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Congress Passes Menu Labeling in Health Care Reform

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April 14, 2010

Embedded deep in the mammoth health care reform legislation, H.R. 3590, is the menu labeling legislation for chain restaurants discussed in Hospitalitas 2009, Issue 2. Found at Section 4205 of the bill, it amends the Federal Food, Drug and Cosmetic Act (21 U.S. C. § 343(q) (5) by adding new subdivision (H) to require restaurants that are part of a chain of 20 or more locations doing business under the same name, regardless of the type of ownership, and offering for sale substantially the same menu items, to disclose certain nutritional information. The legislation appears to take effect whenever the Secretary of Health and Human Services (the Secretary) promulgates regulations to fill in certain gaps left for administrative guidance, but the Secretary is given one year from enactment (on or about March 23, 2010) to complete the task. The following information outlines the foundation of the changes and provides some clues as to the direction the Secretary will be asked to undertake. The legislation delegates broad discretion to the Secretary on the technical aspects of the bill.

Menu Item Coverage. Chain restaurants will be required to provide specific information on standard menu items, a generally undefined term. We presume these menu items are readily identified by what is not covered: condiments not listed on a menu board, daily specials, temporary items on the menu for less than 60 days per year, custom orders and market test items are exempt from the labeling requirement. Standard menu items would then likely be any other menu item that is substantially the same, whether or not prescribed by the home office or in the operations manual. For self-service operations like cafeterias, buffets and salad bars, disclosures must be made for each discrete item or on a per-serving basis.

Information To Be Disclosed. The restaurant must disclose on the printed menu or the menu board if posted, in a clear and conspicuous manner, (a) the number of calories as usually prepared and offered for sale, and (b) a statement about suggested daily caloric intake designed to enable the public to understand the significance of the menu item's calories compared with total daily diet. Such disclosure must be provided in a clear manner and clearly associated with each standard menu item. The restaurant must also provide the information in written form separate from the menu, and notify patrons on the menu and menu board that the separate written disclosure is available.

Basis for Disclosure. Nutrient content disclosures as described above must have a reasonable basis anchored in nutrient databases, cookbooks, laboratory analyses and other reasonable means. This requirement tracks back to Federal Food Labeling regulations under 21 CFR Part 101, particularly Part 101.10 for restaurant foods that are sold on the basis of a nutrient content claim, and by reference, Part 101.9, which governs nutrition labeling of packaged foods. The existing regulations provide guidance on variable menu items and flavors that are listed singly but may have variable nutrition data for each variety or flavor. The legislation encourages the Secretary to examine alternate means of disclosure such as ranges, averages or other methods, but offers little guidance, thereby affording the Secretary a broad mandate to establish rules. The Secretary is also empowered to mandate disclosure of additional information to assist consumers in maintaining healthy dietary practices, in the written disclosure that the chain restaurant will make available to its customers.

Vending Machine Operators. Operators of 20 or more vending machines must post a sign disclosing the calorie content of each food item in close proximity to the item if the prospective purchaser cannot examine the item's Nutrition Facts Panel before buying the particular food item.

Voluntary Compliance. A restaurant or similar food establishment not otherwise subject to the requirements of the clause can volunteer for the nutrient disclosure program by registering with the agency under a voluntary election program to be established within 120 days after enactment of the legislation. This voluntary compliance opportunity is important to restaurants otherwise exempt from the disclosure requirement because it will allow the restaurant to be governed by the federal standards of disclosure and nutrient testing, and not a different local regime, under the preemption language in 21 U.S.C. § 343-1(a)(4).

Preemption. Although the language of the bill is not clear, the federal menu labeling regime appears to pre-empt inconsistent state and local laws to the extent they apply to chain restaurants, but not to food or component safety warning labels, and not to nutrition labeling for non-chain restaurants. The franchise industry is familiar with the concurrent federal-state regulatory philosophy – the tougher standard prevails – and the Secretary may take a similar approach on menu labeling. Watch for the Secretary to give some flexibility to local regulators on additional disclosures like salt, trans-fats (if not banned), gluten or other nutrient related concerns, particularly if local cuisines and tastes produce certain adverse nutrition consequences.

Hospitalitas will track and report on development of the regulations as the Federal regulators propose and promulgate them. Please contact Joel Buckberg (jbuckberg@ bakerdonelson.com), Alisa Chestler (achestler@bakerdonelson.com) or Judy Meritz (jmeritz@bakerdonelson.com) for further information about the recent menu labeling legislation.

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