

Legal Fact Sheet

New Hampshire Food Donation: Date Labels

Created by the Harvard Law School Food Law and Policy Clinic, November 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 across the supply chain. Consumers may discard food after the date on the package due to confusion about product safety and retailers or manufacturers may discard food due to confusion about selling or donating the past-date food.

Federal Law on Date Labels

There is currently no federal law regulating date labels,¹ with the exception of infant formula.² 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.³ To date, 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.⁴
- The USDA does not require date labels on foods under its purview, including meats, poultry, and egg products.⁵ If, however, USDA-regulated foods are dated, either as required under state law (see below) 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 “best if used by.”⁶ 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.⁷ USDA guidance of this kind does not carry the force of law and is merely a recommendation to industry.⁸

In the absence of federal date labeling laws, two major trade associations for retailers and consumer products manufacturing, the Food Marketing Institute (FMI) and Grocery Manufacturers Association (GMA), launched a voluntary initiative to encourage retailers and manufacturers to only use one of two standard phrases on consumer facing food packaging.⁹ The initiative encourages retailers and manufacturers to adopt the phrase “BEST if Used By” to describe dates meant to communicate freshness/quality and the phrase “USE By” for the few products that carry an increased food safety risk if consumed past a certain date.¹⁰

Though non-binding, government guidance and industry initiatives help to clarify date labels and indicate industry support for specific labeling regimes. Currently, because federal law is so limited, states have broad discretion to regulate date labels.¹¹

New Hampshire Law on Date Labels

As a result of broad state discretion in the absence of federal law, states have enacted inconsistent date labeling laws.¹² In response to this patchwork regulatory landscape, food manufacturers label foods with conservative dates based on optimal food quality and freshness,¹³ rather than on food safety.¹⁴ Despite this practice, many consumers continue to mistakenly believe date labels are related to food safety,¹⁵ however, there is no evidence linking post-date consumption to foodborne illnesses.¹⁶ Many states are working to standardize dates to alleviate consumer confusion.

As of 2018, New Hampshire regulates date labels on only one category of food products: prepackaged sandwiches.¹⁷ With the exception of prepackaged sandwiches,¹⁸ New Hampshire does not require date labels on food products and it does not regulate the sale of food products past the labeled date. For prepackaged sandwiches alone, New Hampshire requires all sandwiches not intended or expected to be eaten within 36 hours of packaging to be labeled with “expiration date” or “sell by” followed by the date.¹⁹ The expiration date of the sandwich may not exceed 7 days beyond the date the sandwich was made.²⁰ The statute prohibits the sale of such sandwiches after the date has passed.²¹

New Hampshire does not expressly preempt local and municipal labeling laws.²² Therefore, it is important for manufacturers and retailers to ensure compliance with any local or municipal laws that impose additional restrictions on food date labeling.

Individuals and businesses may only donate food that complies with federal and New Hampshire law. Neither federal nor New Hampshire law require date labels on most foods, except prepackaged sandwiches. Therefore, businesses, organizations, and individuals should feel free to donate past-date food. These donations should receive liability protection; see our Liability Protection Fact Sheet for more information.

Conclusion

In sum, because there is no federal law on date labeling, regulation of these labels has been left largely to the states. New Hampshire date labeling law applies only to prepackaged sandwiches, but otherwise does not regulate date labeling. 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.

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 October 22, 2018).

² 21 CFR § 107.20(c) (2018).

³ 21 U.S.C. § 331(b); 21 U.S.C. § 343; 21 U.S.C. § 463(a); 21 U.S.C. § 607(c); 21 U.S.C. § 1043.

⁴ 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 October 22, 2018); 21 C.F.R. § 107.20 (2018); 21 CFR § 107.20(c).

⁵ 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 October 22, 2018). The USDA does, however, require a "pack date" for poultry and a "lot number" or "pack date" for egg products certified by the USDA. See U.S. DEP'T OF AGRIC., AGRIC. MKTG. SERV., AMS PY INSTRUCTION NO. 910, SHELL EGGS GRADING HANDBOOK, SECTION 5 (2012).

⁶ 9 C.F.R. § 317.8(b)(32) (2018).

⁷ 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 October 22, 2018).

⁸ See, e.g., *P. Gas & Elec. Co. v. Fed. Power Commn.*, 506 F.2d 33, 38 (D.C. Cir. 1974) (holding that an "agency cannot apply or rely upon a general statement of policy as law").

⁹ 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/>.

¹⁰ 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/>.

¹¹ See, e.g., U.S. CONST. amen. X.

¹² See, e.g., HARVARD FOOD LAW & POLICY CLINIC AND NAT'L RES. DEF. COUNCIL, THE DATING GAME: HOW CONFUSING FOOD DATE LABELS LEAD TO FOOD WASTE IN AMERICA 14 fig. 4. (2013) (chart showing the substantial variations between state laws).

¹³ 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 October 22, 2018); EASTERN RESEARCH GROUP, INC., CURRENT STATE OF FOOD PRODUCT OPEN DATES IN THE U.S. 3-2 (2003), http://foodrisk.org/files/Food_Open_Dating.pdf.

¹⁴ See EASTERN RESEARCH GROUP, INC., CURRENT STATE OF FOOD PRODUCT OPEN DATES IN THE U.S. 3-2 (2003), http://foodrisk.org/files/Food_Open_Dating.pdf; THEODORE P. LABUZA & LYNN M. SZYBIST, CURRENT PRACTICES AND REGULATIONS REGARDING OPEN DATING OF FOOD PRODUCTS 20 (The Retail Food Industry Ctr., Working Paper No. 01, 1999), <http://ageconsearch.umn.edu/record/14318/files/tr99-01.pdf>.

¹⁵ See EASTERN RESEARCH GROUP, INC., CURRENT STATE OF FOOD PRODUCT OPEN DATES IN THE U.S. 4-11 (2003); Katherine M. Kosa et al., *Consumer Knowledge and Use of Open Dates: Results of a Web-Based Survey*, 70 J. FOOD PROTECTION 1213, 1218 (2007).

¹⁶ See, e.g., BUSINESS REFERENCE PANEL, BETTER REGULATION OF "USE BY" DATE LABELLED FOODS: A BUSINESS REVIEW 19 (2011), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/262575/11-1474-use-by-dates-report.pdf (study finding no direct evidence linking foodborne illness in the United Kingdom to consumption of food past its expiration date).

¹⁷ N.H. REV. STAT. ANN. § 438:26-b (2018). In 2018, New Hampshire repealed its requirement to date label cream. Previously, New Hampshire required dairies to label cream with a date before which the cream could be reasonably assumed to not be sour, as determined by the manufacturer. N.H. L. Ch. 323 (S.B. 491) (2018, Regular Session); N.H. REV. STAT. ANN. § 184:30-g (2018).

¹⁸ N.H. REV. STAT. ANN. § 438:26-b (2018).

¹⁹ N.H. REV. STAT. ANN. § 438:26-b (2018); N.H. CODE ADMIN. R. AGR. 1412 (2018).

²⁰ N.H. CODE ADMIN. R. AGR. 1412.04 (2018).

²¹ N.H. REV. STAT. ANN. § 438:26-b (2018).

²² See, e.g., *Forster v. Town of Henniker*, 118 A.3d 1016, 1024 (N.H. 2015) (detailing limited circumstances in which New Hampshire state law preempts local law).