

CALIFORNIA ENACTS NATION'S FIRST STATEWIDE MENU LABELING LAW

On September 30, 2008, Governor Arnold Schwarzenegger signed into law SB 1420, making California the first state in the nation to enact statewide legislation requiring restaurants to provide nutritional information on menus and menu boards. SB 1420 applies to restaurant systems with at least 20 locations in California. Over 17,000 restaurants will be affected.

Requirements

SB 1420's requirements are imposed in a two-stage process:

- **By July 1, 2009**, covered restaurants must provide brochures that disclose calories, saturated fat, carbohydrates, and sodium. The brochures must be available at the point of sale, and drive-through areas must display a conspicuous notice stating that the disclosure of nutrition information is available upon request. Restaurants providing sit-down service may provide the information on a table brochure, table tent, menu, or menu insert.
- **By January 1, 2011**, covered restaurants must additionally post calorie content information next to each menu item on their menus, indoor menu boards, or menu tags (for display case items). Restaurants offering "combination" menu items comprised of one or more other items must disclose both minimum and maximum calorie information for the combination on menus or menu boards, based upon all possible combinations. Furthermore, for menu items that are intended to serve more than one individual, menus and menu boards must state the number of individuals intended to be served as well as the calorie content information per individual serving.

Numerical information is to be determined by "any reasonable means recognized by the federal Food and Drug Administration." A restaurant is required to make this determination only once, provided that portion sizes are reasonably consistent, a standardized recipe is followed, and employees are trained to a consistent method of preparation. Restaurants may include a disclaimer indicating that variations in nutritional content may occur.

SB 1420 exempts:

- Specials or other items offered less than 180 days per year;
- Foods that are customized pursuant to an unsolicited request;
- Alcoholic beverages;

Brussels

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Denver

+1 303.863.1000

London

+44 (0)20 7786 6100

Los Angeles

+1 213.243.4000

New York

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Northern Virginia

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San Francisco

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Washington, DC

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This advisory is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.

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- Packaged foods subject to federal nutrition labeling requirements under the Nutrition Labeling and Education Act of 1990; and
- Foods or beverages served at a customer self-service buffet or salad bar.

Penalties

A violation of SB 1420 is an infraction, not a misdemeanor. Fines between US\$50 and US\$500 may be assessed by a local enforcement agency for a violation. Only one violation may be assessed per inspection visit.

Statewide Preemption

SB 1420 contains a provision preempting local menu labeling ordinances as of January 1, 2009. Two California municipalities—the City and County of San Francisco and Santa Clara County—had enacted menu labeling ordinances, but following lawsuits by the California Restaurant Association and passage of SB 1420, each repealed or suspended its local ordinance.

OTHER MENU LABELING LEGISLATION

Following California's lead, the governors of New York and Massachusetts recently have called for statewide menu labeling, and legislation has been introduced in several states. In addition, several municipalities require nutritional disclosures by restaurants:

- New York, New York (effective May 2008)
- King County, Washington (effective January 1, 2009)
- Multnomah County, Oregon (expected to be effective March 2009)
- Westchester County, New York (effective May 1, 2009)
- Philadelphia, Pennsylvania (effective January 1, 2010)

Other state and local entities have taken steps to enact legislation requiring nutritional labeling by restaurants.

Federal legislation has also been proposed. On March 13, 2008, Senator Harkin (D-ID) introduced the Menu Education and Labeling Act (MEAL Act), which would

require systems with more than 20 locations to post calorie content for all menu items on menu boards or printed menus. On September 25, 2008, Senators Carper (D-DE) and Murkowski (R-AK) introduced the Labeling Education and Nutrition Act (LEAN Act), which would require similar information, but not necessarily on the menus themselves. With the latest Congressional session just underway, it remains to be seen whether any of these bills will be reintroduced.

CLASS ACTIONS REGARDING NUTRITIONAL INFORMATION IN MENUS

In 2008, several class actions were filed around the country against certain restaurants that have voluntarily provided nutritional information on their menus. These cases allege that the nutritional information is misleading and that calorie and fat content is understated in the menus. With restaurants being required to provide nutritional information in many jurisdictions, these class actions may represent a new trend in litigation affecting the restaurant industry.

Arnold & Porter LLP 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 represent the New York State Restaurant Association in challenging New York City's regulation requiring posting of nutrition information on menus. After prevailing on a challenge to the original ordinance in September 2007, we challenged the newly revised ordinance. The District Court upheld the new ordinance, but the Second Circuit Court of Appeals is reviewing that ruling.
- We represented the California Restaurant Association in its litigation challenging the San Francisco and Santa Clara County menu labeling ordinances. We negotiated Court-approved stays of enforcement of the local ordinances so that no affected restaurant was required to comply before the ordinances were suspended or repealed.

- We are defending several class action lawsuits around the country in which the plaintiffs have alleged false and misleading nutritional information in menus.

We hope you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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