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Federal Calorie Labeling Regulations

for restaurants and vending machines in Kansas

All too often people underestimate or have no way to know how many calories or how much sugar and salt is in the food and drinks at restaurants or in vending machines. While consumers can find and see nutritional information on the package for most food in grocery stores, this information is typically not easy to find for restaurant food, nor easy to see when buying food from a vending machine. Restaurant type foods and vending machine snacks make up a significant part of people's diets and can have a substantial impact on our health. In the U.S., we spend about half of our food dollars eating away from home; adults buy an average of 5.8 meals or snacks from restaurants each week, while on any given day, over 30% of children consume fast food.¹

Increasingly, consumers are looking for more nutritious options. In a 2015 food industry survey, over 90% of people reported that they thought about the healthfulness of the foods and beverages they consumed, with 48% reporting that they had thought about it "a lot."² Additionally, healthfulness is consistently one

of the top three drivers of food selection.³ Calorie labeling laws can help consumers make the informed and healthy choices they desire, while also providing incentives for vending machine operators and other prepared food retailers to offer healthier options.

What is the federal menu and vending machine labeling law?

In March 2010, the federal government adopted a menu and vending machine labeling law as part of the



This resource provides an overview of the final federal calorie and nutritional labeling requirements for restaurants, similar retail food establishments, and vending machines.



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Patient Protection and Affordable Care Act.⁴ This law requires that large chain restaurants and similar retail food establishments, and certain owners and operators of vending machines, post calorie information on their menus or machines, and make other nutrition information available to customers prior to purchase. The law also sets limits on what other nutritional labeling requirements state and local governments may impose. In December 2014, the Food and Drug Administration (FDA) issued final regulations, which have the force of law, to help interpret and implement these labeling requirements.

What types of food retailers must comply with the federal menu labeling law?

Chain restaurants and similar retail food establishments with 20 or more locations, operating under the same name, and serving “substantially” the same restaurant-type food items, are required to comply with the rule.⁵

There are five criteria used to determine whether an establishment is covered by this rule.

- 1 It must be a retail food establishment that sells restaurant-type food.
- 2 It must be part of a chain of 20 or more locations nationwide.
- 3 Those locations must be fixed sites⁶ — establishments like food trucks and train dining cars are exempt.
- 4 The locations must be operating under the same name. “Name” refers to the name that the locations present to the public, regardless of ownership, like a franchise restaurant.⁷ (A slight variation in a name within a chain will not exempt the establishment from compliance).⁸ For generic establishments, like concession stands, “name” means the name of the entity that owns the establishment.⁹
- 5 A significant proportion of the standard menu items offered must be substantially the same across the different locations’ menus. This means the same general recipes, ingredients, and preparation methods are used across all locations.¹⁰

What are “restaurant-type foods?”

Restaurant-type foods are prepared items that are ready to be eaten within the establishment, or soon after leaving the establishment, without further preparation.¹¹ Examples include food from sit-down restaurants and drive-through establishments, delivery pizza, hot food at buffets, and ready-to-eat food at grocery store deli counters.¹²

What is a “similar retail food establishment?”

The term “similar retail food establishment” overlaps with the definition of a restaurant and is defined

as “a retail food establishment that offers for sale restaurant-type food.”¹³

The final rule guidance issued by the FDA provides additional context, explaining that the term includes: “bakeries, cafeterias, coffee shops, convenience stores, delicatessens, food service facilities located within entertainment venues (such as amusement parks, bowling alleys, and movie theatres), food service vendors (e.g., ice cream shops and mall cookie counters), food take-out and/or delivery establishments (such as pizza take-out and delivery establishments), grocery stores, retail confectionary stores, superstores, quick service restaurants, and table service restaurants.”¹⁴

What is a covered restaurant or similar retail food establishment required to do?

There are four main things that a covered establishment must do to comply with the federal calorie labeling law.

- 1 Calorie information must be clearly provided for all standard food and beverage menu items on menu boards and menus.¹⁵ For self-serve items, such as food on a buffet or soda from a fountain, the information must be provided on signs adjacent to or above the food.¹⁶
- 2 All menus and menu boards must include a succinct statement concerning suggested daily caloric intake, such as “2,000 calories a day is used for general nutrition advice, but calorie needs vary.”¹⁷ For children’s menus, a few options are acceptable, including: “1,200 to 1,400 calories a day is used for general nutrition advice for children ages 4 to 8 years, and 1,400 to 2,000 calories a day for children ages 9 to 13 years, but calorie needs vary.”¹⁸ If the available food is self-serve or on display without a menu or menu board, such as at a buffet, the statement must be placed on a sign near the food. This information is meant to

help consumers understand the significance of the posted calories.

- 3 All menus and menu boards must include a statement that notifies consumers that “additional nutrition information [is] available upon request.”¹⁹ If the available food is self-serve or on display without a menu or menu board, the statement must be placed on a sign near the food.
- 4 Complete nutrition information for standard menu items must be available to consumers who request it.²⁰ The written information must include: total calories; dietary fiber; calories from fat; total fat; cholesterol; saturated fat; sodium; trans fat; total carbohydrates; protein; and sugars.²¹

Do all food and beverage items sold in a covered restaurant or similar retail food establishment require calorie labeling?

No, the labeling requirements only apply to restaurant-type foods that are “standard menu items.”²² “Standard menu items” are those foods and beverages routinely served in the establishment.²³ Items like condiments on tables, daily specials, temporary menu items, and custom orders are excused from the requirement.²⁴ Self-service foods (such as items on a salad bar) and foods placed on display (such as muffins at a coffee shop), do not require calorie labeling if they are available for less than a total of 60 days per year or fewer than 90 consecutive days as a market test.²⁵ The rule also exempts alcoholic beverages that are on display but not self-service,²⁶ such as bottles of liquor behind the bar used to prepare mixed drinks.

Non-restaurant-type foods are not subject to the rule, even if a covered establishment sells them. Certain foods purchased in grocery stores or other similar retail food establishments that are typically intended for more than one person to eat, are stored for use later, or require additional preparation before consuming are not subject



PHOTO: KEVIN HARBER/FLICR

to the labeling requirements.²⁷ Examples include pounds of deli meats and cheeses, whole cakes or loaves of bread from a bakery, and trail mix from a grocery store bulk bin.

Who must comply with the federal vending machine labeling requirements?

Vending machine operators who own or operate 20 or more vending machines must comply with the federal law.²⁸

What specifically must a covered vending machine operator do?

Vending machine operators must provide calorie information for foods and beverages sold in their vending machines.²⁹ The calorie information must be clear, conspicuous, and prominently displayed.³⁰

If the packaged food contains more than one serving, the calorie information must list the total number of calories present in the entire package.³¹ For vending items that include variable selected options (e.g. coffee with options for sugar or cream), calories must be provided per option or for the final product with selected options.³²

Additionally, the vending machine operator must put his or her contact information on the vending machines. The information must include the operator's name, phone number, and email address or mailing address.³³

Must calorie information be provided for all food and beverage items sold in vending machines?

Yes, unless the prospective purchaser can see the nutrition information, including, at a minimum, the total number of calories per container listed on the items' nutrition facts labels, without obstruction, before purchase.³⁴ The information must be clear and conspicuous, and must be easily read while the item is in the machine.³⁵

Are there rules for establishing the nutrition information?

Yes, a covered restaurant or similar retail food establishment must have a reasonable basis for the nutritional values provided for standard menu items.³⁶ Nutrition information "may be determined using nutrient databases ... cookbooks, laboratory

analyses, or other reasonable means.”³⁷ The information must be accurate, and the FDA can require an establishment to provide evidence substantiating the nutritional claims.³⁸ For vending machines, the nutritional content may be derived from the package label, information provided by the manufacturer or supplier, nutrient databases, cookbooks, or laboratory analyses.

May state and local governments enact their own calorie labeling or nutritional disclosure laws for the same businesses covered by the federal law?

Yes and no. The federal law expressly allows state and local governments to enact their own menu or calorie labeling laws as long as the requirements are *identical* to federal law.³⁹ However, state and local governments may not require establishments covered by the federal law to comply with requirements that are *different* from federal law.⁴⁰ A state or local jurisdiction may wish to enact its own identical law so it could directly enforce the requirements under its enforcement scheme, instead of relying on the federal government for enforcement. With respect to local governments in Kansas, the Kansas legislature recently passed a law that declared that the “regulation of ... nutrition labeling for food and nonalcoholic beverages that are menu items in restaurants, retail food establishments or vending machines is reserved to the legislature and may be regulated only by legislation of statewide application.”⁴¹ So local governments in Kansas have been preempted by state law from enacting their own menu or calorie labeling laws.

May state and local governments enact their own menu or vending machine labeling laws for businesses *not* covered by the federal law?

Yes; although in Kansas, only the Kansas Legislature may impose different, stricter requirements on restaurants and similar retail food establishments, as

well as on vending machine operators, that are not covered by the federal law. However, those businesses can choose to register with the FDA and comply with the federal requirements instead.⁴²

When do the federal requirements go into effect?

The FDA will begin enforcing the requirements for restaurants and similar retail food establishments on May 5, 2017. Most of the vending machine labeling requirements go into effect on December 1, 2016, except for certain food products sold in glass-front machines. For these products in glass-front machines, the compliance date is July 26, 2018.⁴³

How will the federal law be enforced?

The FDA may handle enforcement, or it may choose to work through state or local representatives, who would act on behalf of the FDA to enforce the federal requirements.⁴⁴ Also, a state may act on its own behalf to enforce the law within its own borders.⁴⁵ Most likely, enforcement will be a team effort; the FDA has indicated that in the period before the rules go into effect, it will assess resources and consider conducting training and further outreach to state and local inspectors to facilitate enforcement.⁴⁶

Where can I find more information?

The FDA has issued guidance documents to help businesses understand and comply with the new law. Guidance documents, while not legally binding, “represent the [FDA’s] current thinking” on the laws they are enforcing, and assist in implementation and compliance.⁴⁷ The guidance documents include:

- *Guidance for Industry: A Labeling Guide for Restaurants and Retail Establishments Selling Away-From-Home Foods — Part II (Menu Labeling Requirements in Accordance with 21 CFR 101.11)*;⁴⁸ and

- *Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments — Small Entity Compliance Guide*, which restates the requirements in plain language and is intended to help small businesses comply with the final rule.⁴⁹

These guidance documents and other resources to help explain the requirements can be found at <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm217762.htm>.

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Endnotes

- ¹ *About The United States Healthful Food Council*, UNITED STATES HEALTHFUL FOOD COUNCIL, <http://ushfc.org/about> (last visited June 22, 2016).
- ² INTERNATIONAL FOOD INFORMATION COUNCIL FOUNDATION, *FOOD & HEALTH SURVEY 2015* 6 (Mar. 2015), <http://www.foodinsight.org/sites/default/files/2015-Food-and-Health-Survey-Full-Report.pdf>.
- ³ *Id.* at 21.
- ⁴ 21 U.S.C. § 343(q)(5) (2016).
- ⁵ 21 C.F.R. § 101.11(a) (2016).
- ⁶ *Id.*
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ 21 C.F.R. § 101.11(a) (2016).
- ¹¹ *Id.*
- ¹² FDA Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 79 Fed. Reg. 71158 (Dec. 1, 2014).
- ¹³ 21 C.F.R. § 101.11(a) (2016).
- ¹⁴ U.S. FOOD & DRUG ADMINISTRATION, GUIDANCE FOR INDUSTRY: A LABELING GUIDE FOR RESTAURANTS AND RETAIL ESTABLISHMENTS SELLING AWAY-FROM-HOME FOODS — PART II (MENU LABELING REQUIREMENTS IN ACCORDANCE WITH 21 CFR 101.11) 3.9 (Apr. 2016), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm461934.htm>.
- ¹⁵ 21 C.F.R. § 101.11(b)(2)(i)(A) (2016).
- ¹⁶ 21 C.F.R. § 101.11(b)(2)(iii)(A) (2016).
- ¹⁷ 21 C.F.R. § 101.11(b)(2)(i)(B) (2016).
- ¹⁸ *Id.*
- ¹⁹ 21 C.F.R. § 101.11(b)(2)(i)(C) (2016).

- ²⁰ 21 C.F.R. § 101.11(b)(2)(ii) (2016).
- ²¹ 21 C.F.R. § 101.11(b)(2)(ii)(A) (2016).
- ²² 21 C.F.R. § 101.11(b)(1)(i) (2016).
- ²³ 21 C.F.R. § 101.11(a) (2016).
- ²⁴ 21 C.F.R. § 101.11(b)(1)(ii)(A)(1) (2016).
- ²⁵ 21 C.F.R. § 101.11(b)(1)(ii)(A)(2) (2016).
- ²⁶ 21 C.F.R. § 101.11(b)(1)(ii)(B) (2016).
- ²⁷ FDA Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 79 Fed. Reg. 71170, 71184 (Dec. 1, 2014).
- ²⁸ 21 C.F.R. § 101.8(c)(1)(ii)(A) (2016).
- ²⁹ 21 C.F.R. § 101.8(c)(2)(i) (2016).
- ³⁰ 21 C.F.R. § 101.8(c)(2)(ii) (2016).
- ³¹ 21 C.F.R. § 101.8(c)(2)(i)(C) (2016).
- ³² 21 C.F.R. § 101.8(c)(2)(i)(D) (2016).
- ³³ 21 C.F.R. § 101.8(e)(1) (2016).
- ³⁴ 21 C.F.R. § 101.8(b) (2016).
- ³⁵ 21 C.F.R. § 101.8(b)(2) (2016).
- ³⁶ 21 C.F.R. § 101.11(c)(1) (2016).
- ³⁷ *Id.*
- ³⁸ 21 C.F.R. § 101.11(c)(2), (3) (2016).
- ³⁹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573 (2010).
- ⁴⁰ 21 U.S.C. § 343-1(a)(4) (2016).
- ⁴¹ Kan. S.B. 366 § 2(a) (2016).
- ⁴² 21 C.F.R. §§ 101.11(d)(1), 101.8(d)(1) (2016).
- ⁴³ Food Labeling; Calorie Labeling of Articles of Food in Vending Machines; Extension of Compliance Date, 81 Fed. Reg. 50303 (Aug. 1, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-08-01/pdf/2016-18140.pdf>. The FDA explained that it is extending the compliance date for foods that have visible front-of-package labeling and are being sold through glass-front vending machines that do not have the capability to provide nutritional information electronically to align with the date that the new Nutrition Facts Panel label rule also will go into effect. The FDA also extended the compliance date for gums, mints and roll candy sold in small packages in glass-front vending machines in response to industry requests to provide flexibility for labeling these products.
- ⁴⁴ 21 U.S.C. § 372(a)(1)(A) (2016).
- ⁴⁵ 21 U.S.C. § 337(b) (2016).
- ⁴⁶ FDA Food Labeling; Calorie Labeling of Articles of Food in Vending Machines, 79 Fed. Reg. 71283 (Dec. 1, 2014).
- ⁴⁷ 21 C.F.R. § 10.115(d)(3) (2016).
- ⁴⁸ FOOD AND DRUG ADMINISTRATION, GUIDANCE FOR INDUSTRY: A LABELING GUIDE FOR RESTAURANTS AND RETAIL ESTABLISHMENTS SELLING AWAY-FROM-HOME FOODS — PART II (MENU LABELING REQUIREMENTS IN ACCORDANCE WITH 21 CFR 101.11) (Apr. 2016), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm461934.htm>.
- ⁴⁹ FOOD AND DRUG ADMINISTRATION, NUTRITION LABELING OF STANDARD MENU ITEMS IN RESTAURANTS AND SIMILAR RETAIL FOOD ESTABLISHMENTS SMALL ENTITY COMPLIANCE GUIDE (Mar. 2015), <http://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM437566.pdf>.