

ADVISORY

NOVEMBER 2009

STATE AND LOCAL MENU LABELING LAWS PRESENT COMPLIANCE CHALLENGES

OVERVIEW

Almost three years ago, New York City became the first jurisdiction to enact nutrition labeling requirements for restaurants. Since then, various states, counties, and cities have enacted or proposed nutrition labeling requirements. At least a dozen jurisdictions now have specific requirements, with bills pending in almost 20 more jurisdictions.

Although these state and local laws share certain similar features, they also have many important differences. For example, certain laws only require calorie disclosures whereas others require additional nutritional disclosures such as fat, sodium, and carbohydrates. The laws also differ on numerous other issues, such as where and how values must be listed, whether ranges can be used, what types of disclaimers are allowed, and what menu items are excluded. The lack of a uniform approach means that restaurants must understand each law's impact on their operations as they develop and implement a compliance strategy.

BACKGROUND

The federal Nutrition Labeling and Education Act (NLEA), which was enacted in 1990, requires mandatory nutrition labeling for food and preempts state and local nutrition labeling laws that are different or in addition to those under the NLEA. The NLEA generally exempts restaurant foods from its mandatory nutrition labeling requirements.

In 2006, New York City adopted a regulation to require nutrition labeling at certain food establishments that were already voluntarily providing nutritional values to customers. The New York State Restaurant Association challenged this ordinance in federal district court on the grounds that the NLEA preempted New York City's ordinance. The district court found that the ordinance was preempted because it impermissibly attempted to regulate nutritional statements that the restaurants had made voluntarily.

New York City then revised its ordinance in January 2008 to make it apply to all covered food service establishments, whether or not they had already been providing nutritional values to customers voluntarily. The federal district court upheld this revised ordinance and found that because the nutritional disclosures were mandatory (instead of voluntary), they were not preempted by the NLEA. This ruling was affirmed by the Second Circuit Court of Appeals.

Since New York City adopted its regulation, other state and local jurisdictions have enacted or proposed nutrition labeling laws affecting restaurants and other types of retail food establishments. The laws do not always clearly address a specific situation that a restaurant faces, and most of them lack published enforcement guidance.

In 2008, two federal bills were proposed that would require menu labeling by restaurant chains: the LEAN Act ([S.3575](#)) and the MEAL Act ([S.2784](#)). Unlike the

Brussels

+32 (0)2 290 7800

Denver

+1 303.863.1000

London

+44 (0)20 7786 6100

Los Angeles

+1 213.243.4000

New York

+1 212.715.1000

Northern Virginia

+1 703.720.7000

San Francisco

+1 415.356.3000

Washington, DC

+1 202.942.5000

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MEAL Act, the LEAN Act would have preemptive effect. Although these bills were not enacted, similar menu labeling bills were proposed in 2009: [H.R. 1398/S.558](#) and [H.R. 2426/S.1048](#). In addition, in October 2009, the US House of Representatives introduced a bill on health care reform ([H.R. 3962](#)), which included menu labeling provisions that would preempt state and local requirements that are additional to or different from federal requirements. The House passed this bill on November 7, 2009, and it is now pending in the US Senate.

Until national legislation is enacted, however, covered restaurants remain subject to a patchwork of state and local requirements.

ADDITIONAL RESOURCES

Arnold & Porter LLP has prepared a survey of enacted and proposed state and local legislation, which also contains links to the legislation. If you are interested in obtaining a copy of this survey or reviewing the requirements that may apply to your company, please contact your Arnold & Porter attorney or any of the following attorneys:

Sarah Esmaili

+1 415.356.3078

Sarah.Esmaili@aporter.com

Trenton H. Norris

+1 415.356.3040

Trent.Norris@aporter.com

Peter Zimroth

+1 212.715.1010

Peter.Zimroth@aporter.com

Nancy Milburn

+1 212.715.1008

Nancy.Milburn@aporter.com

Kent A. Yalowitz

+1 212.715.1113

Kent.Yalowitz@aporter.com

Arnold & Porter is well-situated to assist clients in addressing these issues. We have substantial experience in legal issues affecting the restaurant and food industry. With respect to restaurant menu labeling specifically, our experience includes the following:

- We provide compliance counseling on various menu labeling laws that affect restaurants and have contested citations for alleged violations of menu labeling laws.
- We represented the New York State Restaurant Association in challenging New York City's regulation requiring posting of nutrition information on menus.
- We represented the California Restaurant Association in its litigation challenging menu labeling ordinances in San Francisco and Santa Clara County, California, which were ultimately preempted by a new state law.
- We are defending several class action lawsuits around the country in which the plaintiffs have alleged false and misleading nutritional information in menus.
- We represent six major restaurant companies in defending against claims by an animal rights advocacy group that Proposition 65 warnings are required for certain menu items. The court granted summary judgment on preemption grounds in the restaurants' favor, and an appeal is pending.