and AI-filtering of recommended content, as well as increasing their human reviewer headcount to try to further prevent the recommendation of content that may create an increased risk of creating liability for them.

In re Grand Jury (21-1397): An unnamed company hired a law firm specializing in international tax law to advise it on the tax consequences of moving operations to the United States. The United States government later initiated a criminal investigation against the company and subpoenaed documents and communications related to the tax expatriation from the law firm. In response, the law firm withheld certain communications, asserting protection under the attorney-client privilege. The government moved to compel arguing the discovery primarily sought business (and tax) advice, rather than legal advice. The district court granted the government's motion to compel,

and the Ninth Circuit affirmed.

Impact: The Supreme Court will resolve a disagreement or "circuit split" between the U.S. Courts of Appeals on how to determine whether the attorney-client privilege applies to "dual-purpose" communications that contain both legal and non-legal (business or tax-related) advice.