

Legal Fact Sheet

New York Food Donation: Date Labels

Created by the Harvard Law School Food Law and Policy Clinic, September 2018

Date labels are the dates on food packaging that are accompanied by phrases such as “use by,” “best before,” “sell by,” “enjoy by,” and “expires on.” Date labels can lead to food waste because they are misleading to consumers and are generally not related to food safety, resulting in safe, wholesome food being needlessly thrown away.

Federal Law on Date Labels

There is currently no federal law regulating date labels.¹ Congress has, however, passed legislation delegating general authority to the FDA and the USDA to ensure food safety and protect consumers from deceptive or misleading food labeling.² Unfortunately, the FDA and the USDA have not interpreted this authority to allow them to regulate date labels, thus:

- The FDA does not require date labels on foods, other than infant formula;³ and
- The USDA does not require date labels on foods under its purview, including meats, poultry, and egg products.⁴ If, however, USDA-regulated foods are dated, either as required under state law or voluntarily, they must include: (1) a day and month (and year for frozen or shelf-stable products) and (2) an explanatory phrase, such as “sell by” or “use before.”⁵

While not a federal requirement, USDA revised its date labeling guidance in December 2016 to encourage food manufacturers and retailers to use “best if used by” to describe a date meant to communicate the time of peak product quality.⁶ Similarly, in the absence of federal date labeling laws, the Food Marketing Institute (FMI) and Grocery Manufacturers Association (GMA) in 2017 launched a voluntary initiative to encourage retailers and manufacturers to only use one of two standard phrases on consumer facing food packaging: “BEST if Used By” to describe dates meant to communicate freshness/quality or “USE By” for the few products that carry an increased food safety risk if consumed past a certain date.⁷ While these government and industry initiatives are non-binding, they could help to clarify date labels going forward.

New York Law on Date Labels

New York is one of the nine states that do not regulate date labeling on food products. New York does not require date labels on food products, with the exception of reduced oxygen packaged food products,⁸ and it does not regulate the sale of food products past the labeled date.⁹ However, certain cities or municipalities may impose additional restrictions on food date labeling, and it is therefore important for manufacturers and retailers to be aware of local laws. Westchester County, for example, requires the use of date labels on certain dairy products, such as raw milk and pasteurized cream stored in cans.¹⁰ New York City used to require date labels on milk but has since repealed this requirement.¹¹

Conclusion

In sum, because there is no federal law on date labeling, regulation of these labels has been left largely to the states. New York has no date labeling laws. However, municipalities within the state may impose additional restrictions on date labeling; it is therefore important for manufacturers and local retailers to be aware of local laws. Furthermore, the USDA and industry trade groups encourage the use of specific date labeling language.



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¹ See Food Product Dating, U.S. DEP'T OF AGRIC. FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited January 31, 2018).

² 21 U.S.C.A. § 331(b) (West 2018); 21 U.S.C.A. § 343 (West 2018); 21 U.S.C.A. § 463(a) (West 2018); 21 U.S.C.A. § 607(c) (West 2018); 21 U.S.C.A. § 1043 (West 2018).

³ See *supra* note 1; 21 C.F.R. § 107.20 (2012).

⁴ See *supra* note 1. The USDA does, however, require a “pack date” for poultry and a “lot number” or “pack date” for egg products certified by the USDA. *The Dating Game: How Confusing Food Date Labels Lead To Food Waste In America*, HARVARD FOOD LAW & POLICY CLINIC AND NAT'L RES. DEF. COUNCIL 11 (2013).

⁵ 9 C.F.R. § 317.8(b)(32)(i) (2013); 9 C.F.R. § 317.8(b)(32)(2) (2013).

⁶ See Press Release, Food Safety & Inspection Serv., U.S. Dep't of Agric., USDA Revises Guidance on Date Labeling to Reduce Food Waste (Dec. 14, 2016), <https://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited January 31, 2018).

⁷ See *Grocery Industry Launches New Initiative to Reduce Consumer Confusion on Product Date Labels*, GROCERY MANUFACTURERS ASSOC. (Feb. 15, 2017), <http://www.gmaonline.org/news-events/newsroom/grocery-industry-launches-new-initiative-to-reduce-consumer-confusion-on-pr/>.

⁸ New York requires that food establishments that package foods using reduced oxygen packaging methods have a Hazard Analysis Critical Control Point (HACCP) plan in place that outlines requirements for labeling this food. The plan must require that reduced oxygen packaged food be labeled with instructions to discard the product after 14 days, and the plan must limit the shelf life of the product to the earlier of 14 days from packaging to consumption or the manufacturer's original labeled date. 1 NYCRR 271-2.24(a)(4)-(5).

⁹ See *The Dating Game: How Confusing Food Date Labels lead to Food Waste in America*, HARVARD FOOD LAW & POL'Y CLINIC & NATURAL RES. DEF. COUNCIL 15 (2013).

¹⁰ See Westchester County Sanitary Code Article I, § 873.541, <http://health.westchestergov.com/images/stories/Sanitarycode/sanitary-code873.pdf>.

¹¹ See *The Dating Game: How Confusing Food Date Labels lead to Food Waste in America*, HARVARD FOOD LAW & POL'Y CLINIC & NATURAL RES. DEF. COUNCIL 15 (2013).

